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

AMICUS BRIEF OF THE CATO INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI OF STEVEN M. HOHN

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STATEMENT OF INTEREST[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Amicus is concerned that the ruling below invites prosecutorial misconduct and impedes upon the rights of criminal defendants to meaningfully participate in their own defense.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment guarantees criminal defendants not only the right to counsel, but also the corollary right to confidential attorney-client communications without intentional government intrusion or interception. These protections are essential to facilitate "just results." *See Strickland v. Washington*, 466 U.S. 668, 685 (1984). Moreover, notwithstanding the constitutional presumption of innocence and thus pretrial release, there is a de facto presumption of detention in the federal system, where approximately 75 percent of those charged with crimes are incarcerated pending trial. Alison Siegler & Kate Harris, *How Did the 'Worst*

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than amicus funded its preparation or submission.

of the Worst' Become 3 Out of 4, N.Y. Times (Feb. 21, 2021).[2]

Of course, pretrial detainees must be able to assist in their own defense. Essential to this right is the ability of the accused to communicate confidentially with their counsel. Nevertheless, some federal courts of appeals, including most recently the Tenth Circuit, have severely undermined the Sixth Amendment right to counsel. Detainees—whose calls are routinely recorded under the auspices of institutional security—have had calls with their attorneys shared with prosecutors. In these circuits, it is the detainee who bears the burden to demonstrate that this gross misconduct has prejudiced them. The Third Circuit accurately described this burden as "virtually impossible" to surmount. *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978).

In 2016, the United States Attorney's Office for the District of Kansas's (Kansas USAO) routine practice of obtaining calls between pretrial defendants and their attorneys came to light. Following a standard discovery conference in a criminal case alleging a drug distribution conspiracy at Leavenworth Detention Center, an Assistant United States Attorney revealed that the government had obtained surveillance footage from video cameras located throughout the facility, including in attorney visitation rooms. *United States v. Carter*, 429 F. Supp. 3d 788, 801 (D. Kan. 2019) order vacated in part, *United States v. Carter,* No. 16-20032-02-JAR, 2020 WL 430739 (D. Kan. Jan. 28, 2020).

Swept up in this scandal was Steven Hohn. While detained at Leavenworth, Mr. Hohn placed a call to his attorney, James Campbell, on April 23, 2012. App. at

[2] Available at https://tinyurl.com/57445wt5.

164a. During that call, Mr. Hohn and Mr. Campbell discussed Hohn's criminal history, his desire to go to trial, and the strengths and weaknesses of his case. *Id.* at 193a, App. at 200a. It is uncontroverted that this call entailed legal advice and strategy. *See* App. at 193a, 200a.

While preparing for trial, Campbell requested copies of the recordings obtained from Leavenworth that were referenced in a different report provided in discovery. App. at 190a, 218a–219a. AUSA Terra Morehead, who has since been disbarred,[3] refused, stating that Campbell could "get all of his client's calls directly from Leavenworth if he chooses." *Id*. at 219a. At that point, Campbell did not know that Morehead had obtained a recording of his phone call with his client on April 23, 2012.

Morehead testified at the evidentiary hearing on Hohn's motion under 28 U.S.C. § 2255 and had "every opportunity to explain how, when, and why she obtained access and became privy to Hohn's attorney-client call[.]…" Instead, she continued to minimize, deflect, and obfuscate her role. App. at 221a–222a. The district court rejected Morehead's assertion that she did not listen to the call from April 23, 2012. App. at 217a–220a. The court concluded that Morehead possessed the recording of the attorney-client call, listened to it, and "took steps to conceal that tactical advantage." App. at 220a. The court further found that Morehead's actions were "consistent with the litigation philosophy of federal prosecutors" who acted on the belief that it was permissible to access attorney-client calls from Leavenworth. Throughout Mr. Hohn's

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[3] Order of Disbarment, *In Re: Terra Dawn Morehead,* Bar Docket No. 12759 (Apr. 26, 2024).

§ 2255 proceedings, the government "trivialize[d]" the circumstances giving rise to his present Sixth Amendment claim, "steadfastly refused" to acknowledge the problem, and "disclaim[ed] any responsibility for fixing that problem." App. at 226a.

A jury convicted Mr. Hohn on all counts. The district court sentenced him to a 360-month term of imprisonment on January 28, 2014. App. at 164a.

