No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Christopher Dominguez,
Petitioner,

v.

United States of America,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The prosecutor, defense counsel, and the district court all informed Mr. Dominguez that if he went to trial he would face a mandatory minimum sentence of 60 years' imprisonment. This was not true. Mr. Dominguez faced a mandatory minimum sentence of 27 years' imprisonment if he went to trial and was convicted on all counts. But because of this misrepresentation of the law, Mr. Dominguez decided to enter into a plea agreement with the government for an agreed-upon-sentence of 28 years.

The question presented in this case is whether Mr. Dominguez's decision to plead guilty was knowingly and intelligently made when he was grossly misinformed about the risks attendant to going to trial.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Dominguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's order denying Mr. Dominguez's petition for rehearing en banc (Attachment A), and Judge Harris L. Hartz's accompanying dissent, is reported at 12 F.4th 1246.

The majority opinion of the Tenth Circuit (Attachment B), and Judge Carlos F. Lucero's accompanying dissent, is reported at 998 F.3d 1094.

The district court's opinion is unpublished but is attached to this petition as Attachment C.

JURISDICTION

The Tenth Circuit Court of Appeals entered its judgment on June 2, 2021 and denied rehearing en banc on September 17, 2021. Accordingly, Mr. Dominguez's petition for a writ of certiorari is due on December 16, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth and the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969).

The Fifth Amendment says to the federal government that "no person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment prohibits state governments from doing the same. U.S. Const. amend. XIV.

INTRODUCTION

Mr. Dominguez was "grossly misinformed" about the mandatory minimum sentence that he would receive if he elected to exercise his constitutional right to a jury trial. *United States v. Dominguez,* 12 F.4th 1246, 1247 (10th Cir. 2021) (Hartz, J., dissenting). He was informed by the court, the prosecutor, and his own defense counsel, that if he went to trial and was convicted on all counts he would receive a mandatory minimum sentence of 60 years' imprisonment. *Id.*; Vol. I at 21-23.[1] Mr. Dominguez entered into plea negotiations with this formidable sentence weighing heavily on his mind. Vol. I at 25.

Ultimately, Mr. Dominguez entered into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement with the government. *United States v. Dominguez,* 998 F.3d 1094, 1098-99 (10th Cir. 2021). The agreement established that the government would

[1] All "Vol. __" citations are to the record on appeal filed in the Tenth Circuit in *United States v. Dominguez,* Case Nos. 19-8021 & 19-8022.

dismiss some of the charged counts—thereby ostensibly eliminating the 60-year mandatory minimum sentence—and that Mr. Dominguez would plead guilty to the remaining counts and agree to a sentence of 28 years' imprisonment. *Id.*

But Mr. Dominguez had been misinformed. In truth, Mr. Dominguez faced a mandatory minimum sentence of only 27 years if he elected to go to trial. *Dominguez*, 12 F.4th at 1247. Before his sentencing hearing, Mr. Dominguez discovered that he had been misinformed. Thus, he moved to withdraw his plea and, as grounds, argued that he was not receiving the benefit for which he believed he had bargained. *Dominguez*, 998 F.3d at 1100. The district court denied the motion and the Tenth Circuit Court of Appeals affirmed in a split opinion. *Id.*

But a decision to plead guilty must constitute an "intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). Mr. Dominguez's plea does not satisfy this standard because he was misinformed as to what his alternatives actually were. The Tenth Circuit decision to the contrary ignores this Court's guidance, creates an intractable split between circuits and at least one state court of last resort, and opens the door for prosecutors to induce pleas by threatening legally impossible mandatory minimum sentences. This case calls out for additional review.

