No. _____

IN THE

Supreme Court of the United States

DANILLE MORRIS,
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

PETITION FOR A WRIT OF CERTIORARI

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December 2023

QUESTION PRESENTED

For untold years, the United States Attorney's Office for the District of Kansas engaged in a secret and "systemic practice of purposeful collection, retention, and exploitation" of confidential attorney-client communications, *United States v. Carter*, 429 F.Supp.3d 788, 849-854, 900 (D. Kan. 2019), in violation of an unknowable number of defendants' Sixth Amendment rights to attorney-client confidentiality. When this unprecedented pattern of misconduct came to light, more than 100 federal prisoners sought habeas relief, asking courts, *inter alia*, to vacate and reduce their sentences to remedy the previously undisclosed prosecutorial misconduct.

For those clients (like the petitioner here) who had pleaded guilty, however, the Tenth Circuit summarily denied relief. The Tenth Circuit adopted a novel interpretation of *Tollett v. Henderson*, 411 U.S. 258 (1973), and held that a defendant's *guilty plea* precludes a collateral attack to *the sentence* based on pre-plea misconduct. That position, however, has no support in *Tollett*, any other decision from this Court, any statute, or any other source or principle of law. Nor has any other federal court extended *Tollett* in this manner. The question presented is:

> When a defendant pleads guilty, does *Tollett v. Henderson*, 411 U.S. 258 (1973), preclude the defendant from collaterally attacking the sentence because of surreptitious prosecutorial misconduct into confidential attorney-client communications that predated the guilty plea?

RELATED PROCEEDINGS

United States v. Morris, No. 23-3202 (10th Cir. Oct. 31, 2023)

United States v. Morris, No. 23-3108 (10th Cir. July 6, 2023)

United States v. Morris, No. 17-3074 (10th Cir. Nov. 9, 2017)

United States v. Morris, No. 2:18-cv-02378 (D. Kan. Sept. 20, 2023)

United States v. Morris, No. 2:16-cr-20022-JAR-3 (D. Kan. Mar. 27, 2017)

In re: CCA Recordings 2255 Litigation, No. 2:19-cv-02491 (D. Kan. Jan. 18, 2021)

United States v. Spaeth, No. 21-3096 (10th Cir. June 12, 2023)

United States v. Carter, No. 2:16-cr-20032 (D. Kan. Aug. 13, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Danille Morris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order denying a certificate of appealability and dismissing Ms. Morris's § 2255 motion is available at 2023 WL 7153220, and is reprinted in the Appendix (Pet. App.) at 1a-4a.[1] The district court's order dismissing Ms. Morris's § 2255 motion and denying a certificate of appealability is available at 2023 WL 6147532, and is reprinted at 5a-17a. The district court's unpublished memorandum and order that preceded the dismissal of the § 2255 motion is available at 2021 WL 150989, and is reprinted at 39a-71a.[2] The Tenth Circuit's prior unpublished opinion affirming Ms. Morris's sentence on direct appeal is available at 713 Fed. Appx. 777, and is reprinted at Pet. App. 18a-20a.

JURISDICTION

The district court had jurisdiction to consider Ms. Morris's motion to vacate her sentence under 28 U.S.C. § 2255. On October 31, 2023, the Tenth Circuit denied a certificate of appealability and dismissed the case under 28 U.S.C. § 2253(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] This unpublished order includes additional defendants who will separately seek certiorari.
[2] This unpublished memorandum and order also pertains to other defendants who will seek certiorari in a different petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

INTRODUCTION

This Court has long guarded against prosecutorial misconduct. *See*, *e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935). It has also steadfastly protected a criminal defendant's Sixth Amendment right to communicate with defense counsel. *See*, *e.g.*, *Geders v. United States*, 425 U.S. 80, 91 (1976). It follows from these protections that the Sixth Amendment "protects the attorney-client relationship from intrusion in the criminal setting," *Wolff v. McDonnell*, 418 U.S. at 576 (1974), and that prosecutors may not surreptitiously invade the defense camp for tactical advantages, *see*, *e.g.*, *Hoffa v. United States*, 385 U.S. 293, 306 (1966); *Black v. United States*, 385 U.S. 26, 28 (1966); *United States v. Morrison*, 449 U.S. 361, 365-367 (1981).

This case is one of over 100 cases involving surreptitious intrusions into confidential attorney-client communications by federal prosecutors in Kansas. As discussed in detail below, although the government still refuses to acknowledge it, the pattern of surreptitious prosecutorial misconduct unearthed by the district court is truly extraordinary. The Tenth Circuit has twice condemned the prosecutorial misconduct. Pet. App. 21a; *see also United States v. Orduno-Ramirez*, 61 F.4th 1263, 1267, 1275 (10th Cir. 2023). But it has consistently refused to remedy the misconduct because of purported legal barriers to relief. Pet. App. 21a-38a; *Orduno-Ramirez*, 61 F.4th at 1277. For Ms. Morris, the barrier to relief has been her guilty plea and the

Tenth Circuit's interpretation of this Court's decision in *Tollett v. Henderson*, 411 U.S. 258 (1973). Pet. App. 4a, 21a-38a.

