

IN THE SUPREME COURT OF THE UNITED STATES

ADRIAN AYALA-GARCIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provision of petitioners' plea agreements preserving their rights to raise ineffective assistance of counsel or prosecutorial misconduct claims created an exception to the rule, articulated by this Court in Tollett v. Henderson, 411 U.S. 258, 267 (1973), that an unconditional guilty plea precludes a criminal defendant from raising independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

2. Whether petitioners' guilty pleas relinquished their right to collaterally attack their sentences based on an alleged deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

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No. 23-6621

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-22a) is not published in the Federal Reporter but is available at 2023 WL 7153220.

In petitioner Ayala-Garcia's case, the order of the district court (Pet. App. 23a-25a) is unreported but is available at 2023 WL 5432996.

In petitioner Bobadilla-Oliva's case, the order of the district court (Pet. App. 26a-28a) is unreported but is available at 2023 WL 5434691.

In petitioner Bradley's case, the order of the district court (Pet. App. 38a-40a) is unreported but is available at 2023 WL 5434694.

In petitioner Campbell's case, the order of the district court (Pet. App. 32a-34a) is unreported but is available at 2023 WL 5434693.

In petitioner Catrell's case, the order of the district court (Pet. App. 41a-43a) is unreported but is available at 2023 WL 5577178.

In petitioner Clifton's case, the order of the district court (Pet. App. 53a-55a) is unreported but is available at 2023 WL 5577107.

In petitioner Dehaven's case, the order of the district court (Pet. App. 35a-37a) is unreported but is available at 2023 WL 5434692.

In petitioner Franco's case, the order of the district court (Pet. App. 47a-49a) is unreported but is available at 2023 WL 5434697.

In petitioner Guevara-Guevara's case, the order of the district court (Pet. App. 62a-64a) is unreported but is available at 2023 WL 5613336.

In petitioner Irvin's case, the order of the district court (Pet. App. 44a-46a) is unreported but is available at 2023 WL 5577267.

In petitioner Jackson's case, the order of the district court (Pet. App. 59a-61a) is unreported but is available at 2023 WL 5434696.

In petitioner Lolar's case, the order of the district court (Pet. App. 50a-52a) is unreported but is available at 2023 WL 5508270.

In petitioner Mebane's case, the order of the district court (Pet. App. 65a-67a) is unreported but is available at 2023 WL 5508070.

In petitioner Montes-Medina's case, the order of the district court (Pet. App. 56a-58a) is unreported but is available at 2023 WL 5507855.

In petitioner Nunez-Aguilar's case, the order of the district court (Pet. App. 68a-70a) is unreported but is available at 2023 WL 5508422.

In petitioner Odegbaro's case, the order of the district court (Pet. App. 86a-88a) is unreported but is available at 2023 WL 5508259.

In petitioner Ponce-Serrano's case, the order of the district court (Pet. App. 74a-76a) is unreported but is available at 2023 WL 5508460.

In petitioner Rodriguez-Torres's case, the order of the district court (Pet. App. 71a-73a) is unreported but is available at 2023 WL 5508447.

In petitioner Soriano's case, the order of the district court (Pet. App. 80a-82a) is unreported but is available at 2023 WL 5508123.

In petitioner Soto-Camargo's case, the order of the district court (Pet. App. 77a-79a) is unreported but is available at 2023 WL 5508410.

In petitioner Thurman's case, the order of the district court (Pet. App. 83a-85a) is unreported but is available at 2023 WL 5512126.

In petitioner Torres's case, the order of the district court (Pet. App. 29a-32a) is unreported but is available at 2023 WL 5576616.

In petitioner Torres-Ayala's case, the order of the district court (Pet. App. 107a-109a) is unreported but is available at 2023 WL 5512083.

In petitioner Vazquez-Saenzpardo's case, the order of the district court (Pet. App. 110a-112a) is unreported but is available at 2023 WL 5512122.

In petitioner Velazquez's case, the order of the district court (Pet. App. 101a-103a) is unreported but is available at 2023 WL 5512106.

In petitioner Vera's case, the order of the district court (Pet. App. 98a-100a) is unreported but is available at 2023 WL 5533571.

In petitioner Villa-Valencia's case, the order of the district court (Pet. App. 92a-94a) is unreported but is available at 2023 WL 5577238.

In petitioner Viveros-Avecias's case, the order of the district court (Pet. App. 104a-106a) is unreported but is available at 2023 WL 5533559.

In petitioner Younger's case, the order of the district court (Pet. App. 89a-91a) is unreported but is available at 2023 WL 5533563.

In petitioner Zamudio's case, the order of the district court (Pet. App. 95a-97a) is unreported but is available at 2023 WL 5533554.