STATEMENT OF FACTS

Federal grand juries sitting in New Mexico and Wyoming charged Mr. Dominguez in multi-count indictments. *Dominguez*, 998 F.3d at 1097-98. Among these charges were three separate violations of 18 U.S.C. § 924(c), use of a firearm in relation to a crime of violence. *Id.* Attached to these indictments was a penalty summary detailing that the first § 924(c) charge carried a mandatory minimum consecutive sentence of 10 years' imprisonment. Vol. I at 21-23. It also detailed that the second and third § 924(c) charges each carried consecutive 25-year mandatory minimum sentences. *Id.* In short, Mr. Dominguez was informed that if he went to trial and was convicted of the three § 924(c) charges, the sentencing judge would have no option but to impose a sentence of at least 60 years' imprisonment. *Id.*; *Dominguez*, 998 F.3d at 1098.

The problem here is that everyone involved in this case was wrong about the penalties that Mr. Dominguez would face if he went to trial and was found guilty on all counts. After Mr. Dominguez's arraignment—but before his change of plea—then-President Donald J. Trump signed into law the First Step Act (FSA). *See Dominguez*, 998 F.3d at 1124 (Lucero, J., dissenting). Relevant here, the FSA significantly reduced the mandatory minimum sentences associated with § 924(c) charges. *Id.* at 1100. Specifically, the FSA limited the 25-year mandatory minimum provision for subsequent offenses to subsequent offenses that occur "after a prior conviction under this subsection has become final." 18 U.S.C. § 924(c). *Id.* As Mr. Dominguez had not sustained a prior

§ 924(c) conviction before the alleged conduct, the 25-year mandatory minimum consecutive sentences for the two "subsequent" § 924(c) counts did not apply to him. *Id.* Despite what he was told, if Mr. Dominguez decided to go to trial and was found guilty of all counts, the maximum mandatory minimum sentence was 27 years' imprisonment. *Id.* A far cry from the threatened 60-year sentence that informed his decision to plead guilty.

Mr. Dominguez was not informed of this material change in the law before his change-of-plea hearing. *Id.* Instead, he entered into plea negotiations believing that if he went to trial, and was convicted on all counts, he would receive a mandatory minimum sentence of at least 60 years. *Id.* at 1098. Motivated by the desire to not spend the rest of his life behind bars, Mr. Dominguez entered into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement with an agreed-upon sentence of 28 years' imprisonment. *Id.* at 1098-99. As part of the deal, the government agreed, inter alia, to drop two of the § 924(c) charges. *Id.*

Soon after Mr. Dominguez changed his plea, he learned of the passage of the FSA and realized the profound impact that it had on his case. *Id.* at 1100-01. Prompted by this knowledge, and the realization that he would not face a 60-year mandatory minimum sentence if he went to trial, Mr. Dominguez moved to withdraw his plea. *Id.*

In support of this motion, counsel informed the district court that "[t]he plea negotiations in this case centered almost entirely on the stacking of the § 924(c) counts

in both Wyoming and New Mexico under the law as it existed at the time of the negotiations." Vol. I at 27. But the FSA dramatically changed the bargaining landscape and cheapened the benefit that Mr. Dominguez believed he was bargaining for. Had Mr. Dominguez known of the FSA, he "almost certainly" would have taken his chances at trial. Vol. V at 100. The district court denied Mr. Dominguez's motion and Mr. Dominguez appealed. *Id.* at 13.

Mr. Dominguez argued on appeal that his plea was not knowingly and intelligently made because he had been erroneously informed of the mandatory minimum penalties attached to the § 924(c) convictions. *Dominguez*, 998 F.3d at 1105. As this Court has long held, a plea is only knowingly and intelligently made so long as it constitutes an "intelligent choice between available alternatives." *Lockhart*, 474 U.S. at 56. It cannot be said that Mr. Dominguez made an intelligent choice between the available alternatives when he fundamentally misunderstood what the alternatives actually were.

Nevertheless, a two-judge majority of the Tenth Circuit affirmed Mr. Dominguez's conviction. The majority opinion acknowledged the aforementioned standard but never explained how Mr. Dominguez's decision to plead guilty—induced by material misinformation—satisfied the standard. *Dominguez*, 998 F.3d at 1105.