Tollett generally holds that a knowing and voluntary guilty plea forecloses a collateral attack to the conviction (or plea) based on an antecedent constitutional violation. 411 U.S. at 266-267. Because Ms. Morris entered a knowing and voluntary unconditional guilty plea, we do not dispute that *Tollett* generally precludes a collateral attack to her **conviction** (or plea) based on prosecutorial misconduct into her confidential attorney-client communications.[3] But the Tenth Circuit has gone further and has held under *Tollett* that Ms. Morris's guilty plea precludes a collateral attack to her **sentence** based on the government's pre-plea prosecutorial misconduct. Pet. App. 35a. That position has no support in *Tollett*, any other decision from this Court, any statute, or any other source or principle of law. Nor has any other federal court extended *Tollett* in this manner.

The Tenth Circuit's extension of *Tollett* has serious implications for federal habeas review. Congress has expressly authorized collateral attacks to sentences, 28 U.S.C. § 2255(a), and nothing within that statute (or anywhere else) differentiates between pre-plea violations and post-plea violations. The Tenth Circuit's unsupported decision to add an absent limitation to the statute raises "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The Tenth Circuit's position also trivializes the indispensable role guilty pleas play in the federal

[3] We unsuccessfully argued otherwise below, but we do not seek certiorari on that basis. *See* Pet. App. 4a; *cf.* Pet. App. 44a (discussing a situation in which the government's pre-plea misconduct into a defendant's attorney-client communications arguably rendered the plea invalid).

criminal justice system, the outsized role sentencing plays in the federal criminal justice system, and the vital role the federal courts play in guarding against prosecutorial misconduct. Review is necessary.

STATEMENT

A. The Underlying Conviction

1. In March 2016, Ms. Morris's boyfriend, Gary Jordan, asked her to be his getaway driver for a bank robbery. Pet. App. 18a. She agreed, drove Jordan and Jacob Smith to the bank, went into the bank to case the bank, and then waited in the car while Jordan and Smith robbed the bank. Pet. App. 18a. Ms. Morris did not act as the getaway driver, however. Instead, she sat in the front passenger seat. Pet. App. 18a. Smith and Morris's daughter were in the backseat. Pet. App. 18a. Jordan led police on a high speed chase, during which Smith fired several shots at the pursuing police cars. Pet. App. 18a. The chase ended when Jordan rolled the vehicle. Pet. App. 18a. Nobody was injured, and Ms. Morris was arrested without incident. Pet. App. 18a.

2. In August 2016, Ms. Morris pleaded guilty without a plea agreement to aiding and abetting the armed bank robbery, 18 U.S.C. § 2113(a), (d), and § 2, and aiding and abetting the discharge of the firearm during and in relation to the bank robbery, 18 U.S.C. § 924(c)(1)(A) and § 2. Pet. App. 6a, 8a, 19a. At sentencing, the government requested an upward variance and opposed a mitigating-role decrease. Pet. App. 7a. Ultimately, the district court imposed a total within-guidelines-range sentence of 200 months' imprisonment (80 months for the bank robbery; 120 months for the firearm offense). Pet. App. 19a.

3. Ms. Morris appealed the sentence, arguing that she should have received a mitigating-role reduction and that the sentence was substantively unreasonable. Pet. App. 19a-20a. The Tenth Circuit affirmed in November 2017. Pet. App. 19a-20a.

B. The Pattern of Prosecutorial Misconduct

For untold years, the United States Attorney's Office for the District of Kansas engaged in a secret and "systematic practice of purposeful collection, retention, and exploitation" of confidential attorney-client communications. *United States v. Carter*, 429 F.Supp.3d 788, 849-54, 900 (D. Kan. 2019). This pattern of prosecutorial misconduct came to light in 2016, when federal prosecutors in Kansas initiated an investigation into a drug-smuggling operation at a private prison in Leavenworth, Kansas. *Orduno-Ramirez*, 61 F.4th at 1266. During the investigation, prosecutors tried to exploit confidential attorney-client communications in their possession to bully a defense attorney into withdrawing from a case. *Carter*, 429 F.Supp.3d at 810. The district court ultimately learned about this and, in October 2016, appointed a special master to investigate. *Id.*

Although the prosecutors were ordered to assist in the investigation by returning any attorney-client communications and preserving documents related to the investigation, the prosecutors instead adopted a "strategy of delay, denial, and deflection." *United States v. Carter*, 995 F.3d 1222, 1229 (10th Cir. 2021) (quotations omitted). Specifically, the prosecutors refused to cooperate and instead: (1) deleted files from their computers; (2) refused to preserve computer hard drives; (3) delayed implementation of a litigation hold on relevant files; (4) refused to talk to the special

master; (5) failed to produce documents; and (6) misrepresented to the district court whether they reviewed the attorney-client communications. *Orduno-Ramirez*, 61 F.4th at 1266-1267.

In what is arguably the most disturbing example of the government's obstructive conduct, the prosecutors allowed their IT manager to reformat the hard drives, "overwriting everything" on the one computer that housed the jail video recordings and that could be used to show which of the prosecutors viewed the videos. *Carter*, 429 F.Supp.3d at 816-818. The district court found that the prosecutors' objective "was to destroy the data." *Id.* at 817. In other ways documented by the district court, the prosecutors "willfully delayed [their] formal preservation duties, allowing evidence to be deleted or removed in the interim." *Id.* at 824.

This obstructive conduct was largely successful in hiding the prosecutors' misconduct from the district court. As the district court found, "[e]vidence likely has been lost due to the Government's failure to timely implement a meaningful litigation hold. And the Government's productions to the Special Master and FPD were incomplete and turned over in a manner designed to mask the individual source of production." *United States v. Carter*, 429 F.Supp.3d 788, 800 (D. Kan. 2019).

