NO. _____

In The
Supreme Court of the United States

CHARLES YORK WALKER, JR.,

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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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court abuses its discretion by determining whether to accept or reject a plea agreement under Rule 11 of the Rules of Criminal Procedure based largely on broad-based policy disagreements with plea bargaining, based on incorrect underlying assumptions, rather than case-specific factors that are, at best, given passing attention.

2. Whether this Court should grant certiorari, vacate Walker's conviction for being a felon in possession of a firearm, and remand the case to the Fourth Circuit for further proceedings in light of this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

II. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Walker*, No. 2:16-mj-00086-1, U.S. District Court for the Southern District of West Virginia. No judgment entered (case proceeded to indictment under separate case number).

- *United States v. Walker*, No. 2:16-cr-00174-1, U.S. District Court for the Southern District of West Virginia. Judgment entered February 6, 2018.

- *United States v. Walker*, No. 2:17-cr-00010-1, U.S. District Court for the Southern District of West Virginia. Judgment entered June 29, 2017.

- *United States v. Walker*, No. 18-4110, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on April 25, 2019.

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V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Walker*, 922 F.3d 239 (4th Cir. 2019), is a published opinion and is attached to this Petition as Appendix A. The basis of the first issue presented in this Petition was ruled upon by the district court at what was intended to be a sentencing hearing. The district court's written opinion memorializing its ruling, *United States v. Walker*, 2017 WL 2766452 (S.D. W. Va. June 26, 2017), is unpublished and is attached to this Petition as Appendix B. The basis of the second issue presented in this Petition became extant only after this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The relevant portions of the jury instructions given at trial regarding the elements of Walker's felon-in-possession offense are attached to this Petition as Appendix C. The final judgment order of the district court is unreported and is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 25, 2019. This Petition is filed within ninety days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The first issue in this Petition requires interpretation and application of Rule 11 of the Rules of Criminal Procedure, which provides, in pertinent parts:

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent

> the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.
>
> **(5) Rejecting a Plea Agreement.** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):
>
> > **(A)** inform the parties that the court rejects the plea agreement;
> >
> > **(B)** advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
> >
> > **(C)** advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

The second issue in this Petition requires interpretation and application of 18 U.S.C. §§ 922 and 924, which provide, in pertinent parts:

> **§ 922(g)**: It shall be unlawful for any person –
>
> > **(1)** who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> **§ 924(a)(2):** Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

This Petition arises from the final judgment and sentence imposed upon Charles York Walker, Jr. ("Walker") following his guilty plea to drug offenses and guilty verdict at trial on a firearms offense. On July 21, 2016, a criminal complaint was filed in the Southern District of West Virginia charging Walker with distribution

of heroin, in violation of 21 U.S.C. § 841(a)(1). J.A 19.[1] On September 13, 2016, a grand jury returned an indictment charging Walker with three counts of distribution of heroin (Counts One through Three), two counts of distribution of fentanyl, also in violation of 21 U.S.C. § 841(a)(1) (Counts Four and Five), and possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Six). J.A. 20-26. On October 18, 2017, a superseding indictment was returned, charging Walker with the two counts of distribution of heroin (Counts One and Three), distributing fentanyl (Count Two), and being a felon in possession of a firearm (Count Four). J.A. 107-111. Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Walker pleaded guilty to Counts One through Three of the indictment and was convicted at trial of Count Four. J.A. 112-114, 423. A Judgment and Commitment Order was entered on February 6, 2018. J.A. 570-577. Walker filed a timely notice of appeal on February 16, 2018. J.A. 578. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This Petition arises from an investigation of Walker for selling heroin in the spring and summer of 2016. It involves a rejected plea agreement, guilty pleas to

[1] "J.A." refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

several counts, and, finally, a trial on the issue of whether Walker was a felon in possession of a firearm.

1. Walker is arrested and charged with drug and firearm offenses.

Between April and July, 2016, investigators in Charleston, West Virginia, with the Metropolitan Drug Enforcement Network Team ("MDENT") made seven controlled purchases of drugs from Walker. Each purchase involved heroin, which on two occasions included fentanyl. J.A. 669-672. On July 14, 2016, MDENT officers arrested Walker. A search incident to his arrest uncovered small amounts of marijuana, cocaine, and heroin on his person. J.A. 672.

Also on July 14, 2016, MDENT officers executed a search warrant at an apartment where Walker sometimes stayed. Among the items recovered during that search were two firearms, a .38-caliber Rossi and a .45-caliber Kimber Ultra Carry. Both firearms, along with boxes of .45-caliber ammunition, were found in a closet of the apartment. Officers also seized two cell phones, one of which Walker identified as his in statements he made following his arrest. J.A. 674.

Two days before, officers had received information from an informant that Walker had "pistol-whipped" Corey Corns ("Corns"), allegedly because Corns owed Walker money for drugs. J.A. 674. After the search of the apartment, officers interviewed Corns, who alleged that he had purchased drugs from Walker and that Walker had beaten him with a black .38-caliber revolver. J.A. 675.

Walker was initially charged in a complaint with one count of distributing heroin. J.A. 19. Two months later, a grand jury returned an indictment charging

Walker with five counts of distribution of drugs (three involving heroin, two involving fentanyl) and one count of being a felon in possession of a firearm. J.A. 20-26.

2. The parties negotiate a plea agreement that allows Walker to plead guilty to one count related to the distribution of drugs.

