No. 22-6426

IN THE SUPREME COURT OF THE UNITED STATES

DELANO MEDINA — PETITIONER,

vs.

UNITED STATES OF AMERICA — RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

Delano Medina, Inmate Number 129304

Colorado Territorial Correctional Facility (CTCF)

P.O. Box 1010

Cañon City, CO 81215

Phone No. 719-486-2585

QUESTIONS PRESENTED

I. **The Right to Counsel.** The Sixth Amendment guarantees criminal defendant's the right to *effective* assistance of counsel. Medina's counsel failed to investigate and prepare for a speedy trial hearing, then incorrectly thought speedy trial "prejudice was presumed". Because of this, Medina requested alternate defense counsel (ADC) and filed a malpractice complaint. Despite the obvious conflict, the court denied ADC and the claim of ineffective counsel. Did these deficiencies cause a conflict of interest, entitling Medina to ADC?

II. **The Right to Speedy Trial.** The constitution guarantees defendants the right to speedy trial. Medina's speedy trial claim was denied on direct appeal because counsel failed to submit evidence proving cell phone data was actually irretrievable. But Medina provided counsel affidavit's demonstrating his cell phone data is unavailable from any other source. So, *Barker v. Wingo,* prejudice was satisfied, but the district court continually overlooks this evidence. Does the court deny a meritorious claim by ignoring key evidence?

III. **Breach of Contract.** Plea agreements are contractual and bind the parties, including the court. Medina's plea agreement promised him the right to appeal his constitutional speedy trial issue, as raised in *his* pro se motions. But Medina's dispositive claim continues to be overlooked in violation of the plea agreement. Promises must be kept. Does a breach of the terms in the contract render the plea void with an unfillable promise?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[☒] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner:

Delano Medina, Inmate No. 129304

Colorado Territorial Correctional Facility (CTCF)

P.O. Box 1010

Cañon City, CO 81215

Respondent:

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Assistant United States Attorney's Office for the District of Colorado

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Solicitor General of the United States Department of Justice

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Washington, D.C. 20580-0001

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[☒] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix: United States v. Medina, 2022 U.S. App. LEXIS 27154, *1, 2022 WL 4490422 (10th Cir. September 28, 2022) to the petition and is

[☒] reported at: *United States v. Medina*, 918 F.3d 774 (10th Cir. Colo. March 12, 2019); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix: United States v. Medina, 2017 U.S. Dist. LEXIS 209698 (D. Colo., Dec. 20, 2017) to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[☒] is unpublished.

JURISDICTION

[☒] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was **September 28, 2022**. See APPENDIX A

[☒] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No._____A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

Petitioner Delano Medina initiates this request after entering into a conditional plea agreement with the United States in his federal criminal case. The Constitutions Sixth Amendment rights afforded to criminal defendants is the general area of law implicated in this request for certiorari review. This case went from the United States District Court in Colorado to the Tenth Circuit Court of Appeals. The errors have occurred since Medina was initially indicted till present time. The case was initially resolved with a plea-agreement and direct appeal being denied. Then post-conviction relief was sought and recently denied.

A grand jury in the District of Colorado indicted Medina in October 2014 on a single felon-in-possession charge. In June 2015, the grand jury handed down a superseding indictment, adding charges for bank fraud, and mail theft. But during the delay in Medina's appearance the states of Colorado, Kansas, and Nevada were prosecuting him at the same time; so Medina did not appear in federal court to answer the federal charges until January 2017. (2 ½ years latter).

By the time Medina finally appeared in federal court he lost his cell phone and phone records which he avers would prove his alibi to the bank fraud and mail theft charges. After a speedy trial motions hearing, Medina was forced to represent himself because his attorney never presented any prejudice at the speedy trial hearing. Medina's speedy trial claim was successful on three out of the four Baker-factors with the prejudice-factor being the only factor not satisfied. See *United States v. Medina,* 918 F.3d 774, at 785 (10th Cir. Colo. March 12, 2019).

