No. _____

IN THE

Supreme Court of the United States

MATTHEW C. SPAETH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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December 2023

QUESTIONS PRESENTED

For untold years, federal prosecutors in Kansas secretly and systematically collected, retained, and exploited confidential attorney-client communications, in violation of numerous defendants' Sixth Amendment rights to attorney-client confidentiality. When this unprecedented pattern of misconduct came to light, more than 100 prisoners, including Matthew Spaeth, sought to collaterally attack their convictions and sentences to remedy the surreptitious prosecutorial misconduct.

Because Mr. Spaeth pleaded guilty, however, the Tenth Circuit held that *Tollett v. Henderson*, 411 U.S. 258 (1973), precluded him from collaterally attacking his conviction based on pre-plea prosecutorial misconduct. The Tenth Circuit considered both parties "bound by this rule of law" even though Mr. Spaeth conditioned his plea on the right to collaterally attack the conviction via "any subsequent claims with regards to … prosecutorial misconduct." The Tenth Circuit alternatively interpreted this conditional language to permit a collateral attack based only on post-plea prosecutorial misconduct. The Tenth Circuit further held that *Tollett* precluded Mr. Spaeth's collateral attack to his sentence based on pre-plea prosecutorial misconduct.

The Tenth Circuit's novel decision is an unprecedented, unwarranted, and erroneous extension of *Tollett* that conflicts with this Court's precedent on plea bargaining.

The questions presented 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 question is also pending in *Danille Morris v. United States*, Supreme Court. No. __-____ (filed Dec. 8, 2023).

RELATED PROCEEDINGS

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)

United States v. Carter, No. 2:16-cr-20032 (D. Kan. Aug. 13, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Spaeth respectfully petitions 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 published opinion is available at 8 F.4th 932, and is reprinted in the Appendix (Pet. App.) at 1a-18a. The Tenth Circuit's unpublished order denying rehearing en banc is reprinted at 67a. The district court's unpublished order denying Mr. Spaeth's motion to vacate under 28 U.S.C. § 2255 is available at 2021 WL 1244789, and is reprinted at 19a-29a. The district court's unpublished order clarifying the certificate of appealability is available at 2021 WL 1945866, and is reprinted at 30a-33a. The district court's unpublished memorandum and order that preceded the dismissal of the § 2255 motion is available at 2021 WL 150989, and is reprinted at 34a-66a.[2]

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255. Because the district court granted a certificate of appealability, the Tenth Circuit had jurisdiction under 28 U.S.C. § 2253(c)(1)(B). The Tenth Circuit affirmed the denial of Mr. Spaeth's § 2255 motion in a published opinion on June 12, 2023, and denied the petition for rehearing en banc on August 11, 2023. This Court granted an extension to file this petition up to December 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[2] This unpublished memorandum and order also pertains to other defendants who will seek certiorari in a different petition.

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 Court has long guarded against prosecutorial misconduct. *See*, *e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935). It has also steadfastly protected a criminal defendant's Sixth Amendment right to communicate with defense counsel. *See*, *e.g.*, *Geders v. United States*, 425 U.S. 80, 91 (1976). It follows from these protections that the Sixth Amendment "protects the attorney-client relationship from intrusion in the criminal setting," *Wolff v. McDonnell*, 418 U.S. at 576 (1974), and that prosecutors may not surreptitiously invade the defense camp for tactical advantages, *see*, *e.g.*, *Hoffa v. United States*, 385 U.S. 293, 306 (1966); *Black v. United States*, 385 U.S. 26, 28 (1966); *United States v. Morrison*, 449 U.S. 361, 365-367 (1981).