In petitioner Zelaya-Pacheco's case, the order of the district court (Pet. App. 113a-115a) is unreported but is available at 2023 WL 5533567.

A prior order of the district court (116a-148a) is unreported but is available at 2021 WL 150989.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2023. The petition for a writ of certiorari was filed on January 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the District of Kansas, petitioners were convicted of federal

offenses and sentenced to terms of imprisonment. See Pet. App. 23a-115a. After their convictions became final, petitioners filed motions to vacate, set aside, or correct their sentences under 28 U.S.C. 2255. See Pet. App. 23a-115a. The district court dismissed the motions. Ibid. The court of appeals denied a certificate of appealability. Id. at 19a-22a.

1. Petitioners were charged by a federal grand jury with committing various federal offenses. See Pet. App. 23a-115a. They were detained at Corrections Corporation of America (CCA), a detention facility in Leavenworth, Kansas. Ibid. In the spring of 2016, the U.S. Attorney's Office for the District of Kansas began investigating the involvement of CCA inmates and employees in a drug-smuggling conspiracy at the facility, in a case that became known as United States v. Carter, 429 F. Supp. 3d 788 (D. Kan. 2019). See Pet. App. 1a-2a, 23a-115a, 116a. The investigation ultimately culminated in an indictment charging certain inmates with conspiring to distribute controlled substances in the prison. Carter, 429 F. Supp. 3d at 799.

Through a grand jury subpoena in the Carter investigation, the government obtained soundless video footage from CCA surveillance cameras, which included footage capturing attorney-visitation rooms, and recordings of outgoing telephone calls placed by detainees. Carter, 429 F. Supp. 3d at 801. With respect to petitioners in particular, the government obtained either soundless videos depicting their interactions with counsel or

recordings of calls that they made to their counsel. See Pet. App. 23a-115a. In August 2016, the district court issued a "clawback" order, impounding all video and audio recordings of attorney-client communications in the government's possession. Carter, 429 F. Supp. 3d at 810; see Pet. App. 2a.

2. Petitioners each entered into plea agreements with the government pursuant to Fed. R. Crim. P. 11(c)(1)(C), under which the district court is bound to impose an agreed-upon sentence (or sentence within an agreed-upon range) if it accepts the plea. See Pet. App. 23a-115a. All but two of petitioners' plea agreements contained a paragraph entitled "Waiver of Appeal and Collateral Attack" that began with a blanket waiver of petitioners' rights to appeal or collaterally attack their sentences and ended with a limitation that states, in what is referred to as the "carve-out" provision, that "the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." Pet. App. 10a (emphasis omitted).¹

¹ In full, the "Waiver of Appeal and Collateral Attack" paragraph reads as follows:

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 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.

Pet. App. 10a (emphasis omitted); see 16-cr-40002 Docket entry No. 20, at 11-12 (D. Kan. Aug. 8, 2016); 16-cr-40006 Docket entry No. 15, at 11-12 (D. Kan. May 23, 2016); 15-cr-20038 Docket entry No. 79, 7 (D. Kan. July 29, 2016); 15-cr-20020 Docket entry No. 308, at 15-16 (D. Kan. July 27, 2016); 16-cr-20030 Docket entry No. 14, at 7-8 (D. Kan. Aug. 2, 2016); 16-cr-40012 Docket entry No. 35, at 10-11 (D. Kan. Aug. 8, 2016); 14-cr-40129 Docket entry No. 465, at 7-8 (D. Kan. Oct. 17, 2016); 16-cr-20014 Docket entry No. 73, at 8-9 (D. Kan. Mar. 13, 2017); 16-cr-20011 Docket entry No. 37, at 10 (D. Kan. May 1, 2017); 15-cr-20020 Docket entry No. 425, at 13-14 (D. Kan. June 20, 2017); 15-cr-20061 Docket entry No. 90, 13-14 (D. Kan. June 27, 2016); 15-cr-20061 Docket entry No. 129, at 17-18 (D. Kan. Dec. 20, 2016); 15-cr-20061 Docket entry No. 100, at 12 (D. Kan. Aug. 11, 2016); 15-cr-20091 Docket entry No. 70, at 14-15 (D. Kan. Mar. 17, 2017); 15-cr-20091 Docket entry No. 89, 10 (D. Kan. May 23, 2017); 16-cr-20008 Docket entry No. 133, at 10 (D. Kan. Mar. 6, 2017); 16-cr-20008 Docket entry No. 149, at 10 (D. Kan. Apr. 4, 2017); 16-cr-20008 Docket entry No. 159, at 9-10 (D. Kan. Apr. 18, 2017); 16-cr-20017 Docket entry No. 48, at 11-12 (D. Kan. Jan. 9, 2017); 16-cr-20017 Docket entry No. 44, at 12 (D. Kan. Dec. 8, 2016); 16-cr-20031 Docket entry No. 135, at 7-8 (D. Kan. Jan. 30, 2017); 16-cr-20031 Docket entry No. 137, at 7-8 (D. Kan. Feb. 1, 2017); 16-cr-20031 Docket entry No. 139, at 7-8 (D. Kan. Jan. 30, 2017); 16-cr-20031 Docket entry No. 141 at 7-8 (D. Kan. Feb. 1, 2017); 16-cr-20031 Docket entry No. 145, 7-8 (D. Kan. Jan. 31, 2017); 16-cr-20001 Docket entry No. 81 at 9-10 (D. Kan.