But it was not entirely successful. In one case, for instance, the district court learned that a federal prosecutor obtained and reviewed a defendant's attorney-client telephone calls and "listened to and took extensive notes of [the defendant's] conversations with her counsel as they discussed" a child custody matter. Pet. App. 44a. The prosecutor's notes "include[d] discussions about defense trial strategy, plea

negotiations, risk-benefit assessment of trial versus plea, and estimates of the sentence [the defendant] faced." Pet. App. 44a. When this misconduct surfaced, the government "quickly settled the matter." Pet. App. 44a. It did so by filing a joint motion to vacate the defendant's sentence under § 2255, requesting that the district court reduce the sentence to time served. *United States v. Reulet*, Case No. 5:14-cr-40005-DDC, D.E.1260 (D. Kan. Oct. 19, 2018), which the district court immediately granted, *id.* at D.E.1261 (Oct. 19, 2018).

In another case, a federal prosecutor obtained and listened to calls between the defendant and his attorney. *United States v. Herrera-Zamora*, Case No. 2:14-cr-20049, D.E.198 (D. Kan. Dec. 1, 2017). When this information came to light during the pendency of the defendant's direct appeal (after prosecutors initially denied listening to the confidential communications), the government agreed to vacate the conviction. *Id.* at 4. To remedy the constitutional violation, the government ultimately agreed to allow the defendant to plead guilty to an information pursuant to a Rule 11(c)(1)(C) agreement that bound the district court to impose a time-served sentence. *Id.*, D.E.232 at 2; D.E.233. The government agreed to similar time-served sentences in other cases after it came about that prosecutors committed misconduct by surreptitiously listening to confidential attorney-client communications. *United States v. Dertinger*, Case No. 2:14-cr-20067, D.E.558 (D. Kan. Oct. 5, 2017); *United States v. Huff*, 2:14-cr-20067, D.E.481 (D. Kan. Mar. 7, 2017); *United States v. Wood*, 2:14-cr-20065, D.E.254 (D. Kan. July 14, 2021); *see also Carter*, 429 F.Supp.3d at 803, 849-854 (discussing these cases).

And in the middle of the investigation, the local United States Attorney and the Federal Public Defender negotiated an end to the litigation by agreeing to sentence reductions for still-incarcerated defendants (like Ms. Morris) whose attorney-client communications the government had collected—regardless of whether that collection occurred before or after the defendant's guilty plea. 429 F.Supp.3d at 805. But the DOJ abruptly reneged the settlement, advising that the government would "either negotiate or litigate each claim individually." *Id.*

Ultimately, and despite the government's obstructive conduct, the district court was able to confirm that prosecutors obtained at least 74 attorney-client telephone calls and over 700 video recordings of attorney-client meetings at the prison. *Carter*, 429 F.Supp.3d at 835, 849. In light of the documented misconduct and obstructive conduct, the district court not only held the prosecutors in contempt, but also made several findings adverse to the government. *United States v. Carter*, 995 F.3d 1222, 1224-1225 (10th Cir. 2021). For instance, the district court found a pattern of prosecutorial misconduct, namely, that the prosecutors "intentionally intruded on attorney-client communications because they knew the subpoena [in the drug-smuggling case] would sweep in video footage and phone calls but took no reasonable steps to filter out privileged material." *Orduno-Ramirez*, 61 F.4th at 1267. The district court further "found there was 'no legitimate law-enforcement purpose' for the breadth of the USAO's collection of attorney-client communications." *Id.*

"In sum, the district court found that the [prosecutors] intruded into a large number of defendants' communications with their attorneys, with no legitimate law-

enforcement purpose, and later tried to conceal these actions." *Id.* The prosecutors "committed 'systemic prosecutorial misconduct' with 'far reaching implications in scores of pending [] cases,' and exacerbated the harm by 'delay[ing] and obfuscat[ing] th[e] investigation' into its misconduct." *Id.* In reaching these conclusions, the district court found that at least four of the prosecutors lacked credibility. *United States v. Carter*, 995 F.3d 1214, 1216-1217 (10th Cir. 2021).

To reiterate, the prosecutors' pattern of misconduct extended beyond the drug-smuggling investigation to "a wide variety of criminal cases." *Carter*, 429 F.Supp.3d at 847. The district court found that the prosecutors "repeatedly requested phone calls without taking any precautions to avoid attorney-client calls." *Carter*, 429 F.Supp.3d at 864. They did so even though they knew or should have known that their requests "might well yield" confidential attorney-client communications. *Id.* at 854. In doing so, the prosecutors often left "no paper trail." *Id.* at 847. It was thus "impossible . . . to identify or even quantify the number of calls obtained in other cases investigated or prosecuted by the USAO." *Id.*

C. The § 2255 Proceedings

1. In July 2018, Ms. Morris filed a pro se § 2255 motion, raising an ineffective-assistance-of-counsel claim and an actual innocence claim. Pet. App. 7a. The district court appointed counsel for Ms. Morris and, in October 2018, permitted her to amend the § 2255 motion to raise a prosecutorial misconduct claim to her conviction and sentence based on a violation of Ms. Morris's Sixth Amendment's right to attorney-client confidentiality. Pet. App. 7a-8a. These additional misconduct claims were based

on the government's previously undisclosed possession of video recordings of two attorney-client meetings between Ms. Morris and her attorney while Ms. Morris was in pretrial custody at a private prison in Leavenworth, Kansas. Pet. App. 8a. The government obtained these recordings prior to Ms. Morris's guilty plea. Pet. App. 8a.[4]

2. The district court ultimately denied relief on all claims. Pet. App. 8a-12a. With respect to the prosecutorial misconduct claims, the district court held that the Tenth Circuit's recent published opinion in a similar case – *United States v. Spaeth*, included at Pet. App. 21a-38a – precluded relief. Pet. App. 8a. Based on *Spaeth*, the district court held that Ms. Morris was precluded from challenging her conviction and sentence under *Tollett* "based on any pre-plea violation." Pet. App. 8a.

