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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW C. SPAETH,

Defendant - Appellant.

No. 21-3096

Appeal from the United States District Court
for the District of Kansas
(D.C. Nos. 2:19-CV-02491-JAR-JPO, 2:19-CV-02413-JAR-JPO,
2:14-CR-20068-DDC-6)

Paige A. Nichols, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, and Lydia Krebs, Assistant Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, District of Kansas, Wichita, Kansas, for Appellant.

Bryan C. Clark, Assistant United States Attorney (Duston J. Slinkard, United States Attorney, James A. Brown, Assistant United States Attorney, and Carrie N. Capwell, First Assistant United States Attorney, with him on the brief), Office of the United States Attorney, District of Kansas, Topeka, Kansas, and Kansas City, Kansas, for Appellee.

Before **TYMKOVICH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

PHILLIPS, Circuit Judge.

By motion under 28 U.S.C. § 2255, Matthew C. Spaeth asks us to vacate his conviction and term of imprisonment or to reduce his sentence imposed for his admitted participation in an extensive conspiracy to distribute methamphetamine. As support, he points out that the government obtained and allegedly listened to recordings of telephone calls that he made from a pretrial-detention facility to his counsel. But the record reveals that Spaeth's guilty conduct was firmly established long before his arrest and that he received a very favorable sentence under a binding plea agreement.[1] Even so, and despite his unconditional guilty plea, the law allows Spaeth to challenge his conviction and sentence if his counsel's deficient performance led to an involuntary and unknowing guilty plea when he otherwise would have chosen a trial. But Spaeth doesn't try to meet this legal standard. Though we condemn the conduct of the Kansas U.S. Attorney's Office, Spaeth still needs to prove his § 2255 claim. We affirm.

[1] Under a Rule 11(c)(1)(C) plea agreement, Spaeth pleaded guilty to Count 1 of the Third Superseding Indictment, which charged violations of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A)(viii), 856, 860, 860a, and 18 U.S.C. § 2, for his role in a large methamphetamine-distribution conspiracy. By the agreement, the district court dismissed Spaeth's other drug and firearms charges, the most significant of which was a charge of violating 18 U.S.C. § 924(c). If convicted, that charge would have compelled a consecutive 60 months on top of the 10-year-to-life sentence on the drug conviction.

BACKGROUND

I. Factual and Procedural Background

A. Spaeth's Admitted Facts About His Criminal Conduct[2]

From January to September 2014, various federal, state, and local law-enforcement agencies and officers investigated an extensive methamphetamine-trafficking conspiracy operating in Kansas City, Kansas. The investigation led to controlled buys, traffic stops, search warrants, and incriminatory interviews of some conspirators, as well as to the seizure of drug ledgers and methamphetamine. In Spaeth's detailed written factual basis attached to his plea agreement, he admitted his role in the conspiracy, which included weekly transactions of pounds of methamphetamine (mostly from Mexico). He also acknowledged that officers had seized methamphetamine from him. For instance, an officer arrested Spaeth at his home on an active warrant and found him with 168 grams of methamphetamine, as well as currency, digital scales, and other paraphernalia. Further, one of Spaeth's recorded jail calls with a drug associate led law enforcement to a backpack in his car. After obtaining a search warrant for the car, law enforcement found in the backpack 223 grams of methamphetamine and Spaeth's loaded .357 Ruger revolver.

[2] This short but packed account of Spaeth's criminal conduct is included in an attachment to his plea agreement, which he verified during his change-of-plea hearing.

B. Spaeth's Indictment, Arrest, Detention, and Sentencing

In October 2014, in a Third Superseding Indictment, a grand jury indicted eight people, including Spaeth, on 25 counts related to the drug conspiracy.[3] In November 2014, law-enforcement officers arrested Spaeth. At Spaeth's arraignment, the judge remanded him to the Leavenworth Detention Center (or CoreCivic),[4] where he remained in detention until his sentencing in January 2017. Located in rural Kansas, CoreCivic houses federal detainees from Kansas, Missouri, Nebraska, and Iowa. The facility contracts with the U.S. Marshals Service to detain federal defendants awaiting trial and sentencing. Given CoreCivic's remote location, detainees must sometimes communicate with their counsel by telephone.

While at CoreCivic, Spaeth placed five recorded telephone calls to his appointed counsel. Four calls occurred between July 8, 2015, and August 19, 2015, and one call occurred on May 3, 2016. The five calls totaled 23 minutes.

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[3] The indictment charged Spaeth with one count of conspiracy to distribute methamphetamine in violation of (among other statutes) 21 U.S.C. §§ 841(a)(1) and 846(b)(1)(A)(viii); two counts of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), and 18 U.S.C. § 2; one count of possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c); and one count of felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

[4] The Leavenworth Detention Center is a private detention center managed by CoreCivic, formerly the Corrections Corporation of America. We refer to the Leavenworth Detention Center as CoreCivic.

During the calls, Spaeth and his counsel discussed "matters relating to legal advice or strategy."[5]

In September 2016, four months after the fifth call, Spaeth agreed to plead guilty to the drug-conspiracy charge in exchange for the government's dismissing the remaining charges and recommending a binding sentence of 180 months' imprisonment. Both in his petition to enter a plea of guilty and in the written plea agreement, as well as during the Rule 11(c)(1)(C) plea colloquy, Spaeth acknowledged that he was pleading guilty because he was guilty and that he entered his guilty plea freely, voluntarily, and knowingly. He also acknowledged that he was "satisfied with the advice and services" of his counsel. Spaeth's counsel represented to the court that he "d[id] not know of any reason why the court should not accept this plea."

Spaeth's plea agreement contained a lengthy appellate-waiver paragraph, which began with a blanket waiver of his right to appeal or collaterally attack his conviction, sentence, or prosecution. But later in the waiver, he reserved any rights he might have to "any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct." After carefully adhering to Rule 11's procedures, the district court accepted Spaeth's guilty plea.

[5] At oral argument, Spaeth's counsel informed us that the transcripts of the calls are "not part of the open record" for our review. As we understand it, the Kansas Federal Public Defender and the district court have listened to these recorded calls.

In January 2017, the court held Spaeth's sentencing hearing. After applying an agreed total offense level of 35 (which had credited a three-level reduction for acceptance of responsibility) and a criminal-history category of III, the court was left with an advisory guideline range of 210 to 262 months' imprisonment for the drug-conspiracy charge.[6] As part of her comments regarding the recommended binding sentence of 180 months, Assistant U.S. Attorney Terra Morehead told the court that the government suspected Spaeth of involvement in a drug conspiracy at CoreCivic for which he might later be charged (the *Black* Investigation). Spaeth's counsel did not speak to that matter but informed the court that Spaeth had no objections to the presentence report and knew of no "lawful reason why the sentence should not now be imposed." The court then imposed a sentence of the binding 180 months' imprisonment under Rule 11(c)(1)(C).

C. Post-Sentencing Developments

In spring 2016, the U.S. Attorney's Office for the District of Kansas began its *Black* Investigation. The investigation concerned the actions of

[6] Even without additional Guidelines enhancements to the base offense level for Spaeth's relevant-conduct amount of methamphetamine, if Spaeth had gone to trial and been convicted, his advisory range would have been 292 to 365 months. *See* U.S. Sent'g Guidelines Manual ch. 5, pt. A (U.S. Sent'g Comm'n 2018) (base offense level 38 and criminal-history category III). And if also convicted on the § 924(c) charge, Spaeth would have received a mandatory consecutive 60 months on top of that. *See* 18 U.S.C. § 924(c)(1)(A). Spaeth's counsel negotiated a very favorable deal for him. We note that Spaeth is not requesting that we allow him to withdraw his guilty plea to enable him to proceed to trial.

detainees, CoreCivic employees, and outside persons to smuggle drugs into the facility. In April 2016, early in the investigation, the lead Assistant U.S. Attorney, Erin Tomasic, subpoenaed recordings of outgoing telephone calls placed by about 40 detainees, which included Spaeth's five calls with his counsel.[7] In August 2016, under a "clawback order," the district court impounded "all video and audio recordings of attorney-client communications" in the government's possession. In September 2016, as mentioned, Spaeth signed and filed with the court his written plea agreement. The record does not reveal when Spaeth or his counsel learned that the government had obtained his recorded calls.

