No. 12-167

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY DAVILA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals correctly set aside the guilty plea of a defendant who had been pressured to plead guilty by a magistrate judge acting in clear violation of Federal Rule of Criminal Procedure 11(c)(1), which prohibits courts from participating in plea discussions.

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STATEMENT

Respondent Anthony Davila pleaded guilty in May 2010 to one count of conspiring to defraud the government in violation of 18 U.S.C. § 286. Mr. Davila initially was adamant about his desire to exercise his right to go to trial. He reluctantly changed his mind only after a magistrate judge did what Federal Rule of Criminal Procedure 11(c)(1) categorically forbids. That Rule states: "An attorney for the government and the defendant's attorney … may discuss and reach a plea agreement. The court must not participate in these discussions." Ignoring this flat prohibition, the magistrate judge implored Mr. Davila to "come to the cross," admit everything, and negotiate a plea agreement. Mr. Davila now seeks to vacate his tainted plea.

A federal grand jury in the Southern District of Georgia indicted Mr. Davila on 34 fraud-related charges in May 2009. J.A. 162-74. The indictment included 11 counts each of making false claims to the IRS, mail fraud, and aggravated identity theft, all arising out of 11 instances in which Mr. Davila allegedly sought to collect improper income tax refunds by submitting sham returns in other people's names. The 11 returns were allegedly prepared and submitted in Richmond County, Georgia, in May 2007. According to the indictment, Mr. Davila improperly collected some $25,000 from the government as a result of this conduct. *See* J.A. 165-67.

The remaining count was the conspiracy charge to which Mr. Davila ultimately pleaded guilty. The scope of the alleged conspiracy extended well beyond

the indictment's substantive counts. According to the indictment, during a three-year period from approximately January 1, 2005 to December 31, 2007, Mr. Davila, acting in both Florida and Georgia, filed more than 120 false tax returns and received some $423,000 in refunds from the IRS. *See* J.A. 163-65. The only allegation of coordinated criminality was that an unindicted co-conspirator (who had later become an informant) supposedly dropped "certain of the false and fictitious returns" in the mail. J.A. 165.

Mr. Davila was arrested and appeared before a magistrate judge on June 1, 2009. The magistrate judge appointed counsel, and Mr. Davila entered a plea of not guilty. The following week, the magistrate judge conducted a detention hearing and granted the government's motion to hold Mr. Davila without bond pending trial. During the hearing, a government investigator testified that the unindicted co-conspirator, Jennifer Rodriguez, had claimed to have mailed "some" of the 11 returns from May 2007 that formed the basis of the substantive counts. Docket Entry 50, at 22 (filed Mar. 18, 2010). The government offered no evidence that Ms. Rodriguez was involved in (or was even aware of) a scheme to prepare and submit false returns prior to May 2007. To the contrary, the investigator admitted that Mr. Davila and Ms. Rodriguez apparently did not even meet until at least July 2006—18 months after their conspiracy supposedly began. *Id.* at 31-32.

The government soon presented a plea offer to Mr. Davila's counsel, which counsel attempted to discuss with Mr. Davila in jail. Mr. Davila, who suf-

fers from schizoaffective disorder, told counsel "in no uncertain terms that he was not capable of reviewing [the plea offer] or comprehending any explanation of it at that time." Docket Entry 35, at 2 (Aug. 21, 2009). Following this exchange, counsel asked the court to order a competency evaluation. *Id.* at 3.

The district court granted counsel's request, and Mr. Davila was sent to a federal medical facility in Texas, where he remained for nearly two months. In January 2010, the district court received a written report from the facility detailing Mr. Davila's condition. Mr. Davila, the report noted, "showed a sufficient rational understanding of the legal proceedings" and expressed a strong desire to exercise his trial rights:

> Although Mr. Davila was aware of the concept of a plea agreement, he was somewhat insistent that he would not consider a plea offer "because I didn't do this and I want my day in court." Mr. Davila reported that, at the present time, he wants to "fight my charges in court with a jury trial. That is my right, even if my attorney does not feel that is the best option." Mr. Davila presented as somewhat irritable and stubborn when discussing his legal case and charges…. He showed no influence of psychosis and/or self-defeating motivation as it related to his decision-making, other than his insistence on wanting to "fight my case and make them prove I did it."

