

No. _____

In the
Supreme Court of the United States of America

RHONDA GITTENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented

I. This Court has held that any legal provision that “needlessly encourages” guilty pleas is “patently unconstitutional.” Although Rhonda Gittens insisted to her attorney that she was innocent, he pressured her to plead guilty because he believed a trial would only ensure a higher guidelines sentence. Does a guidelines provision that needlessly encourages guilty pleas by threatening harsher sentences for “put[ting] the government to its burden of proof at trial” violate the Fifth and Sixth Amendments?

II. A defendant may withdraw a guilty plea before sentencing “and have a trial if for any reason the granting of the privilege seems fair and just.” Over decades, most circuit courts have burdened the right to trial by constricting what “fair and just” means. Has a defendant who consistently maintained her innocence and pled guilty because the guidelines threatened a higher sentence after trial shown a “fair and just” reason to withdraw her plea?

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**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

Rhonda Gittens petitions the United States Supreme Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Rhonda Gittens*, No. 16-14572.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is appended to this Petition, along with a copy of the Court of Appeals' order denying rehearing.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on 5 July 2017. Petitioner timely petitioned the Eleventh Circuit for rehearing *en banc*. The Eleventh Circuit denied the petition for rehearing on 27 November 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1. The district court had jurisdiction under 18 U.S.C. § 3231 because the petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Statement of the Case

Rhonda Gittens was advised by her court-appointed counsel to plead guilty to charges arising from a conspiracy to obtain “federal income tax refunds from the IRS to which [the conspirators] were not entitled.” Immediately after pleading guilty, Ms. Gittens regretted her decision because she did not, in fact, believe she was guilty. Twelve days later, having spoken with another attorney, Ms. Gittens sought to withdraw her guilty plea and to have new counsel appointed. Her *pro se* motion informed the district court that her attorney had told her that, if she insisted on a trial, she would only be guaranteeing herself a longer sentence. She wrote, “I am innocent and I never had his support and was forced to do something despite the fact that I have repeatedly informed him that I am innocent.”

The motion additionally stated, “I have requested my attorney ... to have my guilty plea withdrawn several times and he has delayed it. After two requests to notify the courts that I want to change my plea he is still advising me that I should plea [*sic*] guilty to something I am innocent for because ‘the government does not lie and they indicted me because it is true.’” Ms. Gittens attached correspondence between her and her appointed counsel in support of her *pro se* motion for new counsel.

Two days later, Ms. Gittens’ co-defendant and former boyfriend, Walther Godfrey, filed a confession stating that he and two others, Corey Williams and Marc Brown, were solely responsible for the crime.

Following an *ex parte* hearing, the district court granted the motion for new counsel and, additionally, granted Ms. Gittens’ request to be represented by a woman attorney. Ms. Gittens’ new counsel asked the court to approve the appointment of an investigator. The

district court, however, immediately denied that motion. Intimating the court's view of Ms. Gittens' desire to withdraw her plea, the order, in its entirety, said: "The Defendant is scheduled to be sentenced after entering a plea of guilty pursuant to a plea agreement. No investigative costs related to a defense are necessary."

On 4 April 2016, Ms. Gittens, through her new counsel, reiterated her motion to withdraw the guilty plea. In support of the motion, Ms. Gittens' new counsel stated, "After reviewing the case, it is clear that Gittens is not guilty of the offenses charged." The motion was supported by Mr. Godfrey's confession. Additionally, Ms. Gittens had taken and passed a polygraph test supporting her claim of innocence.

The United States opposed Ms. Gittens' motion to withdraw her guilty plea on legalistic, not equitable, grounds. The only prejudice the prosecution mentioned in opposing the motion was that it would have to prove its allegations at trial, just as the Constitution requires: "If the guilty plea is set aside, the Government will have to once again track down witnesses, prepare the case for trial, and relocate the evidence necessary to conduct a trial."

The court took evidence and heard argument on the motion on 13 April 2016. Ms. Gittens and her former court-appointed lawyer both testified. Ms. Gittens explained that her lawyer had advised her to plead guilty because a jury would not believe that someone like Ms. Gittens, "having a master's degree, didn't know anything about what was going on, that a jury would not believe me." App'x at A-23. She testified that, immediately after pleading guilty, she regretted it and sought advice from other attorneys.

Her former lawyer corroborated Ms. Gittens' testimony. He testified that Ms. Gittens had "said she was innocent many times." App'x at A-58. Nonetheless, he said he had advised

her that the government's case against her "was very strong" and that a conviction was very likely. DE135:54. He testified that he was unaware throughout his representation that Mr. Godfrey could corroborate Ms. Gittens' claim of innocence. The lawyer affirmed that Ms. Gittens had never told him that she was in fact guilty of the offense: "She never said that. Never said that." DE135:63.

Using an incorrect legal standard, the district court denied the motion. The district court applied the standard of review that the Eleventh Circuit and some other courts of appeals use to determine whether a district court abused its broad discretion to grant a trial after a guilty plea. Thus, instead of asking whether Ms. Gittens had shown that the interests of justice favored a trial, the court asked only whether Ms. Gittens' plea was constitutionally valid. This legal error denied Ms. Gittens her Fifth Amendment right to due process of law and her Sixth Amendment right to a jury trial. The only reason not to accommodate Ms. Gittens' right to trial by jury was that doing so would, as the Constitution prescribes, require the prosecution to do the work of proving her guilty beyond a reasonable doubt.

