No. 20-444

In the Supreme Court of the United States

United States of America,

Petitioner,

v.

Michael Andrew Gary,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is with the erosion of the institution of the jury trial and the coercive nature of the plea-bargaining regime that has almost entirely replaced jury trials as the default mechanism for criminal adjudication today.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation" against him. U.S. CONST. amend. VI. This Court has called that right "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). And it has long held that a failure to inform defendants of the essential elements of the charge against them renders a guilty plea constitutionally invalid, no matter the prosecution's confidence in its case. *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976).

Michael Gary was not informed of the essential elements of the charges against him when he opted to plead guilty to two counts of possessing a firearm as a felon. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—decided while Gary's case was on direct appeal—the Court held that in a federal prosecution for illegal possession of a firearm, the state must prove that the defendant "kn[ew] of his status as a person barred from possessing a firearm." *Id.* at 2195. But Gary had not received notice of this element when he decided to plead guilty. Therefore, "his plea was involuntary and the judgment of conviction was entered without due process of law." *Henderson*, 426 U.S. at 647.

Nevertheless, the Government argues that Gary's conviction should be upheld because, in essence, the Government is confident that even if Gary *had* been adequately informed of the charges against him, he would have pleaded guilty anyway. Br. for United States at 11-12. But whether or not this hypothetical assertion is correct as a factual matter, it is exactly the

sort of rationale that this Court has previously rejected. *Henderson*, 426 U.S. at 644-45 ("We assume . . . that the prosecutor had overwhelming evidence of guilt available. . . . Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary . . . unless the defendant received 'real notice of the true nature of the charge against him . . . .'") (quoting *Smith*, 312 U.S. at 334).

Gary's brief explains in detail why the Fourth Circuit decision to vacate his guilty plea was correct under existing precedent—specifically, that the plain-error doctrine does not apply to this case at all because objecting at the time of the plea would have been futile, Br. for Respondent at 8-21; that failure to adequately inform a defendant as to the charges against him meets all the criteria for structural error, *id.* at 22-39; and that even *if* the plain-error doctrine applied, Gary would still be entitled to relief, *id.* at 40-52. *Amicus* will not reprise those arguments here.

But *amicus* writes separately to explain how the Government's position in this case is especially concerning, because it is indicative of a long and steady erosion of the jury trial itself. Had Gary's conviction been handed down by a jury, the Government's failure to prove the *mens rea* element would clearly require vacatur of the judgment.

Yet the Government maintains that the failure to inform Gary of the essential elements of the charge he faced was "harmless error," relying mostly on concerns sounding in plain efficiency. Contending that the failure to inform defendants of the knowledge-of-status requirement "typically makes no difference at all to a

defendant's decision to plead guilty," it emphasizes the "substantial costs" that would be imposed if this Court refused to vacate involuntary guilty pleas. Br. for United States at 14. In other words, the Government's implicit premise is that defendants are presumptively going to plead guilty, and that failure to inform defendants about what they are actually pleading to is a "harmless error" that should not slow down this process.

The stark disparity between the Government's position and foundational constitutional principles of due process and fair notice is illustrative of the extent to which the jury trial itself has been all but replaced by plea bargaining as the default mechanism for adjudicating criminal charges in America today. Whereas the Founders clearly intended to put citizen participation at the heart of our criminal justice system, the extraordinary power that prosecutors can wield to induce guilty pleas effectively sidesteps what was intended to be the ultimate check on state power—the unanimous assent of a jury to any criminal conviction. And as the Government's position in this case plainly illustrates, there is ample reason to doubt whether the bulk of those pleas can truly be called "voluntary."

There is no simple antidote to the erosion of the jury trial, but this Court should avoid exacerbating the problem by accepting the Government's radical position in this case. Specifically, the Court should ensure that, even where defendants do not exercise their Sixth Amendment right to a public trial before an impartial jury itself, they still are guaranteed the right "to be informed of the nature and cause of the accusation" against them. U.S. CONST. amend. VI. Without

such protection, our system of pleas, where voluntariness is already dubious, will be transformed into a regime where voluntariness is avowedly unnecessary.