3. In *Spaeth*, the Tenth Circuit held, *inter alia*, that *Tollett* precluded a prisoner from collaterally attacking her sentence based on a pre-plea violation. Pet. App. 35a. According to the Tenth Circuit, *Tollett* does not permit a prisoner "to recast a pre-plea claim as an ongoing sentencing error." Pet. App. 35a. The Tenth Circuit acknowledged that "*Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional conduct on a defendant's conviction." Pet. App. 35a. From this premise, the Tenth Circuit concluded that "[n]o reason exists, therefore to hold that a sunken pre-plea constitutional violation somehow resurfaces on the other side of a guilty plea." Pet. App. 35a. Without citing any authority, the Tenth Circuit

[4] The district court broadly found that the video recordings obtained by the government, despite being soundless, "visually captured meaningful communication between attorneys and clients." 429 F.Supp.3d at 833. A viewer "could easily observe non-verbal communications, including the communicants' use of their hands, fingers, and other body language." *Id.* A viewer could use the viewing software to zoom in, for instance, on a document. *Id.* at 834.The non-verbal confidential communications "provid[ed] an observer a wealth of information about the communicants." *Id.* (quotation omitted).

"reaffirm[ed] that pre-plea conduct falls under *Tollett*'s ambit no matter if the effect of that conduct continues through sentencing." Pet. App. 35a.

4. Ms. Morris appealed the denial of her § 2255 motion, but she conceded that *Spaeth* foreclosed her sentencing challenge. Pet. App. 4a. The Tenth Circuit denied a certificate of appealability and dismissed the case. Pet. App. 4a.[5] This timely petition follows.[6]

REASONS FOR GRANTING THE PETITION

Tollett holds that a defendant's admission of guilt when pleading guilty generally precludes a collateral attack to the conviction (or plea). 411 U.S. at 266-268. The underlying rationale is simple: the defendant's solemn admission of guilt, if done knowingly and voluntarily, makes irrelevant any constitutional violation that occurred prior to the plea. *Id.* at 267. Under *Tollett*, the "guilty plea, voluntarily and intelligently entered, may not be vacated …." *Id.*

Tollett had nothing to do with a collateral attack to the sentence imposed following the guilty plea. Nor has this Court ever extended *Tollett* to preclude collateral attacks to sentences. That the plea or conviction can't be vacated has no bearing on whether the sentence can be vacated. *See*, *e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 186-188 (2005) (remanding for the lower courts to consider whether the prosecutor's conduct required sentencing relief after determining that the prosecutor's conduct could not

[5] The Tenth Circuit appeal was consolidated with 32 other prisoners. Those prisoners will seek certiorari in a different petition.

[6] Because the Tenth Circuit denied relief under *Spaeth*, we've included *Spaeth* in the Appendix, Pet. App. 21a-38a, and our discussion of the Tenth Circuit's decision below generally concerns *Spaeth* rather than the summary disposition of Ms. Morris's appeal post-*Spaeth*. Mr. Spaeth's petition for a writ of certiorari is due December 11, 2023.

void the guilty plea). The imposition of a sentence, after all, "is a separate legal event from the" guilty plea. *Blackledge v. Perry*, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting).

The Tenth Circuit has largely recognized this latter point. *See*, *e.g.*, *United States v. Glover*, 97 F.3d 1345, 1347-1348 (10th Cir. 1996) (criticizing the government for failing "to distinguish between guilt-phase issues, which are reasonably deemed renounced by the later voluntary act of pleading guilty, and independent sentencing errors, which, arising only after the plea, cannot be deemed abandoned in the same common-sense way"). In *Spaeth*, however, the Tenth Circuit drew a novel line between pre-plea violations and post-plea violations, holding that *Tollett* precludes a sentencing challenge to the former but not the latter. Pet. App. 35a. It cited no precedent to support this novel line (other than *Tollett*).

The Tenth Circuit's unsupported extension of *Tollett* is unprecedented. It is also unwarranted and erroneous. Because most federal defendants plead guilty, sentencing has become the critical stage in federal prosecutions. Prosecutors should not have free reign to use the fruits of their surreptitious pre-plea misconduct for tactical sentencing advantages. Yet that is the effect of the Tenth Circuit's extension of *Tollett*. Under the Tenth Circuit's rule, a prosecutor could intentionally use information obtained unlawfully and surreptitiously from confidential attorney-client communications to prejudice the defendant at sentencing with impunity. Indeed, Ms. Morris has alleged that this is what happened at her sentencing, yet the Tenth Circuit has held that she can't even pursue that post-conviction claim. In practice, the Tenth

Circuit has shielded from review any post-plea sentence tainted by a surreptitious pre-plea constitutional violation, no matter the circumstances. This is not an acceptable outcome. Review is necessary.

I. The Tenth Circuit's Extension Of *Tollett* Is Unsupported, Unwarranted, And Erroneous.

The Tenth Circuit has held that *Tollett* precludes a collateral attack to a sentence based on a pre-plea constitutional violation. Pet. App. 35a. That holding is not an application of *Tollett*, but an unsupported, unwarranted, and erroneous extension of it.

