No. 20-444

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.

MICHAEL ANDREW GARY,
Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID BITKOWER
Counsel of Record
CORINNE M. SMITH
URJA MITTAL
REBECCA R. FATE
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
dbitkower@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers and is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

I. The government seeks to imprison a defendant who was not convicted at trial, and did not plead guilty to the offense of conviction, based upon its conclusion that he *would have* pleaded guilty to that offense if he

---

[1] Respondent's blanket letter of consent to the filing of *amicus* briefs has been filed with this Court. Petitioner has received notice of and consented to this filing. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae*, its members, or its counsel has made a monetary contribution to this brief's preparation or submission.

had been given the choice. That is wrong. The Constitution entrusts the decision to enter a guilty plea to the defendant alone. *See Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (citing *Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966)). Because "[t]he right to defend is personal," the Constitution protects the defendant's autonomy to make certain "fundamental choices about his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507, 1511 (2018) (internal quotation marks omitted); *see also Faretta v. California*, 422 U.S. 806, 834 (1975). Among these choices is the right to decide whether to admit or deny guilt at trial, *see McCoy*, 138 S. Ct. at 1505, and the right to decide whether to accept or decline representation, *see Faretta*, 422 U.S. at 834. The right to enter a knowing and voluntary guilty plea is no different.

When a defendant is not informed of all of the elements of the offense charged, and is allowed to enter a guilty plea to an incomplete set of elements, he is denied the right to enter a knowing and voluntary plea. The requirement that a guilty plea be knowing and voluntary protects the defendant's autonomy interest by ensuring that the choice to present a defense or plead guilty remains "an issue within [his] sole prerogative." *McCoy*, 138 S. Ct. at 1511. Where the defendant does not know what he is pleading to, there is no "foundation for entering judgment" through the defendant's purported admission to the "act charged." *Brady v. United States*, 397 U.S. 742, 748 (1970). Thus, the defendant must be informed of each element of the crime to which he is pleading, or else the plea is invalid. *See Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Mr. Gary was not informed that pleading guilty to the felon-in-possession charge would entail admitting knowledge of his status as a person barred from possessing a firearm. Knowledge of that status was an element of the crime—a fact that the government would have had to prove beyond a reasonable doubt had Mr. Gary chosen to go to trial. *See Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). Because Mr. Gary was not afforded the opportunity to decide for himself whether to acknowledge guilt of that element, his plea was invalid.

II. Each element of the crime matters. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). The elements are no less important at the plea stage. The elements structure both the defendant's calculus about whether to plead guilty or instead put the government to its burden of proving its case at trial, as well as the government's evaluation of whether it could meet that burden at trial. Because the defendant's decision to plead guilty can have grave consequences, including loss of liberty, the court is required to find that the defendant understands the "nature of each charge" to which he is pleading before accepting his plea. *See* Fed. R. Crim. P. 11(b)(1)(G).

The trial court did not find that Mr. Gary knew that he was admitting to knowledge of his status as a person barred from owning a firearm. Without that element, the crime was not complete.

III. The injury to a defendant's autonomy interest in deciding whether to plead guilty to a particular crime is complete when he is denied the opportunity to make that decision. The Constitution does not allow the court or the government to hypothesize whether the defendant would or should have pleaded guilty under different circumstances, just as it does not allow the court or counsel to hypothesize whether the defendant would or should have admitted guilt before a jury. *See McCoy*, 138 S. Ct. at 1511; *see also Nixon*, 543 U.S. at 187-88. Only the defendant can decide whether and when he is willing to voluntarily surrender his liberty. *See Faretta*, 422 U.S. at 834. On the government's theory, the court would be empowered to decide that a defendant would have pleaded guilty even when he was misinformed about one, two, three, or even *all* of the elements of the offense—so long as the government could put together a persuasive record that the defendant would have taken the bargain anyway. The Constitution does not allow imagination, however lifelike, to govern plea outcomes.

IV. The jury system has long been deemed "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Today, however, "criminal justice . . . is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Under the plea system, the government is freed of its burden to prove guilt beyond a reasonable doubt as to every element of the charged crime, while defendants forgo many of their constitutional rights and accept a sweeping array of consequences associated with conviction. *See Class v. United States*, 138 S. Ct. 798, 805 (2018). The government now seeks to further erode the minimal

protections that remain by allowing guilty pleas and imprisonment based on a plea to only part of the crime charged, with supposition and duct tape to cover the gaps. This Court should decline that invitation and preserve the defendant's right to make a knowing and voluntary choice whether to surrender his liberty by pleading guilty.

