NO. _____

In The Supreme Court of the United States

ALEX LENARD McCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Defendant's rights under Article III, Section 2 of the United States Constitution for the trial of his crimes by jury in the State where the said Crimes shall have been committed; under the Fifth Amendment of the United States Constitution not to be compelled in any criminal case to be a witness against himself; and under the Sixth Amendment of the United States Constitution to a speedy and public trial by an impartial jury and to be confronted with the witnesses against him, were violated when the Defendant is induced to enter a plea agreement where government errors in the Rule 11 plea hearing generate ambiguity regarding the drug quantity and drug type and create confusion regarding the consequences of his plea?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Alex Lenard McCoy, a Defendant. The Respondent is The United States of America.

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PETITION FOR A WRIT OF CERTIORARI

ALEX LENARD McCOY respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2a to 14a) is reported at 895 F.3d 358.

JURISDICTION

The judgment of the Court of Appeals (App. 15a) was entered on July 13, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides, in relevant part:

> The Trial of all Crimes ... shall be by Jury ... [and] held in the State where the said Crimes shall have been committed.

The Fifth Amendment of the United States Constitution provides, in relevant part:

> No person … shall be compelled in any criminal case to be a witness against himself.

The Sixth Amendment of the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…. [and] to be confronted with the witnesses against him….

STATEMENT OF THE CASE

1. Criminal Offense. On November 6, 2015, the Defendant, Alex Lenard McCoy, was indicted for conspiracy to traffic controlled substances, in violation of 21 U.S.C. § 841(a)(1) and 846, within the territorial jurisdiction of the Western District of North Carolina and the United States Court of Appeals for the Fourth Circuit. The indictment further alleged that five (5) kilograms or more of cocaine, and two hundred and eighty (280) grams or more of cocaine base, commonly called "crack cocaine," Schedule II controlled substances, were attributable to, and were reasonably foreseeable by Defendant.

2. Plea in District Court. The facts of this case almost ensured confusion on the part of the Defendant as to the actual terms of the plea agreement he was entering.

At the Defendant's Rule 11 plea hearing on June 1, 2016, the Government proffered an executed plea agreement which suggested that the parties agreed that they would jointly recommend that "a. The amount of a mixture and substance containing a detectable amount of **cocaine** that was known to or reasonably foreseeable by the Defendant was at least eight hundred and forty (840) grams but less than two thousand eight hundred (2,800) grams." 37a (Emphasis added).

At the plea hearing, the attorney for the Government realized the error, describing the original plea agreement:

> It talks in terms of cocaine when, in fact, it's cocaine base. I would note that the factual basis does discuss in terms of crack cocaine, so I think that it's clear from the parties' intent that what we're talking about is cocaine base….

> I'm just looking at the bill of indictment, which also refers to cocaine base and does not refer to powder cocaine.

28a.[1]

To solve this ambiguity, the Government had a solution: "So what I would propose that we do is just make a pen and ink change to page 2 of the plea agreement and then refile that." 29a. The attorney for the Defendant had no objection and a handwritten change was made. However, a closer review of the Amended Plea Agreement filed with the Court shows just two sets of initials on the change. 37a. While Defendant's attorney, Kevin Tate's initials ("KT") can be clearly seen, the other set appear to be Steven R. Kaufman ("SRK"), the Assistant United States Attorney, based on similarity to the signature appearing at the end of the document. 41a. This means that the Defendant never initialed the change to the plea agreement.

To further confuse matters, the Government described the change made in open court: "So going back to paragraph 8, the amount of a mixture and substance containing a detectable amount of cocaine base that was known to or reasonably foreseeable by the defendant was at least **240** grams but less than 2,800 grams." 29a. This reflects the minimum quantity in the indictment but not the range shown in the written plea agreement. 37a (emphasis added).

While Mr. McCoy affirmed that he understood "those to be the terms of [his] plea agreement" and that he agreed with those terms, it is a significant challenge to

[1] That statement by the Assistant United States Attorney was actually incorrect. The indictment alleged that the Conspiracy involved "five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine, and two hundred and eighty (280) grams or more of a mixture and substance containing a detectable amount of cocaine base, commonly called "crack cocaine."

determine the "terms of the plea agreement" as understood by the Defendant at the time of the plea with these multiple mistakes and misstatements in the plea hearing. 31a.