Petitioners Dehaven's and Mebane's plea agreements contained a paragraph entitled "Waiver of Appellate and Post-Conviction Rights" that provided that the "defendant expressly waives any right to appeal defendant's sentence, directly or collaterally, on any ground except claims of (1) ineffective assistance of counsel; (2) prosecutorial misconduct; or (3) an illegal sentence." 16-cr-20041 Docket entry No. 61, at 9-10 (D. Kan. Jan. 13, 2017; 16-cr-20041 Docket entry No. 66, at 9-10 (D. Kan. Jan. 20, 2017)).²

Jan. 30, 2017); 13-cr-20070 Docket entry No. 81, at 9-10 (D. Kan. Aug. 28. 2013); 15-cr-20012, Docket entry No. 49, at 7 (D. Kan. Aug. 4, 2016); 11-cr-20125 Docket entry No. 74, at 6-7 (D. Kan. Oct. 15, 2013).

² In full, the "Waiver of Appellate and Post-Conviction Rights" reads as follows:

- a. The defendant acknowledges, understands and agrees that by pleading guilty pursuant to this plea agreement defendant waives any right to appeal or collaterally attack a finding of guilt following the acceptance of this plea agreement, except on grounds of (1) ineffective assistance of counsel; or (2) prosecutorial misconduct.
- b. The defendant expressly waives any right to appeal defendant's sentence, directly or collaterally, on any ground except claims of (1) ineffective assistance of counsel; (2) prosecutorial misconduct; or (3) an illegal sentence. An "illegal sentence" includes a sentence imposed in excess of the statutory maximum, but does not include less serious sentencing errors, such as a misapplication of the Sentencing Guidelines, an abuse of discretion, or the imposition of an unreasonable sentence. 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, as part of the Government's appeal, cross-appeal defendant's sentence as authorized by 18 U.S.C. § 3742(a) with respect to any issues that have not been stipulated to or agreed upon in this agreement.

The district court accepted petitioners' guilty pleas and sentenced them each to terms of imprisonment. See Pet. App. 23a-115a.

The district court in the Carter litigation ultimately found that calls between CCA detainees and their attorneys were routinely recorded even when the attorney requested the privatization of their telephone numbers. Pet. App. 3a. The Carter litigation has "led to important reforms within the entire District of Kansas," designed to better protect attorney-client communications. Id. at 135a.

3. In 2019, petitioners (like more than 70 other CCA inmates) moved for postconviction relief under 28 U.S.C. 2255, contending that the government had violated the Sixth Amendment by intruding on their attorney-client communications. Pet. App. 3a, 23a-115a. Petitioners asked the district court to vacate their convictions and release them immediately or, in the alternative, to vacate their sentences and resentence them to shorter terms of imprisonment. Id. at 23a-115a.

a. The government opposed petitioners' motions. In doing so, it relied on the principle, set forth by this Court in Tollett v. Henderson, 411 U.S. 258 (1973), that, "[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." Id. at 267. Instead, "[h]e may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" in connection with the plea was constitutionally deficient. Ibid. Here, petitioners did not claim that their counsel rendered ineffective assistance relating to their decisions to plead guilty. See Pet. App. 23a-115a.

The district court stayed petitioners' cases pending the resolution of the related appeal of Matthew Spaeth, a CCA detainee whose own Section 2255 motion raising similar claims had been dismissed in reliance on Tollett. Pet. App. 23a-115a; see id. at 116a-148a; see also CCA Recordings 2255 Litig. v. United States, No. 19-2491, 2021 WL 1244789 (D. Kan. Apr. 2, 2021).

b. The court of appeals subsequently affirmed the district court's dismissal of Spaeth's Section 2255 motion. United States v. Spaeth, 69 F. 4th 1190 (10th Cir. 2023); Pet. App. 1a-18a; see Pet. App. 23a. The court of appeals first addressed the question "whether the carve-out provision in [Spaeth's] unconditional standard plea agreement" -- which is identical to the carve-out provision in the "Waiver of Appeal and Collateral Attack" paragraph included in thirty of petitioners' plea agreements here -- "constitutes a waiver of the government's right to raise, or created an exception to, the rule of law in Tollett." Pet. App.

at 10a (brackets and emphasis omitted). The court determined that the appeal waiver did not waive the requirement that Spaeth satisfy the Tollett standard, and that Spaeth therefore had only "one avenue to pursue pre-plea constitutional violations -- ineffective assistance of counsel that causes [his] plea[] to be involuntary and unknowing." Id. at 11a.