ARGUMENT

I. Depriving the defendant of the right to decide whether to plead guilty unconstitutionally undermines his autonomy interest.

A. The decision to plead guilty is entrusted to the defendant alone and thus implicates his fundamental autonomy interest.

The decision to enter a guilty plea is a choice the Constitution reserves to the defendant alone. It is well-established that a defendant has a constitutionally protected interest in "mak[ing] the fundamental choices about his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). This autonomy interest arises out of the fundamental proposition that "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* at 1507 (quotation marks omitted). Thus, this Court has held that certain fundamental decisions may be made only by the defendant.

Just three years ago, in *McCoy*, this Court decided that the "[a]utonomy to decide that the objective of the defense is to assert innocence" belongs in this category. *Id.* at 1508. Specifically, a defendant has the right to

decide whether to admit guilt at trial even if his counsel believes that he should. *See id.* at 1505. This is equally true at the plea stage. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004) (explaining that "counsel lacks authority to consent to a guilty plea on a client's behalf" (citing *Brookhart*, 384 U.S. at 6-7)); *McCoy*, 138 S. Ct. at 1516 ("[A] defendant cannot be forced to enter a plea against his wishes.") (Alito, J., dissenting). As this Court explained in *Nixon*, a guilty plea "is an event of signal significance in a criminal proceeding." 543 U.S. at 187. "While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is 'itself a conviction,' and the high stakes for the defendant require 'the utmost solicitude.'" *Id.* (quoting *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969)).

In recognizing the autonomy interest at stake in a defendant's choice to admit guilt and decide the objectives of his defense, the *McCoy* Court relied on *Faretta v. California*, 422 U.S. 806 (1975). There, this Court held that a defendant has the right to decide whether to refuse counsel, even if doing so would be to his own detriment. *See id.* at 834; *see also McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused."). Neither the court nor counsel may "usurp" the defendant's right to make these types of "fundamental choices about his own defense." *McCoy*, 138 S. Ct. at 1511.

In *Faretta*, the Court explained that this autonomy interest reflects the Framers' belief in "the inestimable worth of free choice." 422 U.S. at 834. Time and again, this Court has reinforced the importance of the

autonomy interest to the Framers' constitutional design—distinguishing, for example, the types of fundamental decisions the Constitution reserves to defendants—"whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"—from the strategic decisions that defense counsel may make. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see* ABA Standards for Criminal Justice 4-5.2 (4th ed. 2017) (listing the categories of decisions "ultimately to be made by" the defendant, including "what pleas to enter" and "whether to accept a plea offer"); *see also Garza v. Idaho*, 139 S. Ct. 738, 746 (2019) (explaining that the defendant has the "'ultimate authority' to decide whether to 'take an appeal'" while "the choice of what specific arguments to make within that appeal belongs to appellate counsel" (citation omitted)); *Brookhart v. Janis*, 384 U.S. 1, 7 (1966) (explaining that defense counsel cannot enter a plea contrary to his client's wishes).

This very autonomy interest is at stake here. Under the Constitution, it was Mr. Gary's choice alone to decide whether to go to trial or plead guilty to the charged offense. But Mr. Gary was denied the right to make this choice when the trial court failed to advise him of each of the elements of his felon-in-possession charge. Specifically, he was not informed that pleading guilty would entail admitting knowledge of his status as a person barred from possessing a firearm. *See* J.A. 41-42. Knowledge of that status was an element of the crime—a fact that the government would have had to prove beyond a reasonable doubt had Mr. Gary chosen to go to trial. *See Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). But Mr. Gary never had the chance to choose

whether to acknowledge guilt of that element, put the government to its burden at trial, or negotiate a more favorable plea bargain. Had he known what he was pleading to, he may have made the same choice, or a different one. He may have made a choice others would consider helpful to his interests, or an apparently harmful one. The Constitution entrusted that choice to Mr. Gary alone—not to his counsel, the government, or even the court. As Justice Scalia once observed, "[o]ur 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." *Martinez v. Ct. of Appeal of Cal., Fourth App. Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment).