ARGUMENT

I. Plea bargaining has supplanted jury trials as the primary mechanism for securing convictions in our criminal justice system.

As with more than 97% of federal criminal convictions, the judicial process leading to Michael Gary's conviction consisted of a long waiver of rights and a guilty plea.[2] To today's practitioners of law, this is a garden-variety criminal case in all respects but one: the failure to inform the defendant of the nature and cause of the accusation against him. But to the men who immortalized that requirement in our Constitution, this criminal process would be wholly unrecognizable.

There is perhaps nothing that our nation's founders agreed on more emphatically than the importance of the jury trial. "Friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury," wrote

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[2] The year Michael Gary was arrested, 97.2% of defendants in federal court plead guilty. 2017 Sourcebook of Federal Sentencing Statistics, Figure C (U.S. Sentencing Comm'n 2017). That number has grown each successive year to 97.8% in 2020. 2018 Sourcebook of Federal Sentencing Statistics, 60 (U.S. Sentencing Comm'n 2018); 2019 Sourcebook of Federal Sentencing Statistics, 60 (U.S. Sentencing Comm'n 2019); 2020 Sourcebook of Federal Sentencing Statistics, 60 (U.S. Sentencing Comm'n 2020).

Alexander Hamilton.[3] The conviction of the founders is apparent in the language of the Constitution itself: "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury." U.S. CONST. art. III, § 2.

Moreover, the jury trial was clearly understood to be more than just a means to prevent unlawful convictions: it was designed as a check against government power. Thomas Jefferson called juries the "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[4] In every case, the prosecutor had to prove to the satisfaction of 12 citizens not just the elements of the defendant's guilt, but his own credibility as an advocate for justice. As much as the "[j]ury trial was a valued right of persons accused of crime . . . it was also an allocation of political power to the citizenry."[5]

For over a century, courts essentially treated jury trials as the Constitution commands. While a defendant could plead guilty in open court, he had little incentive to do so—and as such, guilty pleas were both rare and actively discouraged by judges. "Common-law

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[3] The Federalist No. 83 (Alexander Hamilton).

[4] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789).

[5] Albert W. Alschuler and Albert G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994). *See also* Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 884 (2019) ("The jury trial is both an individual right of the accused and a structural institution of popular self-governance, codified in Article III and described by some as a 'fourth branch' of government.").

courts apparently took a negative view, not of plea bargaining specifically, but of guilty pleas of any description."[6] Just two cases prior to the Civil War generated discussion of guilty pleas, and in both cases the trial judge argued strenuously that the defendant should stand trial.[7] Though today there are fewer and fewer cases where it seems rational for people to exercise their right to trial, the conventional wisdom at the time our nation was founded was that the smart defendant almost always availed himself of the right to be tried by jury.

The jury's place at the heart of our justice system thus went largely unquestioned for the first century of our nation's history. But after the Civil War, prosecutorial calls for judges to sanction "plea deals" became more common. These were, at first, roundly rejected; even the slightest influence from police or prosecutors to persuade a defendant to plead guilty could render a plea void. "[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any . . . direct or implied promises, however slight." *Bram v. United States,* 168 U.S. 532, 542-43 (1897). State courts were equally strict. As the Georgia Supreme Court explained:

> The law . . . does not encourage confessions of guilt, either in or out of court. Affirmative action on the part of the prisoner is required before he will be held to have waived the right of trial, created for his benefit. . . . The affirmative

[6] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 12 (1979).

[7] *Id.* at 9-10.

> plea of guilty is received because the prisoner is willing, voluntarily, without inducement of any sort, to confess his guilt and expiate his offense.

Griffin v. State, 77 S.E. 1080, 1084 (Ga. 1913).

