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NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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TOMMY TATE COLLINS- Petitioner,

vs.

UNITED STATES OF AMERICA - Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

The Petitioner has previously been granted leave to proceed in forma pauperis in the 8<sup>th</sup> Circuit Court of Appeals in case number 22-3035. A copy of the order granting leave is attached hereto. Undersigned Counsel was appointed pursuant to the Criminal Justice Act 18 USC 3006(a). Petitioner is incarcerated in the Federal Bureau of Prisons and remains indigent.

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Babich Sarcone, PLLC  
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Des Moines, IA 50309  
TELEPHONE: 515-244-4300

ATTORNEY FOR PETITIONER

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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 22-3035

United States of America

Appellee

v.

Tommy Tate Collins

Appellant

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Appeal from U.S. District Court for the Southern District of Iowa - Central  
(4:19-cr-00076-RGE-4)

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**ORDER**

Attorney Nicholas Sarcone is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

September 27, 2022

Order Entered under Rule 27A(a):  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

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TOMMY TATE COLLINS- Petitioner,

vs.

UNITED STATES OF AMERICA - Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

1. What is the appropriate test or what factors should a district court consider when determining the appropriate remedy, after an appellate court has found that the Government breached the terms of the defendant's plea agreement and vacated the judgment pursuant to *Santobello v. New York*, 404 U.S. 257 (1971).

## **PARTIES TO THE PROCEEDINGS**

The caption contains the names of all parties to the proceedings.

## **DIRECTLY RELATED PROCEEDINGS**

- (1) *United States v. Collins*, 4:19-cr-00076-SMR-HCA (S.D. Iowa) (criminal proceedings), judgment entered December 7, 2020.
- (2) *United States v. Collins*, 20-3579 (8th Cir.) (direct criminal appeal), judgment entered February 22, 2022, *available at* 25 F.3d 1097 (8th Cir. 2022).
- (3) *United States v. Collins*, 4:19-cr-00076-RGE-HCA (S.D. Iowa) (criminal proceedings after remand), judgment entered September 15, 2022.
- (4) *United States v. Collins*, 22-3035 (8th Cir.) (continued direct criminal appeal following remand), judgment entered February 29, 2024.

## **TABLE OF CONTENTS**

QUESTIONS PRESENTED FOR REVIEW .....	ii
PARTIES TO THE PROCEEDINGS .....	ii
DIRECTLY RELATED PROCEEDINGS .....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT .....	5
<b>ARGUMENT</b>	
1.    The District Court and the Court of Appeals erred in holding Federal Rule of Criminal Procedure 11(d)(2)(B)'s fair and just standard was applicable in determining the remedy after the Government's breach of plea.....	9
2.    Trial Courts should consider the nature and severity of the Government's breach, the potential impact of the breach on further proceedings, and the wishes of the defendant in determining the proper remedy .....	11
CONCLUSION.....	13

## **INDEX TO APPENDICES**

APPENDIX A:	Opinion of the Eighth Circuit Court of Appeals 02-29-2024 ..	15
APPENDIX B:	Judgment of the Eighth Circuit Court of Appeals 02-29-2024 ..	19

