No. 23-5846

IN THE

Supreme Court of the United States

JONG WHAN KIM,

Petitioner,

v.

UNITED STATES,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PROFESSOR BRANDON L. GARRETT AND THE WILSON CENTER FOR SCIENCE AND JUSTICE AT DUKE LAW AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PROFESSOR BRANDON L. GARRETT AND THE WILSON CENTER FOR SCIENCE AND JUSTICE AT DUKE LAW

This case presents a clear circuit split on an issue of considerable importance to the improvement of plea bargaining in the American criminal justice system. Amici Curiae, Professor Brandon L. Garrett and the Wilson Center for Science and Justice at Duke Law are uniquely positioned to provide this Court further insight into the decision below and additional context concerning the decision's place within America's plea-bargaining jurisprudence.

Counsel for the petitioner was informed of Amici's intention to file this amicus brief more than 10 days before its filing. Regrettably, however, Amici neglected to notice counsel for respondent until November 15, 2023, less than 10 days before this motion's filing. Respondent has indicated that it does not intend to file a response to the petition for writ of certiorari. Amici requested respondent's consent to filing the petition despite untimely notice but have not yet heard back. Amici, therefore, respectfully move this Court for leave to file the accompanying brief in support of petitioner.

Professor Brandon Garrett is one of the nation's leading scholars on plea bargaining in America. He directs the Wilson Center for Science and Justice at Duke Law, which has a particular focus on advancing equity in the criminal justice system through the improvement of plea bargaining. In the accompanying brief, amici have drawn on their considerable knowledge and experience to

assist the Court in further understanding this case and its place within plea-bargaining doctrine more generally. Given their background, amici are exceptionally well-positioned to provide this helpful context and explain why granting certiorari and reversing the decision below will meaningfully improve America's plea system. Amici therefore seek leave to file the attached brief urging the Court to grant the petition.

Respectfully submitted,

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The prevalence of plea bargains has created a criminal justice system that would be entirely unrecognizable to America's founders. Brandon L. Garrett, Professor at Duke Law School and Director of the Wilson Center for Science and Justice, has spent his career researching, writing, and teaching about the defects in this system. The Wilson Center for Science and Justice at Duke Law likewise has expended considerable resources on reforming plea bargaining in fulfillment of its mission to advance equity in the criminal justice system. Together, amici's interests are the improvement of America's plea-bargaining system through the sound development of criminal law. This case presents an opportunity for such improvement by permitting citizens to reevaluate pleas resulting from legal error.[1]

SUMMARY OF ARGUMENT

As this Court has recognized, plea bargaining *is* the criminal justice system in America. And it's far from flawless. Numerous structural factors on both sides of the system work together to coerce erroneous guilty pleas.

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1. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief. Amici notified petitioner's counsel of their intent to file this brief more than 10 days before its filing but failed to notify respondent's counsel within the requisite time. Respondent's counsel was latently notified but has not responded whether it will excuse the late filing. Accordingly, this brief is filed pursuant to a motion for leave.

Innocent defendants regularly plead guilty, flipping the founders' ideals of an innocent-until-proven-guilty justice system upon its head. Further, even after an error in the plea-bargaining process is discovered, it can be difficult to correct.

This case presents an opportunity to improve the current system. It fits squarely within the federal courts' miscarriage-of-justice doctrine, as Mr. Kim raises a claim of innocence of the crime charged. Meanwhile, the type of error at issue is purely legal—a misapprehension of the elements of a crime. That is precisely the kind of error appellate courts are best positioned to fix. Finally, reversing the Fourth Circuit will provide several wide-ranging benefits in a manner that is consistent with this Court's recent holdings on collateral attacks and sentencing enhancements.

This Court should grant certiorari.

ARGUMENT

I. Plea Bargaining Is a Dominating but Defective System.

As this Court noted over a decade ago, "the reality [is] 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). To this day, the vast majority of citizens who enter the federal criminal justice system will agree to a plea deal. John Gramlich, *Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022*, Pew Res. Ctr. (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/. "In

today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

In the last several decades, plea bargaining has cemented itself as the central feature of our criminal justice system. Increasing caseload, more severe and structured sentencing guidelines, and limited resources have coalesced together to make any other system nearly impossible. Brandon L. Garrett et al., *Open Prosecution*, 75 Stan. L. Rev. 1365, 1375 (2023).