The time has come for the Court to address the "widely acknowledged circuit split" that exists on whether defendants whose attorney-client communications have been intercepted and digested by prosecutors must show how they were prejudiced by this flagrant violation of their constitutional rights. *See United States v. Hohn*, 123 F.4th 1084, 1162 (10th Cir. 2024) (en banc) (Rossman, J. dissenting, joined by Bacharach, J.). Indeed, at least three members of this Court believed the issue warranted review in 1988 based on the "conflicting approaches among the Circuits" at the time. *Cutillo v. Cinelli*, 485 U.S. 1037 (1988) (White, J. dissenting, joined by Rehnquist, C.J., and O'Connor, J.). The split has only deepened since then.

The Tenth Circuit's test is especially troubling because it invites prosecutorial misconduct by making it "virtually impossible" to prove prejudice from the unlawful intrusion. The Tenth Circuit embraced this standard in spite of other precedents from this Court making clear that defendants do not bear the burden of proving prejudice in the context of other rights-violations. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (irrebuttable presumption of coercion that violates Fifth Amendment); *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (burden on government to affirmatively prove conduct did not violate Fifth Amendment).

ARGUMENT

I. The substantial prosecutorial misconduct in this case demonstrates the need for more robust Sixth Amendment protections for pre-trial detainees.

The Sixth Amendment guarantees a criminal defendant the right to "the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also Strickland*, 466 U.S. at 686 (1984). This right is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *United States v. Cronic*, 466 U.S. 648, 658 (1984). Indeed, an attorney plays a "critical role" in the "ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685.

It follows, then, that the right to communicate with one's defense attorney is "part and parcel" of the Sixth Amendment right to the effective assistance of counsel. *Hohn*, 123 F.4th at 1092 (citing *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977)). Governmental intrusion into those confidential communications "inhibit[s] [the] free exchanges between defendant and counsel" and thereby "constrains an attorney's ability to effectively represent a defendant." *Weatherford*, 429 U.S. at 554 n.4; *see also Hohn*, 123 F.4th at 1094-95 (noting that a defendant's Sixth Amendment claim is not premised on a defendant's demonstration that a conversation was privileged).

Pervasive prosecutorial misconduct and the conditions faced by pretrial detainees demonstrate the importance of a judicial remedy when prosecutors violate the Sixth Amendment.

A. The conditions of confinement for pre-trial detainees illustrate the need for Sixth Amendment protections.

During the relevant period in this case, the Kansas USAO accessed approximately 1,429 attorney-client calls—with a more than one-in-four chance of encountering an attorney-client call within a batch of recorded jail calls. *Carter*, 429 F. Supp. 3d at 856. Despite lacking particular knowledge about how the call-recording system worked, federal prosecutors took the position that they were free to access attorney-client calls over Leavenworth phones because of the preamble that played at the start of the call and signage around the phones indicating that the calls are subject to monitoring. *Id.* at 859. But the district court correctly concluded that the USAO's unilateral determination that detainees had waived their Sixth Amendment rights was made "without factual support or accurate legal analysis." App. at 201a. The relevant Intake Booking Packet and Inmate Handbook did not sufficiently inform detainees about the attorney phone number privatization process, and the Inmate Handbook was not often provided. *Carter*, 429 F. Supp. 3d at 896. As one unit manager testified, "You were more likely to talk to an inmate who didn't have a handbook than one that did." *Id.* at 844. And as the district court aptly noted, recently detained individuals were more likely to focus on things like behavioral rules, access to food, recreation, and visitation, than the privatization protocol buried deep in the handbook. *Id.* at 894–95.

Many "seasoned defense attorneys who regularly represent[ed] clients housed at Leavenworth"—including Hohn's attorney, Mr. Campbell—were not aware of the need to privatize their numbers. App. at

186a–187a; *Carter*, 429 F. Supp. 3d at 843, 896. The investigation also revealed that calls between defense attorneys and their clients at Leavenworth were "routinely recorded even when the attorney properly requested privatization." *Id.* at 842. Further, the warning played at the start of each phone call did not inform the detainees that their phone conversations, even if monitored, might be provided to others—including prosecutors—for use against them at trial. App. at 185a. In fact, Leavenworth did not notify the detainee or their attorney whenever it provided a detainee's phone calls to outside parties. *Id.*

Even worse, the government maintained a "cavalier attitude" to jail calls in general and to its "unilateral and inaccurate assessment of waiver." App. at 211a. Although prosecutors had more than a one-in-four chance of encountering a call between a detainee and their attorney, prosecutors and their agents routinely reviewed the calls received from Leavenworth without employing any precautions to exclude attorney calls or otherwise learning the content of such calls. App. at 214a.

