No. 17-1026

In the Supreme Court of the United States

Gilberto Garza, Jr.,

Petitioner,

v.

State of Idaho,

Respondent.

On Writ of Certiorari to the Supreme Court of Idaho

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

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

August 17, 2018

QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

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 was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending and securing the principle of defendant autonomy, and ensuring that the increasing pervasiveness of plea bargaining does not further erode the participation of citizen juries in the criminal justice system, or deprive defendants of the right to subject the government's case to meaningful adversarial testing.

---

[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 ARGUMENT

Criminal defense is personal business. A criminal defendant may never face a more momentous occasion than his prosecution, nor one where his decisions have greater personal consequence. This Court has therefore recognized that the Constitution "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). The Court recently affirmed this principle in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), holding that the Sixth Amendment secures "a defendant's . . . autonomy," *id.* at 1511, and that violations of autonomy do not require a showing of prejudice. Rather, such a violation is "complete when the court allow[s] counsel to usurp control of an issue within [the defendant's] sole prerogative." *Id.*

This principle of defendant autonomy has received the most attention in the context of trial rights, but it applies equally when a defendant decides whether to appeal his conviction—whether that conviction was obtained as the result of a trial or a guilty plea. This Court has repeatedly held that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," and that these decisions include whether to "take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93, n.1 (1977) (Burger, C. J., concurring)); *see also McCoy*, 138 S. Ct. at 1508 (citing *Jones*).

The remedial side of this right was addressed in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a

manner that is professionally unreasonable," *id.* at 477, and that in such a circumstance, "a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit," *id.* (quoting *Peguero v. United States*, 526 U.S. 23, 28 (1999)) (alteration in original). Thus, although the *Flores-Ortega* Court did not explicitly refer to the defendant's right to decide whether to appeal as "structural," the practical effect of presuming prejudice for its denial is exactly the same. *Cf. McCoy*, 138 S. Ct. at 1511 ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review.").

The question in this case is, essentially, whether the bedrock principle of defendant autonomy should be discarded when defendants waive certain appeal rights as part of a plea bargain. Eight federal circuit courts have correctly answered this question "no," and held that *Flores-Ortega* presents a categorical rule: attorneys may never disregard a client's express instructions to file a notice of appeal.[2] This rule is eminently sensible, because so-called "appeal waivers" can never actually waive *all* of a defendant's appeal rights. As Petitioner notes, "Defendants who sign even the broadest appeal waivers nevertheless retain the right

---

[2] *See Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012); *United States v. Poindexter*, 492 F.3d 263, 265 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Campusano v. United States*, 442 F.3d 770, 775 (2d Cir. 2006); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 794 (11th Cir. 2005).

to appeal a number of fundamental issues concerning the validity, scope, and enforceability of their plea agreement and waiver." Br. for Pet'r, at 16. Defendants are thus entitled to instruct their attorneys to file appeals, notwithstanding the content of their pleas.

To justify its alternative conclusion, the Idaho Supreme Court (like the two federal circuits in the minority position), relied in large part on the argument that "[i]f an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety." *Garza v. State*, 162 Idaho 791, 798 (Idaho 2017). That is, to be sure, an important practical consideration for attorneys to discuss with their clients—but it is ultimately the defendant's choice to decide how to weigh that risk. When it comes to those fundamental matters within the scope of a criminal defendant's autonomy, this Court has repeatedly rejected similar paternalistic arguments for overriding a defendant's informed, voluntary decision. There is no reason this case should be any different.

Finally, securing a defendant's fundamental right to decide whether to appeal a conviction—even when obtained through a plea bargain with an appeal waiver—is especially important in light of the increasing prevalence of plea bargaining, rather than jury trials, as the default means of adjudicating criminal cases. In light of the concerning fact that plea bargains of dubious legitimacy make up the overwhelming percentage of today's criminal convictions, it is all the more important to ensure that defendants are guaranteed the right to decide whether and how to challenge the lawfulness of their pleas.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE AUTONOMY OF CRIMINAL DEFENDANTS TO MAKE FUNDAMENTAL DECISIONS ABOUT THEIR CASES.