The record does reveal that at least before October 2016, CoreCivic automatically recorded all detainee telephone calls unless defense attorneys had requested privatization for their own telephone numbers. The record is silent about whether Spaeth's counsel ever requested privatization. But the district court found that "calls between defense attorneys and clients at [CoreCivic] were routinely recorded even when the attorney properly requested privatization."[8]

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[7] The subpoena requested "all [CoreCivic] inmate recorded calls" "from July 1, 2014 until notified recorded calls are no longer needed." Among these were five calls from Spaeth to his counsel from November 4, 2014, to May 15, 2016.

[8] On November 3, 2014, Spaeth signed a form titled "Monitoring of Inmate/Detainee Telephone Calls." Spaeth acknowledged that CoreCivic could

(*footnote continued*)

In July 2018, Chief Judge Julie A. Robinson appointed the Kansas Federal Public Defender to represent defendants with potential Sixth Amendment claims related to the government's listening to defendants' attorney–client calls.[9] She did so after a Special Master's extensive investigation into misconduct at the Kansas U.S. Attorney's Office. Because the government failed to fully cooperate in the investigation, the district court imposed an adverse inference against the government that "before each petitioner entered a plea, was convicted, or was sentenced, each member of the prosecution team became 'privy to' each recording . . . , either by watching or listening to them or by directly or indirectly obtaining information about them from someone who did." Despite that ruling, AUSA Morehead later filed an affidavit declaring that "[a]t no time prior to [Spaeth's] sentencing . . . was I aware that audio recordings of telephone calls existed that contained communications between [Spaeth] and defense counsel or any individual working for defense counsel." She denied having "listen[ed] to any audio recordings of telephone calls" between Spaeth and his counsel.

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monitor and record "conversations on any telephone located within its institutions." The form also noted that "[a] properly placed phone call to an attorney is not monitored. You must contact your unit team to request an unmonitored attorney call." Apart from this form, Spaeth averred that he "did not take any steps to make sure [his] attorney-client calls were not monitored or recorded."

[9] Chief Judge Robinson detailed the misconduct in a 184-page opinion that included findings of fact and conclusions of law.

D. Federal Habeas Motion

On July 17, 2019, Spaeth filed a "Motion to Vacate and Discharge with Prejudice Under 28 U.S.C. § 2255," which sought to vacate his conviction and sentence.[10] Chief Judge Robinson transferred Spaeth's habeas case to her docket and consolidated it with more than 100 others asserting Sixth Amendment violations from the *Black* Investigation. In his motion, Spaeth alleged that the government had violated his "Sixth Amendment right to counsel by intentionally obtaining phone-call recordings that included protected attorney-client communications between [Spaeth] and counsel."

Despite having pleaded guilty, Spaeth did not address the legal consequences of guilty pleas under the rule set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973). In fact, Spaeth did not even allege that his counsel had performed deficiently, let alone that he had done so in a way that rendered his plea involuntary and unknowing. Nor did he allege prejudice—that he would have gone to trial had he known about the recorded calls before he pleaded guilty. *See Hill v. Lockhart*, 474 U.S. 52, 54-55 (1985).

Spaeth instead rested his motion on *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995), a case involving a *jury verdict* and not a guilty plea. There, we ruled that "a prejudicial effect on the reliability of the trial process must be

[10] At oral argument, Spaeth's counsel acknowledged that Spaeth is not seeking to withdraw his guilty plea; rather, she confirmed that Spaeth is seeking the "greater range of remedies" that she says are available in § 2255 proceedings.

presumed" when "the state becomes privy to confidential communications." *Id.* at 1142. Spaeth's motion asked the district court to vacate his judgment with prejudice and immediately release him or to vacate his sentence and resentence him to 90 months' imprisonment.

The government opposed Spaeth's § 2255 motion. From the outset, it argued that Spaeth's guilty plea left him with a single avenue for redress—showing under *Tollett* that he had received ineffective assistance of counsel that rendered his plea involuntary and unknowing. As the government noted, a guilty plea "settles the issues of a defendant's factual and legal guilt" because it "represents a break in the chain of events which has preceded it in the criminal process" and "operates to foreclose" collateral attacks based on pre-plea misconduct.

The district court ordered supplemental briefing "addressing the collateral-attack waiver by plea agreement issue." In his supplemental brief, Spaeth contended that the government had waived "its *Tollett* defense" by agreeing to the so-called carve-out provision—the last sentence of his appellate-waiver paragraph. Alternatively, Spaeth argued that *Tollett* posed no obstacle because the government's intrusion had "disabl[ed] defense counsel from fully assisting and representing" him. The government countered that it had not waived *Tollett* and further that it could not waive "controlling law" based on "the petitioner's admission of factual guilt." As for Spaeth's argument under *Shillinger*, the government responded that *Shillinger* would not relieve

any petitioner of the requirement of showing that his counsel's deficient performance had caused him to plead guilty rather than go to trial.

From this, the district court ruled on the three underlying issues in a thorough 61-page opinion.[11]

First, examining the appellate waiver's plain language, the court ruled that the carve-out provision "does not state that the government is waiving anything and makes no mention of the substantive standard that applies to [subsequent claims of ineffective assistance of counsel]." *CCA Recordings 2255 Litig.*, 2021 WL 150989, at *12. So the court agreed with the government that this provision did not purport to waive *Tollett*. *Id.* at *9-13.[12] And the district court declared that "the *Tollett* rule creates a separate legal bar to relief, regardless of language in the plea agreement." *Id.* at *12. "To rule otherwise," the court reasoned, "would impermissibly circumvent the rule in *Tollett* and its progeny." *Id.* Put differently, the district court concluded that the government cannot "silently bargain away" the rule of law in *Tollett*; instead "the Court

[11] The district court's order issued on the consolidated docket for all § 2255 petitioners (including Spaeth) who had collaterally attacked their sentences based on allegations of intentional invasions of their attorney–client conversations at CoreCivic. *In re CCA Recordings 2255 Litig. v. United States*, Consol. No. 19-cv-2491, 2021 WL 150989, at *1 n.6 (D. Kan. Jan. 18, 2021).

[12] In so ruling, the district court reversed an earlier ruling that the government had waived application of *Tollett* in the appellate-waiver paragraph. *See id.* at *9.

must consider relevant controlling law, including the standard adopted in *Tollett*." *Id.* at *12-13.

Second, the court rejected Spaeth's view that *Shillinger* applied in the guilty-plea setting. *Id.* at *13-18. Relying on *Tollett*'s command, the district court required that Spaeth show why his guilty plea would not "render[] irrelevant" pre-plea intentional intrusions that were "not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction." *Id.* at *13 (quoting *Haring v. Prosise*, 462 U.S. 306, 321 (1983)). The court further rejected Spaeth's argument that *Shillinger* alone could provide the needed prejudice showing. It reasoned that

> Petitioners' argument ignores the lesson from *Tollett* that the merits of an alleged pre-plea constitutional violation are rendered irrelevant and should not be conflated with the largely separate question of whether a defendant's plea was involuntary. Instead, Supreme Court precedent instructs the Court to look to whether the alleged Sixth Amendment violation *caused* a petitioner's plea to be involuntary or uncounseled.

Id. at *16. And to that end, the district court rejected Spaeth's argument to extend *Shillinger*'s per se Sixth Amendment violation into *Tollett*'s guilty-plea framework. 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 *16-18.

