No. 16-1323

IN THE

Supreme Court of the United States

SUPREME COURT OF NEW MEXICO, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case because the Tenth Circuit's decision threatens defendants' attorney-client relationships and right to counsel, risks unnecessary and burdensome litigation, and invites prosecutorial abuse of grand jury subpoenas.

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

Attorney grand jury subpoenas erode attorney-client relationships, threaten to disqualify defense counsel and risk creating collateral litigation that serves to burden and distract defense attorneys; they are "disruptive at best, and fatal to the client's representation at worst." Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Penn. L. Rev. 1783, 1789 (1988). In turn, they risk giving prosecutors an unfair (if unintended) advantage. Rules like New Mexico's mitigate these risks by discouraging the use of attorney subpoenas except where necessary.

I. THE CONSIDERED RATIONALE BEHIND NEW MEXICO'S RULE.

States like New Mexico had good reason to adopt rules like 16-308(E). In the 1980s, Congress enacted new statutes to combat narcotics trafficking, criminal organizations, and to require forfeiture of funds. In a classic example of the ends justifying the means, prosecutors began targeting attorneys as potential sources of information. See *Whitehouse* v. *U.S. Dist. Court for Dist. of R.I.*, 53 F.3d 1349, 1352 (1st Cir. 1995) ("Congress passed several new federal statutes which, in the eyes of federal prosecutors, make attorneys fertile ground for eliciting incriminating information about the targets of federal investigations.").[2]

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[2] As the *Whitehouse* court explained:

> New federal laws with implications for the attorney-client relationship include: the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988); the Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (1988) (evidence that legal representation was provided by a benefactor, for participation in a criminal enterprise, relevant to

The RICO and CCE statutes largely targeted money laundering activities of groups that may or may not have sought counsel, and also targeted attorneys' legal fees through forfeiture provisions. As prosecutors began using subpoenas against attorneys with increasing frequency, states began questioning whether the practice was a result of prosecutorial overreach or abuse. Certain states–namely Rhode Island and Massachusetts–adopted their own versions of the American Bar Association's Model Rules of Professional Conduct 3.8(f).

In federal cases that followed interpreting the Rhode Island and Massachusetts rules, courts of appeals held that district courts had the authority to implement and enforce local rules almost identical to New Mexico's governing trial and grand jury subpoenas. See *id.* at 1366 (concerning trial subpoenas) (noting specifically that the rule was properly promulgated because it attempted to regulate only the conduct of the prosecutor and not the grand jury procedure as a whole or its functions); *United States* v. *Klubock*, 832 F.2d 649, 658 (1st Cir. 1987), *on reh'g*, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam) (dividing

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prove existence of criminal enterprise); the Comprehensive Forfeiture Act of 1984, Pub.L. No. 98–473, 98 Stat. 2040 (codified as amended at 18 U.S.C. §§ 1961–68 (1988) and 21 U.S.C. §§ 853, 881 (1988)) ("relation back" provision allowing government to seize assets intended for, or paid to, lawyer as legal fees); the Tax Reform Act of 1984, Pub.L. No. 98–369, 98 Stat. 494 (codified at 26 U.S.C. § 60501 (1988)) (attorneys required to report identities of clients who pay fees with cash payments in excess of $10,000); and Money Laundering Control Act of 1986, 100 Stat. 3207–18 (codified as amended at 18 U.S.C. §§ 1956–57 (1988)) (criminalizing certain monetary transactions involving knowing use of funds derived from an illicit source).

See id. at 1352 n.1.

equally over validity of Massachusetts district court rule regarding grand jury subpoenas and affirming the lower court ruling upholding the rule).[3]

Acknowledging the ethical risks that subpoenas presented to attorney-client relationships, the Tenth Circuit itself previously found that Colorado professional ethics rules for federal prosecutors were enforceable with respect to trial subpoenas. *United States* v. *Colo. Supreme Court*, 189 F.3d 1281, 1288 (10th Cir. 1999) ("In sum, a prosecutor violating [the rule] has violated the generally accepted principle that the attorney-client relationship should not be disturbed without cause. To do so would constitute . . . conduct unbecoming any member of the bar, including prosecutors.").