Yet, even as some judges continued to express disapproval, pleas became increasingly common. "The gap between these judicial denunciations of plea bargaining and the practices of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining."[8] In the federal courts, pleas made up about 50% of convictions in 1908. By 1916, that number had jumped to 72%. Despite the well-worn line that plea bargains were a necessary evil to respond to an increase in crime, the overall number of federal criminal cases had actually *decreased* that year.[9]

The primacy of plea bargaining was solidified in the late twentieth century by a handful of landmark Supreme Court decisions. In *Brady v. United States*, 397 U.S. 742 (1970), the Court considered a defendant who pled guilty to kidnapping charges to avoid the death penalty, and where the judge was, apparently, "unwilling to try the case without a jury." *Id.* at 743. Notwithstanding that the Court had already held in *United States v. Jackson*, 390 U.S. 570 (1968), that imposition of the death penalty under these conditions would have been unconstitutional, the Court upheld Brady's plea as voluntary. *Brady*, 397 U.S. at 756-77.

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[8] Alschuler, *supra,* at 24.

[9] *Id.* at 27.

Whereas *Brady* concerned the voluntariness of pleas made in the face of extraordinary pressure, the Court soon faced the other side of the coin—the legitimacy of extraordinary criminal charges introduced for the express purpose of pressuring a defendant to plead guilty. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), a defendant was charged with uttering a forged instrument for writing a bad check in the amount of $88.30. *Id.* at 358. The prosecutor wanted a guilty plea in exchange for recommending a five-year sentence and threatened that if the defendant did *not* plead guilty, he would seek a new indictment under the Kentucky Habitual Criminal Act, which carried a mandatory life sentence. *Id.* at 358-59. Hayes refused the deal, the prosecutor carried out the threat, and Hayes was convicted at trial and given a life sentence—and the Court upheld the conviction. *Id.* at 365.

The combination of *Brady* and *Bordenkircher* essentially meant that prosecutors had free rein to use the threat of extraordinary penalties to secure guilty pleas, no matter the disparity between the sentence offered in a plea and the sentence threatened at trial. And few defendants these days expose themselves to such risk. Pleas have become so common that this Court has declared that "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

Effectively, the state has created an extra-constitutional system for adjudicating criminal charges that, for prosecutors, is convenient, efficient, and certain. This helps the criminal justice system churn some 11

million people through its doors each year.[10] Although our crime rate is comparable to other NATO founding countries, we send our citizens to prison far more frequently. The U.S. incarceration rate is five times higher than the United Kingdom—and the U.K. is the second most punitive country on that list.[11]

It is only within the context of this assembly-line system of mass adjudication that the Government can possibly contend that the element of intent was inessential to Michael Gary's plea. Had Gary's case gone before a jury, the Government's failure to prove the knowledge-of-status element would render any verdict of guilty void. "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 522-523 (1995). But it is also not surprising that, outside the framework of justice prescribed by our nation's founders, the Government has found grounds to argue that a defendant need not always be informed of the nature of the charge against him.

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[10] NAT'L ASS'N OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 9 (2018).

[11] Peter Wagner and Wendy Sawyer. *States of Incarceration: The Global Context*, Prison Policy Institute (2018), https://www.prisonpolicy.org/global/2018.html.

II. The Court should not allow the Government to further erode our standards for voluntary pleas.

"[T]he minimum requirement" of a defendant's plea is that it must "be the voluntary expression of his own choice." *Brady*, 397 U.S. at 748. As this Court later elaborated, a constitutionally valid plea is one made "voluntarily, knowingly, and intelligently." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). These requirements reflect the fundamental understanding that "the accused, and not a lawyer, is master of his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (quoting *Gannett Co. v. DePasquale*, 443 U. S. 368, 382, n.10 (1979)).

But given the extraordinary pressure that prosecutors can bring to bear on individual defendants, it is doubtful whether the bulk of guilty pleas could truly be called "voluntary." Over 97% of defendants convicted in federal court profess their desire to "voluntarily" exchange the possibility of acquittal and freedom for the certainty of conviction and punishment. As one retired federal judge has observed:

> [I]nquiring of a defendant as to the voluntariness of his guilty plea felt like a Kabuki ritual. "Has anyone coerced you to plead guilty," I would ask, and I felt like adding, "like thumbscrews or waterboarding? Anything less than that—a threatened tripling of your sentence

> should you go to trial, for example—doesn't count."[12]

These remarks are not hyperbole: a survey of the United States Sentencing Commission's data for 2015 reveals that, "in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence."[13]

Moreover, routine sentence disparities make up only a fraction of the prosecutor's power to secure guilty pleas. "Almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea." *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). Circuit courts have even sanctioned plea deals premised on threats to indict—or promises not to indict—a defendant's family members. *See id.; States v. Marquez*, 909 F.2d 738 (2d Cir. 1990) (citing cases from the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits).

