No. _____

IN THE

Supreme Court of the United States

GARY JORDAN,
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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QUESTIONS PRESENTED

I. Can a defendant collaterally attack his guilty plea via 28 U.S.C. § 2255 as unconstitutional based on surreptitious pre-plea government misconduct without establishing ineffective assistance of defense counsel?

II. Does a Sixth Amendment attorney-client confidentiality violation that occurs during sentencing proceedings qualify as structural error?

RELATED PROCEEDINGS

United States v. Jordan, No. 23-3273 (10th Cir. April 2, 2025)

United States v. Jordan, No. 2:19-cv-02015 (D. Kan. Nov. 1 & Dec. 11, 2023)

United States v. Jordan, No. 2:16-cr-20022-2 (D. Kan. Dec. 21, 2016)

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

Gary Jordan 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 132 F.4th 1229, and is reprinted in the Appendix (Pet. App.) at 1a-5a. The Tenth Circuit's unpublished order denying rehearing en banc is reprinted at 54a. The district court's unpublished order denying Mr. Jordan's motion to vacate under 28 U.S.C. § 2255 is available at 2023 WL 7551613, and is reprinted at 6a-23a. The district court's unpublished order granting in part Mr. Jordan's motion to reconsider and dismissing Mr. Jordan's motion to vacate is available at 2023 WL 8584881, and is reprinted at 24a-27a. The district court's earlier order setting forth the applicable law is available at 28a-51a. The Tenth Circuit's unpublished order granting a certificate of appealability is reprinted at 52a-53a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255. Because the Tenth Circuit 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. Jordan's § 2255 motion in a published opinion on April 2, 2025, and denied the petition for rehearing en banc on June 12, 2025. Pet. App. 1a, 54a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides: "No person shall be … deprived of life, liberty, or property, without due process of law."

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 case is one of over one hundred from Kansas involving prosecutorial intrusions into confidential attorney-client communications. *See*, *e.g.*, *United States v. Hohn*, 123 F.4th 1084 (10th Cir. 2024) (en banc) (cert. petition filed April 15, 2025); *United States v. Spaeth*, 69 F.4th 1190 (10th Cir. 2023), cert. denied, 144 S. Ct. 1355 (2024); *United States v. Orduno-Ramirez*, 61 F.4th 1263 (10th Cir. 2023), cert. denied, 144 S. Ct. 388 (2023); *see also United States v. Carter*, 995 F.3d 1214 (10th Cir. 2021); *United States v. Carter*, 995 F.3d 1222 (10th Cir. 2021). Unlike prior cases, however, this case involves not just an independent Sixth Amendment attorney-client confidentiality claim, but also a claim that Mr. Jordan's guilty plea was unknowing and involuntary, in violation of constitutional due process principles. *See*, *e.g.*, *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void").

This Court should grant this petition to resolve an entrenched Circuit split over whether a defendant may attack his guilty plea as unconstitutional based on surreptitious pre-plea government misconduct without establishing ineffective assistance of defense counsel. This Court should agree with the majority of the courts

of appeals and hold that defendants may challenge their guilty pleas based on such misconduct without establishing ineffective assistance of defense counsel. This Court should also grant this petition and hold that, when prosecutors intentionally and without any legitimate law-enforcement justification access confidential attorney-client communications before sentencing, those prosecutors commit structural Sixth Amendment error, justifying a remedy regardless of prejudice.

STATEMENT OF THE CASE

A. The Underlying Conviction

In 2016, a federal grand jury returned a three-count superseding indictment, charging Gary Jordan with bank robbery (18 U.S.C. § 2113), discharging a firearm during and in relation to the bank robbery (18 U.S.C. § 924(c)(1)(A)), and possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)). Pet. App. 6a-7a.

Mr. Jordan pleaded guilty to all three counts without a plea agreement. Pet. App. 7a. At the change-of-plea colloquy, Mr. Jordan acknowledged that he had discussed the charges with defense counsel and understood them. R.28-29, 33-34.[1] He stated that he was not pressured, threatened, or coerced to plead guilty, and that he was pleading guilty "voluntarily and of [his] own free will." R.30. He was advised of his trial rights and waived them. R.31-33. The government provided a factual basis for the guilty plea. R.42-45. Mr. Jordan did not agree to this factual basis, but he did agree that there was "sufficient evidence and that he's guilty." R.45-47. The district court found that the plea was done "on an informed basis," that Mr. Jordan was

[1] For information not available in the opinions included within the Appendix, we cite to the Record on Appeal in the Tenth Circuit.

"aware of the charges, the factual and evidentiary basis for the charges, his right to a jury trial, and the potential civil rights and sentencing consequences of pleading guilty to these charges," and that the plea was "knowingly and voluntarily made and that it [was] supported by an independent basis in fact containing each of the essential elements of the offense." R.48. The district court accepted the plea. R.48.