This case is one of over 100 cases involving surreptitious intrusions into confidential attorney-client communications by federal prosecutors in Kansas. As discussed below, although the government refuses to acknowledge it, the pattern of surreptitious prosecutorial misconduct unearthed by the district court is truly extraordinary. The Tenth Circuit has twice condemned the misconduct. Pet. App. 1a; *see also United States v. Orduno-Ramirez*, 61 F.4th 1263, 1267, 1275 (10th Cir. 2023). But it has refused to remedy the misconduct because of purported legal barriers to relief. Pet. App. 1a-18a; *Orduno-Ramirez*, 61 F.4th at 1277. For Mr. Spaeth, the barrier to relief has been his guilty plea and the Tenth Circuit's interpretation of this Court's decision in *Tollett v. Henderson*, 411 U.S. 258 (1973). Pet. App. 1a-18a.

Tollett 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. And here, Mr. Spaeth conditioned his plea on the right to collaterally attack the conviction via "any subsequent claims with regards to … prosecutorial misconduct." Pet. App. 12a. The Tenth Circuit erroneously held that *Tollett* precluded the parties from conditioning the plea on this basis.

This Court has never recognized any limitations on the type of bargain a prosecutor may make to induce a defendant's guilty plea. "As with any type of contract," a plea agreement may "leav[e] many types of claims unwaived." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). This Court has certainly never held that *Tollett* is a limitation on plea bargaining. Rather, this Court has long recognized that "'plea bargaining[]' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). 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." *Id.* at 262.

The Tenth Circuit's decision below runs directly contrary to this precedent, limiting the government and the defendant's ability to plea bargain and rendering effectively unenforceable mutually beneficial bargains like the one at issue here. Because the Tenth Circuit's opinion is unprecedented, unwarranted, and erroneous, and because it fundamentally alters the plea-bargaining system, review is necessary.

The Tenth Circuit also erred with its novel interpretation of Mr. Spaeth's plea agreement to permit only challenges to "post-plea" prosecutorial misconduct. That decision is patently incorrect under well established principles governing the interpretation of plea agreements. Such agreements are construed strictly against the government, and any ambiguities are interpreted in the defendant's favor. Under those well-established principles, the Tenth Circuit's decision interpreting the phrase "any subsequent claims with regard to … prosecutorial misconduct" as limited to post-plea prosecutorial misconduct is indefensible.

Finally, the Tenth Circuit with its novel holding that *Tollett* precluded Mr. Spaeth's collateral attack to his sentence based on pre-plea prosecutorial misconduct. Pet. App. 15a. That holding also has no support in *Tollett*, any other decision from this Court, any statute, or any other source or principle of law. Nor has any other federal court extended *Tollett* in such a manner.

The Tenth Circuit's decision trivializes the indispensable role guilty pleas and plea bargaining play in the federal criminal justice system, the outsized role sentencing plays in the federal criminal justice system, and the vital role the federal courts play in guarding against prosecutorial misconduct. Review is necessary.

STATEMENT

A. The Underlying Conviction

1. In 2014, officers investigating a methamphetamine-trafficking conspiracy in Kansas City, Kansas found 168 grams of methamphetamine, currency, digital scales, and paraphernalia in Mr. Spaeth's home, as well as 223 grams of methamphetamine in his car. Pet. App. 1a-2a. Mr. Spaeth was arrested and charged with various drug-

trafficking crimes, including a drug-conspiracy charge, in a multi-defendant indictment. Pet. App. 2a.

2. In September 2016, Mr. Spaeth pleaded guilty to the drug-conspiracy count pursuant to a Rule 11(c)(1)(C) plea agreement that recommended a binding 180-month prison sentence. Pet. App. 2a. The plea agreement included a conditional collateral-attack waiver. *Id.* at 2a, 19a. Specifically, although Mr. Spaeth 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." Pet. App. 2a, 10a, 19a. The plea agreement also acknowledged that Mr. Spaeth 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.* at 12a. The collateral-attack portion of Mr. Spath's plea agreement was the "standard" language found in most (if not all) plea agreements in the District of Kansas. Pet. App. 19a.