For detainees in far-flung detention centers with their counsel often hours away, telephone calls are even more essential. *Carter*, 429 F. Supp. 3d at 842 ("Access to confidential attorney-client communications by phone was particularly important given Leavenworth's remote location."); s*ee also* Amicus Curiae Brief of Tenth Circuit Federal Public Defenders in Support of Petitioner at 2–10, *Hohn v. United States*, No. 24-1084 (filed May 2025) (detailing remoteness and distances from offices of detention centers throughout the Tenth Circuit). To suggest that a defendant consents to having his attorney calls monitored in these situations is a fiction that cannot withstand scrutiny and cannot

immunize the government from violations of Sixth Amendment rights. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (holding that consent was ineffective where one's eligibility to hold political association and right to hold public office were conditioned on a waiver of Fifth Amendment rights); *see also* James P. McLoughlin, Jr. et al., *Challenging Prosecutorial Use of a Pretrial Detainee's Electronic Communications*, 33 S. Cal. Rev. L. & Social Justice 89, 115–121 (2024) (discussing issues with coerced consent in the context of relevant caselaw). Coerced consent, if a defendant wants to use the telephone at all to speak with his attorney, invites the very harm warned of in *Weatherford*: "[T]he inhibition of free exchanges between defendant and counsel because of the fear of being overheard." *Weatherford*, 429 U.S. at 554 n.4.

B. The imposition of pre-trial detention was never meant to interfere with a detainee's Sixth Amendment rights.

Few rights are more fundamental than the right of a defendant to participate in their own defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Bail Reform Act, 18 U.S.C. §§ 1341 *et. seq.*, gives courts authority to make release decisions with appropriate recognition of the danger a person may pose to others if released. *United States v. Salerno*, 481 U.S. 739, 755 (1987). Notably, this Court's holding in *Salerno* is not plausibly rooted in the original understanding of the Eighth Amendment. *See, e.g.*, Rachel E. Barkow, *Justice Abandoned: How the Supreme Court Ignored the Constitution and Enabled Mass Incarceration* (Harvard University Press 2025). Instead, the Court has averred that pretrial detention is reasonably designed to further the legitimate regulatory goal of

public safety, not to punish defendants and the conditions of pre-trial confinement must be limited—and in no way "excessive." *Salerno*, 481 U.S. at 747. However, those experiencing the practice would likely characterize allowing prosecutors to intrude on calls between attorneys and their clients as rendering the right to the effective assistance of counsel moot.

Though not grounded in historical tradition, the Court's decision in *Salerno* certainly does not preclude a pre-trial detainee from meaningful participation in their own defense. Nowhere in *Salerno n*or elsewhere does the Court harness the regulatory aims of the Bail Reform Act to restrict or deprive pretrial detainees of their Sixth Amendment right to the effective assistance of counsel. Instead, the Court's precedents establish that "no iron curtain separates prisoners from the Constitution," and "the loss of such [constitutional] rights is occasioned only by the legitimate needs of institutional security." *United States v. Cohen,* 796 F.2d 20, 23-24 (2d. Cir. 1986). But the conditions at Leavenworth and the Kansas USAO's exploitation of those conditions did just that.

In the Tenth Circuit, nearly 70 percent of all defendants are detained pre-trial, with their lawyers often hours away, heightening the need to be able to communicate securely with counsel over the phone. *See* Amicus Curiae Brief of Tenth Circuit Federal Public Defenders in Support of Petitioner at 3. The rules surrounding recording of visitation rooms and telephone systems—and the willingness of the USAO to exploit those conditions—created a perfect storm in this case to deprive numerous defendants of the ability to confidentially communicate with their attorneys during critical stages of their confinement and adjudication.

C. The Court should resolve the split with a framework that firmly discourages the sort of Sixth Amendment infringements that became institutionalized and rampant here.