1. In *Tollett*, the defendant attempted to collaterally attack his guilty plea and conviction based on the exclusion of African-Americans from the grand jury. 411 U.S. at 259, 267-268. This Court held that the defendant could not "set aside" or "vacate[]" the plea/conviction on this basis without also establishing that the plea itself was unknowing or involuntary. *Id.* at 267-269. This was so because the defendant's solemn admission of guilt in open court, if done knowingly and voluntarily, makes irrelevant to the plea any preceding constitutional violation. *Id.* at 267. The knowing and voluntary guilty plea "represents a break in the chain of events [that] preceded it." *Id.*

2. This Court has consistently described *Tollett* as a challenge to the plea/conviction. *See*, *e.g.*, *United States v. Broce*, 488 U.S. 563, 573 (1989) (describing Tollett's habeas petition as "contending that his plea should be set aside"); *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (describing *Tollett* as a challenge "to the validity of a state criminal conviction"); *Mabry v. Johnson*, 467 U.S. 504, 508, 508 n.7 (1984)

(citing *Tollett* for the proposition that "a voluntary and intelligent plea of guilty . . . may not be collaterally attacked"); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (similar); *Bradshaw*, 545 U.S. at 186 (similar); *see also Gosa v. Mayden*, 413 U.S. 665, 716 (1973) (Douglas, J., concurring) ("*Tollett* involved a collateral attack upon the validity of a guilty plea."); *Lefkowitz v. Newsome*, 420 U.S. 283, 299 (1975) (White, J., dissenting) ("under *Tollett* itself, federal constitutional principles simply preclude the setting aside of a state conviction … ."); *Class v. United States*, 583 U.S. 174, 190 (2018) (Alito, J., dissenting) (describing *Tollett* as holding that "a defendant who pleaded guilty could not attack his conviction"). This Court has never described *Tollett* as a bar to a collateral attack to a sentence. Nor has any member of this Court ever interpreted *Tollett* to bar a collateral attack to a sentence.

3. The Tenth Circuit recognized that *Tollett* does not preclude collateral attacks to all sentences. Pet. App. 35a ("If [the defendant] alleged instances of post-plea intrusions into his attorney-client conversations, he could bring those claims free of *Tollett*."). Yet, the Tenth Circuit extended *Tollett* to preclude all collateral attacks to sentences based on pre-plea violations in a "brief[]" two-paragraph analysis that lacked a case citation. Pet. App. 35a. The Tenth Circuit acknowledged that "*Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional conduct on a defendant's *conviction*." Pet. App. 35a (emphasis added). It then determined that "[n]o reason exist[ed] … to hold that a sunken pre-plea constitutional violation somehow resurfaces" at *sentencing*. *Id.* Rather, "pre-plea conduct falls under *Tollett*'s ambit no matter if the effect of that conduct continues through *sentencing*." *Id.*

(emphasis added). This unsupported reasoning is unsound for two overarching reasons.

First, the Tenth Circuit adopted a categorical rule, prohibiting any post-plea collateral attack to a sentence based on a pre-plea constitutional violation. Pet. App. 35a. In the Tenth Circuit, any "pre-plea conduct falls under *Tollett*'s ambit," even if "the effect of that conduct continues through sentencing." *Id.* But *Tollett* itself is not a categorical rule. *Class*, 583 U.S. at 178-182. And because *Tollett* is not a categorical rule in the plea/conviction context, it makes little sense to extend that rule categorically to the sentencing context.

Second, the Tenth Circuit's reasoning is a non sequitur. The Tenth Circuit premised its reasoning on the fact that "*Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional [pre-plea] conduct on a defendant's *conviction*." Pet. App. 35a (emphasis added). From this premise, the Tenth Circuit concluded that *Tollett* precluded a prisoner from collaterally attacking his *sentence* based on pre-plea violations. *Id.* That conclusion obviously does not follow from the premise because the *conviction* is different from the *sentence*.

At the conviction (or guilt) phase, the question is whether the defendant committed the charged crime. *Williams v. New York*, 337 U.S. 241, 246 (1949). When a defendant has "solemnly admitted in open court that he is in fact guilty of the offense with which he is charged," and that admission is done knowingly and voluntarily, the question of the defendant's guilt is definitively answered. *Tollett*, 411 U.S. at 266-69. "[T]he validity of th[e] conviction cannot be affected by" information

obtained from a pre-plea violation "because the conviction does not rest in any way" on that information. *Haring*, 462 U.S. at 321. Rather, the conviction rests solely on the guilty plea. And thus the guilty plea itself renders the pre-plea constitutional violation irrelevant to the conviction.

At the sentencing phase, however, the inquiry is materially different and has nothing to do with whether events occurred prior to or after the guilty plea. The unlawful "[i]mposition of sentence … is not an 'antecedent constitutional violation,' since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense with which he is charged." *Blackledge*, 417 U.S. at 37 (Rehnquist, J., dissenting).

This distinction between the guilt phase and the sentencing phase is well established. "In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused." *Williams v. New York*, 337 U.S. 241, 246 (1949). "A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined." *Id.* at 247; *see also Concepcion v. United States*, 597 U.S. 481, 486 (2022) ("[w]hen a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction").

Sentencing in federal court is a holistic inquiry that turns on historical facts and circumstances that both predate and postdate the guilty plea. *See*, *e.g.*, 18 U.S.C.