If depriving a defendant of the right to decide *how* he will put forward a defense undermines his autonomy interest, as in *Faretta*, depriving a defendant of the right to decide *whether* to put forward a defense inflicts an even greater injury to that interest, as *McCoy* makes clear. That greater injury was inflicted here when the trial court accepted Mr. Gary's plea to an incomplete set of elements, depriving him of his right to decide whether to put forward a defense to the crime he was charged with committing. "Autonomy to decide . . . the objective of the defense" is not a "strategic choice[] about how best to *achieve* a client's objectives"; it is a "choice[] about what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508. The prejudice to Mr. Gary's autonomy interest was complete when the illegal plea was

accepted; it did not depend on whether he might have pleaded guilty had the circumstances been different.[2]

B. The requirement that a guilty plea be knowing and voluntary safeguards the defendant's autonomy interest.

Precisely because the defendant's right to decide the objectives of his defense is so fundamental, this Court has long held that a guilty plea must be both knowing and voluntary. "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the act charged in the indictment." *Brady v. United States*, 397 U.S. 742, 748 (1970). A plea *must* be knowing and voluntary to be a constitutional waiver of the defendant's constitutional rights. Because a defendant pleading guilty "stands as a witness against himself[,] and he is shielded by the Fifth Amendment from being compelled to do so," his admission must be "the voluntary expression of his own choice." *Id.* Further, because the plea constitutes "the defendant's consent

---

[2] In *McCoy*, Justice Alito, joined by Justices Thomas and Gorsuch, dissented in part on the view that defense counsel had not erred in unilaterally acknowledging the defendant's guilt on one of the elements of the crime charged. 138 S. Ct. at 1517 (Alito, J., dissenting). Nevertheless, the dissent recognized that a case like Mr. Gary's was a much easier question, acknowledging that "there are some decisions on which a criminal defendant has the final say," including, for example, the decision whether to enter a guilty plea. *See id.* at 1516 (Alito, J., dissenting) (citing *Brookhart*, 384 U.S. at 5-7). In other words, the dissent recognized that even if an in-trial concession should be considered a strategic decision that counsel may make on the defendant's behalf, the same cannot be said of the decision to plead guilty before trial. Nor did the dissent take issue with the majority's recognition of the autonomy interest at stake.

that judgment of conviction may be entered without trial" and all of a trial's attendant protections, the plea must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Id.*

It should be superfluous to say that admitting guilt to a set of elements that does not fully comprise the charged crime is not the same as admitting guilt to the charged crime. The "foundation for entering judgment" established through the admission to the "act charged," *id.*, is thus defunct where the defendant is not informed of what he is pleading to. Getting the act of admission right is indispensable because a defendant's plea is not "voluntary in the sense that it constitute[s] an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him.'" *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

Real notice of the true nature of the offense requires the defendant to be informed of each element of the charge to which he is pleading. "Where a defendant pleads guilty to a crime without having been informed of the crime's elements, [the knowing-and-voluntary] standard is not met and the plea is invalid." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (citing *Henderson*, 426 U.S. 637); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[B]ecause a guilty plea is an admission of *all* of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (emphasis added)). In *Henderson*, the Court held that

the trial court's failure to inform the defendant at the plea hearing of the *mens rea* element of the charge required the plea to be set aside. *See* 426 U.S. at 647. This was the result even "assum[ing] . . . that the prosecutor had overwhelming evidence of guilt available." *Id.* at 644.[3]

Much the same here. Consistent with the trial court's understanding of the law pre-*Rehaif*, Mr. Gary was not informed of the knowledge element of the felon-in-possession charge. As a result, his plea was neither knowing nor voluntary with respect to this element and was therefore invalid. Strikingly, his "guilt [was] established neither by a finding of guilt beyond a reasonable doubt after trial nor by the defendant's own admission that he is in fact guilty." *Id.* at 649 (White, J., concurring).

