No. _____

IN THE

# Supreme Court of the United States

ADRIAN AYALA-GARCIA, NOHEMY BOBADILLA-OLIVA, FERNANDO CABRAL TORRES, DAMIEN CAMPBELL, JONATHAN DEHAVEN, CLARENCE BRADLEY, RONALD D. CATRELL, ANTHONY L. IRVIN, MARIO ALBERTO FRANCO, NICHOLAS LOLAR, TANYA JONES, JULIE CLIFTON, DOMINGO MONTES-MEDINA, BRIAN K. JACKSON, FERNANDO GUEVARA-GUEVARA, DARUS D. MEBANE, JOSE ANTONIO NUNEZ-AGUILAR, GERADIS RODRIGUEZ-TORRES, EDUARDO PONCE-SERRANO, NICHOLAS SOTO-CAMARGO, JR., JOSE MARIN SORIANO, JASEN LOWELL THURMAN, RAQUEL ODEGBARO, QUIAN YOUNGER, LUIS VILLA-VALENCIA, SERGIO ZAMUDIO, JESUS VERA, VICTOR VELAZQUEZ, OSCAR VIVEROS-AVECIAS, JOSE TORRES-AYALA, ANTONIO VAZQUEZ-SAENZPARDO, NINCY SARAHI ZELAYA-PACHECO

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## JOINT PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

This is a joint petition that raises the identical questions presented in *Spaeth v. United States*, Supreme Court No. 23-6250 (petition filed Dec. 9, 2023; response requested and currently due February 8, 2024). Those questions are:

I. Does *Tollett v. Henderson*, 411 U.S. 258 (1973), preclude the government and a defendant from conditioning a guilty plea on the defendant's right to collaterally attack the conviction on grounds other than ineffective assistance of counsel that renders the plea invalid?

II. If not, when a defendant conditions a guilty plea on the right to collaterally attack the conviction via "any subsequent claims with regards to … prosecutorial misconduct," does this language only authorize collateral attacks based on post-plea prosecutorial misconduct?

III. When a defendant pleads guilty, does *Tollett* preclude the defendant from collaterally attacking the sentence because of surreptitious prosecutorial misconduct into confidential attorney-client communications that predated the guilty plea?[1]

[1] This third question is also pending in *Danille Morris v. United States*, Supreme Court No. 23-6230 (response requested and due February 12, 2024).

## RELATED PROCEEDINGS

*United States v. Ayala-Garcia*, No. 23-3178 (10th Cir. Oct. 31, 2023)

*United Stats v. Ayala-Garcia*, No. 5:18-cv-04103 (D. Kan. Aug. 23, 2023)

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*United States v. Campbell*, No. 2:16-cr-20011 (D. Kan. Aug. 1, 2017)

*United States v. Dehaven*, No. 23-3182 (10th Cir. Oct. 31, 2023)

*United States v. Dehaven*, No. 2:18-cv-02474 (D. Kan. Aug. 23, 2023)

*United States v. Dehaven*, No. 2:16-cr-20041 (D. Kan. Aug. 12, 2017)

*United States v. Bradley*, No. 23-3183 (10th Cir. Oct. 31, 2023)

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*United States v. Cattrell*, No. 2:11-cr-20125 (10th Cir. Mar. 11, 2015)

*United States v. Irvin*, No. 23-3186 (10th Cir. Oct. 31, 2023)

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*United States v. Irvin*, No. 2:13-cr-20070-5 (D. Kan. Dec. 10, 2013)

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*United States v. Franco*, No. 2:18-cv-02415 (D. Kan. Aug. 23, 2023)

*United States v. Franco*, No. 2:15-cr-20061 (D. Kan. Sept. 22, 2017)

*United States v. Lolar*, No. 23-3188 (10th Cir. Oct. 31, 2023)

*United States v. Lolar*, No. 2:19-cv-02393 (D. Kan. Aug. 24, 2023)

*United States v. Lolar*, No. 2:15-cr-20012-2 (D. Kan. Dec. 5, 2016)

*United States v. Jones*, No. 23-3189 (10th Cir. Oct. 31, 2023)

*United States v. Jones*, No. 2:18-cv-02254 (D. Kan. Sept. 22, 2023)

*United States v. Jones*, No. 2:15-cr-20091 (D. Kan. Jan. 8, 2018)

*United States v. Clifton*, No. 23-3190 (10th Cir. Oct. 31, 2023)

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*United States v. Mebane*, No. 2:18-cv-02413 (D. Kan. Aug. 24, 2023)

*United States v. Mebane*, No. 2:16-cr-20041 (D. Kan. May 31, 2017)

*United States v. Nunez-Aguilar*, No. 23-3196 (10th Cir. Oct. 31, 2023)

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*United States v. Rodriguez-Torres*, No. 2:18-cv-02462 (D. Kan. Aug. 24, 2023)

*United States v. Rodriguez-Torres*, No. 2:15-cr-20038 (D. Kan. Oct. 24, 2016)

*United States v. Ponce-Serrano*, No. 23-3198 (10th Cir. Oct. 31, 2023)

*United States v. Ponce-Serrano*, No. 5:18-cv-04104 (D. Kan. Aug. 24, 2023)

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*United States v. Soriano*, No. 2:18-cv-02435 (D. Kan. Aug. 24, 2023)

*United States v. Soriano*, No. 2:15-cr-20020 (D. Kan. Oct. 24, 2016)

*United States v. Thurman*, No. 23-3201 (10th Cir. Oct. 31, 2023)

*United States v. Thurman*, No. 2:19-cv-02398 (D. Kan. Aug. 25, 2023)

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*United States v. Odegbaro*, No. 23-3203 (10th Cir. Oct. 31, 2023)

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*United States v. Younger*, No. 23-3204 (10th Cir. Oct. 31, 2023)

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*United States v. Younger*, No. 5:16-cr-40012 (D. Kan. Nov. 17, 2016)

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*United States v. Vera*, No. 2:15-cr-20061 (D. Kan. Sept. 11, 2017)

*United States v. Velazquez*, No. 23-3208 (10th Cir. Oct. 31, 2023)

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*United States v. Velazquez*, No. 2:16-cr-20031-3 (D. Kan. May 8, 2019)

*United States v. Viveros-Avecias*, No. 23-3209 (10th Cir. Oct. 31, 2023)

*United States v. Viveros-Avecias*, No. 2:20-cv-02431 (D. Kan. Aug. 28, 2023)

*United States v. Viveros-Avecias*, No. 2:16-cr-20031-2 (D. Kan. Aug. 21, 2019)

*United States v. Torres-Ayala*, No. 23-3210 (10th Cir. Oct. 31, 2023)

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*United States v. Zelaya-Pacheco*, No. 2:21-cv-02107 (D. Kan. Aug. 28, 2023)

*United States v. Zelaya-Pacheco*, No. 2:16-cr-20031-5 (D. Kan. Feb. 12, 2020)

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

*United States v. Spaeth*, No. 2:19-cv-02413 (D. Kan. April 2 & May 14, 2021)

*United States v. Spaeth*, No. 2:14-cr-20068-6 (D. Kan. Jan. 9, 2017)

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

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## PETITION FOR WRIT OF CERTIORARI

The above-listed petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The Tenth Circuit's unpublished order denying certificates of appealability and dismissing the petitioners' § 2255 motions is available at 2023 WL 7153220, and is reprinted in the Appendix (Pet. App.) at 19a-22a. The district court's unpublished order dismissing Mr. Ayala-Garcia's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5432996, and is reprinted at 23a-25a. The district court's unpublished order dismissing Ms. Bobadilla-Oliva's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5434691, and is reprinted at 26a-28a. The district court's unpublished order dismissing Mr. Torres's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5576616, and is reprinted at 29a-32a. The district court's unpublished order dismissing Mr. Campbell's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5434693, and is reprinted at 32a-34a. The district court's unpublished order dismissing Mr. Dehaven's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5434692, and is reprinted at 35a-37a.