With rare exceptions, standard practice in the Kansas USAO was for prosecutors to collect phone calls without filtering out those between detainees and their attorneys. *See Carter*, 429 F. Supp. 3d at 864. In light of this practice, recordings of calls between Mr. Hohn and his attorney, Mr. Campbell, stayed in the government's possession for several years. This continued even after the district court issued a claw-back order, specifically to prevent the government from holding such privileged communications. App. at 194a–196a. The Acting United States Attorney later admitted that the government's delayed discovery and release of these attorney-client calls clearly went against both the specific instructions and the fundamental purpose of the district court's order in the *Black*[4] litigation. App. at 196a.

At the Kansas USAO, "[p]rosecutors' exposure to attorney-client calls was neither infrequent nor uncommon." *Carter*, 429 F. Supp. 3d at 854. The office was an "echo chamber," in which prosecutors insisted that case law on waiver and consent supported their position, even though none of them had ever litigated the issue. *Id.* at 860.

At some point before the *Black* investigation came into being, AUSA Erin Tomasic sought advice from the office's professional responsibility officer who, in turn, sought advice from DOJ's Professional Responsibility Advisory Office (PRAO). In relaying the facts up

[4] *United States v. Black*, No. 14-1000 (10th Cir. 2014).

the chain, Tomasic assured the local Professional Responsibility Officer and DOJ's PRAO that the detainees had waived their attorney-client privilege. Crediting that assurance, PRAO still advised her to employ a filter team to review the recordings obtained from Leavenworth. *Carter*, 429 F. Supp. 3d at 852.

AUSA Tomasic frequently discussed the propriety of the practice of listening to attorney-client calls with a group of federal prosecutors who dined together in the office's break room. *Carter*, 429 F. Supp. 3d at 854. When Tomasic told the group of the contrary advice that she received from PRAO, her own supervisors, and her training at the National Advocacy Center on the production of jail calls under Fed. R. Crim. P. 16, the group "roundly dismissed the advice as wrong." *Id*. at 859–860. The "lunchroom group's" insistence that the calls were not discoverable under Rule 16 made the practice of obtaining these attorney-client calls easier to hide. *Id*. at 861–862.

The Kansas USAO ignored a 2014 DOJ policy memorandum on "Electronic Surveillance Procedures within the Federal Prison System," (Dec. 1, 2014) that required prior approval and a grand jury subpoena to obtain recorded phone calls of detainees. *Carter,* 429 F. Supp. 3d at 857. That guidance made clear that detainees' communications with their counsel are "not within the scope of this memorandum." *Id*. But the Kansas federal prosecutors struck their own path, "unilaterally determin[ing] that recorded attorney-client calls were available for review, without approval, from the court or notice to the defense." *Id.* at 858.

Prosecutors are among the most powerful—and least accountable—actors in our criminal justice system. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Given the inability of victims of prosecutorial

misconduct to file civil suits, internal accountability mechanisms are even more important. Yet, at the federal level, even influential members of Congress have voiced concerns with the Justice Department's lack of transparency surrounding prosecutorial misconduct, which allows federal prosecutors to evade public scrutiny.[5] None of the built-in institutional safeguards at DOJ—not office supervisors, not PRAO, and not training at the National Advocacy Center—worked. All internal precautions failed. And now, the Tenth Circuit has shut the courthouse doors on the only remaining safeguard. The practice of listening to attorney-client calls from Leavenworth festered and worsened for years. "It was only when the inexperienced and unsupervised [AUSA] Tomasic disseminated a voluminous batch of phone calls in discovery in the *Black* case that the widespread practices [came] to light." *Carter*, 429 F. Supp. 3d at 858.

The systemic misconduct in this case—having escaped internal controls over so many years—illustrates the need for this Court to establish a clear standard and appropriate allocation of the burden of proof in order to deter future prosecutorial misconduct. Given the impact of such misconduct on the integrity of every phase of the criminal process, it is essential that the Court leave no doubt that the government bears the burden of showing its Sixth Amendment violations caused no prejudice, contrary to the Tenth Circuit's erroneous holding.

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[5] Letter from Senate Judiciary Committee Chairman Chuck Grassley to the Inspector General of the Department of Justice, Mar. 19, 2025, available at https://tinyurl.com/z3yrym88.