Third, the district court considered and discarded Spaeth's argument that *Tollett* didn't apply to pre-plea constitutional violations whose effects somehow continued post-plea to sentencing. *Id.* at *18. The district court found no reason

to depart from *Tollett*'s reasoning that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* (quoting 411 U.S. at 267). The court determined that allowing Spaeth to challenge his sentence based on pre-plea violations would render *Tollett* and its progeny "meaningless." *Id.* at *18 & n.185 (collecting cases).

After that, the district court invited Spaeth to amend his § 2255 motion to seek relief under *Tollett*. *Id.* But rather than amend his motion, Spaeth sought and obtained a certificate of appealability (COA) on three issues and appealed. In his notice to the court, he acknowledged that "this decision will result in the dismissal of his § 2255 motion."

On April 2, 2021, the court honored Spaeth's choice and dismissed his § 2255 motion. *In re CCA Recordings 2255 Litig. v. United States*, Consol. No. 19-cv-2491, 2021 WL 1244789 (D. Kan. Apr. 2, 2021). The court analogized *Tollett* to the "materially similar" standard in *Hill*, deducing that a defendant asserting pre-plea constitutional violations "must demonstrate that, 'but for counsel's errors, the defendant would not have pled guilty and would instead have insisted upon proceeding to trial.'" *Id.* at *6 (quoting *Hill*, 474 U.S. at 59). And "[b]ecause Petitioner d[id] not attempt to meet this standard," he could not establish that "his binding, unconditional guilty plea is subject to vacatur." *Id.* at *8.

The court issued a COA. *Id.* at *9 (citing 28 U.S.C. § 2253(c)(2)). The court's amended COA questions are as follows[13]:

> (1) whether the carve-out provision 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*.
>
> (2) whether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, [and] specifically . . . whether a pre-plea *Shillinger* violation renders a plea unknowing and involuntary and, because Petitioner did not otherwise challenge the validity of his unconditional plea under the applicable standard, whether the rule in *Tollett* procedurally bars his claim.
>
> (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.

II. Legal Background

Before we turn to the COA questions, we set the stage with an overview of some key precedents involving constitutional challenges made after guilty pleas. To resolve the COA questions, we must evaluate *Tollett*, its predecessors, and its successors. We therefore discuss those cases first.

The *Brady* Trilogy

Our review begins with a trio of cases decided the same day, known as the *Brady* trilogy. The first, *Brady v. United States*, involved a defendant

[13] The district court rejected Spaeth's attempt to "expand the COA to allow him to appeal its rejection of a post-plea Sixth Amendment claim" based in part on Spaeth's failure "to allege a discrete post-plea Sixth Amendment violation."

(Brady) who pleaded guilty to avoid the death penalty under a federal kidnapping statute. 397 U.S. 742, 743 (1970). He did so after learning that a codefendant had agreed to plead guilty and testify against him. *Id.* Years later, the Supreme Court ruled that the death-penalty provision of the kidnapping statute was unconstitutional. *Id.* at 745-46 (citing *United States v. Jackson*, 390 U.S. 570 (1968)). In his *Jackson*-based § 2255 motion, Brady claimed that his plea had been involuntary because the unconstitutional death-penalty provision "operated to coerce his plea" and because "his plea was induced by representations with respect to reduction of sentence and clemency." *Id.* at 744. The Court thus grappled with whether the Fifth Amendment prohibited guilty pleas "influenced by the fear of a possibly higher penalty for the crime charged." *Id.* at 750-51.

The Court rejected Brady's collateral constitutional challenge to his plea. It began by reaffirming that "guilty pleas are valid if both 'voluntary' and 'intelligent.'" *Id.* at 747 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). "Central to the plea and the foundation for entering judgment against the defendant," the Court reasoned, "is the defendant's admission in open court that he committed the acts charged in the indictment." *Id.* at 748. And because guilty pleas necessarily waive a defendant's constitutional right to a trial, the defendant must waive that right "voluntarily" and "with sufficient awareness of the relevant circumstances and likely consequences." *Id.* Because Brady admitted his guilt in open court and understood the terms of his plea, the Court

upheld his plea. *Id.* at 748-49 ("Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner.").

The Court declined to invalidate guilty pleas based on post-plea arguments about pre-plea constitutional violations. Even assuming that Brady had pleaded guilty at least in part to avoid the death-penalty provision, the Court ruled that "this assumption merely identifies the penalty provision as a 'but for' cause of his plea." *Id.* at 750. But the constitutional defect did not "necessarily prove that the plea was coerced and invalid as an involuntary act." *Id.* The Court noted that pleading guilty to avoid a harsher punishment (in Brady's case, death) "is inherent in the criminal law and its administration" because "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." *Id.* at 751-52. The ingrained "mutuality of advantage" between the government and the defendant in guilty pleas thus placed a high bar for collateral attacks on a plea. *See id.* at 752-53 ("[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.").

Equally important for the Court was the role of competent counsel in advising defendants of the consequences of a guilty plea.

> A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts . . . hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

Id. at 757. Brady's voluntary admission of guilt did not become involuntary just because counsel advised him that he risked a death sentence. *See id.* at 757-58. That neither Brady nor counsel anticipated the Court's later invalidation of the death-penalty provision did not matter. As the Court observed, nothing in the Constitution mandated that "a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." *Id.* at 757.

The Court elaborated on the role of counsel in guilty pleas in another case issued the same day as *Brady*. In *McMann v. Richardson*, the Court addressed whether pre-plea involuntary confessions accompanied by deficient advice from counsel required courts to hold hearings on the voluntariness of those pleas. 397 U.S. 759, 760 (1970). At issue were three appeals from defendants who had pleaded guilty and later collaterally attacked their pleas on grounds that they would have demanded trial but for their coerced confessions. *Id.* at 761-64. For example, one defendant (Richardson) alleged that officers

had beaten him into signing a confession to first-degree murder. *Id.* at 763. Richardson's petition added that his court-appointed counsel had advised him to plead guilty and later file for habeas relief based on the coerced confession. *Id.* at 763. The other defendants alleged similarly questionable advice from court-appointed counsel. *Id.* at 762, 764 (describing, for example, that counsel "ignored" an alibi defense for a defendant facing five felony charges and "represented that his plea would be to a misdemeanor").

The Court ruled that allegations of pre-plea, coerced confessions alone do not require hearings on the voluntariness of the defendants' pleas. *Id.* at 768. It noted first the odd legal posture of defendants who plead guilty despite believing they have a credible constitutional defense about coerced confessions. *Id.* ("The sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however guilty he might be."). The guilty plea, according to the Court, flipped the script on an otherwise sensible contest of guilt: "a guilty plea in such circumstances is nothing less than a refusal to present . . . federal claims to the state court in the first instance." *Id.* Because the defendant had chosen to "take the benefits, if any, of a plea of guilty," his later allegations in collateral proceedings that the plea was involuntary "appear incredible." *Id.* In short then, the defendant must proffer that "he was so incompletely advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead." *Id.* at 769.

In other words, counseled guilty pleas occasioned by antecedent constitutional violations require, at a minimum, that habeas challengers attack the plea advice they received. The Court was clear that showing deficient performance in plea advice was a high bar on collateral review. "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770. Rather, courts review the competency of plea advice based "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

Along with clarifying plea counsel's role, the *McMann* Court also rejected on collateral review an approach that would treat defendants convicted by guilty plea the same way as those convicted after trial.

> A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence.

Id. at 773. As with the death-penalty provision in *Brady*, the Court recognized that the coerced confession was merely a but-for cause of defendants' decisions to plead guilty. The confession was not the sole cause nor was the defendant in

the same posture as a trial defendant who preserved a coerced-confession defense for direct and habeas review. Based on that "different posture," defendants challenging their guilty pleas on collateral review must, as mentioned above, show deficient plea advice that would have changed their decision to plead guilty. *See id.* at 773-74 ("Although [a defendant] might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.").

