No. 21-6685

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

REPLY BRIEF IN SUPPORT OF 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

INTRODUCTION

This case presents a troubling ("contrary to common sense") Tenth Circuit opinion that severely erodes the protections afforded to defendants entering into plea negotiations with the government. *United States v. Dominguez*, 12 F.4th 1246, 1247 (10th Cir. 2021) (Hartz, J., dissenting). In short, the majority opinion holds that defendants can be grossly misinformed as to their sentencing exposure when deciding whether to enter into a plea agreement. *United States v. Dominguez*, 998 F.3d 1094, 1109 (10th Cir. 2021). So long as the misinformation pertains to counts that are dismissed as part of the agreement, the misinformation does not impact the knowing and intelligent nature of the plea. *Id.*

As one dissenter observed, "this cabined view of the 'knowingly and intelligently' requirement for guilty pleas cannot be right." *Id.* at 1122 (Lucero, J., dissenting). "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.* Such reasoning, after all, cannot be squared with this Court's long-standing rule that a valid plea must "represent [inter alia] a[n] . . . intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

Despite the obvious conflict between the Tenth Circuit's opinion and this Court's established precedent, the United States argues that this Court's review is not warranted. In its brief in opposition, the United States denies the existence of a national split on the issue presented and claims that the facts of this case are *sui generis*, and, as such, the issue is undeserving of additional review. Both of these claims are wrong.

ARGUMENT

I. Mr. Dominguez did not receive an "extremely favorable" plea deal.

As an initial matter, the United States, in its brief in opposition, repeatedly claims that Mr. Dominguez received an "extremely favorable" outcome as a result of his plea agreement with the government. Opp. at 14, 16. The government employs this erroneous claim in two ways—as an attempt to distinguish factually similar cases, and to insinuate that the impact of the Tenth Circuit's erroneous opinion is not too great. But the claim is false as a factual matter, and, even if true, misdirects the appropriate focus of this case.

To be sure, the United States' assertion is supported by the majority opinion which states that the plea agreement "was very advantageous" to Mr. Dominguez because it was 76 months below the low end of the applicable Guidelines range. *Dominguez*, 998 F.3d at 1113. But, in dissent, Judge Lucero provides a thoughtful explanation as to why such a variance cannot be considered "very advantageous" when viewed in its proper context. To that end, in the context of the 336 months of imprisonment "to which Dominguez was sentenced under the plea agreement, a 76-month discount for agreeing to plead guilty is hardly overwhelmingly advantageous." *Id.* at 1124-25 (Lucero, J., dissenting). This is even more true when one considers some of the evidentiary shortcomings in the government's overall case. Aplt.'s Opening Br. at 4, 15 (detailing the lack of eye-witness or DNA evidence connecting Mr. Dominguez to the Wyoming robberies).

Moreover, the United States' focus on the conferred advantage of the plea agreement is misplaced. The proper focus is on the benefit that Mr. Dominguez believed he was receiving by entering into the agreement. Mr. Dominguez believed that entering into the agreement

would eradicate the risk that he would face a 60-year mandatory minimum sentence. In truth, by foregoing any agreement and proceeding to trial, Mr. Dominguez only faced a mandatory minimum sentence of 27 years' imprisonment. Agreeing to a 28-year sentence in order to avoid a 27-year mandatory sentence can hardly be deemed "extremely favorable."

II. This Court's review is needed to cure a solidified split.

The issue presented has created a rift between the Tenth Circuit and two other circuit courts of appeals as well as the Tenth Circuit and at least one state court of last resort. While the United States denies the existence of such a split, a review of the relevant cases undermines this claim. Contrary to the United States' view, the majority opinion in this case does not comport with the other decisions that have considered the issue.