## TABLE OF AUTHORITIES

### Cases:

<i>Santobello v. New York</i> , 404 U.S. 257 (1971) .....	5-8, 10-13
<i>U.S. v. Armendariz</i> , 80 F.4 <sup>th</sup> 546 (5 <sup>th</sup> Cir. 2023).....	10
<i>U.S. v. Barr</i> , 960 F.3d 906 (7 <sup>th</sup> Cir. 2020) .....	10
<i>U.S. v. Byrum</i> , 567 F.3d 1255 (10 <sup>th</sup> Cir. 2009) .....	10
<i>U.S. v. Carson</i> , 32 F.4 <sup>th</sup> 615 (6 <sup>th</sup> Cir. 2022).....	10
<i>United States v. Collins</i> , 25 F.4 <sup>th</sup> 1097, 1101 (8 <sup>th</sup> Cir. 2022) .....	3, 7
<i>United States v. Corsentino</i> , 685 F.2d 48, 52 (2d Cir.1982) .....	6
<i>United States v. Cortes-Lopez</i> , No. 22-1918, 2024 WL 2104676, at *1 (1st Cir. May 10, 2024) .....	7
<i>U.S. v. Cruz</i> , 95 F.4 <sup>th</sup> 106, 113 (3 <sup>rd</sup> Cir. 2024) .....	7
<i>U.S. v. Edgell</i> , 914 F.3d 281, 291 (4 <sup>th</sup> Cir. 2019) .....	7
<i>U.S. v. Fisch</i> , 863 F.2d 690 (9 <sup>th</sup> Cir. 1988) .....	6
<i>U.S. v. Gomez</i> , 326 F.3d 971, 973-974 (8 <sup>th</sup> Cir. 2003).....	3
<i>U.S. Hawley</i> , 93 F.3d 682, 694 (10 <sup>th</sup> Cir. 1996) .....	3
<i>U.S. v. Hunter</i> , 835 F.3d 1320, 1329 (11 <sup>th</sup> Cir. 2016) .....	6
<i>U.S. v. Jeffries</i> , 908 F.2d 1520, 1527 (5 <sup>th</sup> Cir. 1990).....	6
<i>U.S. v. Nicholson</i> , 676 F.3d 376 (4 <sup>th</sup> Cir. 2012) .....	10
<i>U.S. v. Nieves-Melendez</i> , 58 F.4 <sup>th</sup> 569 (1 <sup>st</sup> Cir. 2023) .....	10
<i>U.S. v. Oakes</i> , 680 F.3d 1243, 1247 (10 <sup>th</sup> Cir. 2012).....	6, 12
<i>U.S. v. Ortega-Ascanio</i> , 376 F.3d 879 (9 <sup>th</sup> Cir. 2004) .....	10
<i>U.S. v. Overton</i> , 24 F.4 <sup>th</sup> 870 (2 <sup>nd</sup> Cir. 2022).....	10

<i>U.S. v. Palladino</i> , 347 F.3d 29 (2 <sup>nd</sup> Cir. 2003) .....	5
<i>U.S. v. Rivera</i> , 62 F.4 <sup>th</sup> 778 (3 <sup>rd</sup> Cir. 2023) .....	10
<i>U.S. v. Seys</i> , 27 F.4 <sup>th</sup> 606 (8 <sup>th</sup> Cir. 2022) .....	10
<i>U.S. v. Tobon-Hernandez</i> , 845 F.2d 277, 280 (11 <sup>th</sup> Cir. 1988) .....	6
<i>U.S. v. Vaval</i> , 404 F.3d 144, 156 (2 <sup>nd</sup> Cir. 2005) .....	4-6, 12
<i>U.S. v. Weaver</i> , 275 F.3d 1320, (11 <sup>th</sup> Cir. 2001).....	10
<i>U.S. v. Williams</i> , 821 F.3d 656 (5 <sup>th</sup> Cir. 2016).....	7
<i>U.S. v. Wilson, et. al.</i> , 920 F.3d 155 (2 <sup>nd</sup> Cir. 2019).....	5

**Rules:**

Federal Rule of Criminal Procedure 11(d)(2)(B) .....	3-4, 7, 9-11, 13
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IN THE SUPREME COURT OF THE UNITED STATES

---

Tommy Tate Collins - Petitioner,

vs.

United States of America - Respondent.

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Tommy Tate Collins, through counsel, respectfully prays that a writ of certiorari issue to review the February 29, 2024, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 22-3035.

**OPINION BELOW**

On February 29, 2024, a panel of the Eighth Circuit Court of Appeals entered an opinion affirming the judgment of the United States District Court for the Southern District of Iowa and its use of Federal Rule of Criminal Procedure 11(d)(2)(B) as the relevant legal standard in ruling on a motion to withdraw a guilty plea after vacation of Mr. Collin's sentence by the 8<sup>th</sup> Circuit for the Government's breach of the plea agreement. The decision is unpublished.