3. Change of Counsel and Sentencing in District Court. After the plea hearing, a probation officer prepared a presentence report ("PSR"). Relying on the terms of the edited written plea agreement and stipulated facts, the PSR concluded that McCoy was responsible for between 840 and 2,800 grams of crack cocaine. 6a. The PSR also found that McCoy maintained a premise for the purposes of manufacturing or distributing drugs, was an organizer or leader of a criminal enterprise involving five or more people and possessed a firearm in connection with his drug dealing. 6a. McCoy wrote several letters complaining about his lawyer, which led to him receiving new counsel. 6a.

Even though there was no discussion of confusion at the plea hearing, the court concluded that McCoy's guilty plea was knowing and voluntary and that McCoy fully understood the charge, potential penalties, and consequences of his plea. The district court also independently found there was a factual basis for the entry of the plea based on the stipulated factual basis and other information in the record. The court accepted McCoy's plea and adjudged him guilty.

Proceeding to the sentencing phase, the district court found that evidence supported McCoy's leadership and firearm enhancement. The court also determined that the applicable guidelines range was 292 to 365 months in prison, sentencing McCoy to 292 months' imprisonment. 16a to 21a.

4. The Court of Appeals Decision. On Appeal, McCoy argued in relevant part, that the District Court improperly determined a drug quantity for sentencing without sufficient factual basis, specifically that there was no sufficient evidence in the record to support the court's finding that the defendant's "relevant conduct" included 840 grams of cocaine base as suggested in the altered version of the plea agreement. 3a.

The Government moved to dismiss the appeal based on the appellate waiver contained in the plea agreement. 3a. McCoy responded that a challenge to a plea's factual basis falls outside the scope of the waiver. 3a.

In a published opinion, the Court of Appeals for the Fourth Circuit determined that valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea, and also determined that McCoy's waiver was knowing and intelligent. 2a to 14a. The Court reviewed McCoy's argument that the government's blunders during the colloquy rendered the plea invalid under a plain error standard. 9a. The Court found no error. However, the Court of Appeals never directly considered the lack of evidence to support the factual determination of larger drug quantity (840 to 2,800 grams of crack cocaine) at sentencing.

REASONS FOR GRANTING THE PETITION

The confusion regarding both the type of drug and the quantity of drug in McCoy's Rule 11 hearing presents this Court with a concrete example of the inherent problems in interplay between the plea bargain process and sentencing after United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In order to knowingly enter a plea agreement, a Defendant must be "fully aware of the direct consequences" of his plea. The most important consequence is the sentence he will receive. Where there is confusion regarding both the type of drug and the quantity of drug that will be applied for sentencing, the Defendant is unaware of the most important consequence of his plea.

This Court has not examined the effect of confusion and misstatement in the plea process on the Defendant's voluntariness in light of the critical importance of the effect of the plea process on the Defendant's rights and in light of the huge percentage of cases resolved by plea.

Rule 10(c) of the Rules of the Supreme Court suggests that this Court would consider writs where "…United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court…." The issue of the Defendant's voluntariness and knowledge in the face of an inherently ambiguous plea agreement represents an important question of federal law that has not been, but should be, settled by this Court.

We believe the Court should extend its recent reasoning in Lee v. United States, ___ U.S. ___, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017) to apply to direct

appeals challenging the plea process by applying a higher standard to examining errors in the plea process as these errors prejudiced the defendant "by the denial of the entire judicial proceeding to which he had a right." *Id*., ___ U.S. at ___, 137 S. Ct. at 1965.

A. Errors in the plea process prevented McCoy from knowingly and voluntarily entering the plea in this case.

The plea bargain is a relatively new feature of the history of the American Criminal Process and has only been subject to formal Constitutional review for the last several decades.[2] As this Court has explained, the process of plea bargaining and "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427 (1971).