Docket Entry 38, at 8-9 (Jan. 11, 2010); *see also* Docket Entry 128, at 8-9 (filed Jan. 18, 2011) (competency hearing transcript) (noting that Mr. Davila had "adamantly stated not only his right to have a jury determine the issues of guilt or innocence but his absolute desire to submit the case to the jury for determination").

The magistrate judge scheduled Mr. Davila's competency hearing for late February. Meanwhile, on January 27, 2010, Mr. Davila sent a handwritten letter to the district court requesting substitution of his appointed counsel. Among other things, Mr. Davila complained that his counsel, who was primarily a civil lawyer, was not qualified to handle a federal criminal trial, had not been adequately consulting with him, had failed to investigate the government's star witness (the unindicted co-conspirator), and had never discussed possible defenses with him. C.A. E.R. Ex. B, at 1. In Mr. Davila's words, counsel "has never mentioned a defense at all. The only defense he has expressed to me is to plead guilty[.]" *Id.* at 1-2.

In response to the letter, the magistrate judge convened an in camera hearing with Mr. Davila and his appointed counsel on February 8, 2010. From the start, the judge made clear that he had no intention of appointing new counsel. *See* J.A. 148 ("[H]e is the only court appointed attorney you are going to get. Make sure you understand that."). According to the judge, Mr. Davila's complaints rang especially hollow because his attorney "was my law clerk for a year, and he was one of the finest law clerks I ever had." J.A. 148.

Turning to the specifics of Mr. Davila's letter, the judge addressed "the fact that [counsel] thinks you ought to plead guilty." J.A. 152. This is often good advice, the court noted, and suggested that it was so here:

> In view of whatever the Government's evidence in a case might be, it might be a good idea for the Defendant to accept responsibility for his criminal conduct to plead guilty and go to sentencing with the best arguments on your behalf still available for not wasting the Court's time, not causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case.

Id.

Mr. Davila responded that counsel had pressed him to "sign an agreement without giving me my options" and did not once "talk about a viable defense at all except for pleading guilty." J.A. 154-55. The judge replied by telling Mr. Davila that "there may not be a viable defense to these charges." J.A. 155.

The judge then reiterated that he would not appoint new counsel and "strongly advise[d] [Mr. Davila to] make up with Mr. Loebl and recognize the fact that he is a very fine attorney." J.A. 158. The judge went on to urge Mr. Davila to stop resisting and to take a plea:

> [T]ry to understand, the Government, they have all of the marbles in this situation…. The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.

J.A. 159-60.

Noting that Mr. Davila's guidelines range would "probably [be] pretty bad because your criminal history score would be so high," the judge advised that, beyond reducing his sentencing exposure by accepting responsibility, Mr. Davila should attempt to find "some way" to "cooperate with the Government" so that they might move for downward departure from the guidelines. J.A. 160. The judge told Mr. Davila that, to get the acceptance-of-responsibility and cooperation benefits, he would have to be "forthcoming and not try[] to make yourself look like you really didn't know what was going on." J.A. 160.

The judge concluded by again urging Mr. Davila "to come to the cross":

> You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

J.A. 160-61.

Several weeks later, the magistrate judge conducted a competency hearing and issued a report and recommendation finding Mr. Davila competent to stand trial. Docket Entry 44 (Mar. 4, 2010). The district court adopted the report and recommendation in late March. Docket Entry 52 (Mar. 23, 2010).

Immediately thereafter, plea negotiations became active, and Mr. Davila signed an agreement on May 11, 2010. In exchange for his plea of guilty to the conspiracy count, the government agreed to dismiss the remaining counts. The government also agreed not to object to a recommendation from the probation office for a two-level reduction for acceptance of responsibility and to move for an additional one-point reduction if Mr. Davila met certain conditions. *See* J.A. 127-28.