The district court imposed a 30-year prison sentence. Pet. App. 10a. The Tenth Circuit affirmed the sentence. Pet. App. 12a; *United States v. Jordan*, 711 Fed. Appx. 475 (10th Cir. 2017).

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 an investigation into a drug-smuggling operation at a private prison in Leavenworth, Kansas (known as 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. 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.

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. *In re: CCA Recordings 2255 Litigation v. United States*, 2021 WL 150989 at *8 (D. Kan. Jan. 18, 2021). 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." *Id.* When this undeniable misconduct surfaced, the government "quickly settled the matter." *Id.* 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.

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*, Case No. 2:14-cr-20067, D.E.481 (D. Kan. Mar. 7, 2017); *United States v. Wood*, Case No. 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. Jordan) 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). The district court further determined in all of the § 2255 cases (including this one) that, because the government had intentionally violated orders designed to discover whether prosecutors had accessed communications that the United States Attorney's Office had collected, the court would adopt an adverse-inference finding that they had, "either by watching or listening to them or by directly or indirectly obtaining information about them from someone who did." *In re: CCA Recordings 2255 Litigation v. United States*, Case No. 2:19-cv-02491-JAR, D.E.587 at 1, 13 (D. Kan. Oct. 15, 2020). Noting that "proof of this element rests almost entirely within the government's control," the district court stated that it would enter this finding in all of the § 2255 cases. *Id.* at 13-14.

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

In January 2019, Mr. Jordan filed a counseled § 2255 motion, challenging his sentence based on the prosecutor's violation of his Sixth Amendment right to attorney-client confidentiality. Pet. App. 12a.[2] Mr. Jordan also moved to vacate his guilty plea because the prosecutors' actions rendered the plea unknowing and involuntary (and, thus, unconstitutional). Pet. App. 2a. As discussed below, these claims were based on the above-discussed pattern of prosecutorial misconduct.

Specifically, Mr. Jordan's claims were based on the government's previously undisclosed possession of a video recording of an attorney-client meeting between Mr. Jordan and defense counsel while Mr. Jordan was in pretrial custody at Corecivic. Pet. App. 16a. The video depicted defense counsel reviewing the guidelines and other

[2] Mr. Jordan also challenged his conviction on this basis, but because Mr. Jordan entered an unconditional guilty plea, we did not pursue that aspect of the claim in the court of appeals and do not pursue it here.

documents with Mr. Jordan. Supp.R.59. Mr. Jordan's attorney confirmed that the two discussed "matters related to legal advice or strategy" during this meeting, that the attorney did not know that the meeting was being recorded, and that, although there was no sound on the recording, "[n]on-verbal communication [was] discernable." Supp.R.59, 102-103; R.255; Pet. App. 16a-17a. The government surreptitiously possessed this recording before trial and sentencing. Pet. App. 12a-13a.

Mr. Jordan argued that the government violated his Sixth Amendment right to attorney-client confidentiality at the sentencing phase because the prosecution team unjustifiably and intentionally became privy to his confidential attorney-client communications. Pet. App. 6a. He took the position that this was structural error and that he was entitled to some remedy even absent a showing of prejudice. Pet. App. 11a-12a; R.205-207; Supp.R.119-121. Mr. Jordan separately argued that his guilty plea was unconstitutional because of this surreptitious government misconduct. Pet. App. 25a-26a. He alleged that the misconduct rendered his plea unknowing and that, had he known that the government possessed his confidential attorney-client communications, he would not have pleaded guilty. R.197; *see also* R.206 (explaining why it "would have been entirely reasonable for him to proceed to trial" because he pleaded unconditionally and thus had no promise of a favorable sentencing recommendation from the government).

The district court denied both claims. Pet. App. 2a, 25a-26a. The district court determined that Mr. Jordan could only challenge his guilty plea through an ineffective assistance of counsel claim. Pet. App. 2. The district court gleaned this

rule from this Court's opinion in *Tollett v. Henderson*, 411 U.S. 258 (1973). Pet. App. 25a-27a. And because Mr. Jordan did not claim that his attorney was ineffective as a basis to invalidate the guilty plea, he failed to raise a valid basis to attack the constitutionality of the guilty plea. Pet. App. 26a-27a.

The district court also determined that the Sixth Amendment violation did not constitute structural error under the Tenth Circuit's decision in *Orduno-Ramirez*. Pet. App. 20-21. The district court further determined that the government established that the violation was harmless because: (1) "the government submitted an affidavit from the lead prosecutors stating that at no time during their involvement in the case did they view any video recordings"; (2) the sentencing proceedings in Mr. Jordan's case bore "no indicia of a tainted proceeding"; and (3) "none of the information the Court, the United States Probation Office, or the government relied on for sentencing could have come from" the recording. Pet. App. 21a-22a.