After several months of negotiation, Walker entered into a plea agreement with the Government to resolve the case against him. J.A. 28-38. Walker agreed to waive his right to indictment and plead guilty to a single-count information charging him with possession of heroin with the intent to distribute it. In return, the Government agreed to dismiss the pending indictment. J.A. 28-29. The parties agreed that the applicable base offense level under the Sentencing Guidelines was twelve, but left open whether two-level enhancements for possession of a weapon and use of violence would apply. J.A. 32. The parties also agreed to waive many of their appellate rights. J.A. 32-33. Finally, the parties agreed to a stipulation of facts covering the drugs recovered from Walker when he was arrested. J.A. 37.

A plea hearing was held on January 26, 2017. J.A. 39-64. The district court performed the required Rule 11 colloquy and accepted Walker's guilty plea. J.A. 61-62. As to the plea agreement, the district court explained that it was going to "defer acceptance until after I have the Probation Department . . . prepare a draft Presentence Report." J.A. 44-45.

A Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. J.A. 589-633. The probation officer recommended that Walker's base offense level be twelve, the lowest possible for offenses involving heroin or

fentanyl. In doing so the probation officer noted that the actual amount of drugs sold and seized, when converted to marijuana equivalents, would have otherwise resulted in a lower base offense level. J.A. 599. The probation officer also recommended a two-level enhancement for possession of a firearm and a two-level reduction for acceptance of responsibility, for a final offense level of 12. J.A. 601-602. Combined with a Criminal History Category of IV, Walker's advisory Guideline range was twenty-one to twenty-seven months in prison. J.A. 612, 626. The probation officer did not identify any factors that could support either a departure from the Guidelines or a variance. J.A. 627-628. Both parties had objections to those calculations. J.A. 629-630.

In its presentencing memorandum, the Government argued that a sentence within its suggested advisory Guideline range, twenty-four to thirty months in prison, was "a just sentence that would satisfy the 18 U.S.C. § 3553(a) factors and other purposes of sentencing." J.A. 646. Walker in his memorandum, by contrast, argued for a sentence of twelve months and one day in prison, a slight variance from his suggested advisory Guideline range of fifteen to twenty-one months in prison. J.A. 65.

3. The district court rejects Walker's plea agreement because of policy disagreement with plea agreements, particularly in cases involving opioids.

A hearing was held on June 26, 2017. J.A. 79-106. However, rather than proceeding to impose sentence on Walker, the district court announced that it was

rejecting the plea agreement. J.A. 81.[2] The district court explained that Rule 11 of the Federal Rules of Criminal Procedure "obligates judges to accept or reject" plea agreements, but "is silent on what the Court should or may consider in making that decision." *Id*. The district court explained that it was its "function to prevent the transfer of criminal adjudications from the public arena to the prosecutor's office for the purpose of expediency at the price of confidence in and effectiveness of the criminal justice system." *Id*. "The community," the district court continued, "must not be systematically excluded from its proper place in this participatory democracy, especially with regard to the heroin and opioid crisis." *Id*. Because the plea agreement "is not in the public interest," the district court held, "I reject it." *Id*.

The district court then reviewed Walker's charged conduct, as well as his criminal history. Walker, the district court concluded, "is intimately familiar with the criminal justice system," having sustained eighteen convictions as an adult as well as having eight pending charges. J.A. 82-83. "Despite this very lengthy criminal history," the district court observed, "courts and prosecutors have repeatedly given him leniency." J.A. 83. The district court also noted that Walker had been involved with drugs for "most of his life," beginning at age twelve, but "there is evidence to suggest that Mr. Walker mixed drugs and threats of violence with his criminal and drug activity," referencing the alleged pistol-whipping of Corns. J.A. 84. The district court also observed that "the particular facts of this case trouble me" because it

[2] The district court memorialized its findings with regard to the rejection of the plea in a written opinion as well, which is attached as Appendix B. *United States v. Walker*, 2017 WL 2766452 (S.D. W. Va. June 26, 2017).

involved mixtures of heroin and fentanyl. *Id*. In addition, during the final controlled purchase, Walker allegedly told the informant that some other buyers had "recently overdosed and warned the confidential informant to use the product he sold him cautiously." J.A. 85.

Returning to Rule 11, the district court explained that it "grants a judge broad discretion to accept or reject a plea agreement" and that the court was "not obligated to accept any recommendation or bargain reached by the parties." J.A. 86. Walker's plea agreement "was made in the context of a clear, present and deadly opioid crisis in this community." *Id*. After noting that "[h]eroin and opioids are different from other addictive substances," the district court explained at length how the number of overdoses and deaths related to those drugs had increased in recent history, particularly in West Virginia. J.A. 86-91. The district court concluded that the "heroin and opioid crisis in our state implicates the general welfare in a preeminent way" and that the "seriousness of this crisis in West Virginia convinces me that I should carefully scrutinize plea agreements that bargain away multi-count grand jury indictments." J.A. 91.

The district court then examined the history of plea agreements and their justifications, noting that the "most commonly cited justifications are docket pressure and overburdened prosecutors and judges." J.A. 93. "I am juberous of these assertions," the district court continued, explaining that "the overburdened justification for plea bargaining is empirically unsupported." *Id*. Plea bargaining "eliminates the jury and conflates the judges' and prosecutors' roles, creating an

administrative system of criminal justice." J.A. 93-94. Such agreements "diminish the right of the people to participate in the administrating of the criminal justice system to a near vanishing point." J.A. 95. Even if the overburden justification was once applicable, it no longer is. *Id*.