The district court convened a change-of-plea hearing on May 17. At the hearing, Mr. Davila insisted that the indictment overstated the scope of the

conspiracy. *See, e.g.*, J.A. 96 ("[A]ny conspiracy with Jennifer Rodriguez did not start until after July of 2006."). But he ultimately agreed that his conduct satisfied the elements of the offense. J.A. 99. To determine whether there was indeed a factual basis for the plea, the court heard testimony from a government investigator, who confirmed that, as far as he knew, Mr. Davila and Ms. Rodriguez did not meet until July 2006. The investigator acknowledged that the government had not "spoken to anyone directly who has information concerning a filing of fraudulent tax returns prior to July of '06." J.A. 110. The district court nevertheless accepted Mr. Davila's plea to the conspiracy as charged—a three-year, two-state conspiracy involving more than 120 tax returns and more than $423,000 in losses. J.A. 123.

Prior to sentencing, Mr. Davila filed a motion seeking to terminate his appointed counsel and proceed pro se. He cited "a breakdown in … communication" and a breach of "attorney/client loyalty." Docket Entries 67, at 1 (July 27, 2010), 70, at 2 (Aug. 4, 2010). Specifically, he complained that counsel had acted improperly by advising him to plead guilty to the charged conspiracy and that counsel was now refusing to take steps to clarify to the court that any conspiracy was much narrower than the government alleged. The magistrate judge ultimately agreed to allow Mr. Davila to represent himself, with his appointed counsel serving as stand-by counsel. Docket Entry 77 (Sept. 14, 2010).

A day after the magistrate judge granted Mr. Davila's motion to terminate counsel, Mr. Davila moved to vacate his plea. Mr. Davila again faulted

the government for knowingly overstating the scope of the charged conspiracy and faulted his attorney for encouraging him to proceed with the plea. Docket Entries 79 (Sept. 15, 2010), 87 (Oct. 26, 2010).

The district court quickly disposed of Mr. Davila's motion at the start of his sentencing proceeding. Mr. Davila, the court concluded, had voluntarily entered into the plea agreement and had admitted that "any facts stated in the plea agreement were true and correct." J.A. 71.

The court proceeded to reject Mr. Davila's objections to the presentence investigation report. The report had calculated a total offense level of 23, which included a 14-point enhancement based on the report's conclusion that the losses at issue exceeded $400,000. J.A. 74, 76. The result was a guidelines range of 92 to 115 months' imprisonment. J.A. 74. The court sentenced Mr. Davila at the top of that range and ordered restitution of $423,530.63. J.A. 77.

Mr. Davila promptly filed a pro se notice of appeal. Docket Entry 96 (Nov. 15, 2010). The Court of Appeals assigned his trial counsel—the same attorney Mr. Davila had previously terminated—to represent him. Docket Entry 100 (Nov. 30, 2010). Mr. Davila asked both the district court and the Court of Appeals for new "conflict-free" counsel and filed papers criticizing his attorney for advising him to accept the plea without fully informing him of its consequences. Docket Entries 96 (Nov. 15, 2010), 116 (Dec. 17, 2010); 10-15310 Docket Entry (11th

Cir. Jan. 28, 2011). The courts denied those requests.

Mr. Davila's counsel then filed a brief stating that Mr. Davila had no nonfrivolous basis to appeal and sought to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals denied counsel's *Anders* motion. During its "independent review" of the record, the court found "an irregularity in the statements of a magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge Davila to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." Pet. App. 7a. Counsel, the court observed, had not discussed "whether this irregularity constituted an issue of arguable merit or express[ed] an opinion as to whether judicial participation [in plea discussions] occurred." *Id.* The court instructed counsel to file either "a merits brief that challenges the magistrate's pre-plea statements under Rule 11(c)(1)" or a new *Anders* brief addressing the issue. Pet. App. 8a.

Mr. Davila's counsel proceeded to file a brief asking the Court of Appeals to vacate Mr. Davila's conviction on the ground that the magistrate judge had violated Rule 11(c)(1)'s judicial participation prohibition. 10-15310 Docket Entry (11th Cir. Aug. 19, 2011). In response, the government conceded that the magistrate judge's comments "amounted to error, and the error was plain." 10-15130 Docket Entry at 14 (11th Cir. Sept. 29, 2011). The government, however, urged the Court of Appeals to deny relief on the ground that "Davila cannot demonstrate that the comments had any effect on his substantial rights,

that is, that there is a reasonable probability that Davila would not have pled guilty had the magistrate judge refrained from making the troublesome comments." *Id.* at 11.