First, in *Morrow v. State*, the Kansas Supreme Court stated that "in order to be valid" a plea of guilty, "must be freely, knowingly and understandingly made." 219 Kan. 442, 445 (Kan. 1976). To that end, a "plea induced by promises or threats which deprive it of its voluntary character is void." *Id.* Importantly, relying on this Court's decision in *Brady*, the court held that "[it] is improper for the prosecutor to induce a guilty plea by misrepresentations of the law or by unfulfillable promises." *Id.* (citing *Brady v. United States*, 397 U.S. 742, 755 (1970)). This cannot be squared with the Tenth Circuit's holding that misrepresentations of the law are permissible, so long as they pertain to dismissed counts.

The facts of *Morrow* are likewise materially indistinguishable from the facts contained here. In *Morrow*, the defendant claimed that during plea negotiations the prosecutor agreed to dismiss three counts in exchange for the defendant's guilty plea to a fourth charge. *Id.* at 443-44. But this was an implicit misrepresentation of the law, and a legally meaningless promise,

as the three counts would have been necessarily dismissed regardless of any agreement. *Id.* at 445. The Kansas Supreme Court held that if these allegations—*i.e.*, the prosecutor's misrepresentations of the law—were true, they would render the "guilty plea involuntary." *Id.* at 447. Here, Mr. Dominguez was falsely informed of the law as to dismissed counts and the Tenth Circuit held that such information could not, as a matter of law, render a plea involuntary. *Dominguez*, 998 F.3d at 1109. *Morrow* and *Dominguez* are at direct odds.

Nevertheless, the United States attempts to distinguish the two cases by claiming that Mr. Dominguez is not challenging the "voluntariness of his plea," while the *Morrow* Court noted that the defendant's plea would be rendered involuntary based on misinformation. Opp. at 14. But whether Mr. Dominguez is challenging the voluntariness of his plea is immaterial. As a full review of the *Morrow* demonstrates, when the court used the word "voluntary" in its decision, it was shorthand for "knowing, voluntary and intelligent." *Morrow,* 219 Kan. at 446-47. As the majority opinion in *Dominguez* noted, it is common practice for courts to omit "one or more" of these different modifiers "when referring to the general constitutional requirement regarding pleas." *Dominguez*, 998 F.3d at 1102 n.5 (internal quotation marks omitted). The *Morrow* Court's common, albeit imprecise, use of "voluntary" as a substitute for "knowing, voluntary, and intelligent" does not distinguish it from *Dominguez*.

The United States also attempts to distinguish *Morrow* by claiming that Mr. Dominguez received a "thorough plea colloquy" unlike the defendant in *Morrow*. Opp. at 14. Again, this difference is apparent but not real. The *Morrow* Court only looked to the plea colloquy in an attempt to divine whether the defendant's allegations were "groundless." *Morrow*, 219 Kan. at 447. In other words, the colloquy had the potential to reveal whether the misrepresentation

did indeed occur. To this end, the colloquy was unhelpful, and, thus, the court remanded for an evidentiary hearing. *Id.* But, as the court made clear, if the allegations were proven, the plea would be constitutionally infirm.

Here, there is no question that Mr. Dominguez was misinformed as to the law. All the parties agree that he was erroneously told that he faced a mandatory minimum sentence of 60 years if he decided to go to trial and was convicted. Under *Morrow*, this information should render his plea unconstitutional. The strength or weakness of the plea colloquy is irrelevant.

The United States' attempt to distinguish the Fifth and Seventh Circuit Courts' opinions is equally unpersuasive. To use the United States' own characterization, in *United States v. De La Torre*, 940 F.3d 938 (2019), "the Seventh Circuit vacated the guilty pleas of two defendants who were incorrectly advised that they faced a mandatory minimum of life imprisonment if convicted at trial." Opp. at 14. This was so, even though the erroneous advice was attached to charges that were dismissed as part of the plea agreement. *De La Torre*, 940 F.3d at 950-51. *Dominguez* would have demanded a different result.