"Because the most common justifications for plea bargaining no longer have any substantial heft," the district court continued, "the counterweight of the people's general interest in observing and participating in their government requires close consideration of proffered plea bargains in every case." J.A. 96. Therefore, "courts should reject a plea agreement upon finding that the plea agreement is not in the public interest," because there "is no justice in bargaining against the people's interest." J.A. 97.

The district court then laid out three factors to consider when evaluating a plea agreement. First, the court "should consider the cultural context surrounding the subject criminal conduct." J.A. 97. In this case, that context was "a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction." *Id*. Second, the court should "weigh the public's interests in participating in the adjudication of the criminal conduct charged by the indictment." *Id*. In this case, "the public has a high interest in adjudication of heroin and opioid crimes such as these because of the severity of the crisis occurring in our state." *Id*. The district court explained that "[e]ducation about and deterrence of heroin and opioid crimes is of paramount importance at this time." *Id*. Third, the court must "consider whether community catharsis can occur without the transparency of a public jury trial." *Id*. The district

court explained that "jury trials in cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts." J.A. 98. Walker's alleged crimes, the district court concluded, "are vicious criminal acts." *Id.* Finally, the court should "examine the plea agreement and in light of the presentence report determine whether the apparent motivation is to advance justice or more probably . . . expediently avoid trial." *Id.* The district court concluded that the agreement in this case showed that the "principle motivation appears to be convenience." *Id.*

"Upon full consideration of these factors," the district court concluded, "I find that the plea agreement offered in this case is not in the public interest. I reject the plea agreement." J.A. 98. The district court went on to note that a jury trial "reveals the dark details of drug distribution and abuse to the community in a way that a plea bargain guilty plea cannot" and that the "attendant media attention that a jury trial occasions communicates that such conduct . . . is unlawful and that the law is upheld and enforced." J.A. 99. As jury verdicts in such cases accumulate over time and "reinforce condemnation of the conduct by the public at large" the "respect for the law propagates." J.A. 100. By contrast, the "secrecy surrounding plea agreements . . . frequently undermines respect for the law and deterrence of crime." *Id.*

Following the district court's rejection of the plea agreement, Walker withdrew his guilty plea. J.A. 668.

4. Without a plea agreement, Walker pleads guilty to three counts of distributing heroin and fentanyl and is convicted of being a felon in possession of a firearm.

After Walker withdrew his guilty plea, the Government obtained a superseding indictment charging him with three counts of distributing drugs (two counts of heroin, one of fentanyl) and with being a felon in possession of a firearm. J.A. 107-111. Trial on the indictment was scheduled to begin on November 7, 2017. J.A. 115. However, before trial began, Walker pleaded guilty to the three drug counts in the indictment. J.A. 112-114. Walker proceeded to trial only on the felon-in-possession count.

At trial, the Government presented testimony from five law enforcement officers about the search of the apartment and the recovery of the firearms there. J.A. 187-228, 269-367. The Government also presented testimony from two witnesses about the incident where Walker allegedly pistol-whipped Corns. J.A. 229-268. Corns was not one of them. The jury was instructed that to convict Walker it had to find that he knowingly possessed the firearms, that he was a felon, and that the guns travelled in interstate commerce. J.A. 413. The jury convicted Walker of being a felon in possession of a firearm. J.A. 423.

5. Walker is sentenced to 120 months in prison.

A second PSR was prepared after Walker's guilty pleas and conviction at trial. J.A. 664-723. As with the original PSR, the probation officer recommended a base offense level of twelve on the drug distribution charges, without any adjustments. On the felon-in-possession conviction, the probation officer recommended that the base

offense level be twenty, with upward adjustments for possession of a stolen firearm (two levels), use in the commission of another felony offense (four levels), and obstruction of justice (two levels), for a total offense level of twenty-eight. J.A. 684. Applying grouping rules the final offense level was 28 and, when combined with a Criminal History Category IV, produced an advisory Guideline range of 110 to 137 months in prison. J.A. 685, 695, 710. Again, the probation officer did not identify any factors that warranted a departure or variance. J.A. 713.

Sentencing was held on February 1, 2018. J.A. 518-569. The district court adopted the advisory Guideline calculations from the PSR. 548. After hearing the arguments of counsel, the district court imposed a sentence of 120 months in prison, to be followed by a three-year term of supervised release. J.A. 565-566.

6. The Fourth Circuit affirms Walker's convictions and sentence.

Walker appealed his convictions and sentence to the Fourth Circuit. As relevant to this Petition, Walker argued that the district court abused its discretion by rejecting the plea agreement, forcing him to ultimately be subject to much greater sentencing exposure as a result. The Fourth Circuit rejected Walker's argument in a published opinion. *United States v. Walker*, 922 F.3d 329 (4th Cir. 2019).

After noting that "Rule 11 does not establish criteria to guide a district court's discretion with respect to accepting or rejecting a plea agreement," the court concluded that a "district court is not entitled to base its discretion on arbitrary or irrational factors" and must state its reasons for rejecting a plea agreement on the record. *Walker*, 922 F.3d at 249. In addition, the "bases for a court's rejection of a plea

agreement must pertain to the specific agreement at hand, and the court should not rely on extraneous considerations or broad categorical determinations." *Id.* The court concluded that the district court could reject a plea agreement as being either too lenient or too harsh and that a "district court should also weigh whether the plea agreement is in the public interest." *Id.* at 250.