The Court of Appeals ruled in Mr. Davila's favor. Reviewing for plain error, the court "agree[d] with Davila that the magistrate judge's comments at the *in camera* hearing amounted to judicial participation in plea discussions." Pet. App. 5a. Judicial participation, the court noted, "'inevitably carries with it the high and unacceptable risk of coercing a defendant to … plead guilty'" and threatens "'the integrity of the judicial process.'" Pet. App. 3a-4a (quoting *United States v. Johnson*, 89 F.3d 778, 782-83 (11th Cir. 1996)). Accordingly, the fact that Mr. Davila "pled guilty after these comments were made" sufficed to warrant relief without any further showing of "individualized prejudice." Pet. App. 5a. The court "vacate[d] Davila's conviction and remand[ed] … with the instruction that Davila's not guilty plea be reinstated and that the Chief Judge of the District Court reassign the case to another district judge with the instruction that the magistrate judge who handled Davila's case is disqualified." *Id.*

SUMMARY OF ARGUMENT

I. Federal judges "must not participate in [plea] discussions." Fed. R. Crim. P. 11(c)(1). This case involves an undisputed and egregious violation of that categorical prohibition: a judge urging a criminal defendant to forgo his trial rights and admit his guilt. When a defendant pleads guilty in the wake of such a violation, it is inappropriate for a

reviewing court to speculate about whether the defendant might have made the same decision in the absence of the judge's improper intervention. It must treat the plea as invalid and allow the defendant to plead anew.

A. The ban on judicial participation in plea discussions announced in Rule 11(c)(1) differs in kind from the technical plea-colloquy procedures set forth elsewhere in Rule 11, which come into play *after* a defendant decides to proffer a guilty plea. A variance from those colloquy requirements does not inherently impair the process that led to the plea. This Court confronted such variances in *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004)—the two precedents on which the government most heavily relies. The judicial participation prohibition, in contrast, speaks to the period *before* any plea has been proffered and reflects a judgment that such participation, especially when it comes in the form of blatant judicial pressure to plead guilty, is fundamentally incompatible with a fair criminal process. A judge who violates the ban alters the entire pretrial dynamic. For the defendant, the judge becomes an additional adversary rather than the ultimate guarantor of the defendant's rights and guardian of the presumption of innocence. For the defendant's attorney, the judge's intervention creates serious pressure to secure a deal. Because judicial intervention inevitably prevents the adversary system from functioning as it should, any guilty plea that follows is tainted and is properly deemed invalid.

B. A reviewing court cannot save a plea obtained after a plain Rule 11(c)(1) violation by conducting a speculative inquiry into whether the defendant might have entered the same plea absent the judge's misconduct. Rule 11(h) does not call for such analysis. By its terms, the Rule applies only to "variance[s]" from the "procedures required" by Rule 11. Rule 11(c)(1) is a clear prohibition. It is not properly characterized as a required "procedure[]," and violations of the Rule are not "variance[s]." This language is instead meant to describe the type of plea-colloquy errors at issue in *Vonn* and *Dominguez Benitez*. The Advisory Committee notes accompanying Rule 11(h) lend strong support to this view. They recognize that certain types of Rule 11 errors can never be dismissed as harmless. The chief example the Advisory Committee offered is the error a judge commits by allowing a prosecutor to conduct the Rule 11 plea colloquy. If that error requires reversal, the same is necessarily true of the more egregious error that occurs when a judge exhorts a defendant to plead guilty.

C. Even if subdivision (h) applied, the characteristics of plain Rule 11(c)(1) violations confirm that they should not be subject to the sort of individualized prejudice inquiry the government advocates. All of the factors this Court has considered when deciding whether to require a specific showing of prejudice counsel in favor of holding that judicial exhortations to plead guilty affect substantial rights by their very nature:

First, when judges participate in plea discussions and press for guilty pleas, they threaten

a defendant's fundamental rights by, among other things, interfering with the jury trial guarantee and the privilege against self-incrimination. They also gravely compromise the neutrality of the court.