Mr. Jordan appealed, and the Tenth Circuit (Judge Hartz) granted a certificate of appealability on the following question: "whether the district court erred in concluding Jordan could challenge the constitutionality of his guilty plea only via an ineffective-assistance-of-counsel claim." Pet. App. 52a. Because *Orduno-Ramirez* foreclosed his Sixth Amendment structural error claim, Mr. Jordan did not seek a certificate of appealability on that issue. He did raise the issue in his brief in support of a motion for a certificate of appealability, however, "to preserve the issue for review in the Supreme Court." Br. at 11.

The Tenth Circuit affirmed in a published opinion. Pet. App. 1a-5a. The Tenth Circuit held that "[p]risoners challenging whether their plea was knowing and voluntary must do so through an ineffective assistance of counsel claim unless they entered their plea only because of threats, misrepresentations, or inappropriate prosecutorial promises." Pet. App. 1a. The Tenth Circuit based its ruling on this Court's decisions in *Tollett* and *Brady v. United States*, 397 U.S. 742, 755 (1970). Pet. App. 2a-4a. The Tenth Circuit ultimately concluded that Mr. Jordan "could pursue his claim only through an ineffective counsel claim if he wished to challenge his guilty plea based on pre-plea conduct, which he concededly did not do. His challenge fails for that reason." Pet. App. 5a.

Mr. Jordan petitioned for rehearing en banc, but that petition was denied. Pet. App. 54a. This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve whether a defendant can attack a guilty plea as unconstitutional based on surreptitious pre-plea government misconduct without establishing ineffective assistance of defense counsel.

The Tenth Circuit held below that a defendant can attack a guilty plea as unconstitutional based on surreptitious pre-plea government misconduct only by establishing ineffective assistance of defense counsel. For four reasons, this Court should review the Tenth Circuit's decision.

First, the Tenth Circuit's decision creates a conflict in the Circuits over whether a defendant must establish ineffective assistance of *defense* counsel to withdraw a guilty plea based on *prosecutorial* misconduct. No other court of appeals has adopted

such an odd and unworkable rule. Rather, the Tenth Circuit's decision conflicts with published decisions from at least six other Circuits, all of which have held in published opinions that a defendant may challenge a guilty plea as unconstitutional based on surreptitious pre-plea government misconduct without also establishing that defense counsel was ineffective.

The **Fourth Circuit** has recently and repeatedly vacated guilty pleas as unconstitutional based on pre-plea government misconduct without a showing of ineffective assistance of defense counsel. *United States v. Garrett*, 141 F.4th 96, 107-114 (4th Cir. 2025) (holding that a "a reasonable defendant standing in [the defendant's] shoes would not have pled guilty had he or she known all the relevant information," including "egregious police misconduct that affected the prosecution's integrity, and prosecutorial misconduct that blocked [the defendant's] ability to understand the case against him"; involving police who lied in a search warrant affidavit and a prosecutor who lied to the district court during suppression proceedings); *United States v. Paylor*, 88 F.4th 553, 561 (4th Cir. 2023) (involving an undisclosed pattern of corrupt misconduct by a police officer); *United States v. Fisher*, 711 F.3d 465, 469 (4th Cir. 2013) (involving an officer's false testimony to obtain a search warrant). The Tenth Circuit's published opinion in this case is in direct conflict with this line of Fourth Circuit precedent.

The **First, Second, Sixth, Eighth, and Ninth Circuits** have similarly recognized that pre-plea prosecutorial misconduct – namely, a prosecutor's failure to disclose evidence – may render a guilty plea invalid without a showing of ineffective

assistance of defense counsel. *Ferrara v. United States*, 456 F.3d 278, 291-294 (1st Cir. 2006) ("the prosecution's failure to disclose evidence may be sufficiently outrageous to constitute the sort of impermissible conduct that is needed to ground a challenge to the validity of a guilty plea"); *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) ("even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution"); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985) (similar); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (adopting as "sensible" the rule from the Second, Sixth, and Eighth Circuits "that a defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld [] material"); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988) (similar; rejecting the claim that "the *Tollett* line of cases" "preclude[s] a collateral attack upon a guilty plea" based on a prosecutor's withholding of evidence). The Tenth Circuit's published opinion in this case also conflicts with this line of precedent.