The manner in which these more recent court decisions address the subject of voluntariness reveals just how far our constitutional norms have shifted under the "system of pleas." For example, the Second Circuit asserted in *Marquez* that "'[v]oluntary' for purposes of entering a lawful plea to a criminal charge has never meant the absence of benefits influencing the defendant to plead." 909 F.2d at 742. But contrary to this pronouncement, "the absence of benefit" *was* an explicit

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[12] Nancy Gertner, Bruce Brower and Paul Shectman, *Why the Innocent Plead Guilty: An Exchange*, THE N.Y. REV. OF BOOKS (2015).

[13] THE TRIAL PENALTY, *supra*, at 15.

requirement of this Court's conception of voluntary pleas at the turn of the twentieth century. *See Bram v. United States,* 168 U.S. 532, 542-43 (1897) ("[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any . . . direct or implied promises, however slight.").

The notion that prosecutorial leverage does not disrupt the voluntary nature of a plea is belied by the stark reality that factually innocent defendants are regularly coerced into pleading guilty. Of the 375 men and women exonerated by the Innocence Project's use of DNA testing, nearly 12% had pled guilty to crimes they did not commit.[14] It is necessarily challenging to estimate the number of convicted felons who pled guilty to crimes of which they were factually innocent. But criminologists have estimated that between 2-8% of prisoners sit behind bars because they were coerced into giving false pleas.[15] As one federal judge remarked, "[w]ith over 2.2 million people in American prisons that is a haunting amount of injustice."[16]

To be sure, these sorts of widespread, systemic concerns with the voluntariness of modern guilty pleas are not directly at issue in this case. Coercive plea bargaining is a complex, structural problem with our

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[14] *DNA Exonerations in the United States*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited March 19, 2021).

[15] J. John L. Kane, *Plea Bargaining and the Innocent*, The Marshall Project, https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent (last accessed March 19, 2021).

[16] *Id.*

criminal justice system, with no panacea.[17] But these deep background concerns with the implicit lack of voluntariness in plea deals generally make it all the more urgent that the Court recognize the *explicit* lack of voluntariness in this particular case.

As this Court has stressed again and again, a guilty plea is inherently involuntary where a defendant is not adequately informed of the charges against him. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("Where a defendant pleads guilty to a crime without having been informed of the crime's elements, [the] standard is not met and the plea is invalid."); *Henderson v. Morgan*, 426 U.S. 637, 647 (1976) (plea to second-degree murder is not voluntary where defendant is not informed that intent is an element of the offense).

There is no dispute in this case that Gary was not adequately informed of the elements of the charges against him. Yet the Government still argues that Gary's conviction should be upheld because the "Respondent could not have realistically hoped to persuade a jury" that he was innocent on the knowledge-of-status element. Br. for United States at 24. Whether or not this assertion is true, it is entirely irrelevant. One could as well argue that denial of the right to a jury trial entirely would be "harmless" in cases where, in the Government's view, a defendant could not have "realistically hoped to persuade a jury" as to their innocence. The Sixth Amendment does not permit the

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[17] *See, e.g.*, Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719 (2020).

state to justify criminal convictions based on the *prosecutor*'s level of confidence in a case.

In sum, the jury trial itself—intended by the founders to be an indispensable component of criminal adjudication—is on the verge of extinction, and there is ample reason to doubt the genuine voluntariness of the plea-bargaining regime that has replaced it. Against that background, this Court should be especially reluctant to countenance the Government's extraordinary position in this case.

CONCLUSION

For the foregoing reasons, and those advanced by the Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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