Instead of directly addressing the controlling standard, the majority opinion narrowed the test to only require that a defendant understand the "direct consequences" of his or her plea. *Id.* (quoting *United States v. Hurlich*, 293 F.3d 1223, 1230 (10th Cir.

2002)). Applying this narrower reconstruction of the test, the majority concluded that Mr. Dominguez understood the direct consequences of his plea as he was correctly informed of the potential penalties attached to the charges to which he pleaded guilty. *Id.* at 1107 ("Mr. Dominguez was fully apprised of the direct consequences of his proposed guilty plea and thus knowingly and intelligently made it."). Any information related to dismissed counts, the court held, was collateral and of no consequence. *Id.*

Judge Lucero, in dissent, criticized the majority opinion for failing to appreciate the decision-making process that precedes the acceptance of a plea agreement. *Id.* at 1121-22. "Demanding only that a criminal defendant understands the penalties to be received, not the penalties to be avoided, is tantamount to requiring that the defendant only understand half the bargain." *Id.* at 1122. The reality is that the penalties that Mr. Dominguez wished to avoid were "anything but collateral" and were, instead, the "basic impetus that motivated Dominguez to enter into his plea agreement with the United States." *Id.* at 1121. The majority's "cabined view of the 'knowingly and intelligently' requirement for guilty pleas cannot be right" and to say otherwise "falls well short of what the Constitution and [Tenth Circuit] caselaw demand." *Id.* at 1122.

The Tenth Circuit denied Mr. Dominguez's petition for rehearing en banc. *Dominguez*, 12 F.4th at 1247. But Judge Hartz and Judge Tymkovich voted to grant the

petition.[2] *Id.* In his dissent of the denial, Judge Hartz accused the majority of setting "puzzl[ing]" and "unfortunate precedent" as he could not "understand how a court can say that Mr. Dominguez's choice was adequately informed when he was provided grossly incorrect information about the minimum sentence he could receive if he were convicted at a trial." *Id.* Thus, en banc rehearing was necessary in order to eliminate an analysis that is "contrary to common sense." *Id.*

REASONS FOR GRANTING THE PETITION

This case needs additional review. The concept of "voluntariness" is rife with ambiguity. *See Parker v. North Carolina*, 397 U.S. 790, 801-02 (1970) (Brennan, J., dissenting). This ambiguity has created a split between circuit courts and at least one state court of last resort when it comes to the "voluntariness" of a plea induced by a misrepresentation of the law. This Court's intervention is needed to clarify the ambiguity.

The American criminal justice system is wholly dependent on the plea bargaining process. Due to the thousands of criminal defendants that engage in this process on a daily basis the exceptional importance of the issue presented is self-evident: can the government induce a guilty plea with misrepresentations of the sentencing law applicable after trial. This Court should not permit the current split to deepen but should take this case to clarify that the Constitution protects against such coercive conduct.

[2] Judge Lucero assumed senior status on February 1, 2021 and, as a result, was not allowed to vote on Mr. Dominguez's petition for rehearing en banc.

A. There is a split between the Tenth Circuit and the Supreme Court of Kansas.

The Tenth Circuit's resolution of this case conflicts with the Kansas Supreme Court's holding on the same issue. This split between the Tenth Circuit and a state court of last resort within the Tenth Circuit warrants review. After all, a criminal defendant's federal constitutional rights should not be less protective in federal court than in a state court.

Kansas. In *Morrow v. State*, 219 Kan. 442 (Kan. 1976), the Supreme Court of Kansas held that a defendant's plea could not be voluntary if it was induced by "misrepresentations of the law or by unfulfillable promises." *Id.* at 445. In *Morrow*, the state charged the defendant with four distinct crimes arising out of the same criminal episode. *Id.* at 443. In his collateral attack motion, the defendant alleged that during the plea bargaining process, the prosecutor threatened to seek maximum consecutive sentences on all four counts if the defendant elected to exercise his right to a trial. *Id.* at 443-44. But, the prosecutor promised to drop three of the counts, if the defendant pleaded guilty to one count of aggravated robbery. *Id.* at 444. The defendant alleged that he was advised by his counsel that he should accept the deal because he could expect "a minimum sentence of 45 years if he did not." *Id.*