Prior to sentencing, Ms. Gittens moved for reconsideration of the motion to withdraw her guilty plea on the grounds that the district court had applied the wrong legal test for permitting withdrawal of a guilty plea. The court heard argument on the motion immediately before sentencing Ms. Gittens. In the course of the argument, Ms. Gittens' counsel advised the Court that the acceptance-of-responsibility guideline unconstitutionally burdens the right to trial. The district court denied Ms. Gittens' motion and denied her the adjustment for acceptance of responsibility, "even though Ms. Gittens has entered pleas of guilty," because

she had sought to withdraw those pleas. The district court sentenced Ms. Gittens to 75 months in prison and three years of supervised release.

The Eleventh Circuit affirmed the conviction and sentence. It reasoned that Ms. Gittens had not shown a “fair and just reason” for withdrawing her guilty plea, as Federal Rule of Criminal Procedure 11(d) requires, because she “received close assistance of counsel from her attorney” and because “she does not even argue on appeal that her plea was not knowing and voluntary.” The Court of Appeals also rejected Ms. Gittens’ argument that the acceptance-of-responsibility adjustment is unconstitutional because its purpose and effect are to pressure defendants to declare themselves guilty by threatening substantially higher penalties for a conviction by jury than a conviction by self-incrimination. The court relied exclusively on two very old precedents that interpreted the original version of the guideline, which differed in constitutionally significant ways from the current version.

Ms. Gittens sought rehearing and rehearing *en banc*. The Court of Appeals denied that petition summarily.

Reasons for Allowance of the Writ

Trials are not just for the innocent. Justice Scalia, writing for this Court, believed that proposition was so obviously true that he relied on it to make a point about the right to confront witnesses at trial: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Crawford v. Washington*, 541 U.S. 36, 62 (2004). *Crawford* is one of countless cases concerning trial rights to which this Court has devoted its energy. Last year, however, there were fewer than 1,900 federal criminal jury trials in the entire country, a record low. The number of trials has fallen virtually every year for three decades because people, like the petitioner, are being systematically pressured to self-incriminate, even if they believe they are innocent. This Court should grant the writ of certiorari to reaffirm the adversarial nature of our criminal justice system and the centrality of jury trials to that system before the federal criminal trial disappears completely.

Rhonda Gittens was pressured into pleading guilty because her attorney feared that, if she went to trial, the jury would convict her and she would consequently receive a much longer sentence than if she pleaded guilty. This violated her Fifth and Sixth Amendment rights. Since 1990, the Federal Sentencing Guidelines have expressly provided that any defendant who “puts the government to its burden of proof at trial,” U.S.S.G. § 3E1.1 cmt.2 (1990), should receive a much longer sentence than would apply if the defendant self-incriminated. This guidelines provision has transformed our criminal-justice system from an adversarial one, characterized by the availability of trials and the parties’ ability to plea-bargain based on their assessments of the case, into an inquisitorial one, characterized by

huge numbers of guilty pleas and mass incarceration. The Federal Judicial Center's statistics show that many people who, like Ms. Gittens, believe they are innocent are incarcerated and that the guidelines are the reason. There is no way to know how many are, in fact, innocent because guilty pleas are supported by proffers, not actual evidence.

The guidelines' condemnation of going to trial has demoted the criminal jury trial from being considered the preferred method of ascertaining guilt to being considered interchangeable with and just as reliable as a guilty plea. That is why the district court and the court of appeals would not allow Ms. Gittens to withdraw her guilty plea and have a trial. Today's federal judges, prosecutors, and defense attorneys soon learn that the guidelines system considers trials a waste of time. Thus, although Ms. Gittens immediately reconsidered her decision to plead guilty, the district court never seriously entertained the possibility of a trial. It appointed a new lawyer for Ms. Gittens but denied money for an investigator even before ruling on the motion to withdraw the plea: "The Defendant is scheduled to be sentenced after entering a plea of guilty pursuant to a plea agreement. No investigative costs related to a defense are necessary." The court denied the motion to withdraw by applying an unlawfully high standard, and the court of appeals affirmed.

I. The Federal Sentencing Guidelines unconstitutionally pressure people, even innocent ones, to self-incriminate, supplanting our adversarial system with an unchecked inquisitorial one whose fruits are injustice and mass incarceration.

Both Ms. Gittens and her attorney testified in the district court that she had always maintained her innocence. Her attorney nonetheless pressured her to plead guilty. He believed that she would likely be convicted, in which case the Federal Sentencing Guidelines would penalize her for having exercised her right to trial.

No one involved found any of this remarkable. All the prosecutors, defense attorneys, and federal judges in the case accepted as routine and commonplace that an attorney would counsel a woman who insists she is innocent to declare herself guilty. Everyone with any experience in today's federal criminal justice system understands that people who believe they are innocent of at least some of the government's allegations routinely plead guilty anyway because the guidelines have made the "right" to trial too risky to exercise.

Statistics substantiate that this unconstitutional state of affairs is attributable in substantial part to the Federal Sentencing Guidelines, specifically the euphemistically named "acceptance-of-responsibility" reduction. Originally, its authoritative commentary provided that "[c]onviction by trial does not preclude a defendant" from the reduction. U.S.S.G. § 3E1.1 cmt.2 (1987). This phrasing was owed to the original Sentencing Commission's understanding of the need to skirt the constitutional problem with threatening higher sentences to encourage guilty pleas:

[T]o explicitly write a reduction into the Guidelines based on a guilty plea is to explicitly tell a defendant that a guilty plea means a lower sentence and that insistence upon a jury trial means a higher sentence.

... The Guidelines' solution to this problem is to provide a two-level discount (amounting to approximately twenty to thirty percent) for what the Guidelines call "acceptance of responsibility." The Guidelines are vague regarding the precise meaning of "acceptance of responsibility."

