

IN THE SUPREME COURT OF THE UNITED STATES

No. A-____

STEVEN M. HOHN, APPLICANT

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Neil M. Gorsuch, Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Steven M. Hohn applies for a 60-day extension of time, to and including May 16, 2025, within which to file a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. The Tenth Circuit entered its judgment on December 16, 2024. App., *infra*, 1a-72a. Unless extended, the time for filing a petition for a writ of certiorari will expire on March 17, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case presents the question whether a Sixth Amendment violation occurs when the prosecution intentionally and unjustifiably intrudes upon a defendant's attorney-client communications. This Court's precedents, particularly its decision in Weatherford v. Bursey, 429 U.S. 545 (1977), suggest that the answer

is yes. The courts of appeals are in conflict, however, over whether a defendant must make some further showing of prejudice, and what such a showing should entail.

2. Applicant was convicted of firearm possession and conspiracy to possess and distribute methamphetamine, in violation of federal law. App., infra, 5a-6a. Applicant's claim arises from the discovery, after his conviction, that the United States Attorney's Office for the District of Kansas collected, over a seven-year period, an estimated 1,400 communications between defendants in custody and their attorneys. Id. at 104a. That collection included a call between applicant and his counsel while applicant was in pre-trial detention, during which applicant and his counsel discussed legal advice and trial strategy. Id. at 6a-8a. As the district court found, the lead prosecutor in applicant's case obtained and listened to that call during his trial and then took steps to conceal that she had done so. Id. at 207a-211a, 231a-237a.

3. Applicant sought habeas relief under 28 U.S.C. 2255 in the United States District Court for the District of Kansas. Relying on the Tenth Circuit's previous decision in Shillinger v. Haworth, 70 F.3d 1132 (1995), applicant argued that the prosecution's misconduct violated the Sixth Amendment without his needing to show any discrete, trial-specific harm caused by the intrusion. App., infra, 3a-4a.

4. The district court denied relief. App., infra, 187a-241a. Mr. Hohn appealed, and a panel of the court of appeals heard

oral argument. Before the panel issued a decision, however, the court of appeals decided sua sponte to hear the case en banc.

By a 7-3 vote, with nearly 200 pages of opinions, the en banc court of appeals affirmed. App., infra, 1a-186a. In its majority opinion, the court overruled its previous decision in Shillinger, reading this Court's precedents to provide that no Sixth Amendment violation occurs when the prosecution intentionally and unjustifiably invades attorney-client communications unless the defendant can further show that the invasion caused a discrete, trial-specific harm. Id. at 2a-72a.

Judge Bacharach, joined by Judges McHugh and Rossman, dissented in part. App., infra, 73a-98a. Judge Bacharach contended that the majority's rule unfairly and impractically required defendants to show how prosecutors might have used the information that they obtained from their intrusions -- something that only the prosecutors could know -- given that the prosecutors could entirely avoid that burden by not engaging in misconduct. Id. at 76a-86a. Judge Bacharach would instead have followed the approach of the First and Ninth Circuits, which require a defendant to make a prima facie showing of prejudice and then shift the burden to the prosecution to negate that showing. Id. at 75a-76a.

Judge Rossman, joined by Judge Bacharach, also dissented. App., infra, 99a-186a. Judge Rossman reasoned that, under this Court's precedents, Shillinger correctly declined to require a showing of discrete, trial-specific prejudice in the context of the rare, egregious prosecutorial misconduct it addressed. Id. at

131a-142a. Judge Rossman explained that the majority's rule improperly ignored the distinction between Sixth Amendment claims premised on ineffective assistance of counsel and those premised on government interference. Id. at 116a-131a.

5. The undersigned counsel respectfully requests a 60-day extension of time, to and including May 16, 2025, within which to file a petition for a writ of certiorari. This case presents a complex and important question involving the Sixth Amendment right to counsel that has led to conflicting decisions in the federal courts of appeals. Counsel of record has a number of competing obligations, including oral arguments and briefing deadlines, before the current deadline of March 17, 2025. See City of New York v. Exxon Mobil Corporation, No. 24-1568 (2d Cir.) (reply brief due January 31); County Commissioners of Boulder County v. Suncor Energy USA, Inc., No. 2024SA206 (Colo.) (oral argument on February 11); OWLink Technology, Inc. v. Cypress Technology Co., No. 23-4314 (9th Cir.) (oral argument on February 13); City of New York v. Exxon Mobil Corporation, No. 24-1568 (2d Cir.) (oral argument on March 4); In re: National Football League Players' Concussion Injury Litigation, No. 24-1910 (3d Cir.) (oral argument tentatively scheduled for March 7); Bell v. United States, No. 24A737 (cert. petition due March 8); Zafirov v. Florida Medical Associates, No. 24-13581 (11th Cir.) (brief of appellees due March 10); Johnson v. United States, No. 24-675 (cert. reply due March 12). In addition, the lead associate on this case returned from maternity leave on January 16. Additional time is therefore needed to prepare the petition in this case.

Respectfully submitted.

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