2023 WL 7153220
Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Adrian AYALA-GARCIA, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Nohemy Bobadilla-Oliva, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Fernando Cabral Torres, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Damien Campbell, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Jonathan Dehaven, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Clarence Bradley, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Ronald D. Catrell, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Anthony L. Irvin, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Mario Alberto Franco, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Nicholas Lolar, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Tanya Jones, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Julie Clifton, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Domingo Montes-Medina, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Brian K. Jackson, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Fernando Guevara-Guevara, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Darus D. Mebane, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Jose Antonio Nunez-Aguilar, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Geradis Rodriguez-Torres, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Eduardo Ponce-Serrano, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Nicholas Soto-Camargo, Jr., Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Jose Marin Soriano, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Jasen Lowell Thurman, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Danille Morris, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Raquel Odegbaro, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Quian Younger, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Luis Villa-Valencia, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Sergio Zamudio, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Jesus Vera, Defendant - Appellant.
United States of America, Plaintiff - Appellee,

v.

Victor Velazquez, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Oscar Viveros-Avecias, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Jose Torres-Ayala, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Antonio Vazquez-Saenzpardo, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Nincy Sarahi Zelaya-pacheco, Defendant - Appellant.

No. 23-3178, No. 23-3179, No. 23-3180, No. 23-3181, No. 23-3182, No. 23-3183, No. 23-3184, No. 23-3186, No. 23-3187, No. 23-3188, No. 23-3189, No. 23-3190, No. 23-3192, No. 23-3193, No. 23-3194, No. 23-3195, No. 23-3196, No. 23-3197, No. 23-3198, No. 23-3199, No. 23-3200, No. 23-3201, No. 23-3202, No. 23-3203, No. 23-3204, No. 23-3205, No. 23-3206, No. 23-3207, No. 23-3208, No. 23-3209, No. 23-3210, No. 23-3211, No. 23-3213

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FILED October 31, 2023

(D.C. Nos. 2:19-CV-02491-JAR; 5:18-CV-04103-JAR-JPO & 5:16-CR-40002-DDC-1, 2:21-CV-2109-JAR-JPO & 2:16-CR-20031-JAR-4, 2:19-CV-2298-JAR-JPO & 2:16-CR-20031-JAR-8, 2:18-CV-02414-JAR-JPO & 2:16-CR-20011-JAR-1, 2:18-CV-02474-JAR-JPO & 2:16-CR-20041-JAR-1, 2:20-CV-02002-JAR-JPO & 2:16-CR-20014-JAR-4, 2:19-CV-02408-JAR-JPO & 2:11-CR-20125-DDC-1, 2:19-CV-02046-JAR-JPO & 2:13-CR-20070-DDC-5, 2:18-CV-02415-JAR-JPO & 2:15-CR-20061-JAR-8, 2:19-CV-02393-JAR-JPO & 2:15-CR-20012-JAR-DJW-2, 2:18-CV-02254-JAR-JPO & 2:15-CR-20091-JAR-1, 2:19-CV-02411-JAR-JPO & 2:14-CR-20014-KHV-2, 2:18-CV-02464-JAR-JPO & 2:15-CR-20020-JAR-2, 2:18-CV-02434-JAR-JPO & 2:16-CR-20030-JAR-1, 2:21-CV-02427-JAR-JPO & 2:16-CR-20017-DDC-1, 2:18-CV-02413-JAR-JPO & 2:16-CR-20041-JAR-3, 2:18-CV-02503-JAR-JPO & 2:15-CR-20061-JAR-1, 2:18-CV-02462-JAR-JPO & 2:15-CR-20038-JAR-2, 5:18-CV-04104-JAR-JPO & 5:16-CR-40006-DDC-1, 5:18-CV-04097-JAR-JPO & 5:14-CR-40129-DDC-1, 2:18-CV-02435-JAR-JPO & 2:15-CR-20020-JAR-9, 2:19-CV-02398-JAR-JPO & 2:15-CR-20091-JAR-2, 2:18-CV-02378-JAR-JPO & 2:16-CR-20022-JAR-3, 2:18-CV-02416-JAR-JPO & 2:16-CR-20001-JAR-1, 5:18-CV-04105-JAR-JPO & 5:16-CR-40012-DDC-2, 2:19-CV-02491-JAR & 2:16-CR-20008-DDC-7, 2:19-CV-02491-JAR & 2:16-CR-20008-DDC-3, 2:18-CV-02422-JAR-JPO & 2:15-CR-20061-JAR-6, 2:20-CV-02254-JAR-JPO & 2:16-CR-20031-JAR-3, 2:20-CV-02431-JAR-JPO & 2:16-CR-20031-JAR-2, 2:19-CV-02399-JAR-JPO & 2:16-CR-20008-DDC-5, 2:18-CV-0417-JAR-JPO & 2:16-CR-20017-DDC-2, 2:21-CV-02107-JAR-JPO & 2:16-CR-20031-JAR-5) (D. Kansas)

Attorneys and Law Firms

James A. Brown, Gregory Hough, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in Nos. 23-3178, 23-3198, 23-3199.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in Nos. 23-3179, 23-3181, 23-3200, 23-3209.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Terra Morehead, Scott C. Rask, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in Nos. 23-3180, 23-3207.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Office of the United States Attorney, Kansas City, KS, Steve Clymer, Office of the United States Attorney, Syracuse, NY, for Plaintiff - Appellee in Nos. 23-3182, 23-3195.

James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Michelle McFarlane, Scott C. Rask, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3183.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Donald Christopher Oakley, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3184.

James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Trent Michael Krug, David Paxton Zabel, Office of the United States

Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3186.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Trent Michael Krug, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in Nos. 23-3187, 23-3196, 23-3197.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Bryan C. Clark, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in No. 23-3188.

James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Sheri Catania, Scott C. Rask, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in Nos. 23-3189, 23-3192, 23-3201.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Sheri Catania, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3190.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Terra Morehead, Office of the United States Attorney, Kansas City, KS, Aaron L. Smith, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3193.

James A. Brown, Office of the United States Attorney, Topeka, KS, Scott C. Rask, Office of the United States Attorney, Kansas City, KS, Aaron L. Smith, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3194.

James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Kim Ilene Flannigan, Donald Christopher Oakley, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in No. 23-3202.

James A. Brown, Kathryn E. Sheedy, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Jabari Brooks Wamble, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in No. 23-3203.

James A. Brown, Gregory Hough, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in No. 23-3204.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Trent Michael Krug, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3205.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3206.

James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Terra Morehead, Scott C. Rask, Office of the United States Attorney, Kansas City, KS, for Plaintiff - Appellee in Nos. 23-3208, 23-3213.

James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Kim Ilene Flannigan, Trent Michael Krug, Scott C. Rask, Office of the United States Attorney, Kansas City, KS, Annette B. Gurney, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3210.

James A. Brown, Office of the United States Attorney, Topeka, KS, Carrie N. Capwell, Office of the United States Attorney, Kansas City, KS, Aaron L. Smith, Office of the United States Attorney, Wichita, KS, for Plaintiff - Appellee in No. 23-3211.

Melody Brannon, Kirk C. Redmond, Office of the Federal Public Defender, Topeka, KS, for Defendant - Appellant in Nos. 23-3178, 23-3180, 23-3181, 23-3182, 23-3183, 23-3186, 23-3188, 23-3189, 23-3190, 23-3193, 23-3195, 23-3197, 23-3198, 23-3199, 23-3200, 23-3201, 23-3202, 23-3203, 23-3205, 23-3207, 23-3210, 23-3211.

Melody Brannon, Office of the Federal Public Defender, Topeka, KS, for Defendant - Appellant in Nos. 23-3179, 23-3184, 23-3187, 23-3194, 23-3196, 23-3206, 23-3209.

Melody Brannon, Kirk C. Redmond, Office of the Federal Public Defender, Topeka, KS, Laquisha Shalon Ross, Office of the Federal Public Defender, Kansas City, KS, for Defendant - Appellant in Nos. 23-3192, 23-3204.

Melody Brannon, Lydia Hazel Krebs, Kirk C. Redmond, Office of the Federal Public Defender, Topeka, KS, for Defendant - Appellant in Nos. 23-3208, 23-3213.

Before MATHESON, BACHARACH, and PHILLIPS, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY *

***1** These matters are before us on the Appellants' *Unopposed Motion to Consolidate, Expedite, and Resolve Appeals*, wherein they each request a certificate of appealability (COA) on the question whether the district court erred by relying on *United States v. Spaeth*, 69 F.4th 1190 (10th Cir. 2023) and *Tollett v. Henderson*, 411 U.S. 258 (1973) to dismiss their 28 U.S.C. § 2255 sentencing challenges. [1]

Appellants bring these appeals to challenge only the *Spaeth*-based dismissal of their § 2255 sentencing challenges based on the Kansas USAO's pre-plea collection of their attorney-client communications. They do not intend to challenge any other aspect of the district court's resolution of their § 2255 motions. Appellants acknowledge that, absent a COA, these appeals must be dismissed. 28 U.S.C. § 2253(c). They also acknowledge that this court is bound by *Spaeth*.

Appellants' request for a COA is foreclosed by *Spaeth*. Accordingly, we deny a COA and dismiss these matters.

All Citations

Not Reported in Fed. Rptr., 2023 WL 7153220

Footnotes

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 This order addresses only Appellants' request for a COA. The request to consolidate and for other case management actions contained in the motion has been addressed by separate order.

2023 WL 6147532
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

In re: CCA RECORDINGS
2255 LITIGATION, Petitioners,
v.
UNITED STATES of America, Respondent.
This Document Relates to United States v. Danille Morris, Danille Morris v. United States

Case No. 19-cv-2491-JAR-JPO, Case No. 16-cr-20022-JAR-3, Case No. 18-2378-JAR
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Signed September 19, 2023
|
Filed September 20, 2023

Attorneys and Law Firms

David J. Guastello, The Guastello Law Firm, LLC, Kansas City, MO, Kirk C. Redmond, Lydia Krebs Albert, Melody Brannon, Office of Federal Public Defender, Topeka, KS, for Petitioners.

Bradley R. Cornelsen, Council Bluffs, IA, Pro Se.

Bryan C. Clark, Carrie Nicole Capwell, Office of United States Attorney, Kansas City, KS, Duston J. Slinkard, James A. Brown, Office of United States Attorney, Topeka, KS, Steve Clymer, Department of Justice - USAO, Lrm Eckert, William, Syracuse, NY, for Respondent in Case No. 19-cv-2491.

Arthur S. Chalmers, Kansas Attorney General, Topeka, KS, Jeffrey A. Chanay, Topeka, KS, for Interested Party Kansas Bureau of Investigation.

Carrie Nicole Capwell, Donald Christopher Oakley, Kim I. Flannigan, Tristram W. Hunt, Office of United States Attorney, Kansas City, KS, Colin D. Wood, Colin Wood, Attorney at Law, Caldwell, KS, James A. Brown, Jared S. Maag, Office of United States Attorney, Topeka, KS, for Respondent in Case No. 16-cr-20022.

Kirk C. Redmond, Melody Brannon, Federal Public Defender, Topeka, KS, for Petitioner Danille Morris in Case No. 18-2378.

Carrie Nicole Capwell, Donald Christopher Oakley, Tristram W. Hunt, Office of United States Attorney, Kansas City, KS, Colin D. Wood, Colin Wood, Attorney at Law, Caldwell, KS, James A. Brown, Office of United States Attorney, Topeka, KS, for Respondent in Case No. 18-2378.

MEMORANDUM AND ORDER

JULIE A. ROBINSON, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Petitioner Danille Morris's Motion to Vacate and Discharge with Prejudice under 28 U.S.C. 2255, as amended (Docs. 137, 151).[1] Petitioner filed a pro se motion alleging that counsel was ineffective and asserts an actual innocence claim.[2] Petitioner was permitted to amend her motion to add a claim alleging the government violated the Sixth Amendment by intentionally and unjustifiably becoming privy to her attorney-client communications. She asks the Court to reject the government's request to dismiss this action on procedural grounds, and to find that she has made a sufficient showing to warrant an evidentiary hearing. As a remedy, Petitioner asks the Court to vacate her judgment with prejudice to refiling or alternatively, to reduce her term of imprisonment by approximately 50% and vacate her term of supervised release. The matter is fully briefed, and the Court is prepared to rule. For the reasons explained in detail below, the Court dismisses Petitioner's Sixth Amendment intentional intrusion claim and denies her remaining claims without an evidentiary hearing.

I. Procedural History and Background

Petitioner was charged in Count 1 of a superseding indictment with armed bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d) and 2, and in Count 2 with using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence, and possessing those firearms in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. These charges stem from the robbery of the First National Bank, located in Stillwell, Kansas.[3] Count 1 was punishable by up to 25 years' imprisonment, and Count 2 carried a mandatory, consecutive sentence of at least ten years and up to life imprisonment.[4]

Petitioner was detained at Corrections Corporation of America ("CCA") in Leavenworth, Kansas, from March 10, 2016, to April 6, 2017. She was represented at the time by attorney Scott Toth.

On August 8, 2016, Petitioner pleaded guilty as charged to both counts with no plea agreement.[5] At the change of plea hearing, the Court asked Petitioner about the fact that there was no written plea agreement between herself and the government. Petitioner raised the question about whether her plea was an "open plea." The Court then discussed with Petitioner the difference between pleading guilty without a plea agreement versus proceeding under a plea agreement. During the exchange, Petitioner said, "I just—I mean, I'm new to this. I've never been in trouble before, so I'm—I'm just having a hard time. I mean, he's—my attorney is a good attorney. He's went over it pretty good with me, but I'm having kind of a hard—."[6] The Court gave Petitioner a chance to consult with her attorney, stating, "You can have a few minutes, you can have a few hours, a few days, a few weeks, whatever you need. I don't want to—we're not going to rush this. So if you're not ready, that's fine."[7]

***2** Petitioner consulted with Toth for approximately ten minutes, then indicated that she was prepared to proceed. Petitioner subsequently acknowledged that she understood she had a right to a jury trial, that she understood the mandatory-minimum consecutive sentence for Count 2 was ten years, and that she was satisfied with the advice and representation her attorney provided her.[8]

The government then provided a factual basis for Petitioner's guilty plea. Highly summarized, on March 9, 2016, co-defendant Gary Jordan asked Petitioner to be his getaway driver for a bank robbery. Petitioner drove her 2003 Chevy Tahoe to pick up Jordan and co-defendant Jacob Smith, bringing along her 19-month-old daughter. Petitioner drove while Jordan and Smith looked for a target, and ended up at the bank in Stillwell, Kansas. Petitioner "cased" the bank by going inside and pretending to be interested in a job. She then left the bank and relayed how many employees were working inside the bank to Jordan and Smith. Jordan and Smith entered the bank and confronted two tellers with handguns and took approximately $15,440 in cash from the tellers while Petitioner waited with the Tahoe running. After the robbery, Jordan drove the Tahoe while Petitioner and Smith began putting the money into a backpack. Law enforcement officers located the Tahoe a short time after the bank robbery and initiated a high-speed vehicle pursuit for approximately 21 miles, during which Smith fired numerous shots at law enforcement from the rear seat, striking a patrol car near the driver's door. Believing that law enforcement could not cross state lines, Petitioner told Jordan to head for Missouri. The three were apprehended after Jordan lost control and wrecked the Tahoe attempting to avoid officers in Kansas City, Missouri. Petitioner was located in the front passenger seat, and her child was in a carseat in the seat directly behind Petitioner. Jordan ran from the Tahoe and tried to carjack another vehicle before being apprehended.

Petitioner stated that she agreed that, if the case went to trial, the government would present evidence as described by the prosecutor. The Court then summarized both counts, and asked Petitioner whether she did what she was charged with in both counts. Petitioner answered, "Yes, ma'am," to both.[9] Petitioner signed a Petition to Enter Plea of Guilty, which was filed that day.[10] In the Petition, she acknowledged that her guilty plea was entered "freely and voluntarily, and ... my plea of guilty is not the result of any force or threats against me, or of any promises made to me other than those noted in the [P]etition."[11]

After her guilty plea, Petitioner sent a letter to the Court asking for a new attorney.[12] After Toth withdrew, the Court appointed attorney David Guastello, who represented Petitioner at sentencing and on appeal.

The Presentence Investigation Report ("PSIR") calculated Petitioner's base offense level at 20; applied a two-level enhancement under U.S.S.G. § 2B3.1(b)(1) because property of a financial institution was taken; applied a two level-enhancement under § 2B3.1(b)(5) because the offense, including relevant conduct, involved carjacking or attempted carjacking; and applied a six-level enhancement under § 3A1.2(c)(1) because, in a manner creating a substantial risk of serious bodily injury, Petitioner or a person for whose conduct she is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense, or immediate flight therefrom.[13] After a three-level decrease for acceptance of responsibility, Petitioner's total offense level was 27, which, with a criminal history category of I, resulted in an advisory Guidelines range of 70 to 87 months for Count 1 that was required by statute to run consecutively to the mandatory-minimum 120 month sentence for Count 2.[14]

***3** Petitioner requested a downward variance and counsel advocated for a minor-participant role reduction under U.S.S.G. § 3B1.2, for a total sentence of 150 months' imprisonment. [15] The government requested an upward variance of 98 months on Count 1, seeking a total sentence of 218 months' imprisonment, based on Petitioner's decision to bring her 19-month old child to a bank robbery, placing the child at serious risk of injury or death. [16] The Court denied the role reduction objection, declined to grant any variance, and imposed a within-Guidelines sentence of 80 months' imprisonment on Count 1 and 120 months' imprisonment on Count 2, to be run consecutively, for a total of 200 months' imprisonment. [17]

Petitioner filed an appeal with the Tenth Circuit Court of Appeals that raised two issues: the Court's denial of the role reduction under § 3B1.2, and that her sentence was substantially unreasonable. The Tenth Circuit affirmed. [18]

Petitioner filed a pro se § 2255 motion on July 19, 2018, claiming ineffective assistance of counsel and actual innocence, but not raising the instant Sixth Amendment intentional-intrusion claim. [19] The Court appointed the Federal Public Defender ("FPD") to represent Petitioner in this matter on July 17, 2018. [20] Petitioner was granted leave to amend and on October 25, 2018, amended her § 2255 motion, claiming she is entitled to vacatur of her conviction and sentence or alternatively, reduction of her custodial sentence.

II. Discussion

A. *Tollett*

Petitioner is one of 39 Petitioners in this consolidated matter who allege pre-plea Sixth Amendment violation claims based on the government's intentional intrusion into their attorney-client communications, and whose proceedings were stayed pending the outcome of a related appeal in *United States v. Matthew Spaeth*, after the Court dismissed Spaeth's claim as foreclosed by the rule in *Tollett v. Henderson*. [21] In *Tollett*, the United States Supreme Court rejected a pre-plea constitutional challenge where the defendant failed to show that the violation rendered his guilty plea involuntary and unknowing. [22] These Petitioners, including Ms. Morris, declined the opportunity afforded by the Court to amend their § 2255 motions to seek relief under *Tollett* or to allege a post-plea violation, and acknowledged that by doing so, they rendered their pre-plea Sixth Amendment claims vulnerable to dismissal under the Court's previous rulings. [23]

On June 12, 2023, the Tenth Circuit Court of Appeals affirmed this Court's ruling in *Spaeth*. [24] The Tenth Circuit ruled: (1) the carve-out provision in Spaeth's unconditional standard plea agreement did not constitute a waiver of the government's right to raise, or create an exception to, the rule of law in *Tollett*, and because Spaeth did not meet his burden under *Tollett* to vacate his unconditional guilty plea, this Court did not err in ruling that *Tollett* bars his Sixth Amendment challenge; [25] (2) Spaeth's reliance on the per se Sixth Amendment violation rule in *Shillinger v. Haworth* [26] is misplaced because that case did not concern *Tollett*'s guilty-plea situation and "has nothing to do with whether a guilty plea is voluntary or knowing"; [27] and (3) *Tollett* precludes Spaeth from challenging his sentence based on an alleged pre-plea Sixth Amendment violation. [28] The court concluded:

> ***4** We abide by several principles that the Supreme Court made transparent 50 years ago. When a defendant voluntarily and knowingly pleads guilty, the defendant acknowledges that unconstitutional conduct preceding the guilty plea is irrelevant to the admission of factual guilt. As a result, we do not assess the merits of pre-plea constitutional claims but instead ask whether ineffective assistance of counsel caused defendants to enter their guilty pleas involuntarily and unknowingly. *Tollett* and its progeny tell us how to answer that question: challengers must show ineffective assistance of plea counsel. Because Spaeth does not even contend that his counsel performed deficiently, or that such deficient performance prejudiced him by depriving him of a trial right he would have chosen, we conclude that Spaeth's § 2255 motion must be dismissed. [29]

The Tenth Circuit's ruling in *Spaeth* compels dismissal of Petitioner's Sixth Amendment intentional-intrusion claim. Petitioner's Sixth Amendment claim arises from the video recording of two attorney-client meetings that took place at CCA on April 29 and May 16, 2016. The government had possession of and access to these recordings prior to Petitioner's August 8, 2016 guilty plea.[30] Petitioner challenges both her conviction and her sentence based on this alleged Sixth Amendment violation by the government. Like Mr. Spaeth, Petitioner relies on *Shillinger* for this claim and does not attempt to meet the applicable *Tollett* standard for showing that ineffective assistance of counsel caused her to enter her plea involuntarily and unknowingly.[31] Thus, she is also precluded from challenging her sentence based on any alleged pre-plea violation. Accordingly, this claim is dismissed.[32]

B. Ineffective Assistance of Counsel

Petitioner raises three claims that trial and appellate counsel were ineffective: (1) for failing to assert that the mandatory ten-year sentence under § 924(c) did not apply; (2) for failing to object to a two-level enhancement in the PSIR because the offense involved carjacking under § 2B3.1(b)(5); and (3) for failing to allow her the opportunity to enter a plea that was knowing and voluntary. As discussed below, these claims are without merit.

1. Standard

Section 2255 entitles a federal prisoner to relief if the court finds that "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or [is] otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack."[33] The court must hold an evidentiary hearing on a § 2255 motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."[34] A § 2255 petitioner must allege facts that, if proven, would warrant relief from his conviction or sentence.[35] An evidentiary hearing is not necessary where the factual allegations are contradicted by the record, inherently incredible, or when they are conclusions rather than statements of fact.[36]

***5** The Sixth Amendment guarantees that "[i]n all criminal prosecution, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."[37] A successful claim of ineffective assistance of counsel must meet the two-pronged test set forth in *Strickland v. Washington*.[38] First, a defendant must show that his counsel's performance was deficient in that it "fell below an objective standard of reasonableness."[39] To meet this first prong, a defendant must demonstrate that the omissions of his counsel fell "outside the wide range of professionally competent assistance."[40] This standard is "highly demanding."[41] Strategic or tactical decisions on the part of counsel are presumed correct, unless they were "completely unreasonable, not merely wrong, so that [they] bear no relationship to a possible defense strategy."[42] In all events, judicial scrutiny of the adequacy of attorney performance must be strongly deferential: "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[43] Moreover, the reasonableness of the challenged conduct must be evaluated from counsel's perspective at the time of the alleged error, and "every effort should be made to 'eliminate the distorting effects of hindsight.' "[44]

Second, a defendant must also show that her counsel's deficient performance actually prejudiced her defense.[45] To prevail on this prong, a defendant "must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different."[46] A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome."[47] This, in turn, requires the court to focus on "the question whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair."[48]

A defendant is entitled to the effective assistance of counsel during plea negotiations.[49] "The performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness."[50] To show prejudice in the guilty plea context, the defendant must establish "that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and [would have] insisted on going to trial.' "[51]

Claims of ineffective assistance of appellate counsel are also governed by *Strickland's* standards. To prove that appellate counsel was ineffective under *Strickland*, a defendant must show "(1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of ... the appeal ... would have been different." [52] Although "[a] claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, ... counsel need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." [53] The strength of the omitted issue guides the court's assessment of the ineffectiveness claim. "If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance." [54] "[I]f the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission." [55] And "if the issue is meritless, its omission will not constitute deficient performance." [56] As the Tenth Circuit has explained, the omission of a "dead-bang winner" by counsel is deficient performance that may result in prejudice; a dead-bang-winner is "an issue which was obvious from the trial record *and* one which would have resulted in a reversal on appeal." [57]

***6** In all events, a defendant must demonstrate both *Strickland* prongs to establish a claim of ineffective assistance of counsel, and a failure to prove either one is dispositive. [58] "The performance component need not be addressed first. 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.' " [59]

2. Application

a. Mandatory ten-year sentence under § 924(c)

Petitioner claims that Guastello should have argued that the mandatory-minimum sentence on Count 2 was five years, not ten, and therefore counsel was ineffective for failing to raise the issue both at sentencing and on appeal.

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a violent crime, or possessing a firearm in furtherance of a violent crime. The statute carries a mandatory-minimum sentence of five years, in addition to the sentence for the underlying crime. [60] The mandatory-minimum sentence is increased to seven years "if the firearm is brandished," and ten years "if the firearm is discharged." [61] The statutory sentencing enhancement of ten years when a firearm is discharged during and in relation to a crime of violence under § 924(c)(1)(A)(iii) requires no proof of intent —the enhancement applies if a gun is discharged, whether intentionally or by accident. [62]

Here, the Superseding Indictment alleged in Count 2 that the defendants "knowingly used, carried, brandished, and discharged" firearms "during and in relation to the robbery of First National Bank in Stillwell, Kansas, charged in Count One, a crime of violence, ... and possessed those firearms in furtherance of that crime of violence." [63] It is undisputed that during the flight from the bank robbery, co-defendant Smith fired two handguns at law enforcement officers. Because a firearm was discharged, a mandatory-minimum sentence of ten years applied. And at the time of her guilty plea, Petitioner admitted that she understood that she faced a mandatory-minimum sentence of at least ten years. Thus, Petitioner is incorrect that the five-year mandatory minimum applied to her charged offense, and counsel was not deficient for failing to raise the issue.

Petitioner also claims that counsel was ineffective for failing to object to the six-level enhancement for discharge of a firearm. She argues that the official victim enhancement under U.S.S.G. § 3A1.2(c)(1) does not apply where a defendant was also convicted under § 924(c), resulting in impermissible double counting. That Guideline calls for the increase,

> [i]f, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—knowing or having reasonable cause to believe that a person was a law enforcement

> officer, assaulted such officer during the course of the offense or immediate flight therefrom. [64]

***7** This argument is without merit. Section 924(c) requires a ten-year mandatory minimum sentence when a firearm is discharged; it does not require proof that anyone was assaulted by the discharge nor that law enforcement was present. [65] By contrast, § 3A1.2 applies where a law enforcement officer was assaulted during the crime or during flight from the crime, whether by firearm or otherwise. That sentencing enhancement does not require that a firearm be discharged. [66] Thus, there is no inappropriate double counting in applying this enhancement to a crime that involved a violation of § 924(c). [67]

Because counsel did not perform deficiently for failing to make objections and arguments at sentencing or on appeal that are legally incorrect, this claim fails.

b. Objection to PSIR

Next, Petitioner argues that counsel was ineffective for failing to object to the two-level enhancement for carjacking under U.S.S.G. § 2B3.1(b)(5). Carjacking means the taking, or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation. [68] U.S.S.G. § 1B1.3 provides that in the case of a jointly undertaken criminal activity, specific offense characteristic determinations should be determined based on:

> all acts and omissions of others that were—(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or *in the course of attempting to avoid detection or responsibility for that offense*. [69]

In attributing the two-level carjacking enhancement, the PSIR determined that after Jordan crashed the getaway vehicle, he ran on foot and attempted to carjack a nearby vehicle to facilitate his escape. [70] The PSIR found that this conduct, which occurred after the three defendants led police on an extended high-speed chase during which shots were fired at police officers, was in furtherance of that criminal activity and was reasonably foreseeable to the co-defendants. [71] The Court adopted the PSIR's recommendation.