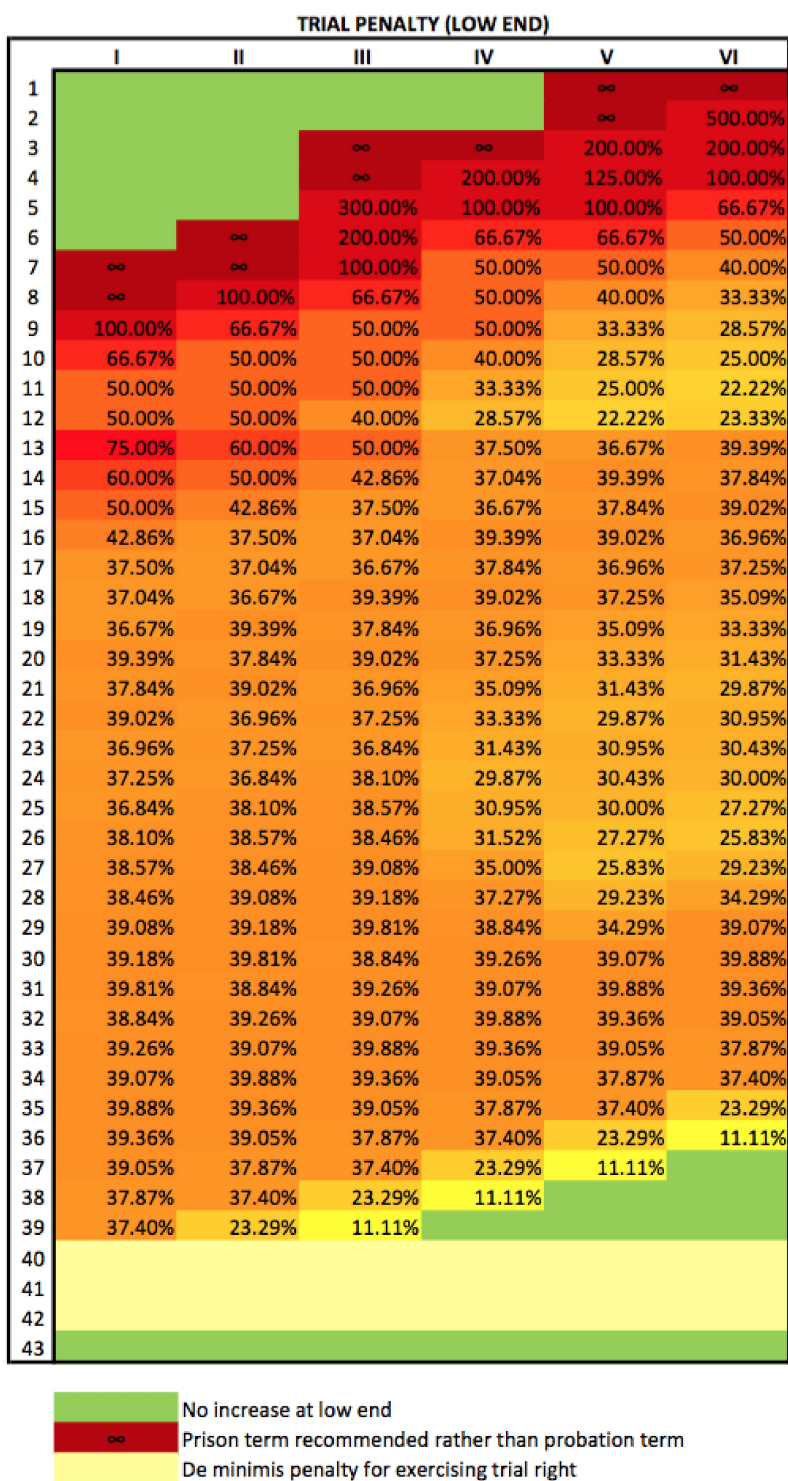
Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28 (1988). Since 1990, the commentary has been explicit about the purpose of this provision: "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual

elements of guilt, is convicted, and only then admits guilt and expresses remorse.” U.S.S.G. § 3E1.1 cmt.2 (1990).

The trial penalty is also higher now than it was. In 1992, the penalty was raised from two offense-level points to three. For Ms. Gittens, who had no criminal record, choosing to go to trial meant risking that her low-end guidelines sentence would be more than 37% higher than if she pled guilty.