The effect of a plea on the Defendant's rights is extraordinary. "A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged." McMann v. Richardson, 397 U.S. 759, 766, 90 S. Ct. 1441, 1446, 25 L. Ed. 2d 763 (1970); Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747 (1970); McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1170—1171, 22 L.Ed.2d 418 (1969). It is not a feature of the process, but rather the effective conclusion of the process of determining guilt or innocence. "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give

[2] *See generally,* Alschuler, Albert W. "Plea Bargaining and its History." 79 Colum. L .Rev. 1 (1979).

judgment and sentence." Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510, 513, 7 L. Ed. 2d 473 (1962).

As this Court has explained, a plea of guilty pursuant to a plea agreement serves as a waiver of multiple critical Constitutional rights of the Defendant: First, the privilege against compulsory self-incrimination; Second, the right to trial by jury; and Third, the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969) *citing* Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964); Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491(1968); and Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965). This requires that the Court carefully examine the plea process to ensure sufficient protection of the Defendant's rights. "Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." Brady, 397 U.S. at 758, 90 S. Ct. at 1474.

One of the precautions is the longstanding test for determining the validity of a guilty plea -- "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985). North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L.Ed.2d 162 (1970). The Courts examine the Defendant's mindset rather his attorney's. "[T]he validity of a bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant -- and not his counsel -- enters the bargained plea." Mabry v. Johnson, 467 U.S. 504, 509 104 S. Ct. 2543, 2547, 81 L. Ed. 2d 437 (1984). The Court's inquiry must look to

the knowledge of the Defendant at the time the plea was entered, and the bargain made.

There was a plea agreement and factual basis filed in the case, but during the Rule 11 plea hearing, the Government suggested that "there's an error in the plea agreement." The Government proposed that the plea agreement listed the charge of possession of cocaine rather than cocaine base, even though both substances were identified in the indictment. As the Government acknowledges, the attorneys made a pen and ink change in the actual agreement, adding the term "base" after "cocaine." The Defendant's attorney initialed the agreement, but the Defendant did not sign or orally acknowledge the change. The record is silent whether the Defendant understood this particular change and the effect it had on the ultimate consequences of the plea. The ratio between the sentences for these two different controlled substances is effectively 18 to 1, meaning that the change in the document increased the Mr. McCoy's drug quantity at sentencing by a factor of 18.

The error in the written agreement was compounded by a mistake in the oral description of the minimum quantity of controlled substances by the Government on the record at the plea hearing. The government proceeded to summarize (incorrectly) the terms of the plea agreement, stating the minimum quantity of cocaine base (or crack cocaine) involved in the conspiracy was "at least 240 grams" when the minimum amount set forth in the written plea agreement was, in fact, 840 grams. The effect of these compounded errors was disregarded by the Court of Appeals, who failed to consider the fact that the indictment included both cocaine and crack cocaine and

specifically references two hundred and eighty (280) grams (not 840 grams) of cocaine base. *See* 7a

This Court has already held errors during the plea process to a higher standard than errors made during trial. During the 2017 term, this Court considered the case of Lee v. United States, ___ U.S. ___, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017). Jae Lee was a citizen of South Korea who moved to the United States in 1982 at the age of 13. He was a lawful permanent resident and business owner in Memphis, who was convicted of one count of possessing ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1). In addition to his sentence, Lee soon learned he faced mandatory deportation under the Immigration and Nationality Act, and he filed a motion under 28 U.S.C. § 2255 to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

This Court rejected the typical standard for evaluating claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), that defendants claiming ineffective assistance must demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 1037, 145 L.Ed.2d 985 (2000) (quoting Strickland, 466 U.S., at 694, 104 S. Ct. at 2068; internal quotation marks omitted). Rather, this Court determined that "When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different

than the result of the plea bargain. That is because, while we ordinarily apply a strong presumption of reliability to judicial proceedings, we cannot accord any such presumption to judicial proceedings that never took place." Lee, ___ U.S. at ___, 137 S. Ct. at 1965 (quoting Roe, 528 U.S. at 482-483, 120 S.Ct. at 1038; internal quotation marks omitted). "We instead consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." *Id.,* ___ U.S. at ___, 137 S. Ct. at 1965 (internal quotation marks and ellipses omitted).