Yet the collateral consequences of an attorney's compliance with a grand jury subpoena versus a trial subpoena are not so different in kind as to support this distinction. That grand jury investigations may be conducted in secret certainly does not mean that they are secret from the client and that secrecy in no way diminishes the attorney's obligations to the client and to the court. And in a trial setting a judge

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[3] The *Klubock* court noted the "mounting" problem giving rise to the state ethical rule:

> [W]hen we consider the admission by appellants to the effect that in the District of Massachusetts alone, from 50 to 100 attorney subpoenas per year have been served during the last four years under [the state ethical rule] circumstances, and we compare this figure to the criminal case load in that District of approximately 306 to 463 cases filed per year, the possibility arises that [these ethical] situations could very well be present in from 10.7 to 32.6% of that District's criminal cases, not an insignificant proportion.

Klubock, 832 F.2d at 657–58.

presides to independently rule on the propriety of questions to the attorney-witness. No such protection exists in a grand jury setting.

II. ATTORNEY SUBPOENAS UNNECESSARILY PUT A NUMBER OF SIGNIFICANT RIGHTS AT RISK.

A. The Attorney-Client Relationship.

The attorney-client relationship should not suffer intrusion from the government without a singular need. This Court has often recognized the relationships importance and its protected status. See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (stating that the purpose of the attorney-client 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."); *Patterson* v. *Illinois*, 487 U.S. 285, 290 n.3 (1988) (interpreting the Sixth Amendment) ("Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect").

Attorney subpoenas "subvert some of the most vital concerns that the attorney-client privilege aims to safeguard," in that "[n]o attorney can represent a client effectively, unless the client feels free to speak frankly to the advocate without fear that such disclosures will be used against him." *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 260 (2d Cir. 1986) (Cardamone, J., dissenting). If an attorney complies with a subpoena and produces documents or testifies, his or her client may become suspicious of him and thereafter decline to be forthcoming, undermining the purpose of the representation. See *Klubock* 832 F.2d at 653 ("The serving of a subpoena un-

der such circumstances [on a represented target's attorney prior to indictment] will immediately drive a chilling wedge between the attorney/witness and his client."); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 946 (E.D. Pa. 1976) ("The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests").

Attorneys are obliged to inform their clients when they receive subpoenas for client documents or information. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 473 (2016); Model Rules of Prof'l Conduct r. 1.6 cmt. [15] (Am. Bar. Ass'n 2015). The potential for "the client [to be] uncertain at best, and suspicious at worst, that his legitimate trust in his attorney may be subject to betrayal," *Klubock* 832 F.2d at 653 (emphasis omitted), highlights the need to regulate how prosecutors subpoena defense counsel.[4]

An attorney who fails to quash a subpoena will have to answer questions regarding his or her client concerning non-privileged matters. See *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976), (witnesses

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[4] Importantly, it is not just one attorney-client relationship that is jeopardized; should the attorney comply with the subpoena, the attorney's credibility may be damaged in the eyes of all of his current (and future) clients, chilling attorney-client communication. *See* Cary Bricker, *Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders*, 82 Temp. L. Rev. 149, 166–67 (2009). Grand jury secrecy provides no bulwark against this potential, given that attorneys must consult their clients about responding to a subpoena and any litigation concerning the subpoena will be a matter of public record.

"ha[ve] an absolute duty to answer all questions"). Even where he or she testifies on non-privileged matters, the attorney's duty to zealously defend his or her client and duty to testify candidly as a witness may conflict. See *Williams* v. *Dist. Court, El Paso Cty.*, 700 P.2d 549, 553 (Colo. 1985) ("A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles."); see also *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1009 n.4 (4th Cir. 1982), *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982) (en banc) ("the attorney may well be placed in the position of becoming a witness against his client or risk[ ] contempt").

"[T]he attorney-client relationship is by general consensus of our profession worthy of protection, and the service of an attorney-subpoena may cause irreparable damage to the attorney-client relationship." *Colo. Supreme Court*, 189 F.3d at 1288 (citation and quotation marks omitted). The possibility of such damage highlights the McDade Amendment's specific purpose in ensuring that federal prosecutors are subject to rules such as 16-308(E). Congress has spoken on the matter. The Department of Justice simply does not like what Congress has said.