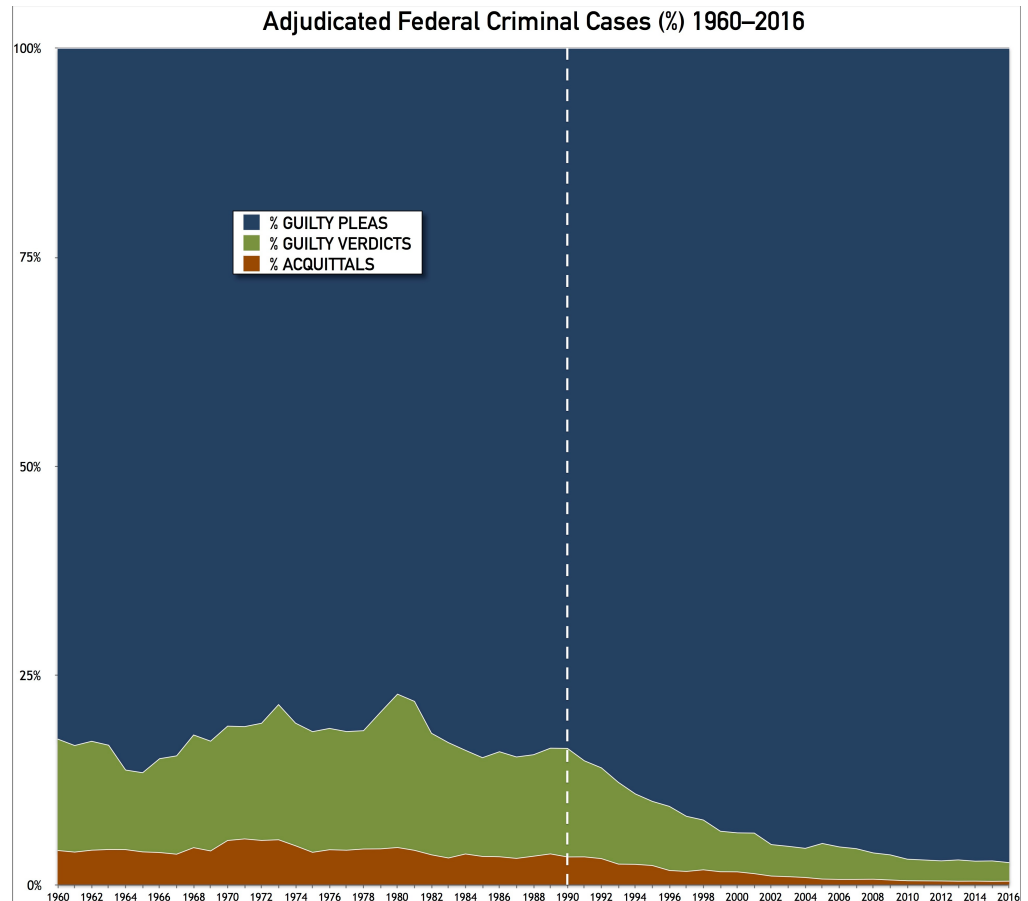
There are far fewer trials today than for decades before 1990, and the number is still falling. Throughout the 1970s and 1980s, between 77% and 85% of non-dismissed federal prosecutions ended in a guilty plea. During the

last 20 years, the proportion has steadily climbed to nearly 98%. These statistics provide



strong evidence that the revised acceptance-of-responsibility has eliminated our country's reliance on adversarial processes to separate the innocent from the guilty.

Percentages do not tell the whole story. In the two decades from 1971 to 1990, there were



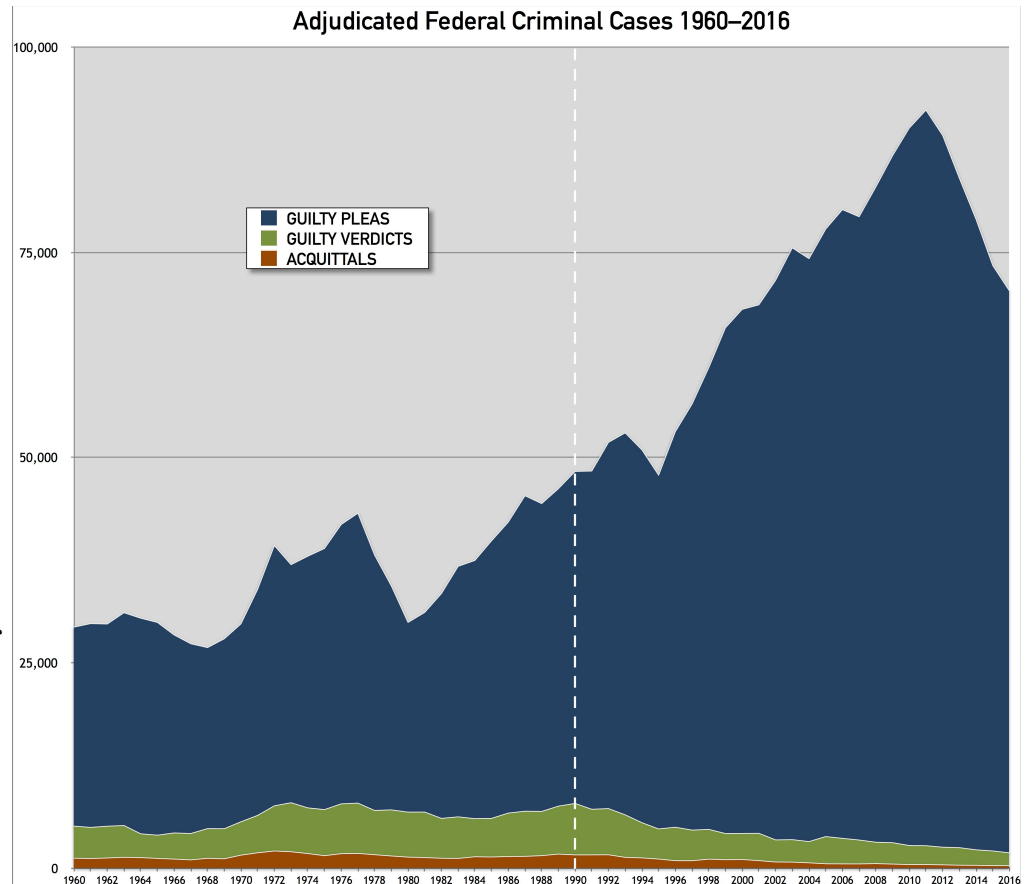
between 6,000 and 8,000 trials annually — even though in each year the total number of cases was a fraction of what it is today. In 1986, the year before the guidelines went into effect, there were 6,698 trials federal criminal trials, and the number was increasing as the Nation grew. That trend reversed in 1990. In 1996, there were only 4,976. By 2006, we were down to 3,620. In 2016, the last year for which statistics have been published, just 1,853 federal criminal cases were tried *in the entire country*.

“The right to jury trial is fundamental to our system of criminal procedure,” *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), but jury boxes in federal courtrooms are so seldom used today that concern over the disappearance of adversarial jury trials has moved from the pages of law reviews to the newspapers. See Benjamin Weiser, *Trial by Jury, a Hallowed*

American Right, Is Vanishing, N.Y. TIMES

(7 Aug 2016). There is every reason to believe that the dwindling number of trials signals a broken system that incarcerates a significant number of innocent people.