The knowing-and-voluntary requirement protects the defendant's autonomy interest by ensuring that the choice to present a defense or plead guilty remains "an issue within [his] sole prerogative." *McCoy*, 138 S. Ct. at 1511 ("[T]he violation of McCoy's protected autonomy right was complete when the court allowed counsel to

---

[3] Although the Court rejected the government's attempt to dismiss the error in *Henderson* as harmless, it did not address whether harmless-error review was required as a general matter. *See Henderson*, 426 U.S. at 647. In *Bradshaw*, the Court rejected the defendant's claim that the trial court had failed to advise him of the intent element of the charged crime because the defendant confirmed that his lawyers had advised him of the elements of the charge. *See Bradshaw*, 545 U.S. at 182-83. Here, it is clear that Mr. Gary could not have received any such advisement since it was not yet understood that knowledge-of-status was an element of the charge.

usurp control of an issue within McCoy's sole prerogative."). Tellingly, this Court's jurisprudence on the knowing-and-voluntary requirement rests on the same basic precepts about the value of free choice as its jurisprudence on the autonomy interest. As Justice White explained in *Henderson*, "the choice to plead guilty must be the defendant's: it is [h]e who must be informed of the consequences of his plea and what it is that he waives when he pleads . . . and it is on his admission that he is in fact guilty that his conviction will rest." 426 U.S. at 650 (White, J., concurring) (citing *Boykin*, 395 U.S. 238). In other words, the knowing-and-voluntary requirement ensures the defendant's choice to plead guilty is consistent with his autonomy interest.

II. The failure to inform the defendant of each element of the offense to which he is pleading guilty requires vacatur of the plea.

Since Mr. Gary did not plead to the knowledge element of the charged offense, he did not knowingly and voluntarily plead guilty to the charged offense. As Justice Ames wrote for the Supreme Judicial Court of Massachusetts in 1869, "[t]he plea of guilty is, of course, a confession of all the facts charged in the indictment[,] . . . . [b]ut if the facts alleged and admitted do not constitute a crime against the laws . . . the defendant is entitled to be discharged." *Class v. United States*, 138 S. Ct. 798, 804 (2018) (quoting *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869)).

Each element of the crime charged matters. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with

which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). This requirement is "indispensable," because the accused "may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Id.* at 363-64. The reasonable-doubt standard ensures that no man is deprived of his "good name and freedom" without basis. *Id.* at 364. At trial, of course, the jury must find each element proven beyond a reasonable doubt before a conviction may be entered.

The elements of the crime are no less important at the plea stage. Before a defendant decides to enter a plea, the government presents charges based on the evidence it thinks it can use to prove those charges at trial. Following the indictment or information, the defendant evaluates the strength of the government's evidence in light of the elements of the offense. The defendant then considers whether to put the government to its burden of proving its case at trial, or whether to bargain for a charge or sentence reduction in exchange for a guilty plea. *See* Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas and Trials*, 100 Cal. L. Rev. 1573, 1584-98 (2012) (explaining how the parties' calculus of the costs and benefits of trial versus a plea bargain may vary based on the nature of the crime at issue).

The government's likely evidence in view of the elements of the charged offense can have substantial and even dispositive consequences for the penalty the defendant faces. For instance, in controlled-substance cases under 21 U.S.C. §§ 841 or 846, the applicable sentencing range, including the applicability of a

mandatory-minimum sentence, is tied to one main element—the quantity of the controlled substance involved. A difference of one gram can translate to an additional mandatory 5 years of imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(ii) (requiring a minimum sentence of 10 years for 5 kilograms or more of cocaine); *id.* § 841(b)(1)(B)(ii) (requiring a minimum sentence of 5 years for 500 to 4,999 grams of cocaine). Similarly, mandatory-minimum sentences for firearms offenses under 18 U.S.C. § 924(c) are keyed to three elements: whether the defendant unlawfully brandished or discharged the firearm, *see* 18 U.S.C. § 924(c)(1)(A) (setting minimum sentences of 5, 7, or 10 years); the type of firearm involved, *see id.* § 924(c)(1)(B) (setting minimum sentences of 10 or 30 years); and whether the defendant has a prior conviction under the statute, *see id.* § 924(c)(1)(C) (setting minimum sentences of 25 years or life).

Likewise in the white-collar context, particularly with respect to intent elements. *See, e.g.*, *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (holding that a conviction for obstruction of judicial proceedings under 18 U.S.C. § 1503(a) requires the defendant's knowledge that his actions are likely to affect a judicial proceeding); *Cheek v. United States*, 498 U.S. 192, 201–04 (1991) (requiring defendant's knowledge of his specific legal duties under 26 U.S.C. §§ 7201 and 7203); *see also* Graham, 100 Cal. L. Rev. at 1577-78, 1614-15 (suggesting that the elements of an offense, such as specific intent, can contribute to different conviction, acquittal, and guilty-plea rates). Where the government must prove willfulness or knowledge of a specific statutory scheme, the defendant typically has more bargaining power.