Mr. McCoy was prejudiced by the errors in his plea process. Because the entry of a plea of guilty is a final and determinative process, it is critical that the Defendant understand the actual consequences of his plea, including the likely sentence. "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand." Brady, 397 U.S. at 755, 90 S. Ct. at 1472. On the other hand, "The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea." Lee, ___ U.S. at ___, 137 S. Ct. at 1966. Where the direct consequences of a plea are uncertain because of errors made by the government, the plea is necessarily suspect.

The consequences of Mr. McCoy's plea included in large part, the sentence he was to receive. United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) and its progeny made the United States Sentencing Guidelines advisory and "a district court may depart from the Guidelines, but it must consult them and take them into account when sentencing." Molina-Martinez v. United States, ___ U.S.

___, ___, 136 S. Ct. 1338, 1339, 194 L. Ed. 2d 444 (2016) (quoting Booker, 543 U.S. at 264, 125 S. Ct. at 767; internal quotations removed).

While judges made variances citing Booker discretion in 20.1% of cases in 2016,[3] the United States Sentencing Guidelines serve as the initial basis for any ultimate sentence which the Court would impose. The guidelines provide a clear basis for calculating drug quantities based on the offense conduct. Because both the drug type and drug quantity were botched during the Plea Hearing, it was impossible to know the advisory sentence that Mr. McCoy would face under the United States Sentencing Guidelines, and the Defendant has no way to evaluate the consequences of his plea.

B. The proliferation of plea bargains in the federal criminal system supports a more thorough review of the plea process.

The problems of this inherently ambiguous plea process necessarily raise questions of the Defendant's knowledge and the voluntariness at the time he entered his plea. These issues are exacerbated when 95% of all criminal defendants are convicted by plea rather than by trial. Mr. McCoy was sentenced based on the facts botched during the plea process – that he was responsible for 240 or 840 grams of cocaine or of cocaine base. While facts used for later sentencing in a trial are determined on testimony under oath from the stand, facts used in sentencing after a

[3] U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table N (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/TableN.pdf.

plea agreement are solely reliant upon the plea document and the propriety of the Rule 11 hearing.[4]

Plea bargaining has become the rule rather than the exception. "Most defendants in the United States are not found guilty following a trial. Instead more than ninety-seven percent of federal defendants and ninety-four percent of state defendants are sentenced pursuant to a plea bargain with the prosecutor." Bagaric, Mirko, Julie Clarke, and William Rininger. "Plea Bargaining: From Patent Unfairness to Transparent Justice." 84 Missouri L. Rev. __ (2019); Draft posted 6 Mar 2018, retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129469.

This transition from the jury as ultimate fact-finder to a process where the guilt of the defendant and the facts of the case determined by plea agreement has been a notable feature over the past 40 years. In the federal system, "[i]n 1980, one defendant went to trial for every four who pled guilty. By 1999, that ratio fell to one in twenty." Schwartz, Irwin H., Consequences of the Disappearing Criminal Jury Trial, Champion, Nov. 2001, at 7. Quoted by Dripps, Donald A., "Plea Bargaining Regulation: The Next Criminal Procedure Frontier Symposium: Guilt Innocence and Due Process of Plea Bargaining," 57 Wm. & Mary L. Rev. 1343, 1351-1352 (Mar.

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[4] For more than a century some courts have recognized the challenge of gathering facts from a plea:
It is urged that the accused by his plea has admitted only a conclusion of law resulting from facts that do not appear on the record--a conclusion of his own mind, which may or may not be correct according to the legal effect of the facts known to the accused on which he based his plea; and as the court cannot know whether the conclusion drawn by the prisoner from facts which are not before the court is correct, it does not appear that he has committed the crime which he has admitted by his plea… But if the party accused admits the charge of murder by the plea of guilty, he necessarily determines that question for himself, and draws the legal conclusion from facts which do not appear on the record and which are not shown to the court.
Green v. Commonwealth, 94 Mass. 155, 175 (1866).

2016). The numbers have continued to decline. "From 2006 to 2016, the overall number of criminal jury trials declined by 47%, and the jury trial rate declined by almost 40%." Conrad, Jr., The Hon. Robert J., and Katy L. Clements, "The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges." 86 Geo. Wash. L. Rev. 99, 105-106 (Jan 2018).