Applying those observations, the Fourth Circuit concluded that the district court did not abuse its discretion when it rejected Walker's plea agreement. The court recognized that the district court "relied on some generalized analysis" and "invoked broad considerations," but that the district court "centered its analysis on whether the particular plea agreement between Walker and the United States Attorney was too lenient and on whether it served the public interest." *Walker*, 922 F.3d at 251. This conclusion was "made easier by the position taken by the Government in this appeal," in that the Government did not seek to defend its ability to craft plea agreements or stand by the particular agreement negotiated in this case. *Id.* In light of the Fourth Circuit's conclusion, it did not investigate the bases of the policy considerations the district court cited while rejecting Walker's plea agreement.

IX. REASONS FOR GRANTING THE WRIT

I. The writ should be granted to determine whether a district court abuses its discretion by determining whether to accept or reject a plea agreement under Rule 11 of the Rules of Criminal Procedure based largely on broad-based policy disagreements with plea bargaining, based on incorrect underlying assumptions, rather than case-specific factors that are, at best, given passing attention.

More than nine in ten criminal cases in this country are disposed of via guilty pleas. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). As this Court has recognized, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* at 144, quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992). As both the district court and the Fourth Circuit recognized, there is a paucity of guidance for district courts as to how to exercise their discretion over one of the most fundamental parts of the modern criminal justice system. J.A. 81 ("Rule 11 is silent on what the Court should or may consider in making that decision"); *Walker*, 922 F.3d at 249 ("as our sister circuits have recognized, Rule 11 does not establish criteria to guide a district court's discretion with respect to accepting or rejecting a plea agreement"). In light of such limited guidance in such an important area of the criminal law, how a district court may exercise its discretion to reject or accept a plea bargain is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. The district court's reasons for rejecting Walker's plea agreement, and those of other defendants, are based on broad policy objections to the practice of plea bargaining, not the particular facts of Walker's case.

The Fourth Circuit ultimately concluded that the district court did not improperly reject Walker's plea agreement because it did so after focusing on the particular facts of Walker's case, his criminal history, and the "context" in which his case arose. *Walker*, 922 F.3d at 250-251. In doing so it essentially agreed with the Government's position that everything else the district court said – about the evils of plea bargaining, about the need for the public to speak through the grand jury, about how trials will help educate the public on a crisis they are deep in the middle of – was "merely dicta." Government Brief, 2018 WL 3617128 at *18, n.4. That conclusion can only be reached by ignoring the mass of words the district court has expounded on these topics, both inside and outside the courtroom.

Walker's case was the first of several in which the district court rejected plea agreements for broad, policy based reasons. *See United States v. Wilmore*, 282 F. Supp. 3d 937 (S.D. W. Va. 2017); *United States v. Stevenson*, 2018 WL 1769371 (S.D. W. Va. Apr. 12, 2018). The district court has continued to expound on its philosophy, both inside and outside the courtroom. During the plea hearing in a more recent case the district court explained that it had been one year since it first set forth the "*Walker* factors" and that while some period of adjustment was required, that period was over. *United States v. Thomas*, 2:18-cr-00005-5 (S.D. W. Va.), Dkt. No. 85.

After Walker was sentenced, the district court also participated in a panel discussion organized by the Cato Institute about plea bargaining, along with criminal

defense attorney Scott Greenfield and law professor Suja Thomas. *Plea Bargaining: Good Policy or Good Riddance?*, Cato Institute (July 19, 2018), https://www.cato.org/events/plea-bargaining-good-policy-or-good-riddance ("Cato Panel").[3] The panel provided the district court with the best opportunity yet to expound on the philosophy behind its rejection of plea agreements like Walker's. It made it clear that the district court is trying to change the system, one case at a time.

The district court stated that plea bargaining was a "near total substitution . . . for what our Founding Fathers envisioned as the normal participatory system of criminal justice calling for jury trials." Cato Panel at 5:02. Citing an unnamed scholar, the district court went on to state that "rights, including the jury trial, are not solely the possession of an individual. They are cultural artifacts that must be preserved in order to finally realize freedom." *Id*. at 6:53. Plea bargaining, the district court complained, "treats the accused as a voluntary rational actor in a marketplace where reductions in his loss of liberty are traded for determinations of his guilt." *Id*. at 7:14. The district court would repeatedly return to the criticism of liberty as a form of currency. *Id*. at 10:00, 1:06:55. It called the idea "most reprehensible." *Id*. at 1:06:55. "The people of the United States," the district court said in concluding its opening remarks, "have been conned into believing that they have a criminal justice system anchored by the jury trial." *Id*. at 10:28. The district court later admitted that "I don't like the whole process." *Id*. at 1:07:14. These remarks make clear that the

[3] The discussion was streamed live on the Internet and is now available on the Cato Institute website.

district court's rejection of Walker's plea agreement was based on the district court's intense dislike of plea bargaining, not the particular facts of this case. *See United States v. Vanderwerff*, 788 F.3d 1266, 1276-1277 (10th Cir. 2015)(finding abuse of discretion in rejection of plea agreement, based partly on district court's "apparent antipathy toward plea bargaining as a whole").