The acceptance-of-responsibility



provision pressures people to plead guilty even when the government could not prove guilt beyond a reasonable doubt. As a result, there are fewer trials but more prisoners than ever before. During the ten years before the guidelines went into effect (from 1977 to 1986), 13,975 of the 440,698 defendants prosecuted were acquitted at trial. The numbers for the preceding decade (from 1967 to 1976) were comparable: 15,815 acquittals of 422,040 prosecutions. Over the past ten years (from 2007 to 2016), then, there should have been about 28,780 acquittals among the 907,583 people the government prosecuted. But there were only 4,014 acquittals in that ten-year span — more than 86% fewer than expected. At least some of those 24,000 people who would have been acquitted are innocent of some or all of the allegations to which they pled guilty.

The Founders would hardly be surprised to hear that relying on self-incrimination rather than adversarial processes results in innocent people being incarcerated. Our system was premised on the idea that the jury trial is safer and more reliable than a system built on self-incrimination, as this Court has recognized:

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

Blakely v. Washington, 542 U.S. 296, 313 (2004). Unnecessarily burdening the right to trial erodes the system's integrity because the Constitution does not provide any checks on an inquisitorial system of criminal justice, as the statistics demonstrate.

The testimony by Ms. Gittens' former attorney, who was called by the government, also shows that, since the sentencing guidelines went into effect, federal criminal trials have dwindled. Ms. Gittens' former counsel testified for the prosecution that he had been a federal prosecutor from 1977 to 1982, first in the Eastern District of New York and then in the Southern District of Florida. App'x at A-63–64. Since 1982, he had been a criminal defense lawyer and had taken court-appointed cases for virtually all those years. App'x at A-64. While he was unable to estimate the number of cases he had tried, he was certain that the number of trials had fallen with the enactment of the sentencing guidelines: "I just don't know how many. But it's — I've been doing it for — since 1984. So it's over 30 years. And during that

period of time, especially in the old days, we used to try a lot more than we do now. A lot of them now end up in pleas.” App’x at A-64.

The acceptance-of-responsibility provision not only exerts pressure to plead guilty to the actual charges but also to admit all the details the government alleges. As the district court’s refusal to grant Ms. Gittens the benefit of the adjustment shows, *any* adversarial testing of the government’s case, or even just inconvenience to the prosecution, can result in forfeiture of the reduction for pleading guilty. In this way, federal courts discourage defendants and their attorneys from challenging the government’s allegations in any way. *See also, e.g., United States v. Espinoza*, No. 14-11890, 2015 WL 9461714, at *12 (CA11 Dec. 28, 2015) (affirming the denial of the acceptance adjustment because “[a]lthough Espinoza offered to plead guilty to Counts 1, 22 and 23, he ultimately contested those counts factually by, inter alia, challenging the admissibility of evidence in support of those counts”); *United States v. Salas*, 756 F.3d 1196, 1205–06 (CA10 2014) (holding that the defendant was not entitled to the acceptance adjustment because he moved to suppress evidence and, in response, the government began to prepare for trial); *United States v. Drennon*, 516 F.3d 160, 161–63 (CA3 2008) (holding that the defendant was not entitled to the acceptance adjustment because he moved to suppress evidence and the government performed “the large majority of the work to prepare for trial ... in connection with the suppression hearing”); *United States v. Smith*, 422 F.3d 715, 726–27 (CA8 2005) (holding that the defendant was not entitled to the acceptance adjustment because he engaged in conduct that was “arguably overly dilatory and certainly contrary to his admission of guilt[,]” including filing a motion to suppress and filing a motion to continue the notification deadline); *United States v. Gonzalez*,

70 F.3d 1236, 1239 (CA11 1995) (affirming the denial of the acceptance adjustment because, “[b]y challenging the admissibility of the essential evidence against him, Gonzalez attempted to avoid a determination of factual guilt and to thereby escape responsibility for his crime”). Any system that punishes the accused for challenging the prosecution’s case is not in any meaningful sense adversarial.

That the acceptance-of-responsibility guideline does not literally coerce guilty pleas does not make it constitutional. As *United States v. Jackson*, 390 U.S. 570 (1968), held, any provision that needlessly encourages defendants to waive their trial rights transgresses the Constitution. *Jackson* invalidated, on Fifth and Sixth Amendment grounds, a provision of a federal statute authorizing the execution of kidnappers convicted by a jury but not those convicted by bench trial or guilty plea:

The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Id. at 581. *Jackson* stated that “the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them.” *Id.* at 583.

Jackson’s reasoning applies squarely to the acceptance-of-responsibility provision. It is intended to and, in fact, does “discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.” It accomplishes this by “needlessly encourag[ing]” guilty pleas, as this case and the Federal Judicial Center’s statistics show.

Provisions that discourage trials and encourage self-incrimination are dangerous because history shows they are susceptible to abuse and oppression:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. ... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) (footnote omitted). In addition, the over-reliance on guilty pleas over the last 30 years causes the loss of knowledge of adversarial norms. An entire generation of prosecutors and defense attorneys — and, in turn, judges — has less experience with, and less understanding of, adversarial norms than any before, as the record in this case reflects.

The denigration of the jury trial has allowed dangerous inquisitorial methods of adjudication to contaminate our system and it cannot survive this infection forever. The centerpiece of our criminal justice system is no longer the jury trial but is now the litany of questions and answers that comprise a Rule 11 plea colloquy. The Confrontation Clause, the Compulsory Process Clause, the Impartial Jury Clause, and the Self-Incrimination Clause are all superfluous to a system that relies on guilty pleas rather than trials. All of this Court's decisions interpreting those clauses are likewise becoming mere anachronisms in a system where trials account for an infinitesimal — and still shrinking — fraction of convictions.