The district court's unpublished order dismissing Mr. Bradley's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5434694, and is reprinted at 38a-40a. The district court's unpublished order dismissing Mr. Catrell's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5577178, and is reprinted at 41a-43a.The district court's unpublished order dismissing Mr. Irvin's motion to vacate under 28

U.S.C. § 2255 is available at 2023 WL 5577267, and is reprinted at 44a-46a. The district court's unpublished order dismissing Mr. Franco's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5434697, and is reprinted at 47a-49a. The district court's unpublished order dismissing Mr. Lolar's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508270, and is reprinted at 50a-52a. The district court's unpublished order dismissing Ms. Clifton's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5577107, and is reprinted at 53a-55a. The district court's unpublished order dismissing Mr. Montes-Medina's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5507855, and is reprinted at 56a-58a.

The district court's unpublished order dismissing Mr. Jackson's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5434696, and is reprinted at 59a-61a. The district court's unpublished order dismissing Mr. Guevara-Guevara's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5613336, and is reprinted at 62a-64a. The district court's unpublished order dismissing Mr. Mebane's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508070, and is reprinted at 65a-67a. The district court's unpublished order dismissing Mr. Nunez-Aguilar's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508422, and is reprinted at 68a-70a. The district court's unpublished order dismissing Mr. Rodriguez-Torres's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508447, and is reprinted at 71a-73a.

The district court's unpublished order dismissing Mr. Ponce-Serrano's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508460, and is reprinted at

74a-76a. The district court's unpublished order dismissing Mr. Soto-Camargo's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508410, and is reprinted at 77a-79a. The district court's unpublished order dismissing Mr. Soriano's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508123, and is reprinted at 80a-82a. The district court's unpublished order dismissing Mr. Thurman's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5512126, and is reprinted at 83a-85a. The district court's unpublished order dismissing Ms. Odegbaro's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5508259, and is reprinted at 86a-88a. The district court's unpublished order dismissing Mr. Younger's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5533563, and is reprinted at 89a-91a. The district court's unpublished order dismissing Mr. Villa-Valencia's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5577238, and is reprinted at 92a-94a. The district court's unpublished order dismissing Mr. Zamudio's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5533554, and is reprinted at 95a-97a. The district court's unpublished order dismissing Mr. Vera's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5533571, and is reprinted at 98a-100a.

The district court's unpublished order dismissing Mr. Velazquez's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5512106, and is reprinted at 101a-103a. The district court's unpublished order dismissing Mr. Viveros-Avecias's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5533559, and is reprinted at 104a-106a. The district court's unpublished order dismissing Mr. Torres-

Ayala's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5512083, and is reprinted at 107a-109a. The district court's unpublished order dismissing Mr. Vazquez-Saenzpardo's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5512083, and is reprinted at 110a-112a.The district court's unpublished order dismissing Ms. Zelaya-Pacheco's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 5533567, and is reprinted at 113a-115a.

The district court's unpublished memorandum and order that preceded the dismissal of the § 2255 motions is available at 2021 WL 150989, and is reprinted at 116a-148a. The Tenth Circuit's opinion in *United States v. Spaeth* is available at 8 F.4th 932, and is reprinted at 1a-18a. The district court's unpublished order dismissing Ms. Jones's § 2255 motion is not available on a commercial legal database and is also sealed and unavailable to the public. The sealed order will be provided to the Court separately and is not included within the Appendix.

## JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255. The Tenth Circuit denied certificates of appealability and dismissed the petitioners' § 2255 motions under 28 U.S.C. § 2253(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

## INTRODUCTION

This joint petition, filed by 32 criminal defendants prosecuted by the Kansas United States Attorney's Office, involves an extraordinary pattern of surreptitious

prosecutorial misconduct into confidential attorney-client communications. That pattern of misconduct is documented in the petition for a writ of certiorari filed in *Spaeth v. United States*, Supreme Court No. 23-6250 (petition filed December 9, 2023; response requested and currently due February 8, 2024). *See also Danille Morris v. United States*, Supreme Court No. 23-6230 (response requested and due February 12, 2024) (also documenting this misconduct). At issue in each case is whether *Tollett v. Henderson*, 411 U.S. 258 (1973) precludes defendants who pleaded guilty via plea agreements with conditional collateral-attack waivers and who had no knowledge of the government's surreptitious misconduct from later invoking this misconduct (once discovered) to collaterally attack either their guilty pleas or sentences. The lower courts denied relief based on the Tenth Circuit's earlier decision in *Spaeth*.

*Spaeth* is an excellent vehicle for this Court to grant certiorari to resolve the three questions presented here and in *Spaeth*.[2] This Court should grant certiorari in *Spaeth*, hold this joint petition pending the disposition in *Spaeth*, and dispose of the joint petition consistent with the disposition in *Spaeth*. Otherwise, this Court should grant certiorari here to address the three questions presented in this joint petition.

## STATEMENT

### A. Proceedings Below

As documented below, each of the 32 petitioners pleaded guilty to federal offenses pursuant to written plea agreements that contained conditional collateral-appeal

[2] *Morris* is also an excellent vehicle for this Court to grant certiorari and to resolve the third question presented in this joint petition. The difference between *Morris* and this joint petition is that Morris pleaded guilty without a plea agreement, whereas the petitioners here (and Spaeth) pleaded guilty pursuant to a written plea agreement with a conditional collateral-attack waiver, as discussed below.

waivers. Those waivers allowed the petitioners to raise in a postconviction motion "any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." *See*, *e.g.*, *United States v. Ayala-Garcia*, Case No. 2:16-cr-20008, D.E.20 at 11-12 (D. Kan. Aug. 8, 2016); Pet. App. 10a (quoting identical provision in *Spaeth*).

1. In August 2016, Adrian Ayala-Garcia pleaded guilty to a drug-conspiracy count under 21 U.S.C. § 846 pursuant to the "standard" written plea agreement, which included a conditional collateral-attack waiver. *See* Pet. App. 23a; *United States v. Ayala-Garcia*, Case No. 2:16-cr-20008, D.E.20 at 11-12 (D. Kan. Aug. 8, 2016). The plea agreement included a conditional collateral-attack waiver. *Ayala-Garcia*, D.E.20 at 11-12. Specifically, although Mr. Ayala-Garcia generally waived his right to collaterally attack the conviction and sentence, he conditioned his plea on the right to collaterally attack his conviction or sentence via "any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." *Id.* at 12. The plea agreement also acknowledged that Mr. Ayala-Garcia could collaterally attack the conviction or sentence under *United States v. Cockerham*, 237 F.3d 1187 (10th Cir. 2001) (holding that a defendant may always collaterally attack his conviction by challenging the validity of the plea). *Id.* Again, the collateral-attack portion of Mr. Ayala-Garcia's plea agreement was the "standard" language found in most (if not all) plea agreements in the District of Kansas. *See* Pet. App. 23a. In January 2017, the district court imposed a 60-month prison sentence. *See id.*

2. In October 2015, petitioner Clifton pleaded guilty to a drug conspiracy pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 53a; *United States v. Clifton*, Case No. 2:14-cr-20014, D.E.201 at 1, 10-11 (D. Kan. Jan. 20, 2015). The district court imposed a 131-month prison sentence. Pet. App. 53a.

3. In May 2016, petitioner Ponce-Serrano pleaded guilty to a drug conspiracy under 21 U.S.C. § 846 pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 74a; *United States v. Ponce-Serrano*, Case No. 5:16-cr-40006, D.E.15 at 1, 11-12 (D. Kan. May 23, 2016). The district court imposed a 192-month prison sentence. Pet. App. 74a.

4. In July 2016, petitioner Rodriguez-Torres pleaded guilty to a drug conspiracy under 21 U.S.C. § 846 pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. Pet. App. 71; *United States v. Rodriguez-Torres*, Case No. 2:15-cr-20038, D.E.79 at 1, 7 (D. Kan. July 29, 2016). The district court imposed a 60-month prison sentence. Pet. App. 71a.

5. In July 2016, petitioner Soriano pleaded guilty to a drug conspiracy under 21 U.S.C. § 846 pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 80a; *United States v. Soriano*, Case No. 2:15-cr-20020, D.E.308 at 1, 15-16 (D. Kan. July 27, 2016). The district court imposed a 108-month prison sentence. Pet. App. 80a.