The only defendants burdened with the impossible task of demonstrating that *defense* counsel was ineffective when a *prosecutor* commits surreptitious pre-plea misconduct are those defendants who were convicted in the Tenth Circuit. Outside of the Tenth Circuit, a defendant may move to withdraw his guilty plea solely because of the pre-plea surreptitious prosecutorial misconduct. For this reason alone, this Court should grant this petition to resolve this newly-created Circuit split.

Second, this Court should grant this petition because the Tenth Circuit's opinion is unpersuasive. For starters, the Tenth Circuit's opinion is premised on a misreading

of this Court's opinion in *Brady v. United States*. Citing *Brady*, the Tenth Circuit held that only three types of pre-plea government misconduct can render a guilty plea unconstitutional without a showing of ineffective assistance of defense counsel: "threats, misrepresentation, and inappropriate prosecutorial promises." Pet. App. 5a. But this Court in *Brady* acknowledged that this list is not exhaustive when it recognized that "other impermissible conduct by state agents" could render a guilty plea unconstitutional. 397 U.S. at 757. The Tenth Circuit's restrictive interpretation ignores this broader principle.

Additionally, other Circuits have identified pre-plea government misconduct like the misconduct at issue here as falling within *Brady*'s "misrepresentations" category. As the Fourth Circuit recently stated: "Courts of appeals, including our own, have since determined that the word 'misrepresentations' includes certain falsehoods or omissions attributable to the prosecution," including "abusive prosecutorial discovery tactics … when the prosecution's actions amount to deceit or lack of candor that materially affects the defendant's understanding of the case against him." *Garrett*, 141 F.4th at 108. The Tenth Circuit, on the other hand, appears to have narrowed "misrepresentations" to *overt* misrepresentations. Pet. App. 3a-5a. That restrictive reading is not supported by this Court's precedents (or any other court's precedents).

The other courts of appeals have rightly recognized that surreptitious government misconduct – conduct that defendants cannot know about when entering their pleas – can render pleas unknowing and involuntary just as much as overt threats or promises. The withholding of evidence, for instance, is a form of "misrepresentation"

because the government has a duty to disclose such evidence. The same principle applies to prosecutorial intrusions into attorney-client communications.

The Tenth Circuit's decision also misunderstands this Court's opinion in *Tollett*. *Tollett* held that a defendant who enters a constitutionally valid guilty plea may not thereafter "raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 267. This holding presupposes a knowing and voluntary *guilty plea*; it has nothing to do with whether the *guilty plea itself* was knowing and voluntary (i.e., constitutional). *Id.* at 264, 268. Thus, the Tenth Circuit incorrectly held that *Tollett* "establish[es] the conduct defendants [may] use to attack their guilty plea as unconstitutional," Pet. App. 3a, and that *Tollett* requires a defendant who challenges the constitutionality of his guilty plea to establish ineffective assistance of counsel, Pet. App. 5a. This error is obvious when one considers that Mr. Jordan challenged his guilty plea as unknowing and involuntary because of surreptitious pre-plea government misconduct. The Tenth Circuit's ultimate conclusion – that Mr. Jordan "could pursue his claim only through an ineffective counsel claim," Pet. App. 5a – is nonsensical. The *government's surreptitious misconduct*, and thus the constitutionality of the plea itself, could not possibly have anything to do with *defense counsel's performance* in such circumstances.

It is this incoherent result that cries out for correction. Under the Tenth Circuit's opinion, a defendant who claims his guilty plea is unconstitutional because of surreptitious government misconduct must prove his own attorney was ineffective --

even though the constitutional violation has nothing to do with counsel's performance. This turns *Tollett* on its head and contradicts this Court's precedent establishing that the validity of a guilty plea depends on whether it was knowing and voluntary, not on counsel's effectiveness.

Third, this Court should grant this petition because the question presented is of exceptional importance. The question presented affects the fundamental fairness of the criminal justice system and the constitutional rights of all criminal defendants. Guilty pleas resolve approximately 95% of criminal cases, making the standards for plea validity critically important to the administration of justice.

The Tenth Circuit's restrictive interpretation of when defendants may challenge guilty pleas based on government misconduct creates a dangerous precedent that could be exploited by prosecutors nationwide. If left standing, the decision would essentially eliminate meaningful consequences for surreptitious prosecutorial misconduct in the vast majority of criminal cases.

Indeed, the Tenth Circuit's opinion encourages surreptitious pre-plea government misconduct because the opinion effectively immunizes that misconduct whenever a defendant pleads guilty (again, as most defendants do). If a defendant cannot challenge the constitutionality of a guilty plea based on subsequently discovered surreptitious government misconduct, government officials "may be more likely to engage in such conduct, as well as more likely to conceal it to help elicit guilty pleas." *Fisher*, 711 F.3d at 469. That result is especially troubling in this case, which is one of over a hundred cases involving prosecutorial misconduct that the en banc Tenth

Circuit has "condemn[ed]" in words and theory but not practice. *Hohn*, 123 F.4th at 1109.