Our system is not great because it is our system. It is great *only* insofar as it is adversarial because experience shows that to be the fairest and most reliable type of justice system. Given the evidence that the right to trial has been seriously compromised, this Court should not hesitate to take this opportunity to reaffirm the centrality of the jury trial to our system of justice by holding that, because the acceptance-of-responsibility guideline “needlessly encourages” guilty pleas, it is “patently unconstitutional.”

II. Because federal courts now erroneously views trials as wasteful rather than crucial, most now unconstitutionally require defendants wanting to withdraw a guilty plea before sentencing to demonstrate that the plea was invalid.

Federal Rule of Criminal Procedure 11(d) allows a defendant who has pled guilty to withdraw that plea before sentencing and have a trial whenever she shows a “fair and just reason” for the withdrawal request. The circuit courts of appeals have divided over how to identify a “fair and just reason.” In the Eleventh Circuit, courts look only at whether the plea was constitutional. In this case, for example, the court of appeals held that “the district court may consider the totality of the circumstances surrounding the plea, including (1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the government were allowed to withdraw the plea.” App’x at A-9 (citation omitted). The court of appeals affirmed the denial of Ms. Gittens’ motion to withdraw her plea because her attorney “had discussed the case with her and had reviewed the plea agreement with her before the hearing” and because “the plea was knowing and voluntary.” App’x at A-10. In other words, the court of appeals held that the district court was right to require Ms. Gittens to show that her plea was unconstitutional.

The origin of Rule 11(d)’s “fair and just” standard confirms that it did not impose anywhere near the burden on the Sixth Amendment right to trial as the Eleventh Circuit supposed. The “fair and just” language is drawn from *Kercheval v. United States*, 274 U.S. 220 (1927), which held that evidence of a guilty plea is inadmissible at a subsequent trial. In *Kercheval*, the defendant pled guilty to mail fraud and was sentenced to three years. He petitioned for a reduction in the sentence, claiming that the prosecutor promised him a sentence of three months and a \$1,000 fine if he pled guilty. After hearing evidence, the trial court refused to reduce the sentence but allowed the petitioner to withdraw his plea. At the subsequent trial, the court allowed the prosecution to introduce the guilty plea and allowed the defense to introduce the order withdrawing it. The defendant was convicted, and the Eighth Circuit affirmed. *Id.* at 222–23.

This Court reversed the conviction. First, using the language later codified in Rule 11(d), the Court noted that a guilty plea, even though it is accepted only after a colloquy, can nonetheless be withdrawn because of the Constitution’s guarantee of trial rights: “The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.” 274 U.S. at 224 (citations omitted). In support of this, the Court cited various cases illustrating the breadth of the rule, including two in which the accused was led to believe that he would receive a lighter sentence by pleading guilty. *See Montana v. Nichols*, 46 Mont. 470 (1912); *Missouri v. Stephens*, 71 Mo. 535 (1880). A third case that *Kercheval* cited elaborated on the Court’s own reasoning:

A party should not be allowed to trifle with the Court by deliberately entering a plea of “guilty” one day and capriciously withdrawing it the next. But when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly, and mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.

California v. McCrory, 41 Cal. 458, 461–62 (1871). *Kercheval*’s approving citation to *McCrory* indicates that a person who is induced to plead guilty by the expectation of a lower sentence has a “fair and just” reason for seeking to withdraw the plea.

Having lost sight of the jury trial’s indispensability to our system of justice, the Eleventh Circuit and most other courts of appeals rely on multi-factor tests to determine whether the “fair and just” standard is met rather than simply asking whether there is any reason to deny the accused a trial. For decades after *Kercheval*, that is how its standard was interpreted. Withdrawal of even a valid plea was permissible so long as procedural gamesmanship was not the reason for requesting it:

Even where the plea was properly entered, however, the standard for judging the movant’s reasons for delay remains low where the motion comes only a day or so after the plea was entered. A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government’s legitimate interests.

United States v. Barker, 514 F.2d 208, 222 (CA5 1975). The Advisory Committee adopted the *Kercheval* standard, as developed in *Barker*, for motions to withdraw made before sentencing:

Although “the terms ‘fair and just’ lack any pretense of scientific exactness,” guidelines have emerged in the appellate cases for applying this standard. Whether the movant has asserted his legal innocence is an important factor to be weighed, as is the reason why the defenses were not put forward at the time

of original pleading. The amount of time which has passed between the plea and the motion must also be taken into account.

A swift change of heart is itself strong indication that the plea was entered in haste and confusion. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

Advisory Committee Note to Fed. R. Crim. P. 32(d) (1983 amendments) (citations omitted).

Because Rule 11(d)'s "fair and just" standard is one and the same as *Kercheval's*, Ms. Gittens had a "fair and just reason" for withdrawing her plea. She and her attorney testified that her reason for pleading guilty, and for seeking to withdraw her plea, was that her attorney told her that, if she went to trial, she would be convicted and receive a much higher sentence than if she pleaded guilty. They both testified that she had consistently maintained her innocence. The fact that she immediately took steps to seek other advice and then to undo her plea confirmed that she was acting in good faith. The Eleventh Circuit erred in holding that Ms. Gittens could not withdraw her guilty plea under those circumstances.

The Ninth Circuit still adheres to the true meaning of "fair and just," asking only whether there is any good reason why the defendant should have a trial, notwithstanding his guilty plea. "Fair and just reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea." *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (CA9 2004).