6. In August 2016, petitioner Jackson pleaded guilty to a drug count under 21 U.S.C. § 841(a)(1) pursuant to the "standard" plea agreement that included the

identical conditional collateral-attack waiver. *See* Pet. App. 59a; *United States v. Jackson*, Case No. 2:16-cr-20030, D.E.14 at 1, 7-8 (D. Kan. Aug. 2, 2016). The district court imposed a 151-month prison sentence. Pet. App. 59a.

7. In August 2016, petitioner Younger pleaded guilty to a drug conspiracy under 21 U.S.C. § 846 pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 89a; *United States v. Younger*, Case No. 5:16-cr-40012, D.E.35 at 1, 10-11 (D. Kan. Aug. 8, 2016). The district court imposed a 76-month prison sentence. Pet. App. 89a.

8. In October 2016, petitioner Soto-Camargo pleaded guilty to several drug counts pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 77a; *United States v. Soto-Camargo*, Case No. 5:14-cr-40129, D.E.465 at 1, 7-8 (D. Kan. Oct. 17, 2016). The district court imposed a 180-month prison sentence. Pet. App. 77a.

9. In March 2017, petitioner Bradley pleaded guilty to a drug conspiracy pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 38a; *United States v. Bradley*, Case No. 2:16-cr-20014, D.E.73 at 1, 8-9 (D. Kan. Mar. 13, 2017). The district court imposed a 150-month prison sentence. Pet. App. 38a.

10. In May 2017, petitioner Campbell pleaded guilty to drug charges under 21 U.S.C. § 841(a)(1) pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 32a; *United States v.*

*Campbell*, 2:16-cr-20011, D.E. 37 at 1, 10 (D. Kan. May 1, 2017). The district court imposed a 117-month term of imprisonment. Pet. App. 32a.

11. In June 2017, petitioner Montes-Medina pleaded guilty to a drug count under 21 U.S.C. § 841(a)(1) pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 56a; *United States v. Montes-Medina*, Case No. 2:15-r-20020, D.E.425 at 1, 13-14 (D. Kan. June 20, 2017). The district court imposed a 300-month prison sentence. Pet. App. 56a. Mr. Montes-Medina did not appeal. In July 2021, the district court reduced the sentence to time served, to be followed by a 10-year term of supervised release. *Id.*, D.E.625.

12. In September 2015, petitioners Franco, Nunez-Aguilar, and Vera were indicted on drug charges. *See* Pet. App. 47a, 68a, 98a; *United States v. Franco*, Case No. 2:15-cr-20061, D.E.27 (D. Kan. Sept. 2, 2015). Each petitioner pleaded guilty to a drug count pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See id.*; *Franco et al.*, D.E.90 at 1, 13-14; D.E.129 at 1, 17-18; D.E.100 at 1, 12. Franco received an 87-month prison sentence, Pet. App. 47a, Nunez-Aguilar received a 168-month prison sentence, Pet. App. 68a, and Vera received a 126-month prison sentence, Pet. App. 98a.

13. In November 2015, petitioners Thurman and Jones were indicted on drug charges. *See* Pet. App. 83a; *United States v. Thurman et al.*, Case No. 2:15-cr-20091, D.E.15 (D. Kan. Nov. 18, 2015). They both pleaded guilty pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *Id.*, D.E.70 at 1, 14-15; D.E.89 at 1, 10. Thurman received a 100-month prison sentence,

Pet. App. 83a, and Jones received a 45-month prison sentence, Case No. 2:15-cr-20091, D.E.107 (D. Kan. Jan. 8, 2018).

14. In February 2016, petitioners Zamudio, Villa-Valencia, and Torres-Ayala were indicted on drug charges. *See* Pet. App. 92a, 95a, 107a; *United States v. Zamudio*, Case No. 2:16-cr-20008, D.E.1 (D. Kan. Feb. 17, 2016). Each petitioner pleaded guilty pursuant to a "standard" plea agreement that included the identical conditional collateral-attack waiver. *Id.*, D.E.133 at 1, 10; D.E.149 at 1, 10; D.E.159 at 1, 9-10. Mr. Zamudio received a 78-month prison sentence, Pet. App. 92a, Mr. Villa-Valencia received an 81-month prison sentence, Pet. App. 95a, and Mr. Torres-Ayala received a 108-month prison sentence, Pet. App. 107a.

15. In March 2016, petitioners Guevara-Guevara and Vazquez-Saenzpardo were indicted on drug charges. See Pet. App. 61a, 110a; *United States v. Guevara-Guevara*, Case No. 2:16-cr-20017, D.E.9 (D. Kan. Mar. 17, 2016). They both pleaded guilty pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *Id.*, D.E.48 at 1, 11-12; D.E.44 at 1, 12. Mr. Vazquez-Saenzpardo received an 81-month prison sentence. Pet. App. 110a. Mr. Guevara-Guevara's sentence was reduced to time served, effective February 1, 2024, to be followed by a 5-year term of supervised release. *Id.*, D.E.120, 164.

16. In April 2016, petitioners Bobadilla-Oliva, Viveros-Avecias, Velazquez, Torres, and Zelaya-Pacheco were indicted on drug charges. *See* Pet. App. 26a, 29a, 101a, 104a, 113a; *United States v. Bobadilla-Oliva*, Case No. 2:16-cr-20031, D.E.68 (D. Kan. Apr. 13, 2016). Each petitioner pleaded guilty to a drug conspiracy pursuant to the

"standard" plea agreement that included the identical conditional collateral-attack waiver. *Bobadilla-Oliva et al.*, D.E.135 at 1, 7-8; D.E.137 at 1, 7-8; D.E.139 at 1, 7-8; D.E.141 at 1, 7-8; D.E.145 at 1, 7-8. Bobadilla-Oliva received a 130-month prison sentence, Pet. App. 26a, Viveros-Avecias received a 216-month prison sentence, Pet. App. 104a, Velazquez received a 168-month prison sentence, Pet. App. 101a, Torres received a 60-month prison sentence, *Bobadilla-Oliva et al.*, D.E.240, and Zelaya-Pacheco received a 130-month prison sentence, Pet. App. 113a.

17. In January 2017, petitioner Odegbaro pleaded guilty to a fraud count under 28 U.S.C. §§ 286 and 7206 pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 86a; *United States v. Odegbaro*, Case No. 2:16-cr-20001, D.E.81 at 1, 9-10 (D. Kan. Jan. 30, 2017). Ms. Odegbaro received a 75-month prison sentence. Pet. App. 86a.

18. In August 2013, petitioner Irvin pleaded guilty to carjacking under 18 U.S.C. § 2119 and a gun offense under 18 U.S.C. § 924(c) pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 44a; *United States v. Irvin*, Case No. 2:13-cr-20070, D.E.81 at 1, 9-10 (D. Kan. Sept. 2, 2015). The district court imposed a 207-month prison sentence. Pet. App. 44a.

19. In August 2016, petitioner Lolar pleaded guilty to a robbery charge under 18 U.S.C. § 1951 and a gun charge under 18 U.S.C. § 924(c) pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 50a; *United States v. Lolar*, Case No. 2:15-cr-20012, D.E.49 at 1, 7 (D. Kan. Aug. 4, 2016). The district court imposed a 240-month prison sentence. Pet. App. 50a.

20. In October 2013, petitioner Catrell pleaded guilty to various fraud offenses pursuant to the "standard" plea agreement that included the identical conditional collateral-attack waiver. *See* Pet. App. 41a; *United States v. Catrell*, Case No. 2:11-cr-20125, D.E.74 at 1, 6-7 (D. Kan. Oct. 15, 2013). The district court imposed a 132-month prison sentence. *Catrell*, D.E.86. Mr. Catrell appealed, and the Tenth Circuit vacated the sentence and remanded for resentencing. *United States v. Catrell*, 774 F.3d 666 (10th Cir. 2014) (Baldock, J., joined by McKay, J. and McHugh, J.). On remand, the district court reimposed the 132-month prison sentence. Pet. App. 41a. Mr. Catrell was the only petitioner who filed a direct appeal.