Petitioner argues that she was unconscious following the crash of the getaway vehicle, and thus it would not be reasonably foreseeable to her that Jordan would attempt to carjack a vehicle. In the case of jointly undertaken activity, however, a defendant is responsible for conduct of others that was (1) "within the scope," (2) "in furtherance," and (3) "reasonably foreseeable." [72] There is no requirement that a defendant assist the co-defendant in the relevant conduct, know of the co-defendant's intention to do so, or even be present during the conduct for it to be considered part of the relevant offense conduct. [73]

***8** The Court finds that counsel did not err by failing to object to this two-level enhancement in the PSIR. Petitioner was aware that the offense involved an armed bank robbery; that she provided the getaway car; and that Petitioner and the two co-defendants led law enforcement on a high-speed chase across the state line, which ultimately ended in the wreck of the vehicle and a continued attempt by Jordan to flee the scene. Given the violent nature of the bank robbery plan, which continued with an extended attempt to flee in which Smith fired shots at law enforcement officers, Petitioner should have known that an attempted carjacking was reasonably foreseeable. [74] Thus, the record supports Petitioner meeting the requirements for application of § 1B1.3(a)(1)(B), and it was not error for counsel to fail to object to this enhancement in the PSIR. She is not entitled to relief on this claim.

c. Knowing and voluntary plea

Finally, Petitioner argues that counsel was ineffective for failing to allow her the opportunity to enter a plea that was knowing, voluntary, and intelligent. "The Due Process Clause of the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty." [75] "This means a defendant's decision to plead guilty must be 'deliberate and intelligent and chosen from available alternatives.' " [76] "[C]oercion by the accused's counsel can render a plea involuntary." [77] "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " [78] "A plea may be involuntary when an attorney materially misinforms the defendant of the consequences of the plea." [79] Further, "a plea may be involuntary if counsel informs the defendant that he has no choice, he must plead guilty." [80]

Petitioner alleges that (1) counsel's pressure on her to enter a guilty plea resulted in it being coerced and involuntary, and (2) that counsel rendered ineffective assistance in advising her to enter the plea because he refused to consider what she purports to be exculpatory evidence about her participation in the bank robbery. She notes her hesitancy during her plea colloquy and contends that she was coerced into entering the guilty plea and acted out of fear. She alleges that she spoke with counsel on numerous occasions about her unwillingness to participate in the bank robbery and provided him with exculpatory statements from the hospital staff, text messages, and camera footage that would have provided proof that she did not aid and abet in the offense.

Petitioner was neither coerced, misinformed, nor told she had no choice but to plead. The Tenth Circuit has recognized that a "central component of a lawyer's job is to assimilate and synthesize information from numerous sources and then advise clients about what is perceived to be in their best interests." [81] " 'Advice—even strong urging' by counsel does not invalidate a guilty plea." [82] Likewise, vigorous urging by counsel based on the belief that it was in his client's best interest to plead guilty does not render a plea involuntary. [83] Here, Petitioner does not allege that counsel forced or threatened her to plead guilty.

***9** Nor does the evidence described by Petitioner constitute potentially exculpatory evidence, which would be evidence relevant to her guilt. [84] Instead, evidence regarding her unwillingness to participate in the bank robbery or any domestic abuse issues with Jordan would be mitigation evidence, which would be relevant to her punishment. Petitioner does not claim that counsel was ineffective for failing to present such evidence at sentencing, nor would such a claim have merit—counsel advocated for a mitigating role in the offense, requesting a decrease at sentencing, both in an objection to the PSIR and in a Sentencing Memorandum. [85] Guastello urged the Court to consider that Petitioner's role in the offense was minor and motivated by her infatuation with Jordan, and that she needed to get away from him but loved him, which the Court rejected. [86]

Furthermore, this Court conducted a thorough colloquy with Petitioner at the change of plea hearing, which is an "important safeguard that protects defendants from incompetent counsel or misunderstandings," and "insure[s] that defendants understand the consequences of a guilty plea." [87] The Court acknowledged Plaintiff's hesitancy to enter her plea and advised Petitioner that she should take all the time she needed to make a decision. After meeting with counsel, Petitioner indicated that she was prepared to proceed, acknowledged that she understood she had a right to a jury trial, that she understood the mandatory-minimum sentence for Count 2 was ten years, and that she was satisfied with the advice and representation her attorney provided her. [88] She also stated that she agreed that, if the case went to trial, the government would present evidence as described in detail by the prosecutor. Had Petitioner misunderstood or been misinformed about the nature of the evidence against her, this Court's colloquy would have alerted her to that fact. Moreover, after she entered her guilty plea and then moved to withdraw counsel, she does not claim that she told new counsel or raised the issue with this Court about previous counsel's actions nor sought to withdraw her plea on those grounds.

Accordingly, the Court finds that Petitioner has not demonstrated that counsel's purported ineffectiveness rendered her guilty plea involuntary. This claim is denied.

C. Actual Innocence

" '[A]ctual innocence' means factual innocence, not mere legal insufficiency." [89] To establish actual innocence, a petitioner must demonstrate that "it is more likely than not that no reasonable juror would have convicted [her] in light of ... new evidence." [90] To be credible, a claim of actual innocence ordinarily must be supported with new reliable evidence such

as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.[91] Because such evidence is unavailable in the majority of cases, claims of actual innocence are rarely successful.[92] In addressing a petitioner's claim that she is actually innocent of a charge to which she has pleaded guilty, petitioner must overcome the hurdle presented by her admission that her plea was knowing and voluntary and that she was guilty of the crime to which she pleaded guilty.[93]

***10** Here, Petitioner fails to present any evidence that she is innocent of the crimes to which she pleaded guilty. She claims that testimony from hospital staff, her text messages to Jordan, and documented abuse is exculpatory evidence that, if presented to a reasonable juror, supports her claim of evidence. But this evidence falls short of proving that she did not aid and abet the armed bank robbery or the discharge of a firearm during the flight from that robbery. Indeed, Petitioner admitted that she agreed to join Jordan while committing a robbery, that she drove her vehicle and her 19-month-old daughter to the bank, that she cased the bank, and that she directed Jordan to drive into Missouri in order to avoid apprehension by Kansas law enforcement officers. Moreover, Petitioner acknowledged to this Court, both orally and in writing, that she committed the offenses. Because Petitioner has not met her burden to present credible new evidence of actual innocence, this claim is denied.

III. Certificate of Appealability

Rule 11 of the Rules Governing Section 2255 Proceedings states that the Court must issue or deny a certificate of appealability ["COA"] when it enters a final order adverse to the applicant. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."[94] If the district court denies a habeas petition on procedural grounds without reaching the merits of petitioner's underlying constitutional claim, "the prisoner must show both (1) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling' *and* (2) 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.' "[95] For the reasons stated above, the Court finds that Petitioner has not satisfied this standard and, therefore, denies a certificate of appealability as to its ruling dismissing her intentional-intrusion Sixth Amendment claim as well as on the merits of her § 2255 motion.

IT IS THEREFORE ORDERED BY THE COURT that Petitioner Danille Morris' Motion to Vacate and Discharge with Prejudice under 28 U.S.C. § 2255, as amended (Docs. 137, 151) is **dismissed** with respect to her Sixth Amendment intentional-intrusion claim, and **denied** with respect to her ineffective assistance of counsel and actual innocence claims. Petitioner is also denied a COA.

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 6147532

Footnotes

1 Unless otherwise specified, citations prefaced with "Doc." refer to filings and docket entries in the underlying criminal case, No. 16-20022-JAR-3. Citations prefaced with "*CCA Rec. Lit.* Doc." Refer to filings and entries in this consolidated case, No. 19-cv-2491-JAR-JPO.

2 Morris also has pending a Motion for Compassionate Release (Doc. 193), which will be addressed in a separate order.

3 Doc. 26.

4 *Id.* at 4. *See also* 18 U.S.C. §§ 924(c), 2113(a), (d).

5 Doc. 48.

6 Doc. 129 at 9.

7 *Id.*

8 *Id.* at 13, 22.

9 *Id.* at 30–31.

10 Doc. 48.

11 *Id.* at 5 ¶ 22.

12 Doc. 54.

13 Doc. 90 ¶¶ 46–50.

14 *Id.* ¶ 90.

15 Doc. 97.

16 Doc. 95.

17 Doc. 104.

18 *United States v. Morris*, 713 F. App'x 777 (10th Cir. 2017).

19 Doc. 137.

20 Standing Order 18-3.

21 411 U.S. 258, 266 (1973); *see Spaeth v. United States*, No. 19-2413-JAR-JPO, Docs. 3, 7, 8; *CCA Rec. Lit.*, Docs. 730, 785, 922.

22 *Tollett*, 411 U.S. at 266

23 *CCA Rec. Lit.*, Doc. 848; *see Hill v. Lockhart*, 474 U.S. 52, 58–60 (1985) (adopting two-part test for ineffective assistance of counsel claim in the plea context and to show prejudice: "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

24 *United States v. Spaeth*, 69 F.4th 1190 (10th Cir. 2023). The mandate issued August 21, 2023.

25 *Id.* at 1204–08.

26 70 F.3d 1132, 1142 (10th Cir. 1995) (holding a per se Sixth Amendment violation occurs when the government becomes privy to an attorney-client communication because of its purposeful intrusion that is not justified by any legitimate law enforcement interest).

27 *Spaeth*, 69 F.4th at 1211. The Tenth Circuit declined to decide "what effect any per se presumption of a Sixth Amendment violation might have in applying the *Hill* prejudice standard—a reasonable probability that the defendant would not have pleaded guilty absent the deficient performance." *Id.*

28 *Id.* at 1212–13.

29 *Id.* at 1213.

30 The government had possession of and access to hundreds of hours of video recordings obtained from CCA in a separate criminal matter from May 17, 2016 until August 9, 2016, when it disgorged the videos to the Court. *See CCA Rec. Lit.*, Doc. 784 at 13; *United States v. Carter*, No. 16-20032-JAR, Doc. 758 (D. Kan. Aug. 13, 2019).

31 As discussed below, Petitioner raises a separate claim that counsel's deficient performance and coercion with respect to her guilty plea caused her to enter her plea involuntarily and unknowingly. *See infra* at 16–19.

32 The Court does not reach the government's additional procedural argument that Petitioner's § 2255 motion is procedurally defaulted.

33 28 U.S.C. § 2255(b).

34 *United States v. Galloway*, 56 F.3d 1239, 1240 n.1 (10th Cir. 1995) (quoting 28 U.S.C. § 2255(b)).

35 *In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009).

36 *See Hatch v. Oklahoma*, 58 F.3d 1447, 1471 (10th Cir. 1995) ("[T]he allegations must be specific and particularized, not general or conclusory"); *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994) (rejecting ineffective assistance of counsel claims that are merely conclusory in nature and without supporting factual averments).

37 U.S. Const. amend. VI; *see Kansas v. Ventris*, 556 U.S. 586, 590 (2009).

38 466 U.S. 668 (1984).

39 *Id.* at 688.

40 *Id.* at 690.

41 *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

42 *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (quotation and citations omitted).

43 *Strickland*, 466 U.S. at 689.

44 *Edens v. Hannigan*, 87 F.3d 1109, 1114 (10th Cir. 1996) (quoting *Strickland*, 466 U.S. at 689).

45 *Strickland*, 466 U.S. at 687.

46 *Id.* at 694.

47 *Id.*

48 *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

49 *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012).

50 *Id.* at 163 (internal quotation marks omitted).

51 *Heard v. Addison*, 728 F.3d 1170, 1176 (10th Cir. 2013) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985)).

52 *United States v. Turrentine*, 638 F. App'x 704, 705 (10th Cir. 2016) (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)).

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *United States v. Challoner*, 583 F.3d 745, 749 (10th Cir. 2009) (quoting *United States v. Cook*, 45 F.3d 388, 394 (10th Cir. 1995)).

58 *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000).

59 *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)); *see also Romano v. Gibson*, 239 F.3d 1156, 1181 (10th Cir. 2001) ("This court can affirm the denial of habeas relief on whichever *Strickland* prong is the easier to resolve.").

60 18 U.S.C. § 924(c)(1)(A)(i).

61 *Dean v. United States*, 556 U.S. 568, 571–72 (2009) (quoting 18 U.S.C. §§ 924(c)(1)(A)(ii), (iii)).

62 *Id.* at 572.

63 Doc. 26 at 2.

64 U.S.S.G. § 3A1.2(c)(1).

65 18 U.S.C. § 924(c)(1)(A)(iii).

66 *See United States v. Ford*, 613 F.3d 1263, 1269 (10th Cir. 2010) (recognizing cases from other circuits approving of enhancement where a firearm was displayed to officers, but not discharged).

67 By contrast, a seven-level specific offense enhancement for discharge of a firearm during relevant conduct to the offense was *not* applied under § 2B3.1(b)(2) because, according to the comment to § 2K2.4, the weapon enhancement is incorporated into the conviction under Count 2, requiring a mandatory consecutive sentence. *See* Doc. 90 at ¶ 48. There is no corresponding incorporation for the enhancement under § 3A1.2. *See* Doc. 90 at ¶ 48.

68 U.S.S.G. § 2B3.1, Application Note 1.

69 U.S.S.G. § 1B1.3(a)(1)(B) (emphasis added).

70 Doc. 90 ¶ 49.

71 *Id.* (first citing *United States v. Cover*, 199 F.3d 1270 (11th Cir. 2000) (upholding carjacking enhancement when defendant was arrested as he exited a bank after a robbery, and an unidentified co-conspirator carjacked a motorist outside the bank to facilitate his escape), and then citing *United States v. Melton*, 131 F.3d 1400 (10th Cir. 1997) (discussing sentencing accountability in the context of the scope of criminal activity involving an arrest, and subsequent activity in which defendant participated in a reverse sting operation)).

72 U.S.S.G. § 1B1.3, Application Note 3.

73 *Id.*; *see United States v. Kantete*, 610 F. App'x 173, 176 (3d Cir. 2015) (finding that the defendant "need not have been present during the carjacking for it to be considered part of the relevant offense conduct" under U.S.S.G. § 1B1.3(a)(1) (B)).

74 *See United States v. Martinez*, 342 F.3d 1203, 1209–10 (10th Cir. 2003) (finding that the defendant knew, or should have known, carjacking by bank robbery accomplice was foreseeable where defendant was asked to dispose of a firearm and to provide transportation).

75 *United States v. McIntosh*, 29 F.4th 648, 655 (10th Cir. 2022) (quoting *Fields v. Gibson*, 277 F.3d 1203, 1212–13 (10th Cir. 2002)).

76 *Id.* (quoting *United States v. Libretti*, 38 F.3d 523, 529 (10th Cir. 1994), *aff'd*, 516 U.S. 29 (1995)).

77 *Fields*, 277 F.3d at 1213 (quoting *United States v. Estrada*, 849 F.2d 1304, 1306 (10th Cir. 1988)).

78 *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

79 *Fields*, 277 F.3d at 1213 (quoting *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir. 1990)).

80 *Id.* (quoting *United States v. Carr*, 80 F.3d 413, 416 (10th Cir. 1996)).

81 *Id.* at 1214.

82 *Id.* (quoting *Williams v. Chrans*, 945 F.2d 926, 933 (7th Cir. 1991)).

83 *Miles v. Dorsey*, 61 F.3d 1459, 1469 (10th Cir. 1995)

84 *See* discussion regarding Petitioner's actual innocence claim, *infra*, at 19–20.

85 Doc. 90 ¶¶ 107–112; Doc. 97.

86 Doc. 97.

87 *Fields*, 277 F.3d at 1214 (citation omitted).

88 *Id.* at 13, 22.

89 *Bousley v. United States*, 523 U.S. 614, 623 (1998).

90 *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see United States v. Starr*, 275 F. App'x 788, 789 (10th Cir. 2008); *see also Bousley*, 523 U.S. at 623 (applying *Schlup* standard to § 2255 motion).

91 *See Schlup*, 513 U.S. at 324.

92 *Id.* at 324.

93 *See O'Bryant v. Oklahoma*, 568 F. App'x 632, 637 (10th Cir. 2014) (In addressing an actual innocence claim, the court "may take into account the fact that the petitioner's conviction was based on a guilty plea predicated on the petitioner's representations of competence and voluntariness, and findings by the court.").

94 28 U.S.C. § 2253(c)(2).

95 *United States v. Park*, 727 F. App'x 526, 528 (10th Cir. 2018) (emphasis in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

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713 Fed.Appx. 777
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Danille MORRIS, Defendant-Appellant.

No. 17-3074
|
Filed November 9, 2017

Synopsis

Background: Defendant pled guilty in the United States District Court for the District of Kansas, No. 2:16-CR-20022-JAR-3, to armed bank robbery, and using, carrying, brandishing, and discharging firearms during and in relation to a crime of violence, and possessing those firearms in furtherance of a crime of violence. Defendant appealed her sentence.

Holdings: The Court of Appeals, Gregory A. Phillips, Circuit Judge, held that:

district court did not clearly err in denying minor participant sentence reduction, and

sentence was substantively reasonable.

Affirmed.

(D.C. No. 2:16-CR-20022-JAR-3) (D. Kansas)

Attorneys and Law Firms

James A. Brown, Office of the United States, Attorney District of Kansas, Topeka, KS, for Plaintiff-Appellee

David Joseph Guastello, Guastello Law Firm, Kansas City, MO, for Defendant-Appellant

Before KELLY, PHILLIPS, and McHUGH, Circuit Judges.

ORDER AND JUDGMENT *

Gregory A. Phillips, Circuit Judge

The events underlying Danille Morris's convictions and sentence—a bank robbery, a car chase, wild gunshots, a rollover accident, and an attempted carjacking—seem ripped from a movie script. But the 200-month sentence from which she appeals is quite real. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

BACKGROUND

Morris had an intimate relationship with Gary Jordan. On March 9, 2016, Jordan asked her to be his getaway driver for a bank robbery. Bringing her 19-month-old daughter, Morris drove her 2003 Chevrolet Tahoe to pick up Jordan and then another man, Jacob Smith. She drove the men as they looked for a good target, eventually ending up at the First National Bank in Stilwell, Kansas.

Pretending to look for work, Morris went in and cased the bank, then reported the number of employees to Jordan and Smith. Carrying handguns, Jordan and Smith robbed the bank of more than $15,000 while Morris waited with the Tahoe running. After the robbery, Jordan took the wheel. Morris was in the front passenger seat, with Smith and Morris' daughter in the backseat. Morris and Smith began putting the money into a backpack.

Within minutes, police spotted and chased the Tahoe. For approximately 21 miles, Jordan drove at high speeds, evaded "stop sticks" the police deployed, ran at least a half-dozen red lights, and drove on the sidewalk to get around traffic. During the chase, Smith fired numerous shots at the pursuing police cars, hitting one car near the driver's door.

Believing that the police could not cross state lines, Morris told Jordan to head for Missouri. Shortly after they entered Missouri, the chase ended when Jordan lost control and rolled the Tahoe. None of the Tahoe's occupants (including Morris' daughter) was seriously injured, and officers were able to arrest Morris and Smith with little trouble. Jordan, on the other hand, ran and tried to carjack another vehicle before being apprehended.

Morris pleaded guilty to one count of armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) & (d) and 2, and one count of using, carrying, brandishing, and discharging firearms during and in relation to a crime of violence, and possessing those firearms in furtherance of a crime of violence, in violation of ***779** 18 U.S.C. §§ 924(c)(1)(A) and 2. Her presentence report recommended increasing her offense level by 8 levels for relevant conduct (2 levels for Jordan's carjacking and another 6 levels for Smith's firing on police officers). With these increases, the presentence report established a Guidelines range of 70 to 87 months for the bank robbery. The firearm conviction carried a mandatory 120-month consecutive sentence.

Suggesting she was a minor participant in the crimes, particularly with regard to the relevant conduct, Morris requested an offense-level reduction under Sentencing Guideline § 3B1.2. She also requested that the district court vary downward and order a sentence totaling 150 months (30 months for the bank robbery and 120 months for the firearm conviction). The government opposed both requests and moved for an upward variance. The district court denied the § 3B1.2 request and declined to vary either downward or upward. It imposed a within-Guidelines sentence of 80 months for the bank robbery and 120 months for the firearms violation, for a total sentence of 200 months.

DISCUSSION

Morris raises two issues on appeal. First, she challenges the district court's denial of her § 3B1.2 request. Second, she challenges the substantive reasonableness of her sentence.

I. Section 3B1.2 Adjustment

Sentencing Guideline § 3B1.2 establishes offense-level deductions for minimal and minor participants. Morris relies on § 3B1.2(b), which provides a two-level deduction for a minor participant. A "minor participant" is one "who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." U.S. Sentencing Guidelines Manual § 3B1.2, cmt. n.5 (U.S. Sentencing Comm'n 2016).

Morris has the burden of proving minor-participant status by a preponderance of the evidence. *United States v. Adams*, 751 F.3d 1175, 1179 (10th Cir. 2014). A minor-participant determination is a factual finding reviewed for clear error. *Id.* "To constitute clear error, we must be convinced that the sentencing court's finding is simply not plausible or permissible in light of the entire record on appeal, remembering that we are not free to substitute our judgment for that of the district judge." *United States v. Garcia*, 635 F.3d 472, 478 (10th Cir. 2011) (internal quotation marks omitted).

While recognizing that Jordan and Smith did the robbing, Jordan was the getaway driver, and Smith did the shooting, the district court found that Morris had provided the Tahoe, had driven Jordan and Smith to the bank, and then had cased the bank. The district court therefore denied the § 3B1.2(b) reduction because she had "engaged in both the planning and provided the car that allowed for the robbery itself." R., Vol. 2 at 63.

Morris asserts that the district court improperly relied on her "essential role" in the robbery, Aplt. Br. at 9, and it ignored her lower culpability in the relevant conduct. We disagree. The district court explicitly noted what she did not do, but it then determined that what she did do exceeded minor participation. On this record, we cannot conclude that the district court's findings were implausible or impermissible.

"[A] defendant is not entitled to a minor-participant reduction merely because [s]he is the least culpable among several participants in a jointly undertaken criminal enterprise." *Adams*, 751 F.3d at 1179 (internal quotation marks omitted). In *Adams*, ***780** this court identified several cases in which defendants with roles similar to Morris's were denied minor-participant reductions. *See id.* at 1179-80. Morris's arguments how various factors would support a minor-participant reduction essentially seek to have this court re-weigh the evidence, which we do not do on clear-error review. *See United States v. Gilgert*, 314 F.3d 506, 515-16 (10th Cir. 2002).

II. Reasonableness of Sentence

Morris next argues that her sentence is unreasonable in light of the sentencing factors set forth in 18 U.S.C. § 3553(a) and that the district court should have granted the downward variance. These arguments invoke substantive reasonableness analysis. *See United States v. Smart*, 518 F.3d 800, 804 (10th Cir. 2008) ("A challenge to the sufficiency of the § 3553(a) justifications relied on by the district court implicates the substantive reasonableness of the resulting sentence.").

"We review sentences for reasonableness under a deferential abuse-of-discretion standard." *Adams*, 751 F.3d at 1181

(brackets and internal quotation marks omitted). "A sentencing decision is substantively unreasonable if it exceeds the bounds of permissible choice, given the facts and the applicable law. Further, we presume a sentence is reasonable if it is within the properly calculated guideline range." *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013) (brackets, citation, and internal quotation marks omitted). "[G]iven the district court's institutional advantage over our ability to determine whether the facts of an individual case justify a variance ..., we generally defer to its decision to grant, or not grant, a variance based upon its balancing of the § 3553(a) factors." *United States v. Haley*, 529 F.3d 1308, 1311 (10th Cir. 2008).

Morris argues that the district court gave too much weight to those factors concerning the nature of the offense and too little weight to mitigating factors such as her complete lack of criminal history. But we do not consider the § 3553(a) factors de novo. *See Smart*, 518 F.3d at 808 ("[W]e must ... defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings."). "[A]s long as the balance struck by the district court among the factors set out in § 3553(a) is not arbitrary, capricious, or manifestly unreasonable, we must defer to that decision even if we would not have struck the same balance in the first instance." *United States v. Sells*, 541 F.3d 1227, 1239 (10th Cir. 2008). And although Morris disagrees with the district court's balancing, she has failed to show that the balance the court struck was arbitrary, capricious, or manifestly unreasonable.

CONCLUSION

The district court's judgment is affirmed.

All Citations

713 Fed.Appx. 777

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

69 F.4th 1190
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Matthew C. SPAETH, Defendant - Appellant.

No. 21-3096
|
FILED June 12, 2023

Synopsis

Background: Federal inmate filed motion to vacate, set aside, or correct sentence. The United States District Court for the District of Kansas, Julie A. Robinson, Chief Judge, 2021 WL 1244789, denied motion, and inmate appealed.

Holdings: The Court of Appeals, Phillips, Circuit Judge, held that:

exception to plea agreement's appeal waiver did not relieve inmate of obligation to demonstrate that government's misconduct prejudiced him;

government's recording of inmate's pre-plea telephone calls with counsel did not render his plea unknowing and involuntary; and

government's misconduct did not provide grounds for inmate to challenge his sentence.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***1191 Appeal from the United States District Court for the District of Kansas (D.C. Nos. 2:19-CV-02491-JAR-JPO, 2:19-CV-02413-JAR-JPO, 2:14-CR-20068-DDC-6)**

Attorneys and Law Firms

Paige A. Nichols, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, and Lydia Krebs, Assistant Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, District of Kansas, Wichita, Kansas, for Appellant.

Bryan C. Clark, Assistant United States Attorney (Duston J. Slinkard, United States Attorney, James A. Brown, Assistant United States Attorney, and Carrie N. Capwell, First Assistant United States Attorney, with him on the brief), Office of the United States Attorney, District of Kansas, Topeka, Kansas, and Kansas City, Kansas, for Appellee.

Before TYMKOVICH, PHILLIPS, and McHUGH, Circuit Judges.

Opinion

PHILLIPS, Circuit Judge.