Moreover, the decision creates an artificial and illogical barrier to justice. There is no principled reason why a defendant whose plea was rendered involuntary by government misconduct should be required to prove that his attorney was ineffective—particularly when the misconduct may have been specifically designed to remain hidden from defense counsel.

Fourth, this case is an excellent vehicle to resolve the Circuit split on this exceptionally important issue. Mr. Jordan challenged the validity of his guilty plea at the earliest possible time – in a timely habeas petition filed after he learned of the government's surreptitious misconduct. He consistently invoked the favorable precedent discussed above in support of his position. The Tenth Circuit resolved the claim on the merits, knowingly (but silently) creating a Circuit split on this issue. There no procedural hurdles to this Court's review.

II. This Court should resolve whether a Sixth Amendment attorney-client confidentiality violation that occurs during sentencing proceedings qualifies as structural error.

The Tenth Circuit has held that a Sixth Amendment attorney-client confidentiality violation that occurs during the sentencing phase does not amount to structural error. This Court should review that decision for four reasons.

First, deliberate and systemic prosecutorial instructions into the defense camp undermine the legitimacy of our adversarial system and cry out for this Court's attention.

This Court has called deliberate prosecutorial interceptions of attorney-client communications "government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa v. United States*, 385 U.S. 293, 306 (1966). And this Court has warned prosecutors that particularly egregious or repeated misconduct might justify a remedy even absent prejudice. *See*, *e.g.*, *United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) (holding that agents' interference with defendant's attorney-client relationship did not justify dismissing indictment absent prejudice, but noting that "a pattern of recurring violations . . . might warrant the imposition of a more extreme remedy in order to deter further lawlessness"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988) (holding that, "as a general matter," prosecutorial misconduct before the grand jury must be prejudicial to justify dismissing indictment, but distinguishing cases "with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process"); *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (noting that habeas relief might be warranted absent prejudice for "deliberate and especially egregious" trial misconduct or "a pattern of prosecutorial misconduct"); *cf. United States v. Russell*, 411 U.S. 423, 432-33 (1973) ("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction").

It's time for this Court to put some teeth into these warnings. A criminal-justice system can only earn the public's deference and assistance through its own moral credibility. Paul H. Robinson, *Criminal Law's Core Principles*, 14 Wash. U. Jurisprudence Rev. 153 (2021); *Cf. Williams v. Pennsylvania*, 579 U.S. 1, 15-16 (2016) (holding that appellate judge's failure to recuse was structural error in part because "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself"). Cheating is wrong, especially by those who wield the significant power of prosecutors. Prosecutors who cheat undermine the credibility of the system, which presupposes two equal opponents acting within a clear set of rules. And prosecutors who cheat by spying on the defense camp commit the "grossest kind" of intrusion. *Hoffa*, 385 U.S. at 306.

This Court's intervention is critical given the above-discussed years-long "systematic practice of purposeful collection, retention, and exploitation of calls," 429 F.Supp.3d at 849-54, 900; the prosecutors' full-bore grab of video and audio recordings in *Carter*, *id*. at 835, 848-49; the prosecutors' "intent to deprive the Special Master and the FPD of evidence" during the ensuing investigation, *id*. at 874, and their blatant violation of discovery orders in the consolidated § 2255 cases, *In re: CCA Recordings 2255 Litigation*, Case No. 2:19-cv-02491-JAR, D.E.587 at 13. To this day, the Kansas United States Attorney's Office denies any Sixth Amendment violations. The legal implications of this misconduct matter not only to the Kansas defendants whose communications were collected, but also to the courts, the bar, and the public as a whole.

The Tenth Circuit, sitting en banc, has "condemned" the misconduct. *Hohn*, 123 F.4th at 1109. But condemnation without consequences is an empty gesture. As the venerable Judge Frank once warned: "Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of [denouncing prosecutors without reversing their victories]—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

This Court and only this Court can correct that cynical attitude by granting certiorari and holding that when prosecutors access confidential attorney-client communications before a defendant is sentenced, and do so intentionally and without any legitimate law-enforcement justification, those intrusions are structural Sixth Amendment violations justifying a remedy regardless of prejudice. Such a rule would not be unfair to the government—after all, it is completely within every prosecutor's control to avoid such intrusions. *Cf. Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("In certain Sixth Amendment contexts, prejudice is presumed," including "various kinds of state interference with counsel's assistance" that, "because the prosecution is directly responsible," are "easy for the government to prevent"). Review is necessary for institutional reasons and to protect the rule of law.