The final case in the *Brady* trilogy is *Parker v. North Carolina*, 397 U.S. 790 (1970). There, a 15-year-old Black defendant (Parker) confessed to burglary and rape and later pleaded guilty to first-degree burglary under a North Carolina statute. *Id.* at 791-92. Parker pleaded guilty based on his attorney's advice that he would receive life imprisonment and avoid the death penalty. *Id.* at 792. The state court accepted Parker's guilty plea and sentenced him to life imprisonment. *Id.* at 793. After exhausting his state-court remedies, Parker filed a habeas petition in federal court, alleging that his statute of conviction had unconstitutionally allowed the death penalty and that his confession was coerced. *Id.* at 793-94.

Relying on *Brady* and *McMann*, the Court denied Parker's petition. As to his death-penalty argument, the Court reiterated that "an otherwise valid plea is not involuntary because [it is] induced by the defendant's desire to limit the

possible maximum penalty to less than authorized if there is a jury trial." *Id.* at 795 (citing *Brady*, 397 U.S. 742). And, echoing *McMann*, the Court reasoned that the coerced confession was insignificant to Parker's decision to plead guilty. "[W]e cannot believe that the alleged conduct of the police during the interrogation period was of such a nature or had such enduring effect as to make involuntary a plea of guilty *entered over a month later*." *Id.* at 796 (emphasis added). Said another way, because "[t]he connection, if any, between Parker's confession and his plea of guilty" was "attenuated," the unconstitutional confession could not invalidate the guilty plea. *Id.*

Rather, Parker had to show that his counsel provided deficient plea advice affecting the voluntariness and knowingness of his plea. *See id.* ("[T]here remains the question whether his plea, even if voluntary, was unintelligently made because his counsel mistakenly thought his confession was admissible"). And under *McMann*, he flunked that test. That's because "even if Parker's counsel was wrong in his assessment of Parker's confession," the plea advice was not wrong enough to fall under "the range of competence required of attorneys representing defendants in criminal cases." *Id.* at 797-98. The Court thus maintained the high bar that collateral challengers face in proving invalid guilty pleas.

Tollett v. Henderson

That brings us to the case the parties argue most about, *Tollett v. Henderson*. With the benefit of the three-year-old *Brady* trilogy, the Court

considered whether a defendant (Henderson) could collaterally attack his counseled guilty plea decades after learning that Tennessee state prosecutors had systematically excluded Black jurors from the grand jury. *Tollett*, 411 U.S. at 259-60.[14] In 1948, during a botched robbery of a liquor store, 20-year-old Henderson shot and killed an employee. *Id.* at 261. A grand jury without Black jurors then indicted Henderson for murder. *Id.* at 259. After confessing to the robbery and murder, Henderson pleaded guilty in exchange for a 99-year prison sentence. *Id.* According to Henderson, he accepted the plea deal on the advice of counsel to avoid the death penalty. *Id.* at 261.

Henderson's attorney did not advise him of—or perhaps even know about[15]—the exclusion of Black jurors from the grand jury. *Id.* at 260. When Henderson learned of this constitutional violation (25 years after his plea), he filed for habeas relief. *Id.* at 259. Both the district court and the Sixth Circuit inquired whether Henderson had waived his collateral constitutional challenge by pleading guilty. For instance, the Sixth Circuit cited the oft-quoted rule that "a voluntary plea of guilty made by an accused while represented by competent

[14] The Court had long before ruled that excluding Black jurors from serving on a grand jury is indisputably unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975).

[15] An affidavit submitted by Henderson's plea counsel asserted that he "did not know as a matter of fact that [Black jurors] were systematically excluded from the Davidson County grand jury, and that therefore there had been no occasion to advise respondent of any rights he had as to the composition or method of selection of that body." *Id.*

counsel[] waives all non-jurisdictional defects." *Henderson v. Tollett*, 459 F.2d 237, 241 (6th Cir. 1972) (citations and footnote omitted). Yet the Sixth Circuit concluded that Henderson had not waived his non-jurisdictional constitutional claim because neither he nor his plea counsel had known about the systematic exclusion when he pleaded guilty. *Id.* at 241-42. The court concluded that "we must be wary of blindly applying this [waiver] doctrine to every case involving such a plea. There is nothing inherent in the nature of a plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims." *Id.* at 241.

The Supreme Court reversed, declaring that the Sixth Circuit had taken "too restrictive a view" of the *Brady* trilogy holdings, each of which involved a habeas petitioner asserting a pre-plea constitutional defect. *Tollett*, 411 U.S. at 265. Those cases, reasoned the Court, had "refused to address the merits of the claimed constitutional deprivations that occurred prior to the guilty plea." *Id.* The Court set the relevant inquiry as being "whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel." *Id.* Thus, the Sixth Circuit erred by inquiring into whether Henderson knew about or waived his constitutional claim. When a habeas petitioner enters a counseled guilty plea, the merits of the underlying claim have little role to play: "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." *Id.* at 266.

All told, the Court ruled that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." *Id.* Echoing its prior holdings, the Court ruled that habeas petitioners "must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* (quoting *McMann*, 397 U.S. at 771). The Court saw no role for questioning advice pertaining to the "constitutional significance of certain historical facts" or counsel's not "pursu[ing] a certain factual inquiry . . . [to] uncover[] a possible constitutional infirmity." *Id.* at 267. Rather, the advice needed to relate to the "principal value of counsel to the accused in a criminal prosecution," such as advice pertaining to the "prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused." *Id.* at 267-68. "Counsel's concern," reasoned the Court, "is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Id.* at 268. Those interests "are not advanced by challenges that would only delay the inevitable date of prosecution or by contesting all guilt." *Id.* (citations omitted). Indeed, a contrary ruling would skirt defense counsel's role, which is often unserved by exploring every conceivable constitutional defense. *See id.*

Tollett's Successors

Early on, our circuit published several cases implicating the *Brady* trilogy and *Tollett*. In a string of post-*Tollett* cases, we rejected pre-plea constitutional challenges when defendants had failed to show that the violations had rendered their guilty pleas involuntary and unknowing. For example, in *United States v. Montgomery*, we ruled that a guilty plea barred a defendant from raising a challenge that the district court had violated his Sixth Amendment right to proceed pro se. 529 F.2d 1404, 1406-07 (10th Cir. 1976). We noted that "[t]he Supreme Court in recent cases has rejected challenges to guilty pleas, generally endorsing the practice of plea bargaining and holding that the plea bars efforts to set aside such pleas based upon asserted unconstitutional contentions." *Id.* at 1406 (citing *Brady*, 397 U.S. 742). Indeed, by relying on the "more extensive view" of *Tollett*, we concluded that "[t]he voluntary plea of guilty is the independent intervening act which renders ineffectual the prior failure to allow appellant to represent himself at a trial." *Id.* at 1407.

We endorsed a similar view in *United States v. Nooner*, in which we refused to review a pre-plea ruling on a motion to suppress. 565 F.2d 633,

633-34 (10th Cir. 1977).[16] Citing *Tollett*, we concluded that the defendant was "foreclosed from a review of the trial court's order denying the motion to suppress" because of "his subsequent plea of guilty." *Id.* at 634 (citing *Tollett*, 411 U.S. at 267). We identified not only the rule in *Tollett* but also several cases from our Circuit that supported that "a voluntary plea of guilty is a waiver of all non-jurisdictional defenses." *Id.* (listing cases).

And one year after *Nooner*, we said the same thing again when barring a habeas petitioner from raising a pre-plea claim that a predicate conviction for a felon-in-possession charge was somehow faulty. *See Barker v. United States*, 579 F.2d 1219, 1225-26 (10th Cir. 1978). "In essence," we said, "Barker's voluntary plea of guilty . . . preclude[s] such challenge under § 2255, inasmuch as the conclusive effect of a voluntary plea of guilty is a waiver of all nonjurisdictional defects and defense[s] occurring prior to the plea." *Id.* at 1225 (citations omitted).