Conversely, if only generalized knowledge is required, the government can take the harder tack. In each of these cases, the elements play a central role in the plea negotiations and the defendant's choice to plead.

The elements of the crime thus bear fundamental significance to both the defendant and the government. For the defendant, a difference in one element can spell the difference between guilt and innocence, guilt the defendant is willing to admit versus guilt he would deny to his grave, or a few years versus decades of imprisonment. This, in turn, determines the defendant's willingness to plead or go to trial. For the government, a difference in one element can determine the possibility of conviction in the first place.

This is precisely why the court is required to find that the defendant understands the "nature of each charge" to which he is pleading before accepting his plea. *See* Fed. R. Crim. P. 11(b)(1)(G) (requiring that the court "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading"). The plea hearing is the "principal oversight mechanism" for the court to determine that the defendant understands the nature of the charge and is pleading voluntarily. Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post*-Boykin *Era*, 77 Notre Dame L. Rev. 597, 627 (2002). When defense counsel discusses the terms and consequences of a proposed plea with her client, "neither the judge, nor the prosecutor, nor any independent arbiter are present." *Id.* Therefore, to ensure the defendant's comprehension and voluntariness, and "in light of the gravity of a plea," the

court "will assume no knowledge on the part of the defendant, even if represented by counsel." *United States v. Vonn*, 535 U.S. 55, 80 (2002) (Stevens, J., concurring in part and dissenting in part).

The plea colloquy is a gateway, not a speedbump. It is a solemn fact-finding moment in which the court, standing in the shoes of the jury, makes critical determinations about whether the plea is knowing, voluntary, and based in fact. Here, the trial court did not find that Mr. Gary knew that he was admitting to knowledge of his status as a person who was barred from owning a firearm. The knowledge element was no less important to the felon-in-possession charge than any other element. Without that element, the crime was not complete.

It is the very nature of this error that distinguishes Mr. Gary's case from those on which the government relies. The government cites *United States v. Vonn* to assert that the reviewing court ought to evaluate the record for evidence of prejudice to the defendant from the error. *See* Pet. Br. 31. But the error in *Vonn* was fundamentally different from the error in Mr. Gary's case. There, the defendant argued that he had not been advised of his right to counsel at trial during the plea colloquy. *See Vonn*, 535 U.S. at 61. Here, the problem was not merely the failure to advise Mr. Gary of his rights at trial in the course of the plea proceeding. Mr. Gary was denied the choice to enter a knowing and voluntary plea in the first place. Without the opportunity to decide whether to plead guilty to knowledge element, he cannot have pleaded to the charged offense—or in this case, to any federal offense,

as "the facts alleged and admitted d[id] not constitute a crime against the laws." *Class*, 138 S. Ct. at 804 (quoting *Hinds*, 101 Mass. at 210). Pleading guilty to a particular crime is a choice the Constitution reserves to defendants. Because Mr. Gary was not afforded that choice, there is no justification for measuring prejudice. Mr. Gary's constitutionally protected interests were definitively impaired when his conviction was accepted without his plea to each of the elements of the offense. He was deprived of the opportunity to make this choice, and thereby injured, even if he would have made the same choice in the hypothetical scenario in which he knew what the crime entailed.

Nor is *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) applicable. *See* Pet. Br. 16-18, 31. There, the defendant argued that the court had failed to advise him that he could not withdraw his plea if the court did not accept the government's recommendations. *See Dominguez Benitez*, 542 U.S. at 79. This, too, was an error different in kind from the error in Mr. Gary's case. The absence of this advisement in *Dominguez Benitez* concerned the defendant's awareness of one specific consequence of his plea. It did not call into question whether the defendant was pleading to the charged crime at all.[4] The problem in Mr. Gary's case is not that

---

[4] The government's citation to *Bousley v. United States*, 523 U.S. 614 (1998) is even farther afield. *See* Pet. Br. 20-21. In *Bousley*, the Court reviewed a collateral challenge to a plea after this Court narrowed the definition of the relevant offense. *See Bousley*, 523 U.S. at 616-18. The Court applied an actual-innocence standard to review the claim precisely because it was a collateral challenge to the plea and implicated finality concerns. It is well established that

he was unaware of certain potential consequences of his plea; it is that he did not agree to plead guilty to the charged offense in the first place, since he never admitted guilt of the knowledge element. Acceptance of his plea nullified his constitutional right to enter a knowing-and-voluntary guilty plea.