The principle of defendant autonomy underlies this Court's decisions in a wide range of contexts: most notably, self-representation, choice of counsel, and the defendant's authority to make fundamental decisions in his case, even when represented by counsel—including the decision whether to take an appeal. Taken as a whole, this jurisprudence establishes that autonomy is a bedrock principle of the Sixth Amendment, and due process more generally.

1. Defendant autonomy received robust consideration in *Faretta v. California*, 422 U.S. 806 (1975), and in the Court's subsequent self-representation cases. But in holding that a defendant has the right to represent himself, the Court relied on the larger and more fundamental right "to make one's own defense personally," *id.* at 819, of which self-representation is only one component.

The holding in *Faretta* was not just an interpretation of the Assistance of Counsel Clause, nor a mere inference from the general capacity of defendants to waive constitutional rights. *See* 422 U.S. at 819 n.15 ("Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel."). Instead, self-representation was "necessarily implied by the structure of the [Sixth] Amendment," and an instance of those

constitutional rights that "though not literally expressed in the document, are essential to due process of law in a fair adversarial process." *Id.* at 819 & n.15.[3]

The extensive legal history of the right to self-representation discussed in *Faretta* underscores the historical basis for defendant autonomy more generally. *See id.* at 821–32. Many of the Colonial Era sources relied upon by the Court explicitly grounded this right in the natural liberty of all free persons. *See id.* at 828 n.37 (Pennsylvania Frame of Government of 1682 provided that "in all courts all persons of all persuasions may freely appear in their own way"); *id.* at 829 n.38 (Georgia Constitution in 1777 secured "that inherent privilege of every freeman, the liberty to plead his own cause"); *id.* at 830 n.39 (Thomas Paine, in support of the 1776 Pennsylvania Declaration of Rights, argued that people have "a natural right to plead [their] own case").

The subsequent self-representation case law reinforces this autonomy-driven understanding of *Faretta*. *McKaskle v. Wiggins* explicitly confirms that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." 465 U.S. 168, 178 (1984). *See also Indiana v. Edwards*, 554 U.S. 164, 176 (2008) ("'[d]ignity' and 'autonomy' of individual underlie self-representation right"). In *Rock v. Arkansas*, the Court held that "an accused's right to present his own version of events in his own words" was "[e]ven more funda-

---

[3] The Court gave as examples a defendant's right "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, to testify on his own behalf, and to be convicted only if his guilt is proved beyond a reasonable doubt." *Faretta v. California*, 422 U.S. 806, 819 n.15 (citations omitted).

mental to a personal defense than the right of self-representation." 483 U.S. 44, 52 (1987). In other words, the right to a "personal defense"—the defendant's autonomy—is the fountainhead from which flow specific procedural guarantees. And in *Weaver v. Massachusetts*, the Court explained that the right to self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." 137 S. Ct. 1899, 1908 (2017).

Even where the Court has identified the limits of the right to self-representation, it has generally done so in a manner that tracks the limits of autonomy itself. *See, e.g.*, *Edwards*, 554 U.S. at 176–77 (dignity and autonomy interests are not served when defendant lacks the mental capacity to conduct his defense in the first place);[4] *McKaskle*, 465 U.S. at 185 (limited participation of standby counsel at trial did not violate right to self-representation when the *pro se* defendant maintained "actual control of the defense").

---

[4] It could reasonably be argued that an autonomy-driven understanding of self-representation mandates a different outcome than the one reached in *Indiana v. Edwards*, and that mentally ill defendants—when competent to stand trial—should be permitted to elect self-representation. *See* 554 U.S. 164, 187 (2008) ("[I]f the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.") (Scalia, J., dissenting). But regardless of whether *Edwards* was rightly decided, both the majority and the dissent agreed on autonomy as the foundational principle; they simply disagreed on its application in the area of mental illness. *See generally* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1184–87 (2010) (discussing the complicated relationship between mental illness and defendant autonomy).