But it was not always this way. At the time of the founding, guilty pleas were almost nonexistent. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 5-10 (1979). Instead, our founders were accustomed to the trial system. For that system, they enacted numerous safeguards: indictment by grand jury, protection against self-incrimination, a prohibition on double jeopardy, a guaranteed speedy trial, the right to confront witnesses, and a trial by jury. U.S. Const. amends. V-VII. Conviction required the highest factual standard in our court system—beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 361 (1970).

The original design of the federal criminal justice system was thus fiercely protective of accused citizens. It encapsulated the prevailing Blackstonian view that "it is better a hundred guilty persons should escape than one innocent person should suffer." Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), *in* 11 *The Works of Benjamin Franklin*, 11, 13 (John Bigelow ed., 1904).

Contrast those ideals to the present reality. While the founding fathers were able to erect numerous safeguards around the criminal trial process, they did not provide any protections for a future plea system they never anticipated. In the absence of safeguards, the current criminal justice system has produced the opposite outcome. Research is replete with examples of individuals who pleaded guilty to a crime only later to be exonerated by exculpatory evidence. Nat'l Registry of Exonerations, *Innocents Who Plead Guilty* 1-2 (2015); *see also* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 151-53 (2011). Surveys likewise reveal large numbers of individuals who claim they pleaded guilty despite actually being innocent. Garrett, *Open Prosecution*, *supra*, at 1382.

Meanwhile, judges and scholars alike have recognized the numerous factors that incentivize individuals to accept guilt for crimes they never committed. *See, e.g.*, *United States v. Timbana*, 222 F.3d 688, 718 (9th Cir. 2000) (Kleinfeld, J., concurring in part and dissenting in part); Peter A. Joy & Kevin C. McMunigal, *Innocent Defendants Pleading Guilty*, 30 Crim. Just. 45 (2015). Perhaps most powerfully, plea bargaining has created a "trial penalty," whereby the threat of a significantly longer sentence after trial forces even the most rational of innocents to soberly contemplate pleading. Garrett, *Open Prosecutions*, *supra*, at 1382; *see also Frye,* 566 U.S. at 144 (recognizing that plea bargains incentivize "defendants to admit their crimes and receive more favorable terms at sentencing").

Structural forces further exacerbate this shortcoming. Defendants do not decide to enter a plea bargain following a rational, arms-length negotiation. Garrett, *Open*

Prosecutions, *supra*, at 1382. Rather, the government is permitted to apply significant coercion. *Ibid.* at 1377. Prosecutors may extend offers of leniency in exchange for a plea. *Ibid.* They may also, without violating due process, threaten more serious charges if a defendant does not accept a plea offer. *Ibid.* Prosecutors can withhold exculpatory evidence, impairing defendants' ability to appraise the strength of the case against them. *Ibid.* Defendants are often detained in jail pre-trial and face enormous pressures to plead. *Ibid.* In some jurisdictions, defendants do not even receive representation by counsel pre-indictment, and pleas can be entered by unrepresented individuals. *Ibid.* In others, defendants may enter an "open" or "blind" plea, in which they plead guilty without any assurances regarding their ultimate punishment. *Ibid.* at 1378.

These structural defects result in prosecutors possessing enormous power with little oversight or checks. Plea bargaining is a "black box," within which prosecutors have free reign absent strong evidence of discrimination. *Ibid.* at 1368. Prosecutors can use plea deals to obtain convictions where a lack of evidence would otherwise prevent success at trial. *Ibid.* at 1375. Prosecutors can resolve pleas for reasons that are discriminatory, self-interested, and arbitrary. *Ibid.* at 1368. Such motivations encompass everything, from the invidious (e.g., defendants' race, sex, or wealth) to considerations irrelevant to the crime (e.g., whether the defendant is in pretrial detention or the skill of the defendant's counsel). *Ibid.* at 1382. Unsurprisingly, then, researchers have been able to document racial disparities in charging. *Ibid.* at 1368. For instance, a Durham County study found that when deciding what plea to offer, prosecutors considered more

mitigating factors in cases involving white defendants and more aggravating factors in cases involving black defendants. *Ibid.* at 1401.

