No. 22-6350

In the Supreme Court of the United States

RAUL ALVAREZ,
Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Must a client object in open court to invoke their Sixth Amendment right to maintain actual innocence as the objective of their defense?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. REQUIRING AN EXPRESS OBJECTION TO DEFENSE COUNSEL'S ADMISSION OF GUILT IS INCONSISTENT WITH *MCCOY V. LOUISIANA*. 4

II. THE LOWER COURT'S OPINION WILL FURTHER ERODE THE RIGHT TO A JURY TRIAL. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Faretta v. California, 422 U.S. 806 (1975) 2, 3, 4, 5, 6, 13

Illinois v. Allen, 397 U.S. 337 (1970) 6

Jones v. Barnes, 463 U.S. 745 (1983) 2

Lafler v. Cooper, 566 U.S. 156 (2012) 9

McCoy v. Louisiana, 138 S. Ct. 1500 (2018) 2, 3, 6, 7, 8, 9, 11

McKaskle v. Wiggins, 465 U.S. 168 (1984)..... 12

People v. Alvarez, 205 A.D.3d 577 (2022)..... 7

Strickland v. Washington, 466 U.S. 668 (1984) 11

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) 6, 12

Other Authorities

Clark Neily, *A Distant Mirror: American-Style Plea Bargaining through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719 (2020) 10, 11

Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. REV. 1147 (2010) 5, 12

George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000)..... 9

Goldschmidt & Stemen, *Patters and Trends in Federal* Pro Se *Defense, 1996–2011: An*

Exploratory Study, 8 FED. CTS. L. REV. 81 (2015) 12

Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014) 10

Kimberly Helene Zelnick, *In* Gideon*'s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363 (2003) 7

Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013)..... 13

Michael Nasser, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599 (2013)..... 11

NAT'L ASSOC. OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018) 11

Paul Marcus, *The* Faretta *Principle: Self-Representation versus the Right to Counsel*, 30 AM. J. COMP. L. SUPP. 551 (1982)..... 12

Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344 (2014) 11

U.S. SENT'G COMM'N, 2021 SOURCEBOOK OF FED. SENT'G STATS., TABLE 11 (2021)..... 10

Why Do Innocent People Plead Guilty To Crimes They Didn't Commit?, THE INNOCENCE PROJECT (2018) 10

WILLIAM R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE (2018) 11

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending and securing the principle of defendant autonomy and ensuring that the criminal defense bar functions as a check on government power through zealous representation of individual citizens—not as an arm of the state imposing its own view of the good on unwilling defendants.

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[1] Rule 37 statement: All parties were timely notified to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Criminal defense is personal business. A criminal defendant may never face a more momentous occasion than his trial, nor one where his decisions have greater personal consequence. This Court has recognized that the Sixth Amendment not only mandates procedural rights for the accused, but also secures a defendant's autonomy in the exercise of those rights: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). This principle of autonomy initially received attention in the context of self-representation, but has since found expression in the defendant's "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). One such "fundamental decision" is the right to decide the objective of the defense. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

In the present case, Raul Alvarez sought to exercise his autonomy and maintain factual innocence as the objective of the defense. He expressed this decision to counsel numerous times in advance of trial, and reasonably believed counsel's actions would be in pursuit of complete acquittal. Pet. Br. at 8–9. However, during closing arguments, defense counsel told the jury Mr. Alvarez was guilty. *Id.* at 8. Counsel argued that the jury should find Mr. Alvarez guilty of the lesser charge of third-degree assault and acquit on the charge of second-degree assault. *Id.* The jury did as counsel requested, and Mr. Alvarez was convicted on the lesser charge. *Id.* at 9.

Unprepared for his attorney's concession of guilt, and under the impression that he was not allowed to speak during trial, Mr. Alvarez did not contemporaneously object to counsel's statements. At a post-trial hearing, Mr. Alvarez testified that he had numerous discussions with counsel and made it unequivocally clear his decision to maintain factual innocence. *Id.* Trial counsel's testimony verified Mr. Alvarez's claims and made clear his understanding of Mr. Alvarez's decision to maintain innocence. *Id.* Regardless, the trial court held that defendant's autonomy rights were not violated, and on appeal, the New York Supreme Court agreed. *Id.* at 10.