Second, how to identify structural constitutional error is a question of exceptional importance to both federal and state courts.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that most constitutional errors are subject to harmless-error analysis; that is, they will not justify a remedy unless they prejudiced the defendant. This Court nonetheless recognized that some constitutional errors can never be treated as harmless. *Id*. at 23. Ever since *Chapman*, courts have struggled to identify which errors fall into which category. *See* Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411, n.98 (2021) ("These labels are not helpful."); Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. 965 (2020) (canvassing cases); David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401 (1997) (discussing "rampant confusion" over how to identify structural errors).

One criminal-procedure treatise attributes this struggle to the fact that even this Court's own members "continue to disagree about the appropriate analysis for distinguishing between those errors that may be harmless and those that may not be harmless." Wayne R. LaFave, et al., 7 CRIM. PROC. § 27.6(d) (4th ed. Nov. 2022). Another commentator, in contrast, finds this Court's cases "both conservative and cohesive," while "the 'structural' errors identified by the circuit courts are anything but—exposing the need for a clearer and more accurate prescriptive definition of structural error." Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. at 982.

Either way, how to identify structural constitutional error is a question of exceptional importance to both federal and state courts. It is a question that frequently reflects tension between concerns about the outcome in a particular case (courts are loath to grant what they view as a "windfall" to criminal defendants) and concerns about systemic interests beyond the case at hand. *Compare, e.g., State v. Paumier*, 288 P.3d 1126, 1130 (Wash. 2012) (en banc) (finding violation of public-trial-right procedural rule structural error justifying reversal regardless of prejudice, in part because of right's unique importance to the public), *with id.* at 1133 (Madsen, C.J., dissenting on grounds that treating violation as structural error resulted in "defendant automatically obtaining the windfall of reversal of his conviction and a new trial").

This Court has sometimes resolved this tension by prioritizing core constitutional rights over individual case outcomes when those rights are not just derived from our general interest in fair judicial proceedings, but are, rather, part of the essential framework in which those proceedings are constitutionally required to take place. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006) (denial of right to counsel of choice is "structural defect" affecting "the framework within which the trial proceeds," rather than "simply an error in the trial process itself"). And thus considerations of prejudice in an individual case are off the table when it comes to enforcing the constitutional framework for a **discrimination-free judicial system**, *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Ballard v. United States*, 329 U.S. 187 (1946); **unbiased judges and juries**, *Williams v. Pennsylvania*, 579 U.S. 1 (2016); *Gray v.*

Mississippi, 481 U.S. 648 (1987); *Tumey v. Ohio*, 273 U.S. 510 (1927); **public trials**, *Waller v. Georgia*, 467 U.S. 39 (1984); **counsel in criminal cases**, *Gonzalez-Lopez*, 548 U.S. 140; *Gideon v. Wainwright*, 372 U.S. 335 (1963); **defendant autonomy**, *McCoy v. Louisiana*, 584 U.S. 414 (2018); *Faretta v. California*, 422 U.S. 806 (1975); and **jury verdicts**, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Despite these many examples, it remains difficult to identify which rights are structural ("framework"-related) and which rights are not. This Court has relied on one or more of three "broad" but "not rigid" rationales when deeming rights structural: (1) when the "right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "if the effects of the error are simply too hard to measure"; and (3) "if the error always results in fundamental unfairness." *Weaver v. Massachusetts*, 582 U.S. 286, 294-96 (2017).

This Court illustrated the "other interest" rationale in *Williams* when it held that "an unconstitutional failure to recuse constitutes structural error" justifying a remedy regardless of prejudice and "even if the judge in question did not cast a deciding vote." 579 U.S. at 14. As this Court explained, "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Id.* at 16. Framework-related interests are so much stronger than individual outcomes in the defendant-autonomy context that this Court enforces autonomy rights without regard to prejudice even while recognizing that doing so "usually increases the likelihood of a trial outcome *unfavorable* to the defendant." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)

(emphasis added). In sum, "[t]he very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right." *Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., dissenting in part). This means that sometimes individual defendants will get a second crack at things (a trial, a sentencing, an appeal), not because their personal interests were harmed the first time around, but because a court or prosecutor has blundered in a way that disrupts the very framework of our constitutional system.[3]

When an entire United States Attorney's Office has not merely blundered, but has intentionally, secretly, and repeatedly disrupted that framework in countless cases, it seems like an easy case for declaring structural error. But then again, this Court has adopted a "strong presumption" that constitutional errors are subject to harmless-error analysis, *Rose v. Clark*, 478 U.S. 570 (1986), and described structural errors as "a very limited class of errors," *United States v. Marcus*, 560 U.S. 258, 263 (2010) (citation omitted), that are "highly exceptional," *United States v. Davila*, 569 U.S. 597, 611 (2013). These cautionary flags are understandable, and yet they leave courts erring on the side of *right results* over *basic rights*. Here, for instance, the Tenth Circuit has recognized that "the USAO's systemic conduct may point to the need for a 'prophylactic rule[ ],'" but the Tenth Circuit was sufficiently worried about this Court's "caution against per se or sweeping Sixth Amendment rules that obviate