The court arrived at that determination "for several reasons." Pet. App. 11a. "First, the appeal waiver addresses [the defendant's] waiver of appellate rights, not the government's." Ibid. "Second, and relatedly, the carve-out provision does not purport to bind the government to anything; it merely provides an exception to [the defendant's] earlier blanket waiver." Ibid. "Third, and relatedly again, the appeal waiver does not -- and cannot -- manufacture new rights for [the defendant] beyond those provided by law." Ibid. "Fourth, the carve-out provision simply excepts from [the defendant's] blanket appeal waiver his right to appeal any subsequent (so post-plea-based) claims for ineffective assistance of counsel and prosecutorial misconduct." Ibid.

The court of appeals also rejected Spaeth's argument that, "even if Tollett bars his pre-plea constitutional claims, it cannot bar a challenge to his sentence." Pet. App. 15a. First, the court observed that it had "already concluded that Spaeth's plea counsel's performance was neither deficient nor prejudicial." Ibid. Second, the court stated that it "cannot agree that Tollett

permits [a defendant] to recast a pre-plea claim as an ongoing sentencing error." Ibid. The court explained that Tollett rested on a guilty plea breaking the causal effect of any unconstitutional conduct on the defendant's conviction. Ibid. And the court reasoned that, without any claim of "post-plea intrusions into his attorney-client conversations," the alleged pre-plea conduct "falls under Tollett's ambit no matter if the effect of that conduct continues through sentencing." Ibid.

c. Following the court of appeals' decision in Spaeth, petitioners declined the opportunity to amend their Section 2255 motion to seek relief under Tollett or allege a post-plea violation of their rights. Pet. App. 23a-115a. They acknowledged that, by doing so, they invited dismissal of their motions. Ibid.

With respect to each petitioner, the district court determined that the court of appeals' decision "in Spaeth compels dismissal of Petitioner's * * * Sixth Amendment [intentional-intrusion] claim." Pet. App. 24a; see id. at 23a-115a. "Like Mr. Spaeth," the court explained, each petitioner "d[id] not attempt to meet the applicable Tollett standard for showing that ineffective assistance of counsel caused him to enter his plea involuntarily and unknowingly." Id. at 24a; see id. at 23a-115a. The court therefore found that each petitioner "is also precluded from challenging his sentence based on any alleged pre-plea violation." Id. at 24a. The court both dismissed each

petitioner's Section 2255 claim and denied a certificate of appealability. Ibid.; see id. at 23a-115a.

5. The court of appeals likewise denied a certificate of appealability and dismissed petitioners' consolidated appeals. Pet. App. 19a-22a. It observed that petitioners "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." Id. at 22a. And it observed that petitioners "acknowledge that [the court of appeals] is bound by Spaeth." Ibid.

ARGUMENT

Petitioners contend (Pet. 18-28) that the carve-out provisions of the appeal waivers in their plea agreements created an exception the rule of Tollett v. Henderson, 411 U.S. 258, 267 (1973), that an unconditional guilty plea bars a criminal defendant from raising independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.³ They further contend (Pet. 28-34) that, even if their guilty plea bars them from collaterally challenging their convictions under 28 U.S.C. 2255 based on their pre-plea constitutional claims, it does not bar them from challenging their sentences based on those same claims.

³ Although Dehaven's and Mebane's plea agreements are worded differently from the other petitioners', they make no argument in this Court that they should be viewed or treated differently on that basis.

Petitioners' arguments are identical to the ones raised in the petition for a writ of certiorari in Spaeth v. United States, No. 23-6250 (filed Dec. 11, 2023).⁴ And for the reasons explained in the government's brief in opposition in Spaeth, petitioners' claims do not warrant this Court's review.⁵ As explained there, the claims lack merit, see Br. in Opp. at 13-17, Spaeth, supra (No. 23-6250); the court of appeals' decision in Spaeth (and thus petitioners' follow-on cases) implicates no conflict in the circuits, see id. at 17-18; and the in-circuit precedent on which petitioners relied in seeking relief on attorney-client privilege grounds is currently undergoing en banc reconsideration by the court of appeals (and would not warrant further review in any event), see id. at 18-19.

⁴ Similar arguments are also presented in the petition for a writ of certiorari in Morris v. United States, No. 23-6230 (filed Dec. 8, 2023).

⁵ Because counsel of record in this case is also counsel of record in Spaeth, he will receive a copy of the government's brief in opposition in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2024