## **JURISDICTION**

The Court of Appeals entered its judgment on February 29, 2024.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **United States Constitution, Amendment V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

On August 13, 2019, a Southern District of Iowa grand jury returned an indictment charging the defendant with 32 counts in violation of 18 U.S.C. § 1591(a)(1), (b)(2). R. Doc. 164<sup>1</sup>. Then in February 2020, Collins and the Government entered into a plea agreement in which Collins pled guilty to Count 20 – Sex Trafficking of Children. R. Doc. 376. At the sentencing hearing, the Government submitted a sentencing memorandum in which they argued against the acceptance of responsibility that was promised in the plea agreement and utilized evidence that impermissibly used Collin’s pre-plea conduct against him. *United States v. Collins*, 25 F.4th 1097, 1101 (8th Cir. 2022).

Collin’s appealed, arguing breach of the plea agreement. R. Doc. 702. The Eighth Circuit found the Government was in breach and remanded the case back to the district court to assess the most appropriate remedy. *Id.* at 1102. On remand, Collin’s filed a Request to Determine Proper Remedy after Government’s Breach of Plea. R. Doc. 682. Collin’s argued the “fair and just” standard of Fed. R. Crim. P. 11(d)(2)(B) did not apply in the post remand context citing a prior 8<sup>th</sup> Circuit panel opinion *U.S. v. Gomez*, 326 F.3d 971, 973-974 (8<sup>th</sup> Cir. 2003). Collin’s requested that the district consider the totality of the circumstances and utilize considerations such as the intentionality and egregiousness of the breach as suggested by the 10<sup>th</sup> Circuit. See, *U.S. Hawley*, 93 F.3d 682, 694 (10<sup>th</sup> Cir. 1996) Collins also asked the

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<sup>1</sup> In this brief, “R. Doc.” Refers to the district court docket, criminal case No. 4:19-cr-00076.

district court to consider whether the taint of the breach could be cured by sentencing in front of a different district court judge as suggested by the 2<sup>nd</sup> Circuit. See, *U.S. v. Vaval*, 404 F.3d 144, 156 (2<sup>nd</sup> Cir. 2005).

However, without a hearing, the district court denied Collins request to withdraw ruling that Collins had not satisfied the “fair and just” prong of Fed. R. Crim. P. 11. R. Doc. 686. The district court then resentenced Collins to a longer term of incarceration than he originally received. R. Doc. 698.

Collins again appealed to the 8<sup>th</sup> Circuit arguing that Fed. R. Crim. P. 11(d)(2)(B) was inapplicable to ruling on a motion to withdraw a plea on remand after a finding of breach by the appellate court. See 8<sup>th</sup> Cir. No. 22-3035, ID: 5232921, pp. 9-15. Collins argued that district courts should consider the totality of the circumstances surrounding the breach including whether the breach was intentional and egregious and whether the taint of the breach could in fact be removed by resentencing in front of a new judge. Id. The 8<sup>th</sup> Circuit disagreed holding that Rule 11(d)(2)(B)’s standard is applicable.

## REASONS FOR GRANTING THE WRIT

### Summary of the Argument

*Santobello v. New York*, 404 U.S. 257 (1971) held that when the Government breaches a plea agreement the appropriate remedy is to vacate the sentence and remand to the lower court to determine whether a new sentencing hearing should be held in front of a new judge wherein the Government must specifically perform under the terms of the plea agreement (specific performance) or whether the defendant should be permitted to withdraw the plea of guilty. In the five decades that have passed since *Santobello*, this Court has never articulated a test or set of considerations lower courts should utilize in determining whether to order specific performance or permit withdrawal of the defendant's guilty plea. As a result, the Circuits Courts of Appel have taken markedly different approaches in considering whether specific performance or withdrawal is the appropriate remedy.