However, the government could not legally secure a conviction on all four counts. *Id.* at 444-45. The three dismissed counts were all lesser included offenses of the aggravated robbery charge. *Id.* The threatened minimum sentence of 45 years was a

legal impossibility. *Id.* at 445 ("The alleged threat to seek maximum consecutive sentences on all four counts was a legal impossibility; the alleged promise . . . to dismiss the three lesser counts if defendant would plead guilty to the robbery was meaningless.") Thus, like here, the defendant was falsely informed of the benefit he was receiving by accepting the plea deal. *Id.*

Contrary to the Tenth Circuit's opinion in this case, the Kansas Supreme Court held that the facts as alleged in the collateral attack motion *would* amount to an involuntary plea. *Id.* at 447. Pointing to a First Circuit Court of Appeals decision, the Kansas Supreme Court noted that "prosecutorial misrepresentations, though made in good faith, even to obtain a just, and here mutually desired end, are not acceptable. Ignorance of the law is no excuse for the government, just as it avails not the defendant." *Id.* at 446 (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973)). Thus, the Kansas Supreme Court held that "a plea induced by promises or threats which deprive it of its voluntary character is void," and that such a plea is one induced by "misrepresentations of the law." *Id.* at 445. That is the opposite of what the Tenth Circuit held in Mr. Dominguez's case.

It is impossible to square the Kansas Supreme Court's decision in *Morrow* with the Tenth Circuit's decision in *Dominguez*. Thus, as it currently stands, a defendant charged in state court in Kansas is afforded greater constitutional protections in the

plea bargaining process than that same defendant charged in federal court in Kansas. This Court's review is needed to cure this inequity.

B. There is a 1-2 split among the circuit courts of appeals.

As noted by Justice Brennen in his dissent in *Parker*, the "legal concept of 'involuntariness' has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations that the government cannot properly introduce." *Parker*, 397 U.S. at 802. Contrary to this acknowledgment, the Tenth Circuit "cabined" the concept of involuntariness by holding that Mr. Dominguez was only entitled to know the direct consequences of his plea—*i.e.*, the sentencing exposure he faced by pleading guilty. This holding created an entrenched circuit split between the Tenth Circuit and the Fifth and Seventh Circuits, with the latter two circuits holding that the government cannot introduce misrepresentations of the law into plea negotiations.

Fifth Circuit. The Fifth Circuit Court of Appeals addressed the issued presented here in *United States v. Guerra*, 94 F.3d 989 (5th Cir. 1996) where it held that a defendant's plea was involuntary. This was because the defendant was not aware of the true nature of the available alternatives as he was provided misinformation as to the sentence he could face if he was convicted at trial. *Id.* at 995. In *Guerra,* a grand jury indicted the defendant on two counts related to the sale of heroin. *Id.* at 991. The court informed

Guerra that he was subject to enhanced criminal penalties because he was a repeat offender. *Id.* at 995. Guerra was told that if he went to trial, and was convicted on both charges, he would face a 60-year sentence. *Id.*

This was wrong, but no one told Guerra of the mistake. Thus, believing that he would face a steep sentence if he exercised his right to a trial, Guerra pleaded guilty to one count in exchange for dismissal of the other. *Id.* Unlike *Dominguez*, however, the Fifth Circuit held that because of the erroneous "information as to the possible penalty he faced, Guerra was unaware of the true nature of the options he faced." *Id.* Guerra did not know that going to trial "would only put him at risk of half the possible sentence he was informed he would face." *Id.* In light of this material misrepresentation, Guerra's "resulting waiver of his Sixth Amendment right to a jury trial was made unintelligently" and was "therefore invalid." *Id.*

Seventh Circuit. The Seventh Circuit has also addressed the issue presented here and held the opposite of the *Dominguez* court. In *United States v. De La Torre*, 940 F.3d 938 (7th Cir. 2019), the Seventh Circuit decided, in a consolidated appeal, that the pleas of two different defendants were involuntary because they were based on threats of mandatory minimum sentences that could not be legally imposed.