2. Just as a defendant's autonomy guarantees the right to self-representation, it also supports the right to retained counsel of one's *choice*. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The Assistance of Counsel Clause does not discuss "choice of counsel" in so many words, but the "right to select counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147–48. It is not just a procedural protection for the accused, but rather a reflection of the larger right to a personal defense. This component of the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes* to be best." *Id.* at 146 (emphasis added).

3. Once a defendant chooses to be represented by counsel, "law and tradition may allocate to the counsel the power to make binding decisions of strategy in many areas." *Faretta*, 422 U.S. at 820. But a defendant retains "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)). These "fundamental decisions" include whether to enter a guilty plea[5] (or the functional equivalent of a guilty plea),[6] waive the right to a jury trial,[7] waive the

---

[5] *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[6] *Brookhart v. Janis*, 384 U.S. 1, 6–7 (1966) (counsel lacked authority to agree to a "prima facie" trial that was equivalent to a guilty plea).

[7] *Taylor v. Illinois*, 484 U.S. 400, 417–18 & n.24 (1988) (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277 (1942).

right to be present at trial,[8] testify on one's own behalf,[9] maintain innocence before a jury,[10] and—most notably for the present case—whether to take an appeal.[11]

In general, these "fundamental decisions" speak to one or both of two major sets of questions in which concerns for defendant autonomy are at their peak. First, a defendant has the authority to decide, as a threshold matter, whether to avail himself of certain structural elements of the criminal justice system—i.e., by entering a plea, waiving a jury trial, or taking an appeal. Second, the defendant has final authority over his *personal* involvement (or non-involvement) in his case, and the fundamental goals of his defense—i.e., his attendance at trial, the decision to testify (and what to say), and how to weigh the risks of an adverse verdict or sentence (including whether to take a plea, and whether to admit guilt before the jury). As this Court recently explained, such decisions "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy v. Lousiana*, 138 S. Ct. 1500, 1508 (2018).

---

[8] *Taylor*, 484 U.S. at 417–18 & n.24 (citing *Cross v. United States*, 325 F.2d 629, 632–33 (D.C. Cir. 1963)).

[9] *Jones*, 463 U.S. at 751; *see also Rock v. Arkansas*, 483 U.S. 44, 49 (1987) ("[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

[10] *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

[11] *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Jones*, 463 U.S. at 751.

II. OVERRULING A DEFENDANT'S DECISION TO FILE AN APPEAL VIOLATES DEFENDANT AUTONOMY.

The general rules governing this case have already been explicitly stated in prior decisions of this Court. The Court has repeatedly instructed that, even when a defendant accepts the assistance of counsel, "[s]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy*, 138 S. Ct. at 1508 (citing *Jones*, 463 U.S. at 751 (1983)). And specifically in the context of appeals, the Court has clarified that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Such a refusal of the client's wishes "cannot be considered a strategic decision," *id.*, and the defendant need not show prejudice to obtain a new appeal, *id.* (citing *Peguero v. United States*, 526 U.S. 23, 28 (1999)).[12]

---

[12] *Flores-Ortega* construed the problem with counsel refusing a defendant's request to file an appeal as one of ineffective assistance. 528 U.S. at 476–77. While ineffective assistance claims generally require a showing of prejudice, *see Strickland v. Washington*, 466 U.S. 668, 692 (1984), the *Flores-Ortega* Court indicated that counsel's refusal to file an appeal would constitute one of those contexts in which prejudice is presumed. *See* 528 U.S. at 483.

Amicus suggests that a more coherent framework for understanding Mr. Garza's right in this case is autonomy, not ineffective assistance. As this Court recently explained in *McCoy*, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural';

Here, there is no dispute that Mr. Garza instructed his trial counsel to file an appeal, and that his attorney refused this request. *Flores-Ortega* would thus seem to squarely govern this case. But the Idaho Supreme Court decided that the rule in *Flores-Ortega* should not apply, because Mr. Garza's plea agreement included a waiver of his right to take an appeal. But this is neither a principled nor practical reason to depart from the clear autonomy-baseline set forth in *Flores-Ortega* and subsequent cases.