By motion under 28 U.S.C. § 2255, Matthew C. Spaeth asks us to vacate his conviction ***1192** and term of imprisonment or to reduce his sentence imposed for his admitted participation in an extensive conspiracy to distribute methamphetamine. As support, he points out that the government obtained and allegedly listened to recordings of telephone calls that he made from a pretrial-detention facility to his counsel. But the record reveals that Spaeth's guilty conduct was firmly established long before his arrest and that he received a very favorable sentence under a binding plea agreement.[1] Even so, and despite his unconditional guilty plea, the law allows Spaeth to challenge his conviction and sentence if his counsel's deficient performance led to an involuntary and unknowing guilty plea when he otherwise would have chosen a trial. But Spaeth doesn't try to meet this legal standard. Though we condemn the conduct of the Kansas U.S. Attorney's Office, Spaeth still needs to prove his § 2255 claim. We affirm.

BACKGROUND

I. Factual and Procedural Background

A. Spaeth's Admitted Facts About His Criminal Conduct[2]

From January to September 2014, various federal, state, and local law-enforcement agencies and officers investigated an extensive methamphetamine-trafficking conspiracy operating in Kansas City, Kansas. The investigation led to controlled buys, traffic stops, search warrants, and incriminatory interviews of some conspirators, as well as to the seizure of drug ledgers and methamphetamine. In Spaeth's detailed written factual basis attached to his plea agreement, he admitted his role in the conspiracy, which included weekly

transactions of pounds of methamphetamine (mostly from Mexico). He also acknowledged that officers had seized methamphetamine from him. For instance, an officer arrested Spaeth at his home on an active warrant and found him with 168 grams of methamphetamine, as well as currency, digital scales, and other paraphernalia. Further, one of Spaeth's recorded jail calls with a drug associate led law enforcement to a backpack in his car. After obtaining a search warrant for the car, law enforcement found in the backpack 223 grams of methamphetamine and Spaeth's loaded .357 Ruger revolver.

B. Spaeth's Indictment, Arrest, Detention, and Sentencing

In October 2014, in a Third Superseding Indictment, a grand jury indicted eight people, including Spaeth, on 25 counts related to the drug conspiracy.[3] In November 2014, law-enforcement officers arrested ***1193** Spaeth. At Spaeth's arraignment, the judge remanded him to the Leavenworth Detention Center (or CoreCivic),[4] where he remained in detention until his sentencing in January 2017. Located in rural Kansas, CoreCivic houses federal detainees from Kansas, Missouri, Nebraska, and Iowa. The facility contracts with the U.S. Marshals Service to detain federal defendants awaiting trial and sentencing. Given CoreCivic's remote location, detainees must sometimes communicate with their counsel by telephone.

While at CoreCivic, Spaeth placed five recorded telephone calls to his appointed counsel. Four calls occurred between July 8, 2015, and August 19, 2015, and one call occurred on May 3, 2016. The five calls totaled 23 minutes. During the calls, Spaeth and his counsel discussed "matters relating to legal advice or strategy."[5]

In September 2016, four months after the fifth call, Spaeth agreed to plead guilty to the drug-conspiracy charge in exchange for the government's dismissing the remaining charges and recommending a binding sentence of 180 months' imprisonment. Both in his petition to enter a plea of guilty and in the written plea agreement, as well as during the Rule 11(c)(1)(C) plea colloquy, Spaeth acknowledged that he was pleading guilty because he was guilty and that he entered his guilty plea freely, voluntarily, and knowingly. He also acknowledged that he was "satisfied with the advice and services" of his counsel. Spaeth's counsel represented to the court that he "d[id] not know of any reason why the court should not accept this plea."

Spaeth's plea agreement contained a lengthy appellate-waiver paragraph, which began with a blanket waiver of his right to appeal or collaterally attack his conviction, sentence, or prosecution. But later in the waiver, he reserved any rights he might have to "any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." After carefully adhering to Rule 11's procedures, the district court accepted Spaeth's guilty plea.

In January 2017, the court held Spaeth's sentencing hearing. After applying an agreed total offense level of 35 (which had credited a three-level reduction for acceptance of responsibility) and a criminal-history category of III, the court was left with an advisory guideline range of 210 to 262 months' imprisonment for the drug-conspiracy charge.[6] As part of her comments regarding the recommended binding sentence of 180 months, Assistant U.S. Attorney Terra Morehead told the court that the government suspected Spaeth of involvement in a drug conspiracy at CoreCivic for which he might later be charged (the *Black* Investigation). Spaeth's counsel did not speak to that matter but informed the court that Spaeth had no objections to ***1194** the presentence report and knew of no "lawful reason why the sentence should not now be imposed." The court then imposed a sentence of the binding 180 months' imprisonment under Rule 11(c)(1)(C).

C. Post-Sentencing Developments

In spring 2016, the U.S. Attorney's Office for the District of Kansas began its *Black* Investigation. The investigation concerned the actions of detainees, CoreCivic employees, and outside persons to smuggle drugs into the facility. In April 2016, early in the investigation, the lead Assistant U.S. Attorney, Erin Tomasic, subpoenaed recordings of outgoing telephone calls placed by about 40 detainees, which included Spaeth's five calls with his counsel.[7] In August 2016, under a "clawback order," the district court impounded "all video and audio recordings of attorney-client communications" in the government's possession. In September 2016, as mentioned, Spaeth signed and filed with the court his written plea agreement. The record does not reveal when Spaeth or his counsel learned that the government had obtained his recorded calls.

The record does reveal that at least before October 2016, CoreCivic automatically recorded all detainee telephone calls unless defense attorneys had requested privatization for

their own telephone numbers. The record is silent about whether Spaeth's counsel ever requested privatization. But the district court found that "calls between defense attorneys and clients at [CoreCivic] were routinely recorded even when the attorney properly requested privatization." [8]

In July 2018, Chief Judge Julie A. Robinson appointed the Kansas Federal Public Defender to represent defendants with potential Sixth Amendment claims related to the government's listening to defendants' attorney–client calls. [9] She did so after a Special Master's extensive investigation into misconduct at the Kansas U.S. Attorney's Office. Because the government failed to fully cooperate in the investigation, the district court imposed an adverse inference against the government that "before each petitioner entered a plea, was convicted, or was sentenced, each member of the prosecution team became 'privy to' each recording ... , either by watching or listening to them or by directly or indirectly obtaining information about them from someone who did." Despite that ruling, AUSA Morehead later filed an affidavit declaring that "[a]t no time prior to [Spaeth's] sentencing ... was I aware that audio recordings of telephone calls existed that contained communications between [Spaeth] and defense counsel or any individual working for defense counsel." She denied having "listen[ed] to any audio recordings of telephone calls" between Spaeth and his counsel.

D. Federal Habeas Motion

On July 17, 2019, Spaeth filed a "Motion to Vacate and Discharge with Prejudice ***1195** Under 28 U.S.C. § 2255," which sought to vacate his conviction and sentence. [10] Chief Judge Robinson transferred Spaeth's habeas case to her docket and consolidated it with more than 100 others asserting Sixth Amendment violations from the *Black* Investigation. In his motion, Spaeth alleged that the government had violated his "Sixth Amendment right to counsel by intentionally obtaining phone-call recordings that included protected attorney-client communications between [Spaeth] and counsel."

Despite having pleaded guilty, Spaeth did not address the legal consequences of guilty pleas under the rule set forth in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In fact, Spaeth did not even allege that his counsel had performed deficiently, let alone that he had done so in a way that rendered his plea involuntary and unknowing. Nor did he allege prejudice—that he would have gone to trial had he known about the recorded calls before he pleaded guilty. *See Hill v. Lockhart*, 474 U.S. 52, 54-55, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Spaeth instead rested his motion on *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995), a case involving a *jury verdict* and not a guilty plea. There, we ruled that "a prejudicial effect on the reliability of the trial process must be presumed" when "the state becomes privy to confidential communications." *Id.* at 1142. Spaeth's motion asked the district court to vacate his judgment with prejudice and immediately release him or to vacate his sentence and resentence him to 90 months' imprisonment.

The government opposed Spaeth's § 2255 motion. From the outset, it argued that Spaeth's guilty plea left him with a single avenue for redress—showing under *Tollett* that he had received ineffective assistance of counsel that rendered his plea involuntary and unknowing. As the government noted, a guilty plea "settles the issues of a defendant's factual and legal guilt" because it "represents a break in the chain of events which has preceded it in the criminal process" and "operates to foreclose" collateral attacks based on pre-plea misconduct.

The district court ordered supplemental briefing "addressing the collateral-attack waiver by plea agreement issue." In his supplemental brief, Spaeth contended that the government had waived "its *Tollett* defense" by agreeing to the so-called carve-out provision—the last sentence of his appellate-waiver paragraph. Alternatively, Spaeth argued that *Tollett* posed no obstacle because the government's intrusion had "disabl[ed] defense counsel from fully assisting and representing" him. The government countered that it had not waived *Tollett* and further that it could not waive "controlling law" based on "the petitioner's admission of factual guilt." As for Spaeth's argument under *Shillinger*, the government responded that *Shillinger* would not relieve any petitioner of the requirement of showing that his counsel's deficient performance had caused him to plead guilty rather than go to trial.

From this, the district court ruled on the three underlying issues in a thorough 61-page opinion. [11]

***1196** First, examining the appellate waiver's plain language, the court ruled that the carve-out provision "does not state that the government is waiving anything and makes no mention of the substantive standard that applies to [subsequent claims of ineffective assistance of counsel]." *CCA Recordings 2255 Litig.*, 2021 WL 150989, at *12. So the court agreed with the government that this provision did

not purport to waive *Tollett*. *Id.* at *9-13. [12] And the district court declared that "the *Tollett* rule creates a separate legal bar to relief, regardless of language in the plea agreement." *Id.* at *12. "To rule otherwise," the court reasoned, "would impermissibly circumvent the rule in *Tollett* and its progeny." *Id.* Put differently, the district court concluded that the government cannot "silently bargain away" the rule of law in *Tollett*; instead "the Court must consider relevant controlling law, including the standard adopted in *Tollett*." *Id.* at *12-13.

Second, the court rejected Spaeth's view that *Shillinger* applied in the guilty-plea setting. *Id.* at *13-18. Relying on *Tollett*'s command, the district court required that Spaeth show why his guilty plea would not "render[ ] irrelevant" pre-plea intentional intrusions that were "not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction." *Id.* at *13 (quoting *Haring v. Prosise*, 462 U.S. 306, 321, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983)). The court further rejected Spaeth's argument that *Shillinger* alone could provide the needed prejudice showing. It reasoned that

> Petitioners' argument ignores the lesson from *Tollett* that the merits of an alleged pre-plea constitutional violation are rendered irrelevant and should not be conflated with the largely separate question of whether a defendant's plea was involuntary. Instead, Supreme Court precedent instructs the Court to look to whether the alleged Sixth Amendment violation *caused* a petitioner's plea to be involuntary or uncounseled.

Id. at *16. And to that end, the district court rejected Spaeth's argument to extend *Shillinger*'s per se Sixth Amendment violation into *Tollett*'s guilty-plea framework. The district court ruled that *Tollett* rendered irrelevant any pre-plea constitutional violations except for ineffective assistance of counsel resulting in an involuntary and unknowing guilty plea. *Id.* at *16-18.

Third, the district court considered and discarded Spaeth's argument that *Tollett* didn't apply to pre-plea constitutional violations whose effects somehow continued post-plea to sentencing. *Id.* at *18. The district court found no reason to depart from *Tollett*'s reasoning that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* (quoting 411 U.S. at 267, 93 S.Ct. 1602). The court determined that allowing Spaeth to challenge his sentence based on pre-plea violations would render *Tollett* and its progeny "meaningless." *Id.* at *18 & n.185 (collecting cases).

After that, the district court invited Spaeth to amend his § 2255 motion to seek relief under *Tollett*. *Id.* But rather than amend his motion, Spaeth sought and obtained a certificate of appealability (COA) on three issues and appealed. In his notice to the court, he acknowledged that "this decision will result in the dismissal of his § 2255 motion."

***1197** On April 2, 2021, the court honored Spaeth's choice and dismissed his § 2255 motion. *In re CCA Recordings 2255 Litig. v. United States*, Consol. No. 19-cv-2491, 2021 WL 1244789 (D. Kan. Apr. 2, 2021). The court analogized *Tollett* to the "materially similar" standard in *Hill*, deducing that a defendant asserting pre-plea constitutional violations "must demonstrate that, 'but for counsel's errors, the defendant would not have pled guilty and would instead have insisted upon proceeding to trial.' " *Id.* at *6 (quoting *Hill*, 474 U.S. at 59, 106 S.Ct. 366). And "[b]ecause Petitioner d[id] not attempt to meet this standard," he could not establish that "his binding, unconditional guilty plea is subject to vacatur." *Id.* at *8.

The court issued a COA. *Id.* at *9 (citing 28 U.S.C. § 2253(c)(2)). The court's amended COA questions are as follows [13]:

> (1) whether the carve-out provision in Petitioner's unconditional standard plea agreement constitutes a waiver of the government's right to raise, or created an exception to, the rule of law in *Tollett*.
>
> (2) whether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, [and] specifically ... whether a pre-plea *Shillinger* violation renders a plea unknowing and involuntary and, because Petitioner did not otherwise challenge the validity of his unconditional plea under the applicable standard, whether the rule in *Tollett* procedurally bars his claim.
>
> (3) whether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, [and] specifically ... whether *Tollett*

precludes Petitioner from challenging his sentence based on an alleged pre-plea Sixth Amendment violation.

II. Legal Background

Before we turn to the COA questions, we set the stage with an overview of some key precedents involving constitutional challenges made after guilty pleas. To resolve the COA questions, we must evaluate *Tollett*, its predecessors, and its successors. We therefore discuss those cases first.

The *Brady* Trilogy

Our review begins with a trio of cases decided the same day, known as the *Brady* trilogy. The first, *Brady v. United States*, involved a defendant (Brady) who pleaded guilty to avoid the death penalty under a federal kidnapping statute. 397 U.S. 742, 743, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). He did so after learning that a codefendant had agreed to plead guilty and testify against him. *Id.* Years later, the Supreme Court ruled that the death-penalty provision of the kidnapping statute was unconstitutional. *Id.* at 745-46, 90 S.Ct. 1463 (citing *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)). In his *Jackson*-based § 2255 motion, Brady claimed that his plea had been involuntary because the unconstitutional death-penalty provision "operated to coerce his plea" and because "his plea was induced by representations with respect to reduction of sentence and clemency." *Id.* at 744, 90 S.Ct. 1463. The Court thus grappled with whether the Fifth Amendment prohibited guilty pleas "influenced by the fear of a possibly higher penalty for the crime charged." *Id.* at 750-51, 90 S.Ct. 1463.

The Court rejected Brady's collateral constitutional challenge to his plea. It began ***1198** by reaffirming that "guilty pleas are valid if both 'voluntary' and 'intelligent.' " *Id.* at 747, 90 S.Ct. 1463 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). "Central to the plea and the foundation for entering judgment against the defendant," the Court reasoned, "is the defendant's admission in open court that he committed the acts charged in the indictment." *Id.* at 748, 90 S.Ct. 1463. And because guilty pleas necessarily waive a defendant's constitutional right to a trial, the defendant must waive that right "voluntarily" and "with sufficient awareness of the relevant circumstances and likely consequences." *Id.* Because Brady admitted his guilt in open court and understood the terms of his plea, the Court upheld his plea. *Id.* at 748-49, 90 S.Ct. 1463 ("Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner.").

The Court declined to invalidate guilty pleas based on post-plea arguments about pre-plea constitutional violations. Even assuming that Brady had pleaded guilty at least in part to avoid the death-penalty provision, the Court ruled that "this assumption merely identifies the penalty provision as a 'but for' cause of his plea." *Id.* at 750, 90 S.Ct. 1463. But the constitutional defect did not "necessarily prove that the plea was coerced and invalid as an involuntary act." *Id.* The Court noted that pleading guilty to avoid a harsher punishment (in Brady's case, death) "is inherent in the criminal law and its administration" because "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." *Id.* at 751-52, 90 S.Ct. 1463. The ingrained "mutuality of advantage" between the government and the defendant in guilty pleas thus placed a high bar for collateral attacks on a plea. *See id.* at 752-53, 90 S.Ct. 1463 ("[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.").

Equally important for the Court was the role of competent counsel in advising defendants of the consequences of a guilty plea.

> A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts ... hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

Id. at 757, 90 S.Ct. 1463. Brady's voluntary admission of guilt did not become involuntary just because counsel advised him that he risked a death sentence. *See id.* at 757-58, 90 S.Ct. 1463. That neither Brady nor counsel anticipated the Court's later invalidation of the death-penalty provision did not matter. As the Court observed, nothing in the Constitution mandated that "a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." *Id.* at 757, 90 S.Ct. 1463.

The Court elaborated on the role of counsel in guilty pleas in another case issued the same day as *Brady*. In ***1199** *McMann v. Richardson*, the Court addressed whether pre-plea involuntary confessions accompanied by deficient advice from counsel required courts to hold hearings on the voluntariness of those pleas. 397 U.S. 759, 760, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). At issue were three appeals from defendants who had pleaded guilty and later collaterally attacked their pleas on grounds that they would have demanded trial but for their coerced confessions. *Id.* at 761-64, 90 S.Ct. 1441. For example, one defendant (Richardson) alleged that officers had beaten him into signing a confession to first-degree murder. *Id.* at 763, 90 S.Ct. 1441. Richardson's petition added that his court-appointed counsel had advised him to plead guilty and later file for habeas relief based on the coerced confession. *Id.* at 763, 90 S.Ct. 1441. The other defendants alleged similarly questionable advice from court-appointed counsel. *Id.* at 762, 764, 90 S.Ct. 1441 (describing, for example, that counsel "ignored" an alibi defense for a defendant facing five felony charges and "represented that his plea would be to a misdemeanor").

The Court ruled that allegations of pre-plea, coerced confessions alone do not require hearings on the voluntariness of the defendants' pleas. *Id.* at 768, 90 S.Ct. 1441. It noted first the odd legal posture of defendants who plead guilty despite believing they have a credible constitutional defense about coerced confessions. *Id.* ("The sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however guilty he might be."). The guilty plea, according to the Court, flipped the script on an otherwise sensible contest of guilt: "a guilty plea in such circumstances is nothing less than a refusal to present ... federal claims to the state court in the first instance." *Id.* Because the defendant had chosen to "take the benefits, if any, of a plea of guilty," his later allegations in collateral proceedings that the plea was involuntary "appear incredible." *Id.* In short then, the defendant must proffer that "he was so incompletely advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead." *Id.* at 769, 90 S.Ct. 1441.

In other words, counseled guilty pleas occasioned by antecedent constitutional violations require, at a minimum, that habeas challengers attack the plea advice they received. The Court was clear that showing deficient performance in plea advice was a high bar on collateral review. "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770, 90 S.Ct. 1441. Rather, courts review the competency of plea advice based "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771, 90 S.Ct. 1441.

Along with clarifying plea counsel's role, the *McMann* Court also rejected on collateral review an approach that would treat defendants convicted by guilty plea the same way as those convicted after trial.

> A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis ***1200** for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence.

Id. at 773, 90 S.Ct. 1441. As with the death-penalty provision in *Brady*, the Court recognized that the coerced confession was merely a but-for cause of defendants' decisions to

plead guilty. The confession was not the sole cause nor was the defendant in the same posture as a trial defendant who preserved a coerced-confession defense for direct and habeas review. Based on that "different posture," defendants challenging their guilty pleas on collateral review must, as mentioned above, show deficient plea advice that would have changed their decision to plead guilty. *See id.* at 773-74, 90 S.Ct. 1441 ("Although [a defendant] might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.").

The final case in the *Brady* trilogy is *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). There, a 15-year-old Black defendant (Parker) confessed to burglary and rape and later pleaded guilty to first-degree burglary under a North Carolina statute. *Id.* at 791-92, 90 S.Ct. 1458. Parker pleaded guilty based on his attorney's advice that he would receive life imprisonment and avoid the death penalty. *Id.* at 792, 90 S.Ct. 1458. The state court accepted Parker's guilty plea and sentenced him to life imprisonment. *Id.* at 793, 90 S.Ct. 1458. After exhausting his state-court remedies, Parker filed a habeas petition in federal court, alleging that his statute of conviction had unconstitutionally allowed the death penalty and that his confession was coerced. *Id.* at 793-94, 90 S.Ct. 1458.

Relying on *Brady* and *McMann*, the Court denied Parker's petition. As to his death-penalty argument, the Court reiterated that "an otherwise valid plea is not involuntary because [it is] induced by the defendant's desire to limit the possible maximum penalty to less than authorized if there is a jury trial." *Id.* at 795, 90 S.Ct. 1458 (citing *Brady*, 397 U.S. 742, 90 S.Ct. 1463). And, echoing *McMann*, the Court reasoned that the coerced confession was insignificant to Parker's decision to plead guilty. "[W]e cannot believe that the alleged conduct of the police during the interrogation period was of such a nature or had such enduring effect as to make involuntary a plea of guilty *entered over a month later*." *Id.* at 796, 90 S.Ct. 1458 (emphasis added). Said another way, because "[t]he connection, if any, between Parker's confession and his plea of guilty" was "attenuated," the unconstitutional confession could not invalidate the guilty plea. *Id.*

Rather, Parker had to show that his counsel provided deficient plea advice affecting the voluntariness and knowingness of his plea. *See id.* ("[T]here remains the question whether his plea, even if voluntary, was unintelligently made because his counsel mistakenly thought his confession was admissible"). And under *McMann*, he flunked that test. That's because "even if Parker's counsel was wrong in his assessment of Parker's confession," the plea advice was not wrong enough to fall under "the range of competence required of attorneys representing defendants in criminal cases." *Id.* at 797-98, 90 S.Ct. 1458. The Court thus maintained the high bar that collateral challengers face in proving invalid guilty pleas.

Tollett v. Henderson

That brings us to the case the parties argue most about, *Tollett v. Henderson*. With the benefit of the three-year-old *Brady* trilogy, the Court considered whether a ***1201** defendant (Henderson) could collaterally attack his counseled guilty plea decades after learning that Tennessee state prosecutors had systematically excluded Black jurors from the grand jury. *Tollett*, 411 U.S. at 259-60, 93 S.Ct. 1602. [14] In 1948, during a botched robbery of a liquor store, 20-year-old Henderson shot and killed an employee. *Id.* at 261, 93 S.Ct. 1602. A grand jury without Black jurors then indicted Henderson for murder. *Id.* at 259, 93 S.Ct. 1602. After confessing to the robbery and murder, Henderson pleaded guilty in exchange for a 99-year prison sentence. *Id.* According to Henderson, he accepted the plea deal on the advice of counsel to avoid the death penalty. *Id.* at 261, 93 S.Ct. 1602.

Henderson's attorney did not advise him of—or perhaps even know about [15] —the exclusion of Black jurors from the grand jury. *Id.* at 260, 93 S.Ct. 1602. When Henderson learned of this constitutional violation (25 years after his plea), he filed for habeas relief. *Id.* at 259, 93 S.Ct. 1602. Both the district court and the Sixth Circuit inquired whether Henderson had waived his collateral constitutional challenge by pleading guilty. For instance, the Sixth Circuit cited the oft-quoted rule that "a voluntary plea of guilty made by an accused while represented by competent counsel[ ] waives all non-jurisdictional defects." *Henderson v. Tollett*, 459 F.2d 237, 241 (6th Cir. 1972) (citations and footnote omitted). Yet the Sixth Circuit concluded that Henderson had not waived his non-jurisdictional constitutional claim because neither he nor his plea counsel had known about the systematic exclusion when he pleaded guilty. *Id.* at 241-42. The court concluded that "we must be wary of blindly applying this [waiver] doctrine to every case involving such a plea. There is nothing inherent in the nature of a plea of guilty which ipso facto

renders it a waiver of a defendant's constitutional claims." *Id.* at 241.

The Supreme Court reversed, declaring that the Sixth Circuit had taken "too restrictive a view" of the *Brady* trilogy holdings, each of which involved a habeas petitioner asserting a pre-plea constitutional defect. *Tollett*, 411 U.S. at 265, 93 S.Ct. 1602. Those cases, reasoned the Court, had "refused to address the merits of the claimed constitutional deprivations that occurred prior to the guilty plea." *Id.* The Court set the relevant inquiry as being "whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel." *Id.* Thus, the Sixth Circuit erred by inquiring into whether Henderson knew about or waived his constitutional claim. When a habeas petitioner enters a counseled guilty plea, the merits of the underlying claim have little role to play: "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." *Id.* at 266, 93 S.Ct. 1602.

All told, the Court ruled that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the ***1202** plea, not the existence as such of an antecedent constitutional infirmity." *Id.* Echoing its prior holdings, the Court ruled that habeas petitioners "must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.' " *Id.* (quoting *McMann*, 397 U.S. at 771, 90 S.Ct. 1441). The Court saw no role for questioning advice pertaining to the "constitutional significance of certain historical facts" or counsel's not "pursu[ing] a certain factual inquiry ... [to] uncover[ ] a possible constitutional infirmity." *Id.* at 267, 93 S.Ct. 1602. Rather, the advice needed to relate to the "principal value of counsel to the accused in a criminal prosecution," such as advice pertaining to the "prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused." *Id.* at 267-68, 93 S.Ct. 1602. "Counsel's concern," reasoned the Court, "is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Id.* at 268, 93 S.Ct. 1602. Those interests "are not advanced by challenges that would only delay the inevitable date of prosecution or by contesting all guilt." *Id.* (citations omitted). Indeed, a contrary ruling would skirt defense counsel's role, which is often unserved by exploring every conceivable constitutional defense. *See id.*

Tollett's Successors

Early on, our circuit published several cases implicating the *Brady* trilogy and *Tollett*. In a string of post-*Tollett* cases, we rejected pre-plea constitutional challenges when defendants had failed to show that the violations had rendered their guilty pleas involuntary and unknowing. For example, in *United States v. Montgomery*, we ruled that a guilty plea barred a defendant from raising a challenge that the district court had violated his Sixth Amendment right to proceed pro se. 529 F.2d 1404, 1406-07 (10th Cir. 1976). We noted that "[t]he Supreme Court in recent cases has rejected challenges to guilty pleas, generally endorsing the practice of plea bargaining and holding that the plea bars efforts to set aside such pleas based upon asserted unconstitutional contentions." *Id.* at 1406 (citing *Brady*, 397 U.S. 742, 90 S.Ct. 1463). Indeed, by relying on the "more extensive view" of *Tollett*, we concluded that "[t]he voluntary plea of guilty is the independent intervening act which renders ineffectual the prior failure to allow appellant to represent himself at a trial." *Id.* at 1407.

We endorsed a similar view in *United States v. Nooner*, in which we refused to review a pre-plea ruling on a motion to suppress. 565 F.2d 633, 633-34 (10th Cir. 1977).[16] Citing *Tollett*, we concluded that the defendant was "foreclosed from a review of the trial court's order denying the motion to suppress" because of "his subsequent plea of guilty." *Id.* at 634 (citing *Tollett*, 411 U.S. at 267, 93 S.Ct. 1602). We identified not only the rule in *Tollett* but also several cases from our Circuit that supported that "a voluntary plea of guilty is a waiver of all non-jurisdictional defenses." *Id.* (listing cases).