Nevertheless, the United States maintains that *De La Torre* comports with *Dominguez* because Mr. Dominguez received a "very favorable" sentence under the plea agreement and the Tenth Circuit "did not find that any misapprehension affected his decision to plead guilty." Opp. at 15. But, as explained above, Mr. Dominguez did not receive a "very favorable" sentence under the agreement, and he definitely did not receive the bargained-for benefit. Moreover, the majority opinion did not even consider whether the misinformation affected Mr. Dominguez's consideration of the plea agreement because it held that such misinformation was legally irrelevant as it was attached to dismissed counts and, thus, Mr. Dominguez's plea

was knowingly and intelligently made. *Dominguez*, 998 F.3d at 1109. Additionally, such analysis would be cabined to a potential harmless error analysis which the government did not present below. Contrary to the government's claim, *De La Torre* does not comport with *Dominguez*.

Finally, in *United States v. Guerra*, the Fifth Circuit vacated a conviction "where a defendant pleaded guilty to one of two charged offenses after the district court incorrectly informed him that he was subject to a recidivist enhancement that would expose him to 30 years on each count." Opp. at 15 (referencing *United States v. Guerra*, 94 F.3d 989 (5th Cir. 1996)). Specifically, the court agreed with the defendant's argument that he "was unaware of the true nature of the options he faced," as he was erroneously informed of the mandatory minimum sentence attached to all charged counts—not just the one he pleaded guilty to. *Guerra*, 94 F.3d at 995. In other words, "he 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.*

This is the same argument that the majority rejected here. As the majority states, "Mr. Dominguez argues that his plea was not knowingly and intelligently made and is, therefore, invalid because 'he was not aware of his available alternatives' as he was misadvised about his sentencing risk. *Dominguez*, 998 F.3d at 1106. In other words, Mr. Dominguez was "unaware of the true nature of the options he faced." *Guerra*, 94 F.3d at 995. The majority opinion here rejected that argument. The Fifth Circuit accepted it. The two cases cannot be reconciled.

The United States, however, points to the identified Fed. R. Crim. P. 11 violation that occurred in *Guerra* and argues that this is a meaningful difference between the two cases. Opp. at 15. The United States is wrong. The Fifth Circuit expressly noted that a Rule 11 violation, without more, would not have warranted relief. *Guerra*, 94 F.3d at 995 ("To obtain relief,

Guerra's claim regarding the Rule 11 violation must also constitute a constitutional violation."). The court thus reversed, not because of the Rule 11 violation, but because the misinformation rendered the plea unknowing and unintelligent. *Id.* The identified Rule 11 violation had no role to play in the court's ultimate conclusion.

As demonstrated, there is indeed a solidified split over the issue presented in this case. The Tenth Circuit is the lone outlier in its position that a defendant can be grossly misinformed as to mandatory minimums that attach to dismissed counts and that such misinformation is legally irrelevant for determining the voluntariness of a plea. This Court should not delay intervention as defendants in the Tenth Circuit should not be afforded less protection when engaging in plea negotiations than defendants elsewhere in the country. This Court's review is needed to ensure uniformity.

III. This case presents an ideal vehicle for deciding the issue presented.

Lastly, the United States argues that review is not warranted because the facts of this case are unique. Opp. at 16. In part, this is true. That is to say that the specific events that occurred here—a major criminal justice sentencing overall being signed into law minutes before a change-of-plea hearing—are unlikely to repeat themselves in the near future. But this does not diminish the exceptional importance of the issue presented.

The issue presented impacts nearly every defendant as it touches on the protections afforded to them when entering into plea negotiations with the government. Specifically, the question presented is whether a defendant can be induced into pleading guilty by misrepresentations of the law. As 97.8 percent of federal criminal cases end in a guilty plea, and 94 percent of all state convictions are the same, the issue presented herein invades nearly every

American criminal case. Cert. Pet. at 14-15. This Court's review is warranted to make clear that it meant what it said in *Hill v. Lockhart*, and that a plea must "represent [inter alia] a[n] . . . intelligent choice among the alternative courses of action open to the defendant.'" A plea based on blatantly wrong information does not satisfy this standard.

CONCLUSION

This issue of exceptional importance was clearly preserved in the district court, fully argued in the Tenth Circuit, and is ripe for this Court's consideration. Accordingly, Mr. Dominguez respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

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