§ 3553(a)(1) (requiring courts to consider "the nature and circumstances of the offense" and the "history and characteristics of the defendant"); 18 U.S.C. § 3661 (similar); USSG § 1B1.3 (providing that a defendant's guidelines range turns not just on the offense conduct, but also on conduct relevant to the offense); *see also Pepper v. United States*, 562 U.S. 476, 490 (2011) (district courts may consider post-sentencing conduct at a second sentencing hearing). The sentence imposed must "suit not merely the offense but the individual defendant.'" *Pepper*, 562 U.S. at 488.

It is thus firmly established that defendants in federal court are not sentenced based solely on the charged offense conduct. In the federal system, sentences are largely driven by the defendant's guidelines range. *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018) (the advisory guidelines "remain the foundation of federal sentencing decisions"). In turn, the guidelines are not premised on a "charge offense" system, but instead on a "real offense" system which turns on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted." USSG, Ch. 1, Pt.A § 1(4); *see also* USSG § 1B1.3 (defining relevant conduct under the guidelines); *United States v. Watts*, 519 U.S. 148, 154 (1997) (permitting the use of acquitted conduct at sentencing).

Thus, while the defendant's admission of guilt is sufficient on its own to answer the relevant question at the guilt phase (did the defendant commit the offense), it is not sufficient on its own to answer the relevant question at the sentencing phase (what sentence is sufficient, but not greater than necessary, to serve the statutory purposes of sentencing). And because it is not sufficient on its own to answer the

relevant question at the sentencing phase, it doesn't follow that *Tollett*'s guilt-phase rule extends to the sentencing phase. The "gap" between the Tenth Circuit's premise and its conclusion is "painfully wide." Irving M. Copi et al., *Introduction to Logic* 112 (15th ed. 2019).

The Tenth Circuit has never denied that information obtained from post-plea constitutional violations may require the vacatur of a sentence on collateral review. Just the opposite. In *Orduno-Ramirez*, 61 F.4th at 1276-1277, the Tenth Circuit held that a defendant could collaterally attack a sentence based on post-plea prosecutorial misconduct into confidential attorney-client communications. In doing so, the Tenth Circuit recognized that a prosecutor could use confidential attorney-client communications "to prejudice a defendant at sentencing." *Id.* at 1275. A prosecutor, for instance, could "advocate for fact-intensive upward adjustments at sentencing, possibly based on improperly obtained information." *Id.*; *see also Bradshaw*, 545 U.S. at 186-188 (remanding for the lower courts to consider whether the prosecutor's conduct required sentencing relief after determining that the prosecutor's conduct could not void the guilty plea).

As explained above, there is no meaningful difference in the sentencing context between events that occur prior to or after a guilty plea. A defendant's sentence may be based on both. Just as a prosecutor could surreptitiously use confidential attorney-client communications obtained post-plea "to prejudice the defendant at sentencing," *Orduno-Ramirez*, 61 F.4th at 1275, so too a prosecutor could surreptitiously use confidential attorney-client communications obtained pre-plea to prejudice the

defendant at sentencing. There is no rational reason why a collateral attack to the sentence should turn on the pre-plea v. post-plea difference. Indeed, as Justice Rehnquist once explained, the *violation* functionally occurs at sentencing, regardless when the underlying unconstitutional *conduct* occurred. *Blackledge*, 417 U.S. at 37 (Rehnquist, J., dissenting).

Consider the actual holding in *Tollett*: that a defendant may challenge a pre-plea constitutional violation if the violation renders the plea unknowing and involuntary. 411 U.S. at 268. How does that holding make sense when applied to sentencing? How does the knowing and voluntary nature of the plea have anything to do with the sentence? Why would a prisoner have to establish that his plea is invalid in order to challenge his sentence? How can a pre-plea constitutional violation render the sentence unknowing and involuntary? None of this makes sense. Nor does the Tenth Circuit's decision.

4. Below, the government implied that this Court's decision in *Broce* supported the view that *Tollett* precluded a collateral attack to a sentence based on pre-plea prosecutorial misconduct. That's wrong. *Broce* involved a challenge to the defendant's convictions, a challenge this Court rejected because the asserted grounds did "not justify setting aside an otherwise valid guilty plea." *Id.* at 571. *Broce* cited *Tollett* in this context (the guilty-plea context), not in the sentencing context. *Id.* at 572-574 (noting that the challenge in *Tollett* "was foreclosed by the earlier guilty plea"). The "principle" that "control[led] in *Broce* was that "a voluntary and intelligent *plea of guilty* made by an accused person, who has been advised by competent counsel, may

not be collaterally attacked." *Id.* at 574 (quotation omitted; emphasis added). That principle has nothing to do with a challenge to the sentence.

The government also relied on *United States v. Ruiz*, 536 U.S. 622, 626 (2002), below. That reliance is frivolous. *Ruiz* held on the merits that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." 536 U.S. at 633. That merits determination has nothing to do with *Tollett* or a defendant's waiver of the right to collaterally attack a sentence. Tellingly, the Tenth Circuit did not rely on *Broce* or *Ruiz* below.

5. In the end, this Court has never extended *Tollett* to preclude collateral attacks to sentences. Nor is there a rational basis to do so. The Tenth Circuit's extension of *Tollett* to collateral attacks to sentences is unsupported, unwarranted, and erroneous. Review is necessary.