II. The deep circuit split—which several justices have sought to resolve in the past—is ripe for resolution.

A "widely acknowledged circuit split" exists on the fundamental Sixth Amendment issue before the Court: the role of prejudice in establishing a "Sixth Amendment violation when prosecutors wrongfully invade the attorney-client relationship." *See Hohn*, 123 F.4th at 1162. At least three approaches have emerged from the federal courts of appeals concerning "[i] whether prejudice must be shown and [if so,] [ii] who must show it"—the government or the defendant. *Id*. at 1162 n.34 (observing that the "circuit split . . . remains alive and well"). At least three justices believed the issue warranted review in 1988 based on the "conflicting approaches among the Circuits." *Cutillo v. Cinelli*, 485 U.S. 1037 (1988) (White, J. dissenting, joined by Rehnquist, C.J., and O'Connor, J.). The conflicting approaches have only deepened.

The Third Circuit applies a "per se prejudice rule" when "government officials sought such confidential" trial strategy. *Hohn*, 123 F.4th at 1117 (citing *Levy*, 577 F.2d at 210). In other words, a Sixth Amendment violation amounts to structural error when the government acts with that intention. *See Levy,* 577 F.2d at 209; *see also McCoy v. Louisiana*, 584 U.S. 414, 415–416 (2018) (holding that such a "[v]iolation of a defendant's Sixth Amendment-secured autonomy has been ranked 'structural' error . . . not subject to harmless error review . . . without any need first to show prejudice"). Consistent with structural-error jurisprudence, *Levy* recognized the "[v]irtually impossible task" of proving whether and how the confidential information "influenced the government's

investigation or presentation of its case." *Levy*, 577 F.2d at 208.

Levy remains the law of the Third Circuit, despite the *Hohn* majority's incorrect statement that an unpublished and inapposite Third Circuit case "rolled back" *Levy*. *Hohn*, 123 F.4th at 1117 (citing *United States v. Mitan*, 499 F. App'x 187, 192 n.6 (3d Cir. 2012) (unpublished)). Unlike *Levy*, *Mitan* involved an "unintentional" interception by the government—which that court described as "far from the level of intentional invasion involved in *Levy*." *Mitan*, 499 F. App'x at 192–193. The court in *Mitan* did not attempt to undo *Levy* either. *Id.* at 192 n.6. Even if it had attempted to do so, Third Circuit rules prohibit a "subsequent panel [from] overrul[ing] the holding in a precedential opinion of a previous panel"[6]—such as the published decision in *Levy*.

The First and Ninth Circuits apply a "presumption in the defendant's favor, thus putting the onus on the government to disprove any prejudicial effect from [the government's] actions." *Hohn*, 123 F.4th at 1118 (citing *United States v. Mastroianni*, 749 F.2d 900, 907–908 (1st Cir. 1984) and *United States v. Danielson*, 325 F.3d 1054, 1070–1071 (9th Cir. 2003)). These circuits do not follow the Third Circuit's "per se prejudice" structural-error rule. But they both recognize that—between the government and the defendant—the government is singularly well-positioned to show its "non-use of [the defendant's] trial strategy information." *Danielson*, 325 F.3d at

[6] Third Circuit Court of Appeals, Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Effective January 6, 2023, https://tinyurl.com/3486mtfw.

1059 (citing *Mastroianni*, 749 F.2d 900, *Kastigar,* 406 U.S. 441).

The Tenth Circuit—in bucking the First, Third, and Ninth Circuits—now applies the test most likely to incentivize and empower the government to repeat the conduct that occurred in this case. To establish a Sixth Amendment violation under *Hohn*, the defendant must show that the government's "intentional intrusion" into the attorney-client relationship "prejudiced" the defendant. *Hohn*, 123 F.4th at 1095. This is so even when the defendant learns of the intentional intrusion for the first time years after trial, as Hohn did. *See id*. at 1090. But "[o]nly the government has knowledge of the relevant facts"—that is, whether and how the government used the information acquired from the intrusion. *Id.* at 1125 n.3. And with no ability to obtain discovery, such as deposing the AUSAs who investigated and prosecuted the case, meeting the burden is virtually impossible.