1. As a threshold matter, and as explained in detail by Petitioner, no waiver can ever genuinely extinguish *all* of a defendant's rights on appeal. At the very least, the defendant necessarily retains his right to raise issues concerning the plea agreement itself, including its scope and enforceability, and whether it was entered into voluntarily. *See* Br. for Pet'r, at 16–18. Petitioner also explains how, notwithstanding the presumptive validity of appeal waivers, courts often do *not* apply this presumption to certain sufficiently fundamental constitutional rights. *See id.* at 18–20. Thus, no matter the content of the plea agreement, there will *always* be a live and meaningful question about

---

when present, such an error is not subject to harmless-error review." 138 S. Ct. at 1511. *McCoy* likewise confirmed that the right to decide whether to take an appeal is one of these "autonomy" rights. *See id.* at 1508. Therefore, instead of framing the issue as whether or not prejudice should be presumed, it would make more sense to simply hold that the defendant's right to decide whether to take an appeal is a structural autonomy right, and prejudice is not required in the first place. Nevertheless, the practical result is the same—Mr. Garza's constitutional rights were violated, and he is entitled to a new appeal without the need to affirmatively demonstrate prejudice.

whether to take an appeal—and that decision is within the defendant's sole discretion.

But even assuming that a valid appeal waiver were to substantially reduce the likelihood of success on appeal,[13] the Court has repeatedly affirmed the authority of defendants to make fundamental decisions, even with only miniscule chances of success. In a similar context, this Court recently held that a defendant can show he would not have pleaded guilty if he knew he could be deported, even though he had no realistic defense:

> But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. . . . Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee v. United States, 137 S. Ct. 1958, 1968–69 (2017).

---

[13] The additional *amici* supporting Petitioner explain how, in fact, defendants are often successful on appeal, notwithstanding waivers in plea agreements. *See* Br. of Idaho Ass'n of Crim. Def. Lawyers & Nat'l Ass'n of Crim. Def. Lawyers as *Amici Curiae* in Supp. of Pet'r., at 5–20. This is an important and enlightening point. But even were it not so, respect for defendant autonomy cannot rise and fall on the statistical likelihood of success.

Similarly, in *McCoy v. Louisiana*, the Court affirmed the authority of a defendant to decide whether to maintain his innocence in his jury trial—notwithstanding that it was a capital case with apparently overwhelming evidence, and in which his counsel thought admitting guilt was the only realistic means of avoiding the death penalty. *See* 138 S. Ct. at 1508 (noting that the defendant "may hold life in prison not worth living and prefer to risk death *for any hope, however small, of exoneration*") (emphasis added).

2. The primary practical concern driving the lower court's decision—as well as the decisions of the two other circuits that have adopted this minority position—seems to be the idea that an attorney has a duty to protect the client from the possible negative consequences of filing an appeal after he has executed a waiver in his plea. *See Garza v. State*, 162 Idaho 791, 798 (Idaho 2017) ("If an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety."); *see also Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008) ("The prosecutor made substantial concessions to Nunez. An appeal would have put them in jeopardy . . . . Protecting a client from harm is a vital part of a lawyer's job."); *United States v. Mabry*, 536 F.3d 231, 240 (3d Cir. 2008) (noting that filing an appeal in the face of a waiver "could cost the client the benefit of the plea bargain against his or her best interest").

This is, to be sure, an important practical consideration, and attorneys certainly have an obligation to inform their clients of the possible negative consequences of filing an appeal under such circumstances.

But once a client is fully informed, refusing to give effect to the client's final decision on such grounds is exactly the sort of paternalistic argument that the Court has rejected again and again in cases concerning defendant autonomy.

In the context of self-representation, for example, the Court has candidly acknowledged that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta*, 422 U.S. at 834. Nevertheless, the Court held, "[p]ersonal liberties are not rooted in the law of averages," *id.*, and though the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law,'" *id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (Brennan, J., concurring)). *See also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.").