Summary of Relevant Procedural History

On July 4, 2019, Mr. Medina applied for relief under 28 U.S.C. § 2255. In his § 2255 motion, he asserted, that: (1) his counsel rendered constitutionally ineffective assistance; (2) the district court denied him the right to counsel when it declined to appoint ADC for him after a clear conflict of interest arouse with counsel; and (3) the government violated his Fifth and Fourteenth Amendment due process rights by breaching the terms of the conditional plea-agreement.

After a two year delay in ruling, Medina sought mandamus relief from the Tenth Circuit to get an answer on his 2255 motion. Appendix C. The district court then denied Medina's § 2255 motion. It concluded: (1) his ineffective assistance claim failed because his counsel's "briefing and argument demonstrate that he was competent, and because Medina failed to demonstrate the result of the proceedings would have been different even if counsel had presented additional witnesses or made additional arguments; (2) it did not err in declining to appoint ADC because counsel competently prosecuted his speedy trial motion; and (3) Mr. Medina waived the right to collateral review of his breach-of-contract claim.

After the 2255 motion was denied, a certificate of appealability (COA) was sought and denied. Then, a Rule 60(b) motion was filed seeking specific claims to be answered. (quoting *Spitznas v. Boone*, 464 F.3d 1213, 1224-25 (10th Cir. 2006), for the proposition that a Rule 60(b) motion remains appropriate in a habeas proceeding if the "district court failed to consider one of his habeas claims," because this represents "a defect in the integrity of the federal habeas proceedings").

REASONS FOR GRANTING THE PETITION

This case presents the straightforward issue of whether the district court correctly denied appointment of ADC. It did not. For ninety years since *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 64 (U.S. November 7, 1932) this Court has recognized the fundamental right to counsel: *"the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel".*

Every day in this Country hundreds of cases deal with this problem of ineffective assistance of counsel causing a conflict and the need to appoint ADC. This Court has an opportunity to help prevent the waste of judicial resources from countless appeals. "The Fourteenth Amendment "embraced" those "'fundamental principles of liberty and justice ... even though they had been "specifically dealt with in another part of the federal Constitution." *Gideon v. Wainwright*, 372 U.S. 335, 341, 83 S. Ct. 792 (U.S. March 18, 1963). *"[L]awyers in criminal courts are necessities, not luxuries."*

Medina's case exemplifies the vital right to counsel, and an important related right to speedy trial. "The right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment." *Barker v. Wingo*, 407 U.S. 514, 515 (U.S. June 22, 1972).

For the last claim, the governments breach of contract warrants this Court's attention. "When a plea rests in any significant degree on a promise by the prosecutor, so that it can be said to be part of the inducement or consideration, such promise *must* be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (U.S. December 20, 1971).

I. The Tenth Circuit's misapplication of the prejudice standard of *Strickland v. Washington* warrants this Courts' attention.

This case involves exceptionally compelling reasons of broad public interest which will help resolve controversial legal issues. The district court and Tenth Circuit have misapplied this Courts holdings in *Strickland v. Washington,* 466 U.S. 668, 686 (U.S. May 14, 1984) "the right to counsel is the right to the *effective* assistance of counsel... counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." Id. at 688.

This Court should grant certiorari to decide whether the Tenth Circuit court misapplied the Strickland standard of ineffective assistance of counsel, requiring appointment of ADC when a clear conflict arises. This issue is of grave national importance. The lower courts adoption of an erroneous rule of law demands this Courts attention. An important rule of law is crucial to the integrity of the judicial system. Rule 10's "Considerations Governing Review on Certiorari" says that certiorari will be granted "only for compelling reasons," which include the existence of conflicting decisions on issues of law among federal courts of appeals.

The Sixth Amendment entitles a defendant in a criminal case to the effective assistance of competent counsel. *Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55 (1932); *United States v. Winkle,* 722 F.2d 605, 609 (10th Cir. 1983). The constitutional standard for attorney performance is that of reasonably effective assistance, which we have defined as the "exercise [of] the skill, judgment and diligence of a reasonably competent defense attorney." See *Dyer v. Crisp,* 613 F.2d 275, 278 (10th Cir. 1980) discussing the "sham and mockery" test.