The district court also addressed the critical role it believes grand juries play in the criminal justice system. When asked by the moderator for examples of limits that were placed on prosecutorial overreaching, the district court offered "the provision in the Fifth Amendment for grand juries." Cato Panel at 32:11. As set forth below, the grand jury as currently constructed provides little protection for defendants and is mostly a tool of the Government. The district court went on to explain that the "language in the Fifth Amendment is completely mandatory. It doesn't say you can have waivers." Cato Panel at 32:25. That is contrary to existing law. *Smith v. United States*, 360 U.S. 1, 6 (1959); *United States v. Hammerman*, 528 F.2d 326, 332 (4th Cir. 1975)(not allowing defendant to withdraw waiver of indictment, which was "nothing more than a waiver of a finding of probable cause" and was "of relatively little consequences as compared with a waiver of trial"); Fed. R. Crim. P. 7(b). The only other limit offered up by the district court was "the one that was on Senator McCarthy – 'at last, sir, have you no sense of decency?'" Cato Panel at 32:44. In other words, the district court could not offer up any salient limits at all.

Most importantly, the district court admitted that it does not know how parties appearing before it can comply with its own test for determining whether a plea

agreement should be accepted. After admitting that it had taken it three tries to write an opinion that best captured its new test, and the basis for it, the district court admitted that it had not said what compelling case-specific factors would justify accepting a plea agreement. Cato Panel at 8:55, 55:32. The district court simply stated that they "had to be case specific. What are they? I don't know. What are they?" *Id*. at 55:36. "A court may reject a plea in exercise of sound judicial discretion." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Utilizing an improper standard when making a discretionary decision is an abuse of that discretion. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996)(a trial court "by definition abuses its discretion when it makes an error of law"). Utilizing a standard that no one, even the district court, understands is even more so an abuse of discretion.

Greenfield provided a pointed response to the district court's opening remarks. He pointed out that "while many of these things sound wonderful at a theoretical level, we're stuck dealing with human beings." Cato Panel at 16:42. Then, in response to the district court's talk of rights being "cultural artifacts," he said:

> No. They're the things owned by my guy who's going to be sitting in prison for the rest of his life until he dies there. And frankly, people sitting outside of prison talking about how their rights are implicated, let 'em change places with my client before they decide what they're going to call a more important right – his right to get out alive to see his children again before he dies or their right to have wondrous platitudes spread across the land.

Id. at 17:02.

That focus on policy, rather than case specific elements, is evident from the record in this case as well. That is why, after explaining how little guidance district

courts have when deciding whether to accept or reject plea agreements, the district court's first statement was that it was its "function to prevent the transfer of criminal adjudications from the public arena to the prosecutor's office for the purpose of expediency at the price of confidence in and effectiveness of the criminal justice system." J.A. 81. The district court went on to explain that "the community must not be systematically excluded from its proper place in this participatory democracy, especially with regard to the heroin and opioid crisis." *Id*. For that reason, the district court concluded that the plea agreement was "not in the public interest" and rejected it. *Id*. From the outset it was clear that the district court was not rejecting a plea agreement because the defendant cut too favorable a deal – it was because of broad-based policy concerns regarding plea agreements in general and concerns about public participation in in cases involving opioids in particular. The district court looked to the "most commonly cited justifications" for plea agreements – "docket pressure and overburdened prosecutors and judges" – and declared itself "juberous of these assertions." J.A. 93. The district court complained that plea agreements were "creating an administrative system of criminal justice." J.A. 94. This was "diminish[ing] the right of the people to participate in the administering of the criminal justice system to a near vanishing point." J.A. 95. Thus the clear focus of the district court's ruling on Walker's plea agreement was not Walker himself, but the system of plea agreements that has developed in federal criminal justice system.

A full reading of the district court's many opinions on this issue and its public statements during the Cato Panel make clear that the district court desires a

fundamental change in the criminal justice system. However, a single judge is in a poor position to make such a change. The district court's desire to send a message about how the public has been "conned" about the nature of the criminal justice system instead leads to tangible harm to individual defendants caught up in its crusade. When it comes to any particular plea bargain and whether it should be accepted, "the district court's personal policy preferences on the plea bargaining issue . . . are irrelevant." *Vanderwerff*, 788 F.3d at 1277. The case-specific factors stated by the district court in rejecting Walker's plea agreement are merely window dressing, deployed while it fired the first (of several) shots in a war against a system in which defendants like Walker are caught. The district court's policy-based disagreement with modern plea bargaining has led it to attempt to implement a rule against plea agreements in particular cases. That is improper and leads to an abuse of its discretion, as it did in the rejection of the plea agreement in this case.

B. The district court's policy disagreement with plea bargaining is largely based on incorrect conceptions of how the modern criminal justice system works.

The district court abused its discretion because it rejected Walker's plea agreement on broad-based policy concerns, not case-specific facts. That error was compounded by the fact that the district court's policy objections were based on faulty perceptions of how the criminal justice system works. First, it was mistaken by concluding that trials (and grand jury proceedings) are useful tools to educate the public about a public health crisis. Second, it was mistaken by concluding that the

grand jury plays a role in the modern federal criminal justice system as something other than a tool used by the Government to initiate prosecutions.

1. The public is fully aware of the ongoing opioid crisis in southern West Virginia and will not be made more aware of it by criminal jury trials with a limited factual scope.

The district court went into depth about the "context" of Walker's plea agreement, "a clear, present and deadly opioid crisis in this community." J.A. 86. There is no doubt that the picture the district court painted of the crisis in the Southern District of West Virginia is harrowing and accurate. However, the district court presented no findings suggesting that the usual plea agreement process has left the people of the district unaware of that picture. Indeed, the crisis and its impacts have flooded local media for the past several years. In 2017 the *Charleston Gazette-Mail* won a Pulitzer prize for its coverage of the opioid crisis. Staff Report, *Gazette-Mail Wins Pulitzer for Investigative Reporting*, Charleston Gazette-Mail (Apr. 10, 2017).[4] The documentary film *Heroin(e)* was also released in 2017, about a trio of women in Huntington, West Virginia, dealing with the opioid crisis there. Renee Montagne, '*Heroin(e)': The Women Fighting Addiction In Appalachia*, National Public Radio (Mar. 4, 2018);[5] *see also* Kalea Gunderson, *Huntington Residents React to*

[4] Available online at https://www.wvgazettemail.com/news/gazette-mail-wins-pulitzer-for-investigative-reporting/article_0def3dbb-db68-5428-bca6-5c534325446c.html (last visited July 23, 2019).