Second, the coercive pressure inherent in judicial advocacy of guilty pleas makes it virtually certain that such errors will influence the course of the proceedings. The government suggests that judicial involvement in the plea process will sometimes be inconsequential, but its examples likely do not amount to judicial participation within the meaning of Rule 11(c)(1), and they certainly do not come within the core category of conduct the Rule condemns—direct judicial exhortations to plead guilty. That is the class of conduct at issue in this case.

Third, any inquiry into whether the defendant would have entered the same plea had the judge not altered the dynamic of the plea process is hopelessly speculative. Defendants are not required to apply any set criteria to their plea decisions, and the record generally will provide no more than a glimpse into their thought processes and into the details of the parties' negotiations.

Finally, the type of defendant-specific prejudice inquiry the government advocates will have practical costs. To the extent defendants aggrieved by judicial exhortation errors do not obtain relief on direct appeal, they will simply seek collateral review, and the nature of their claims will often necessitate substantial proceedings.

D. Because Rule 11(c)(1) errors categorically differ from plea-colloquy errors, it would be inappropriate to import into this context the remedial analysis this Court adopted in *Vonn* and *Dominguez Benitez*. Where, as in this case, an error alters the structure of the plea negotiation process and injects an element of coercion, stronger remedial medicine is required.

II. Even under the government's preferred approach to prejudice, this Court should affirm the judgment in Mr. Davila's favor.

A. Contrary to the government's assumption, review of Mr. Davila's claim should not occur in a plain-error framework, and the government should therefore have the burden of proving the absence of prejudice. It would have been unrealistic in the circumstances of this case to expect a contemporaneous objection to the magistrate judge's misconduct, and it would be unfair to penalize Mr. Davila for the lack of objection. Mr. Davila's attorney had no incentive to object given that the magistrate judge was sending exactly the message counsel wanted Mr. Davila to hear. Meanwhile, Mr. Davila himself had no obligation to object because he was represented, if only nominally.

B. Regardless, wherever the burden lies, the magistrate judge's misconduct was patently prejudicial. There can be no real doubt that Mr. Davila, who was long adamant about his desire to take his case to trial, was influenced by the judge's exhortations when he decided to pursue a plea deal. The record offers no alternative explanation for his

change of heart. The fact that it took some time for the plea deal to be negotiated and finalized in no way detracts from the powerful inference that the magistrate judge helped get Mr. Davila to the bargaining table. Similarly, it is irrelevant that a different judge later presided over the change-of-plea hearing. The offending remarks almost certainly affected Mr. Davila's decision to proffer the plea, and the district court did nothing to disavow them. Mr. Davila should have an opportunity to replead.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY GRANTED RELIEF TO MR. DAVILA WITHOUT REQUIRING A SPECIFIC SHOWING OF PREJUDICE

A. Judicial Exhortations To Plead Guilty Subvert The Criminal Process In Ways That Other Rule 11 Violations Do Not

Federal Rule of Criminal Procedure 11(c)(1) categorically directs that federal judges "must not participate in [plea] discussions." That flat prohibition on judicial participation pertains primarily to the period *before* a defendant proffers a guilty plea and embodies a basic judgment about how plea negotiations should operate. Most of Rule 11's other provisions, in contrast, merely describe what courts are required to do *after* a plea is proffered. Contrary to the government's assertions, the remedial analysis that applies to violations of those procedural provisions does not and should not apply to the distinct class of error at issue in this case.

1. Variances From Rule 11's Plea-Acceptance Procedures Do Not Inherently Taint Pleas

Rule 11 sets forth detailed procedures a district court must follow after a defendant informs the court of his decision to enter a guilty plea. These procedures help the court make "the constitutionally required determination that [the] plea is truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). For example, because voluntariness "cannot [be] presume[d] … from a silent record," *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), the Rule instructs courts to "address the defendant personally in open court" and inform him in detail about his rights and the consequences of his plea; to confirm that the defendant's plea "did not result from force, threats, or promises (other than promises in a plea agreement)"; and to establish that the plea has a factual basis. Fed. R. Crim. P. 11(b). The Rule also seeks to bring plea bargaining, which was formerly a "clandestine practice" of questionable legality, out of the shadows. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978). It requires the prosecution and the defendant to "disclose [any] plea agreement in open court" so that the court may review it and assess its propriety. Fed. R. Crim. P. 11(c)(2).