3. In January 2017, the district court imposed the 180-month prison sentence. Pet. App. 2a. This sentence represented a downward variance from the applicable advisory guidelines range of 210 to 262 months' imprisonment. Pet. App. 2a. At the sentencing hearing, the prosecutor told the district court that the government might charge Spaeth in a separate case involving a drug-smuggling operation at CoreCivic, a private prison in Leavenworth, Kansas. Pet. App. 2a. Mr. Spaeth did not appeal.

B. The Pattern of Prosecutorial Misconduct

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 the investigation into the drug-smuggling operation at Corecivic. *Orduno-Ramirez*, 61 F.4th at 1266.

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.

In what is arguably the most disturbing example of the government's obstructive conduct, the prosecutors allowed their IT manager to reformat the hard drives, "overwriting everything" on the one computer that housed the jail video recordings and that could be used to show which of the prosecutors viewed the videos. *Carter*, 429 F.Supp.3d at 816-818. The district court found that the prosecutors' objective "was to destroy the data." *Id.* at 817. In other ways documented by the district court, the prosecutors "willfully delayed [their] formal preservation duties, allowing evidence to be deleted or removed in the interim." *Id.* at 824.

This obstructive conduct was largely successful in hiding the prosecutors' misconduct from the district court. As the district court found, "[e]vidence likely has been lost due to the Government's failure to timely implement a meaningful litigation hold. And the Government's productions to the Special Master and FPD were incomplete and turned over in a manner designed to mask the individual source of production." *Carter*, 429 F.Supp.3d at 800.

But it was not entirely successful. In one case, for instance, the district court learned that a federal prosecutor obtained and reviewed a defendant's attorney-client telephone calls and "listened to and took extensive notes of [the defendant's] conversations with her counsel as they discussed" a child custody matter. Pet. App. 44a. The prosecutor's notes "include[d] discussions about defense trial strategy, plea negotiations, risk-benefit assessment of trial versus plea, and estimates of the sentence [the defendant] faced." Pet. App. 44a. When this undeniable misconduct surfaced, the government "quickly settled the matter." Pet. App. 44a. It did so by

filing a joint motion to vacate the defendant's sentence under § 2255, requesting that the district court reduce the sentence to time served. *United States v. Reulet*, Case No. 5:14-cr-40005-DDC, D.E.1260 (D. Kan. Oct. 19, 2018), which the district court immediately granted, *id.* at D.E.1261(Oct. 19, 2018).

In another case, a federal prosecutor admitted that she obtained and listened to calls between the defendant and his attorney. *United States v. Herrera-Zamora*, Case No. 2:14-cr-20049, D.E.198 (D. Kan. Dec. 1, 2017). When this information came to light during the pendency of the defendant's direct appeal (after prosecutors initially denied listening to the confidential communications), the government agreed to vacate the conviction. *Id.* at 4. To remedy the constitutional violation, the government ultimately agreed to allow the defendant to plead guilty to an information pursuant to a Rule 11(c)(1)(C) agreement that bound the district court to impose a time-served sentence. *Id.*, D.E.232 at 2; D.E.233. The government agreed to similar time-served sentences in other cases after it came about that prosecutors committed misconduct by surreptitiously listening to confidential attorney-client communications. *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); *see also Carter*, 429 F.Supp.3d at 803, 849-854 (discussing these cases).

And in the middle of the investigation, the local United States Attorney and the Federal Public Defender negotiated an end to the litigation by agreeing to sentence reductions for still-incarcerated defendants (like Mr. Spaeth) whose attorney-client

communications the government had collected—regardless of whether that collection occurred before or after the defendant's guilty plea. 429 F.Supp.3d at 805. But the DOJ abruptly reneged the settlement, advising that the government would "either negotiate or litigate each claim individually." *Id.*