[5] Available online at https://www.npr.org/2018/03/04/589968953/heroin-e-the-women-fighting-addiction-in-appalachia (last visited July 23, 2019).

Heroin(e) Netflix Documentary, WCHS Eyewitness News (Sept. 13, 2017).[6] Famously, and as the district court recognized, Huntington one day was the site of twenty-six overdoses over a four-hour span. J.A. 91. That attracted national as well as local media attention. *26 Heroin Overdoses Over 4 Hours In 1 West Virginia City*, CBS News (Aug. 17, 2016);[7] Matt Pearce, *26 Overdoses In Just Hours: A Small West Virginia City Faces Its Demons*, Los Angeles Times (Aug. 17, 2016);[8] Lori Kersey, *26 Overdoses Over 5 Hours In One Town, But Nobody Got Referred to Treatment*, Charleston Gazette-Mail (July 29, 2017).[9] When the person who sold the drugs involved in those overdoses was sentenced to prison, the media was there. *Dealer Behind Huntington's 26 Overdoses Sentenced to 18 Years In Prison*, The Herald Dispatch (Apr. 17, 2017).[10] The district court judge who rejected Walker's plea agreement has even presided over litigation arising from media coverage of the opioid epidemic in West Virginia. *See Ballengee v. CBS Broadcasting*, 331 F. Supp. 3d 533 (S.D. W. Va. 2018)(granting summary judgment to broadcaster sued by pharmacist over their coverage of the opioid epidemic).

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[6] Available online at http://wchstv.com/news/local/huntington-residents-react-to-heroine-netflix-documentary (last visited July 23, 2019).
[7] Available online at https://www.cbsnews.com/news/26-heroin-overdoses-over-4-hours-huntington-west-virginia/ (last visited July 23, 2019).
[8] Available online at http://www.latimes.com/nation/la-na-west-virginia-overdoses-20160817-snap-story.html (last visited July 23, 2019).
[9] Available online at https://www.wvgazettemail.com/news/health/overdoses-over-hours-in-one-town-but-nobody-got-referred/article_99c88628-a926-588f-886e-361b53afe6ea.html (last visited July 23, 2019).
[10] Available online at http://www.herald-dispatch.com/_recent_news/dealer-behind-huntington-s-overdoses-sentenced-to-years-in-prison/article_4e22304c-2398-11e7-bcd1-97ce0311d81c.html (last visited July 23, 2019).

In addition, the United State Attorney's Office has its own Twitter feed (@SDWVnews – which has over 2600 followers, as of this writing) where it frequently touts its triumphs in convicting and sentencing drug offenders.[11] Put simply, anyone who is unaware of the opioid crisis in the Southern District of West Virginia does not want to know what is going on in their community. More trials on multi-count indictments will not change that. The district court hopes that more trials might allow for "community catharsis," J.A. 98, but does not explain what that would look like or how the current saturation of local media with stories of the opioid crisis does not already accomplish this.

The district court stated that a jury trial "reveals the dark details of drug distribution and abuse to the community in a way that a plea bargain guilty plea cannot." J.A. 99. Again, it does not explain why that is and, upon consideration, that is because it cannot. A trial is a limited thing, constrained by the charges pending against a defendant, various constitutional provisions, and the Rules of Evidence. By contrast, sentencing is a wide open affair – a judge imposing sentence can consider any evidence that is reliable. *Williams v. New York*, 337 U.S. 241 (1949); 18 U.S.C. § 3661. Uncharged, and indeed acquitted, conduct can be considered. *United States v. Watts*, 519 U.S. 633 (1997); *United States v. Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009). Evidence seized in violation of the Fourth Amendment may be considered.

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[11] *See* https://twitter.com/SDWVnews (last visited July 23, 2019). The United States Attorney himself also has a personal Twitter feed, @USAttyStuart, with an additional 700 followers on which he sometimes boosts his office's accomplishments. *See* https://twitter.com/USAttyStuart. (last visited July 23, 2019).

United States v. Nichols, 438 F.3d 437, 433 (4th Cir. 2006). The Rules of Evidence do not apply. *United States v. Hopkins*, 310 F.3d 145, 154 (4th Cir. 2002). Nor are jurors informed of the potential sentences a defendant faces if convicted. *Shannon v. United States*, 512 U.S. 573, 579 (1994)(it "is well established that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed")(internal quotation marks omitted). If anything, a plea agreement facilitates the release of the "dark details of drug distribution and abuse" because those details are relevant at the only meaningful adversary proceeding that will take place in such a case – sentencing.

2. The district court's conception of the grand jury does not reflect the reality of modern federal grand jury practice.

The district court's underlying complaint with plea agreements, as expressed in this case and its progeny, is that plea agreements cut the public out of the criminal justice process and deny them information about what goes on there. With regard to jury trials, as set forth above, the district court's concerns are unfounded because sentencing is when that information would be made public, not during a trial. With regard to grand juries, the district court's main concern is that plea agreements that dismiss counts brought by a grand jury limit the ability of citizens to participate in the criminal justice system. This view of the grand jury, of a bulwark of individual liberty and organ of public expression about the law, does not comport with the reality of modern grand jury practice.