So too has the Supreme Court reaffirmed the wisdom of *Tollett*. In *Hill v. Lockhart*, the seminal case for ineffective-assistance-of-counsel claims in the plea context, the Court relied on *McMann* for the precept that "the quality of counsel's performance in advising a defendant whether to plead guilty"

[16] When we decided *Nooner*, the Supreme Court had yet to include conditional guilty pleas in the Federal Rules of Criminal Procedure, as it later did in Rule 11(a)(2). Conditional guilty pleas provide defendants with a way to preserve pre-plea rulings on motions to suppress for appellate review. *See* Federal Rules Decisions, 97 F.R.D. 245, 250 (Apr. 28, 1983).

stemmed from the constitutional concern that pleading defendants "are entitled to the effective assistance of competent counsel." 474 U.S. at 57 (quoting *McMann*, 397 U.S. at 771). It adopted the standard for counsel deficiency in *McMann* and *Tollett* as the first prong of establishing ineffective performance for plea advice. *Id.* at 58-59. And it imported into the second prong what those cases didn't say outright—the deficient plea advice had to matter. *Compare McMann*, 397 U.S. at 769 (establishing that habeas petitioner must show that "he was so incompetently advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead"), *with Hill*, 474 U.S. at 59 ("[T]he defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). Put differently, the Court recognized that the *Brady* trilogy and *Tollett* presaged the two-part test for ineffective assistance in the plea context: deficient performance and resulting prejudice. *See Hill*, 474 U.S. at 58-60.

The *Tollett* Exceptions

By our count, the Supreme Court has announced four exceptions to the *Tollett* rule. We have described these exceptions as "narrow." *United States v. De Vaughn*, 694 F.3d 1141, 1145 (10th Cir. 2012).

The first two exceptions concern specific claims for relief that question the legality of the underlying indictment. In two decisions decided soon after *Tollett*, the Court ruled that *Tollett* did not exclude antecedent constitutional

claims asserting vindictive prosecution and double jeopardy. *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974); *Menna v. New York*, 423 U.S. 61, 62 (1975) (per curiam). Those claims for relief questioned "[t]he very initiation of the proceedings against" a defendant. *Blackledge*, 417 U.S. at 30-31. Indeed, both claims differed from the grand-jury claim in *Tollett* because these claims asserted "that the State may not convict [the defendants] no matter how validly [their] factual guilt is established." *Menna*, 423 U.S. at 62 n.2.[17]

The third exception involved a state statutory regime. In *Lefkowitz v. Newsome*, a defendant pleaded guilty after the trial court denied his motion to suppress, which contested the lawfulness of a search. 420 U.S. 283, 284-85 (1975). The defendant appealed under a New York procedural statute that permitted appellate review of a pretrial motion to suppress "notwithstanding . . . that such judgment of conviction is predicated upon a

[17] As for these first two exceptions, we note that the Court has limited the reach of *Blackledge* and *Menna*. It has cautioned that courts should not read those cases as meaning that all collateral claims of vindictive prosecution and double jeopardy will overcome guilty pleas. *United States v. Broce*, 488 U.S. 563, 574-76 (1989). To the contrary, when habeas petitioners assert claims of an unlawful successive prosecution, the relevant inquiry is whether petitioners can undermine the unlawful indictment "without any need to venture beyond that record." *Id.* at 575. The Court thus cabined *Blackledge* and *Menna* to cases in which "the determination that the second indictment could not go forward" could be made based on the indictments alone. *Id.* That's because both cases turned on whether the State had "power to bring any indictment at all." *Id.* In other words, courts should be able to tell when the government can't lawfully bring a second prosecution by looking to only the prosaic factual overlap in two indictments. But when petitioners must resort to extrinsic evidence to attack the factual predicates of a second indictment, "that opportunity is foreclosed by the admissions inherent in their guilty pleas." *Id.* at 576.

plea of guilty." *Id.* at 285. Under that statute, the Supreme Court reasoned that "there is no practical difference in terms of appellate review between going to trial and pleading guilty." *Id.* at 289. It thus distinguished the defendant's conditional plea from the "traditional guilty[ ]plea" in *Tollett* because the government could not assert that the Fourth Amendment claim was final when the defendant pleaded guilty. *Id.* at 289-90.

More recently, the Court crafted a fourth exception. In *Class v. United States*, the Court excluded from *Tollett*'s realm claims on direct appeal that attack the constitutionality of the underlying statute of conviction. 138 S. Ct. 798, 805 (2018). The Court reasoned that those claims did not rely on "case-related constitutional defects" and could not "have been cured." *Id.* at 804-05 (citation and internal quotation marks omitted). Rather, the claims closely aligned with those in *Blackledge* and *Menna* (as modified by *Broce*) because they "do not contradict the terms of the indictment or the written plea agreement" and because they "challenge the Government's power to criminalize [petitioner's] (admitted) conduct." *Id.*

JURISDICTION

We have final-order jurisdiction under 28 U.S.C. §§ 1291 and 2255(d) because the district court dismissed with prejudice Spaeth's § 2255 motion. We also have jurisdiction under 28 U.S.C. § 2253(c) because the district court granted a COA on three issues.

STANDARD OF REVIEW

When a district court dismisses a § 2255 motion without an evidentiary hearing, we review de novo. *United States v. Copeland*, 921 F.3d 1233, 1241 (10th Cir. 2019) (quoting *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015)). And we review de novo any preserved arguments about the meaning of plea-agreement terms. *United States v. E.F.*, 920 F.3d 682, 685-86 (10th Cir. 2019).

DISCUSSION

We turn now to the three COA questions.

I. COA Question 1: "[W]hether the carve-out provision 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*"

We start with the first COA question, which asks what effect, if any, the carve-out provision (the last sentence of the appellate-waiver paragraph) has on the rule of *Tollett.* The short answer is none. To help us analyze the appeal waiver, we quote it in full:

> **Waiver of Appeal and Collateral Attack.** The defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, his conviction, or the components of the sentence to be imposed herein, including the length and conditions of supervised release, as well as any sentence imposed upon a revocation of supervised release. The defendant is aware that 18 U.S.C. § 3742 affords him the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed in accordance with the sentence recommended by the parties under Rule 11(c)(1)(C). The defendant also waives any right to challenge his sentence, or the manner in which it was determined,

> or otherwise attempt to modify or change his sentence, in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255 (except as limited by *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001)), or a motion brought under Federal Rule of Civil Procedure 60(b). In other words, the defendant waives the right to appeal the sentence imposed in this case, except to the extent, if any, the Court imposes a sentence in excess of the sentence recommended by the parties under Rule 11(c)(1)(C). However, if the United States exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence received, as authorized by 18 U.S.C. § 3742(a). Notwithstanding the forgoing waivers, the parties understand that the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct.

To foreshadow what follows, we state up front that Spaeth's § 2255 claim is unaffected by the presence or absence of the above appeal waiver. That is, the government could not (and did not) waive application of the *Tollett* standard, and Spaeth could not (and did not) waive his right to challenge the voluntariness and knowingness of his guilty plea based on ineffective assistance of counsel.

A. Legal Standard

We review plea-agreement terms de novo. In doing so, we apply "general principles of contract law, looking to the agreement's express language and construing any ambiguities against the government as the drafter of the agreement." *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1094 (10th Cir. 2007) (cleaned up) (citations omitted). In addition to the express language of the plea agreement, we focus our inquiry on "the defendant's reasonable understanding of [the nature of the government's promise] at the time of entry

of the guilty plea." *United States v. Bullcoming*, 579 F.3d 1200, 1205 (10th Cir. 2009) (citation omitted). As to waivers in plea agreements, we have stressed that defendants can waive known rights so long as the waiver is unambiguous. *United States v. Libretti*, 38 F.3d 523, 531 (10th Cir. 1994) (deciding that an "unambiguous plea agreement" broadly waiving the right to a jury trial also waived a jury trial on forfeited assets).