III. Permitting the court to impose punishment based on hypothetical guilty pleas would be a dangerous constitutional innovation.

The decision whether to plead guilty is not a choice that the court or the prosecutor can reconstruct by retrospectively examining the record, nor should they. When the defendant did not plead guilty to the charged offense, there is no room for guesswork about the choice the defendant would, could, or should have made had things been a little different—just as there is no room for speculation about whether the defendant would or should have admitted guilt before the jury. *See McCoy*, 138 S. Ct. at 1511; *see also Nixon*, 543 U.S. at 187-88 ("[A] defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid." (citing *Boykin*, 395 U.S. at 242)). Because "[t]he right to defend is personal," only the defendant can decide whether and when he is willing to surrender his liberty. *Faretta*, 422 U.S. at 834.

Neither defense counsel, nor prosecutors, nor even courts may commandeer the right to make the choice to plead guilty, which the Constitution entrusts solely to the defendant. Contrary to the government's assertions,

---

a different standard of review applies on collateral review. *See id.* at 622-23 (citing habeas cases).

see, *e.g.*, Pet. Br. 14, the Constitution demands either a trial or a knowing and voluntary plea. The Constitution does not invite the prosecutor to offer her divination, no matter how well-supported, that the defendant *surely would have* pleaded guilty to the charged crime if he had known what it was. Nor does it permit a court to walk those steps, no matter how few or short, on a defendant's behalf. Nor, it should be said, is there any reason to believe the government's position is limited just one missing element. Under the government's conception of the plea process, a court would be empowered to decide that a defendant would have pleaded guilty even when not told about *multiple* elements; or, who knows, when not told about *any* elements at all—so long as the government could put together a persuasive record about how the defendant would have reacted to a different bargain.

Imagine a defendant charged with the same offense as Mr. Gary, who is told only that the crime involves knowing possession of a firearm, not that it also requires a particular status or knowledge of that status. Under the government's proposed rule, the defendant's guilty plea to knowing possession could be "close enough" assuming a rational defendant would have been unlikely to contest his status or knowledge of his status. *Cf. United States v. Gray*, 780 F.3d 458, 468 (1st Cir. 2015) (rejecting the government's position that the definition of an element in criminal jury instructions was "close enough," explaining that such determinations demand "greater precision than that required by horseshoes and hand grenades"). Or, imagine that the same defendant was not even told that he needed to know he possessed the gun in the first place. The government might then

assert that his guilty plea to mere possession was sufficient because the gun was found in his car, and he would be unlikely to contest knowing possession in light of the simple inference available to a hypothetical jury and the higher penalty he'd likely receive if he lost at trial.

Indeed, imagine a plea scenario even further removed from consideration of the elements charged. The same defendant is told that 18 U.S.C. § 922(g) is violated if he possesses *any* kind of weapon. The defendant acknowledges that an ax was found in his toolshed, so he pleads guilty. On the government's argument here, the government could defend that absurd conviction so long as it could satisfy the court that the defendant would have pleaded guilty to the four missing elements had he known them.

As should be apparent from these examples, the problem with the government's rule is not that it is impossible to prove what a criminal defendant might have done in other circumstances—it is that this very exercise is repugnant to the constitutional process for establishing guilt of an offense. *See, e.g.*, *Brady*, 397 U.S. at 748 (centering the defendant's "admission in open court that he committed the act charged in the indictment" as "the foundation for entering judgment"); *McCarthy*, 394 U.S. at 466 (defining a guilty plea as "admission of all of the elements" of the charged offense and staking voluntariness to the defendant's "understanding of the law in relation to the facts").