II. The Tenth Circuit's Extension Of *Tollett* Creates A Conflict.

The Tenth Circuit extended *Tollett* in a perfunctory two-paragraph analysis that lacked any supporting authority. Pet. App. 35a. In doing so, the Tenth Circuit effectively created a conflict in the Circuits, as no other court of appeals has extended *Tollett* to sentencing challenges.

Below, the government suggested that the First, Fourth, Fifth, and Sixth Circuits had extended *Tollett* to preclude collateral attacks to sentences based on pre-plea constitutional violations, citing *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir. 1991), and four unpublished opinions. The Tenth Circuit was apparently

unpersuaded, as it did not cite any of this precedent to support its own extension of *Tollett* to pre-plea constitutional claims. Pet. App. 35a.

In *Smallwood*, the defendant moved to suppress evidence, the motion was denied, and the defendant pleaded guilty pursuant to a plea agreement that did not reserve the defendant's right to appeal the denial of the suppression motion, but instead included the contraband seized as part of the factual basis for the plea. 920 F.2d at 1234, 1240. On appeal, the defendant attempted to raise the unpreserved suppression issue as a sentencing issue. *Id.* at 1240. The Fifth Circuit rejected the maneuver and held that the defendant could not "resuscitate fourth amendment concerns solely to challenge the consideration of evidence at sentencing." *Id.*

Smallwood is best viewed through the lens of abandonment: the defendant raised the suppression issue, then abandoned it when he pleaded guilty without conditioning the plea on the right to appeal the suppression issue and by expressly admitting to a factual basis that included the fruits of the allegedly unlawful seizure. *Id. Smallwood* is nothing like this case, nor does it stand for some broad proposition that *Tollett*'s rule precludes all collateral sentencing challenges to surreptitious pre-plea violations.

The First Circuit's unpublished opinion in *United States v. Quezada*, 19 F.3d 7, 1994 WL 66104, at *2 (1st Cir. 1994), is no different than *Smallwood*. The Fourth Circuit's opinion in *United States v. Robeson*, 231 Fed. Appx. 222, 224 (4th Cir. 2007), also involved an attempt to shoehorn a waived Fourth Amendment challenge to the evidence underlying the offense of conviction into an appellate sentencing challenge.

These cases do not extend *Tollett* to preclude all post-plea sentencing challenges to pre-plea surreptitious constitutional violations.

Nor has the Sixth Circuit extended *Tollett* to collateral attacks to sentences. In *Flowers v. United States*, 208 F.3d 213, 2000 WL 125851 (6th Cir. 2000), *Tollett* controlled because the defendant, like *Tollett*, pleaded guilty then attempted to collaterally attack the conviction based on a challenge to the grand jury. 2000 WL 125851, at *4-5. It is true that the Sixth Circuit stated that the defendant sought "to vacate his sentence on the [grand jury] basis," but that formulation is likely a product of § 2255's text (which refers exclusively to the "sentence" and not the "conviction") rather than the nature of the prisoner's claim. Indeed, the defendant's grand-jury challenge was not even included in the motion to vacate the sentence, but was instead included within a separate motion to dismiss the indictment. *Id.* at *2. The challenge was plainly to the conviction, not the sentence. So too in *United States v. Hubble*, 1985 WL 13619, at *1-*2 (6th Cir. 1985) (concluding that the defendant could not "collaterally attack his sentence," but earlier enumerating various challenges the defendant made to his conviction).

The Tenth Circuit's decision is unprecedented and causes unnecessary dissension. Review is necessary. Sup. Ct. R. 10(a).

III. The Question Presented Is Exceptionally Important.

1. The Tenth Circuit's decision has serious implications for federal habeas review. Federal prisoners have a broad statutory right to collaterally attack their sentences. 28 U.S.C. § 2255(a). Section 2255(a) broadly provides that a federal prisoner "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 . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Other than a requirement of legal error in the original proceedings, this jurisdiction "is otherwise sweeping in its breadth." *Withrow v. Williams*, 507 U.S. 680, 715 (1993) (Scalia, J., concurring). "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Id.* at 715-16 (quoting *Ex parte McCardle*, 6 Wall. 318, 325–326, 18 L. Ed. 816 (1868)).

By its plain terms, § 2255(a) does not differentiate between pre-plea and post-plea sentencing violations. And it is blackletter law that courts cannot add absent limitations to a statute. *Nichols v. United States*, 578 U.S. 104, 110 (2016). "[T]his Court may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1725 (2020). The Tenth Circuit violated this well-established rule when it narrowed § 2255(a)'s reach by adding a "pre-plea constitutional violation" limitation found nowhere within § 2255's text.

The only apparent way around this limitation is a successful collateral attack to the plea. Pet. App. 35a. But what if the defendant doesn't want to attack the plea? Section 2255(a)'s plain terms do not require a defendant to challenge the conviction in order to challenge the sentence. Nor has this Court ever interpreted the statute in such an atextual and odd way. But the Tenth Circuit has. And that interpretation wreaks havoc on the ability to seek federal habeas relief.

2. The Tenth Circuit's extension of *Tollett* also trivializes the indispensable role guilty pleas play in the federal criminal justice system. Roughly ninety-seven percent of federal defendants plead guilty. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). And many (like Ms. Morris) proceed to contested sentencing hearings. When, for instance, surreptitious pre-plea prosecutorial misconduct into confidential attorney-client communications later comes to light, a defendant should not have to challenge his or her plea as involuntary to challenge the prosecutor's misuse of the information at sentencing. Those two things are logically distinct, and there is no reason why sentencing relief should not be available for a defendant who freely admitted her guilt and who has no desire (or basis) to undo the plea. In practice, the Tenth Circuit's decision disincentivizes guilty pleas for no good reason.