This Court has described the role of the grand jury as "a 'body of accusers' pursuing criminal wrongdoing, and a 'protector of citizens' guarding against overreaching in the criminal process," which one commentator recognized as "ambitious and contradictory tasks." Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1267 (2006)("*Democratic Prosecutor*"); *see also, e.g.*, *United States v. Williams*, 504 U.S. 36, 51 (1992). "Not surprisingly, the grand jury has been accused of suffering from 'institutional schizophrenia' by virtue of its dual roles." *Id*.

That schizophrenia is reflected in how the party most intertwined with it, the Government, perceives the grand jury. When the grand jury process is criticized, it "is championed by the Department of Justice, which generally opposes any changes to grand jury procedures, even though it is federal prosecutors who are ostensibly being 'checked' by the grand jury process." Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1 (2004)("*Dangerous Fiction*"). That is because, while the grand jury is feted as an obstacle to protect the rights of the would-be accused, the truth is that "the deck is stacked in favor of the government." Roger A. Fairfax, Jr. *Should the American Grand Jury Survive Ferguson?*, 58 How. L.J. 825, 828 (2015). That is why it is extraordinarily rare for a grand jury not to indict when the prosecutor asks. Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, Five Thirty Eight (Nov. 24,

2014)("U.S. attorneys prosecuted 162,000 federal cases in 2010 . . . . Grand juries declined to return an indictment in 11 of them.").[12]

That is because, rather than being a truly independent entity, the grand jury is a body convened by, and for the benefit of, the Government in aid of prosecutions it chooses to undertake. Indeed, "knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty." *Dangerous Fiction*, 41 Am. Crim. L. Rev. at 3. Whereas most court proceedings "provide for an adversary hearing at which a judge examines a prosecutor's evidence, a defendant charged by the grand jury receives instead a secret, one-sided review process administered by the prosecutor." *Democratic Prosecutor*, 94 Geo. L.J. at 1268. Observers have noted that "even without committing any 'abuse,' the prosecutor can so dominate the grand jury's decision, simply by following the rules, that its review is not independent at all." *Dangerous Fiction*, 41 Am. Crim. L. Rev. at 8; *see also* Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. Rev. 1, 8 (1999)(grand jury criticism "overlooks the degree to which the Court has accepted, and even encouraged, prosecutorial control of grand jury investigations"); Charles Alan Wright, et al., *Federal Practice and Procedure* § 101 (4th ed. 2018)("it would be a mistake to assume that a grand jury is as independent in fact as it is in theory").

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[12] Available online at http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/ (last visited July 23, 2019).

The prosecutor is the only attorney allowed to be present during a grand jury session. Fed. R. Crim. P. 6(d)(1). Even when an accused testifies before the grand jury, they have no right to counsel in the session with them. *United States v. Mandujano*, 435 U.S. 564, 581 (1976). "This assures, other than the initial charge by the court and their swearing-in, grand jurors virtually never hear from any voice of legal authority other than the prosecutor." *Dangerous Fiction*, 41 Am. Crim. L. Rev at 30. That position assures that the prosecutor "runs the proceedings, calls the witnesses, presents the evidence, answers the grand juror questions, and directs the grand jury when it is time to vote on the charges, which the prosecutor prepares." *Id*. Thus, the prosecutor is the one who decides "what charge to file or bring before a grand jury." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). As a result, the grand jury is not an independent body pursuing justice at its own urging. It has long been so. *See, e.g.*, *United States v. Terry*, 39 F. 355, 361-363 (N.D. Cal. 1889)(rejecting argument that indictment was invalid where grand jury requested prosecutor present witnesses favorable to the defense and the prosecutor refused). Instead, it simply decides if there is probable cause to support the charges brought before it by the Government based only on evidence that the Government provides.

Even that protection is largely hollow, given the broad discretion the prosecutor has to present evidence to the grand jury. Unlike a petit jury working under the rigorous limitations of the Rules of Evidence, a grand jury may "act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." *United States v. Dionisio*, 410 U.S. 1, 15 (1973). An indictment may be based entirely on

hearsay evidence. *Costello v. United States*, 350 U.S. 359, 363 (1956). The prosecutor may present evidence of a defendant's prior convictions without limitation. *United States v. Levine*, 700 F.2d 1176, 1179 (8th Cir. 1983); *United States v. Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975). The grand jury can also be told that the accused refused to talk with police and exercise their right to remain silent. *Levine*, 700 F.2d at 1179. The prosecutor may also rely on evidence that would be suppressed at trial because of constitutional violations when seeking an indictment. *United States v. Calandra*, 414 U.S. 338, 344-345 (1974)(indictment based on information obtained in violation of Fifth Amendment); *Lawn v. United States*, 355 U.S. 339, 349-350 (1958)(indictment based on information obtained in violation of Fourth Amendment). Most important, however, is the evidence that the prosecutor is not required to present – evidence that is exculpatory for the defendant. *United States v. Williams*, 504 U.S. 36, 52-54 (1992). Thus, far from an independent decision made after a wide ranging inquiry into a particular matter, a grand jury indictment is the nearly inevitable result of the Government being able to present, without contest, its case in the most forceful and unlimited way possible. To make matters worse, a "challenge to the reliability or competence of the evidence presented to the grand jury' will not be heard." *Williams*, 504 U.S. at 54 (internal quotation omitted).