Take another, even more ordinary, example. Imagine a parent who pays a babysitter every week in cash without withholding taxes. Under the law, this

person cannot be convicted of obstructing administration of the tax code unless there is a nexus between her conduct and a pending or reasonably foreseeable administrative proceeding, such as an IRS investigation. *See Marinello v. United States*, 138 S. Ct. 1101, 1109-10 (2018) (defining the scope of 26 U.S.C. § 7212(a) as including a nexus requirement). "Such an individual may sometimes believe that . . . he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction." *Id.* at 1108. This distinction matters because the nexus requirement is an element of the offense.

Under the government's theory, however, the parent who hired the babysitter could be convicted of tax obstruction on the basis of supposition alone. She could be charged and allowed to plead guilty to the offense despite never admitting intent to obstruct an IRS proceeding—all the while subjecting herself to up to three years in prison and $5,000 in fines. *See* 26 U.S.C. § 7212(a). On the government's view, as long as the court or the government could bridge that gap on her behalf by contending that the missing element would not have held up the plea, that is enough. *See also Marinello*, 138 S. Ct. at 1108 (listing other examples of people who would be subject to conviction for tax obstruction if the knowledge element could be presumed, including anyone who "leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant").

In effect, the government asks permission to substitute for the guilty plea system a *quasi*-plea system, where the government and court can decide for themselves, based on the record evidence, whether a defendant *should* or *would have* pleaded guilty to a charged offense. Under this system, there is no need for the defendant to decide for himself whether to concede guilt, or to acknowledge that guilt in court, so long as the hypothetical can be answered persuasively by the state. "Knowing and voluntary," under this conception, can be replaced with "close enough for government work."[5]

IV. Given that the Framers' vision of a system of jury trials has already been displaced by pleas, the Court should not accept anything less than informed and voluntary pleas.

For decades, the Framers' vision of a constitutional system of jury trials for criminal defendants has been increasingly supplanted by a system of pleas that

---

[5] In *Marinello*, the Court explained why it could not merely rely on the government's discretion to bring charges when individuals possessed the requisite knowledge or intent. "[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing 'policemen, prosecutors, and juries to pursue their personal predilections,' which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we 'cannot construe a criminal statute on the assumption that the [g]overnment will 'use it responsibly.'" 138 S. Ct. at 1108-09 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974), and *McDonnell v. United States*, 136 S. Ct. 2355, 2372-63 (2016)).

provides far fewer protections for the defendant in exchange for government efficiency. Under this system, defendants surrender their constitutional rights through negotiation with the government and proceedings before the court that are stripped down to a single conversation, resulting in the entry of a conviction that could lead to years or decades of imprisonment. Now the government seeks to chip away at the few protections that remain by asserting that the failure to inform a defendant of the elements of the crime before he pleads guilty is allowable so long as the court and government can agree that the defendant would have pleaded guilty anyway. Accepting the government's argument and allowing entry of a guilty plea without even the defendant's knowing and voluntary admission of guilt to the offense charged would mark an unacceptable further erosion of the Framers' constitutional design.

The jury trial system has long been considered "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The right to a jury trial in criminal proceedings was the only guarantee common to the 12 state constitutions that presaged the Constitutional Convention, *see* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870, 875 n.44 (1994), and is the only right to appear in both an article of the Constitution and the Bill of Rights, *see* U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI.

The Framers were emphatic about the importance of this right as a "valuable safeguard to liberty." As Alexander Hamilton wrote,

> [t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this, the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

Neder v. United States, 527 U.S. 1, 31 (1999) (quoting The Federalist No. 83, at 426 (Alexander Hamilton) (M. Beloff ed. 1987)).

"Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges." *Duncan*, 391 U.S. at 156. "[T]he jury trial provisions in the Federal and State Constitutions" thus "reflect . . . a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*

The reality, however, is that the criminal justice system no longer operates as the Framers envisioned. Only 2% of federal criminal defendants go to trial. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go To Trial, and Most Who Do Are Found Guilty*, Pew Rsch. Ctr. (June 11, 2019), https://perma.cc/R7JZ-SFSE. Instead, "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), and "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).

As Justice Scalia explained, we have accepted this seismic shift "because many believe that without [plea bargaining] our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt." *Lafler*, 566 U.S. at 185 (Scalia, J., dissenting)). And as Justice Scalia suggested, efficiency is the primary benefit to the government from the plea system. By pleading guilty, defendants relieve the government of its burden at trial. The government can secure convictions without having to gather evidence, share it with the defendant, defend its admissibility in court, or deal with any of the other myriad constitutional requirements that accompany trial.

