No. 23-6230

IN THE
Supreme Court of the United States

DANILLE MORRIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

ARGUMENT

This Court should grant this petition to review the Tenth Circuit's unsupported, unwarranted, and erroneous extension of *Tollett v. Henderson*, 411 U.S. 258 (1973), to preclude collateral attacks to sentences based on pre-plea constitutional violations. Pet. 24-34. *Tollett*, which generally holds that a knowing and voluntary guilty plea forecloses a collateral attack to the *conviction* based on an antecedent constitutional violation, had nothing to do with *sentencing* challenges, its reasoning does not extend to such challenges, and neither this Court nor any other court of appeals has extended *Tollett* to the sentencing context. Pet. 13-20. It is also critically important that this Court review the question presented because the Tenth Circuit's decision trivializes the indispensable role guilty pleas play in the federal criminal justice system and the outsized role sentencing plays in the federal criminal justice system, and seriously hampers courts' ability to correct constitutional violations that, although committed prior to the guilty plea, still impact the sentencing stage. Pet. 22-27.

The government has filed a 9-page brief in opposition, incorporating the arguments that it recently made in a different brief in opposition filed in *Spaeth v. United States*, Supreme Court Case No. 23-6250 (cert. petition pending). BIO 8-9. In *Spaeth*, the government disagreed that *Tollett* is limited to plea challenges, erroneously stated that our sentencing challenge is dependent on a challenge to the plea, and suggested that other courts of appeals agree with the Tenth Circuit's extension of *Tollett* to the sentencing context. *Spaeth* BIO 16-18. The government also claimed that the *Spaeth* petition was a poor vehicle because of the Tenth Circuit's

recent en banc grant in *United States v. Hohn*, 91 F.4th 1060 (10th Cir. 2024) (en banc). BIO 19.[1] As explained below (and in the reply in *Spaeth*), none of these arguments are persuasive. Review is necessary.

I. The Tenth Circuit Erred.

Tollett held that the defendant could not vacate his guilty plea based on a pre-plea constitutional violation. 411 U.S. at 259, 267-269. *Tollett* had nothing to do with an attempt to vacate a sentence, nor has this Court ever suggested that *Tollett* had anything to do with a challenge to the defendant's sentence. *See* Pet. 13-14, 19-20. Nor would it make sense to extend *Tollett* to the sentencing context because a sentencing challenge is independent of a challenge to the defendant's guilt. *See* Pet. 14-20.

The government disagrees because *Tollett* involved a pre-plea constitutional violation. *Spaeth* BIO 16-17. That's obviously true. But what is also obviously true is that *Tollett* held that the defendant could not attack the guilty plea itself (not the sentence) based on this pre-plea constitutional violation. 411 U.S. at 259, 267-269. The government does not, and could not, point to anything within *Tollett* that precludes a sentencing challenge because *Tollett* had nothing whatsoever to do with a challenge to the sentence.

Moreover, as we've already explained, Pet. 16-19, that the constitutional violation

[1]The government also suggested that the petition in *Spaeth* was a poor vehicle because Mr. Spaeth entered into a Rule 11(c)(1)(C) agreement and received the agreed-upon sentence. *Spaeth* BIO 19. The government has not pressed that argument here. Nor could it. Ms. Morris did not enter into any plea agreement with the government. Thus, to the extent that this Court agrees that *Spaeth* is a poor vehicle to address the question presented, it should grant certiorari in this case because this case is not a poor vehicle to address the question presented.

preceded the plea says nothing at all about whether that violation affected the sentence. As Justice Rehnquist once explained, the *violation* functionally occurs at sentencing, regardless when the underlying unconstitutional *conduct* occurred. *Blackledge v. Perry*, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting). The government does not even attempt to dispute this point, but instead parrot's the Tenth Circuit's hyperbole that our position "would render [*Tollett*] meaningless." *Spaeth* BIO 17. That is obviously untrue: *Tollett* is not rendered meaningless because it still precludes a challenge to the guilty plea (as it did here).

The government's position also conflicts with 28 U.S.C. § 2255's plain text. Pet. 22-23. The government disagreed with this argument in *Spaeth* by claiming that our sentencing challenge was not "independent of [our] challenge to [Mr. Spaeth's] conviction by plea." BIO 17. But here, Mr. Morris has not challenged her guilty plea (just her sentence). Thus, to the extent that the government has incorporated this argument from *Spaeth*, the argument has no factual basis in Ms. Morris's case. Nor has the government otherwise attempted to square its arguments in this case with § 2255's plain text. Nor could it. For all of these reasons, and those stated in our petition, review is necessary.

II. The Tenth Circuit's Decision Creates a Conflict.

The Tenth Circuit extended *Tollett* in a perfunctory two-paragraph analysis that lacked any supporting authority. *See* Pet. 20. In doing so, the Tenth Circuit effectively created a conflict in the Circuits, as no other court of appeals has extended *Tollett* to sentencing challenges. Pet. 20-22.