While racial discrimination is illegal, there are insufficient safeguards in place to prevent it from happening. *Ibid.* at 1373-75. True, some states prohibit prosecutors from inducing pleas by "charging or threatening to charge" defendants with crimes not "supported by the facts" or "not ordinarily charged in the jurisdiction," or by threatening a more severe sentence than what is "ordinarily imposed." *E.g.* N.C. Gen. Stat. § 15A-1021 crim. code comm'n cmt. But there is no information on what is "ordinarily" charged or imposed in the jurisdiction, so such protections are essentially unenforceable. Garrett, *Open Prosecution*, *supra*, at 1379. Ditto for racial discrimination in plea deals—also prohibited and also impossible to enforce. *Ibid.* at 1373-75.

Given the opportunities for injustices in the legal process, defendants need viable methods to void defective pleas.

II. This Case Presents the Opportunity for Meaningful Improvement of the Plea System.

At present, defendants possess limited options for voiding pleas resulting from latent errors discovered post-plea. This is concerning given the many opportunities for error described above. When the Fourth Circuit denied Mr. Kim the ability to void a plea based on a legally inaccurate colloquy, it narrowed those options even further. That holding was unnecessary and counterproductive.

Permitting plea deals to be stricken due to a legal error during the colloquy is important because of how few alternative pathways there are to challenge errors during the plea or sentencing phases. For instance, pleas cannot be challenged due to counsel's misjudgment of the admissibility of evidence. *See, e.g.*, *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Nor can they be withdrawn if the defendant discovers that he misapprehended the quality of the State's case or the likely penalties attached to a trial proceeding. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 757 (1970). Strategic errors are not correctible either. *United States v. Broce*, 488 U.S. 563, 571 (1989). And while a miscarriage-of-justice standard ostensibly permits plea and sentencing errors to be reconsidered in a variety of contexts, a range of interpretations limit its utility as a vehicle for error correction. Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. Cal. L. Rev. 499, 515, 523, 532 (2014).

Still, a series of federal courts have recognized that defendants who demonstrate a miscarriage of justice are not bound by the appellate waivers in their plea deals. *Ibid.* at 515, 523. What such a miscarriage of justice involves is not rigidly defined. *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001) (focusing on the clarity, the gravity, and the impact of alleged error). Since its initial recognition in the habeas corpus context, the miscarriage-of-justice standard has been applied in a range of post-conviction procedures. Garrett, *Accuracy in Sentencing*, *supra*, at 501. It allows courts to reevaluate errors during pleas and sentencing, particularly based on newly discovered evidence of innocence. *Ibid.* at 526. At present, courts also use a miscarriage of justice-type standard when examining whether to excuse appellate waivers, in

interpreting the plain error standard of review on appeal, when applying postconviction exceptions based on new evidence of innocence, and in interpreting the scope of cognizable claims under 28 U.S.C. § 2255. *Ibid.* at 501.

Here, Mr. Kim's argument is essentially one of innocence—precisely the kind of claims that the miscarriage-of-justice doctrine exists for. *Ibid.* at 501, 512. After Mr. Kim entered his plea, this Court recognized that the government must prove an additional element to convict a defendant under section 841(a)(1). *See Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022). Specifically, the government "must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* This element was not required at the time of Mr. Kim's plea, however, and he did not orally plead to it. Now, Mr. Kim challenges that plea, arguing he would not have admitted to this element.

A valid conviction requires each element of a crime be proven. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). If even one element was lacking, then Mr. Kim is not guilty and thus innocent. Because Mr. Kim is challenging an element of his crime—one that was never orally explained to him—he raised a claim of actual innocence in his appeal. Yet the Fourth Circuit applied a limited version of plain error of review to that claim, contrary to the national trend of recognizing the application of the miscarriage-of-justice standard under such circumstances. *See* Garrett, *Accuracy in Sentencing*, *supra*, at 501, 512.