One of the defendants—Christian Chapman—was indicted on one count of conspiracy to possess and distribute a controlled substance and two counts of possession with intent to distribute methamphetamine. *Id.* at 944. The government also filed

a 21 U.S.C. § 851 information notifying Chapman that it intended to rely on three prior felony convictions for enhanced sentencing. *Id.* at 945. In the government's view, these prior convictions "meant that Chapman faced a mandatory minimum of life imprisonment." *Id.* at 945 (citing 21 U.S.C. § 841(b)(1)). Chapman agreed to plead guilty, and, in exchange, the government agreed to modify its position and allege that only one of Chapman's three prior felony drug convictions would qualify under § 851. *Id.* In short, Chapman believed the bargained-for-benefit was that a mandatory life sentence was being removed from the table. The same factual scenario applied to Chapman's co-defendant Jeffrey Rush. *Id.* at 944.

Both Rush and Chapman challenged the validity of their guilty pleas on appeal claiming that they were involuntary. *Id.* at 944-45. Both were successful. *Id.* at 950-951. As to Rush, the court noted that his prior conviction did not qualify as a predicate felony drug offense, and Rush could not have legally been subject to a mandatory term of life imprisonment. *Id.* at 952-953. This information, if accurately conveyed to Rush, "would have changed the calculus" Rush made about the benefit of the agreement and, thus, rendered his plea involuntary. *Id.*

Likewise, regarding Chapman, the court ruled that he entered into the plea agreement because he "believe[d] life in prison was his only alternative." *Id.* at 949. This was not true. *Id.* As he was not appropriately informed of his true alternatives, his plea was not knowing and voluntary. *Id.* at 949-950 Unlike *Dominguez*, the Seventh Circuit paid

no mind to the fact that neither defendant was falsely informed of the "direct consequences" of their pleas. *See id.*

The Tenth Circuit's decision in this case is intractably at odds with the Fifth and the Seventh Circuit's decisions. The Tenth Circuit held that any misinformation as to a mandatory minimum sentence is immaterial so long as the misinformation relates to a count dismissed as part of the plea agreement. The Fifth and the Seventh Circuit have recognized that this is not how human decision making works. A voluntary plea must be an intelligent choice between available alternatives, and such an intelligent choice cannot be made if the available alternatives are inaccurately presented. This Court's intervention is needed to provide a definitive nationwide standard for the constitutional protections granted to defendants engaged in the plea bargaining process. As Mr. Dominguez argues, that standard, at the very least, should require that the defendant be accurately informed of the mandatory minimums associated with all charged counts.

C. This case is an ideal vehicle for addressing a question of exceptional importance.

In fiscal year 2020, 97.8 percent of federal criminal cases ended in a guilty plea. 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, U.S. Sentencing Comm'n, at 59 (2021). And 94 percent of all state convictions are the result of guilty pleas. Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal*, Cato Institute, Aug. 8, 2019, available at https://www.cato.org/com-

mentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-to-tally-legal#. Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). The issue contained in this petition, which goes to the rights of defendants engaged in plea negotiations with the government, is of exceptional importance as it has bears on an aspect of the American criminal justice system that impacts nearly every criminal defendant.

As this Court has repeatedly emphasized, a guilty plea is a "grave" and "solemn" act that is "more serious than a confession because it is tantamount to a conviction." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Parker*, 397 U.S. at 801 (Brennan, J., dissenting) (citing *Kercheval v. United States*, 274 U.S. 220, 223 (1927)). Thus, pleas must be free from impermissible coercion and must "reflect the unfettered choice of the defendant." *Id.* (citing *Boykin*, 395 U.S. at 242-44). The plea bargaining process *must* contain "procedural safeguards" to ensure that a defendant is "capable of intelligent choice in response to prosecutorial persuasion." *Bordenkircher v. Hayes*, 434 U.S. 357, 463 (1978).