3. The Tenth Circuit's extension of *Tollett* also trivializes the outsized role sentencing plays in the federal criminal justice system. Again, most federal defendants do not proceed to trial, but instead plead guilty with the hope of receiving leniency at sentencing. *Frye*, 566 U.S. at 143-145. When that hope is frustrated by surreptitious prosecutorial misconduct, whether committed pre-plea or post-plea, there should be a remedy for that misconduct. And that remedy should address the harm caused. To require the defendant to attempt to vacate the plea to challenge the sentence, as the Tenth Circuit now requires, is nonsensical and unresponsive to the constitutional violation.

The government cannot seriously dispute this. When a prosecutor was caught violating a defendant's Sixth Amendment right to attorney-client confidentiality, the

government resolved the prosecutorial misconduct claims by agreeing to time-served sentences. *Reulet*, Case No. 5:14-cr-40005-DDC; *Herrera-Zamora*, Case No. 2:14-cr-20049; *Dertinger*, Case No. 2:14-cr-20067; *Huff*, 2:14-cr-20067; *Wood*, 2:14-cr-20065. It did not require the defendant to attempt to vacate the plea or proceed to trial. A lower sentence was sensible in those cases, just as it would be in Ms. Morris's case. Indeed, the government was initially willing to end the mass litigation by agreeing to sentence reductions for still-incarcerated defendants (including Ms. Morris). *Carter*, 429 F.Supp.3d at 805. The Tenth Circuit should not have removed this sensible remedy from the law. A sentencing remedy for a sentencing violation is proper, regardless when the underlying misconduct occurred.

4. The Tenth Circuit's decision also diminishes the vital role the federal courts play in guarding against prosecutorial overreach. The Tenth Circuit's extension of *Tollett* seriously hampers a federal court's ability to correct pre-plea constitutional violations that prejudice a defendant at sentencing. The Tenth Circuit has made clear that it is irrelevant whether the pre-plea constitutional violation "continues through sentencing." Pet. App. 35a. Even if it does, and even if the violation prejudices the defendant at sentencing, the defendant who pleads guilty cannot collaterally attack the sentence in the Tenth Circuit without also successfully attacking the plea. *Id.*

This cannot be right. Prosecutorial misconduct into confidential attorney-client communications is "government intrusion of the grossest kind." *Hoffa*, 385 U.S. at 306. A pattern of such misconduct (like the pattern that occurred here) may even justify a remedy absent individualized prejudice. *Morrison*, 449 U.S. at 365 n.2 ("a

pattern of recurring violations … might warrant the imposition of a more extreme remedy in order to deter future lawlessness"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988) (similar); *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (similar).

How, then, can the Tenth Circuit effectively eliminate any collateral attack to a sentence prejudiced by such a pattern of pre-plea misconduct? Prosecutors who cheat (whether pre-plea or post-plea) undermine the credibility of the system, which presupposes two equal opponents acting within a clear set of rules. Yet, according to the Tenth Circuit, an aggrieved defendant whose sentence is affected by such prosecutorial misconduct can get through the courthouse doors only if the defendant is willing and able to vacate the plea first. That rule, which effectively shields surreptitious pre-plea prosecutorial misconduct from review, does nothing but encourage prosecutors to commit such misconduct.

5. This Court's intervention is critical given the prosecutors' years-long "systematic practice of purposeful collection, retention, and exploitation of [confidential attorney-client] calls," *Carter*, 429 F.Supp.3d at 849-54, 900; its full-bore grab of video and audio recordings, *id.* at 835, 848-49; its "intent to deprive the Special Master and the FPD of evidence" during the ensuing investigation, *id.* at 874; and its blatant violation of discovery and preservation orders, *id.* at 816-824, with the objective "to destroy" the evidence, *id.* at 817. The Tenth Circuit has twice condemned the prosecutorial misconduct. Pet. App. 21a; *Orduno-Ramirez*, 61 F.4th at 1267, 1275. But condemnation while closing the courthouse doors is an empty gesture.

"Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

There is a remedy for such violations. *See* 28 U.S.C. § 2255(a). Because the Tenth Circuit has foreclosed that remedy in any meaningful sense, this Court should grant this petition, reverse the Tenth Circuit, and hold that a defendant (like Ms. Morris) who pleads guilty may still collaterally attack her sentence based on pre-plea prosecutorial misconduct into confidential attorney-client communications. It would be up to the lower courts to determine whether Mr. Morris was entitled to relief. At this point, she just wants to raise the claim. There is no valid reason why she shouldn't be able to do so. Review is necessary.

IV. This Case Is An Excellent Vehicle.

There are no procedural impediments to reviewing the question presented. Ms. Morris entered an open guilty plea. She did not waive her right to collaterally attack her sentence. Following her conviction, she timely sought collateral sentencing relief under § 2255(a) and timely sought appellate review of the district court's denial of relief. The question presented was fully litigated and resolved in *Spaeth*, and the Tenth Circuit applied *Spaeth* to deny Ms. Morris the ability to collaterally attack her sentence. Pet. App. 4a. If this Court were to hold that *Tollett* does not preclude Ms. Morris from collaterally attacking her sentence based on the prosecutors' misconduct into her confidential attorney-client communications, she would be entitled to return

to the district court to pursue that claim. No vehicle problems stand in the way of this Court's review of this exceptionally important question.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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December 2023