The fundamental purpose of a plea colloquy is for a defendant to plead guilty to the specific crime charged. The plea is not just a confession where the defendant admits to a variety of acts that may or may not constitute

elements of the crime. *Broce*, 488 U.S. at 570. As this Court has recognized:

> By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime. That is why the defendant must be instructed in open court on "the nature of the charge to which the plea is offered," and why the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Id. (first quoting Fed. R. Crim. P. 11(c)(1); and then quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). But if the elements are changed, then a defendant cannot be truly appraised of the nature of his plea. The colloquy is ineffective, and the plea is not voluntarily entered. *Accord Smith v. O'Grady*, 312 U.S. 329, 334 (1941) ("[R]eal notice of the true nature of the charge against [a defendant is] the first and most universally recognized requirement of due process . . . .)."

Any concerns about permitting Mr. Kim to challenge his plea are misplaced. For example, reversing the decision below, which resulted from a direct appeal, would not open the doors for widespread collateral attacks. As this Court has established, collateral attacks are disfavored. *Broce*, 488 U.S. at 574. A defendant cannot, for instance, use double jeopardy on appeal to collaterally attack a conviction he previously pleaded to. *Id.* at 565. But when a defendant "call[s] into question the voluntary and intelligent character of their plea," then collateral-attack concerns are off the table. *Id.* at 574. And that is precisely

what is happening here—Mr. Kim is calling into question the intelligent nature of the plea.

Requiring the plea colloquy to address each element of the crime will further support this Court's prohibition on collateral challenges. *See* Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 Wm. & Mary L. Rev. 1415, 1439-41 (2016). At present, courts' disfavor of collateral challenges to pleas sits in strange juxtaposition to the fact that some courts do not require a defendant to specifically plead to each element of the crime at the colloquy. *Ibid.* at 1437-42. The logic is that defendants cannot later collaterally challenge an element they previously agreed existed. *Ibid.* But when defendants' pleas do not require specific admission of each element of the crime, that logic is stretched thin enough to break. *Ibid.* Contrast that to a situation where defendants are required to plead to each element of the crime during the colloquy; suddenly, this Court's collateral-challenge doctrine will rest on far surer footing. *Ibid.*

Recognizing that defendants must be informed of every element of the crime in the plea is likely to have other beneficial consequences. Courts struggle with what facts can provide a basis for an enhanced sentence when defendants have not pleaded to detailed factual circumstances. *Ibid.* at 1438-39. Such concerns are lessened, however, the more specifically defendants plead to each element of a crime. *Ibid.* Likewise, the clearer a defendant admits to each element of an offense, the more the defendant demonstrates an acceptance of responsibility—another valid consideration at sentencing. *Ibid.*

Finally, permitting correction of the error here is particularly appropriate given that the error was entirely legal. While "[a]ppellate tribunals are not equipped to try factual issues," legal errors are an entirely different matter. *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 337 (1967). Factual issues rest on determinations of credibility and demeanor that are much better left to the trial court that hears all the evidence and observes the witnesses firsthand. *See Davis v. Ayala*, 576 U.S. 257, 274 (2015). Appellate courts, on the other hand, are far better suited for legal determinations, given they have the "benefit of 'extended reflection [or] extensive information.'" *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (alteration in original) (quoting Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 Minn. L. Rev. 899, 923 (1989)). As this Court observed, "Courts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy" on issues of law. *Id.*

Given the potential for errors during the plea-bargaining process, there should be a broader spectrum of circumstances in which errors in the process can be corrected. Yet in this case, the Fourth Circuit took the opposite approach, closing off an opportune avenue for correction that numerous other circuits permit. Its decision further denigrates our plea system and multiplies injustice. Permitting error to be corrected in cases like this one fits well within the established criminal justice system and provides a multitude of collateral benefits. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

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