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 prosecutors 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. In July 2019, Mr. Spaeth filed a counseled § 2255 motion, raising a prosecutorial misconduct claim to his conviction and sentence based on a violation of his Sixth Amendment right to attorney-client confidentiality. Pet. App. 3a, 20a. The misconduct claims were based on the above-discussed pattern of prosecutorial misconduct and the government's previously undisclosed possession of five recordings of Mr. Spaeth's calls with his attorney while he was in pretrial custody at CoreCivic. Pet. App. 2a, 22a. Mr. Spaeth made the calls before he pleaded guilty. Pet. App. 22a, 25a. The calls totaled 23 minutes and included discussions about "matters relating to legal advice or strategy." *Id.* The government obtained the calls before Mr. Spaeth

pleaded guilty, but did not disclose this misconduct to Mr. Spaeth prior to his plea. Pet. App. 24a, 31a. Based on this misconduct, and in light of the egregious pattern of prosecutorial misconduct documented above, Mr. Spaeth asked the district court to vacate the conviction with prejudice or immediately release him by vacating the sentence and resentencing him to a time-served sentence. Pet. App. 3a.

2. The district court denied relief. Pet. App. 3a-4a, 19a-29a. Although the prosecutor denied knowledge of the recorded calls in the government's possession, the district court assumed that the prosecutor listened to the calls prior to Mr. Spaeth's guilty plea. *Id.* at 3a-4a. But the district court still concluded that Mr. Spaeth's guilty plea precluded the collateral attack because any surreptitious pre-plea prosecutorial misconduct did not render the plea unknowing or involuntary. *Id.* at 3a-4a.

3. The district court disagreed with Mr. Spaeth that the conditional language within the plea agreement allowed him to raise the prosecutorial-misconduct claim in a collateral attack. *Id.* at 3a-4a, 23a-24a. The district court concluded that *Tollett* "creates a legal bar to relief, regardless of language in the plea agreement." *Id.* at 4a; *see also id.* at 25a (the "plea agreement does not create an exception to the rule of law in *Tollett*, nor did the government waive or forfeit application of that standard"). "The district court ruled that *Tollett* rendered irrelevant any pre-plea constitutional violations except for ineffective assistance of counsel resulting in an involuntary and unknowing guilty plea." *Id.* at 4. The district court further concluded that *Tollett* precluded Mr. Spaeth from challenging his sentence based on pre-plea prosecutorial

misconduct. *Id.* at 4a, 24a. And because Mr. Spaeth made no effort to establish that the plea was involuntary, *Tollett* precluded his collateral attack. Pet. App. 25a.

3. The district court granted a certificate of appealability on three questions, only the first and third of which are relevant here: "(1) whether the [reservation language] in Petitioner's unconditional standard plea agreement constitutes a waiver of the government's right to raise, or created an exception to, the rule of law in *Tollett*"; and "(3) whether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, [and] specifically ... whether *Tollett* precludes Petitioner from challenging his sentence based on an alleged pre-plea Sixth Amendment violation." Pet. App. 4a-5a.[3]

4. The Tenth Circuit affirmed. Pet. App. 1a-18a. Like the district court, the Tenth Circuit held 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.

The Tenth Circuit alternatively held that the parties did not condition the plea on Mr. Spaeth'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" to mean "post-plea-based," and so the phrase "any

[3] The second question involved whether the surreptitious prosecutorial misconduct rendered the plea involuntary. Pet. App. 4a. We do not pursue that issue.

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 that *Tollett* precluded Mr. Spaeth from collaterally attacking his 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.* 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." *Id.* From this premise, the Tenth Circuit concluded that "[n]o reason exists, therefore to hold that a sunken pre-plea constitutional violation somehow resurfaces on the other side of a guilty plea." *Id.* Without citing any authority, the Tenth Circuit "reaffirm[ed] that pre-plea conduct falls under *Tollett*'s ambit no matter if the effect of that conduct continues through sentencing." *Id.* When discussing the sentencing claim, the Tenth Circuit did not mention the collateral-attack waiver within the plea agreement or discuss whether that waiver also precluded the challenge to the sentence. *Id.*

Mr. Spaeth petitioned for rehearing en banc, but that petition was denied. Pet. App. 67a. This timely petition for a writ of certiorari 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 held below 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*, 404 U.S. at 260. It is also well established that

[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.*

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 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*, 139 S.Ct. at 744. "[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 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*, 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 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 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).