B. Effect of the Appeal Waiver

In the first sentence of the appeal waiver, Spaeth provides a blanket waiver of any rights to appeal or collaterally attack his conviction or sentence. But in the fourth sentence of the appeal waiver, Spaeth reserves his rights under *United States v. Cockerham*, 237 F.3d 1179 (10th Cir. 2001), to challenge his sentence under 28 U.S.C. § 2255. And in the last sentence, the carve-out provision, he again limits his blanket waiver by stating that he "in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct."

The appeal waiver cannot and does not relax the legal standard in the *Brady* trilogy and *Tollett*. 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. *Tollett*, 411 U.S. at 266; *Brady*, 397 U.S. at 747-49; *McMann*, 397 U.S. at 768-69. Both the government and defendants are bound by this rule of law. The appeal waiver

could not and does not waive the *Tollett* standard, nor does it revive Spaeth's ability to pursue pre-plea constitutional claims.[18]

Spaeth takes a different view. He claims that the government waived application of the *Tollett* standard for his guilty plea by agreeing to the carve-out provision. This is wrong for several reasons.

First, the appeal waiver addresses *Spaeth*'s waiver of appellate rights, not the government's. Second, and relatedly, the carve-out provision does not purport to bind the government to anything; it merely provides an exception to Spaeth's earlier blanket waiver in the first sentence. Third, and relatedly again, the appeal waiver does not—and cannot—manufacture new rights for Spaeth beyond those provided by law. Fourth, the carve-out provision simply excepts from Spaeth's blanket appeal waiver his right to appeal any subsequent (so *post-plea*-based) claims for ineffective assistance of counsel and prosecutorial misconduct. *See Cockerham*, 237 F.3d at 1187 (declaring that defendants have, but can waive, their right to pursue claims for ineffective assistance of counsel committed after the guilty plea). Revealingly, and contrary to his position on appeal, Spaeth agreed with the government at his change-of-plea hearing that

[18] But *Tollett* leaves it to Spaeth whether to waive his right to assert a claim for ineffective assistance of counsel committed after his guilty plea. To maintain the right, Spaeth need only not waive it. *Cockerham*, 237 F.3d at 1187-88. Though Spaeth did not waive this right, he has not asserted such a claim on appeal. That is, he neither asserts that his counsel performed deficiently after the guilty plea nor that any such deficient performance prejudiced him.

the carve-out provision was inserted to preserve his ability to bring "any claim regarding ineffective assistance of counsel as outlined under the *Cockerham* decision or prosecutorial misconduct."[19] And as mentioned, that refers to ineffective assistance of counsel committed after the guilty plea.

Nor do we agree with Spaeth that *Tollett* is a defense. As stated, *Tollett* is a substantive legal standard, not an affirmative defense applying only when the government knows to raise it. Neither the *Brady* trilogy nor *Tollett* describe the standard as an affirmative defense. *E.g.*, *McMann*, 397 U.S. at 774 (ruling that the petitioner "is bound by his plea and his conviction *unless he can allege and prove*" deficient plea advice (emphasis added)); *Tollett*, 411 U.S. at 268 (ruling that the petitioner "must not only establish" a pre-plea constitutional violation but also show deficient plea advice). Nor would that approach make much sense because it suggests that courts should engage in a merits review of a habeas petition if the government fails to invoke *Tollett*.

Spaeth also contends that "the government relinquished any expectation of finality as to those claims and waived any reliance on *Tollett* as a defense to

[19] Indeed, if the carve-out provision preserved *pre-plea*-based claims of ineffective assistance of counsel, the word "subsequent" would be superfluous. *See United States v. Garcia*, 698 F.2d 31, 36-37 (1st Cir. 1983) (applying surplusage canon to plea agreements). And in any event, an appeal waiver is unnecessary to preserve pre-plea ineffective-assistance claims rendering a guilty plea involuntary and unknowing. Those claims are preserved as a matter of law. *Cockerham*, 237 F.3d at 1187 ("[W]e hold that a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver.").

those claims." We agree that the import of *Tollett* is finality and preclusion. But we do not agree that the built-in preclusion stemming from guilty pleas means that the government must, as Spaeth would have it, unambiguously invoke its interest in finality. That rule would ignore the Supreme Court's emphasis on the importance of finality. The guilty plea itself precludes defendants from raising pre-plea challenges. To defeat that preclusion, the party pleading guilty must convince us that he or she did so involuntarily and unknowingly. If that party fails to do so, our analysis ends. Nothing in the *Brady* trilogy or *Tollett* informs us that the guilty plea's preclusion somehow depends on whether the government invokes it. Indeed, the preclusion inherent to unconditional guilty pleas is often why defendants plead guilty in the first place. *See Brady*, 397 U.S. at 752 ("For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.").

C. Our Decision in *United States v. De Vaughn*

Spaeth insists that our ruling in *De Vaughn*, 694 F.3d 1141, permits the government to waive the *Tollett* standard. Under the First Amendment, the defendant (De Vaughn) challenged the legality of the federal threat and hoax statutes after he had already pleaded guilty to mailing 12 hoax anthrax letters to several public officials. *Id.* at 1142-44 (citing 18 U.S.C. §§ 871, 875(c), 876(c), 1038(a)(1)). On direct appeal, we ruled that the government can waive

argument under *Tollett* by not raising it in its appellate brief. 694 F.3d at 1154-55. We reasoned that the government had waived a *Tollett* argument by perfunctorily citing *Tollett* in the "standard of review" section of its appellate brief. *Id.* at 1154 n.9 ("[T]he Government's brief never asserts Defendant waived the arguments he raises on appeal, nor does it ask us to dismiss the appeal based on Defendant's guilty plea. In light of its complete failure to explain how the *Tollett* rule applies to this case, we cannot conclude the Government raised the issue."). We proceeded to analyze De Vaughn's First Amendment challenge to his indictment on the merits. *Id.* at 1158-59.

The appellate briefing in *De Vaughn* reveals why we concluded that the government had waived any argument under *Tollett*. In his opening brief, De Vaughn argued that he could raise First Amendment challenges to his statute of conviction "for the first time on direct appeal" because those challenges questioned the State's power to indict him. He asked us to review de novo his First Amendment challenge to the federal threat and hoax statutes, citing the *Blackledge* and *Menna* exceptions to *Tollett*.

In response, the government chose not to address De Vaughn's argument for a *Tollett* exception. Instead, it argued for affirmance on a separate ground—that his First Amendment challenge failed under plain-error review.

Ultimately, we affirmed De Vaughn's conviction on the alternative grounds urged by the government—that the district court did not plainly err in ruling that the federal threat and hoax statutes passed First Amendment muster.

Id. at 1158-59. Along the way, we commented that the government had waived any argument under *Tollett* by not responding to De Vaughn's argument that a *Tollett* exception applied. *Id.* at 1154-55 & n.9; *see also United States v. Andasola*, 13 F.4th 1011, 1015 n.4 (10th Cir. 2021) (citing *De Vaughn* to note that we may "declin[e] to consider waiver argument supported by one case cited in standard-of-review section but never applied in analysis section" of a government brief). But in doing so, we did not say that the government could waive the *Tollett* standard. Nor did we create a broad-ranging license for courts to forgo the *Tollett* standard based on language in the parties' plea agreement.[20]

We also note that the government chose the easiest path to affirmance by not disputing that a *Tollett* exception applied in *De Vaughn*. In *Class*, the Supreme Court later clarified that *Tollett* does not apply to constitutional challenges to the legality of the statute of conviction. 138 S. Ct. at 805 (reasoning that "[a] guilty plea does not bar a direct appeal" when appellants' challenges "call into question the Government's power to 'constitutionally prosecute'" them (quoting *Broce*, 488 U.S. at 575)). Thus, the Supreme Court endorsed the outcome we reached in *De Vaughn*—on direct appeal, we consider the constitutional merits of a challenge to the statute of conviction. So *De Vaughn* squares with *Tollett* and *Class*. But it does not address Spaeth's

[20] For clarity, under the *Brady* trilogy and *Tollett*, courts should not resolve pre-plea constitutional merits challenges if counsel deficiently performed in not recognizing the alleged violations, which the defendant later proves led to an involuntary and unknowing guilty plea.

situation, in which the government has steadfastly raised *Tollett* and in which Spaeth does not challenge the legality of his charges or of his statute of conviction.