21. In May 2016, petitioners Dehaven and Mubane were charged with armed bank robbery under 18 U.S.C. § 2113(a). *See* Pet. App. 35a, 65a; *United States v. Dehaven*, Case No. 2:16-cr-20041, D.E.23 (D. Kan. May 12, 2016). They both pleaded guilty pursuant to the "standard" plea agreement that included a similar conditional collateral-attack waiver than the one discussed above. *Dehaven et al.*, D.E.61 at 1, 9-10; D.E.66 at 1, 9. This conditional collateral-attack waiver provided that the petitioners waived the right to appeal "except on grounds of"/"on any ground except claims of (1) ineffective assistance of counsel; (2) prosecutorial misconduct; or (3) illegal sentence." *Id.* The district court sentenced Dehaven to a 96-month prison sentence and Mubane to an 86-month prison sentence. Pet. App. 35a, 65a.

**B. The Pattern of Prosecutorial Misconduct**

As documented in the petition for a writ of certiorari filed in *Spaeth*, Supreme Court No. 23-6250 (and *Morris*, Supreme Court Case No. 23-6230), for untold years,

the United States Attorney's Office in Kansas engaged in a secret and "systematic practice of purposeful collection, retention, and exploitation" of confidential attorney-client communications. *United States v. Carter*, 429 F.Supp.3d 788, 849-54, 900 (D. Kan. 2019). This pattern of prosecutorial misconduct came to light in 2016, when federal prosecutors in Kansas initiated an investigation into a drug-smuggling operation at a private prison in Leavenworth, Kansas known as CoreCivic. *United States v. Orduno-Ramirez*, 61 F.4th 1263, 1266 (10th Cir. 2023).

During the investigation, prosecutors tried to exploit confidential attorney-client communications in their possession to bully a defense attorney into withdrawing from a case. *Carter*, 429 F.Supp.3d at 810; Pet. App. 20a. The district court learned about this and, in October 2016, appointed a special master to investigate. *Id.*

Although the prosecutors were ordered to assist in the investigation by returning any attorney-client communications and preserving documents related to the investigation, the prosecutors instead adopted a "strategy of delay, denial, and deflection." *United States v. Carter*, 995 F.3d 1222, 1229 (10th Cir. 2021) (quotations omitted). Specifically, the prosecutors refused to cooperate and instead: (1) deleted files from their computers; (2) refused to preserve computer hard drives; (3) delayed implementation of a litigation hold on relevant files; (4) refused to talk to the special master; (5) failed to produce documents; and (6) misrepresented to the district court whether they reviewed the attorney-client communications. *Orduno-Ramirez*, 61 F.4th at 1266-1267; *see also* Pet. App. 20a-21a. The petition for a writ of certiorari filed in *Spaeth* (and *Morris*) documents this obstructive conduct.

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

"In sum, the district court found that the [prosecutors] intruded into a large number of defendants' communications with their attorneys, with no legitimate law-enforcement purpose, and later tried to conceal these actions." *Id.* The prosecutors "committed 'systemic prosecutorial misconduct' with 'far reaching implications in scores of pending [] cases,' and exacerbated the harm by 'delay[ing] and obfuscat[ing] th[e] investigation' into its misconduct." *Id.* In reaching these conclusions, the district court found that at least four of the prosecutors lacked credibility. *United States v. Carter*, 995 F.3d 1214, 1216-1217 (10th Cir. 2021).

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

**C. The § 2255 Proceedings**

1. Each of the 32 petitioners in this joint petition filed counseled § 2255 motions, raising prosecutorial misconduct claims to their convictions and sentences based on a violation of their Sixth Amendment rights to attorney-client confidentiality. In four cases – *Catrell*, *Clifton*, *Irvin*, and *Villa-Valencia* – the misconduct claims were based on the above-discussed pattern of prosecutorial misconduct and the government's previously undisclosed possession of the petitioners' telephone calls with their attorneys while they were housed in pretrial custody at CoreCivic. Pet. App. 42a, 45a, 54a, 93a. In the other 29 cases, the misconduct claims were based on the above-discussed pattern of prosecutorial misconduct and the government's previously undisclosed possession of video recordings of attorney-client meetings between petitioners and their attorneys while the petitioners were housed in pretrial custody at CoreCivic. Pet. App. 24a, 27a, 30a, 33a, 36a, 39a, 48a, 51a, 57a, 60a, 63a, 66a, 69a,

72a, 75a, 78a, 81a, 84a, 87a, 90a, 96a, 99a, 102a, 105a, 108a, 111a, 114a, *In re: CCA Recordings 2255 Litigation*, Case No. 2:19-cv-02491, D.E.1161 at 4 (D. Kan. Sept. 22, 2023) (sealed Order in *Jones*).[3]

All of the calls and the meetings occurred before the petitioners pleaded guilty. *Id.*; Pet. App. 42a, 45a, 54a, 93a. The government obtained the calls before the petitioners pleaded guilty, but did not disclose this misconduct to the petitioners prior to their guilty pleas. Based on this misconduct, and in light of the egregious pattern of prosecutorial misconduct documented above, the petitioners each asked the district court to vacate their convictions with prejudice or reduce their sentences. *See generally* Pet. App. 23a-114a.

2. The district court dismissed each petition as foreclosed by the Tenth Circuit's decision in *Spaeth*, concluding that the petitioners' guilty pleas precluded the collateral attacks because any surreptitious pre-plea prosecutorial misconduct did not render the plea unknowing or involuntary. Pet. App. 23a-114a.

3. In *Spaeth*, a factually analogous case, the Tenth Circuit rejected a claim that the conditional collateral-attack waiver discussed above permitted the petitioner's Sixth Amendment misconduct claim. Pet. App. 11a. The Tenth Circuit held that *Tollett v. Henderson*, 411 U.S. 258, precluded a defendant from collaterally attacking a conviction based on pre-plea prosecutorial misconduct. Pet. App. 11a. *Tollett*

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

generally holds that a knowing and voluntary unconditional guilty plea forecloses a collateral attack to the conviction (or plea) based on an antecedent constitutional violation. 411 U.S. at 266-267. *Tollett*, however, had nothing to do with a conditional plea agreement that reserved the defendant's right to collaterally attack the conviction on specified grounds.

The Tenth Circuit nonetheless held in *Spaeth* that "[b]oth the government and defendants are bound by th[e] rule of law" in *Tollett*, and that the parties "could not … waive the *Tollett* standard." Pet. App. 11a. "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." Pet. App. 11a. The plea agreement could not "manufacture new rights for Spaeth beyond those provided by law." Pet. App. 11a.

In *Spaeth*, the Tenth Circuit alternatively held that the parties did not condition the plea on the defendant's ability to raise a prosecutorial misconduct claim premised on pre-plea prosecutorial misconduct. Pet. App. 11a. This was so because the Tenth Circuit interpreted the word "subsequent" in the conditional collateral-attack waiver to mean "post-plea-based," and so the phrase "any *subsequent* claims with regards to ineffective assistance or prosecutorial misconduct" reached only "*post-plea*-based" claims (i.e., ineffective assistance or prosecutorial misconduct committed after the plea). *Id.*

The Tenth Circuit further held – summarily and without citing any authority – that *Tollett* precluded a defendant from collaterally attacking a sentence based on

pre-plea surreptitious prosecutorial misconduct. Pet. App. 15a. According to the Tenth Circuit, *Tollett* does not permit a prisoner "to recast a pre-plea claim as an ongoing sentencing error." *Id.* When discussing the sentencing claim, the Tenth Circuit did not mention the conditional collateral-attack waiver within the plea agreement or discuss whether that waiver also precluded the challenge to the sentence. *Id.* The petition for a writ of certiorari in *Spaeth* is currently pending in this Court. *Spaeth*, Supreme Court No. 23-6250 (petition filed December 9, 2023; response requested and currently due February 8, 2024).

4. The petitioners appealed. The Tenth Circuit consolidated their appeals, summarily denied certificates of appealability, and dismissed the appeals because *Spaeth* foreclosed relief. Pet. App. 19a-22a. This timely joint petition follows.