In many ways, this case presents exactly the same type of question that Court decided just last term, in *McCoy v. Louisiana*. There, the Court confirmed the defendant's sole prerogative to decide whether to admit guilt or maintain innocence before a jury, notwithstanding his attorney's judgment that admitting guilt was the only feasible way to avoid the death penalty. 138 S. Ct. at 1508. The issue in *McCoy* was not whether his attorney's judgment was *reasonable*; rather, the Court recognized that what is at stake in such cases is more than just trial strategy—the defendant

is ultimately entitled to weigh the competing value judgments that go into such a momentous decision. *See id.* ("Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty . . . . But the client may not share that objective.").

Just so here. Counsel may reasonably assess that a waiver makes the likelihood of success on appeal quite small, and that such an appeal would risk the defendant losing the benefits of the plea. But the defendant may not share the objective of preserving at all costs such supposed benefits. He might know, for example, that the plea was not truly involuntary, and therefore insist as a matter of his own integrity that the plea be challenged, though the likelihood of proving as much be slim. Or he may simply prefer any chance of exoneration, however small, over whatever reduced sentence was offered in his plea. If defendants are permitted to risk the *death penalty* in the assertion of their own autonomy, then *a fortiori* they should be permitted to decide whether to risk losing the benefits of a plea agreement.

III. SECURING DEFENDANT AUTONOMY NOTWITHSTANDING APPEAL WAIVERS IS ESPECIALLY CRUCIAL IN LIGHT OF THE INCREASING PREVALENCE OF PLEA BARGAINING.

The defendant's inherent right to make fundamental decisions in his own case (including the decision whether to appeal a conviction) is the core concern of the Sixth Amendment and the chief issue relevant to this appeal. But the fact that the State's proposed exception to defendant autonomy turns on appeal waivers in plea agreements is especially troubling, given the degree to which plea bargaining has become the

default, not the exception, in our criminal justice system.

The criminal jury trial—that bedrock on which our criminal justice system is founded—is dwindling to the point of a practical nullity. Plea bargaining, though essentially unknown to the Founders, has reduced the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, p. 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court.").

The decline of the jury trial is all the more troubling given the vast coercive power that prosecutors can bring to bear on most defendants in plea negotiations, and the resultant concern that many (if not most) pleas are not truly voluntary—nor limited even to guilty defendants. Prosecutors control charging decisions (often charging defendants with mandatory minimum sentences), the discovery provided to defendants prior to a plea, and the terms of plea bargains, which often dictate sentencing and post-release conditions, with little

if any oversight by judges. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/. Indeed, jury trials declined substantially following the imposition of mandatory minimum sentences for drug and other offenses in the 1980s, with 19 percent of federal defendants going to trial in 1980 and less than 3 percent in 2010, a figure that continues to this day. *Id.*

With little judicial oversight, plea bargains take place behind closed doors and with prosecutors in a substantially better bargaining position relative to defense lawyers, as they have access to police reports, crime scenes, witnesses, and other evidence before most defense lawyers are even involved in cases. *See* J.F. Reinganum, *Plea Bargaining & Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988). As many commentators have observed, regardless of whether their evidence is accurate or reliable, prosecutors tend to exhibit confirmation bias about the strength of their cases, which makes them overconfident in defendants' guilt. Rakoff, *supra*; Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 105–06 (2017); Alafair S. Burke, *Prosecutorial, Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007). It is thus unsurprising that, for example, of the 358 individuals exonerated by the Innocence Project through DNA evidence, 40 of them—over 10%—actually pled guilty to crimes we now know with practical certainty they did not commit. *See* DNA Exonerations in the United States, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited August 17, 2018).

Against this background, the State's suggestion that defendant autonomy may be dispensed with in light of the terms of a plea agreement is cause for special concern, not relief. There is ample reason to think that a substantial number of plea agreements are tinged with coercion, secured largely through the threat of massive trial penalties, and entered into by defendants with little-to-no knowledge of the government's supposed case against them. Many such defendants may, in fact, be innocent. That is a difficult structural problem with no easy solutions. But the least we can do is preserve the autonomy of criminal defendants to decide whether to challenge their convictions on appeal—*especially* when those convictions are obtained through plea bargains of dubious legal and moral legitimacy.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should reverse the lower court's judgment.

Respectfully submitted,

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

August 17, 2018