Having won that war, the government now contends that it was too magnanimous in victory and that it is too onerous even to ensure that a defendant is informed of all of the elements of the crime to which he is about to plead guilty. Instead, the government says, courts should be free to assess for themselves whether a defendant "would have" pleaded guilty. *See* Pet. Br. 35.

In the wake of the breakdown of the jury trial system, this Court crafted various protections for defendants who choose to plead guilty, requiring, for example, that the plea be knowing and voluntary. *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). As the Advisory Committee on Criminal Rules recognized in 1966, since the "great majority of all defendants against whom indictments or informations are filed in federal courts plead guilty," the "fairness and adequacy

of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts." Fed. R. Crim. P. 11 advisory committee's note to 1966 amendment. Rule 11 was therefore amended to require courts to determine that each plea is "made voluntarily with understanding of the nature of the charge." *Id.*

In our system of guilty pleas, the determination that the defendant understands the nature of the charge and enters her plea voluntarily is all that stands between the defendant and the extensive loss of rights and benefits that follows a guilty plea. When a defendant pleads guilty, he forgoes not only a fair trial but its accompanying constitutional guarantees, including the right against self-incrimination and the right to confront his accusers. *See Class*, 138 S. Ct. at 805. The defendant also surrenders the right to testify and present evidence in his defense, the right to compel the attendance of witnesses, and the right to be represented by counsel at each stage of the trial proceedings. *See* Fed. R. Crim. P. 11(b)(1)(E)–(F). All this in addition to relinquishing the right to liberty.

And the consequences do not end there. By pleading guilty, a defendant surrenders a sweeping array of other legal protections, of which he may be unaware. These may include the right to vote, the right to carry a firearm, the right to serve on a jury, and the right to obtain a driver's license; a guilty plea may also affect the defendant's eligibility for government-supported health care benefits, food stamps, welfare, housing assistance, and educational aid. The defendant also risks increased penal consequences down the road—ineligibility for

parole, higher penalties on the basis of repeat offender laws, and registration requirements. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 699–700 (2002); *id.* at 700 (explaining that the collateral consequences of conviction are often "much more severe" than the direct consequences and operate "as a secret sentence"). Accepting the sort of *quasi*-pleas that the government has airbrushed as passable here would have the effect of allowing defendants to sacrifice all of these rights with no basis at all.

It is up to this Court to preserve the few constitutional protections that remain at the plea stage. The government asks the Court to sanction the further erosion of these protections by allowing the government to hypothesize whether the defendant would have pleaded guilty in the absence of a knowing and voluntary plea. But to hold that a defendant can plead guilty to a crime without so much as a basic knowledge of the actual elements of the crime would contravene the Framers' intent. It would run afoul of the Fifth Amendment, which guarantees the right against self-incrimination, under which guilty pleas are valid only if they are knowing and voluntary. And it would violate the defendant's autonomy interest in determining the objectives of his own defense. The Court should decline the government's invitation to allow these constitutional protections to crumble any further.

The government points to this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), to assert that the failure to inform a defendant of all of the elements of

a crime before he pleads guilty is not necessarily structural error. *See* Pet. Br. 29-30. Not so. This Court's holding in *Neder* was premised on the fact that the defendant was afforded all of the protections of a trial, including assistance of counsel, an impartial jury, and the opportunity to present evidence. *See Neder*, 527 U.S. at 9. These are precisely the protections a defendant forgoes when he pleads guilty. And it is precisely the absence of these protections at the plea stage that makes it critical that the plea be vacated if the defendant was not on notice of each element of the crime to which he purportedly pleaded.

The Framers "understood the inestimable worth" of a defendant's "free choice" to determine the objectives of his own defense. *Faretta*, 422 U.S. at 834; *see McCoy*, 138 S. Ct. at 1508. This Court has long relied on this principle to protect the defendant's autonomy interest from intrusion and it must do so again here. Allowing the government or the trial court to fill elemental gaps in a defendant's plea is incompatible with this constitutional principle.

CONCLUSION

The Court should affirm the decision below.

MARCH 25, 2021

Respectfully submitted,

DAVID BITKOWER
Counsel of Record
CORINNE M. SMITH
URJA MITTAL
REBECCA R. FATE
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
dbitkower@jenner.com