And one year after *Nooner*, we said the same thing again when barring a habeas petitioner from raising a pre-plea claim that a predicate conviction for a felon-in-possession charge was somehow faulty. *See* ***1203** *Barker v. United States*, 579 F.2d 1219, 1225-26 (10th Cir. 1978). "In essence," we said, "Barker's voluntary plea of guilty ... preclude[s] such challenge under § 2255, inasmuch as the conclusive effect of a voluntary plea of guilty is a waiver of all nonjurisdictional defects and defense[s] occurring prior to the plea." *Id.* at 1225 (citations omitted).

So too has the Supreme Court reaffirmed the wisdom of *Tollett*. In *Hill v. Lockhart*, the seminal case for ineffective-

assistance-of-counsel claims in the plea context, the Court relied on *McMann* for the precept that "the quality of counsel's performance in advising a defendant whether to plead guilty" stemmed from the constitutional concern that pleading defendants "are entitled to the effective assistance of competent counsel." 474 U.S. at 57, 106 S.Ct. 366 (quoting *McMann*, 397 U.S. at 771, 90 S.Ct. 1441). It adopted the standard for counsel deficiency in *McMann* and *Tollett* as the first prong of establishing ineffective performance for plea advice. *Id.* at 58-59, 106 S.Ct. 366. And it imported into the second prong what those cases didn't say outright—the deficient plea advice had to matter. *Compare McMann*, 397 U.S. at 769, 90 S.Ct. 1441 (establishing that habeas petitioner must show that "he was so incompetently advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead"), *with Hill*, 474 U.S. at 59, 106 S.Ct. 366 ("[T]he defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). Put differently, the Court recognized that the *Brady* trilogy and *Tollett* presaged the two-part test for ineffective assistance in the plea context: deficient performance and resulting prejudice. *See Hill*, 474 U.S. at 58-60, 106 S.Ct. 366.

The *Tollett* Exceptions

By our count, the Supreme Court has announced four exceptions to the *Tollett* rule. We have described these exceptions as "narrow." *United States v. De Vaughn*, 694 F.3d 1141, 1145 (10th Cir. 2012).

The first two exceptions concern specific claims for relief that question the legality of the underlying indictment. In two decisions decided soon after *Tollett*, the Court ruled that *Tollett* did not exclude antecedent constitutional claims asserting vindictive prosecution and double jeopardy. *Blackledge v. Perry*, 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *Menna v. New York*, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam). Those claims for relief questioned "[t]he very initiation of the proceedings against" a defendant. *Blackledge*, 417 U.S. at 30-31, 94 S.Ct. 2098. Indeed, both claims differed from the grand-jury claim in *Tollett* because these claims asserted "that the State may not convict [the defendants] no matter how validly [their] factual guilt is established." *Menna*, 423 U.S. at 62 n.2, 96 S.Ct. 241. [17]

***1204** The third exception involved a state statutory regime. In *Lefkowitz v. Newsome*, a defendant pleaded guilty after the trial court denied his motion to suppress, which contested the lawfulness of a search. 420 U.S. 283, 284-85, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975). The defendant appealed under a New York procedural statute that permitted appellate review of a pretrial motion to suppress "notwithstanding ... that such judgment of conviction is predicated upon a plea of guilty." *Id.* at 285, 95 S.Ct. 886. Under that statute, the Supreme Court reasoned that "there is no practical difference in terms of appellate review between going to trial and pleading guilty." *Id.* at 289, 95 S.Ct. 886. It thus distinguished the defendant's conditional plea from the "traditional guilty[ ]plea" in *Tollett* because the government could not assert that the Fourth Amendment claim was final when the defendant pleaded guilty. *Id.* at 289-90, 95 S.Ct. 886.

More recently, the Court crafted a fourth exception. In *Class v. United States*, the Court excluded from *Tollett*'s realm claims on direct appeal that attack the constitutionality of the underlying statute of conviction. —— U.S. ——, 138 S. Ct. 798, 805, 200 L.Ed.2d 37 (2018). The Court reasoned that those claims did not rely on "case-related constitutional defects" and could not "have been cured." *Id.* at 804-05 (citation and internal quotation marks omitted). Rather, the claims closely aligned with those in *Blackledge* and *Menna* (as modified by *Broce*) because they "do not contradict the terms of the indictment or the written plea agreement" and because they "challenge the Government's power to criminalize [petitioner's] (admitted) conduct." *Id.*

JURISDICTION

We have final-order jurisdiction under 28 U.S.C. §§ 1291 and 2255(d) because the district court dismissed with prejudice Spaeth's § 2255 motion. We also have jurisdiction under 28 U.S.C. § 2253(c) because the district court granted a COA on three issues.

STANDARD OF REVIEW

When a district court dismisses a § 2255 motion without an evidentiary hearing, we review de novo. *United States v. Copeland*, 921 F.3d 1233, 1241 (10th Cir. 2019) (quoting *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015)). And we review de novo any preserved arguments

about the meaning of plea-agreement terms. *United States v. E.F.*, 920 F.3d 682, 685-86 (10th Cir. 2019).

DISCUSSION

We turn now to the three COA questions.

I. COA Question 1: "[W]hether the carve-out provision in Petitioner's unconditional standard plea agreement constitutes a waiver of the government's right to raise, or created an exception to, the rule of law in *Tollett*"

We start with the first COA question, which asks what effect, if any, the carve-out provision (the last sentence of the appellate-waiver paragraph) has on the rule of *Tollett.* The short answer is none. To help us analyze the appeal waiver, we quote it in full:

> **Waiver of Appeal and Collateral Attack.** The defendant knowingly and voluntarily ***1205** waives any right to appeal or collaterally attack any matter in connection with this prosecution, his conviction, or the components of the sentence to be imposed herein, including the length and conditions of supervised release, as well as any sentence imposed upon a revocation of supervised release. The defendant is aware that 18 U.S.C. § 3742 affords him the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed in accordance with the sentence recommended by the parties under Rule 11(c)(1)(C). The defendant also waives any right to challenge his sentence, or the manner in which it was determined, or otherwise attempt to modify or change his sentence, in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255 (except as limited by *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001)), or a motion brought under Federal Rule of Civil Procedure 60(b). In other words, the defendant waives the right to appeal the sentence imposed in this case, except to the extent, if any, the Court imposes a sentence in excess of the sentence recommended by the parties under Rule 11(c)(1)(C). However, if the United States exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence received, as authorized by 18 U.S.C. § 3742(a). Notwithstanding the forgoing waivers, the parties understand that the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct.

To foreshadow what follows, we state up front that Spaeth's § 2255 claim is unaffected by the presence or absence of the above appeal waiver. That is, the government could not (and did not) waive application of the *Tollett* standard, and Spaeth could not (and did not) waive his right to challenge the voluntariness and knowingness of his guilty plea based on ineffective assistance of counsel.

A. Legal Standard

We review plea-agreement terms de novo. In doing so, we apply "general principles of contract law, looking to the agreement's express language and construing any ambiguities against the government as the drafter of the agreement." *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1094 (10th Cir. 2007) (cleaned up) (citations omitted). In addition to the express language of the plea agreement, we focus our inquiry on "the defendant's reasonable understanding of [the nature of the government's promise] at the time of entry of the guilty plea." *United States v. Bullcoming*, 579 F.3d 1200, 1205 (10th Cir. 2009) (citation omitted). As to waivers in plea agreements, we have stressed that defendants can waive known rights so long as the waiver is unambiguous. *United States v. Libretti*, 38 F.3d 523, 531 (10th Cir. 1994) (deciding that an "unambiguous plea agreement" broadly waiving the right to a jury trial also waived a jury trial on forfeited assets).

B. Effect of the Appeal Waiver

In the first sentence of the appeal waiver, Spaeth provides a blanket waiver of any rights to appeal or collaterally attack his conviction or sentence. But in the fourth sentence of the appeal waiver, Spaeth reserves his rights under *United States v. Cockerham*, 237 F.3d 1179 (10th Cir. 2001), to challenge his sentence under 28 U.S.C. § 2255. And in the last sentence, the carve-out provision, he again limits his blanket waiver by stating that he "in no way waives any subsequent claims with ***1206** regards to ineffective assistance of counsel or prosecutorial misconduct."

The appeal waiver cannot and does not relax the legal standard in the *Brady* trilogy and *Tollett*. That standard leaves habeas petitioners with one avenue to pursue pre-plea constitutional violations—ineffective assistance of counsel that causes their pleas to be involuntary and unknowing. *Tollett*, 411 U.S. at 266, 93 S.Ct. 1602; *Brady*, 397 U.S. at 747-49, 90 S.Ct. 1463; *McMann*, 397 U.S. at 768-69, 90 S.Ct. 1441. Both the government and defendants are bound by this rule of law. The appeal waiver could not and does not waive the *Tollett* standard, nor does it revive Spaeth's ability to pursue pre-plea constitutional claims. [18]

Spaeth takes a different view. He claims that the government waived application of the *Tollett* standard for his guilty plea by agreeing to the carve-out provision. This is wrong for several reasons.

First, the appeal waiver addresses *Spaeth*'s waiver of appellate rights, not the government's. Second, and relatedly, the carve-out provision does not purport to bind the government to anything; it merely provides an exception to Spaeth's earlier blanket waiver in the first sentence. Third, and relatedly again, the appeal waiver does not—and cannot—manufacture new rights for Spaeth beyond those provided by law. Fourth, the carve-out provision simply excepts from Spaeth's blanket appeal waiver his right to appeal any subsequent (so *post-plea*-based) claims for ineffective assistance of counsel and prosecutorial misconduct. *See Cockerham*, 237 F.3d at 1187 (declaring that defendants have, but can waive, their right to pursue claims for ineffective assistance of counsel committed after the guilty plea). Revealingly, and contrary to his position on appeal, Spaeth agreed with the government at his change-of-plea hearing that the carve-out provision was inserted to preserve his ability to bring "any claim regarding ineffective assistance of counsel as outlined under the *Cockerham* decision or prosecutorial misconduct." [19] And as mentioned, that refers to ineffective assistance of counsel committed after the guilty plea.

Nor do we agree with Spaeth that *Tollett* is a defense. As stated, *Tollett* is a substantive legal standard, not an affirmative defense applying only when the government knows to raise it. Neither the *Brady* trilogy nor *Tollett* describe the standard as an affirmative defense. *E.g.*, *McMann*, 397 U.S. at 774, 90 S.Ct. 1441 (ruling that the petitioner "is bound by his plea and his conviction *unless he can allege and prove*" deficient plea advice (emphasis added)); *Tollett*, 411 U.S. at 268, 93 S.Ct. 1602 (ruling that the petitioner "must not only establish" a pre-plea constitutional violation but also show deficient plea ***1207** advice). Nor would that approach make much sense because it suggests that courts should engage in a merits review of a habeas petition if the government fails to invoke *Tollett*.

Spaeth also contends that "the government relinquished any expectation of finality as to those claims and waived any reliance on *Tollett* as a defense to those claims." We agree that the import of *Tollett* is finality and preclusion. But we do not agree that the built-in preclusion stemming from guilty pleas means that the government must, as Spaeth would have it, unambiguously invoke its interest in finality. That rule would ignore the Supreme Court's emphasis on the importance of finality. The guilty plea itself precludes defendants from raising pre-plea challenges. To defeat that preclusion, the party pleading guilty must convince us that he or she did so involuntarily and unknowingly. If that party fails to do so, our analysis ends. Nothing in the *Brady* trilogy or *Tollett* informs us that the guilty plea's preclusion somehow depends on whether the government invokes it. Indeed, the preclusion inherent to unconditional guilty pleas is often why defendants plead guilty in the first place. *See Brady*, 397 U.S. at 752, 90 S.Ct. 1463 ("For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.").

C. Our Decision in *United States v. De Vaughn*

Spaeth insists that our ruling in *De Vaughn*, 694 F.3d 1141, permits the government to waive the *Tollett* standard. Under the First Amendment, the defendant (De Vaughn) challenged the legality of the federal threat and hoax statutes after he had already pleaded guilty to mailing 12 hoax anthrax letters to several public officials. *Id.* at 1142-44 (citing 18 U.S.C.

§§ 871, 875(c), 876(c), 1038(a)(1)). On direct appeal, we ruled that the government can waive argument under *Tollett* by not raising it in its appellate brief. 694 F.3d at 1154-55. We reasoned that the government had waived a *Tollett* argument by perfunctorily citing *Tollett* in the "standard of review" section of its appellate brief. *Id.* at 1154 n.9 ("[T]he Government's brief never asserts Defendant waived the arguments he raises on appeal, nor does it ask us to dismiss the appeal based on Defendant's guilty plea. In light of its complete failure to explain how the *Tollett* rule applies to this case, we cannot conclude the Government raised the issue."). We proceeded to analyze De Vaughn's First Amendment challenge to his indictment on the merits. *Id.* at 1158-59.

The appellate briefing in *De Vaughn* reveals why we concluded that the government had waived any argument under *Tollett*. In his opening brief, De Vaughn argued that he could raise First Amendment challenges to his statute of conviction "for the first time on direct appeal" because those challenges questioned the State's power to indict him. He asked us to review de novo his First Amendment challenge to the federal threat and hoax statutes, citing the *Blackledge* and *Menna* exceptions to *Tollett*.

In response, the government chose not to address De Vaughn's argument for a *Tollett* exception. Instead, it argued for affirmance on a separate ground—that his First Amendment challenge failed under plain-error review.

Ultimately, we affirmed De Vaughn's conviction on the alternative grounds urged by the government—that the district court did not plainly err in ruling that the federal threat and hoax statutes passed First Amendment muster. *Id.* at 1158-59. Along the way, we commented ***1208** that the government had waived any argument under *Tollett* by not responding to De Vaughn's argument that a *Tollett* exception applied. *Id.* at 1154-55 & n.9; *see also United States v. Andasola*, 13 F.4th 1011, 1015 n.4 (10th Cir. 2021) (citing *De Vaughn* to note that we may "declin[e] to consider waiver argument supported by one case cited in standard-of-review section but never applied in analysis section" of a government brief). But in doing so, we did not say that the government could waive the *Tollett* standard. Nor did we create a broad-ranging license for courts to forgo the *Tollett* standard based on language in the parties' plea agreement. [20]

We also note that the government chose the easiest path to affirmance by not disputing that a *Tollett* exception applied in *De Vaughn*. In *Class*, the Supreme Court later clarified that *Tollett* does not apply to constitutional challenges to the legality of the statute of conviction. 138 S. Ct. at 805 (reasoning that "[a] guilty plea does not bar a direct appeal" when appellants' challenges "call into question the Government's power to 'constitutionally prosecute' " them (quoting *Broce*, 488 U.S. at 575, 109 S.Ct. 757)). Thus, the Supreme Court endorsed the outcome we reached in *De Vaughn*—on direct appeal, we consider the constitutional merits of a challenge to the statute of conviction. So *De Vaughn* squares with *Tollett* and *Class*. But it does not address Spaeth's situation, in which the government has steadfastly raised *Tollett* and in which Spaeth does not challenge the legality of his charges or of his statute of conviction.

D. Application of *Tollett*

The district court did not err in ruling that *Tollett* bars Spaeth's Sixth Amendment challenge. Spaeth does not even try to argue that he meets *Tollett*, much less *Hill*. He is not asserting that his plea counsel performed deficiently, let alone that such performance prejudiced him. And in the district court, he repeatedly stated that he pleaded guilty voluntarily and knowingly and that he was satisfied with his plea counsel's performance. Because Spaeth has not met his burden under *Tollett* to vacate his unconditional guilty plea, we affirm the district court's dismissal of his § 2255 motion. [21]

II. COA Question 2: "[W]hether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, [and] specifically ... whether a pre-plea *Shillinger* violation renders a plea unknowing and involuntary and, because Petitioner did not otherwise challenge the validity of his unconditional plea under the applicable standard, whether the rule in *Tollett* procedurally bars his claim"

As we understand it, Spaeth argues that the *Tollett* standard does not apply whenever the government has intruded on attorney–client communications. Spaeth primarily relies on three post-*Tollett*, out-of-circuit cases: two denial-of-counsel cases and one ineffective-assistance case. As ***1209** seen below, none of these cases help answer the COA question.

In *United States v. Smith*, the court "explore[d] the interrelationship of the Fifth Amendment due process requirement that a guilty plea be voluntary, and the Sixth Amendment guarantee that an accused enjoy 'the Assistance of Counsel.' " 640 F.3d 580, 581 (4th Cir. 2011). Early in the proceedings, the defendant complained to the court that his relationship with counsel was irretrievably broken,

so he sought substitute counsel. *Id.* at 582-84. After the court declined to appoint substitute counsel, the defendant pleaded guilty and was sentenced. *Id.* at 585. On appeal, the defendant challenged his guilty plea and sentence, arguing "that his guilty plea was involuntary because the district court erroneously denied his requests for substitute counsel, an error that left him bereft of the assistance of counsel at the time of plea negotiations and of his actual guilty plea." *Id.* at 585-86.

The court began by noting that defendants may attack guilty pleas on grounds that counsel's advice was deficient, which it said meant "a claim of constructive denial of counsel is not barred." *Id.* at 587 n.3. The court considered the question as whether the breakdown of attorney–client communications was "so great that the principal purpose of appointment—the mounting of an adequate defense incident to a fair trial—has been frustrated." *Id.* at 588. The inquiry was whether "the initial appointment has ceased to constitute Sixth Amendment assistance of counsel." *Id.*

With that, the court turned to *Brady* for the ruling that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Id.* at 592 (quoting 397 U.S. at 748 n.6, 90 S.Ct. 1463). The *Smith* Court explained this as the reason it is "clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid." *Id.* (quoting *Brady*, 397 U.S. at 748 n.6, 90 S.Ct. 1463). Further, addressing the situation of "a total absence of the assistance of counsel," the court noted that "a defendant may obtain reversal of his conviction based on the inadequacy of counsel even in the absence of a showing that would satisfy *Hill* or *Strickland*." *Id.* (alteration omitted) (quoting *United States v. Moussaoui*, 591 F.3d 263, 288-89 (4th Cir. 2010)).

Still, the court denied the defendant relief. It concluded that the record supported "neither a Sixth Amendment violation nor the involuntariness of his guilty plea." *Id.* at 593. Even with the considerable conflict between the defendant and counsel, the court still determined that "the evidence here does not establish that Smith was constructively without counsel when considering the government's plea offer and then entering his guilty plea." *Id.* The court found that counsel "continued to provide meaningful assistance to Smith prior to and during the plea hearing." *Id.* So the court affirmed the conviction. *Id.*

In another *United States v. Smith*, this one a Seventh Circuit case, a defendant sought to withdraw his guilty plea on grounds that "the district court erroneously deprived him of his Sixth Amendment right to retain the counsel of his choice." 618 F.3d 657, 659 (7th Cir. 2010). The district court declined the request to substitute counsel on grounds that doing so would require continuing the trial date. *Id.* at 660. On appeal, the court recognized that under *Tollett*, "an unconditional guilty plea typically waives non-jurisdictional defects in the proceedings below." *Id.* at 663 (citing *Tollett*, 411 U.S. at 267, 93 S.Ct. 1602). But the court vacated the defendant's conviction and sentence and remanded for the district court to withdraw the guilty plea. *Id.* at 667.

***1210** It did so based on the denial of the "constitutional right to his choice of defense counsel." *Id.* The court cited *United States v. Gonzalez-Lopez* as holding that "the erroneous deprivation of counsel of choice in violation of the Sixth Amendment is a 'structural error' in a criminal proceeding and is not subject to harmless error analysis." *Id.* at 663 (citing 548 U.S. 140, 150-52, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)). On the same point, the court cited *United States v. Sanchez Guerrero* for the proposition that "a defendant's guilty plea does not preclude him from challenging on appeal a denial of his right to counsel of choice." *Id.* (citing 546 F.3d 328, 332 (5th Cir. 2008)).

Finally, in *Hammond v. United States*, a § 2255 petitioner challenged his pleas as involuntarily made. 528 F.2d 15, 16 (4th Cir. 1975). The record revealed that his appointed counsel had misadvised him of the maximum prison time he faced if he was convicted at trial. *Id.* at 16-17. Because counsel's deficient performance led to involuntary pleas, the court awarded habeas relief. *Id.* at 18. The court relied on the *Brady* trilogy for its deficient-performance ruling. *Id.* at 18-19 (citations omitted). The court did not require a prejudice showing.

It is hard to see why Spaeth relies on these three guilty-plea cases. After all, all three cases directly focus on the *Tollett* inquiry of whether the guilty plea was entered voluntarily and knowingly. So at the least, they overlap with *Tollett*'s standard. Yet, unlike the defendants in these three cases, Spaeth does not challenge the voluntariness or knowingness of his guilty plea. As best we can tell, Spaeth is asking us to use these cases as a springboard to make a case from our circuit, *Shillinger v. Haworth*, 70 F.3d 1132, relevant to, and dispositive of, his own case.

In *Shillinger*, Steven Haworth filed a federal habeas motion contesting his Wyoming aggravated-assault-and-battery conviction arising from his use of a knife outside a bar. 70 F.3d at 1134. Preparing for trial, Haworth's attorney arranged to meet with the incarcerated Haworth in the courtroom to prepare for trial (the case does not explain this location for a meeting). *Id.* This required the presence of a deputy sheriff, whom defense counsel paid to "consider himself an employee of defense counsel." *Id.*

Sometime before trial, the deputy had told the prosecutor about the content of the attorney–client communications. *Id.* at 1135. Specifically, the deputy had told the prosecutor that defense counsel had advised Haworth to testify that he "cut" the victim rather than "stabbed" him. *Id.* Knowing that, the prosecutor cross-examined Haworth about whether he "specifically used the word 'cut' versus 'stabbed' in [his] testimony." *Id.* The prosecutor reiterated in his closing that Haworth had "told [the jury] that he deliberately ... used the word 'cut' versus 'stabbed.' " *Id.* at 1136. The jury convicted. *Id.*

On collateral review, we decided how courts should review the "prosecutorial intrusion into the attorney–client relationship." *Id.* at 1138 (cleaned up). We ruled that the facts in *Shillinger* warranted a per se presumption of a Sixth Amendment violation. *Id.* at 1142. We characterized the actions of the prosecutor this way: "This sort of purposeful intrusion on the attorney–client relationship strikes at the center of the protections afforded by the Sixth Amendment and made applicable to the states through the Fourteenth Amendment." *Id.* at 1141. Relying thus on the right to a "fair adversary proceeding," we ruled that "when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney–client relationship and lacks a legitimate justification for doing so, a prejudicial effect ***1211** on the reliability of the trial process must be presumed." *Id.* at 1142.

We reject Spaeth's reliance on *Shillinger* and the out-of-circuit authority discussed above. *Shillinger* is a poor fit for Spaeth's case. It involves a prosecutor's using attorney–client communications against the defendant *at trial*. So it does not concern *Tollett*'s guilty-plea situation. And unlike the above denial-of-counsel cases Spaeth relies on, *Shillinger* has nothing to do with whether a guilty plea is voluntary or knowing.

We do not have to decide today whether we agree with the outcomes of the denial-of-counsel cases. We note that they never apply the *Hill* prejudice standard for ineffective-assistance-of-counsel claims. None of those cases provide Spaeth a drawbridge across *Tollett*'s rule requiring deficient performance rendering a guilty plea involuntary and unknowing. Because Spaeth fails at this step, we have no reason to decide further what effect any per se presumption of a Sixth Amendment violation might have in applying the *Hill* prejudice standard—a reasonable probability that the defendant would not have pleaded guilty absent the deficient performance.

We also note other shortcuts in Spaeth's analytical framework. First, in his attempt to shoehorn *Shillinger* into *Tollett*, he equates lack of effective assistance of counsel with "ineffective assistance of counsel" as required by *Tollett*, *Strickland*, *Hill*, and the like. He cannot do so and stay within *Tollett*'s lines. Second, and similarly, he alleges "government-induced" ineffective assistance of counsel, which he apparently means exists whenever the government invades the attorney–client communications. [22] Again, he cannot expand *Strickland*'s and *Tollett*'s ineffective assistance of counsel into something altogether different.

On the first point, for almost 40 years, ineffective assistance of counsel has meant one thing: a claim that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hill*, 474 U.S. at 56-59, 106 S.Ct. 366 (same in plea context). These claims must assert "actual ineffectiveness," which measures "attorney performance ... under prevailing professional norms." *Strickland*, 466 U.S. at 683, 688, 104 S.Ct. 2052. Said another way, ineffective-assistance claims are one kind of claim under the Sixth Amendment's guarantee of effective assistance of counsel, centering on counsel's deficient performance. In the plea context, the cornerstone of ineffectiveness is whether the plea was involuntary because plea counsel's advice was below "the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56, 106 S.Ct. 366 (quoting *McMann*, 397 U.S. at 771, 90 S.Ct. 1441).

Strickland recognized that ineffective-assistance claims differ from other Sixth Amendment claims. [23] At the onset of the opinion, the Court noted that it had never dealt with "a *claim* of 'actual ineffectiveness' of counsel's assistance in

a case going to trial." ***1212** *Strickland*, 466 U.S. at 683, 104 S.Ct. 2052 (emphasis added) (citing *United States v. Agurs*, 427 U.S. 97, 102 n.5, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). The Court had, however, dealt with other "Sixth Amendment claims," including ones for "actual or constructive denial of the assistance of counsel altogether" and "claims based on state interference with the ability of counsel to render effective assistance to the accused." *Id.* (citing *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). The Court noted that those "circumstances" employ different frameworks because the Sixth Amendment violations are "easy to identify." *Id.* at 692, 104 S.Ct. 2052. To that end, the Court did not require any showing of counsel's deficient performance for these kinds of Sixth Amendment violations. That makes sense because those claims—though grounded in the Sixth Amendment as are actual-ineffectiveness claims—rest on conduct outside defense counsel's performance.

Spaeth's argument founders for another reason: as far as we can tell, we have never presumed *Hill* prejudice. As we catalogued in *United States v. Lustyik*, the Supreme Court has outlined specific scenarios for per se prejudice—none of which involve guilty pleas. 833 F.3d 1263, 1268-69 (10th Cir. 2016) (collecting cases). We listed three examples of presumed prejudice, all of which pertained to prejudice that rendered a trial presumptively unfair. *Id.* at 1269 (citing *Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)). In fact, *Cronic* provided the answer on why the presumption often arises in the trial context. It noted that "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel *undermined the reliability of the finding of guilt*." *Cronic*, 466 U.S. at 659 n.26, 104 S.Ct. 2039 (emphasis added). As we have emphasized, with guilty pleas, the reliability of guilt is strong and exists even with underlying unconstitutional conduct.