It was a variance from these required procedures that this Court confronted in the two cases on which the government most heavily relies—*United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). The defendants there had expressed their desire to plead guilty, and, during the course of the Rule 11 plea-review

hearing, the district court neglected to tell them something they likely already knew. The judge in *Vonn* forgot to advise the defendant that he would continue to have the right to the assistance of counsel if he went to trial. 535 U.S. at 60. The judge in *Dominguez Benitez* failed to mention that the defendant would not have the opportunity to withdraw his plea if the court rejected the government's sentencing recommendations. 542 U.S. at 78. While such variances may hinder the district court's ability to double-check that the defendant is aware of the specific consequences of his guilty plea, they do not directly call into question the legitimacy of the plea itself.

2. In Contrast, Judicial Exhortation Errors Corrupt The Very Process By Which Plea Decisions Are Made

The Rule's categorical ban on judicial participation serves a different purpose. It is not primarily intended to help the court scrutinize a defendant's proffered plea. Instead, it serves to prevent the court itself from corrupting the plea process by pressing defendants to admit their guilt and forgo their trial rights. This is a much more foundational protection—one central to the proper functioning of the criminal process.

The American system of criminal justice requires judges to be plea skeptics, not plea proponents. "A plea of guilty," after all, "is more than a confession which admits that the accused did various acts; it is itself a conviction." *Boykin*, 395 U.S. at 242. By entering a guilty plea, a defendant waives a host of

constitutional rights, including "the privilege against compulsory self-incrimination," "the right to trial by jury," and "the right to confront one's accusers." *Id.* at 243. The plea is not constitutionally valid unless the defendant's waiver of these rights is "voluntary and knowing." *McCarthy*, 394 U.S. at 466; *see also United States v. Jackson*, 390 U.S. 570, 581 n.20 (1968) ("due process forbids convicting a defendant on the basis of a coerced guilty plea"); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

While defendants are certainly free to admit their guilt, and often find it advantageous to do so, judges must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted). Their role is to ensure that defendants fully understand the protections the Constitution affords to those accused of crimes and to make certain that no defendant gives up those protections because he feels forced to do so. As this Court has put it, "[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable." *Boykin*, 395 U.S. at 243-44; *see also Patton v. United States*, 281 U.S. 276, 312-13 (1930) (directing courts to scrutinize carefully a defendant's request to be tried by a judge rather than a jury).

In short, the legitimacy of plea bargaining and of plea bargains "[p]resupposes fairness in securing agreement between an accused and a prosecutor," *Santobello v. New York*, 404 U.S. 257, 261 (1971),

which in turn presupposes that the adversary system is operating as it should, with partisan advocacy on both sides and the judge assuring fair play and safeguarding the defendant's rights. When courts urge defendants to plead guilty, they contribute to a "breakdown in the adversary process that our system counts on to produce just results." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). It is difficult for judges to be "fair and neutral arbiter[s]"—and even more difficult for them to be viewed as such—when they cast themselves in what is essentially a prosecutorial role. *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006); *see also United States v. O'Neill*, 437 F.3d 654, 660 (7th Cir. 2006) (Posner, J., concurring in the result) ("Judges in our system do not double as prosecutors.").