[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.

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* to Mr. Spaeth until after his conviction became final. Pet. App. 2a-3a. This is the precise situation envisioned by Mr. Spaeth's conditional plea: 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. Because the Tenth Circuit held otherwise, in an opinion that is inconsistent with this Court's precedent and that is plainly incorrect, this Court should grant this petition.

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

The Tenth Circuit cited no precedent that actually supports its interpretation of *Tollett*. Pet. App. 10a-11a. Nor did the district court. Pet. App. 22a-23a.[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 Mr. Spaeth's Plea Agreement.

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

[6] The district court itself 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, Pet. App. 22a-23a.

reverse the Tenth Circuit, however, Mr. Spaeth would likely not be eligible for any relief because the Tenth Circuit alternatively held that Mr. Spaeth 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 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 agreement conflicts with blackletter law and the agreement's 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's decision does not honor these principles. The plain language of Mr. Spaeth's plea agreement permits him to collaterally attack his conviction via "any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." Pet. App. 10a. Under the plea agreement's plain terms, the word "subsequent" modifies "claims," and, thus, permits Mr. Spaeth to file a "post-plea" (i.e., subsequent) claim alleging prosecutorial misconduct. And Mr. Spaeth did just that: he brought a post-plea collateral attack alleging surreptitious prosecutorial misconduct into confidential attorney-client communications. Pet. App. 19a.

The Tenth Circuit held otherwise 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 agreement permits Mr. Spaeth to raise both pre- and post-plea-based claims of prosecutorial misconduct (and ineffective assistance).

Nor does any other portion of the plea agreement restrict Mr. Spaeth's right to collaterally attack the conviction based only on "post-plea-based" ineffective assistance of counsel or prosecutorial misconduct. Rather, the plea agreement broadly permits Mr. Spaeth 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 Mr. Spaeth's right to bring a collateral attack in one significant respect: Mr. Spaeth cannot raise in a collateral attack (or on direct appeal) a *prior* claim of ineffective assistance of counsel or prosecutorial misconduct. For instance, if Mr. Spaeth 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 agreement's reference 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 portion of the plea agreement says. The relevant portion refers 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 agreement itself expressly permits Mr. Spaeth 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, it was the Tenth Circuit who rendered other portions of the agreement superfluous.

Moreover, this discussion of the ineffective-assistance portion of the relevant language is beside the point because Mr. Spaeth's collateral attack was 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 portion of the provision 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."

Finally, the Tenth Circuit found it "revealing[]" that "Spaeth agreed with the government at his change-of-plea hearing that" he only "preserve[d] his ability to bring 'any claim regarding ineffective assistance of counsel as outlined under the *Cockerham* decision or prosecutorial misconduct." Pet. App. 11a. But again, this case is about prosecutorial misconduct. And *Cockerham* has nothing to do with prosecutorial misconduct (just ineffective assistance). Even assuming that Mr. Spaeth somehow agreed to limit the reach of the ineffective-assistance language at the change-of-plea colloquy, he in no way agreed to limit his ability to collaterally attack his conviction based on "any subsequent claims with regards to … prosecutorial misconduct."