III. COA Question 3: "[W]hether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, specifically ... whether *Tollett* precludes Petitioner from challenging his sentence based on an alleged pre-plea Sixth Amendment violation"

We briefly address the final question on appeal. Spaeth contends that even if *Tollett* bars his pre-plea constitutional claims, it cannot bar a challenge to his sentence. We are uncertain what Spaeth is claiming. As far as the record reflects, the five attorney–client intrusions occurred pre-plea and are unlinked to his sentencing. We assume that Spaeth is arguing that because the pre-plea invasion somehow disabled counsel as a matter of law, that defect persisted into the sentencing phase.

We reject Spaeth's sentencing challenge. We have already concluded that Spaeth's plea counsel's performance was neither deficient nor prejudicial. But even more fundamentally, we cannot agree that *Tollett* permits Spaeth to recast a pre-plea claim as an ongoing sentencing error. As mentioned, *Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional conduct on a defendant's conviction. No reason exists, therefore, to hold that a sunken pre-plea constitutional violation somehow resurfaces on the other side of a guilty plea. If Spaeth alleged instances of post-plea intrusions into his attorney–client conversations, he could bring those claims free of *Tollett*.[24] Without ***1213** that showing, however, we reaffirm that pre-plea conduct falls under *Tollett*'s ambit no matter if the effect of that conduct continues through sentencing.

CONCLUSION

We abide by several principles that the Supreme Court made transparent 50 years ago. When a defendant voluntarily and knowingly pleads guilty, the defendant acknowledges that unconstitutional conduct preceding the guilty plea is irrelevant to the admission of factual guilt. As a result, we do not assess the merits of pre-plea constitutional claims but instead ask whether ineffective assistance of counsel caused defendants to enter their guilty pleas involuntarily and unknowingly. *Tollett* and its progeny tell us how to answer that question: challengers must show ineffective assistance of plea counsel. Because Spaeth does not even contend that his counsel performed deficiently, or that such deficient performance prejudiced him by depriving him of a trial right he would have chosen, we conclude that Spaeth's § 2255 motion must be dismissed.

We affirm.

All Citations

69 F.4th 1190

Footnotes

1 Under a Rule 11(c)(1)(C) plea agreement, Spaeth pleaded guilty to Count 1 of the Third Superseding Indictment, which charged violations of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A)(viii), 856, 860, 860a, and 18 U.S.C. § 2, for his role in a large methamphetamine-distribution conspiracy. By the agreement, the district court dismissed Spaeth's other drug and firearms charges, the most significant of which was a charge of violating 18 U.S.C. § 924(c). If convicted, that charge would have compelled a consecutive 60 months on top of the 10-year-to-life sentence on the drug conviction.

2 This short but packed account of Spaeth's criminal conduct is included in an attachment to his plea agreement, which he verified during his change-of-plea hearing.

3 The indictment charged Spaeth with one count of conspiracy to distribute methamphetamine in violation of (among other statutes) 21 U.S.C. §§ 841(a)(1) and 846(b)(1)(A)(viii); two counts of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), and 18 U.S.C. § 2; one count of possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c); and one count of felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

4 The Leavenworth Detention Center is a private detention center managed by CoreCivic, formerly the Corrections Corporation of America. We refer to the Leavenworth Detention Center as CoreCivic.

5 At oral argument, Spaeth's counsel informed us that the transcripts of the calls are “not part of the open record” for our review. As we understand it, the Kansas Federal Public Defender and the district court have listened to these recorded calls.

6 Even without additional Guidelines enhancements to the base offense level for Spaeth's relevant-conduct amount of methamphetamine, if Spaeth had gone to trial and been convicted, his advisory range would have been 292 to 365 months. *See* U.S. Sent'g Guidelines Manual ch. 5, pt. A (U.S. Sent'g Comm'n 2018) (base offense level 38 and criminal-history category III). And if also convicted on the § 924(c) charge, Spaeth would have received a mandatory consecutive 60 months on top of that. *See* 18 U.S.C. § 924(c)(1)(A). Spaeth's counsel negotiated a very favorable deal for him. We note that Spaeth is not requesting that we allow him to withdraw his guilty plea to enable him to proceed to trial.

7 The subpoena requested “all [CoreCivic] inmate recorded calls” “from July 1, 2014 until notified recorded calls are no longer needed.” Among these were five calls from Spaeth to his counsel from November 4, 2014, to May 15, 2016.

8 On November 3, 2014, Spaeth signed a form titled “Monitoring of Inmate/Detainee Telephone Calls.” Spaeth acknowledged that CoreCivic could monitor and record “conversations on any telephone located within its institutions.” The form also noted that “[a] properly placed phone call to an attorney is not monitored. You must contact your unit team to request an unmonitored attorney call.” Apart from this form, Spaeth averred that he “did not take any steps to make sure [his] attorney-client calls were not monitored or recorded.”

9 Chief Judge Robinson detailed the misconduct in a 184-page opinion that included findings of fact and conclusions of law.

10 At oral argument, Spaeth's counsel acknowledged that Spaeth is not seeking to withdraw his guilty plea; rather, she confirmed that Spaeth is seeking the “greater range of remedies” that she says are available in § 2255 proceedings.

11 The district court's order issued on the consolidated docket for all § 2255 petitioners (including Spaeth) who had collaterally attacked their sentences based on allegations of intentional invasions of their attorney–client

conversations at CoreCivic. *In re CCA Recordings 2255 Litig. v. United States*, Consol. No. 19-cv-2491, 2021 WL 150989, at *1 n.6 (D. Kan. Jan. 18, 2021).

12 In so ruling, the district court reversed an earlier ruling that the government had waived application of *Tollett* in the appellate-waiver paragraph. *See id.* at *9.

13 The district court rejected Spaeth's attempt to "expand the COA to allow him to appeal its rejection of a post-plea Sixth Amendment claim" based in part on Spaeth's failure "to allege a discrete post-plea Sixth Amendment violation."

14 The Court had long before ruled that excluding Black jurors from serving on a grand jury is indisputably unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

15 An affidavit submitted by Henderson's plea counsel asserted that he "did not know as a matter of fact that [Black jurors] were systematically excluded from the Davidson County grand jury, and that therefore there had been no occasion to advise respondent of any rights he had as to the composition or method of selection of that body." *Id.*

16 When we decided *Nooner*, the Supreme Court had yet to include conditional guilty pleas in the Federal Rules of Criminal Procedure, as it later did in Rule 11(a)(2). Conditional guilty pleas provide defendants with a way to preserve pre-plea rulings on motions to suppress for appellate review. *See* Federal Rules Decisions, 97 F.R.D. 245, 250 (Apr. 28, 1983).

17 As for these first two exceptions, we note that the Court has limited the reach of *Blackledge* and *Menna*. It has cautioned that courts should not read those cases as meaning that all collateral claims of vindictive prosecution and double jeopardy will overcome guilty pleas. *United States v. Broce*, 488 U.S. 563, 574-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). To the contrary, when habeas petitioners assert claims of an unlawful successive prosecution, the relevant inquiry is whether petitioners can undermine the unlawful indictment "without any need to venture beyond that record." *Id.* at 575, 109 S.Ct. 757. The Court thus cabined *Blackledge* and *Menna* to cases in which "the determination that the second indictment could not go forward" could be made based on the indictments alone. *Id.* That's because both cases turned on whether the State had "power to bring any indictment at all." *Id.* In other words, courts should be able to tell when the government can't lawfully bring a second prosecution by looking to only the prosaic factual overlap in two indictments. But when petitioners must resort to extrinsic evidence to attack the factual predicates of a second indictment, "that opportunity is foreclosed by the admissions inherent in their guilty pleas." *Id.* at 576, 109 S.Ct. 757.

18 But *Tollett* leaves it to Spaeth whether to waive his right to assert a claim for ineffective assistance of counsel committed after his guilty plea. To maintain the right, Spaeth need only not waive it. *Cockerham*, 237 F.3d at 1187-88. Though Spaeth did not waive this right, he has not asserted such a claim on appeal. That is, he neither asserts that his counsel performed deficiently after the guilty plea nor that any such deficient performance prejudiced him.

19 Indeed, if the carve-out provision preserved *pre-plea*-based claims of ineffective assistance of counsel, the word "subsequent" would be superfluous. *See United States v. Garcia*, 698 F.2d 31, 36-37 (1st Cir. 1983) (applying surplusage canon to plea agreements). And in any event, an appeal waiver is unnecessary to preserve pre-plea ineffective-assistance claims rendering a guilty plea involuntary and unknowing. Those claims are preserved as a matter of law. *Cockerham*, 237 F.3d at 1187 ("[W]e hold that a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver.").

20 For clarity, under the *Brady* trilogy and *Tollett*, courts should not resolve pre-plea constitutional merits challenges if counsel deficiently performed in not recognizing the alleged violations, which the defendant later proves led to an involuntary and unknowing guilty plea.

21 In summary fashion, Spaeth suggests that his guilty plea is like the one the Court encountered in *Lefkowitz*—and therefore should be excepted from *Tollett*'s ambit. But that case involved a conditional guilty plea under a state-court rule, unlike Spaeth's case. *See Lefkowitz*, 420 U.S. at 285, 95 S.Ct. 886. Nor does Spaeth argue for any other *Tollett* exception.

22 At oral argument, Spaeth's counsel referred to his § 2255 claim as "government-induced" ineffective assistance of counsel.

23 We note that Spaeth seems to have recognized this distinction in his habeas motion. For one, the motion does not describe his claim as one for ineffective assistance of counsel but instead as a violation of his "right to confidential attorney client communications as guaranteed under the Sixth Amendment's right to counsel." Further, Spaeth quotes *Strickland* in a long footnote to note that a denial of the Sixth Amendment right to counsel can be " 'actual *or* constructive,' based on 'various kinds of state interference with counsel's assistance,' *or* due to ineffective assistance of counsel."

24 We note as well that Spaeth's request for a presumption of prejudice in the sentencing context appears to conflict with our precedent. "[A] presumption of prejudice is the exception, not the rule." *Cooks v. Ward*, 165 F.3d 1283, 1296 (10th Cir. 1998) (citation omitted). In *Cooks*, for example, we declined to presume prejudice even though we agreed that sentencing counsel was ineffective. *Id.*; *see also Lustyik*, 833 F.3d at 1268-71 (refusing to presume prejudice when the defendant argued that the "court denied him access to potentially relevant classified information that he could have used to argue for a more lenient sentence"); *United States v. Orduño-Ramirez*, 61 F.4th 1263, 1273-76 (10th Cir. 2023) (refusing to adopt conclusive presumption of prejudice for Sixth Amendment violations in the guilty-plea sentencing context).

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2021 WL 150989
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

IN RE: CCA RECORDINGS
2255 LITIGATION, Petitioners,
v.
UNITED STATES of America, Respondent.

Case No. 19-cv-2491-JAR-JPO
|
Signed 01/18/2021

Attorneys and Law Firms

David J. Guastello, The Guastello Law Firm, LLC, Kansas City, MO, Kirk C. Redmond, Lydia Krebs, Melody J. Brannon, Office of Federal Public Defender, Topeka, KS, for Petitioners.

Carrie Nicole Capwell, Stephen R. McAllister, Bryan C. Clark, Office of United States Attorney, Kansas City, KS, Duston J. Slinkard, James A. Brown, Office of United States Attorney, Topeka, KS, Steve Clymer, Department of Justice - USAO, Syracuse, NY, for Respondent.

(This Document Relates to All Cases)

MEMORANDUM AND ORDER

JULIE A. ROBINSON, CHIEF UNITED STATES DISTRICT JUDGE

***1** In its Memorandum and Order dated October 15, 2020, this Court asked for supplemental briefing on issues related to two categories of legal defenses raised by the government: (1) defenses the government characterized as jurisdictional, and (2) collateral-attack waiver by plea. [1] The government subsequently filed an additional motion requesting the Court to require the petitioners to comply with Rule 2(b) of the Rules Governing Section 2255 Proceedings, which it also characterizes as jurisdictional. [2] After reviewing the parties' submissions, the Court ordered additional briefing on the application of *Tollett v. Henderson* [3] and its progeny to cases in which the petitioner pleaded guilty pursuant to the standard plea agreement utilized by the government in the District of Kansas. [4] The parties have made their additional submissions and the Court is prepared to rule on these issues. [5]

I. Introduction

The Court assumes the reader is familiar with its ruling in another criminal case in the District of Kansas, *United States v. Carter et al.* (the "*Black* Order") that precipitates the § 2255 motions before the Court. [6] That comprehensive opinion was intended to provide a record for future consideration of the many anticipated motions filed pursuant to 28 U.S.C. § 2255 and is incorporated by reference herein. The Court likewise assumes the reader is familiar with the proceedings in the consolidated master case that precipitate the matter before the Court. The Court does not restate the underlying facts and conclusions of law in the *Black* Order or these proceedings in detail but will provide excerpts from the orders and record as needed to frame its discussion of the issues presently before it.

During the *Black* investigation, the Department of Justice ("DOJ") and the Office of the United States Attorney ("USAO") repeatedly urged that the appropriate mechanism for investigation of any alleged Sixth Amendment violations is through 28 U.S.C. § 2255 litigation. In the *Black* Order, the Court attempted to provide a roadmap for future consideration of the many cases pending on these issues under § 2255. Although many common issues overlap in the individual Sixth Amendment claims, the Court stressed that particularized findings must be made with respect to each § 2255 claimant. The Court made clear the common legal standards that will govern in those proceedings and what must remain pending for particularized findings in each case. The Order also created an evidentiary record to inform the individualized determinations required in § 2255 litigation. And by reassigning the habeas actions to the undersigned and consolidating the cases for discovery, it was the Court's intent that the process for seeing over 100 cases to completion would be streamlined for all parties.

***2** Pending before the Court are 106 motions seeking relief under § 2255 based on alleged violations by the government of petitioners' Sixth Amendment rights. All but six of these motions involve petitioners who entered a guilty plea; six petitioners proceeded to trial and were convicted by a jury. Building from the findings and conclusions in the *Black* Order, petitioners allege across the board the same basis for relief: that once a petitioner shows the government intruded into the attorney-client relationship by intentionally and unjustifiably becoming privy to attorney-

client communications, this Court must grant that petitioner's § 2255 motion, leaving only the question of determining what remedy to impose. [7] Each petitioner asks the Court to impose the same remedy for this constitutional violation: to vacate the judgment and discharge the petitioner immediately, with prejudice to further prosecution, or alternatively, to reduce the sentence by 50%. [8]

As the supplemental issues discussed in this Order illustrate, however, petitioners' all-or-nothing approach is antithetical to the individual procedural barriers, standards, and burdens of proof each petitioner faces in seeking habeas relief. Petitioners' approach does not take into consideration whether a petitioner pleaded guilty or proceeded to trial, the nature of the sentence imposed, the timing of the alleged Sixth Amendment violation, or whether petitioner remains in custody. Likewise, the government's scorched-earth approach to defending the motions has compounded the Court's ability to conduct a meaningful initial review as required by the Rules Governing Section 2255 Proceedings. Disputes over discovery and whether the recordings are protected by the Sixth Amendment consumed much of the parties' and Court's attention during the first year of these consolidated proceedings, ultimately ending with the Court reviewing hundreds of audio and video recordings and imposing discovery sanctions against the government. The government's latest procedural fencing invoking a Rule to require all petitioners to certify their motions—made over a year into these consolidated proceedings in the wake of the government's demand that the Court rule immediately on its myriad procedural defenses—further delayed this Court's review.

At this juncture, the Court advises the parties that particularized consideration will be given to each petition, and any future briefing, motions, and arguments should likewise give each petition individual attention. The Supreme Court has described the habeas writ as "both the symbol and guardian of individual liberty." [9] While deterrence and correction of governmental misconduct are also available consequences of habeas relief, petitions are initiated and considered with respect to the propriety of restraints on individual liberty. Dozens of petitions have been collected together in this action for efficient handling, but each petition must ultimately stand or fall on its own. Sweeping claims about misconduct or deterrence interests put potentially meritorious petitions at risk when their survival is staked to other petitions that are unlikely to survive the rigorous requirements and limitations of collateral relief. Similarly, lumping materially dissimilar petitions together in an attempt to dismiss large swaths of claims or petitions does not enable this Court to evaluate the injuries and liberty interests at stake for the many aggrieved individuals who have petitioned this Court for help.

Given the number of cases affected by the issues presently before the Court, it will again endeavor to establish legal standards common to various categories of petitioners, with individualized application to follow for each petitioner. The Court begins by discussing the standard in the Tenth Circuit for Sixth Amendment intentional-intrusion claims invoked by petitioners as the basis for their § 2255 motions for habeas relief. Next, the Court addresses the collateral-attack waiver defense and application of the so-called *Tollett* rule to cases in which petitioners pleaded guilty. Finally, the Court addresses numerous jurisdictional defenses raised by the government, including standing, mootness, and certification requirements under Rule 2(b).

II. Sixth Amendment Standard

***3** Throughout the *Black* case and continuing with these consolidated § 2255 proceedings, the parties have debated what is required to establish a violation of the Sixth Amendment based on the government's alleged intentional intrusion into petitioners' protected attorney-client communications. Review of the applicable law and the Court's prior rulings leading up to this dispute frame the issues presently before the Court. Because the parties' arguments have evolved since the *Black* Order was issued, and in light of the government's position that the Order does not control this § 2255 proceeding, the Court reaffirms its analysis and legal determinations here.

A. Overview

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for defense." [10] This right is "indispensable to the fair administration of our adversarial system of criminal justice." [11] It "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." [12] There are three general components to the Sixth Amendment right to counsel: (1) the absolute right to be represented by counsel in a criminal proceeding that could result in imprisonment; (2) the qualified right to counsel of one's choice; and (3) the right to effective assistance of counsel. [13]

Government intrusion claims like those at issue here are one of four categories of cases to be considered when deciding if a defendant has been denied the right to effective assistance of counsel. These categories are "distinguished by the severity of the deprivation and the showing of prejudice required of the defendant in order to succeed on his claim."[14] Generally speaking, these categories are: (1) general ineffective assistance of counsel claims analyzed under the familiar *Strickland v. Washington* two-pronged framework;[15] (2) severe circumstances that constitute per se violations;[16] (3) cases where counsel labored under an actual conflict of interest;[17] and (4) government invasions of the attorney-client relationship.[18]

In addition to prohibiting the government from preventing the accused from obtaining assistance of counsel, the Sixth Amendment imposes an affirmative obligation on the government "not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[19] This second category of per se violation claims includes "various kinds of state interference with counsel's assistance."[20] The Supreme Court has held that in very limited circumstances, the government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing counsel from "participat[ing] fully and fairly in the adversary factfinding process."[21] Examples of government interference found to violate a defendant's Sixth Amendment rights per se include: refusing to allow defense counsel closing argument in a bench trial;[22] prohibiting direct examination of the defense by counsel;[23] requiring defendants who chose to testify to do so before any other defense witness;[24] and prohibiting any consultation between a defendant and his attorney during an overnight recess separating the direct-examination and the cross-examination of the defendant.[25]

***4** The Sixth Amendment right to effective assistance of counsel also includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference.[26] Petitioners assert that the right to communicate privately with counsel about certain subjects is not just a requirement "that a trial be fair;" instead, like the right to have counsel at all and the right to have counsel of choice, the right to such communication is a requirement "that a particular guarantee of fairness be provided."[27] Petitioners cite no authority supporting this theory, however, nor did the Court's independent research reveal any cases that characterize intentional-interference claims such as this one as anything but one for the effective assistance of counsel.[28] Thus, as an ineffective-assistance claim, a petitioner's claim necessarily derives from the right to a fair adversary proceeding.[29]

Under this fourth category of ineffective-assistance claims, and relevant to these proceedings, the Supreme Court has held that the government violates the Sixth Amendment right to effective counsel if it intentionally interferes with the confidential relationship between defendant and defense counsel and that interference prejudices the defendant.[30] In the seminal decision of *Weatherford v. Bursey*, the Court rejected the contention that "whenever conversations with counsel are overheard the Sixth Amendment is violated and a new trial must be had."[31] Instead, "the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial."[32] The Court identified four factors that are relevant to the determination of whether the defendant suffered injury from the government's intrusion: (1) whether the government purposely intruded into the attorney-client relationship; (2) whether any evidence offered at trial was obtained directly or indirectly from the intrusion; (3) whether the prosecutor obtained any details of the defendant's trial preparation or defense strategy; and (4) whether the overheard conversations were used in any other way to the substantial detriment of the defendant.[33]

The Court did not, and still has not, resolved "the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information."[34] As discussed in detail in the *Black* Order, federal appellate courts are divided on the issue.[35] The Second,[36] Sixth,[37] and Eighth[38] Circuits place the burden on the defendant to establish prejudice, even where the government intentionally intrudes in the attorney-client relationship. The Third,[39] Tenth,[40] and District of Columbia[41] Circuits have found the intentional intrusion into the defendant's attorney-client relationship producing privileged communications constitutes a per se Sixth Amendment violation, with no need to demonstrate that the defendant has suffered prejudice as a result of the

intrusion. And the First [42] and Ninth [43] Circuits have taken a middle position, holding that once the defendant has shown that confidential defense strategy was transmitted to the prosecution, the burden shifts to the government to show there was no prejudice to the defendant from the disclosure.

B. *Shillinger*

***5** Under extant Tenth Circuit law, the government's purposeful intrusion into the attorney-client relationship with no legitimate law enforcement justification constitutes a per se violation of the Sixth Amendment, with no affirmative showing of prejudice necessary. [44] In *Shillinger v. Haworth*, the Tenth Circuit held that "when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed." [45] The court reasoned that "no other standard can adequately deter this sort of misconduct," and that "prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." [46] The court further explained that its holding "subsumes the state's argument that harmless error analysis should apply to this sort of Sixth Amendment violation because our *per se* rule recognizes that such intentional and groundless prosecutorial intrusions are never harmless because they 'necessarily render a trial fundamentally unfair.' " [47] The court observed that "dismissal of the indictment could, in extreme circumstances, be appropriate." [48] The court clarified, however, that this per se rule "in no way affects the analysis to be undertaken in cases in which the state has a legitimate law enforcement purpose for its intrusion." [49] Such cases would require proof of prejudice, or " 'a realistic possibility of injury to [the defendant] or benefit to the State in order to constitute a violation of a defendant's Sixth Amendment rights." [50]

As the court recognized, however, even where there has been an unjustified intrusion resulting in a per se Sixth Amendment violation, the court must fashion a remedy "tailored to the injury suffered." [51] Under *Morrison*, the remedy for a Sixth Amendment violation should not "unnecessarily infringe on competing interests." [52] Those competing interests are: (1) the constitutional right to the assistance of counsel, "fundamental to our system of justice to assure fairness in the adversary criminal process," and (2) society's interest in the administration of criminal justice. [53] Thus, the Supreme Court emphasized in *Morrison* that its preferred approach "has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." [54] Thus, the *Shillinger* court remanded the case to the district court to determine whether the proper remedy for "Sixth Amendment [v]iolations [o]ccasioned by [p]rosecutorial [m]isconduct" was retrial of the defendant or dismissal of the indictment. [55]

Morrison further held that dismissal of the indictment is a "drastic" form of relief. [56] Other cases suggest that dismissal of the indictment is appropriate only where the injury is irreparable. [57] And the Tenth Circuit recently counseled that *Morrison* requires that courts rule out "more narrowly tailored remedies" before resorting to the "extraordinary remedy" of dismissing an indictment. [58] Notably, and relevant to these proceedings, the *Morrison* Court suggested that a more severe remedy might be appropriate even in cases where the harm is not irreparable, but where there is a "pattern of recurring violations" by the government. [59]

***6** The government argues that petitioners are not entitled to rely upon *Shillinger*'s per se rule for several reasons. First, the government contends that the per se rule is dictum. It argues that because there was demonstrable prejudice in *Shillinger*, the Tenth Circuit had no need to "fashion" a new rule for when prejudice "must be presumed," [60] and thus the per se rule was not essential to the determination of the case. The Court disagrees. Dicta are "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand." [61] The Tenth Circuit has explained that, unlike dicta, "[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment." [62] Under that definition, *Shillinger*'s crafting of a per se rule is a holding, "not a lurking proposition." [63] Although the court could have affirmed based on actual, as opposed to presumptive, prejudice, it followed a different "decisional path" by holding that when the government intentionally and unjustifiably becomes privy to protected attorney-client communications, prejudice must be presumed. [64] Because the *Shillinger* court expressly concluded that this per se rule

provides "the relevant standard" for assessing intentional-intrusion claims, it is binding Tenth Circuit precedent. [65]

Citing *United States v. Gonzalez-Lopez*, [66] the government next argues that petitioners must nonetheless establish actual prejudice to demonstrate that the government violated the Sixth Amendment. In that case, the Supreme Court discussed the separate grounding of the effective-assistance component of the right to counsel and the right to representation of counsel of choice. [67] The "recognition of the right to effective counsel within the Sixth Amendment was a consequence of [the Court's] perception that representation by counsel 'is critical to the ability of the adversarial system to produce just results.' " [68] "Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from the same purpose." [69]

By contrast, the Court explained that the right to select counsel of choice "has never been derived from the Sixth Amendment's purpose of ensuring a fair trial, but instead "has been regarded as the root meaning of the constitutional guarantee" to assistance of counsel. [70] Significantly, where the latter right is wrongly denied, "it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation," because "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." [71] The Court further held that, once established, a Sixth Amendment violation of the right to representation by counsel of choice required automatic reversal of a subsequent conviction, as that is a "structural error," and therefore not subject to harmless error analysis. [72]

In making this distinction, the Court explained that a defendant must generally demonstrate prejudice to succeed on an ineffective-assistance-of-counsel claim, citing *Strickland v. Washington* as support for this general rule. [73] *Strickland* instructs that a petitioner seeking to establish a Sixth Amendment violation must typically demonstrate "some effect...on the reliability of the trial process" as a component of the violation itself. [74] Thus, a petitioner who alleges that defense counsel's performance was constitutionally inadequate must show both that counsel's performance "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [75] But in consideration of the standard for measuring the quality of the lawyer's work, the *Strickland* Court noted that direct governmental interference with the right to counsel is a different matter, expressly finding that the "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." [76] As the Court explained, this type of government misconduct is presumed to result in prejudice because "in these circumstances [it] is so likely that a case-by-case inquiry into prejudice is not worth the cost," [77] and because the government is "directly responsible" for, and can therefore easily prevent, such misconduct. [78]

***7** In fashioning a rule that "best accounts for the competing interests at stake," the Tenth Circuit in *Shillinger* recognized and drew upon this category of cases where Sixth Amendment prejudice is presumed, in which direct state interference with the right to effective counsel has been held to violate the defendant's Sixth Amendment right per se. [79] The court cited the rationale behind the use of a per se rule in such cases: because such "state-created procedures impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him." [80] The quoted passage goes on to state, "[b]ecause these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate." [81] The court proceeded to hold that a prosecutor's intrusion into the attorney-client relationship likewise constitutes a "direct interference" with the Sixth Amendment rights of a defendant that constitutes a per se violation of the Sixth Amendment. [82]

The *Shillinger* court expressly acknowledged both *Strickland*'s general rule and its direct-interference exception. [83] Thus, *Gonzalez-Lopez* does not alter that exception that a defendant need not always show prejudice to prove a Sixth Amendment claim. And because the Tenth Circuit reached the same conclusion in *Shillinger*, the decision is consistent with the Supreme Court's decision in *Gonzalez-Lopez*.