Requiring a defendant to object to his attorney's admission of guilt in open court misunderstands the purpose of the Sixth Amendment right to a personal defense. The Framers wanted defendants to have control over matters with a direct impact on their individual liberty. As such, they structured the Sixth Amendment to give certain protections to the defendant personally. *Faretta*, 422 U.S. at 848. Thus, the question is not whether the defendant took specific steps at trial to preserve his autonomy rights, but rather, whether "counsel usurp[ed] control of an issue within" the defendant's "sole prerogative." *McCoy*, 138 S. Ct. at 1511. Conditioning the defendant's autonomy on his ability to object in open court gives counsel the opportunity to rob the defendant of his right to a personal defense. It places a barrier between the defendant and his ability to maintain his innocence, and will inevitably result in the erosion of defendant autonomy.

It is especially important to protect the defendant's right to autonomy in light of the near-disappearance of the criminal jury trial. Today, jury trials have been

all but replaced by plea bargaining as the baseline for criminal adjudication, and there is ample reason to doubt whether the bulk of these pleas are truly voluntary. If defendants are forced to contend with their own attorneys as potential adversaries, they will feel increased pressure to plead guilty. Disregarding the importance of defendant autonomy not only places coercive pressure on criminal defendants; it contributes to the erasure of criminal jury trials from American courtrooms.

This Court should grant certiorari to ensure the Sixth Amendment right to autonomy remains accessible to criminal defendants. Making the defendant's right to maintain innocence contingent on his ability to object if and when counsel fails to abide by his decision undermines the purpose of the Sixth Amendment right to a personal defense. Moreover, it will cause more defendants to plead guilty in order to avoid contending with their own attorneys at trial. Failure to respect defendant autonomy damages the criminal justice system as a whole, and thus the system will be best served by a clear decision protecting defendant autonomy.

ARGUMENT

I. REQUIRING AN EXPRESS OBJECTION TO DEFENSE COUNSEL'S ADMISSION OF GUILT IS INCONSISTENT WITH *MCCOY V. LOUISIANA*.

The Sixth Amendment "grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819–20. The Framers understood "that the defendant, not counsel, was to be in charge of the defense." Erica J. Hashimoto, *Resurrecting Autonomy:*

The Criminal Defendant's Right to Control the Case, 90 B.U.L. REV. 1147, 1149 (2010). Thus, "the entire history upon which the Framers drafted the Sixth Amendment featured the defendant as the primary decision-maker and advocate in the case." *Id.* at 1168.

This Court recognized the Framers' intent in *Faretta v. California*, when it established autonomy as a bedrock principle of the Sixth Amendment, and due process more generally. 422 U.S. at 806. In holding that the Sixth Amendment grants a defendant the right to self-representation, the Court relied on the larger and more fundamental right "to make one's own defense personally." *Id.* at 819. "The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the antilawyer sentiment of the populace, but also the 'natural law' thinking that characterized the Revolution's spokesman." *Id.* at 830 n.39.

The *Faretta* Court emphasized that *all* of the procedural rights in the Sixth Amendment, not just assistance of counsel, are granted to the accused, *id.* at 819, and that this suite of "defense tools" must be protected as an "aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820. Thus, the Sixth Amendment's guarantee that "the accused personally" possesses "the right to make his defense" is not only imperative to self-representation, it is central to the overall principle of defendant autonomy. *Id.* at 819.

The right to decide the objective of one's case is likewise rooted in the Sixth Amendment right to a personal defense. In *McCoy v. Louisiana*, the defendant expressed his desire to maintain innocence; however,

at trial, counsel conceded guilt over the defendant's "intransigent and unambiguous" objection. 138 S. Ct. at 1507. In finding counsel's actions unconstitutional, the Court held that the Sixth Amendment right to a personal defense affords the defendant ultimate authority to decide the objective of his case. *Id.* at 1505.

Much like the right to self-representation, the right to defendant autonomy—i.e., the right to decide the objective of one's defense—is based on the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* at 1511 (quoting *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017)). It is the defendant's "prerogative, not counsel's, to decide on the objective of his defense" because ultimately, it is his individual liberty at stake. *Id.* at 1505. The decision to maintain innocence is not a strategic choice "about how best to *achieve* a client's objective;" it is a choice "about what the client's objectives in fact *are*." *Id.* at 1508. "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel . . . so may she insist on maintaining her innocence." *Id.* Therefore, "although he may conduct his own defense ultimately to his own detriment," the defendant's "choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337 (1970) (Brennan, J., concurring)).

Just as in *McCoy*, Mr. Alvarez's attorney conceded guilt even though Mr. Alvarez "repeatedly and adamantly insisted on maintaining his factual innocence." *McCoy*, 138 S. Ct. at 1501. However, because Mr. Alvarez failed to expressly object to counsel's concession

on the record at trial, the Supreme Court of New York distinguished this case from *McCoy*. *People v. Alvarez*, 205 A.D.3d 577, 577 (2022). It deemed counsel's admission a "strategic concession" made "in a successful effort to prevent his client from being convicted of second-degree assault," and found Mr. Alvarez's Sixth Amendment rights unviolated. *Id.* at 577.