The Seventh Circuit likewise does not enumerate factors, but its approach is, like the Eleventh Circuit's, grounded in considerations that are not germane to the "fair and just" standard. The Seventh Circuit requires a movant to substantiate a claim of actual innocence,

which cannot contradict the plea colloquy. *See United States v. Collins*, 796 F.3d 829, 333 (CA7 2015) (“A defendant presenting a reason for withdrawal that contradicts answers he gave at the plea hearing faces an ‘uphill battle.’”). In practice, this means that the only way to withdraw a plea in the Seventh Circuit, like the Eleventh, is to prove that it was constitutionally invalid. *Id.* at 835 (affirming finding that plea was knowing and voluntary); *United States v. Carroll*, 412 F.3d 787, 792 (CA7 2005) (affirming finding that counsel was not ineffective); *United States v. Gomez-Orozco*, 188 F.3d 422, 425 (CA7 1999) (vacating conviction because defendant showed he was a United States citizen who could not be convicted of a crime applicable only to aliens).

Most federal courts, like the Seventh Circuit, unduly burden the right to trial by requiring the defendant to show either that the plea was constitutionally defective or that there is a substantial probability that she is innocent. The Second and Eighth Circuits have reduced the Advisory Committee’s “guidelines” to a three-factor inquiry that examines: (1) whether the defendant claims to be innocent, (2) the timing of the withdrawal request, and (3) whether the government will be prejudiced. *See United States v. Carreto*, 583 F.3d 152, 157 (CA2 2009); *United States v. Heid*, 651 F.3d 850, 853 (CA8 2011). The First and D.C. Circuits look at (1) the constitutional validity of the plea, (2) the timing of the withdrawal request, and (3) whether the defendant *colorably* claims to be innocent. *See United States v. Fernandez-Santos*, 856 F.3d 10, 15 (CA1 2017); *United States v. Robinson*, 587 F.3d 1122, 1126–27 (CA DC 2009). The Third Circuit looks at (1) whether the defendant’s claim of innocence has factual support, (2) whether strong reasons justify the withdrawal request, and (3) whether the government will be prejudiced. *United States v. Siddons*, 660 F.3d 699, 703

(CA3 2011). In application, these tests often, and in some cases always, require the accused to show that his plea is invalid, rather than merely ill-advised or make a substantial showing of innocence.

The remaining circuits employ various multi-factor tests that also unnecessarily and unconstitutionally burden the right to trial to different degrees. The Fourth, Fifth, and Tenth Circuits look at six factors, with some variation in how they are weighed and enumerated: (1) the constitutional validity of the guilty plea, (2) whether the defendant claims to be innocent, (3) whether the plea was assisted by counsel, (4) the timing of the withdrawal request, (5) whether the government will be prejudiced, (6) whether judicial inconvenience or a waste of judicial resources would result. *See United States v. Marceleno*, 819 F.3d 1267, 1272 (CA10 2016); *United States v. Urias-Marrueta*, 744 F.3d 361, 364 (CA5 2014); *United States v. Bowman*, 348 F.3d 408, 414 (CA4 2003). The Sixth Circuit uses a similar test with seven overlapping factors: (1) the timing of the withdrawal request, (2) the reason for the timing of the withdrawal request, (3) whether the defendant claims to be innocent, (4) the circumstances of the guilty plea (which in practice means its constitutional validity), (5) the defendant's background and degree of sophistication, (6) the defendant's prior record, and (7) whether the government will be prejudiced. *See United States v. Martin*, 668 F.3d 787, 794 (CA6 2012).

These circuits, like the Eleventh, unnecessarily examine whether the plea was constitutional, which erases the distinction between motions to withdraw a plea made before sentencing and those made after. Likewise, the First and Fourth Circuits hold that “[t]he most important consideration ... is an evaluation of the Rule 11 colloquy” to determine

whether it “was both counseled and voluntary.” *Bowman*, 348 F.3d at 414; see *United States v. Caramadre*, 807 F.3d 359, 367 (CA1 2015) (“Rule 11 considerations are a paramount concern in a plea-withdrawal inquiry.”); see also *Robinson*, 587 F.3d at 1227 (stating that “whether the guilty plea was somehow tainted” is the “most important” consideration). Indeed, in *Bowman* the Fourth Circuit required the defendant to prove that “(1) his counsel’s performance ‘fell below an objective standard of reasonableness and (2) that there was a reasonable probability that, but for counsel’s error, he would have pleaded guilty and would not have insisted on going to trial.” 348 F.3d at 414 (quotation marks omitted). In contrast, the Ninth Circuit correctly holds that “[e]rroneous or inadequate legal advice may also constitute a fair and just reason for plea withdrawal, even without a showing of prejudice, when the motion to withdraw is made presentence.” *United States v. McTiernan*, 546 F.3d 1160, 1167 (CA9 2008).

Only the Ninth Circuit correctly maintains that “the fact that a plea was voluntary, knowing, and intelligent cannot count against a defendant’s attempt to withdraw it prior to sentencing unless the defendant’s *only* asserted ‘fair and just reason’ for withdrawing the plea is lack of voluntariness itself. To conclude otherwise would render a motion to withdraw a plea prior to sentencing ‘nothing more than an expedited hearing on a challenge to the voluntariness of the plea.’” *United States v. Garcia*, 401 F.3d 1008, 1012 (CA9 2005).