The vulnerable position in which criminal defendants find themselves makes judicial advocacy of guilty pleas especially troubling. The distressing experience of being arrested, brought before a judge, and charged with crimes threatening lengthy imprisonment can intimidate even the most unflappable defendants. With their liberty at stake and the full force of the government's prosecutorial apparatus lined up against them, their only solace is the rights afforded by the Constitution and criminal rules—rights meant to provide a vital counterweight. When defendants perceive the court to be working hand-in-hand with the prosecution, they lose faith that the system will indeed presume them innocent, honor their rights, and hold the government to its heavy burden of proof. In their eyes, the court becomes "an adversary rather than … the embodiment of [the] guarantee of a fair trial and just

sentence." *Bradley*, 455 F.3d at 461 (alteration and internal quotation marks omitted). A defendant who is led to believe that his trial right is illusory and that a guilty plea is his only real option cannot be said to have made a "voluntary and intelligent choice among the alternative courses of action open to [him]." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

Judicial intervention in the plea process, moreover, can leave as indelible an impression on defense counsel as on the defendant himself. While counsel is supposed to "play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the [defendant's] claim[s]," *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), counsel will no doubt be reluctant to go against the court's expressed wishes and will feel pressure to deliver a deal. The defendant may, for all practical purposes, find himself facing three prosecutors—the government, the court, and his own attorney—with no one truly acting on his behalf to assure "a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. A pretrial system that has been distorted in this way simply cannot produce valid pleas.

Rule 11(c)(1)'s bright-line prohibition on judicial exhortations to plead guilty is thus no mere procedural technicality. It reflects an important judgment that judicial interference with a defendant's plea calculus imperils the basic fairness of the criminal process. Even before the enactment of the 1975 version of Rule 11, which addressed plea bargaining and judicial participation for the first time, courts and commentators widely condemned the sort of judicial

advocacy that occurred in this case.[1] As one of the most cited analyses of the issue put it, "[t]he unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office." *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966). The Advisory Committee that drafted the judicial participation prohibition quoted this passage in its commentary and observed that the pressure a defendant inevitably feels to "go[] along with the

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[1] *See, e.g.*, *Scott v. United States*, 419 F.2d 264, 273-74 (D.C. Cir. 1969) (discussing the "compelling" reasons "for demanding that the judge not become a participant in the bargaining process"); *Brown v. Beto*, 377 F.2d 950, 957 (5th Cir. 1967); *Worcester v. Comm'r*, 370 F.2d 713, 718 (1st Cir. 1966); *Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957); *People v. Clark*, 515 P.2d 1242, 1242-43 (Colo. 1973) (finding it "fundamentally unfair" for a judge to "use[] the power of his position in an attempt to force the defendant to plead guilty"); *State v. Poli*, 271 A.2d 447, 450 (N.J. 1970); *State v. Wolfe*, 175 N.W.2d 216, 221 (Wis. 1970); *Commonwealth v. Evans*, 252 A.2d 689, 690-91 (Pa. 1969); *Weaver v. State*, 207 So. 2d 134, 136 (Ala. 1968); *State v. Benfield*, 140 S.E.2d 706, 707-08 (N.C. 1965); *Letters v. Commonwealth*, 193 N.E.2d 578, 580-81 (Mass. 1963); Recent Developments, *Judicial Plea Bargaining*, 19 Stan. L. Rev. 1082, 1089 (1967) (describing judicial advocacy of pleas as a "threat to judicial impartiality" that runs counter to the notion that the judge "should not be an advocate, but rather a symbol of even-handed justice").

When this Court approved the practice of prosecutorial bargaining, it was careful to clarify that it was not dealing with a situation in which the judge sought "to induce a particular defendant to tender a plea of guilty." *Brady v. United States*, 397 U.S. 742, 751 n.8 (1970).

disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent." Rule 11 advisory committee's note (1974).

Since the adoption of Rule 11(c)(1), the consensus has only deepened that judicial exhortations to plead guilty are beyond the pale. While some states allow limited judicial involvement in the plea negotiation process, they denounce with virtual unanimity the practice of pushing defendants into guilty pleas.[2] The ABA Standards for Criminal Justice reflect the prevailing view: "The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." ABA Standards for Criminal Justice: Pleas of Guilty § 14-3.3(c) (3d ed. 1999); *see also id.* § 14-3.3(d) ("A judge should not ordinarily participate in plea negotiation discussions among the parties."). "This standard is im-