In requiring a defendant to expressly object to his attorney's concession of guilt, the New York Supreme Court's opinion deviates from this Court's holding in *McCoy* as well as the greater constitutional principle of defendant autonomy. Instead of focusing on whether the defendant's autonomy rights were violated by counsel's actions, the New York Supreme Court focused on whether such a violation was established on the record at trial. In doing so, the New York Supreme Court ignored the role of autonomy in the expression of the defendant's Sixth Amendment right to a personal defense.

To conclude that the defendant's right to maintain his innocence is waived if not expressly invoked in open court is inconsistent with *McCoy* and this Court's previous opinions concerning the right to a personal defense. Counsel should act as "the means for preserving autonomy, not a mechanism for forfeiting it." Kimberly Helene Zelnick, *In* Gideon*'s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 367 (2003). When, as in this case, a defendant expresses to counsel his "unambiguous and intransigent" decision to maintain innocence, counsel is bound by that decision. *McCoy*, 138 S. Ct. at 1509 ("If after consultations," the defendant disagrees with counsel's proposal to concede guilt, "it [is] not open to [counsel] to override [the

defendant's] objection."). It is immaterial whether the defendant expresses his decision to maintain innocence in private or in open court because the ultimate result is the same: counsel is choosing to usurp control of an issue within the defendant's sole prerogative. *See id.* at 1511. Thus, the question for determining whether a *McCoy* violation occurred is not whether the defendant expressed his desired objective on the record in open court, but rather whether "counsel usurp[ed] control of an issue within" the defendant's sole prerogative. *Id.*

In the instant case, the answer to that question is yes. Mr. Alvarez invoked his Sixth Amendment right to autonomy when he unequivocally expressed his desire to maintain innocence to defense counsel. Knowing Mr. Alvarez wanted to maintain innocence as the objective of his defense, counsel chose to concede guilt during closing argument. In doing so, counsel usurped an issue within the Mr. Alvarez's sole prerogative, and thus violated Mr. Alvarez's Sixth Amendment right to autonomy. To hold otherwise would undermine the right to autonomy established by this Court in *McCoy* and protected by the Sixth Amendment.

It is inconsequential that Mr. Alvarez's attorney conceded guilt to a lesser offense, rather than all charged offenses. Nor does it matter that counsel's choice to concede guilt was ultimately successful in achieving a lesser conviction. Mr. Alvarez told his attorney he wanted to maintain total factual innocence. Pet. Br. at 8–9. By conceding guilt to the lesser charge, defense counsel acted in opposition to Mr. Alvarez's desired objective for the case. As much was recognized by defense counsel. *Id.* at 9. When, as here, counsel is "[p]resented with express statements of the client's

will to maintain innocence," he "may not steer the ship the other way." *McCoy*, 138 S. Ct. at 1509. To do so violates the defendant's Sixth Amendment right to autonomy.

The defendant's ability to decide the objective of his defense should not be predicated on his ability to object to counsel's unilateral decision to depart from the defendant's expressed objective. Requiring a defendant to affirmatively preserve the invocation of his right to autonomy is inconsistent with the Sixth Amendment guarantee to a personal defense and undercuts this Court's holding in *McCoy*. Accordingly, this Court should grant certiorari to protect defendant autonomy and ensure counsel cannot hijack a client's assertion of innocence and "steer the ship the other way." *Id.*

II. THE LOWER COURT'S OPINION WILL FURTHER ERODE THE RIGHT TO A JURY TRIAL.

The jury trial is foundational to the notion of American criminal justice, and it is discussed more extensively in the Constitution than nearly any other subject. Yet despite their intended role as the central pillar of our criminal justice system, jury trials have all but disappeared from modern American courtrooms. The proliferation of plea bargaining, which was completely unknown to the Framers, has transformed our robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

Today, guilty pleas comprise all but a small fraction of convictions. In 2021, 98.3% of federal convictions resulted from pleas. U.S. SENT'G COMM'N, 2021

SOURCEBOOK OF FED. SENT'G STATS., TABLE 11 (2021).[2] This statistic reflects the understanding that many criminal defendants—regardless of factual guilt—feel pressured to plead guilty simply because the risk of going to trial is too great. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014).[3]