Two decisions of this Court also undermine the district court's conception of the grand jury as a fundamental bulwark of liberty. The first is that, unlike most of the rights set forth in the Bill of Rights, this Court has decided that the right to only be charged by a grand jury does not apply to the states. *Hurtado v. California*, 110

U.S. 516 (1884); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 761 (2010). That suggests the grand jury is less a bulwark and more one of several possible means of initiating a criminal prosecution. Secondly, the decision of a grand jury not to return a particular indictment has no preclusive effect – a prosecutor may present the same evidence again to a different grand jury. *United States v. Thompson*, 251 U.S. 407, 414-415 (1920). Thus, if the grand jury performs its alleged primary function, as a bulwark against Government overreach, the Government has only to present the same charges to another grand jury. Such was even the case in the colonial era. In the 16th Century a London grand jury refused to indict two men who were perceived enemies of the King. While the news "crossed the Atlantic and was used to resist loyalist prosecutions of American colonists," in England "another grand jury simply was drawn from Crown-friendly Oxford and dutifully approved the charges." Fairfax, 58 How. L.J. at 825 and n.22.

The modern practice of the grand jury also undermines the district court's ideal of making the public more aware of how the criminal justice system handles opioid cases. "The most distinctive feature of a federal grand jury is that its work is conducted in secret." Charles Alan Wright, *Federal Practice and Procedure* § 106 (4th ed. 2018); Fed. R. Crim. P. 6(e). By contrast, plea agreements are public documents that cannot be sealed without rigorous findings that preserve the public's First Amendment rights. *United States v. DeJournett*, 817 F.3d 479, 485 (6th Cir. 2016) ("just as the public's presence in judicial proceedings plays a significant role in ensuring fairness in jury trials . . . its access to plea agreements . . . plays a significant

role in monitoring the administration of justice by plea"). Sentencing memoranda should earn similar scrutiny before being sealed, with redacted versions produced for public consumption. *United States v. Harris*, 890 F.3d 480, 491-492 (4th Cir. 2018). There is nothing preventing a publicly-filed plea agreement, followed by a sentencing hearing in open court, from informing the public about the opioid crisis and the law's response to it just as well, if not more so, than a jury trial.

II. As to Walker's conviction for being a felon in possession of a firearm, the petition should be granted, the Fourth Circuit's decision below partially vacated, and the case remanded in light of this Court's decision in *Rehaif*.

After Walker withdrew his guilty plea, the Government obtained a superseding indictment charging him with three counts of distributing drugs and with being a felon in possession of a firearm. J.A. 107-111. Before trial began, Walker pleaded guilty to the three drug counts in the indictment. J.A. 112-114. Walker proceeded to trial only on the felon-in-possession count. At trial the district court instructed the jury that in order to "sustain its burden of proof" the Government "must prove three essential elements beyond a reasonable doubt." J.A. 413. Those where that (1) Walker "had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year"; (2) that he "knowingly possessed the firearm described in the indictment"; and (3) that "such possession was in of affecting interstate commerce." *Id*. The district court did not instruct the jury that the Government was required to prove that Walker was aware of status as a convicted felon and that he could not legally possess firearms. That was in line with existing Fourth Circuit law. *See United States v. Langley*, 62 F.3d 602 (4th Cir. 1995)(*en banc*).

Those instructions are no longer a correct statement of the law. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court concluded that there is an additional element that the Government must prove to secure a conviction under 18 U.S.C. § 922(g). Rehaif came to the United States on a student visa, but was eventually dismissed from university, effectively revoking his permission to remain in the United States. He did remain, however, and at some point possessed firearms. He was charged under 18 U.S.C. § 922(g)(5) for possessing a firearm while unlawfully in the United States. *Id*. at 2194-2195. Reviewing Rehaif's conviction after a trial where the jury was instructed similarly to Walker's, this Court concluded that "we think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Id*. at 2196. As this Court explained, without knowledge of his prohibited status "the defendant may well lack the intent needed to make his behavior wrongful." *Id*. at 2197. This Court reversed Rehaif's conviction, concluding that "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id*. at 2200.

As in *Rehaif*, the jury in this case was told it had to find that Walker "knew he possessed a firearm," but not "that he knew he belonged to the relevant category of persons barred from possessing a firearm." Therefore, like Rehaif, his conviction must be vacated and his case remanded to the Court of Appeals for further proceedings, as

this Court has done in other similar cases. *See, e.g.*, *Hall v. United States*, ___ S. Ct. ___, 2019 WL 2649770 (2019); *Moody v. United States*, ___ S. Ct. ___, 2019 WL 1980311 (2019); *Reed v. United States,* ___ S. Ct. ___, No. 18-7490.

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

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By Counsel

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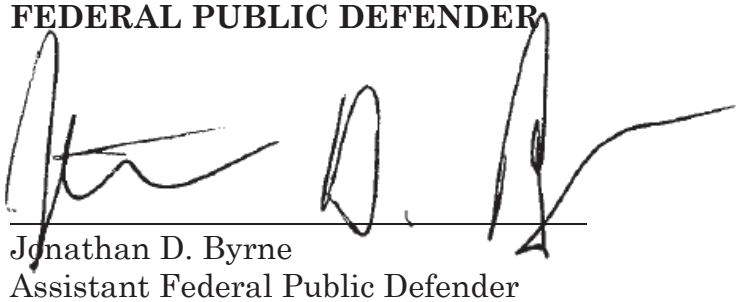

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