For example, the Second Circuit itself typically determines whether to remand for specific performance or whether to grant withdrawal of plea. See, U.S. v. Wilson, et. al., 920 F.3d 155 (2<sup>nd</sup> Cir. 2019); *U.S. v. Vaval*, 404 F.3d 144, 156 (2<sup>nd</sup> Cir. 2005) and *U.S. v. Palladino*, 347 F.3d 29 (2<sup>nd</sup> Cir. 2003). The Second Circuit looks to the totality of the circumstances. As it stated in *Vaval*:

Certainly, where resentencing before another district judge would not cure the “taint[ ]” caused by a government breach—because, for example, the government violated the agreement by introducing new evidence that could not be “magically erased or ignored on remand”—we have held that plea withdrawal was the appropriate remedy. *Id.* at 35. In other cases, where remand to a different judge for resentencing would cure the breach caused by the government, we have ordered that

remedy. *E.g.*, *United States v. Corsentino*, 685 F.2d 48, 52 (2d Cir.1982) (government violated agreement to take no position at sentencing). Applying these principles, appellant has no valid claim to relief that does more than remedy the designated breach. Because remand for resentencing before a different judge will fully cure the government's breach, we order this remedy.

*Id.* 404 F. 3d at 156.

The Tenth Circuit, like the Second Circuit, ordinarily decides the remedy but usually orders specific performance unless the breach is particularly egregious or intentional. *U.S. v. Oakes*, 680 F.3d 1243, 1247 (10<sup>th</sup> Cir. 2012). Although *Santobello* dictates that case be remanded to the trial court for determination of the appropriate remedy, these Circuits at minimum have at least articulated some consideration for determining the appropriate remedy which directly relates to the type or severity of the Government's breach.

In contrast, the Eleventh Circuit also determines the choice of remedy but strongly prefers specific performance<sup>2</sup>, particularly where, in its view, the defendant entered a knowing and voluntary guilty plea. *U.S. v. Tobon-Hernandez*, 845 F.2d 277, 280 (11<sup>th</sup> Cir. 1988); See also, *U.S. v. Jeffries*, 908 F.2d 1520, 1527 (5<sup>th</sup> Cir. 1990); *U.S. v. Hunter*, 835 F.3d 1320, 1329 (11<sup>th</sup> Cir. 2016). In other words, unlike the 2<sup>nd</sup> and 10<sup>th</sup> Circuits, where the type and severity of the Government's breach is the main remedial consideration, the

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<sup>2</sup> So too does the Ninth Circuit. *U.S. v. Fisch*, 863 F.2d 690 (9<sup>th</sup> Cir. 1988).

11<sup>th</sup> Circuit focuses on whether the guilty plea was knowingly and voluntarily entered as its primary concern in deciding which remedy to apply.

The Fifth Circuit, an outlier but perhaps the one to fashion remedial considerations nearest to what *Santobello* contemplated, permits a Defendant to elect the choice of remedy. *U.S. v. Williams*, 821 F.3d 656 (5<sup>th</sup> Cir. 2016). However, the Fifth Circuit has left open the question, but strongly indicated, that the breach of plea must be material for relief to be awarded in the first instance. *Id.* at 659.

Many Circuits simply remand to the trial court to determine the remedy. See, *United States v. Cortes-Lopez*, No. 22-1918, 2024 WL 2104676, at \*1 (1st Cir. May 10, 2024); *U.S. v. Cruz*, 95 F.4<sup>th</sup> 106, 113 (3<sup>rd</sup> Cir. 2024); *U.S. v. Edgell*, 914 F.3d 281, 291 (4<sup>th</sup> Cir. 2019); *United States v. Collins*, 25 F.4<sup>th</sup> 1097, 1102 (8<sup>th</sup> Cir. 2022). After a diligent search of the caselaw, no standard for consideration, no test, no guidance has been devised by any Circuit which tells a trial court what it should consider when determining the appropriate relief once the case has been remanded.