The data reflects this conclusion. Out of the 362 DNA-based exonerations since 1989, nearly 11% "involved people who pleaded guilty to serious crimes they didn't commit." *Why Do Innocent People Plead Guilty To Crimes They Didn't Commit?*, THE INNOCENCE PROJECT (2018).[4] Likewise, "according to the National Registry of Exonerations, 18 percent of known exonerees pleaded guilty." *Id.* Yet even when faced with an innocent defendant, "[i]nstead of vacating their convictions on the basis of innocence, the prosecution offers the wrongly convicted a deal—plead guilty." *Id.*

The government is at a distinct advantage during the plea bargaining process. Prosecutors "possess a wide array of levers that they can—and routinely do—bring to bear on defendants to persuade them to waive their right to trial and simply plead guilty." Clark Neily, *A Distant Mirror: American-Style Plea Bargaining through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 730 (2020). These levers include: threatening increased penalties for defendants hoping

[2] Available at https://bit.ly/3Mv0ud0.

[3] Available at https://bit.ly/3KC6EHa.

[4] Available at https://bit.ly/3OHEptX.

to go to trial (commonly known as the "trial penalty"),[5] threatening to add charges in an effort to increase a potential sentence,[6] the use of pretrial detention,[7] withholding exculpatory evidence during plea negotiations,[8] threatening to use uncharged or acquitted conduct to enhance a potential sentence,[9] and threatening to prosecute family members.[10] *Id.* Therefore, it comes as no surprise to learn that many of those who plead guilty "have been induced by the government to do so." *Id.* at 726.

Our criminal justice system is premised on adversarial proceedings, and effective, zealous defense counsel is therefore "critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Not every defendant succumbs to the immense pressure to plead guilty, and those who do seek to exercise their constitutional right to a jury trial typically rely on defense counsel for assistance. *McCoy,* 138 S. Ct. at 1507 (citing Goldschmidt & Stemen, *Patters and Trends in Federal* Pro Se *Defense, 1996–2011: An Exploratory Study*, 8 FED.

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[5] NAT'L ASSOC. OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://bit.ly/38IF8KG.

[6] *Id.* at 50.

[7] Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1351–56 (2014)

[8] Michael Nasser, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3613 (2013).

[9] WILLIAM R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE 75 (2018).

[10] *Id.*

CTS. L. REV. 81, 91 (2015)). If a defendant wishing to avoid a guilty plea cannot trust counsel to advocate for his innocence, his only alternative is to dispense with counsel and proceed *pro se*. *See* Hashimoto, *supra*, at 1183.

But, "[f]or the average defendant . . . self-representation may not be a great option." *Id.* at 1184. The American criminal justice system is complex and difficult to navigate. *See* Paul Marcus, *The* Faretta *Principle: Self-Representation versus the Right to Counsel*, 30 AM. J. COMP. L. SUPP. 551, 569 (1982) (explaining that "the right of self-representation will not alter the rules of procedure in trials"). For this reason, "few felony defendants—between .03% and .05%—actually choose to self-represent." *Id.* Even the Court has recognized that self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant." *Weaver*, 137 S. Ct. at 1908 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)).

Forcing defendants to contest their own attorneys places additional stress on individuals already facing immense pressure to plead guilty. The possibility that defense counsel may become an adversary during trial is enough reason for many defendants to forego trial altogether. In fact, Mr. Alvarez told the trial court that, had he known his attorney intended to concede guilt, he "would [have] just take[n] a plea bargain." Pet. Br. at 10. If defendants are forced to contend with not only the government, but their own counsel, in seeking to maintain innocence, it will inevitably cause more defendants to concede to the government's demands and forego their constitutional right to a jury trial. *See* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative*

Empirical Study of Plea Bargaining's Innocence Problem, 103 J. CRIM. L. & CRIMINOLOGY 1, 17–19 (2013) (discussing why many innocent defendants choose to plead guilty rather than "roll the dice" at trial").

The disappearance of the jury trial is a deep, structural problem that far exceeds the bounds of any one case or doctrine. But "[w]hen admission of guilt is forced upon an unwilling defendant, it is not just the accused who "can only . . . believe the law contrives against him," it is the jury, and the public at large. *Faretta*, 422 U.S. at 834. Criminal defendants face insurmountable pressure to plead guilty. If they are unable to trust counsel to honor their Sixth Amendment right to maintain innocence, they are more likely to take a deal, rather than roll the dice at trial. Thus, to avoid further discouraging defendants from exercising their right to a jury trial, it is especially important now to ensure that the defendant's Sixth Amendment right to autonomy is respected.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

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