## REASONS FOR GRANTING THE PETITION

### I. Review Is Necessary To Determine Whether *Tollett* Limits Plea Bargaining In Federal Courts.

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

*Tollett* was not about plea bargaining, however, nor has this Court ever held that *Tollett* limits plea bargaining in federal court. Yet the Tenth Circuit has held that *Tollett* precludes the government from conditioning a defendant's guilty plea on the

defendant's right to collaterally attack the conviction. Pet. App. 11a.[4] The Tenth Circuit's decision is inconsistent with this Court's precedent. It is also the first time that a federal appeals court has interpreted *Tollett* to limit plea bargaining in federal court. The decision has serious consequences for the federal plea bargaining system. Review is necessary.

### A. The Tenth Circuit's erroneous decision is inconsistent with this Court's precedent.

In *Tollett*, the defendant did not bargain for the right to collaterally attack the conviction. *See* 411 U.S. at 261. Thus, to bring a collateral attack, the defendant first had to void the plea. *Id.* at 266-267. *Tollett* did not hold that a defendant could not bargain for the right to collaterally attack the conviction, however. *Tollett* said nothing at all about plea bargaining.

It is well established that "'plea bargaining[]' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). It is also well established that a defendant can bargain for the right to appeal pre-plea constitutional violations without also attacking the plea as unknowing or involuntary. *See*, *e.g.*, Fed. R. Crim. P. 11(a)(2) (permitting the parties to enter pleas conditioned on the defendant's right to appeal the denial of a pre-trial motion); *see also Class v. United States*, 583 U.S. 174, 184 (2018) (noting that Rule 11(a)(2) is not "the *exclusive* procedure for a defendant to preserve a constitutional claim following a guilty plea," and permitting a constitutional challenge to the statute of conviction

[4] It is true that the Tenth Circuit recognized one exception to this rule – a claim of "ineffective assistance of counsel that causes the[] plea[] to be involuntary and unknowing." Pet. App. 11a. But this claim is "preserved as a matter of law." Pet. App. 17a. It is thus "unnecessary" to preserve it. *Id.*

despite the defendant's failure to preserve the issue for appeal); *Lefkowitz v. Newsome*, 420 U.S. 283, 291 (1975) (defendant could appeal the denial of a motion to suppress under a state statute even though the defendant did not otherwise reserve the right to appeal the denial).

This principle makes sense because a plea agreement is at bottom a contract between the government and the defendant. *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019). "[B]ecause each side may obtain advantages" from the agreement, "the agreement is no less voluntary than any other bargained-for exchange." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). "As with any type of contract," a plea agreement can "leav[e] many types of claims unwaived," including "claims based on prosecutorial misconduct." *Garza*, 139 S.Ct. at 744, 744 n.5. And "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262.

The Tenth Circuit's decision in *Spaeth* is at odds with all of this. According to the Tenth Circuit, "the government and defendants are bound by [*Tollett*'s] rule of law," which "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." Pet. App. 11a.[5] In support, the Tenth Circuit cited not just *Tollett*,

[5] It is not true that a defendant can only collaterally attack the plea's validity based on a claim of ineffective assistance of counsel. The Tenth Circuit has also held, for instance, that a collateral-attack waiver does not preclude a defendant's claim that he was incompetent when he entered his guilty plea. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009). This misunderstanding is not specifically relevant to this appeal, but it does reinforce the problematic reasoning adopted by the courts below.

but also *Brady v. United States*, 397 U.S. 742, 747-749 (1970), and *McMann v. Richardson*, 397 U.S. 759, 768-769 (1970). *Id.* But again, *Tollett* did not involve a plea conditioned on the defendant's right to collaterally attack the conviction. 411 U.S. at 261. Nor did *Brady* or *McMann*, each of which involved unconditional guilty pleas. *Brady*, 387 U.S. at 744; *McMann*, 397 U.S. at 761-763.

The Tenth Circuit's decision in *Spaeth* appears to be premised entirely on the mistaken belief (also shared by the district court) that Mr. Spaeth's guilty plea was "unconditional." Pet. App. 1a, 4a, 10a., 11a, 12a. The Tenth Circuit never explained why it viewed the plea in *Spaeth* as unconditional, and that conclusory determination is patently incorrect. By its plain terms, the plea agreement conditions the plea on Mr. Spaeth's right to collaterally attack the conviction via "any subsequent claims with regards to … prosecutorial misconduct." Pet. App. 10a. If that is not conditional language, we do not know what is. That language permits Mr. Spaeth to bring a subsequent collateral attack that raises a prosecutorial misconduct claim, which is precisely what he did. *See*, *e.g.*, *United States v. Sanchez-Guerrero*, 546 F.3d 328, 331 (5th Cir. 2008) (describing an "unconditional" plea as one containing "no manifestation of a reservation of appellate right") (citations omitted).

Of course, Mr. Spaeth's conditional plea is not rooted in Rule 11(a)(2). But that's beside the point. Rule 11(a)(2) is not the exclusive procedure for entering conditional pleas. *Class*, 583 U.S. at 184; *see*, *e.g.*, *Lefkowitz*, 420 U.S. at 291 (defendant's plea was conditioned on the right to appeal provided under a state statute). Plea agreements are contracts, and "[a]s with any type of contract," a plea agreement can

"leav[e] many types of claims unwaived," including "claims based on prosecutorial misconduct." *Garza*, 139 S.Ct. at 744, 744 n.5.

Indeed, Rule 11(a)(2) could not have applied here because that rule permits a party to condition a plea on the right *to appeal* the denial of a pretrial motion, which in turn is premised on *known* misconduct. But this case is about the right to *collaterally attack* (not appeal) a conviction based on *secretive* prosecutorial misconduct that was *unknown* until after the convictions became final. *See* Pet. App. 2a-3a. This is the precise situation envisioned by the conditional pleas at issue here: the ability to bring a collateral attack via "any subsequent claims with regards to … prosecutorial misconduct." *See* Pet. App. 10a.

When this Court decided *Tollett*, conditional guilty pleas were not universally accepted. *See* Note, Conditional Guilty Pleas, 93 Har. L. Rev. 564, 565-566 & n.10 & n.11 (Jan. 1980). Without a conditional plea in *Tollett* (and without any established practice of such pleas), *Tollett* was premised on the idea that a "traditional" guilty plea (i.e., one that did not include a condition) provided the government a "legitimate expectation of finality." *Lefkowitz*, 420 U.S. at 289-290; Fed. R. Crim. P. 11, Advisory Committee Notes to 1983 Amendments (adding Rule 11(a)(2)). But that expectation of finality doesn't exist when the government agrees to premise the plea on the defendant's right to bring a collateral attack raising subsequent claims of prosecutorial misconduct, and the defendant does just that, as happened here. As in *Lefkowitz*, *Tollett* does not apply here because Mr. Spaeth's plea "carried with it the guarantee that judicial review of his [reserved] constitutional claims would continue

to be available to him." 420 U.S. at 290. *Spaeth* was wrongly decided, and this Court should grant the petition in *Spaeth* or this joint petition.

### B. The Tenth Circuit's decision creates a conflict in the Circuits.

In *Spaeth*, the Tenth Circuit cited no precedent that actually supports its interpretation of *Tollett*. Pet. App. 10a-11a.[6] We haven't found any cases either. The reality is that, before the Tenth Circuit's decision, it was universally accepted that the government and defendants could condition pleas without incorporating *Tollett* into the conditional plea. That's still the rule everywhere but the Tenth Circuit. Review is necessary.

## II. Review Is Necessary To Address The Tenth Circuit's Erroneous Interpretation Of The Plea Agreements.

### A. It is critical that this Court review this sufficiently connected issue.

It is critically important that this Court grant this petition to address the first question presented. If this Court were to grant certiorari on the first question and reverse the Tenth Circuit, however, the petitioners would likely not be eligible for any relief because the Tenth Circuit alternatively held in *Spaeth* that the defendant did not reserve the right to raise a pre-plea-based prosecutorial misconduct claim in the plea agreement. Pet. App. 11a. Thus, it is necessary to grant certiorari to review that decision as well. As Justice Scalia explained, when this Court grants certiorari to address a critically important question, it "also often grant[s] certiorari on attendant questions that are not independently 'certworthy,' but that are sufficiently connected

[6] The district court issued conflicting opinions on this issue, first concluding that the collateral-attack waiver permitted challenges to surreptitious prosecutorial misconduct that occurred pre-plea, *United States v. Phommaseng*, 2019 WL 3801720, at *6 (D. Kan. 2019), before reversing course.

to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 620 (2015) (Scalia, J., concurring in part and dissenting in part). The Tenth Circuit's alternative holding about the meaning of the plea agreement is a "sufficiently connected" question that this Court should review.