Moreover, this case is the only case counsel could find which considered the use of Fed. R. Crim. P. 11(d)(2)(B) in ruling on the remedial question, let alone the only case sanctioning its use. But Rule 11 contemplates solely the withdrawal of plea prior to acceptance or sentencing. It does not speak to the unique circumstances which arise when the Government breaches a plea agreement. The fairness and integrity of the

criminal justice system which were at the heart of Santobello, should be the primary concern for a court in determining the choice of remedy. Thus, when a lower court determines what remedy to apply it should consider the circumstances of the breach, its type and severity, and its impact on the proceedings. This Court, therefore, should set forth such guidance for lower courts in determining the best remedy for the Government's breach of its plea obligations.

## Argument

1. ***The District Court and the Court of Appeals erred in holding Federal Rule of Criminal Procedure 11(d)(2)(B)'s fair and just standard was applicable in determining the remedy after the Government's breach of plea.***

By its plain language, Federal Rule of Criminal Procedure 11(d)(2)(B) is not applicable in determining which remedy applies after judgement has been vacated by an appellate court because the Government was found in breach of the plea agreement. Procedurally, sentencing has already occurred and therefore Rule 11 is inapposite. A new sentencing may or may not take place, but whether to order specific performance or withdrawal of plea as a remedy for the Government's breach of the plea agreement is a separate and distinct inquiry which must be determined in the context of the nature, severity, and impact of the Government's breach. Rule 11(d)(2)(B) is only concerned with whether a defendant should be permitted to withdraw his plea and that, before sentencing. The choice of remedy is not solely a question of whether the defendant should be permitted to withdraw his plea but rather which remedy is sufficient to cure the Government's breach, specific performance, or withdrawal

Furthermore, Rule 11 puts the burden on the defendant to show a "fair and just" reason for withdrawal of the plea. The substantially varying tests the circuits have developed to determine what a fair and just reason is and whether the defendant has proven a fair and just reason, are largely concerned with matters extraneous to the impact of the Government's conduct on the fairness

and integrity of the proceedings. They include such considerations as 1) whether the plea was knowing, intelligent and voluntary, 2) the strength of the reason for withdrawal, 3) the timing of the motion to withdraw, 4) the length of the delay between the plea and the motion to withdraw, 5) whether the defendant has asserted actual innocence, 6) whether new evidence has been discovered, 7) whether the defendant had the close assistance of competent counsel, 8) whether the Government will suffer prejudice, 9) whether it will inconvenience the court and waste judicial resources, 10) the defendants nature and background, and 11) the degree to which the defendant has had prior experience with the criminal justice system. See, *U.S. v. Nieves-Melendez*, 58 F.4<sup>th</sup> 569 (1<sup>st</sup> Cir. 2023); *U.S. v. Overton*, 24 F.4<sup>th</sup> 870 (2<sup>nd</sup> Cir. 2022); *U.S. v. Rivera*, 62 F.4<sup>th</sup> 778 (3<sup>rd</sup> Cir. 2023); *U.S. v. Nicholson*, 676 F.3d 376 (4<sup>th</sup> Cir. 2012); *U.S. v. Armendariz*, 80 F.4<sup>th</sup> 546 (5<sup>th</sup> Cir. 2023); *U.S. v. Carson*, 32 F.4<sup>th</sup> 615 (6<sup>th</sup> Cir. 2022); *U.S. v. Barr*, 960 F.3d 906 (7<sup>th</sup> Cir. 2020); *U.S. v. Seys*, 27 F.4<sup>th</sup> 606 (8<sup>th</sup> Cir. 2022); *U.S. v. Ortega-Ascanio*, 376 F.3d 879 (9<sup>th</sup> Cir. 2004); *U.S. v. Byrum*, 567 F.3d 1255 (10<sup>th</sup> Cir. 2009); *U.S. v. Weaver*, 275 F.3d 1320, (11<sup>th</sup> Cir. 2001). These reasons are tailored to a specific point in the procedural timeline and focused primarily on the defendant's actions/reasons and whether prejudice to the Government and the court may occur. In the breach of plea context, the defendant and the process itself, have already suffered some prejudice at the hands of the Government and thus the inquiry is how to best remedy the impact of that wrong. *Santobello* was concerned primarily with the fairness and integrity of the criminal process. *Id.*,

404 U.S. at 261-262. How else could those considerations be protected than by looking at the type and severity and the impact of the Government's breach when considering how best to remedy said breach. The Rule 11 factors are not tailored to determining that remedy. Put simply, Rule 11 is designed for a wholly different procedural framework and its considerations as set forth by the Circuits are not well suited to remedying this type of harm.