Similarly, the government continues to question whether *Shillinger* is good law in light of the Supreme Court's

view in *Weatherford* and *Morrison* that at least "a realistic probability" of prejudice must be demonstrated to substantiate a Sixth Amendment violation of the kind alleged here, and a presumption falls short of this demonstration. [84] But as this Court has explained, the Tenth Circuit analyzed and distinguished *Weatherford*, noting that the Supreme Court "emphasized both the absence of purposefulness in the prosecutor's intrusion and the legitimate law enforcement interests at stake." [85] The *Shillinger* court concluded, unlike in *Weatherford*, that "the intrusion here was not only intentional, but also lacked a legitimate law enforcement purpose." [86] The court also explained that *Morrison* "left open the question of whether intentional and unjustified intrusions upon the attorney-client relationship may violate the Sixth Amendment even absent proof of prejudice." [87] As previously discussed, *Morrison* never reached the prejudice question, "holding only that even if the defendant's Sixth Amendment rights were violated, dismissal of the indictment was an inappropriate remedy in that case." [88]

Finally, the government argues that the *Shillinger* per se rule has no application to cases resolved by guilty plea instead of proceeding to trial. The government notes that in *Shillinger*, the Tenth Circuit stated that intentional and unjustifiable intrusions render trials unfair but said nothing about the impact of such intrusions on cases involving guilty pleas. "The Sixth Amendment, however, is not so narrow in its reach." [89] Instead, "[t]he Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding," including the plea-bargaining stage, sentencing, and direct appeal. [90] As detailed in the *Black* Order, the government's own conduct belies its argument that prosecutors can only exploit the information learned from protected attorney-client communication at trial. [91] The case against Michelle Reulet is a prime example of such exploitation.

***8** AUSA Tanya Treadway, who retired before the October 2018 hearing in *Black*, was the USAO's Senior Litigation Counsel and served as a primary filter, or taint, attorney for the USAO. [92] While prosecuting Reulet's criminal case, Treadway obtained and reviewed Reulet's phone calls with, *inter alia*, her attorney handling her child custody proceedings and her attorney handling her separate DUI case. [93] While this might have appeared objectively irrelevant to the criminal case that Treadway was prosecuting, Reulet's attorney in that case provided the subjective adversarial value when she testified at the *Black* hearing to the role of the child custody issue in resolving the criminal case and the DUI related to Reulet's pretrial detention. [94] Counsel explained that the child custody matter was relevant to Reulet's decision to accept a plea offer and that the DUI conversations with her attorney were used by Treadway in a contested pretrial matter, including an appeal to the Tenth Circuit Court of Appeals. [95] Treadway lied about not listening to the calls in court proceedings before Judge Daniel D. Crabtree. [96] But undisputed evidence at the *Black* hearing showed Treadway listened to and took extensive notes of Reulet's conversations with her counsel as they discussed these matters. [97] The notes include discussions about defense trial strategy, plea negotiations, risk-benefit assessment of trial versus plea, and estimates of the sentence Reulet faced. Treadway's misrepresentation was not discovered in the *Reulet* litigation; rather, it surfaced later when she testified at the *Black* hearing. [98] Days after Treadway's testimony, Judge Crabtree signed an agreed order vacating Reulet's sentence. [99] Of course, because the government quickly settled the matter, Reulet never collaterally attacked her conviction and any resulting Sixth Amendment issues were never litigated.

Thus, the government's arguments that petitioners cannot rely upon *Shillinger* are unavailing. Petitioners base their claims for habeas relief on *Shillinger*—which sets a high bar to establish a per se Sixth Amendment violation—and it is the *Shillinger* elements petitioners must satisfy. The *Shillinger* per se rule, like the per se rules adopted by other courts, presupposes that the defendant has first established that protected attorney-client information was communicated to the prosecution team. [100] Thus, in *Black*, this Court determined that under *Shillinger*, a per se Sixth Amendment violation occurs when a defendant makes the following prima facie case: (1) there is a protected attorney-client communication; (2) the government purposefully intruded into the attorney-client relationship; (3) the government becomes "privy to" the attorney-client communication because of its intrusion; and (4) the intrusion was not justified by any legitimate law enforcement interest. [101] Once these elements are established, prejudice is presumed in determining whether a Sixth Amendment violation occurred. The harmless-error test does not "apply to this sort of Sixth Amendment violation." [102]

Using the *Black* Order as their foundation, petitioners argue that *Shillinger*'s per se rule not only presumes the

existence of prejudice for purposes of determining whether a Sixth Amendment violation occurred; it also treats prejudice as irrelevant for purposes of determining whether the resulting violation requires relief. Petitioners allege that once a petitioner shows the government intruded into the attorney-client relationship by intentionally and unjustifiably becoming privy to attorney-client communications, this Court must grant the petitioner's § 2255 motion, leaving only the question of determining what remedy to impose. [103]

***9** Petitioners acknowledge that individual prejudice is relevant at this stage of the inquiry but urge that the need to address and deter the government's conduct on a collective basis justifies an extreme remedy. They contend that the government's actions were part of a large-scale pattern of similar misconduct that the government later attempted to conceal, obfuscate, minimize, and excuse. In making this determination, petitioners urge the Court to take into account the government's: (1) pattern of committing similar Sixth Amendment violations; [104] (2) subsequent attempts to prevent this Court from discovering those violations; [105] and (3) continuing efforts to evade responsibility for its actions. Under these circumstances, each petitioner asks the Court to vacate his judgment and discharge him immediately, with prejudice to further prosecution. Any other remedy, they argue, is inconsistent with the Tenth Circuit's goal of "adequately deter[ing] this sort of misconduct." [106] Alternatively, petitioners ask the Court to reduce their sentence by 50%.

III. Collateral-attack Waiver by Plea

The Court previously addressed this issue in the context of the government's response to Petitioner Petsamai Phommaseng's motion for leave to conduct discovery under Rule 6 of the Rules Governing Rule 2255 Proceedings with respect to his audio recording claims. [107] As noted, Phommaseng's Fed. R. Civ. P. 11(c)(1)(C) plea agreements contained the following waiver provision often used by the United States Attorney's Office in the District of Kansas (the "standard plea agreements"):

> **Waiver of Appeal and Collateral Attack**. The defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, his conviction, or the components of the sentence to be imposed herein, including the length and conditions of supervised release, as well as any sentence imposed upon revocation of supervised release. The defendant is aware that 18 U.S.C. § 3742 affords him the right to appeal the conviction and sentence imposed. The defendant also waives any right to challenge his sentence, or the manner in which it was determined, or otherwise attempt to modify or change his sentence, in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 (except as limited by *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001)), or a motion brought under Federal Rule of Civil Procedure 60(b). *Notwithstanding the forgoing waivers, the parties understand that the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct*. [108]

The government argued that Phommaseng could not show good cause for his discovery requests under Rule 6(a) because his Sixth Amendment "confidential communications claim" was waived (1) by operation of law under *Tollett v. Henderson*, [109] or (2) by the express waiver provision he signed as part of his three plea agreements. The Court disagreed and denied the government's motion to enforce the plea waiver.

First, the Court agreed with Phommaseng that his plea agreements specifically reserved his right to appeal or collaterally attack his convictions and sentence based on a claim of prosecutorial misconduct. [110] The Court explained that Phommaseng's Sixth Amendment claim was not an "independent confidential communications claim," but rather, a prosecutorial misconduct claim alleging the government's misconduct violated his Sixth Amendment right to effective counsel, which was expressly excepted from the waiver in the plea agreements that affirmatively assured a defendant

who is pleading guilty that he "in no way waives" the right to subsequently bring such claims. [111] The Court then addressed the government's motion to enforce the waiver of appeal or collateral attack in the plea agreements. The Court rejected the government's argument that Phommaseng had waived any Sixth Amendment claim because prosecutorial misconduct can only arise in the context of the Fifth Amendment, as prosecutorial misconduct can prejudice a specific constitutional right amounting to a denial of that right as well as the denial of a defendant's due process right. [112]

***10** After the *Black* Order was issued, Phommaseng supplemented his § 2255 motion, arguing broadly that the government's interference with his attorney-client relationship violates the Sixth Amendment by infringing on his right to the effective assistance of counsel as well as his right to counsel in general and that, unlike a petitioner who alleges that defense counsel's performance was constitutionally inadequate, intentional-intrusion claims either presume that prejudice occurred or treat it as altogether irrelevant. [113] The government responded, again citing the rule in *Tollett* that a defendant who enters an unconditional guilty plea may not thereafter raise independent claims relating to deprivation of constitutional rights antecedent to the plea and that *Shillinger*'s per se rule does not apply to defendants who enter a plea rather than proceed to trial. [114] Without any discussion of the specifics or timing of the alleged Sixth Amendment violations or his standard plea agreements, Phommaseng replied that his decision to enter a plea does not render the Tenth Circuit's per se approach inapplicable and thus he does not need to show that he would have proceeded to trial rather than entering a plea. [115]

Because subsequent replies filed by other petitioners in these consolidated proceedings who also pleaded guilty under a standard plea agreement raised new issues regarding collateral attack of the voluntary and intelligent character of their guilty pleas and the necessary showing required to succeed on such a claim, [116] the Court directed supplemental briefing from both parties on this issue. [117] After reviewing the parties' submissions, the Court revisits its previous ruling on the government's argument that an independent Sixth Amendment claim is foreclosed as a matter of law under *Tollett*. [118]

A. Whether the Carve-out Provision in the Standard Plea Agreements Waived or Forfeited Application of the *Tollett* Rule

It is well-settled that a defendant who pleads guilty waives most non-jurisdictional antecedent issues, including allegations of constitutional error, unless he entered a conditional plea and specifically reserved his right to raise such claims. As the Supreme Court held in *Tollett*, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." [119] Review of any challenge to a conviction obtained via a guilty plea is ordinarily confined to whether the plea was both counseled and voluntary; otherwise the collateral attack is foreclosed. [120] Thus, a defendant's unconditional and voluntary guilty plea constitutes a waiver of all non-jurisdictional defenses to the charge(s) to which he has pleaded guilty except: (1) due process claims alleging vindictive prosecution, (2) double jeopardy claims that are evident from the face of the indictment, or (3) claims that the statute of conviction is unconstitutional. [121] In applying this rule, the Tenth Circuit has noted that "a defendant can waive claims that even implicate a charge of government misconduct" unless such misconduct constitutes a matter of jurisdiction or due process that cannot be waived. [122]

***11** The government previously argued that Phommaseng's claim that the government violated his Sixth Amendment right to confidential attorney-client communications is not jurisdictional, nor does it implicate any one of the three types of claims identified in *DeVaughn* and *Class* as falling outside the general waiver rule. The government contended that because Phommaseng is now raising an independent claim relating to the alleged deprivation of constitutional rights that purportedly occurred before the entry of his guilty plea—and he does not challenge his plea as either uncounseled or involuntary—his claim is foreclosed under *Tollett*.

The government has revised its position since the Court's order in *Phommaseng*. It now agrees that petitioners with standard plea agreements may rely on the carve-out provision in the agreements to challenge their guilty pleas, but in assessing such claims, the Court must still consider the relevant controlling law for rendering a guilty plea involuntary. In other words, the carve-out provision does not create an exception to the rule in *Tollett*, which is not based on a plea agreement but admission of factual guilt. Instead,

the government asserts that petitioners must still show their intentional-intrusion claims caused them to plead guilty, when they otherwise would have gone to trial. Petitioners argue that they are free to bring independent Sixth Amendment claims because the government relinquished its *Tollett* defense in the carve-out provision in the standard plea agreements, under which they "in no way waives any subsequent claims" of ineffective assistance of counsel or prosecutorial misconduct.

Thus, the government does not dispute that certain claims of ineffective assistance of counsel or prosecutorial misconduct are outside the scope of the waiver provision in the standard plea agreements. Instead, the question before the Court is whether the carve-out provision in the standard plea agreements effectively limits or creates an exception to application of the foreclosure-by-operation-of-law rule under *Tollett* and its progeny. Petitioners argue that because the rule in *Tollett* is not jurisdictional, the government is free to waive or forfeit such a defense just as it can waive or forfeit any other nonjurisdictional bar to § 2255 relief, and that the government knowingly and intentionally bargained away its right to invoke *Tollett* in response to a narrow class of claims, including the alleged intentional-intrusion claims. The Court disagrees.

The rule in *Tollett* reiterates a principle announced by the Supreme Court in the so-called *Brady* trilogy. [123] "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." [124] This rule "inheres in the nature and function of the guilty plea itself, which 'represents a break in the chain of events which has preceded it in the criminal process.' " [125] By pleading guilty, a defendant "forgoes not only a fair trial, but also other accompanying constitutional guarantees." [126] "Allowing a defendant to plead guilty unconditionally, but nevertheless to raise on appeal the very constitutional challenges that a guilty plea is designed to relinquish, would give the defendant the benefits of a guilty plea without the attendant waiver of rights that a plea necessarily entails." [127] As the Supreme Court has explained, a valid guilty plea "renders irrelevant —and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered." [128]

***12** The Court agrees that the carve-out provision in the standard plea agreements created only an exception to the collateral-attack waiver provisions in the plea agreement itself, and not to the rule of law in *Tollett*. First, that rule of law is not based on the plea agreement, but rather, on the admission of guilt during a guilty plea. In other words, the *Tollett* rule creates a separate legal bar to relief, regardless of language in plea agreement; thus, a defendant cannot preserve a right to collaterally attack his conviction on grounds that could not be preserved by pleading unconditionally. Absent the inclusion of a Rule 11(a)(2) conditional plea, a plea agreement itself does not undermine the import of *Tollett*, even if it includes waiver language pertaining to pre-plea issues because a defendant cannot retain a right that does not exist. To rule otherwise would impermissibly circumvent the rule in *Tollett* and its progeny.

Second, in interpreting the standard plea agreements, the Court "looks to the express language in the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of this promise at the time of the entry of the guilty plea." [129] Courts apply "general principles of contract law...looking to the express language and construing any ambiguities against the government as the drafter of the agreement." [130] Here, the carve-out provision does not alter the standard for determining the validity of a guilty plea, but simply states that the petitioner's waiver of appeal and collateral attack do not waive his right to appeal or collaterally attack his prosecution, conviction, or sentence based on a claim of ineffective assistance of counsel or prosecutorial misconduct. The provision does not state that the government is waiving anything and makes no mention of the substantive standard that applies to such subsequent claims. Petitioners do not cite, nor did the Court independently find, any authority supporting their position that the government can silently bargain away a defense based on the rule of law in *Tollett* short of a conditional plea of guilty under Fed. R. Crim. P. 11(a)(2). Instead, in cases where courts have concluded that a defendant's collateral challenge falls within the carve-out to the collateral-attack waiver, the *Tollett* standard has applied — whether the defendant's plea was knowing and voluntarily made. [131] Thus, petitioners' argument that the government unambiguously waived application of this standard lacks support in both the law and the language of the standard plea agreements.

Nor has the government waived or forfeited application of the *Tollett* standard by failing to raise it. Although not always labeled as a procedural defense, the government's responses in these consolidated cases argue that *Tollett* and its progeny

preclude petitioners from challenging their guilty pleas. [132] Neither of the cases cited by petitioners to support their waiver argument is persuasive. In *Wood v. Milyard*, "the State twice informed the District Court that it 'will not challenge, but [is] not conceding' the timeliness" of the petitioner's petition, and thus the Supreme Court held that the Tenth Circuit erred in overriding the State's deliberate waiver. [133] The government has not "strategically with[e]ld...or cho[sen] to relinquish" its argument that *Tollett* and its progeny apply. [134] In *United States v. DeVaughn*, the Tenth Circuit found that the government had waived or forfeited the preclusive effect of an unconditional plea by failing to raise the argument in its briefing on appeal as such a defense is not jurisdictional. [135] The government has not waived the argument here.

***13** Accordingly, the Court finds there was no government waiver of the defense that *Tollett* forecloses an independent inquiry into a petitioner's Sixth Amendment claim. Instead, as discussed below, the Court must consider relevant controlling law, including the standard adopted in *Tollett*. Consequently, the carve-out language in the standard plea agreement does not limit petitioners from bringing ineffective assistance of counsel or prosecutorial misconduct claims that bear on the voluntary and intelligent nature of their guilty pleas. [136] To the extent the Court's previous order held or suggested otherwise, the Court reconsiders and clarifies its ruling at this time.

This ruling also applies to petitioners who pleaded guilty pursuant to Western District of Missouri plea agreements that did not contain the carve-out language in this District's standard plea agreements, as well as to petitioners who pleaded guilty without any written agreement. [137] Thus, the Court proceeds to address the application of *Tollett* and its progeny to all member cases in which the petitioner pleaded guilty.

B. Whether Petitioners' Sixth Amendment Claims as Alleged Satisfy the *Tollett* Standard

1. Pre-plea Violations

While a Sixth Amendment intentional-intrusion violation is not limited to trials, application of *Shillinger*'s per se rule in the context of an interceding guilty plea must be reconciled with the rule of law in *Tollett* that "forecloses direct inquiry into the merits of claimed antecedent constitutional violations." [138] Petitioners contend that they are not precluded from alleging the government committed a *Shillinger* violation during the plea-bargaining stage of their criminal case because the rule announced in *Tollett* is subject to an exception for government misconduct that calls into question the voluntary nature of the plea itself. And, they argue, they can prevail on those claims by making the same showing as any other petitioner, that is, by showing the government intentionally and unjustifiably became privy to their protected communications.

The rule in *Tollett* rests on the rationale that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case," and "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." [139] The Court explained that because "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity," a defendant who has pleaded guilty on the advice of counsel "must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.' " [140] This standard is materially similar to the familiar two-pronged test for an actual ineffective assistance of counsel claim set forth in *Strickland*. [141]

***14** In *Hill v. Lockhart*, the Supreme Court held that in the guilty plea context, the *Strickland* prejudice requirement "focuses on whether counsel's constitutionally effective performance affected the outcome of the plea process." [142] Thus, a defendant must demonstrate that, but for counsel's errors, the defendant would not have pled guilty and would instead have insisted upon proceeding to trial." [143] The government argues that petitioners who pleaded guilty cannot prevail under the *Tollett*—or *Hill*—standard unless they allege and show that defense counsel performed deficiently and there is a reasonable probability that but for counsel's unreasonable errors, petitioners would have insisted upon going to trial rather than pleading guilty.

Petitioners argue that this exception to *Tollett*'s rule is not so narrow. As the government acknowledges, *Tollett* does not permit any and all ineffective assistance of counsel or prosecutorial misconduct claims, but only such claims

that bear on the "voluntary and intelligent character of the guilty plea." [144] As petitioners stress, their Sixth Amendment claims do not advance actual-ineffectiveness claims against defense counsel, but claim the government intentionally and unjustifiably intruded upon protected attorney-client communications. To the extent this government misconduct occurred during the plea-bargaining phase, they assert that the resulting per se Sixth Amendment violation is not an independent Sixth Amendment violation, but instead qualifies as an exception for a claim that calls into question the voluntary nature of the plea itself. Citing *Brady v. United States*, [145] petitioners proceed under the theory that the government's misconduct presumptively rendered their guilty pleas involuntary by "disabling" defense counsel "from fully assisting and representing" them. [146] Accordingly, the Court will analyze petitioners' argument under the standard set forth in *Brady*.

"[A] guilty plea is a grave and solemn act to be accepted only with care and discernment ..." [147] "When a defendant pleads guilty he or she, of course, foregoes not only a fair trial, but also other accompanying constitutional guarantees." [148] Thus, a guilty plea "not only must be voluntary but must be [a] knowing, intelligent act[ ] done with sufficient awareness of the relevant circumstances and likely consequences." [149] "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " [150]

The *Brady* Court defined the standard for determining the voluntariness of a guilty plea:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). [151]

Accordingly, to set aside a plea as involuntary based on prosecutorial misconduct, a defendant who was fully aware of the direct consequences of the plea must show that (1) "some egregiously impermissible conduct" by the government "antedated the entry of his plea," and (2) "the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice." [152] Petitioners argue that a pre-plea *Shillinger* per se violation necessarily satisfies that two-part test, thus rendering plea involuntary. The Court disagrees.

***15** A petitioner must first show that impermissible government conduct occurred. As the cases cited by petitioners illustrate, courts have sometimes allowed defendants to raise claims of government misconduct despite a guilty plea where the misconduct was so egregious that it called into question the defendant's guilt. [153] These cases involved claims that the government made affirmative misrepresentations that rendered the defendants' guilty pleas involuntary. [154] Although no petitioner alleges such misrepresentations (or threats or promises), the Court assumes, arguendo, that if a member of the prosecution team intentionally became privy to a defendant's protected attorney-client communications without any legitimate law-enforcement justification for doing so, the government agent engages in egregiously impermissible conduct. As the Tenth Circuit explained in *Shillinger*, "[t]his sort of purposeful intrusion on the attorney-client relationship strikes at the center of the protections afforded by the Sixth Amendment." [155]

In addition, however, a petitioner must show that the misconduct induced him to plead guilty. In other words, a petitioner must show "a reasonable probability that, but for the misconduct, he would not have pleaded guilty and would have insisted on going to trial." [156] Petitioners assert that once the Court presumes the government's misconduct resulted in prejudice under *Shillinger* during the plea-bargaining stage, a reviewing court must also presume that the government's misconduct rendered the plea involuntary under the *Tollett* and *Hill* standard.

In order to address Petitioners' theory, it requires unraveling. Petitioners argue that a *Shillinger* "error" is presumptively prejudicial. An error is prejudicial only if there exists a reasonable probability that, but for the error, "the result of the proceeding would have been different." [157] When the proceeding in question is at the plea-bargaining stage, an error is prejudicial only if there is a reasonable probability that, but for the error, the defendant would have refused to enter a plea and would have insisted upon going to trial. Thus, in light of *Shillinger*'s presumption of prejudice, a petitioner who alleges that an intentional-intrusion "error" occurred during the plea bargaining stage is necessarily alleging there presumptively exists a reasonable probability that, but for the disabling impact of this misconduct on defense counsel's representation, the result of the proceeding would have been different. In other words, once a petitioner establishes that an intentional and unjustifiable intrusion occurred, a reviewing court must presume the intrusion resulted in prejudice. This is so, petitioners argue, because at the plea-bargaining stage, the test for determining whether an error resulted in prejudice is the same as the test for determining whether an error rendered the plea involuntary: whether there is a reasonable probability that, but for the error, the defendant would not have pleaded guilty and would have proceeded to trial instead.

Petitioners' argument is misplaced. First, the test they cite for determining whether an act or omission is prejudicial—a reasonable probability that, but for the act or omission, the result of the proceeding would have been different—is quoted out of context and is the standard used to determine the prejudice necessary to demonstrate plain error. [158] Under *Shillinger*, as with all intentional-intrusion claims, the prejudice necessary to prove the Sixth Amendment violation is a reasonable probability of injury to the defendant or benefit to the state. [159] But the *Shillinger* rule that the prejudice necessary to establish a Sixth Amendment *violation* can be presumed has no application here. Instead, at issue here is whether a petitioner has made a showing of prejudice necessary to demonstrate his *guilty plea* was involuntary.

***16** The Court is not persuaded that a *Shillinger* presumption of prejudice can serve as a makeweight for prejudice under *Hill*'s standard, as such a presumption does not speak to whether a petitioner would have insisted on going to trial and that it would have been rational for him to do so. Petitioners cite no authority supporting such extrapolation of the *Shillinger* presumption to that required for a guilty plea to be rendered involuntary. Petitioners' argument ignores the lesson from *Tollett* that the merits of an alleged pre-plea constitutional violation are rendered irrelevant and should not be conflated with the largely separate question of whether a defendant's plea was involuntary. Instead, Supreme Court precedent instructs the Court to look to whether the alleged Sixth Amendment violation *caused* a petitioner's plea to be involuntary or uncounseled.

Petitioners also contend that they should not have to make a prejudice showing under *Tollett* because the pre-plea *Shillinger* constitutional violation they allege is a "structural error," that is, presumptively prejudicial and not subject to harmless error. [160] But the fact that a pre-plea constitutional violation is a structural error is not "by definition" an error that renders a plea involuntary. "The notion that a structural error occurring prior to a guilty plea necessarily invalidates the subsequent guilty plea would be at odds with the result in *Tollett*, wherein the defendant sought to invalidate his guilty plea on the basis that blacks were systematically excluded from the grand jury that indicted him," which "would amount to structural error." [161]

In apparent recognition that this presumption-of-prejudice argument cannot be squared with *Tollett and Hill*, petitioners acknowledge in a lengthy footnote that, "[t]o be clear, this doesn't mean all petitioners in all § 2255 cases are free to pursue all claims arising from all pre-petition errors, even assuming those errors are prejudicial." [162] Petitioners concede that some pre-plea errors do not "influence" the defendant's subsequent decision to enter a plea, and therefore "wouldn't independently or automatically undermine the voluntariness of the plea itself," [163] citing the error during grand jury proceedings at issue in *Tollett* as an example. [164] Petitioners explain, "[s]uch an error is prejudicial if it influenced the grand jury's decision to indict—not if it influenced the defendant's subsequent decision to enter a plea—and therefore wouldn't independently or automatically undermine the voluntariness of the plea itself." [165] But as the government points out, this argument creates more problems for petitioners than it solves because no petitioner in these consolidated cases has alleged any connection between the government's alleged intentional intrusion into his protected attorney-client communications and his decision to plead guilty rather than go to trial or articulated how the government's misconduct influenced his decision to do so.