Here, Medina's case conflicts with other circuit courts of appeals on the right to effective assistance of counsel from a conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481-82 (1977); *But see Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); *United States v. Unger*, 700 F.2d 445, 453 n.13 (8th Cir. 1983).

Here, Medina established a conflict of interest with his attorney when he informed the court he filed a malpractice complaint against his attorney for failing to show his cell phone is able of showing his location, thereby supporting Medina's alibi defense. Appendix D. The court than put Medina in a Hobson's choice: "continue with counsel, or represent yourself." A reviewing court must be "confident the defendant is not forced to make a choice between incompetent counsel or appearing pro se." *Pazden v. Maurer,* 424 F.3d 303, 313 (3d Cir. N.J. September 27, 2005).

Reluctantly, Medina choose to go pro se. But, because Medina was pro se, his claims have been ignored. The fundamental requisite of due process of law is the right to be heard. Medina should not be put in a Hobson's choice, only to then be deliberately ignored. This is a case that shocks the average American and scares the public from what can happen. The integrity of the judicial system is at stake.

Where a constitutional right to counsel exists, the Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); this Court even said in *Cuyler v. Sullivan*, that if a petitioner can show counsel operated under a conflict, he doesn't even have to show prejudice. Id at 349.

That a defendant cannot be forced to choose between incompetent counsel and no counsel at all implicates the fundamental fairness and accuracy of the criminal proceeding and a showing of prejudice is therefore not required. *Crandell v. Bunnell*, 144 F.3d 1213, 1216 (9th Cir. Cal. May 19, 1998). Federal courts have applied the constructive denial of counsel doctrine to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 778-79 (9th Cir. 2001).

When Medina filed a malpractice complaint on counsel there was a clear conflict. See e.g. *Smith v. Lockhart*, 923 F.2d 1314, 1321 (8th Cir. Ark. January 15, 1991) "A federal lawsuit pitting the defendant against his attorney certainly suggests divided loyalties", citing *Douglas v. United States*, 488 A.2d 121, 136 (D.C.App. 1985) (finding a conflict of interest when defendant filed a complaint against his counsel with the Office of the Bar). [A] defendant who shows that a conflict of interest affected the adequacy of representation need not demonstrate prejudice. *Mickens v. Taylor*, 535 U.S. 162, 171 (U.S. March 27, 2002).

Because of the numerous decisions in disagreement with the Tenth Circuit this Court should review to clear up the matter for the correct evolvement of law. "A conflict of interest arises when an attorney's interest in avoiding damage to his own reputation is at odds with his client's strongest argument, i.e., that his attorneys had abandoned him." (Per curiam opinion of Roberts, Ch. J., and Scalia, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) See *Christeson v. Roper*, 135 S. Ct. 891, 892, (U.S. January 20, 2015).

II. The right to speedy trial is violated when a criminal defendant losses evidence that would prove his innocence.

Medina's motion to dismiss for speedy trial violation was denied after a hearing. Attorney Arthur Nieto did not present the specific prejudice of lost cell phone data. Medina asserted under the *Barker v. Wingo*, 407 U.S. 514 (1972) four-part inquiry that the delay violates his constitutional right to a speedy trial from lost cell phone data and phone records. Courts applying the Barker-test must balance the following factors: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) *prejudice to the defendant.*" *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006). (Emphasis added).

Medina's claim was at least debatable, but both the district court and Tenth Circuit denied a COA. In a similar speedy trial case with lost phone records the defendant's speedy trial motion was successful: *United States v. Vasquez*, 15 F. Supp. 3d. 1000, 1008 (E.D. Cal. 2014), stated in pertinent part: "If he had been arrested reasonably soon after indictment...those records could have been produced in response to his subpoena. Because of the delay caused by the government, those records are unavailable...*the Sixth Amendment requires that the court grant defendant's motion to dismiss the Indictment.*" Yet in Medina's case the court has contradicted this by saying Medina is not prejudice by losing cell phone data.

In the 2255 motion Medina submitted two affidavits proving email and application data are irretrievable from all sources. The affidavits demonstrate cell phone evidence is irretrievable. Like Vasquez, Medina's motion to dismiss was immediately filed upon learning the cell phone data was unavailable.