The Tenth Circuit opinion severely erodes such protections. The Tenth Circuit denies the defendant the right to make an intelligent choice between available alternatives, as the Tenth Circuit denies the defendant the right to be accurately informed of the available alternatives. The burden is on the defendant to cast aside any information provided to him by a court, or a prosecutor, and seek out on his own to determine the

relative value of any plea offer. This severely undermines any confidence one might hold in the plea bargaining process.

Moreover, to stretch the Tenth Circuit's decision to its logical conclusion creates alarming results. For example, a defendant could be charged with one count of Hobbs Act Robbery and one count of violating § 924(c). At his arraignment, this defendant could be erroneously told that the § 924(c) charge carried a mandatory punishment of death. Wishing to avoid death, the defendant enters into a plea agreement wherein he pleads guilty to Hobbs Act Robbery and, in exchange, the government agrees to dismiss the § 924(c) charge. The Tenth Circuit would deem this a voluntary plea. But there is nothing voluntary about this coerced conduct.

The Tenth Circuit decision carries the very real risk of permitting the inducement of innocent defendants to plead guilty. As detailed in an amicus brief submitted to this Court, recent discoveries in psychology make clear that innocent people will admit to guilty conduct in an attempt at risk avoidance.

> The criminal justice system's reliance on pleas places pressure on all defendants to plead guilty .... Neither innocent nor guilty defendants want to receive the most severe punishments available under the law or endure the stress and uncertainty of trial, and their decisions to plead guilty or not are informed by these pressures. Put differently, life and liberty are often the prevailing considerations, rather than guilt or innocence.

Brief of the Innocence Project as Amicus Curiae in Support of Petitioner at 6, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

The Tenth Circuit decision ignores such basic elements of human decision making and, in its wake, enhances the government's coercive strength to extract pleas from innocent defendants through the use of threatened sentences that are legally impossible. While a prosecutor has the right to threaten increased punishment for a defendant's exercise of their right to a trial, such a threat must be grounded in the law. This Court's immediate review is needed as the risk of false confessions created by the Tenth Circuit in this case is too great to justify any delay. As the issue was adequately preserved in the district court, and squarely decided by the Tenth Circuit, this case presents an ideal vehicle for this Court to make clear that misinformation regarding potential sentences has no role to play in the plea bargaining process.

D. The Tenth Circuit decision is wrong.

The Tenth Circuit's decision is not only "contrary to common sense," it is contrary to this Court's established principles. This Court has long made clear that the test "for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Lockhart*, 106 S. Ct. at 369.

But the Tenth Circuit recasts this "longstanding" standard as one that only requires the defendant to understand the "direct consequences" of the plea. *Dominguez*, 998 F.3d at 1105 ("More particularly, a defendant knowingly and intelligently pleads guilty if he understands his plea's '*direct* consequences.'"). In other words, the Tenth

Circuit equates the intelligent-choice standard with a standard that only considers whether a defendant understands the direct consequences of their plea. This is not a faithful application of the controlling standard. As the dissenting opinion points out, "[d]emanding only that a criminal defendant understands the penalties to be received, not the penalties to be avoided, is tantamount to requiring that the defendant only understand half the bargain." *Id.* at 1122 (Lucero, J., dissenting). A defendant cannot intelligently choose between available alternatives, if he is only entitled to know one alternative.

Additionally, in *Brady,* this Court adopted the Fifth Circuit Court of Appeals' standard that a guilty plea

> 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 unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationships to the prosecutor's business (e.g. bribes).

Brady, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957) (en banc)).

Under this standard too it would appear that Mr. Dominguez's plea is invalid. It was made without Mr. Dominguez being aware of the actual value of the commitments made to him by the prosecutor. He believed that the value of the dismissal of the two § 924(c) charges was that he would not be subject to a mandatory minimum sentence

of 60 years' imprisonment. This was not true. Moreover, the prosecutor's promise to not seek a 60-year mandatory minimum sentence was "improper" because the prosecutor could not have sought such a sentence regardless of Mr. Dominguez's plea.