### B. The Tenth Circuit's interpretation of the plea agreements conflict with blackletter law and the agreements' plain terms.

"[P]lea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009). The lower courts generally construe plea agreements "according to contract principles and what the defendant reasonably understood when he entered his plea." *United States v. Lonjose*, 663 F.3d 1292, 1297 (10th Cir. 2011); *United States v. Miller*, 833 F.3d 274, 284 (3d Cir. 2016) (same); *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004) (same); *Stern v. Shalala*, 14 F.3d 148, 150 (2d Cir. 1994) (same); *United States v. Charles*, 581 F.3d 927, 931 (9th Cir. 2009) (same). "The 'most persuasive evidence' of what a defendant 'reasonably appreciated as his bargain is found in the plain language of the court-approved agreement.'" *United States v. Fields*, 763 F.3d 443, 453 (6th Cir. 2014).

Any ambiguities are construed against the government. *United States v. Rubbo*, 948 F.3d 1266, 1268 (10th Cir. 2020); *Copeland*, 381 F.3d at 1106 (same); *Charles*, 581 F.3d at 931 (same); *see also United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005) ("we construe plea agreements strictly against the government and do not 'hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness'"). "[B]ecause plea bargains require defendants to waive

fundamental constitutional rights, prosecutors are held to meticulous standards of performance." *Vaval*, 404 F.3d at 152.

The Tenth Circuit has not honored these principles. The plain language of the petitioners' plea agreements permit them to collaterally attack their convictions via "any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." *See* Pet. App. 10a. Under the agreements' plain terms, the word "subsequent" modifies "claims," and, thus, permits the petitioners to file "post-plea" (i.e., subsequent) claims alleging prosecutorial misconduct. And the petitioners did just that: they brought post-plea collateral attacks alleging surreptitious prosecutorial misconduct into confidential attorney-client communications.

The Tenth Circuit held otherwise in *Spaeth* by altering the structure of the sentence. The Tenth Circuit interpreted "subsequent" not to mean "post-plea," but instead "post-plea-based," effectively rewriting the language to read: "any subsequent claims with regards to *subsequent* ineffective assistance of counsel or prosecutorial misconduct." Pet. App. 11a (emphasis added). But "subsequent" does not modify "ineffective assistance of counsel or prosecutorial misconduct"; it modifies "claims." As written, the plea agreements permit the petitioners to raise both pre- and post-plea-based claims of prosecutorial misconduct (and ineffective assistance).

Nor does any other portion of the plea agreements restrict the petitioners' right to collaterally attack the convictions based only on "post-plea-based" ineffective assistance of counsel or prosecutorial misconduct. Rather, the plea agreement broadly permits the petitioners to raise "any" such "subsequent claims." *See*, *e.g.*, *Ali v.*

*Federal Bureau of Prisons*, 552 U.S. 214, 216, 219 (2008) ("read naturally, the word 'any' has an expansive meaning"); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018) ("[i]n this context, as in so many others, 'any' means 'every'").

The Tenth Circuit also claimed that a contrary reading – in which the agreement "preserved *pre-plea*-based claims of ineffective assistance of counsel" – would render "the word 'subsequent' … superfluous." Pet. App. 17 n.19. But that conclusion is based on the false premise that "subsequent" means "post-plea-based," rather than "post-plea." When the language is given its plain, ordinary meaning, the word "subsequent" is not superfluous, but instead limits the petitioners' rights to bring a collateral attack in one significant respect: they cannot raise in a collateral attack (or on direct appeal) a *prior* claim of ineffective assistance of counsel or prosecutorial misconduct. For instance, if a petitioner had moved to dismiss the indictment based on a *Brady* violation, but that motion was denied, the conditional language wouldn't reserve the right to raise that *prior Brady* claim in a collateral attack (or on direct appeal).

The Tenth Circuit also cryptically noted that it would be "unnecessary to preserve pre-plea ineffective-assistance claims rendering a guilty plea involuntary and unknowing" because "[t]hose claims are preserved as a matter of law." Pet. App. 17 n.19 (citing *Cockerham*). We do not disagree with this statement, but we don't understand the point of it. The statement appears to presume that the agreements' references to "ineffective assistance of counsel" claims is limited to "ineffective-assistance claims rendering a guilty plea involuntary and unknowing." *Id.* But that is not what the relevant portions of the plea agreements say. The relevant portions

refer to "any subsequent claims with regards to ineffective assistance of counsel." There is no plausible basis to give that language a limiting construction, especially when the agreements expressly permit petitioners to raise "ineffective-assistance claims rendering a guilty plea involuntary and unknowing" elsewhere within the agreement. *See* Pet. App. 10a (plea agreement language permitting claims under *Cockerham*). By limiting the conditional language to *Cockerham* claims in *Spaeth*, it was the Tenth Circuit who rendered other portions of the agreements superfluous.

Moreover, this discussion of the ineffective-assistance portion of the relevant language is beside the point because the petitioners' collateral attack were based on prosecutorial misconduct. Even if the Tenth Circuit's superfluity rationale with respect to ineffective-assistance-of-counsel claims made sense, and even if the ineffective-assistance portions of the provisions must be given a limited reach, none of that would apply to "any subsequent claims with regards to … prosecutorial misconduct." Prosecutorial misconduct claims are not mentioned anywhere else within the plea agreement, and those claims are not "preserved as a matter of law."

It is telling that the Tenth Circuit had earlier adopted our construction of the conditional language in several unpublished opinions, interpreting that language to permit defendants to raise "'any subsequent [IAC or misconduct] claims,' not just *Cockerham* ineffective-assistance claims." *United States v. Wilson*, 820 F. App'x 763, 768 n.5 (10th Cir. July 14, 2020); *United States v. Antoine Beasley*, 820 Fed. App'x 754, 759 n.6 (10th Cir. July 14, 2020); *United States v. Gerald Beasley*, 816 F. App'x 291, 295 n.6 (10th Cir. July 14, 2020). In *Wilson*, the Tenth Circuit noted that a

limited interpretation of the conditional language would distort its "scope by relying on earlier [*Cockerham*] language in the waiver to alter its meaning—the exception explicitly states that it takes effect '[n]otwithstanding the foregoing waivers[.]'" 820 F. App'x at 768 n.5.

District courts in Kansas have also read the relevant language this way, thus putting prosecutors on notice that the conditional language would permit defendants to raise subsequent pre-plea prosecutorial misconduct claims. *See*, *e.g.*, *United States v. Chavez*, 2016 WL 2989149, at *5 n.6 (D. Kan. May 24, 2016) (calling the prosecutor's elision of the "any subsequent claims" language "particularly egregious"); *United States v. Smith*, 2016 WL 2958454, at *2 (D. Kan. May 23, 2016) (noting that the prosecutor "ignores the final sentence of the waiver"); *United States v. Drayton*, 2013 WL 789027, at *4 (D. Kan. Mar. 1, 2013) (same); *United States v. Cereceres-Morales*, 2012 WL 4049801, at *1 n.2 (D. Kan. Sept. 13, 2012) (same).

Knowing all this, it is impossible to construe the plea agreements against petitioners. Considering the competing decisions from the Tenth Circuit and the district courts, the relevant language was at most ambiguous, and that ambiguity is construed against the government. Because the Tenth Circuit reached a patently incorrect result on this sufficiently connected issue, this Court should grant this petition on questions one and two in *Spaeth* or here and reverse the district court.

## III. The Tenth Circuit's Extension Of *Tollett* To Preclude Sentencing Claims Is Unsupported, Unwarranted, And Erroneous.