The Ninth Circuit’s isolation is a new development. Before the sentencing guidelines compromised the adversary system, the other circuits interpreted the “fair and just” standard just as the Ninth Circuit still does. See, e.g., *United States v. Campbell*, 778 F.2d 764, 767 (CA11 1985) (“Defects remedied under rule [11(d)] need not be of constitutional

magnitude.”); *United States v. Brown*, 617 F.2d 54, 55 (CA4 1980) (“Withdrawal of a guilty plea prior to sentencing should normally be allowed.”); *United States v. Simmons*, 497 F.2d 177, 178 (CA5 1974) (“The rationale for [*Kercheval*’s ‘fair and just’] policy is that the public interest in protecting a defendant’s right to trial by jury usually outweighs any inconvenience that the court or the prosecution is likely to suffer as a result of a withdrawn plea prior to sentencing.”); *Kirshberger v. United States*, 392 F.2d 782, 784 (CA5 1968) (“[R]ule 32(d) should be construed liberally in favor of the accused when a motion is made to withdraw a plea of guilty before sentence is imposed.”). More recently, the D.C. Circuit has twice stated, almost nonsensically, “Prior to sentencing the ‘standard for withdrawal of a plea is fairly lenient when the defendant can show that *the plea was entered unconstitutionally*.” *United States v. McCoy*, 215 F.3d 102, 107 (CADC 2000) (emphasis added; quoting *United States v. Taylor*, 139 F.3d 924, 929 (CADC 1998)).

As that quotation and this case show, the federal courts have largely failed to maintain the distinction between pre-sentence and post-sentence motions to withdraw a guilty plea and thus failed to uphold the centrality of the criminal trial in our system. The district judge saw nothing wrong with requiring Ms. Gittens to prove that her plea was constitutionally defective before she could withdraw it. The idea that a defendant’s guilty plea was irrevocable was anathema to three Justices of this Court 45 years ago: “A guilty plea ... should not be allowed to stand if the defendant upon reflection or additional developments seeks in good faith to exercise his right to trial. I cannot accept a concept of irrevocable waiver of constitutional rights, at least where the government will not suffer substantial prejudice in restoring those

rights.” *Nelly v. Pennsylvania*, 411 U.S. 954, 957 (1973) (Douglas, J., dissenting from denial of certiorari, with Stewart and Marshall, JJ.) (citation omitted).

The Ninth Circuit also correctly holds that requiring a defendant to assert factual innocence “runs contrary to the language of the ‘fair and just reason’ standard. The standard asks whether the defendant has presented a ‘fair and just reason’ for withdrawal, not whether the original plea was likely erroneous.” *Garcia*, 401 F.3d at 1012. Some other circuits require the defendant to substantiate his assertion of innocence, which requires the defendant to reveal his trial strategy and evidence in advance in order to reclaim his right to a trial. *See, e.g., Marceleno*, 819 F.3d at 1273 (“A defendant ‘must support the assertion of innocence with a credible argument,’ meaning he ‘must make a factual argument that supports a legally cognizable defense.’”); *Carroll*, 412 F.3d at 793 (“[A] defendant’s bare protestations of innocence — especially after a knowing and voluntary guilty plea colloquy — will not suffice. ... The defendant must proffer some credible evidence.”); *McCoy*, 215 F.3d at 102 (“The defendant’s ‘general denial’ is not enough; he must ‘affirmatively advance an objectively reasonable argument that he is innocent, for he has waived his right to try his luck before a jury.’”). Just a few years earlier, the D.C. Circuit had recognized that a bare assertion of legal innocence was sufficient to permit withdrawal. *See, e.g., United States v. Ford*, 993 F.2d 249, 251 (CA DC 1993) (“If the motion asserts a legally cognizable defense to the charges, ‘presentence withdrawal should be rather freely allowed.’”).

In practice, this requirement results in the denial of a trial based on the courts’ assessment of whether the defendant’s case is worth the bother based on what it predicts a jury would likely find. “[T]he presentation of a plausible defense does not, ipso facto, mean

that the district court abuses its discretion by denying leave to withdraw a guilty plea.” *United States v. Garcia*, 577 F.3d 1271, 1275 (CA10 2009); *see also Marceleno*, 819 F.3d at 1273–75 & n.3 (predicting the credibility of testimony); *United States v. Hamilton*, 510 F.3d 1209, 1215 (CA10 2007) (holding that, because the government’s evidence was “sufficient proof” to sustain a conviction, the defendant’s “arguments do not ... amount to an assertion of factual or legal innocence”).

The Ninth Circuit is also in accord with the Advisory Committee in holding that courts should look “to a defendant’s delay in moving to withdraw a plea as a barometer of the defendant’s candor with the court about his reasons for withdrawal.” *Garcia*, 401 F.3d at 1013. Delay should not count against a defendant wanting a trial if it is “entirely unrelated to the legitimacy or sincerity of the defendant’s reasons for wishing to withdraw his plea.” *Id.* Other circuits, however, mechanically count days without analyzing the reasons for the delay and refuse to permit withdrawal even when the refusal is likely to generate *more* unnecessary collateral litigation. *See, e.g., United States v. Catchings*, 708 F.3d 710, 718 (CA6 2013) (holding that delay was excessive even though there was “some indication that Catchings himself might not have caused the delay” and that it was owed to his attorney’s inattention); *Martin*, 668 F.3d at 798 (finding that delay was inordinate because “[w]e have consistently found shorter period to be excessive” notwithstanding that the delay was attributable to defense counsel’s failure to communicate with the accused, who “may ultimately have a claim for ineffective assistance of counsel”).

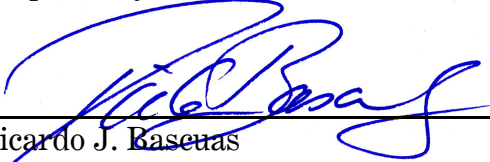
While it used to be agreed that leave to withdraw a guilty plea before sentencing should be liberally given, over time, the several courts of appeals have increasingly burdened

the right to trial by requiring extraordinary showings of cause. This violates infringes the right to trial, particularly in a case like this one where the defendant pled guilty only because she was made to fear that she would never be acquitted and would receive a higher sentence for exercising her trial rights.

Prayer for Relief

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit to reaffirm the centrality and indispensability of the jury trial to the federal criminal-justice system.

Respectfully submitted,



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