D. Application of *Tollett*

The district court did not err in ruling that *Tollett* bars Spaeth's Sixth Amendment challenge. Spaeth does not even try to argue that he meets *Tollett*, much less *Hill*. He is not asserting that his plea counsel performed deficiently, let alone that such performance prejudiced him. And in the district court, he repeatedly stated that he pleaded guilty voluntarily and knowingly and that he was satisfied with his plea counsel's performance. Because Spaeth has not met his burden under *Tollett* to vacate his unconditional guilty plea, we affirm the district court's dismissal of his § 2255 motion.[21]

II. COA Question 2: "[W]hether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, [and] specifically . . . whether a pre-plea *Shillinger* violation renders a plea unknowing and involuntary and, because Petitioner did not otherwise challenge the validity of his unconditional plea under the applicable standard, whether the rule in *Tollett* procedurally bars his claim"

As we understand it, Spaeth argues that the *Tollett* standard does not apply whenever the government has intruded on attorney–client

[21] In summary fashion, Spaeth suggests that his guilty plea is like the one the Court encountered in *Lefkowitz*—and therefore should be excepted from *Tollett*'s ambit. But that case involved a conditional guilty plea under a state-court rule, unlike Spaeth's case. *See Lefkowitz*, 420 U.S. at 285. Nor does Spaeth argue for any other *Tollett* exception.

communications. Spaeth primarily relies on three post-*Tollett*, out-of-circuit cases: two denial-of-counsel cases and one ineffective-assistance case. As seen below, none of these cases help answer the COA question.

In *United States v. Smith*, the court "explore[d] the interrelationship of the Fifth Amendment due process requirement that a guilty plea be voluntary, and the Sixth Amendment guarantee that an accused enjoy 'the Assistance of Counsel.'" 640 F.3d 580, 581 (4th Cir. 2011). Early in the proceedings, the defendant complained to the court that his relationship with counsel was irretrievably broken, so he sought substitute counsel. *Id.* at 582-84. After the court declined to appoint substitute counsel, the defendant pleaded guilty and was sentenced. *Id.* at 585. On appeal, the defendant challenged his guilty plea and sentence, arguing "that his guilty plea was involuntary because the district court erroneously denied his requests for substitute counsel, an error that left him bereft of the assistance of counsel at the time of plea negotiations and of his actual guilty plea." *Id.* at 585-86.

The court began by noting that defendants may attack guilty pleas on grounds that counsel's advice was deficient, which it said meant "a claim of constructive denial of counsel is not barred." *Id.* at 587 n.3. The court considered the question as whether the breakdown of attorney–client communications was "so great that the principal purpose of appointment—the mounting of an adequate defense incident to a fair trial—has been frustrated."

Id. at 588. The inquiry was whether "the initial appointment has ceased to constitute Sixth Amendment assistance of counsel." *Id.*

With that, the court turned to *Brady* for the ruling that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Id.* at 592 (quoting 397 U.S. at 748 n.6). The *Smith* Court explained this as the reason it is "clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid." *Id.* (quoting *Brady*, 397 U.S. at 748 n.6). Further, addressing the situation of "a total absence of the assistance of counsel," the court noted that "a defendant may obtain reversal of his conviction based on the inadequacy of counsel even in the absence of a showing that would satisfy *Hill* or *Strickland*." *Id.* (alteration omitted) (quoting *United States v. Moussaoui*, 591 F.3d 263, 288-89 (4th Cir. 2010)).

Still, the court denied the defendant relief. It concluded that the record supported "neither a Sixth Amendment violation nor the involuntariness of his guilty plea." *Id.* at 593. Even with the considerable conflict between the defendant and counsel, the court still determined that "the evidence here does not establish that Smith was constructively without counsel when considering the government's plea offer and then entering his guilty plea." *Id.* The court found that counsel "continued to provide meaningful assistance to Smith prior to and during the plea hearing." *Id.* So the court affirmed the conviction. *Id.*

In another *United States v. Smith*, this one a Seventh Circuit case, a defendant sought to withdraw his guilty plea on grounds that "the district court erroneously deprived him of his Sixth Amendment right to retain the counsel of his choice." 618 F.3d 657, 659 (7th Cir. 2010). The district court declined the request to substitute counsel on grounds that doing so would require continuing the trial date. *Id.* at 660. On appeal, the court recognized that under *Tollett*, "an unconditional guilty plea typically waives non-jurisdictional defects in the proceedings below." *Id.* at 663 (citing *Tollett*, 411 U.S. at 267). But the court vacated the defendant's conviction and sentence and remanded for the district court to withdraw the guilty plea. *Id.* at 667.

It did so based on the denial of the "constitutional right to his choice of defense counsel." *Id.* The court cited *United States v. Gonzalez-Lopez* as holding that "the erroneous deprivation of counsel of choice in violation of the Sixth Amendment is a 'structural error' in a criminal proceeding and is not subject to harmless error analysis." *Id.* at 663 (citing 548 U.S. 140, 150-52 (2006)). On the same point, the court cited *United States v. Sanchez Guerrero* for the proposition that "a defendant's guilty plea does not preclude him from challenging on appeal a denial of his right to counsel of choice." *Id.* (citing 546 F.3d 328, 332 (5th Cir. 2008)).

Finally, in *United States v. Hammond*, a § 2255 petitioner challenged his pleas as involuntarily made. 528 F.2d 15, 16 (4th Cir. 1975). The record revealed that his appointed counsel had misadvised him of the maximum prison

time he faced if he was convicted at trial. *Id.* at 16-17. Because counsel's deficient performance led to involuntary pleas, the court awarded habeas relief. *Id.* at 18. The court relied on the *Brady* trilogy for its deficient-performance ruling. *Id.* at 18-19 (citations omitted). The court did not require a prejudice showing.

It is hard to see why Spaeth relies on these three guilty-plea cases. After all, all three cases directly focus on the *Tollett* inquiry of whether the guilty plea was entered voluntarily and knowingly. So at the least, they overlap with *Tollett*'s standard. Yet, unlike the defendants in these three cases, Spaeth does not challenge the voluntariness or knowingness of his guilty plea. As best we can tell, Spaeth is asking us to use these cases as a springboard to make a case from our circuit, *Shillinger v. Haworth*, 70 F.3d 1132, relevant to, and dispositive of, his own case.

In *Shillinger*, Steven Haworth filed a federal habeas motion contesting his Wyoming aggravated-assault-and-battery conviction arising from his use of a knife outside a bar. 70 F.3d at 1134. Preparing for trial, Haworth's attorney arranged to meet with the incarcerated Haworth in the courtroom to prepare for trial (the case does not explain this location for a meeting). *Id.* This required the presence of a deputy sheriff, whom defense counsel paid to "consider himself an employee of defense counsel." *Id.*

Sometime before trial, the deputy had told the prosecutor about the content of the attorney–client communications. *Id.* at 1135. Specifically, the

deputy had told the prosecutor that defense counsel had advised Haworth to testify that he "cut" the victim rather than "stabbed" him. *Id.* Knowing that, the prosecutor cross-examined Haworth about whether he "specifically used the word 'cut' versus 'stabbed' in [his] testimony." *Id.* The prosecutor reiterated in his closing that Haworth had "told [the jury] that he deliberately . . . used the word 'cut' versus 'stabbed.'" *Id.* at 1136. The jury convicted. *Id.*

On collateral review, we decided how courts should review the "prosecutorial intrusion into the attorney–client relationship." *Id.* at 1138 (cleaned up). We ruled that the facts in *Shillinger* warranted a per se presumption of a Sixth Amendment violation. *Id.* at 1142. We characterized the actions of the prosecutor this way: "This sort of purposeful intrusion on the attorney–client relationship strikes at the center of the protections afforded by the Sixth Amendment and made applicable to the states through the Fourteenth Amendment." *Id.* at 1141. Relying thus on the right to a "fair adversary proceeding," we ruled that "when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney–client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed." *Id.* at 1142.