Apart from the collateral attack to the conviction, the Tenth Circuit also held in *Spaeth* that *Tollett* precludes a collateral attack to the sentence based on a pre-plea

constitutional violation. Pet. App. 15a. That holding is not an application of *Tollett*, but an unsupported, unwarranted, and erroneous extension of it.[7]

**A. The Tenth Circuit Erred.**

1. In *Tollett*, this Court held that the defendant could not "set aside" or "vacate[]" his plea/conviction because of a grand-jury violation without also establishing that the plea itself was unknowing or involuntary. 411 U.S. at 259, 267-269. This was so because the defendant's knowing and voluntary admission of guilt made irrelevant to the plea any preceding constitutional violation. *Id.* at 267. The knowing and voluntary plea "represents a break in the chain of events [that] preceded it." *Id.*

2. This Court has consistently described *Tollett* as involving a challenge to the plea/conviction. *See*, *e.g.*, *United States v. Broce*, 488 U.S. 563, 573 (1989) (describing Tollett's habeas petition as "contending that his plea should be set aside"); *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (describing *Tollett* as a challenge "to the validity of a state criminal conviction"); *Mabry*, 467 U.S. at 508, 508 n.7 (citing *Tollett* for the proposition that "a voluntary and intelligent plea of guilty . . . may not be collaterally attacked"); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (similar); *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005) (similar); *see also Gosa v. Mayden*, 413 U.S. 665, 716 (1973) (Douglas, J., concurring) ("*Tollett* involved a collateral attack upon the validity of a guilty plea."); *Lefkowitz*, 420 U.S. at 299 (White, J., dissenting) ("under *Tollett* itself, federal constitutional principles simply preclude the setting aside of a state conviction

[7] This question is also pending in *Morris*, Supreme Court No. 23-6230. If this Court grants the Petition in *Morris*, it could hold this petition pending the disposition in that case. Unlike *Morris*, however, but like *Spaeth*, this case involves a conditional collateral-attack waiver. For the same reasons discussed in Section II, this conditional collateral-attack waiver permits a challenge to the sentence.

… ."); *Class*, 583 U.S. at 190 (Alito, J., dissenting) (describing *Tollett* as holding that "a defendant who pleaded guilty could not attack his conviction"). This Court has never described *Tollett* as a bar to a collateral attack to a sentence.

3. The Tenth Circuit in *Spaeth* recognized that *Tollett* does not preclude collateral attacks to all sentences. Pet. App. 15a (conceding that a defendant could "allege[] instances of post-plea intrusions into his attorney-client conversations"). Yet, the Tenth Circuit extended *Tollett* to preclude all collateral attacks to sentences based on pre-plea violations in a "brief[]" two-paragraph analysis that lacked a case citation. Pet. App. 15a. The Tenth Circuit acknowledged that "*Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional conduct on a defendant's *conviction*." Pet. App. 15a (emphasis added). It then determined that "[n]o reason exist[ed] … to hold that a sunken pre-plea constitutional violation somehow resurfaces" at *sentencing*. *Id.* Rather, "pre-plea conduct falls under *Tollett*'s ambit no matter if the effect of that conduct continues through *sentencing*." *Id.* (emphasis added). This unsupported reasoning is unsound for two overarching reasons.

First, the Tenth Circuit adopted a categorical rule, prohibiting any post-plea collateral attack to a sentence based on a pre-plea constitutional violation. Pet. App. 15a. In the Tenth Circuit, any "pre-plea conduct falls under *Tollett*'s ambit," even if "the effect of that conduct continues through sentencing." *Id.* But *Tollett* itself is not a categorical rule. *Class*, 583 U.S. at 178-182. And because *Tollett* is not a categorical rule in the plea/conviction context, it makes little sense to extend that rule categorically to the sentencing context.

Second, the Tenth Circuit's reasoning is a non sequitur. The Tenth Circuit premised its reasoning on the fact that "*Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional [pre-plea] conduct on a defendant's *conviction*." Pet. App. 15a (emphasis added). From this premise, the Tenth Circuit concluded that *Tollett* precluded a prisoner from collaterally attacking his *sentence* based on pre-plea violations. *Id.* That conclusion obviously does not follow from the premise because the *conviction* is different from the *sentence*.

At the conviction (or guilt) phase, the question is whether the defendant committed the charged crime. *Williams v. New York*, 337 U.S. 241, 246 (1949). When a defendant has "solemnly admitted in open court that he is in fact guilty of the offense with which he is charged," and that admission is done knowingly and voluntarily, the question of the defendant's guilt is definitively answered. *Tollett*, 411 U.S. at 266-69. "[T]he validity of th[e] conviction cannot be affected by" information obtained from a pre-plea violation "because the conviction does not rest in any way" on that information. *Haring*, 462 U.S. at 321. Rather, the conviction rests solely on the guilty plea. And thus the guilty plea itself renders the pre-plea constitutional violation irrelevant to the conviction.

At sentencing, however, the inquiry is materially different and has nothing to do with whether events occurred prior to or after the guilty plea. The unlawful "[i]mposition of sentence … is not an 'antecedent constitutional violation,' since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense

with which he is charged." *Blackledge v. Perry*, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting).

This distinction between the guilt phase and the sentencing phase is well established. "In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused." *Williams v. New York*, 337 U.S. 241, 246 (1949). "A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined." *Id.* at 247.

Sentencing in federal court is a holistic inquiry that turns on historical facts and circumstances that both predate and postdate the guilty plea. *See*, *e.g.*, 18 U.S.C. § 3553(a)(1) (requiring courts to consider "the nature and circumstances of the offense" and the "history and characteristics of the defendant"); 18 U.S.C. § 3661 (similar); USSG § 1B1.3 (providing that a defendant's guidelines range turns not just on the offense conduct, but also on conduct relevant to the offense); *see also Pepper v. United States*, 562 U.S. 476, 490 (2011) (district courts may consider post-sentencing conduct at a second sentencing hearing).

It is thus firmly established that defendants in federal court are not sentenced based solely on the charged offense conduct. In the federal system, sentences are largely driven by the defendant's guidelines range. *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018). In turn, the guidelines are not premised on a "charge offense" system, but instead on a "real offense" system which turns on "the actual conduct in

which the defendant engaged regardless of the charges for which he was indicted or convicted." USSG, Ch. 1, Pt.A § 1(4); *see also* USSG § 1B1.3 (defining relevant conduct under the guidelines).

Thus, while the defendant's admission of guilt is sufficient on its own to answer the relevant question at the guilt phase (did the defendant commit the offense), it is not sufficient to answer the relevant sentencing question (what sentence is sufficient, but not greater than necessary, to serve the statutory purposes of sentencing). And because it is not sufficient on its own to answer the relevant question at the sentencing phase, it doesn't follow that *Tollett*'s guilt-phase rule extends to the sentencing phase. The "gap" between the Tenth Circuit's premise and its conclusion is "painfully wide." Irving M. Copi et al., *Introduction to Logic* 112 (15th ed. 2019).

The Tenth Circuit has never denied that information obtained from post-plea constitutional violations may require the vacatur of a sentence on collateral review. Just the opposite. In *Orduno-Ramirez*, 61 F.4th at 1276-1277, the Tenth Circuit held that a defendant could collaterally attack a sentence based on post-plea prosecutorial misconduct into confidential attorney-client communications. *See also Bradshaw*, 545 U.S. at 186-188 (remanding for the lower courts to consider whether the prosecutor's conduct required sentencing relief after determining that the prosecutor's conduct could not void the guilty plea). There is no rational reason why a collateral attack to the sentence should turn on the pre-plea v. post-plea difference. Indeed, as Justice Rehnquist once explained, the *violation* functionally occurs at sentencing, regardless

when the underlying unconstitutional *conduct* occurred. *Blackledge*, 417 U.S. at 37 (Rehnquist, J., dissenting).

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

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

**B. The Tenth Circuit's extension of *Tollett* creates a conflict.**

In *Spaeth*, the Tenth Circuit extended *Tollett* in a perfunctory two-paragraph analysis that lacked any supporting authority. Pet. App. 15a. 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.

The Tenth Circuit's decision also conflicts with 28 U.S.C. § 2555(a). Under that provision, federal prisoners have a broad statutory right to collaterally attack their convictions and sentences. 28 U.S.C. § 2255(a). Section 2255(a) broadly provides that a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the

sentence." 28 U.S.C. § 2255(a). Other than a requirement of legal error in the original proceedings, this jurisdiction "is otherwise sweeping in its breadth." *Withrow v. Williams*, 507 U.S. 680, 715 (1993) (Scalia, J., concurring). "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Id.* at 715-16 (quoting *Ex parte McCardle*, 73 U.S. 318, 325–326 (1868)).