Petitioners' attempt to cast their claims as implicating the right to counsel in general is also unavailing. The Fourth Circuit addressed a similar argument in *United*

States v. Smith, where the defendant argued on appeal that his guilty plea was rendered involuntary because the district court erroneously denied his requests for substitute counsel.[166] After acknowledging the rule in *Tollett* that when a defendant pleads guilty, he "has no non-jurisdictional ground upon which to attack the judgment except the inadequacy of the plea," the court addressed whether that rule shielded a challenge alleging the total absence of the assistance of counsel.[167] The court held that if the defendant could show that he was denied his Sixth Amendment right to the appointment of a substitute and thus constructively denied counsel, "a constitutionally compelled finding of involuntariness would immediately follow from the underlying Sixth Amendment violation."[168] After applying these principles, the court went on to conclude that the evidence did not show that the defendant was constructively without counsel during plea negotiations and thus had established neither a Sixth Amendment violation nor the involuntariness of his guilty plea.[169] Despite asserting the government's misconduct disabled defense counsel from rendering effective assistance, petitioners do not go so far as to allege they were constructively without counsel during the plea negotiation process.[170]

***17** Nor does petitioners' argument that a "*Shillinger* error" presumptively establishes that a plea was involuntary on the rationale that counsel was disabled from representing the petitioner find any support in the law. Such an argument presupposes that in order to enter a voluntary plea a defendant must have full awareness and knowledge of each available defense or constitutional claim. The Supreme Court has rejected the notion that such lack of awareness or knowledge of a particular defense, even if constitutionally grounded, necessarily renders a guilty plea involuntary. In *Tollett*, the Court refused to find on the papers submitted that the defendant's guilty plea was rendered involuntary based on a constitutional claim that he discovered after he pleaded guilty, namely, that he was indicted by an unconstitutionally selected grand jury in violation of his Fourteenth Amendment due process rights.[171] The Court stated, "[a] guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry."[172]

More recently, in *United States v. Ruiz*, the Court reversed the Ninth Circuit's ruling that the defendant's plea was involuntary on the basis that the government failed to disclose material impeachment evidence to him prior to entering his guilty plea.[173] While the Court recognized that a plea must be entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, it noted that "the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor," such as misapprehending the quality of the government's case, the relevant penalties, or potential defenses.[174]

For all these reasons, the Court finds that petitioners' presumption-of-prejudice argument does not satisfy the applicable standard in *Brady, Tollett*, or *Hill.* Without any analogous authority from the Tenth Circuit or Supreme Court supporting petitioners' argument that a *Shillinger* per se violation presumptively renders a guilty plea involuntary or unknowing, this Court declines to do so in the first instance. Accordingly, each petitioner is held to the applicable standard for showing his plea was involuntary—a reasonable probability that, but for the government's misconduct, he would not have pleaded guilty and would instead have insisted on going to trial.[175]

A court charged with determining such a reasonable probability must take an objective approach.[176] Reviewing whether such a reasonable probability existed in a given case involves a "holistic inquiry into all of the factual circumstances surrounding the plea to determine whether the petitioner would have proceeded to trial," including assessment of "objective facts specific to a petitioner, such as his age, the length of the sentence he faced under the terms of the plea deal, the prospect of minimizing exposure to other charged counts, and so on."[177] Further, proof of prejudice requires a petitioner to show that a decision to go "to trial would have been objectively 'rational under the circumstances.' "[178] Under this standard, it is not unreasonable to predict that Ms. Reulet could have mounted a colorable collateral attack on her guilty plea stemming from AUSA Treadway's misconduct. Because no petitioner in these consolidated proceedings attempts to meet this standard, however, they have not established that their guilty pleas are subject to vacatur and their § 2255 motions are subject to dismissal on this basis.[179]

***18** The government has provided the Court with a list of petitioners who received favorable charge and/or sentence-related bargains as part of a plea agreement, and speculates that the reason petitioners have not attempted to make the applicable showing for withdrawal of a plea is because the vast majority of the cases in this consolidated litigation involved overwhelming evidence, the real prospect of a lengthy sentence, the lack of any colorable factual or legal defense to the charges by petitioners, and highly favorable plea deals. [180] Indeed, petitioners do not seek to have their pleas withdrawn or voided but instead, seek dismissal of their cases with prejudice or alternatively, reduction of their sentences. Petitioners' choice appears to be calculated, as the appropriate remedy for a defendant who asserts in post-conviction proceedings that his plea was involuntary is to grant his motion conditioned on withdrawal of the plea. [181]

The Court declines to analyze these petitioners' claims under the applicable standard without acknowledgement that an individual petitioner wishes to withdraw his respective plea and, at a minimum, a sworn declaration attesting that he would not have pleaded guilty had he known of the government's misconduct. [182] Accordingly, the Court will give petitioners who allege pre-plea violations additional time to consider whether to seek leave to amend their motions to withdraw their respective pleas under the applicable standard for showing their guilty pleas were involuntary. Petitioners should be prepared to address this issue at the status conference set for January 26, 2021.

2. Post-plea Violations

In many member cases, any governmental intrusion with respect to the petitioner's video recording claims could only have occurred after petitioner pleaded guilty but before he was sentenced. As petitioners acknowledge, these petitioners cannot demonstrate that the government's post-plea misconduct rendered their pleas involuntary. Petitioners argue, however, that *Tollett* does not preclude claims that the government intentionally and unjustifiably became privy to protected recordings after a petitioner entered a plea, thus violating his Sixth Amendment rights during sentencing. The government agrees that *Tollett* does not apply where the alleged constitutional violation took place after a defendant pleaded guilty but maintains that the Court lacks authority to grant the sentencing relief petitioners request. The Court addresses this issue below in its discussion of whether these petitioners have standing.

Petitioners further argue that they may rely on any pre-plea constitutional violations to collaterally attack subsequent stages of the criminal proceedings, including the sentence, even if a petitioner cannot rely on the alleged violation to challenge his guilty pleas. They assert that the government necessarily remained privy to those pre-plea communications after a petitioner pleaded guilty and thus this continued familiarity with a petitioner's confidential information necessarily "disabled" defense counsel from fully assisting and representing him during each subsequent stage of the proceedings, including sentencing. And, petitioners argue, there is a reasonable probability that but for these disabling effects, the results of the post-plea proceedings would have been different.

The government argues that petitioners are barred from relying on any pre-plea violation to collaterally attack their sentence. The Court agrees. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." [183] Petitioners cite no authority for their argument, which is contrary to the teaching of the *Brady* trilogy and *Tollett* that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process," and thus after pleading guilty, a defendant "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." [184] Finding such a continuing violation would render this precedent meaningless. Moreover, several Circuit courts have held that *Tollett* precludes a defendant from challenging his sentence based on evidence that the defendant contends the government obtained before his plea in violation of his constitutional rights. [185] Petitioners' concern that the prosecutor "remained privy to" the information through his sentencing would be true of any allegedly unconstitutionally-obtained information or evidence that predated a defendant's plea. Thus, petitioners cannot use a pre-plea alleged violation to challenge their sentence.

IV. Jurisdictional Defenses

***19** In response to this Court's directive for additional briefing on jurisdictional issues, the government has raised several jurisdictional, mootness, and procedural arguments. Generally, the government argues that certain categories of petitioners lack standing to challenge either their convictions

or sentences, while others lack standing to challenge their sentences: (1) petitioners who have been deported following completion of their custodial sentences cannot challenge their sentences, as any such challenges are moot; (2) petitioners sentenced to statutory mandatory minimum terms cannot challenge their sentences; (3) petitioners whose Sixth Amendment claims are based on video or audio recordings that the government did not receive until after the petitioners' sentencing lack standing to challenge either conviction or sentence; (4) petitioners cannot challenge their conviction or sentence if the government received the recordings after the petitioners entered into binding plea agreements and were then sentenced consistent with the agreement; and (5) petitioners cannot challenge convictions if the government received the recordings after petitioners entered a plea or were convicted. [186] Further, the government objects that the petitions uniformly fail to satisfy the certification requirement of Rule 2(b)(5) of the Rules Governing Section 2255 Proceedings, and, as a result, the claims cannot be considered.

Petitioners respond that the Sixth Amendment intrusions are per se prejudicial and satisfy the injury requirements for habeas relief regardless of when the intrusions may have occurred for individual petitioners. The petitioners rely, in part, on this Court's stated intent to presume the misconduct occurred at least before sentencing as a discovery sanction. [187] Petitioners deny that any of their petitions are subject to dismissal for mootness or lack of standing. Finally, petitioners deny that Rule 2(b) compliance is jurisdictional and urge the Court to ignore the government's arguments.

A. Standard

Federal courts must have a statutory or constitutional basis to exercise jurisdiction. [188] And, without jurisdiction, a court must dismiss the case. [189] Courts thus must determine, either *sua sponte* or upon a challenge by a party "at any stage in the litigation," whether subject matter jurisdiction exists. [190]

Article III's case-or-controversy requirement applies at all stages of litigation. [191] A case or controversy requires the parties to have a personal stake in the outcome of the litigation; among other things a petitioner's injury must be capable of redress by a favorable ruling. [192] When circumstances change, extinguishing a party's interest in the case, it becomes moot and is subject to dismissal. [193] A habeas petitioner's release from custody is one such change in circumstance. [194]

"A habeas corpus petition is moot when it no longer presents a case or controversy under Article III, § 2, of the Constitution." [195] To satisfy the case or controversy requirement, "the [petitioner] must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." [196] In other words, "[a]n issue becomes moot when it becomes impossible for the court to grant 'any effectual relief whatsoever' on that issue to a prevailing party." [197] "Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." [198]

***20** "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." [199] Sibron also recognized that it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." [200] It therefore follows, as the Court said in *Spencer*, that "[a]n incarcerated convict's (or a parolee's) [habeas] challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." [201]

B. The Government's Standing and Mootness Challenges

The government's jurisdictional and standing arguments are rooted in the nature of the alleged infirmity identified in the various categories of petitions. Each category is discussed below, although some have been consolidated.

1. Completion of Sentence and Removal From Country

The first category of motions the government discussed in its brief are petitioners who have completed their custodial sentences and subsequently been deported. [202] The government contends that such petitioners lack standing to challenge their sentences, primarily relying on Tenth Circuit precedent in *United States v. Vera-Flores*. [203] In that case,

the Tenth Circuit dismissed a direct appeal by an appellant who had been deported following a custodial sentence but remained on supervised release, albeit only in a hypothetical sense as the appellant was no longer in the country. [204] The Tenth Circuit held that Vera-Flores' deportation "has eliminated all practical consequences associated with serving a term of supervised release," curtailing the "redressability" potential in a discussion that cites *Spencer*, [205] a case the petitioners here rely on broadly in response to the government's brief. The court then dismissed the appeal as moot. Remote hypothetical consequences about what might happen if these petitioners reentered were not sufficient in *Vera-Flores* for the appeal to survive a mootness challenge. The government does not suggest that they lack standing to challenge their convictions.

Petitioners first address specific petitioners, correctly arguing that Camargo-Simental, Carrillo-Elias, and Tabares-Aviles do not challenge their sentences, only their convictions. [206] In addition, the Court notes that petitioner Stephen Dillow has not been removed by a deportation order; his custodial sentence was reduced and his term of supervised release was terminated through a compassionate release order. He thereby has withdrawn his sentencing challenge but retains the challenge to his conviction. Petitioners distinguish the remaining nine cases identified by the government in this category from *Vera-Flores* by contending they, unlike the appellant in that case, have challenged their supervised release terms, and that the court is compelled to provide some form of relief now that it has concluded, or least offered an intent to presume, that a non-harmless constitutional violation took place. Finally, petitioners contend that subsequent changes to the sentencing guidelines undermine the Tenth Circuit's holding in *Vera-Flores* that an injury is not redressable for an individual under supervised release who has been deported from the country. [207]

Vera-Flores remains binding on this Court, and petitioners' attempts to distinguish their cases from *Vera-Flores* fall short. While this Court could hypothesize about possible injuries related to the term of supervised release for each of the nine subject petitioners should they attempt to reenter the United States, as the petitioners invite this court to do, such hypothetical consequences were squarely rejected in *Vera-Flores* as a basis for relief. [208] Regarding the deterrence effect of the supervised release term, this also appears hypothetical, as removal from the country in and of itself precludes the petitioners from committing offenses in the United States, begging the question as to what acts they can be deterred from undertaking. While other circuits have deemed a continuing theoretical deterrence effect to be a sufficient, the Tenth Circuit has not done so.

***21** Turning to a broader defense that, as established in *Spencer*, a lack of custody is insufficient to render sentencing claims moot, petitioners struggle to answer a critical question: What redressability is there for individuals who have served their sentences and been deported? A continuing injury is required to establish standing for these petitioners, i.e., a collateral consequence. [209] Petitioners' arguments for broad presumptions of standing lie in statements from *Spencer* describing an earlier era of more permissive standing in habeas cases. The *Spencer* Court noted that standing has tightened considerably over time. [210] Collateral consequences cannot be presumed simply based on the nature of the alleged misconduct, either, because, as noted in *Spencer*, it does not matter if the mootness was the result of conduct by the state: "mootness, however it may come about, simply deprives [the Court] of...power to act." [211] While deterrence of future governmental misconduct may be something for the Court to consider when developing habeas relief, it does not, standing alone, resolve the redressability issue. Petitioners' nearly singular focus on deterrence also does not account for systematic remedies that have already been implemented to correct practices in the USAO and provide financial compensation to many incarcerated petitioners. Prevention of future misconduct and some measure of compensation has already been meted out, habeas proceedings are not intended as means for retribution, and deterrence without some redressability for the alleged injuries the individual petitioners suffered does not suffice to satisfy the redressability requirement to proceed under § 2255. The Court must be able to provide some sort of redress to the individual prevailing habeas petitioner, not just systematic relief. [212]

Petitioners within this category have not demonstrated that adequate collateral consequences for their convictions exist now that they have been deported following completion of their custodial sentences. They do not raise any of the other possible exceptions to mootness. Considering this, petitioners Adrian Ayala-Garcia, Manuel Bailon-Valles, Fernando Cabral Torres, Jose Garcia-Velasquez, Eladio Marquez, Gerardis Rodriguez-Torres, Jose Silva-Cardona, Paola Soto-Camargo, and Juan Vasquez-Montalvo cannot satisfy the redressability component of standing required

to challenge their sentences. This Court cannot provide these individuals any relief with respect to their completed sentences. Their removal from the United States following the end of their custodial sentences rendered the § 2255 challenges to their sentences moot. Deportation does not render their conviction challenges moot, however.

2. Mandatory Minimum Sentences

The Court must next address the category of petitioners who were sentenced to statutory mandatory minimum terms. The government argues that the Court lacks authority to reduce these petitioners' sentences, precluding them from satisfying the case or controversy requirement for Article III standing.

Petitioners respond that the Court has broad discretion under § 2255 to modify a petitioner's sentence as relief, despite any limitations on judicial authority embodied in 18 U.S.C. § 3553. Petitioners rely on *United States v. Pearce*[213] for this sweeping sentence correction authority, but this reliance is misplaced. In *Pearce*, the district court declined, as a matter of discretion, to resentence a defendant after vacating most of his convictions.[214] That case had nothing to do with mandatory minimum sentences or reducing a sentence subject to a statutory mandatory minimum as a function of habeas relief. The circumstances under which a court can impose a sentence lower than the statutory mandatory minimum are limited and proscribed. Under 18 U.S.C. § 3553(e), a district court can only deviate below the statutory minimum on the government's motion based on substantial assistance. Safety valve relief under § 3553(f) only applies in limited circumstances, and there is no reason to believe that such relief was withheld as a result of any alleged governmental conduct here. Petitioners do not allege that any of these established routes for sentencing below the statutory minimums would be applicable.

***22** Petitioners do not cite any cases in which a court has provided relief under § 2255 by reducing a sentence imposed in accordance with statutory mandatory minimums, nor has the Court identified any such cases. The Court may not sentence any of the petitioners who were subject to mandatory minimum sentences below that required by statute, except as noted above. There is no indication that the outcome of sentencing for these petitioners could have been any different had there been no constitutional violation. While petitioners urge this Court to accept that the intrusion into attorney-client privilege was itself a sufficient injury to allow these cases to go forward, their request flies in the face of the individual, case-by-case approach required to provide the extraordinary relief sought in these cases.

Petitioners urge this Court to look beyond what it is authorized to do at sentencing and proceed unfettered under 28 U.S.C. § 2255 yet provide no basis for doing so beyond a general citation to the habeas statute.[215] There is no authority to support this position. The only other method of post-sentencing relief is sentence modification, which only applies in specific, limited circumstances authorized by Congress.[216] This Court is not empowered to ignore statutory mandatory minimums or other limits on its authority when resentencing in response to a § 2255 petition. Accordingly, petitioners subject to mandatory minimum sentences have not demonstrated that their sentencing challenges are redressable, and they are hereby limited to challenging their convictions only. As of today, these petitioners include Jessie Silva and Jorge Soto-Saldivar.[217]

3. Audio and Video Recordings Received After Sentencing

The government has identified eleven petitioners who were sentenced before the government received either the soundless video or audio recordings related to those petitioners.[218] The government and the petitioners disagree with respect to whether the Court should presume the subject petitioners were prejudiced. Specifically, the parties raise the question of whether the *Shillinger* presumption of prejudice applies.[219]

In the *Black* Order, this Court previously considered *Shillinger* and determined that the government had no legitimate purpose for the intrusion into the attorney-client privilege of the petitioners, at least with respect to the video recordings. This Court observed that post-*Shillinger* cases in the Tenth Circuit have indicated that it is not just the intrusion itself that matters with respect to prejudice, but what is done with the improperly obtained communications that also determines whether there has been a Sixth Amendment violation.[220] The *Shillinger* holding places great importance on the actual fairness of proceedings.[221] In reaffirming *Shillinger*, the Tenth Circuit declined to presume prejudice where it was undisputed that the prosecutors themselves did

not access privileged communications and thus could not have used them to undermine the actual fairness of trial. [222]

***23** For petitioners who concede that there was no violation until after sentencing, there is nothing the government could have done with the recordings that would implicate the fairness concerns of *Shillinger*. This conclusion does not disregard the seriousness of a governmental intrusion into the attorney-client relationship, which has led this Court to undertake an unprecedented investigation and impose numerous sanctions, but the mere fact of the intrusion is not the only matter the court must consider. As this Court previously observed, "a *per se* Sixth Amendment violation occurs when: (1) there is a protected attorney-client communication; (2) the government purposefully intruded into the attorney-client relationship; (3) the government becomes "privy to" the attorney-client communication because of its intrusion; and (4) the intrusion was not justified by any legitimate law enforcement interest." [223] At the same time, this Court declined to make a blanket finding of Sixth Amendment violations for all petitioners here, indicating that each petitioner would need to meet the *Shillinger* test in order to qualify for the presumption. [224] Petitioners still seek a one-size-fits-all approach, but this Court stands by its previous decision to apply the *Shillinger* test to each petitioner individually.

Where it is undisputed that the government could not have made any use of the privileged communications as a result of not receiving them until after a petitioner was sentenced, this Court will follow the Tenth Circuit's example in *Singleton* and decline to presume the petitioner was prejudiced. In the absence of the presumption, there is no nexus between the petitioners' alleged injuries and the government's conduct. For these petitioners, the intrusion cannot be tied to any claimed unfairness or impropriety in the conviction, plea, or sentencing processes. Without such a nexus, these petitioners cannot proceed with claims challenging either their convictions or sentences. Although the Court has generally presumed as true that an intrusion occurred prior to plea, conviction, or sentencing, these individuals will be unable to demonstrate that any presumptive intrusion included privileged materials, as they are still required to show. [225] The Court will dismiss the subject motions for lack of standing to pursue § 2255 relief.

4. Video and Audio Recordings Received After Petitioner Entered Into a Binding Plea and Received Sentence Agreed to in Plea

Next, the government contends that thirteen petitioners who entered into binding plea agreements for a specific term of imprisonment before the government received either audio or video recordings of potentially privileged communications and were then subsequently sentenced to the agreed upon term of imprisonment lack standing to challenge either their convictions or their sentences. [226] Petitioners contend that the intrusion into the attorney-client privilege provides standing for every petitioner regardless of the timing of the intrusion. [227] Neither position adequately addresses the *Shillinger* approach to prejudice.

The intrusion for these petitioners occurred after guilty plea or conviction, eliminating the possibility that the intrusion could have tainted these petitioners' convictions. As noted above, the intrusion itself is not a sufficient injury to provide standing. Absent the possibility of any related unfairness or injury at the conviction stage, these petitioners do not have standing to challenge their convictions under § 2255.

However, the intrusions in these cases, unlike those for the petitioners in the previous discussion, occurred *before* sentencing. Here, the *Shillinger* presumption does apply, as there is a proceeding subsequent to the intrusion which may have been unfair or somehow tainted. At this stage, the Court need not and should not determine whether any petitioners actually suffered an injury related to the intrusion and may presume that the petitioners were injured. This creates standing to survive the government's challenge to these petitioners' sentencing claims. While the actual sentence imposed may be relevant to whether an injury was actually incurred, it has no bearing on the *Shillinger* presumption test and the related fairness concerns.

5. Soundless Recordings Received After Plea or Conviction Lack Standing to Challenge Conviction

***24** Incorporating the above discussion, this Court concludes that post-conviction or plea intrusions preclude conviction challenges. As with earlier categories, petitioners in this category would be unable to demonstrate, despite this Court's general presumption, that anything the prosecutors

were privy to contained privileged information. The fairness concerns of *Shillinger* are not implicated, no redressable injury is present, and a necessary element of a challenge to their convictions could not be met.

C. Failure to Certify

In November 2020, the government filed a document entitled "Motion Requesting Compliance with Rules Requiring all 28 U.S.C. § 2255 Petitions to be Signed Under Penalty of Perjury,"[228] arguing that local rules as well as Rule 2 of the Rules Governing Section 2255 Proceedings require a motion to be signed by the petitioner or a next friend under penalty of perjury.[229] The government insists that petitioners must conform to this procedural requirement or they cannot proceed with their claims.

The court concludes that Rule 2(b)(5), as a court-made procedural rule, is not jurisdictional but rather a mandatory claim processing rule, such that it must be enforced when invoked, but is otherwise waivable.[230] The Supreme Court has explained that "the procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion."[231] A court has no authority to create equitable exceptions to jurisdictional requirements.[232] Furthermore, rules that are not jurisdictional may still be mandatory claim processing rules, which, absent invocation, may otherwise be waived or forfeited.[233]

Rule 2(b)(5) of the Rules Governing Section 2255 Proceedings requires § 2255 petitions to "be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant."[234] The advisory committee notes for Rule 2(b)'s 2004 amendments specifically use "an attorney for the movant" as an example of one who might be authorized to sign on behalf of the movant.[235] The Committee envisioned a "next-friend" standing analysis for deciding whether a signer was actually authorized to sign a motion on behalf of a movant.[236] The advisory committee notes also state that courts should allow movants to submit corrected motions conforming to Rule 2(b).[237] This approach both underscores the claim processing nature of the rule and the proper remedy for violations: allow petitioners to either submit certifications of their motions or permit appointed counsel to do it for them as next friend.

***25** In the habeas context, 28 U.S.C. § 2242 provides in pertinent part that an "[a]pplication for writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." In *Whitmore v. Arkansas*, the Supreme Court made clear that standing to proceed as next friend on behalf of a prisoner "is by no means granted automatically to whomever seeks to pursue an action on behalf of another."[238] A party seeking to represent a prisoner in a habeas proceeding must: (1) explain why the real party in interest cannot prosecute the action in his own behalf; and (2) establish a significant relationship with and a true dedication to the best interests of the real party in interest.[239] A "next friend" bears the burden of clearly establishing the propriety of his or her status, and thereby justify the jurisdiction of the court.[240]

The Tenth Circuit allows defendants to correct § 2255 motions that have not met procedural requirements. In *Guerrero*, the court considered an amended claim filed under § 2255 by a pro se litigant in an unverified memorandum and held that the defendant could correct his motion to meet the procedural requirements of Rule 2(b).[241] If Rule 2(b) was jurisdictional, the result would have been a dismissal of the petition, not remand with an opportunity to amend.

Even though Rule (2)(b)(5) is a claim processing rule and not jurisdictional, it must be enforced now that it has been invoked.[242] This Court will not accept an invitation to materially delay any forthcoming proceedings in this case due to the petitioners' non-compliance with Rule 2(b).[243] The Court has previously made findings of fact on which it may rely in evaluating the petitions, as well as other facts and materials in the record. Allegations made in uncertified petitions will not be treated as evidence, however, and this Court advises petitioners or their counsel to comply with Rule 2(b) in order to present particular evidence in each motion. As noted throughout this memorandum, blanket approaches to either dismiss or defend these motions are insufficient for the fact-specific analyses required in habeas cases. While the motions are not presently subject to dismissal, the government has invoked the Rule 2(b) certification requirements. Petitioners must therefore comply, or their motions will be dismissed.

The Court hereby orders all petitioners to verify their motions on or before **February 26, 2021**. Unverified motions will be subject to dismissal. Each motion must be individually verified, particularly in light of this Court's statement on the

need for individualized treatment of the motions collected together in this matter. The government and petitioners will work together to draft forms for verification directly by petitioners as well as through the next friend process. The Court anticipates that appointed counsel will take up the next friend mantle where needed. These agreed proposed forms will be submitted to the Court prior to the status conference on January 26, 2021, or each party must file an explanation for a failure to comply.

V. Conclusion

The fairness of the adversary system has been called into question by the allegations of government misconduct here. The Court has endeavored to give the consolidated § 2255 litigants an opportunity to seek efficient, fair, and consistent relief. Unfortunately, it appears that many of petitioners' claims fall short of the rigorous standards required for habeas relief. As this Order makes clear, the remedy sought may be procedurally foreclosed for many consolidated litigants who pleaded guilty. The Court intends to grant petitioners certificates of appealability to facilitate review of these issues of first impression by the Tenth Circuit.

***26** The Court notes, however, evidence of systemic government abuse that came to light in the *Black* investigation has not gone without consequences. Such evidence may still be relevant for determining an appropriate remedy should petitioners who proceed to an evidentiary hearing prevail on their claims. In addition, the *Black* investigation and evidentiary hearing were able to shine light on the practices and environment of the USAO, which in turn led to important reforms within the entire District of Kansas. A mandatory comprehensive policy was issued in May 2017 that is largely curative of many of the issues that came to light in the *Black* case, which includes a requirement that prosecutors make their requests for CCA calls in writing on request forms and provides for a filter team procedure.[244] CCA, Securus, and the United States Marshal's office have all also implemented reforms in light of the revelations in these collected cases.

Moreover, in January 2020, this Court approved the settlement of a civil class action brought on behalf of detainees who had their attorney-client telephone calls recorded by CCA and Securus Technologies, Inc.[245] Under this settlement, more than 500 former detainees received progressive payments from a $1.45 million settlement fund, ranging from approximately $500, $2,000, and $6,000, depending on the nature of their injury. This civil action was not meant to be a substitute for habeas relief, and the plaintiffs did not waive or forfeit any right to file a § 2255 motion in return for participation in the class action; in fact, many plaintiffs are petitioners in this consolidated action.[246]

The Court will soon issue orders in individual cases either dismissing claims as noted above, or granting an evidentiary hearing on claims, all consistent with the particularized approach the parties must take going forward. While numerous global procedural and discovery issues have been addressed by the Court over the last several years, ultimately "habeas relief sought must be considered on an individual basis."[247]

IT IS THEREFORE ORDERED BY THE COURT that the government's Motion Requesting Compliance with Rules Requiring all 28 U.S.C. § 2255 Petitions to be Signed Under Penalty of Perjury (Doc. 605) is **granted**. Petitioners shall verify their motions on or before **February 26, 2021**. To facilitate this compliance, by **January 25, 2021**, the parties shall meaningfully confer and attempt to reach agreement on the verification forms required to certify the motions under Rule 2(b). If the parties are unable to reach agreement, they shall raise any disputes in a joint motion filed by that same date. Such motion shall be limited to five (5) double-spaced pages, equally divided between the parties.

IT IS FURTHER ORDERED that petitioners affected by the Court's collateral-attack waiver by plea ruling shall advise the Court at the January 26, 2021 status conference whether they intend to seek leave to amend their motions.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 150989

Footnotes

1 Doc. 588 at 55–56, 60–61.

2 Doc. 605.

3 411 U.S. 258 (1973).