**2. *Trial Courts should consider the nature and severity of the Government's breach, the potential impact of the breach on further proceedings, and the wishes of the defendant in determining the proper remedy.***

Remedying the impact of the Government's breach of its plea agreement obligations can only be accomplished by specifically considering the nature and severity of the breach, and the potential impact of the breach on further proceedings in conjunction with the defendants desired remedy. Firstly, this Court should make clear that the ordinary procedure is to remand to the district court to decide the remedy as set forth in *Santobello*. Where the wishes of the defendant are clear however, such as in a case where the defendant only asks for specific performance, the appellate court may determine the issue and remand accordingly.

Secondly, in choosing which remedy to apply, specific performance or withdrawal of the plea, trial courts should look to the nature of the breach and severity of the breach and its potential impact on further proceedings. Both the Second and Tenth Circuits utilize versions of these considerations in their own

decisions regarding the choice of remedy. The Second Circuit looks to whether the "taint" of the breach can be cured with specific performance. *Vaval*, 404 F.3d at 156. In cases such as those where the Government introduces evidence at sentencing it should not have, that court has found correctly the taint of the breach cannot be magically wiped away. *Id.* This realistic view counsel in favor of withdrawal of the plea. The Tenth Circuit looks to the nature and severity of the breach in determining whether it was intentional or egregious. *Oakes*, 680 F.3d at 1247. Afterall it is the Government's wrong that is being remedied and the more severe the wrong the more likely the more significant remedy (plea withdrawal) is appropriate. The remedy should be based on the nature and severity of the breach and whether it will continue to potentially have a lasting impact on the process. Santobello was concerned with the fairness and integrity of the process and the defendant's right to get what he/she bargained for. Choosing the appropriate remedy should logically then, also be based on those considerations. This Court has never determined what considerations should apply on remand and as such has left a void which appellate courts have struggled to fill. This Court should fill that void.

This case should be remanded back to the district court to consider, not whether a "fair and just" reason exists for Mr. Collins to withdraw his plea, but rather, which will remedy, will vindicate the equally important considerations of fairness in the criminal process and ensuring Mr. Collins gets the benefit of his bargain. In so doing, this Court should hold that the trial court should consider

the nature and severity of the Government's breach and its potential future impact on the proceedings in determining which remedy to apply.

## CONCLUSION

The choice of remedy after the Government's breach of plea agreement is not governed by Rule 11(d)(2)(B) and the district court and 8<sup>th</sup> Circuit erred in so finding. Five decades after *Santobello* was decided, this Court should fill the void left by *Santobello*, and instruct lower courts to consider the nature and severity of the Government's breach and the potential impact on further proceedings when determining which remedy is appropriate after the Government breaches a plea agreement. Mr. Collins, therefore, respectfully requests that the Court grant certiorari, vacate the Eight Circuit's decision, and remand the matter for a proper determination of which remedy to apply.

RESPECTFULLY SUBMITTED,

/s/ Nicholas A. Sarcone

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ATTORNEY FOR PETITIONER

## APPENDIX A

### United States Court of Appeals

#### *For The Eighth Circuit*

Thomas F. Eagleton U.S. Courthouse  
111 South 10th Street, Room 24.329

St. Louis, Missouri 63102

Michael E. Gans  
*Clerk of Court*

VOICE (314) 244-2400  
FAX (314) 244-2780  
[www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)

February 29, 2024

Nicholas Sarcone  
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Suite J  
501 S.W. Seventh Street  
Des Moines, IA 50309

RE: 22-3035 United States v. Tommy Collins

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion.