B. Disqualifying Conflicts Of Interest.

An attorney that complies with a subpoena may ultimately need to withdraw from a case where he provides testimony that makes him a likely witness against his or her client at trial. See *Whitehouse*, 53 F.3d at 1354 (emphasizing this problem). This could give a prosecutor effective control over a future defendant's choice of counsel. See *Sturgis*, 412 F. Supp. at 946 (an attorney subpoena "create[s] the possibility of a conflict of interest between attorney and client" that "may lead to a suspect's being denied his choice

of counsel by disqualification"); see also *Klubock*, 832 F.2d at 653 (emphasizing "the immediate conflict of interests created" by attorney subpoenas, and stressing that the attorney-witness "has separate legal and practical interests" that "may or may not coincide" with those of his or her client).

Targets of subpoenas should not be put in this position, especially given that defendants in criminal prosecutions who do not require appointed counsel have a Sixth Amendment right to choose who will represent them. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); see also *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) (noting that a criminal defendant "should be afforded a fair opportunity to secure counsel of his own choice"). To be sure, multiple courts have held that grand jury targets do not have a right to counsel prior to being indicted, see *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1493 (10th Cir. 1990) (citing cases); see also *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). Nevertheless, prosecutors should not be permitted to undermine defendants' access to counsel even before this right attaches; at the very least, states should be permitted to prevent this from occurring unnecessarily.

A party attempting to quash a subpoena must rebut the "'presumption of regularity' that attaches to a grand jury's proceedings." See, *e.g.*, *In re Grand Jury Subpoena*, 646 F.3d 159, 164 (4th Cir. 2011) (citation omitted); *Hamling* v. *United States*, 418 U.S. 87, 139 n.23 (1974). Courts have set high standards for motions to quash subpoenas, i.e., requiring a showing that "the subpoena would create actual conflict between the attorney and client," *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1129-30 (5th

Cir. 1990) (reversing grant of motion to quash); see also *In re Grand Jury Matter*, 926 F.2d 348, 351 (4th Cir. 1991) (citations omitted); that "trial preparation is the sole or dominant purpose" of the subpoena's issuance, *United States* v. *Bin Laden*, 116 F. Supp. 2d 489, 492–93 (S.D.N.Y. 2000) (denying motion to quash subpoena) (noting that the rule against using grand juries for trial preparation in effect had a "limited reach"); or that the subpoena itself is "somehow harassing or interferes with counsel's preparation for trial," *Anderson*, 906 F.2d at 1495 (affirming denial of motion to quash subpoena). The difficulty of satisfying these standards *ex ante* may leave an attorney with limited ability to resist a subpoena. See *Bin Laden*, 116 F. Supp. 2d at 492 (noting that the only Second Circuit case to quash a grand jury subpoena was one where the government's improper purpose in issuing the subpoena was "patently obvious") (citing *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 30 (2d Cir. 1985)).

C. Proceedings That Burden Defense Counsel And The Courts.

The issuance of an attorney subpoena typically will compel the attorney-witness to move to quash (and attempt to appeal a denial), forcing defense counsel to expend valuable resources that he or she would otherwise devote to defending his or her client. See Bricker, *supra* note 5, at 166; Stacy Caplow, *The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel*, 51 Brook. L. Rev. 769, 784 (1985) (noting that "[e]ven an eventually successful motion to quash will entail extensive tangential litigation"). If he complies with the subpoena, the attorney will spend time and resources preparing to testify and then appearing, a meaningful burden and dis-

traction for any attorney, especially an overworked public defender. See *Klubock*, 832 F.2d at 653 (noting that a compliant attorney "now has a difficult 'second front' to deal with, in which he must dedicate his own time and resources to looking after his own interests, while at the same time trying to protect those of his client"). Where a defendant's court-appointed attorney complies with a subpoena, this defendant may burden the court with his or her motion to substitute counsel. Rules like New Mexico's help mitigate these risks and curb these inefficiencies.

D. An Unfair (If Unintended) Strategic Advantage.

NACDL does not cast aspersions on the motives of prosecutors for seeking to gather documents and testimony that they may believe in good faith are necessary. As explained *supra*, however, attorney subpoenas at least strain the attorney relationship and tax defense counsel resources, and at worst force defendants to forge a relationship with new counsel and start over in preparing their cases.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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