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, including in cases involving Spaeth's prosecutor, thus putting the prosecutor on notice that the conditional language would permit Spaeth to raise a subsequent pre-plea prosecutorial misconduct claim. *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 in her § 2255 response "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 not possible to construe the plea agreement against Mr. Spaeth. 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 both questions one and two 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 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 guilty plea "represents a break in the chain of events [that] preceded it." *Id.*

2. This Court has consistently described *Tollett* as 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

[7] This question is also pending in *Danille Morris v. United States*, Supreme Court. No. __-____ (filed Dec. 8, 2023). If this Court grants the Petition in *Morris*, it could hold this petition pending the disposition in that case. Unlike *Morris*, however, this case involves a conditional collateral-attack waiver. Yet, when resolving this issue, the Tenth Circuit did not discuss whether the collateral-attack waiver precluded Mr. Spaeth from challenging the sentence. For the same reasons discussed in Section II, the answer is no.

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 … ."); *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 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; *see also Concepcion v. United States*, 597 U.S. 481, 486 (2022) ("[w]hen a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction").

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). The sentence imposed must "suit not merely the offense but the individual defendant.'" *Pepper*, 562 U.S. at 488.

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) (the advisory guidelines "remain the foundation of federal sentencing decisions"). 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); *United States v. Watts*, 519 U.S. 148, 154 (1997) (permitting the use of acquitted conduct at sentencing).

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 on its own to answer the relevant question at the sentencing phase (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. Below, the government implied that this Court's decision in *Broce* supported its position. That's wrong. *Broce* involved a challenge to the defendant's convictions, a challenge this Court rejected because the asserted grounds did "not justify setting aside an otherwise valid guilty plea." *Id.* at 571. The "principle" that "control[led] in *Broce* was that "a voluntary and intelligent *plea of guilty* made by an accused person,

who has been advised by competent counsel, may not be collaterally attacked." *Id.* at 574 (quotation omitted; emphasis added).

The government also relied on *United States v. Ruiz*, 536 U.S. 622, 626 (2002), below. That reliance is frivolous. *Ruiz* held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." 536 U.S. at 633. That merits determination has nothing to do with *Tollett* or a defendant's waiver of the right to collaterally attack a sentence. Tellingly, the Tenth Circuit did not rely on *Broce* or *Ruiz* below.

5. 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.

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.

Below, the government suggested that the First, Fourth, Fifth, and Sixth Circuits had extended *Tollett* to preclude collateral attacks to sentences based on pre-plea constitutional violations, citing *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir. 1991), and four unpublished opinions. The Tenth Circuit was apparently unpersuaded, as it did not cite any of this precedent to support its own extension of *Tollett* to pre-plea constitutional claims. Pet. App. 15a.

In *Smallwood*, the defendant moved to suppress evidence, the motion was denied, and the defendant pleaded guilty pursuant to a plea agreement that did not reserve the defendant's right to appeal the denial of the suppression motion, but instead included the contraband seized as part of the factual basis for the plea. 920 F.2d at 1234, 1240. On appeal, the defendant attempted to raise the unpreserved suppression issue as a sentencing issue. *Id.* at 1240. The Fifth Circuit rejected the maneuver and held that the defendant could not "resuscitate fourth amendment concerns solely to challenge the consideration of evidence at sentencing." *Id.*

Smallwood is best viewed through the lens of abandonment: the defendant raised the suppression issue, then abandoned it when he pleaded guilty without conditioning the plea on the right to appeal the issue and by expressly admitting to a factual basis that included the fruits of the allegedly unlawful seizure. *Id. Smallwood* is not like this case, nor does it stand for some broad proposition that *Tollett*'s rule precludes all collateral sentencing challenges to surreptitious pre-plea violations.

The First Circuit's unpublished opinion in *United States v. Quezada*, 19 F.3d 7, 1994 WL 66104, at *2 (1st Cir. 1994), is no different than *Smallwood*. The Fourth Circuit's opinion in *United States v. Robeson*, 231 Fed. Appx. 222, 224 (4th Cir. 2007), also involved an attempt to shoehorn a waived Fourth Amendment challenge to the evidence underlying the offense of conviction into an appellate sentencing challenge. These cases do not extend *Tollett* to preclude all post-plea sentencing challenges to pre-plea surreptitious constitutional violations.