[3] It is usually *not* the case that recognizing error to be structural *frees* the defendants who benefit from that recognition. Structural error justifies a remedy regardless of prejudice, but *what* remedy is a separate question (a question that is not presented here). *See Waller v. Georgia*, 467 U.S. 39, 49-50 (1984) (discussing distinction between recognizing error and choosing a remedy "appropriate to the violation"); *United States v. Morrison*, 449 U.S. 361, 364-366 & n.2 (1981) (assuming Sixth Amendment error and discussing how remedies "should be tailored to the injury").

consideration of prejudice in every instance" that it found "insufficient reason here to adopt a per se rule." *Orduno-Ramirez*, 61 F.4th at 1276. Which raises the question: if not here, where?

This Court has previously granted certiorari to review and correct erroneous *adoptions* of structural-error rules. *See, e.g., Greer v. United States*, 593 U.S. 503, 512-514 (2021) (reversing Fourth Circuit decision vacating conviction without regard to prejudice due to error in plea colloquy); *Davila*, 569 U.S. at 608-13 (reversing Eleventh Circuit decision vacating conviction without regard to prejudice where magistrate judge improperly participated in plea discussions); *Marcus*, 560 U.S. at 262-67 (reversing Second Circuit decision vacating conviction on ex post facto grounds without regard to prejudice); *Weatherford v. Bursey,* 429 U.S. 545, 557-58 (1977) (reversing Fourth Circuit decision vacating conviction without regard to prejudice where undercover agent attended defendant's attorney-client meetings but did not convey details of conversation to the prosecution).

This Court should grant certiorari to review and correct the Tenth Circuit's erroneous *rejection* of a structural-error rule here.

Third, the Tenth Circuit's decision undervalues the Sixth Amendment's core requirement of confidentiality; the critical nature of sentencing proceedings; and the role of legitimacy and deterrence interests in structural-error analyses.

a. State and federal courts have long recognized that the right to *private* communications with counsel is at the core of the right to counsel. *Coplon v. United States*, 191 F.2d 749, 758 (D.C. Cir. 1951) ("The sanctity of the constitutional right of

an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts."); *In re Rider*, 195 P. 965, 966 (Cal. App. 1920) ("it is the absolute right of parties charged with crime to consult privately with their attorneys"); *State v. Davis*, 130 P. 962, 964 (Okla. Ct. Crim. App. 1913) (same; if parties in prison and charged with crime are compelled to consult their attorneys in the presence of an officer or officers of the law, the very object and purpose of the Constitution and of the statute would be defeated . . . [t]his alone would render such consultations a miserable and contemptible farce").

This core value of confidentiality plays a critical role in the adversarial process. The defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 61 (1932). To benefit from that guiding hand, "[a] criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential." *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014). Indeed, "those necessary conferences between counsel and accused" are nearly sacrosanct, "sometimes partak[ing] of the inviolable character of the confessional." *Powell*, 287 U.S. at 69; *accord Nordstrom*, 762 F.3d at 910 ("In American criminal law, the right to privately confer with counsel is nearly sacrosanct."). Given the value and sensitivity of information exchanged during attorney-client conferences, that information "must be insulated from the government" "[i]n order for the adversary system to function properly." *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978). The Sixth Amendment thus necessarily "protect[s] the attorney-client relationship from intrusion in the criminal setting." *Wolff v. McDonnell*, 418 U.S. 539,

576 (1974). In other words, the right to confidentiality of communications with counsel is—like the right to counsel of choice—part of the Sixth Amendment framework in which criminal proceedings are constitutionally required to take place. *See Gonzalez-Lopez*, 548 U.S. at 148-49. The Tenth Circuit undervalued the core value of this right when it refused to enforce it here absent prejudice.

b. Courts and commentators alike have recognized that "[t]he sentencing phase of a criminal stage is one of the most critical stages of the judicial process." Nancy Fox Kaden, *Sentencing*, 73 GEO. L. J. 671, 671 (Dec. 1984). Indeed, given the fact that "[t]he vast majority of [criminal] cases not dismissed ultimately result in conviction, either after a trial or as a result of a negotiated plea," sentencing is usually not just "one of," but "*the* most critical stage of a criminal prosecution, and the proceeding having the greatest personal impact on the defendant." 3 CRIM. PRAC. MANUAL § 102:2 (March 2023) (emphasis added); *accord United States v. Ruiz-Rodriguez*, 277 F.3d 1281, 1291 (11th Cir. 2002) (initial sentencing in a felony case is "often the most critical stage when a defendant pleads guilty"); *United States v. Jackson*, 32 F.3d 1101, 1109 (7th Cir. 1994) ("sentencing is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant" (marks and citations omitted)).