4 Doc. 677.

5 Docs. 602, 729 (petitioners), 611, 613, 725 (government).

6 Case No. 16-20032-JAR, Doc. 785 (D. Kan. Aug. 13. 2019). As discussed in that Order, petitioners' Sixth Amendment claims stem from recordings of conversations and meetings with counsel while they were detained at Corrections Corporation of America ("CCA") in Leavenworth, Kansas. That facility has since been renamed CoreCivic. The Court continues to refer to it as CCA in this Order.

7 *See, e.g.* Doc. 87 at 21–25.

8 Some petitioners have withdrawn their collateral attack of their sentences in light of their release from custody.

9 *Peyton v. Rowe*, 391 U.S. 54, 58 (1968) (citations omitted).

10 U.S. Const. amend. VI.

11 *Maine v. Moulton*, 474 U.S. 159, 168 (1985).

12 *Id.* at 169.

13 *United States v. Nichols*, 841 F.2d 1485, 1496 n.7 (10th Cir. 1988) (citations omitted).

14 *United States v. O'Neil*, 118 F.3d 65, 70 (2d Cir. 1997).

15 466 U.S. 668 (1984).

16 *United States v. Cronic*, 466 U.S. 648, 658 (1984) (describing "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.").

17 *See Mikens v. Taylor*, 535 U.S. 162 (2002).

18 *See United States v. Morrison*, 449 U.S. 361, 365 (1981); *Weatherford v. Bursey*, 429 U.S. 545, 557–58 (1977).

19 *Maine v. Moulton*, 474 U.S. 159, 170–71 (1985).

20 *Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 658 & n.24 (1984) (collecting cases in which the Court has discussed circumstances justifying a presumption of prejudice).

21 *Herring v. New York*, 422 U.S. 853, 858 (1975).

22 *Id.*

23 *Ferguson v. Georgia*, 365 U.S. 570 (1961).

24 *Brooks v. Tennessee*, 406 U.S. 605 (1972).

25 *Geders v. United States*, 425 U.S. 80 (1976).

26 *See Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard.").

27 *See, e.g.*, Doc. 87 at 16–17 (first citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); then citing *Perry v. Leeke*, 488 U.S. 272, 276, 279–80 (1989)).

28 *See, e.g., United States v. Morrison*, 449 U.S. 361, 365 (1981) (treating a Sixth Amendment claim based on alleged governmental interference in the defendant's communications with counsel as relating to "the effective assistance of counsel and a fair trial"); *Weatherford*, 429 U.S. at 547 (describing the defendant's claim regarding governmental interference in the defendant's communications with counsel as a question of "effective assistance of counsel"); *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (acknowledging that the "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding"); *cf. Perry v. Leeke*, 488 U.S. 272, 279, 284 (1989) (distinguishing between the "right to be represented by counsel" and "the right to effective assistance" of counsel).

29 *Gonzalez-Lopez*, 548 U.S. at 146–48.

30 *See Morrison*, 449 U.S. at 365; *Weatherford*, 429 U.S. at 554 n.4.

31 *Weatherford*, 429 U.S. at 551.

32 *Id.* at 552.

33 *Id.* at 551.

34 *Cutillo v. Cinelli*, 485 U.S. 1037 (1988), *denying cert to Cinelli v. City of Revere*, 820 F.2d 474 (1st Cir. 1987) (White, J., dissenting); *see Kaur v. Maryland*, 141 S. Ct. 5, 2020 WL 5882039 (2020), *denying cert to Kaur v. Maryland*, No. 2516, 2019 WL 2407997 (Md. Ct. App. June 7, 2019) (Sotomayor, J., statement).

35 *See Cutillo*, 485 U.S. at 1037–38 (White, J., dissenting) (noting conflicting approaches between the Circuits in cases where the Sixth Amendment violation involves the transmission of confidential defense strategy information).

36 *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985).

37 *United States. v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984) ("Even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted." (citing *Morrison*, 449 U.S. 365–66)).

38 *United States v. Johnson*, 47 F.3d 272, 275 (8th Cir. 1995) (holding that dismissal was improper because even assuming the government intentionally violated the defendant's Sixth Amendment rights, he had failed to "demonstrate a nexus between the intrusion and any benefit derived by the prosecution" (citing *United States v. Davis*, 646 F.2d 1298, 1303 (8th Cir. 1981)); *Clark v. Wood*, 823 F.2d 1241, 1249–50 (8th Cir. 1987).

39 *United States v. Costanzo*, 740 F.2d 251, 254–55 (3d Cir. 1984) (holding Sixth Amendment violation follows from finding of prejudice); *United States v. Levy*, 577 F.2d 200, 209–10 (3d Cir. 1978) (holding that "the inquiry into prejudice must stop" where defense strategy material is actually disclosed to the prosecution or the government intentionally sought such confidential information).

40 *Shillinger v. Haworth*, 70 F.3d 1132, 1141–42 (10th Cir. 1995) (holding that an intentional intrusion into the attorney-client relationship "must constitute a *per se* violation of the Sixth Amendment," and that if the

government "lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed.").

41 *Briggs v. Goodwin*, 698 F.2d 486, 494–95 (D.C. Cir. 1983), *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1983) (holding when the privileged communication contains details of the defendant's trial strategy, the defendant is not required to prove he was prejudiced by the governmental intrusion, but prejudice may be presumed).

42 *United States v. Mastroianni*, 749 F.2d 900, 907–08 (1st Cir. 1984) (noting that "[l]ike the District of Columbia and Third Circuits, we believe that placing the entire burden on the defendant to prove both disclosure and use of confidential information is unreasonable," but "[l]ike the Ninth Circuit, however, we believe that there are certain circumstances in which the revelation of confidential communications by the informant is harmless"); *United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008) (" '[T]he government's intrusion into the attorney-client relationship' is not a *per se* Sixth Amendment violation; there must also be some demonstration of resulting prejudice. Because such intrusions pose a serious risk to defendants' constitutional rights, and because it would be unreasonably difficult for most defendants to prove prejudice, we only require defendants to make a prima facie showing of prejudice by 'prov[ing] that confidential communications were conveyed as a result' of the government intrusion into the attorney-client relationship. The burden then shifts to the government to show that the defendant was not prejudiced; that burden is a demanding one." (quoting *Mastroianni*, 749 F.2d at 907–08)).

43 *United States v. Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003) (rejecting a per se rule of prejudice; rather the defendant bears the initial burden of making "a prima facie showing of prejudice" by demonstrating the government "acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information;" once a *prima facie* showing has been made, the burden shifts to the government to show there has been no prejudice to the defendant as a result of these communications).

44 *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (1995).

45 *Id.*

46 *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

47 *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

48 *Shillinger*, 70 F.3d at 1143 (citations omitted).

49 *Id.* (citing *Weatherford v. Bursey*, 429 U.S. 545, 557 (1977)).

50 *Id.* (quoting *Weatherford*, 429 U.S. at 558).

51 *Id.* (quoting *Morrison*, 449 U.S. at 364).

52 449 U.S. 361, 364 (1981); *Shillinger*, 70 F.3d at 1142–43.

53 *Morrison*, 449 U.S. at 364 (citations omitted).

54 *Id.* at 365.

55 *Shillinger*, 70 F.3d at 1143.

56 *Morrison*, 449 U.S. at 364.

57 *See Delaware v. Robinson*, 209 A.3d 25, 55–57 (Del. 2019) (collecting cases).

58 *United States v. Orozco*, 916 F.3d 919, 925 (10th Cir. 2019).

59 *Morrison*, 449 U.S. at 365 n.2 (noting the record did "not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness"); *see also Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) ("[while] not presented with such a situation here[,]...[o]ur holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict"); *Robinson*, 209 A.3d at 57–59 (discussing *Morrison*).

60 *Shillinger*, 70 F.3d at 1141–42.

61 *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009) (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995)).

62 *Id.*

63 *Id.*

64 *Shillinger*, 70 F.3d at 1139, 1141–42 (adopting and applying the per se rule to intentional-intrusion claims because it is the only standard that is capable of adequately deterring the type of misconduct at issue).

65 *Id.* at 1142; *Thompson*, 582 F.3d at 1129–30 (distinguishing between questions that courts expressly address and resolve and those that "merely lurk in the record") (quoting *United Food & Com. Workers Union, Local 1564 v. Albertson's, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000)).

66 548 U.S. 140 (2006).

67 *Id.* at 146–48.

68 *Id.* at 147 (quoting *Strickland v. Washington*, 466 U.S. 658, 685 (1984)).

69 *Id.* (citation omitted).

70 *Id.* at 148 (citations omitted).

71 *Id.*

72 *Id.* at 149–50.

73 *Id.* at 146 (citing *Strickland*, 466 U.S. 668 (1984)).

74 *United States v. Cronic*, 466 U.S. 648, 658 (1984) (noting "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect is has on the ability of an accused to receive a fair trial"); *Gonzalez-Lopez*, 548 U.S. at 147 (explaining "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.").

75 *Strickland*, 466 U.S. at 693 ("Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."). The Supreme Court has subsequently held that "prejudice is presumed 'when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.' " *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000)); *see*

United States v. Jasso Chavero, 630 F. App'x 866, 868 (10th Cir. 2015) (holding a particularized claim that counsel failed to file a notice of appeal despite a timely request from the defendant is generally sufficient to warrant relief).

76 *Strickland*, 466 U.S. at 686 (collecting cases).

77 *Id.* at 692.

78 *Id.*

79 *Shillinger*, 70 F.3d at 1141 (citing *Strickland*, 466 U.S. at 692).

80 *Id.* (quoting *United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1979)).

81 *Id.*

82 *Id.* at 1142.

83 *Id.* at 1141 (citing *Strickland*, 466 U.S. at 692).

84 *See* Doc. 745 at 133 n.97.

85 *Shillinger*, 70 F.3d at 1138–39.

86 *Id.* at 1139.

87 *Id.* at 1140.

88 *Id.*

89 *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

90 *Id.* at 164–65 (citations omitted).

91 *See Black* Order at 67–80 (describing in detail the instigating event in this litigation in *United States v. Dertinger*); 185 n.673 (list of additional cases involving plea agreements in which the government forestalled any finding of Sixth Amendment violations by approving reduced sentences to time-served for defendants in other cases who had pending motions filed under Fed. R. Crim. P. 41(g) or where it had listened to, procured, or used video and audio recordings of attorney client communications).

92 *Id.* at 98.

93 *Id.* at 99.

94 *Id.* at 99–100.

95 *Id.*

96 *Id.* at 100.

97 *Id.* at 99. Treadway's notes of these conversations comprised 106 pages of a legal pad.

98 *Id.* at 100–101.

99 *Id.* at 101.

100 *Shillinger*, 70 F3d. at 1132, 1134–36 (finding defendant demonstrated that the prosecution learned about confidential attorney-client discussions from a deputy sheriff); *United States v. Danielson*, 325 F.3d 1054, 1074 (9th Cir. 2003) (finding defendant made prima facie showing of prejudice where privileged information "was told to, and preserved by, members of the prosecution team" and "the prosecutor in charge of the case kept much (perhaps all) of this information in his private office"); *United States v. Mastroianni*, 749 F.2d 900, 907–08 (1st Cir. 1984) ("the defendant must prove that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting" before the burden shifts to the government to demonstrate the absence of prejudice); *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) ("We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government agencies responsible for investigating and prosecuting the case[.]").

101 *Black* Order at 162 (citing *Shillinger*, 70 F.3d at 1142).

102 *Shillinger*, 70 F.3d at 1142. Also relevant to the individual Sixth Amendment claims, but not to the issues currently before the Court, are rulings in the *Black* Order and these consolidated proceedings regarding the threshold showing required to establish the protected communication element of petitioners' claims, privilege, implied and actual waiver, and procedural defenses. *See, e.g.*, Docs. 225, 588.

103 *See, e.g.* Doc. 87 at 21–25.

104 *See Black* Order at 6.

105 *See id.* at 6–7.

106 *Shillinger*, 70 F.3d at 1142.

107 *United States v. Phommaseng*, D. Kan. No. 15-20020-JAR-5, Doc. 608. Phommaseng pleaded guilty in three separate cases that all contained this waiver language.

108 *Id.* at 10 (emphasis added).

109 411 U.S. 258 (1973).

110 *Phommaseng*, D. Kan. No. 15-20020-JAR, Doc. 608 at 10.

111 *Id.*

112 *Id*. at 11–12 (citing *United States v. Christy*, 916 F.3d 814, 824–25 (10th Cir. 2019) (citing *Underwood v. Royal*, 894 F.3d 1154, 1167 (10th Cir. 2018)).

113 Doc. 87 at 16–19.

114 Doc. 328 at 56–57.

115 Doc. 522 at 29–31.

116 Doc. 588 at 54–55.

117 *Id.* at 55; Doc. 677.

118 *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1224–25 (10th Cir. 2007) (explaining "law of the case" doctrine is discretionary, and that district courts remain free to reconsider their earlier interlocutory rulings made before the entry of judgment).

119 411 U.S. 258, 267 (1973).

120 *United States v. Broce*, 488 U.S. 563, 569 (1989).

121 *See United States v. DeVaughn*, 694 F.3d 1141, 1145–46 (10th Cir. 2012) (stating that an unconditional and voluntary guilty plea waives all non-jurisdictional claims except for constitutional due process claims for vindictive prosecution and double jeopardy claims that are evident from the face of the indictment); *Class v. United States*, 138 S. Ct. 798, 803 (2018) (holding that guilty plea by itself does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal).

122 *United States v. Doe*, 698 F.3d 1284, 1293 (10th Cir. 2012).

123 *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered"); *McMann v. Richardson*, 397 U.S. 759, 774 (1970) (a defendant who pleads guilty "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts"); *Parker v. North Carolina*, 397 U.S. 790, 797 (1970) (same).

124 *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

125 *United States v. Chavez-Diaz*, 949 F.3d 1202, 1206 (9th Cir. 2020) (quoting *Tollett*, 411 U.S. at 267).

126 *Class*, 138 S. Ct. at 805 (quoting *United States v. Ruiz*, 536 U.S. 622, 628–29 (2002)).

127 *Id.*

128 *Id.* (citing *Haring v. Prosise*, 462 U.S. 306, 320 (1983)); *see also Haring*, 426 U.S. at 321 (recommending against the use of the term "waiver" to describe the effect of *Tollett*, which rests instead on the fact that the claim is "irrelevant to the constitutional validity of the conviction.").

129 *United States v. Trujillo*, 537 F.3d 1195, 1200 (10th Cir. 2008) (quoting *United States v. Van Dam*, 493 F3d 1194, 1199 (10th Cir. 2007)).

130 *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1094 (10th Cir. 2007) (quoting *United States v. Rodriguez*, 456 F.3d 1246, 1250–51 10th Cir. 2006)).

131 *See, e.g., United States v. Almazan*, No. 17-10150-01-EFM, 2019 WL 4537194, at *3 (D. Kan. Sept. 19, 2019); *United States v. Gilchrist*, No. 12-20066-40-KHV, 2016 WL 2989150, at *4 (D. Kan. May 24, 2016); *United States v. King*, No. 12-10197-MLB, 2014 WL 4704842, at *4 (D. Kan. Sept. 22, 2014).

132 *See, e.g.*, Doc. 328 at 56–57.

133 566 U.S. 463, 474 (2012) (alteration in original).

134 *Id.*

135 694 F.3d 1141, 1154–55, 1158 (10th Cir. 2012).

136 *But see United States v. Beasley*, 820 F. App'x 754, 758–59 (10th Cir. 2020) (concluding exception for ineffective- assistance claim in standard plea agreements used in the District of Kansas was not limited to *Cockerham* ineffective-assistance claims and that district court erred by not permitting defendant to raise *any* ineffective-assistance claim, specifically that counsel was ineffective for failure to raise certain Fourth Amendment challenges that were tangential to the plea agreement and waiver).

137 *See United States v. Ramos*, 492 F. App'x 688, 689 (7th Cir. 2012) (citing *Tollett*, 411 U.S. at 266–67) (discussing defendant who pleaded guilty without a plea agreement).

138 411 U.S. at 267 (explaining, "while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief.").

139 *Haring v. Prosie*, 462 U.S. 306, 321 (1983) (emphasis in original) (quoting *Menna v. New York*, 423 U.S. 61, 62–63 (1975)); *see also Class v. United States*, 138 S. Ct. 798, 805 (2018) (same); *United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.").

140 *Tollett*, 411 U.S. at 266 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

141 *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

142 474 U.S. 52, 59 (1985).

143 *Id.* at 58–59.

144 411 U.S. at 267; *see also Hill*, 474 U.S. at 60.

145 397 U.S. 622, 755 (1970).

146 Doc. 602 at 7, 11–14.

147 *Brady v. United States*, 397 U.S. 742, 748 (1970).

148 *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

149 *Brady*, 397 U.S. at 748.

150 *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

151 *Brady*, 397 U.S. at 755 (citation and internal quotation marks omitted).

152 *United States v. Fisher*, 711 F.3d 460, 465 (4th Cir. 2013) (quoting *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006) (citing *Hill*, 474 U.S. at 59); *see also Brady*, 397 U.S. at 755.

153 *See, e.g., Fisher*, 711 F.3d at 464–65; *Ferrara*, 456 F.3d at 290.

154 *Id.*

155 *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (quoting *United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1979)).

156 *Ferrara*, 456 F.3d at 294 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

157 *United States v. Weiss*, 630 F.3d 1263, 1274 (10th Cir. 2010).

158 *Id.* (holding that even assuming there was an error that is plain, defendant did not demonstrate that this error affected his substantial rights, explaining "[a]n error only affects substantial rights when it is prejudicial, meaning that there is 'a reasonable probability that, but for the error claimed, the result of the proceeding would have been different' ") (quoting *United States v. Algarate-Valencia*, 550 F.3d 1238, 1242 (10th Cir. 2008)).

159 *Shillinger*, 70 F.3d at 1142 (citing *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977)).

160 *Id.* (citing *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

161 *United States v. Moussaoui*, 591 F.3d 263, 280 n.12 (4th Cir. 2010).

162 Doc. 602 at 10 n.34.

163 *Id.*

164 *Id.* (citing *Tollett*, 411 U.S. 258, 259 (1973)).

165 *Id.*

166 640 F.3d 580, 585 (4th Cir. 2011).

167 *Id.* at 591–92 (citing *United States v. Moussaoui*, 591 F.3d 263, 279 (4th Cir. 2010)).

168 *Id.* at 593.

169 *Id.* at 593–94.

170 *See United States v. Cronic*, 466 U.S. 648, 654 n.11 (1984) (explaining a constructive denial of counsel results from circumstances where "the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided" at all).

171 411 U.S. at 260–61.

172 *Id.* at 267.

173 536 U.S. 622, 630 (2002).

174 *Id.* at 629–31 (citations omitted).

175 *Ferrara v. United States*, 456 F.3d 278, 294 (1st Cir. 2006) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

176 *United States v. Walters*, 269 F.3d 1207, 1215 (10th Cir. 2001).

177 *Beard v. Addison*, 728 F.3d 1170, 1183 (10th Cir. 2013).

178 *Id.* at 1184 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

179 The Court's initial review of the motions and record identified over twenty petitioners whose Sixth Amendment claims are based on audio and/or video recordings the USAO received before they entered their guilty pleas.

180 Doc. 722 (sealed).

181 *See Gill v. Turner*, 443 F.2d 1064, 1066 (10th Cir. 1971) (holding that the state should be allowed to retry prisoner entitled to federal habeas relief before writ is actually issued); *see also United States v. Wright*, 43 F.3d 491, 494 (10th Cir. 1994) ("Having pled guilty, a defendant's only avenue for challenging his conviction is to claim that he did not voluntarily or intelligently enter his plea." (citations omitted)).

182 *See Ferrara v. United States*, 456 F.3d 278, 295 (2006).

183 *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

184 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence.").

185 *See United States v. Quezada*, No. 93-1972, 1994 WL 66104, at *2 (1st Cir. Mar. 4, 1994) ("By pleading guilty, appellant waived the right to assert his Fourth Amendment claim for the purpose of attacking his sentence."); *United States v. Robeson*, 231 F. App'x 222, 224 (4th Cir. 2007) (holding that under *Tollett*, the defendant waived her argument that "her sentence should be vacated because the drugs upon which her sentence was calculated were seized in violation of the Fourth Amendment"); *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir. 1991) ("Smallwood cannot resuscitate [F]ourth [A]mendment concerns solely to challenge the consideration of the evidence at sentencing."); *see also United States v. Hubble*, No. 84-5866, 1985 WL 13619, *2 (6th Cir. Aug. 22, 1985) (relying on *Tollett* in holding that because the defendant did not contend that defense counsel's failure prior to entry of plea to file a suppression motion or pursue a § 3006A(e) psychiatric examination affected his decision to plead guilty, he may not collaterally attack his sentence on those grounds); *Flowers v. United States*, No. 98-1690, 2000 WL 125851, at *4–5 (6th Cir. Jan. 24, 2000) (relying on *Tollett* to reject the defendant's motion to vacate his sentence).

186 Doc. 603, Ex. A.

187 Doc. 587.

188 *Davenport v. Wal-Mart Stores, Inc.*, No. 14-2124-JAR-JPO, 2014 WL 3361729, at *1 (D. Kan. July 9, 2014).

189 *Id.*; *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

190 *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) (explaining that challenges to subject matter jurisdiction "may be raised...at any stage in the litigation, even after trial and the entry of judgment.").

191 *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).

192 *Id.* at 477–78.

193 *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 794 (10th Cir. 2009) (quoting *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1245 (10th Cir. 2009) ("If, during the pendency of the case, circumstances change such that the plaintiff's legally cognizable interest in a case is extinguished, the case is moot, and dismissal may be required.")).

194 *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

195 *Aragon v. Shanks*, 144 F.3d 690, 691 (10th Cir.1998).

196 *Id.* (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)).

197 *United States v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004) (quoting *Smith v. Plati*, 258 F.3d 1167, 1169 (10th Cir. 2001)).

198 *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996).

199 *Sibron v. New York,* 392 U.S. 40, 57 (1968).

200 *Id.* at 55.

201 *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

202 Doc. 603 at 6–8.

203 496 F.3d 1177 (10th Cir. 2007).

204 *Id.* at 1180–82.

205 523 U.S. 1, 7 (1998).

206 Doc. 610 at 15.

207 *Id.* at 16–18.

208 496 F.3d at 1181–82.

209 *Spencer*, 523 U.S. at 7 (quoting *Lewis*, 494 U.S. at 477–78 ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate....The parties must continue to have a 'personal stake in the outcome' of the lawsuit.").

210 *Spencer*, 523 U.S. at 11–13 (noting that a "parsimonious view of standing" has developed over time that could limit presumptions regarding the existence of collateral consequences in habeas challenges). In addition, in some cases, there may be reason to doubt this Court should presume collateral consequences exist if petitioner has prior convictions and already suffers the consequences of those unchallenged elements of his criminal record. *See Romero v. Goodrich*, 480 F. App'x 489, 494 (10th Cir. 2012) (citing *Malloy v. Purvis*, 681 F.2d 736 (11th Cir.1982)).

211 *Spencer*, 523 U.S. at 18.

212 *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (explaining that to satisfy Article III's case or controversy requirement, "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)).

213 146 F.3d 771 (1998).

214 *Id.* at 775.

215 Doc. 610 at 11.

216 A federal district court may modify a defendant's sentence only where Congress has expressly authorized it to do so. *See* 18 U.S.C. § 3582(b)–(c); *United States v. Blackwell*, 81 F.3d 945, 947 (10th Cir. 1996). Congress has set forth only three limited circumstances in which a court may modify a sentence: (1) upon motion of the Director of the Bureau of Prisons or defendant under § 3582(c)(1)(A); (2) when "expressly permitted by statute or by Rule 35;" and (3) when defendant has been sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c). Relief under subsection (2) includes compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) or, alternatively, home confinement under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. Law 116-136, 134 Stat. 281 (2020). None of these measures are relevant to the issues discussed herein.

217 While also sentenced to a statutory mandatory minimum term, the Court notes Vernon Brown will soon be released from custody and has withdrawn his motion to reduce his sentence. His conviction challenge remains undisturbed.

218 Doc. 603, Ex. A. Two Petitioners identified in this category were also identified as individuals who have been deported. While they are unable to challenge their sentences due to deportation, their challenges to their convictions remain potentially valid and therefore the discussion here applies to them with equal force.

219 *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995).

220 Doc. 758 at 157–58.

221 The *Shillinger* court also instructed that, "[i]n tailoring relief for infractions of the attorney-client privilege that amount to constitutional violations, the proper approach is 'to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.' " *United States v. Kaufman*, 2005 WL 2087759 *3 (D. Kan. Aug, 25, 2005) (quoting *Shillinger v. Haworth*, 70 F.3d 1132, 1143 (10th Cir. 1995)).

222 *United States v. Singleton*, 52 F. App'x 456, 459–60 (10th Cir. 2002).

223 *Black Order* at 162. It was not the Court's intent to include intrusions that, after review of the record, clearly could not have occurred during that time frame. The Court emphasized that "the attorney-client privilege and the Sixth Amendment are personal to the defendant." *Id.* at 163.

224 *Id.*

225 Doc. 587 at 14.

226 Doc. 603 at 12–13.

227 Doc. 610 at 13–14.

228 Doc. 605.

229 *Id.* at 1.

230 *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S.Ct. 13, 17–18 (2017) ("Mandatory claim- processing rules are less stern [than jurisdictional limits imposed by Congress]. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived for forfeited."). The *Hamer* Court specifically differentiated court-made processing rules from statutory jurisdictional requirements. *Id.* at 17. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (explaining that claim-processing rules are non-jurisdictional rules "that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times"). Unlike jurisdictional requirements, claim-processing rules can be waived or forfeited. *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 783 (10th Cir. 2013).

231 *Schacht v. United States,* 398 U.S. 58, 64 (1970).

232 *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

233 *Hamer*, 138 S. Ct. at 17.

234 R. Gov. § 2255 Proc. 2.

235 R. Gov. § 2255 Proc. 2 advisory committee's notes to 2004 amendment.

236 *Id.*

237 *Id.*

238 495 U.S. 149, 163 (1990).

239 *Id.*

240 *Id.* at 164.

241 488 F.3d 1313, 1316 (10th Cir. 2013).

242 *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017).

243 The government suggests that proceedings will need to be stayed while awaiting compliance with the certification rules. Doc. 605 at 6-7. Such a delay is not necessary given the materials already in the record.

244 *Black* Order at 120.

245 *Huff v. CoreCivic*, D. Kan. No. 17-cv-2320-JAR-JPO, Doc. 177 (Jan. 28, 2020).

246 *See id.*, Doc. 177-1 (list of settlement class members).

247 *Wang v. Reno,* 862 F. Supp. 801, 811 (E.D.N.Y 1994) (denying sweeping, non-particularized non- declaratory relief to collected habeas cases, instead electing to consider each case on its own).