The Fifth Circuit similarly appears to burden the defendant, but its use of passive language leaves ambiguity. *United States v. Melvin*, 650 F.2d 641, 644 (5th Cir. Unit B 1981) (rejecting the per se prejudice rule and remanding on the issue of whether the "intrusion into appellees' attorney-client relationship prejudiced" the defendant).

Other circuits require "some showing" of prejudice from an intentional intrusion but do not specify who carries the burden. *See United States v. Allen*, 491 F.3d 178, 192 (4th Cir. 2007) ("[S]ome showing of prejudice is a necessary element."); *see also United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984) ("[P]rejudice to the defendant must be shown.").

III. The Tenth Circuit's extreme rule for establishing prejudice generates perverse incentives and fundamental unfairness.

The Tenth Circuit's new test creates perverse incentives for the government when investigating and prosecuting a case. The prosecution's decision to conceal evidence relating to an intentional intrusion into a criminal defendant's attorney-client relationship could all but guarantee that nobody can ever show prejudice from the intrusion. *See Hohn*, 123 F.4th at 1125 n.3 (dissent) (citing 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)). The government, after all, is the only party that truly knows whether and how it used evidence from an intentional intrusion.

The Tenth Circuit's test is profoundly unfair—defying the long-held rule that "the right to the assistance of counsel . . . .is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (holding that detective "deliberately" interfered with attorney-client relationship in violation of the criminal defendant's Sixth Amendment rights). The district court that made factual findings concerning the misconduct of the USAO said it best: "One only need read [AUSA Treadway's] copious handwritten notes of the attorney client phone calls [from an earlier case] to see that a prosecutor gleans information from the content of attorney-client calls that has utility to the prosecutor, whether or not the calls are going to be evidence at trial." *Carter*, 429 F. Supp. 3d at 862, order vacated in part, *United States v. Carter,* 2020 WL 430739 (D. Kan. Jan. 28, 2020).

Thus, the Tenth Circuit's decision burdens the defendant with a "virtually impossible task"—deciphering and then proving the impact of the government's implicit knowledge gleaned from its intentional misconduct. *See Levy,* 577 F.2d at 208. A defendant in Mr. Hohn's shoes cannot know or discover all the reasons the prosecutors decided to call certain witnesses, how to order those witnesses, and which questions to ask of those witnesses. The defendant cannot know all the reasons why the prosecutors introduced (or chose not to introduce) certain documents, tangible evidence, or testimony. The defendants cannot know or discover how the government knew to be prepared to put on certain rebuttal evidence. The defendant cannot know which evidence, if any, the government fronted in its case in chief to tame the impact of the defendant's use of the same evidence. And this is not merely a trial problem: similar unsolvable conundrums apply to often highly coercive plea negotiations and sentencing recommendations. Clark Neily, *Coercive Plea Bargaining: An American Export the World Can Do Without*, DecipherGray (Apr. 23, 2021).[7]

In many other contexts involving the government's violations of constitutional rights, the defendant is properly free of any burden to demonstrate prejudice. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (imposing irrebuttable presumption of coercion that violates the Fifth Amendment when law enforcement fails to give the prescribed warnings); *Kastigar*, 406 U.S. 441, 460 (1972) (imposing burden on prosecution to affirmatively prove that evidence to be used against defendant with use immunity came from an "independent,

[7] Available at https://tinyurl.com/ycxr83cj.

legitimate source" that otherwise would have violated the Fifth Amendment); *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986) (imposing burden on prosecution to show lack of a racially motivated peremptory strike that would have violated the Sixth and Fourteenth Amendments); *Hill v. Texas*, 316 U.S. 400, 405 (1942) (imposing burden on prosecution to show lack of racial bias in jury selection that would have violated the Fourteenth Amendment).

Mr. Hohn's petition presents the ideal opportunity for this Court to resolve the three-way circuit split on this fundamental Sixth Amendment issue. And in doing so, the Court should (i) rectify the Tenth Circuit's deeply flawed decision that only incentivizes the type of grave misconduct that occurred at the Kansas USAO, and (ii) uphold the Sixth Amendment's promise of fundamental fairness in our adversarial system.

CONCLUSION

The decision below invites prosecutorial misconduct and erodes the right of the accused to meaningfully participate in their own defense. This Court should grant Mr. Hohn's petition and reverse the decision below.

Respectfully submitted,

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