Federal sentencing proceedings in particular are dizzyingly complex proceedings during which the district court is required to "subject[ ] the defendant's sentence to the thorough adversarial testing contemplated by the federal sentencing procedure." *Rita v. United States*, 551 U.S. 338, 351 (2007). And prosecutors play an

"*indispensable* role" in these proceedings. Department of Justice Manual (JM) 9-27.710 cmt. (emphasis added).[4] For instance, prosecutors provide the Probation Office with detailed facts to include in the PSR, some of which are "obtainable only from prosecutorial or investigative files to which probation officers do not have access." JM 9-27.720(1) & cmt.; *see, e.g.,* R3.17-18 (PSR allegations derived from FBI reports). And prosecutors routinely recruit and rely on cooperating witnesses for material aspects of those facts. *See, e.g.,* R3.18-19 (PSR allegations derived from proffer statements). If a defendant objects to a fact that will affect sentencing, the prosecutor then bears the burden of proving that fact at the sentencing hearing by a preponderance of the evidence. *United States v. McDonald*, 43 F.4th 1090, 1095 (10th Cir. 2022); Fed. R. Crim. P. 32(i)(3)(B); JM 9-27.720(5) cmt. ("the government should be prepared to substantiate significant factual allegations disputed by the defense").

Prosecutors also advocate for fact-sensitive adjustments that "can have a profound effect on the defendant's sentence." JM 9-27.720(2) cmt. They gather and present victim-impact statements at sentencing. Manual 9-27.720(6) cmt. (prosecutors should "notify victims" of their statutory right to allocution and "notify the court of any victims wishing to make a statement"). They advocate for upward variances, respond to defense requests for leniency, and decide when to recommend sentence reductions for substantial assistance. JM 9-27.730. With so many factual and legal issues in play, prosecutors have many opportunities at sentencing to take strategic advantage of the content of a defendant's confidential communications with counsel. In finding

[4] Available at https://www.justice.gov/jm/justice-manual.

that post-plea, pre-sentencing intrusions do not violate the Sixth Amendment, the Tenth Circuit undervalued and understated the critical nature of sentencing proceedings.

c. Perhaps more importantly, the Tenth Circuit's focus on the likelihood of prejudice at sentencing distracted it from any genuine inquiry into legitimacy and deterrence interests as valid reasons to adopt a structural-error rule here. The Tenth Circuit has touched on these latter concerns only long enough to reject them on grounds that such rules are "blunt legal instrument[s]" that this Court has "caution[ed] against." *Orduno-Ramirez*, 61 F.4th at 1273.

By defaulting to this presumption against structural-error rules without giving legitimacy and deterrence interests their due, the Tenth Circuit has liberated prosecutors to carry on collecting and exploiting attorney-client communications "with a fair assurance of impunity." Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. at 1432-36 (2021). Harm to the system matters to the courts, the bar, and the public as a whole. But as long as courts like the Tenth Circuit continue to believe "that outcome-determinative prejudice is the only kind of harm that truly matters, deep reform will elude our grasp." *Id*. at 1441. The Kansas USAO broke the rules for years, concealed its misconduct, and then lied about it. The Tenth Circuit erred when it held that the USAO's intentional, secret, systemic, and unjustified intrusions neither violated the Sixth Amendment nor justified a sentencing remedy absent prejudice. Review is necessary.

Fourth, this is an excellent vehicle to address this question. There are no procedural impediments to review. Mr. Jordan timely sought appellate review of the district court's order denying his § 2255 motion. The issue has been fully litigated in the Tenth Circuit. If this Court were to hold that post-plea, pre-sentencing intrusions of the egregious type that occurred are structural Sixth Amendment violations justifying a remedy regardless of prejudice, then Mr. Jordan and several others whose appeals remain abated in the Tenth Circuit would be entitled to return to the district court and pursue their § 2255 claims. No vehicle problems stand in the way of this Court's review.[5]

CONCLUSION

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

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[5] We note that the petition in *Hohn*, which asks whether a prosecutor's intentional, unjustified intrusion into a defendant's attorney-client communications violates the Sixth Amendment without a showing of discrete, trial-specific prejudice, is currently pending with a likely distribution date of September 25, 2025. Supreme Court Case No. 24-1084. This Court should grant the petition in *Hohn*. If it does, it would make sense to hold this petition pending *Hohn*'s disposition.