Nor has the Sixth Circuit extended *Tollett* to collateral attacks to sentences. In *Flowers v. United States*, 208 F.3d 213, 2000 WL 125851 (6th Cir. 2000), *Tollett* controlled because the defendant, like *Tollett*, pleaded guilty then attempted to collaterally attack the conviction based on a challenge to the grand jury. 2000 WL 125851, at *4-5. It is true that the Sixth Circuit stated that the defendant sought "to vacate his sentence on the [grand jury] basis," but the defendant's challenge was included in a separate motion to dismiss the indictment, not in the motion to vacate the sentence. *Id.* at *2. The challenge was plainly to the conviction, not the sentence. So too in *United States v. Hubble*, 1985 WL 13619, at *1-*2 (6th Cir. 1985) (concluding that the defendant could not "collaterally attack his sentence," but earlier enumerating various challenges the defendant made to his conviction).

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.

The Tenth Circuit's decision is unprecedented and causes unnecessary dissension. Review is necessary. Sup. Ct. R. 10(a).

IV. It Is Critically Important To The Administration Of The Federal Criminal Justice System That This Court Grant This Petition And Reverse The Tenth Circuit's Decision.

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 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 the Tenth Circuit's published opinion on the books, every federal prosecutor and criminal defense attorney in Kansas who signs an agreement with the "standard" conditional language included in Mr. Spaeth's agreement has committed an ethical violation (and every prosecutor has violated DOJ policy). That includes the criminal defense attorney and the prosecutor in Mr. Spaeth's case. For this reason, and in light of the

[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.

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, the government resolved the prosecutorial misconduct claims by agreeing to time-served sentences. *Reulet*, Case No. 5:14-cr-40005-DDC; *Herrera-Zamora*, Case No. 2:14-cr-20049; *Dertinger*, Case No. 2:14-cr-20067; *Huff*, 2:14-cr-20067; *Wood*, 2:14-cr-20065. It did not require the defendant to attempt to vacate the plea or proceed to trial. A lower sentence was sensible in those cases, just as it would be in this case. Indeed, the government was initially willing to end the mass litigation by agreeing to sentence reductions for still-incarcerated defendants (including Mr. Spaeth). *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 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*, 385 U.S. at 306. A pattern of such misconduct (like the pattern that occurred here) should even justify a remedy absent individualized prejudice. *Morrison*, 449 U.S. at 365 n.2 ("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); *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (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 "systematic practice of purposeful collection, retention, and exploitation of [confidential attorney-client] calls," *Carter*, 429 F.Supp.3d at 849-54, 900; its full-bore grab of video and audio recordings, *id.* at 835, 848-49; its "intent to deprive the Special Master and the FPD of evidence" during the ensuing investigation, *id.* at 874; and its blatant violation of discovery and preservation orders, *id.* at 816-824, with the objective "to destroy" the evidence, *id.* at 817. The Tenth Circuit has twice condemned the misconduct. Pet. App. 21a; *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 Co.*, 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 Mr. Spaeth) 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. It would be up to the lower courts to determine whether Mr. Spaeth was entitled to relief. At this point, he just wants to raise the claims. There is no valid reason why he shouldn't be able to do so.

V. This Case Is An Excellent Vehicle.

There are no procedural impediments to reviewing the questions presented. Mr. Spaeth entered a conditional guilty plea, reserving the right to collaterally attack his conviction and sentence based on subsequent claims of prosecutorial misconduct. Following his conviction, he timely sought collateral relief under § 2255(a) and timely sought appellate review of the district court's denial of relief. The questions presented were fully litigated and resolved in a published opinion below. If this Court were to hold that *Tollett* does not preclude Mr. Spaeth from collaterally attacking his conviction and/or sentence based on the prosecutors' misconduct into his confidential attorney-client communications, he would be entitled to return to the district court to pursue that claim. No vehicle problems stand in the way of this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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December 2023