We reject Spaeth's reliance on *Shillinger* and the out-of-circuit authority discussed above. *Shillinger* is a poor fit for Spaeth's case. It involves a prosecutor's using attorney–client communications against the defendant *at trial*. So it does not concern *Tollett*'s guilty-plea situation. And unlike the

above denial-of-counsel cases Spaeth relies on, *Shillinger* has nothing to do with whether a guilty plea is voluntary or knowing.

We do not have to decide today whether we agree with the outcomes of the denial-of-counsel cases. We note that they never apply the *Hill* prejudice standard for ineffective-assistance-of-counsel claims. None of those cases provide Spaeth a drawbridge across *Tollett*'s rule requiring deficient performance rendering a guilty plea involuntary and unknowing. Because Spaeth fails at this step, we have no reason to decide further what effect any per se presumption of a Sixth Amendment violation might have in applying the *Hill* prejudice standard—a reasonable probability that the defendant would not have pleaded guilty absent the deficient performance.

We also note other shortcuts in Spaeth's analytical framework. First, in his attempt to shoehorn *Shillinger* into *Tollett*, he equates lack of effective assistance of counsel with "ineffective assistance of counsel" as required by *Tollett*, *Strickland*, *Hill*, and the like. He cannot do so and stay within *Tollett*'s lines. Second, and similarly, he alleges "government-induced" ineffective assistance of counsel, which he apparently means exists whenever the government invades the attorney–client communications.[22] Again, he cannot expand *Strickland*'s and *Tollett*'s ineffective assistance of counsel into something altogether different.

[22] At oral argument, Spaeth's counsel referred to his § 2255 claim as "government-induced" ineffective assistance of counsel.

On the first point, for almost 40 years, ineffective assistance of counsel has meant one thing: a claim that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hill*, 474 U.S. at 56-59 (same in plea context). These claims must assert "actual ineffectiveness," which measures "attorney performance . . . under prevailing professional norms." *Strickland*, 466 U.S. at 683, 688. Said another way, ineffective-assistance claims are one kind of claim under the Sixth Amendment's guarantee of effective assistance of counsel, centering on counsel's deficient performance. In the plea context, the cornerstone of ineffectiveness is whether the plea was involuntary because plea counsel's advice was below "the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56 (quoting *McMann*, 397 U.S. at 771).

Strickland recognized that ineffective-assistance claims differ from other Sixth Amendment claims.[23] At the onset of the opinion, the Court noted that it had never dealt with "a *claim* of 'actual ineffectiveness' of counsel's assistance in a case going to trial." *Strickland*, 466 U.S. at 683 (emphasis added) (citing

[23] We note that Spaeth seems to have recognized this distinction in his habeas motion. For one, the motion does not describe his claim as one for ineffective assistance of counsel but instead as a violation of his "right to confidential attorney client communications as guaranteed under the Sixth Amendment's right to counsel." Further, Spaeth quotes *Strickland* in a long footnote to note that a denial of the Sixth Amendment right to counsel can be "'actual *or* constructive,' based on 'various kinds of state interference with counsel's assistance,' *or* due to ineffective assistance of counsel."

United States v. Agurs, 427 U.S. 97, 102 n.5 (1976)). The Court had, however, dealt with other "Sixth Amendment claims," including ones for "actual or constructive denial of the assistance of counsel altogether" and "claims based on state interference with the ability of counsel to render effective assistance to the accused." *Id.* (citing *United States v. Cronic*, 466 U.S. 648 (1984)). The Court noted that those "circumstances" employ different frameworks because the Sixth Amendment violations are "easy to identify." *Id.* at 692. To that end, the Court did not require any showing of counsel's deficient performance for these kinds of Sixth Amendment violations. That makes sense because those claims—though grounded in the Sixth Amendment as are actual-ineffectiveness claims—rest on conduct outside defense counsel's performance.

Spaeth's argument founders for another reason: as far as we can tell, we have never presumed *Hill* prejudice. As we catalogued in *United States v. Lustyik*, the Supreme Court has outlined specific scenarios for per se prejudice—none of which involve guilty pleas. 833 F.3d 1263, 1268-69 (10th Cir. 2016) (collecting cases). We listed three examples of presumed prejudice, all of which pertained to prejudice that rendered a trial presumptively unfair. *Id.* at 1269 (citing *Bell v. Cone*, 535 U.S. 685, 695 (2002)). In fact, *Cronic* provided the answer on why the presumption often arises in the trial context. It noted that "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel *undermined the reliability of the finding of guilt*." *Cronic*, 466 U.S. at 659 n.26 (emphasis

added). As we have emphasized, with guilty pleas, the reliability of guilt is strong and exists even with underlying unconstitutional conduct.

III. COA Question 3: "[W]hether Petitioner's per se intentional-intrusion Sixth Amendment claim as alleged satisfies the standard in *Tollett* and its progeny, specifically . . . whether *Tollett* precludes Petitioner from challenging his sentence based on an alleged pre-plea Sixth Amendment violation"

We briefly address the final question on appeal. Spaeth contends that even if *Tollett* bars his pre-plea constitutional claims, it cannot bar a challenge to his sentence. We are uncertain what Spaeth is claiming. As far as the record reflects, the five attorney–client intrusions occurred pre-plea and are unlinked to his sentencing. We assume that Spaeth is arguing that because the pre-plea invasion somehow disabled counsel as a matter of law, that defect persisted into the sentencing phase.

We reject Spaeth's sentencing challenge. We have already concluded that Spaeth's plea counsel's performance was neither deficient nor prejudicial. But even more fundamentally, we cannot agree that *Tollett* permits Spaeth to recast a pre-plea claim as an ongoing sentencing error. As mentioned, *Tollett* rested on the guilty plea's breaking the causal effect of any unconstitutional conduct on a defendant's conviction. No reason exists, therefore, to hold that a sunken pre-plea constitutional violation somehow resurfaces on the other side of a guilty plea. If Spaeth alleged instances of post-plea intrusions into his

attorney–client conversations, he could bring those claims free of *Tollett*.[24] Without that showing, however, we reaffirm that pre-plea conduct falls under *Tollett*'s ambit no matter if the effect of that conduct continues through sentencing.

CONCLUSION

We abide by several principles that the Supreme Court made transparent 50 years ago. When a defendant voluntarily and knowingly pleads guilty, the defendant acknowledges that unconstitutional conduct preceding the guilty plea is irrelevant to the admission of factual guilt. As a result, we do not assess the merits of pre-plea constitutional claims but instead ask whether ineffective assistance of counsel caused defendants to enter their guilty pleas involuntarily and unknowingly. *Tollett* and its progeny tell us how to answer that question: challengers must show ineffective assistance of plea counsel. Because Spaeth does not even contend that his counsel performed deficiently, or that such

[24] We note as well that Spaeth's request for a presumption of prejudice in the sentencing context appears to conflict with our precedent. "[A] presumption of prejudice is the exception, not the rule." *Cooks v. Ward*, 165 F.3d 1283, 1296 (10th Cir. 1998) (citation omitted). In *Cooks*, for example, we declined to presume prejudice even though we agreed that sentencing counsel was ineffective. *Id.*; *see also Lustyik*, 833 F.3d at 1268-71 (refusing to presume prejudice when the defendant argued that the "court denied him access to potentially relevant classified information that he could have used to argue for a more lenient sentence"); *United States v. Orduño-Ramirez*, 61 F.4th 1263, 1273-76 (10th Cir. 2023) (refusing to adopt conclusive presumption of prejudice for Sixth Amendment violations in the guilty-plea sentencing context).

deficient performance prejudiced him by depriving him of a trial right he would have chosen, we conclude that Spaeth's § 2255 motion must be dismissed.

We affirm.