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

The only apparent way around this limitation is a successful collateral attack to the plea. Pet. App. 15a. But what if the defendant doesn't want to attack the plea? Section 2255(a)'s plain terms do not require a defendant to challenge the conviction in order to challenge the sentence. Nor has this Court ever interpreted the statute in such an atextual and odd way. But the Tenth Circuit has. And that interpretation wreaks havoc on the ability to seek federal habeas relief. Review is necessary.

## IV. It Is Critically Important To The Administration Of The Federal Criminal Justice System That This Court Resolve The Questions Presented And Reverse The Tenth Circuit.

1. This Court often grants certiorari when a lower court decision implicates the contours of the plea-stage or plea-bargaining process. *See*, *e.g.*, *Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012); *see also* Pet. App. 5a-9a (discussing several other cases). After all, roughly ninety-seven percent of federal defendants plead guilty. *Frye*, 566 U.S. at 143. Plea bargaining "'is not some adjunct to the criminal justice system; it *is* the criminal justice system.'" *Id.* at 144. "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.*

This Court has recognized that the "sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips." *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995); *see also Shutte v. Thompson*, 82 U.S. 151, 159 (1873) ("[a] party may waive any provision, either of a contract or of a statute, intended for his benefit"). The Tenth Circuit's decision in *Spaeth*does the opposite. It removes from the negotiation table the prosecutor's ability to condition a plea on the defendant's right to bring a collateral attack to remedy unknown prosecutorial misconduct or ineffective assistance of counsel that does not invalidate the plea. But that ability is vital for two reasons. First, it sends a clear signal to the defendant that the prosecutor has honored her ethical obligations and hasn't cheated. Second, it sends a similarly clear signal to the defendant that his attorney has done his level best and has

provided competent representation. If either of those things turn out to be untrue, the defendant has a remedy.

These ideals are memorialized in two significant places. The Kansas Bar's Ethics Opinion No. 17-02 states that it is an ethical violation "for an attorney to request, or for a prosecutor to demand, that a criminal defendant release his right to claim ineffective advice of counsel or prosecutorial misconduct as part of a plea agreement."[8]

> In negotiating a plea agreement, it is improper for a defense attorney to request, counsel, advise, or recommend that his criminal defendant client release or waive the client's right to assert a claim that the defense attorney's representation has been ineffective or departed from the applicable standard of care, or that the prosecutor committed prosecutorial misconduct. In the same setting, it is improper for a prosecutor to request or demand that a criminal defendant waive, release or forego the right to claim that the defense attorney's representation has been ineffective or departed from the standard of care or to waive, release or forego the right to claim misconduct on the part of the prosecutor.

*Id.*

Similarly, the Department of Justice itself has a policy directing federal prosecutors not to "seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel … made on collateral attack."[9]

Neither of these sources limit such claims to those related to ineffective assistance of counsel that renders the plea invalid. Thus, as it stands now, with *Speath* on the books, every federal prosecutor and criminal defense attorney in Kansas who signs an agreement with the "standard" conditional language has committed an ethical

[8] KBA Legal Ethics Opinion No. 17-02, available at https://ks.fd.org/sites/ks/files/media-library/attorneys-forms-and-procedures/procedures-guidelines-miscellanea/kba-opinion-17-02-ethics-plea-waivers.pdf

[9] Memorandum for Deputy Attorney General James M. Cole re Department Policy on Waivers of Claims of Ineffective Assistance of Counsel, available at https://www.justice.gov/file/70111/download.

violation (and every prosecutor has violated DOJ policy). That includes the criminal defense attorneys and the prosecutors in petitioners' cases. For this reason, and in light of the importance of plea bargaining in the federal system, it is critically important that this Court grant this petition and reverse the Tenth Circuit's decision.

2. The Tenth Circuit's extension of *Tollett* in the sentencing context also trivializes the outsized role sentencing plays in the federal criminal justice system. Most federal defendants do not proceed to trial, but instead plead guilty with the hope of receiving leniency at sentencing. *Frye*, 566 U.S. at 143-145. To require the defendant to attempt to vacate the plea to challenge the sentence, as the Tenth Circuit now requires, is nonsensical and unresponsive to the constitutional violation.

The government cannot seriously dispute this. When a prosecutor was caught violating a defendant's Sixth Amendment right to attorney-client confidentiality in cases similar to petitioners' cases, the government resolved the prosecutorial misconduct claims by agreeing to time-served sentences. *United States v. Reulet*, Case No. 5:14-cr-40005-DDC, D.E.1260 (D. Kan. Oct. 19, 2018); *United States v. Herrera-Zamora*, Case No. 2:14-cr-20049, D.E.198 (D. Kan. Dec. 1, 2017); *United States v. Dertinger*, Case No. 2:14-cr-20067, D.E.558 (D. Kan. Oct. 5, 2017); *United States v. Huff*, 2:14-cr-20067, D.E.481 (D. Kan. Mar. 7, 2017); *United States v. Wood*, 2:14-cr-20065, D.E.254 (D. Kan. July 14, 2021). It did not require the defendants to attempt to vacate the pleas or proceed to trial. A lower sentence was sensible in those cases, just as it would be in these cases. Indeed, the government was initially willing to end the mass litigation by agreeing to sentence reductions for still-incarcerated

defendants. *Carter*, 429 F.Supp.3d at 805. The Tenth Circuit should not have removed this sensible remedy from the law. A sentencing remedy for a sentencing violation is proper, regardless when the underlying misconduct occurred.

3. Finally, the Tenth Circuit's decision diminishes the vital role the federal courts play in guarding against prosecutorial misconduct. The Tenth Circuit's extension of *Tollett* in *Spaeth* seriously hampers a federal court's ability to correct pre-plea constitutional violations. If the government conditions a plea agreement on the right to correct prosecutorial misconduct, courts have no business striking that part of the bargain from the agreement. Nor should courts draw arbitrary lines to avoid remedying pre-plea prosecutorial misconduct that continues through sentencing.

Prosecutorial misconduct into confidential attorney-client communications is "government intrusion of the grossest kind." *Hoffa v. United States*, 385 U.S. 293, 306 (1966). A pattern of such misconduct (like the pattern that occurred here) should even justify a remedy absent individualized prejudice. *United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) ("a pattern of recurring violations … might warrant the imposition of a more extreme remedy in order to deter future lawlessness"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988) (similar).

How, then, can the Tenth Circuit effectively eliminate any bargained-for collateral attack to such a pattern of pre-plea misconduct? Prosecutors who cheat (whether pre-plea or post-plea) undermine the credibility of the system, which presupposes two equal opponents acting within a clear set of rules. Yet, according to the Tenth Circuit, an aggrieved defendant who bargained for the right to collaterally attack the

conviction based on any prosecutorial misconduct can't get through the courthouse doors. Nor can such a defendant challenge the sentence without first being willing and able to vacate the plea first. Those rules, which effectively shield surreptitious pre-plea prosecutorial misconduct from review, do nothing but improperly encourage prosecutors to commit such misconduct. It also improperly encourages prosecutors to enter into unenforceable bargains to induce guilty pleas.

This Court's intervention is critical given the prosecutors' years-long obstructive misconduct below. *See Carter*, 429 F.Supp.3d at 816-900. The Tenth Circuit has twice condemned the misconduct. Pet. App. 1a; *Orduno-Ramirez*, 61 F.4th at 1267, 1275. But condemnation while closing the courthouse doors is an empty gesture. "Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." *United States v. Antonelli Fireworks*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

This Court should grant this petition, reverse the Tenth Circuit, and hold that a defendant (like petitioners here) who conditions a guilty plea on the right to bring any subsequent claim of prosecutorial misconduct may still collaterally attack the conviction and sentence based on pre-plea surreptitious prosecutorial misconduct into confidential attorney-client communications.

## CONCLUSION

This Court should grant the petition in *Spaeth* and hold this joint petition pending the disposition in that case (or *Morris*). If not, this Court should grant this petition.

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