Please review [Federal Rules of Appellate Procedure](#) and the [Eighth Circuit Rules](#) on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Except as provided by Rule 25(a)(2)(iii) of the Federal Rules of Appellate Procedure, no grace period for mailing is allowed. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans  
Clerk of Court

MTB

Enclosure(s)

cc: Clerk, U.S. District Court, Southern Iowa  
Tommy Tate Collins  
Craig Peyton Gaumer  
Kristin Herrera  
Amy L Jennings

District Court/Agency Case Number(s): 4:19-cr-00076-RGE-4

United States Court of Appeals  
For the Eighth Circuit

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No. 22-3035

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United States of America

*Plaintiff - Appellee*

v.

Tommy Tate Collins

*Defendant - Appellant*

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Appeal from United States District Court  
for the Southern District of Iowa - Central

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Submitted: December 14, 2023

Filed: February 29, 2024

[Unpublished]

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Before SMITH, Chief Judge, MELLOY and ERICKSON, Circuit Judges.

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PER CURIAM.

Tommy Collins pled guilty to sex trafficking of children, in violation of 18 U.S.C. § 1591(a)(1) and (b)(2), and he was sentenced to 210 months in prison. On appeal, this Court found the government breached the plea agreement, vacated Collins' sentence, and remanded to the district court for a determination on the appropriate remedy. See United States v. Collins, 25 F.4th 1097 (8th Cir. 2022).

On remand, Collins' case was reassigned to a different judge. Collins moved to withdraw his guilty plea, arguing the government's breach was intentional and egregious. The district court<sup>1</sup> disagreed and enforced the terms of the parties' plea agreement. At resentencing, after weighing the sentencing factors, the district court imposed a within-Guidelines sentence of 228 months' imprisonment—longer than Collins' initial sentence.

On appeal, Collins asserts the district court applied the wrong legal standard when it denied his motion to withdraw his guilty plea. We review this question of law *de novo*, Karsjens v. Lourey, 988 F.3d 1047, 1050 (8th Cir. 2021), and the district court's denial of the motion to withdraw under the abuse of discretion standard, United States v. McHenry, 849 F.3d 699, 705 (8th Cir. 2017).

While Collins contends a different legal standard should apply in cases involving government misconduct, we decline to adopt a new legal standard because the fair and just standard of Fed. R. Crim. P. 11(d) permits the district court to consider evidence of the government's improper conduct. See United States v. Thompson, 906 F.2d 1292, 1298-99 (8th Cir. 1990) (affirming denial of motion to withdraw guilty plea after district court considered allegations by defendant of government threats to introduce false evidence, among other factors). In addition, we can find no abuse of discretion by the district court in denying Collins' motion when the evidence that Collins offered on government misconduct was not egregious or intentional.

Collins also asserts the district court erred by imposing a presumptively vindictive sentence on remand. A presumption of vindictiveness arises only where there is a "reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." United States v. Anderson,

<sup>1</sup>The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

440 F.3d 1013, 1015-16 (8th Cir. 2006) (quoting Alabama v. Smith, 490 U.S. 794, 799 (1989)). No presumption exists if the sentences are imposed by different judges since a new sentencing judge comes with a new point of view and a new approach to the exercise of the considerable discretion afforded under 18 U.S.C. § 3553(a). Id. at 1017. Here, a different judge resentenced Collins. The record demonstrates a thorough review of the sentencing factors, and Collins has offered no evidence of vindictiveness other than a longer sentence.

We find no error or abuse of the broad discretion afforded a sentencing court. The judgment of the district court is affirmed.

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APPENDIX B

**UNITED STATES COURT OF APPEALS**  
**FOR THE EIGHTH CIRCUIT**

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No: 22-3035

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United States of America

Plaintiff - Appellee

v.

Tommy Tate Collins

Defendant - Appellant

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Appeal from U.S. District Court for the Southern District of Iowa - Central  
(4:19-cr-00076-RGE-4)

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**JUDGMENT**

Before SMITH, Chief Judge, MELLOY, and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 29, 2024

Order Entered in Accordance with Opinion:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

19

Adopted April 15, 2015  
Effective August 1, 2015

**Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.**

**V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari**

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.