The government disagrees and states that other courts of appeals have also

interpreted *Tollett* to preclude sentencing challenges based on pre-plea constitutional violations. *Spaeth* BIO 17-18 (citing published opinions from the Second, Fifth, and Ninth Circuits, and unpublished opinions from the First and Fourth Circuits). We have already addressed the unpublished opinions and the Fifth Circuit's opinion in *United States v. Smallwood*, 920 F.2d 1231 (5th Cir. 1991). Pet. 21-22. The Second Circuit's opinion in *United States v. Arango*, 966 F.2d 64 (2d Cir. 1992), is not materially different than those decisions. That case involved a defendant's failure to move to suppress drugs prior to a guilty plea, then a belated attempt to suppress the drugs at sentencing. *Id.* at 65. These decisions generally follow the view, not at issue here, that the judicially-created (as opposed to constitutionally required) exclusionary rule does not apply at federal sentencings. *See*, *e.g.*, *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir. 1992) (citing cases). But even then, if a defendant makes "a showing that officers obtained evidence expressly to enhance a sentence," courts may refuse to consider such evidence at sentencing (even when defendants plead guilty). *Id.* And the Ninth Circuit's decision in *United States v. Leming*, 532 F.2d 647, 648-649 (9th Cir. 1975), turned on the defendants' "plea bargaining" to be sentenced under the Youth Corrections Act. That the defendants bargained away their ability to challenge the juvenile sentences in *Leming* is irrelevant here (Ms. Morris never entered into a plea agreement, and so she never bargained away her sentencing challenge). The government's inapposite cases confirm that the Tenth Circuit's decision below is an outlier.

III. The Question Presented Is Exceptionally Important.

We have explained that review is necessary because the Tenth Circuit's decision has serious implications for federal habeas review, trivializes the indispensable role guilty pleas play in the federal criminal justice system, trivializes the outsized role sentencing plays in the federal criminal justice system, and diminishes the vital role the federal courts play in guarding against prosecutorial overreach. Pet. 22-27. The government does not dispute any of these points. Nor does the government dispute our point that this Court's intervention is critical given the years-long pattern of prosecutorial misconduct at issue here and in other cases (like *Spaeth*) raising analogous claims.[2] For all of these undisputed reasons, review is necessary.

IV. This Petition Is An Excellent Vehicle.

There are no procedural impediments to reviewing the question presented here. Pet. 27-28. Ms. Morris did not enter into a plea agreement or otherwise waive her statutory right to bring a collateral attack to her sentence under 28 U.S.C. § 2255.

The government does not dispute this, but instead claims that this petition is a poor vehicle because the Tenth Circuit recently granted hearing en banc in another case involving the pattern of prosecutorial misconduct at issue here. *Spaeth* BIO 19 (citing *Hohn*, 91 F.4th 1060). The government claims that the Tenth Circuit may "reverse the decision on which petitioner's Section 2255 motion is premised." *Spaeth* BIO 19. But the en banc grant does not ask whether that decision – *Shillinger v.*

[2] *See Ayala-Garcia et al. v. United States*, Supreme Court Case No. 23-6621 (a pending joint petition on behalf of 32 other petitioners raising analogous Sixth Amendment prosecutorial misconduct claims).

Haworth, 70 F.3d 1132 (10th Cir. 1995) – should be "reversed," but instead whether the Court should reconsider the structural-error aspect of that decision and whether nonprivileged communications can still be considered "confidential" for Sixth Amendment purposes under *Shillinger*. 91 F.4th at 1061. Those questions have nothing to do with the question presented here, which concerns the Tenth Circuit's erroneous extension of *Tollett* to the sentencing context, and any en banc opinion in *Hohn* would not negate the need to resolve the wholly separate question presented in this petition.

Moreover, unlike *Hohn* (which involved a defendant who was aware that his attorney-client calls were being recorded by prison officials), here, it is undisputed that Ms. Morris was unaware that the prison was recording her attorney-client meetings. And the Tenth Circuit has already held that structural error does not apply in the sentencing context. *United States v. Orduno-Ramirez*, 61 F.4th 1263 (10th Cir. 2023). The government does not grapple with either of these points. And in light of those points, the en banc grant in *Hohn* should play no role in whether this Court grants this petition.

Finally, even if the questions posed in *Hohn* somehow become relevant in this case at some future point (although we doubt that is possible), the mere grant of en banc hearing offers no insight into what the Tenth Circuit might hold in its en banc decision (or even whether the Tenth Circuit will issue an en banc decision, *see*, *e.g.*, *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (vacating en banc rehearing

order without issuing an en banc opinion)).[3]

In the end, the pattern of prosecutorial misconduct at issue here and in other similar cases is truly extraordinary. And the Tenth Circuit's novel and erroneous extension of *Tollett* is sure to wreak havoc on the plea bargaining process and the ability of courts to hold the government accountable for surreptitious constitutional violations that are only unearthed after the government obtains a guilty plea from the defendant. The question presented in this petition is exceptionally important. Review is necessary.

Respectfully submitted,

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[3] If this Court believes that *Hohn* might have some relevance to the disposition of this petition, it could hold this petition pending *Hohn*'s en banc resolution. But there is no rational reason to deny this petition based solely on the en banc grant in *Hohn*, before this Court even knows how the en banc Tenth Circuit resolves *Hohn*. With that said, leaving in place the Tenth Circuit's erroneous interpretation of *Tollett* should not be an option under any circumstance.