As many courts have recognized, a defendant's plea is involuntary if the defendant is falsely informed of the statutory maximum or minimum attached to the count to which they are pleading guilty. *See, e.g., United States v. Monie*, 858 F.3d 1029 (6th Cir. 2017); *United States v. Santo*, 225 F.3d 92 (1st Cir. 2000). The reason for this is that a defendant relies on such sentencing exposure in order to inform their decision as to whether to plead. If that sentencing exposure is misstated, it alters the defendant's calculus. The same has to be true regarding sentencing exposure attached to dismissed counts. If courts recognize, as they do, that a defendant's decision to plead guilty is informed by the potential consequences attached to the guilty plea, then it necessarily follows that a defendant's decision not to go to trial is informed by the potential consequences attached to going to trial.

Finally, basic contract principles support Mr. Dominguez's position. Courts routinely look to commercial contract principles to guide their analysis of plea agreements. *United States v. Frownfelter*, 626 F.3d 549, 554 (10th Cir. 2010) ("Plea agreements are interpreted according to general principles of contract law."). Of particular note, the commercial contract doctrine of mutual mistakes has been applied to the plea agreement

context. *See Frownfelter*, 626 F.3d at 555 (citing *United States v. Lewis*, 138 F.3d 549 (10th Cir. 2010)). Under the doctrine of mutual mistake, the following three-part test applies:

> First, the mistake must relate to a basic assumption on which the contract was made. Second, the party seeking avoidance must show that the mistake has a material effect on the agreed exchange of performances. Third, the mistake must not be one as to which the party seeking relief bears the risk.

Frownfelter, 626 F.3d at 556 (citing Restatement 2d Contracts § 152 cmt. a).

These three factors work in Mr. Dominguez's favor. The mistake—believing that Mr. Dominguez faced a 60-year mandatory minimum sentence on the three § 924(c) charges—was a driving force behind Mr. Dominguez's decision to plead guilty. *See* Vol. V at 106. The threat of this penalty singularly scared Mr. Dominguez away from taking his chances at trial. *Id.* Moreover, one of the bases for the bargain between Mr. Dominguez and the government was that Mr. Dominguez would greatly benefit from the dismissal of the two § 924(c) counts, which he believed represented 50 years of mandatory imprisonment. Thus, the plea agreement was based on the assumption that Mr. Dominguez faced a 60-year mandatory minimum sentence for the three § 924(c) charges.

Second, as counsel conveyed at the motion hearing, if Mr. Dominguez was not threatened by a 60-year sentence, he almost certainly would not have pleaded guilty. Vol. V at 100, 106. As his motion to withdraw demonstrates, once the mutual mistake was revealed, Mr. Dominguez no longer believed it was worth it for him to plead guilty.

Thus, the mistake had a "material effect on the agreed exchange of performances." *Frownfelter*, 626 F.3d at 556.

And third, Mr. Dominguez did not bear the risk of knowing the potential penalties associated with the charges against him. In the penalty summary attached to the indictment, Mr. Dominguez was informed by the government and the court that § 924(c) carried a mandatory minimum consecutive sentence of 25-years for second and subsequent offenses. Moreover, Mr. Dominguez's counsel stated that he told Mr. Dominguez that second and subsequent § 924(c) convictions each carried a mandatory 25-year sentence. No one told Mr. Dominguez that the law had changed before he changed his plea. Mr. Dominguez surely did not shoulder the risk of investigating and disproving the information that had been relayed to him by his attorney, the court, and the government. Thus, under contract law, Mr. Dominguez would be permitted to void his agreement, as it was based on a material misunderstanding

The Tenth Circuit decision in this case is a gross departure from this Court's established principles and from the basic tenants of contract law. This Court's review is warranted to align the law appropriately.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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