The current reliance on plea bargaining is contrasted with the disfavored status of plea bargains and guilty pleas by the Defendant at the time of the Constitution in the courts of both England and America. "Common-law courts apparently took a negative view, not of plea bargaining specifically, but of guilty pleas of any description. Alschuler, Albert W. "Plea Bargaining and its History." 79 Colum. L .Rev. 1, 7-11 (1979). If a Defendant attempted to enter a plea of guilty, the Court would "generally advise the prisoner to retract it." 4 W. Blackstone, Commentaries *329. Courts would go to extraordinary measures before they would accept a guilty plea by the defendant. *See generally*, Alschuler, 79 Colum. L .Rev. at 7-11. The Court considered its first guilty plea conviction in 1892, and provided a snapshot of the careful process invoked to consider a Defendant's plea of guilty: "The court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force, and effect of his plea of guilty.." Hallinger v. Davis, 146 U.S. 314, 324, 13 S. Ct. 105, 108-109, 36 L. Ed. 986 (1892).

As Commentator Tim Lynch of the Cato Institute explained, "This standard operating procedure [of accepting plea bargains] was not contemplated by the

Framers. The inability to enter into plea arrangements was not among the grievances set forth in the Declaration of Independence. Plea bargaining was not discussed at the Constitutional Convention or during ratification debates. In fact, the Constitution says 'the Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.' It is evident that jury trials were supposed to play a central role in the administration of American criminal justice." Lynch, Tim, "The Devil's Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice," (appearing in the Reason, July 2011) retrieved from https://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice

Over more recent years, this Court has provided its approbation for plea bargains. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons." Santobello, 404 U.S. at 261, 92 S. Ct. at 498, 30 L.Ed.2d 427. "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." Blackledge v. Allison, 431 U.S. 63, 71, 97 S. Ct. 1621, 1627 (1977). As a result, the importance of plea bargains has continued to increase over time. As this Court explained,

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials, it is

> insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. To a large extent horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.

Missouri v. Frye, 566 U.S. 134, 143–44, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012) (internal citation, brackets, and quotations omitted.)

Despite their widespread use, there have been numerous recent studies and articles critical of the role of plea agreements in the criminal justice system.[5] Judge Robert J. Conrad, Jr., of the Western District of North Carolina where McCoy was sentenced, has written specifically on the negative effects of plea bargains on establishing the facts of the case: "[T]he death of trials marks the end of doing justice where disputes are played out under the attentive eye of judge and jury…. The courtroom record created in trials becomes a script, immortalizing the details of the case, the attorneys' arguments, and the jury's final decision." Conrad, 86 Geo. Wash. L. Rev. at 157.

Where no facts are immortalized under the "attentive eye of judge and jury," there is a far greater risk that the Defendant will not know and understand the facts which will ultimately determine the consequences of his plea. The advisory

[5] See, i.e., Elrod, The Hon. Jennifer Walker, W(h)ither the Jury? The Deminishing Role of the Jury Trial in our Legal System, 68 Wash. & Lee L. Rev. 3 (2011); Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty 2 (2013). Dripps, 57 Wm. & Mary L. Rev. at 1351-1352 (Mar. 2016); Emily Yoffee, "Innocence Is Irrelevant: This is the age of the plea bargain—and millions of Americans are suffering the consequences," ATLANTIC (Aug. 7, 2017); National Association of Criminal Defense Lawyers, "The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It." (2018). Retrieved from www.nacdl.org/trialpenaltyreport

guidelines sentence is based on the "facts" of the case. These facts must be clear to the Defendant before he pleas so that he understands the consequences of his plea.

Mr. McCoy did not have sufficient information when he entered his plea to know the facts of drug quantity and type, which would suggest his ultimate sentencing. Where there are mistakes which cause clear ambiguity within the plea process, the protection of the rights of the 97% of defendants who enter into the plea process suggests that this is an important question of federal law that should be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED THIS the 11th day of October, 2018.

/s/ James W. Kilbourne, Jr.
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