Medina's speedy trial claim also shows a conflict within the Tenth Circuit and between the circuit court of appeals on the reason-for-delay in a speedy trial analysis. *United States v. Vaughan,* 643 Fed. Appx. 726, 730-731 (10th Cir. Kan. March 23, 2016) "HOLDINGS: [1]-The 22-month delay between the time of indictment and the time the prisoner was *notified* of the indictment and arrested would have weighed in his favor had counsel raised a speedy-trial challenge." (citing *United States v. Schreane,* 331 F.3d 548, 555 (6th Cir. 2003) (holding that government's decision to delay a defendant's trial until state completed its prosecution was "a valid reason for delay," but ruling the reason-for-delay factor weighed against the government in part because the state failed to notify the defendant of the federal detainer); *United States v. Erenas-Luna,* 560 F.3d 772, 777-78 (8th Cir. 2009) (same)).

The Sixth Circuit is in favor of a defendant: United States v. Watford, 468 f.3d 891, 903 (6th Cir. 2006) (This delay was attributable to the state's failure to notify the defendant.) The Ninth Circuit is conflicted: *United States v. Barraza-Lopez,* 659 F.3d 1216, 1219 (9th Cir. Cal. September 28, 2011) (We agree with the government, and with the numerous other circuits that have addressed the issue.)

The Tenth Circuit's position on the reason-for-delay should be uniform with other circuits, or at least the same within the circuit. The Tenth Circuit has taken up a contrary position from *Doggett v. United States,* 505 U.S. 647 (1992). This Court should take up review to clarify the question of who is at fault when a defendant is not provided notice of indictment. The government, or the defendant?

III. There is a breach of contract by a conditional plea agreement promising to address the constitutional speedy trial issue, but the claim continues to be overlooked.

It is well-established that plea agreements are "contracts". *Santobello v. New York*, 404 U.S. 257, 262-263 (U.S. December 20, 1971). So, if we take a look at how a conflict of interest would affect a contract's validity, we see more issues that are fatal to the plea agreement. Such as if the government induces a plea promising an issue will be determined on appeal, only to have the issue deliberately ignored on appeal. Here, the United States entered into a contract with Medina, only to have the issue of cell phone records covered-up on appeal by the use of strategically deceptive fallacies by the United States. This issue was crucial to Medina's claim of prejudice to his defense.

This is an important question of whether the government's plea agreement can be breached by the false promise that claims would be resolved on appeal. The conditional plea promising to have the speedy trial claim of a cell phone being able to confirm Medina's location was not addressed by the Tenth Circuit on appeal.

Is this breach of the contract by an inability to address the merits of Medina's claim sufficient to warrant specific performance of the promise? Here, the law and its application alike are plain. E.g., all breaches of contract make specific performance available as a remedy. This claim also calls for the exercise of this Court's supervisory power. Rule 10(a). Because the Tenth Circuit Court of Appeals has truncated the scope of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), prejudice review, this Court should grant certiorari. The emerging practice of the

Tenth Circuit is ignoring evidence while performing prejudice analysis. This was precisely the type of review that this Court condemned in *Williams v. Taylor*, 529 U.S. 362, 397-98 (U.S. April 18, 2000). These cases illustrate the fact that the Tenth Circuit Court of Appeals is out of step with this Court and with other circuits in its consideration of the *Strickland v. Washington,* prejudice prong. Certiorari should be granted to correct this error.

This Court now has an opportunity to take control. Enough is enough. The numerous state and federal courts that deny counsel need guidance. The integrity of the judicial system is at an all-time low. The case gives this Court the chance to create an imperative precedent that shows it cares. Not just for making things right. But for laying a foundation for years to come. For the equitable treatment of criminal defendants entitling appointment of counsel. Also for the important issues regarding speedy trial and promises made to defendants' by the government.

Thousands of cases across this country deal with ineffective counsel. They can now have a guiding light to prevent the waste of judicial resources. "This Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own." *Brown v. Allen*, 344 U.S. 443, 536, 73 S. Ct. 397, n. 8 (U.S. February 9, 1953).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Delano Cleelia

Date: December 16th 2022.