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[2] *See, e.g.*, *State v. Vandehoven*, 772 N.W.2d 603, 607-09 (N.D. 2009); *State v. Oliver*, 186 P.3d 1220, 1225-26 (Kan. Ct. App. 2008); *State v. Anyanwu*, 681 N.W.2d 411, 414 (Minn. Ct. App. 2004); *People v. Weaver*, 118 Cal. App. 4th 131, 146-50 (2004); *State v. Bouie*, 817 So. 2d 48, 55 (La. 2002); *State v. Sanders*, 549 S.E.2d 40, 55-56 (W. Va. 2001); *McDaniel v. State*, 522 S.E.2d 648, 649-50 (Ga. 1999); *People v. Cobbs*, 505 N.W.2d 208, 211-12 (Mich. 1993); *In re Fisher*, 594 A.2d 889, 893-94 (Vt. 1991); *In re Cox*, 553 A.2d 1255, 1256-58 (Me. 1989); *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983); *State v. Jordan*, 672 P.2d 169, 173-74 (Ariz. 1983); *State v. Byrd*, 407 N.E.2d 1384, 1387-89 (Ohio 1980); *State v. Svoboda*, 287 N.W.2d 41, 44-45 (Neb. 1980); *Fermo v. State*, 370 So. 2d 930, 933 (Miss. 1979); *State v. Cross*, 240 S.E.2d 514, 516 (S.C. 1977); *State v. Buckalew*, 561 P.2d 289, 291 (Alaska 1977); *Anderson v. State*, 335 N.E.2d 225, 227-28 (Ind. 1975).

portant," the ABA commentary explains, "because it protects the constitutional presumption of innocence, and avoids placing judicial pressure on the defendant to compromise his or her rights…. [D]irect judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed." *Id.* § 14-3.3(c)-(d) cmt.

B. Properly Understood, Rule 11(h) Accepts That Judicial Exhortation Errors Are, By Their Nature, Not Harmless

Because judicial advocacy of guilty pleas distorts the process our system counts on to produce fair pleas, a plea entered in the wake of such conduct is inherently tainted. Contrary to the government's repeated assertions, Rule 11(h) does not entitle courts to save such pleas by conducting a speculative inquiry into what might have happened absent the improper intervention. Before subdivision (h) was added to the Rule in 1983, it was the norm for courts to remedy judicial exhortation errors without a defendant-specific prejudice inquiry. *See, e.g.*, *United States v. Adams*, 634 F.2d 830, 839 (5th Cir. Unit A Jan. 1981). Nothing in subdivision (h) requires courts to change course. By its terms, Rule 11(h) simply does not apply to the type of error at issue here. And even if the provision did apply, a blatant violation of Rule 11(c)(1) is exactly the sort of error that the drafters of Rule 11(h) said would *not* be harmless.

The text of Rule 11(h) makes clear that its function is to enable courts to uphold guilty pleas notwithstanding a minor plea-colloquy defect of the type

at issue in *Vonn* and *Dominguez Benitez*. As originally enacted, Rule 11(h) declared: "Any *variance* from the *procedures required* by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h) (1983) (emphasis added).[3] While that language perfectly describes what happens when a court departs from the usual script during a Rule 11 hearing, it does not capture a violation of Rule 11(c)(1)'s categorical ban on judicial participation in plea discussions.

In normal parlance, a prohibition, such as the one set out in Rule 11(c)(1), is not a "required procedure," and the breach of a prohibition is not a "variance." *Cf.* Black's Law Dictionary 1323 (9th ed. 2009) (defining "procedure" as "[a] specific method or course of action"); *id.* at 1692 (defining "variance" as "[a] difference or disparity between two statements or documents that ought to agree"). Had the drafters meant for subdivision (h) to apply to every type of Rule 11 error and not just to variances from the Rule's detailed plea-acceptance procedures, they easily could have said that "all violations of Rule 11 shall be reviewed for harmlessness," or they could have drawn broader language from elsewhere in the Rules. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). Their choice of narrower language is strong evidence that they

[3] As amended, Rule 11(h) now states: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." As the government notes, Gov't Br. 12-13, this amendment was "intended to be stylistic only." Rule 11 advisory committee's note (2002).

did not intend subdivision (h) to sweep as broadly as the government suggests. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (the absence of language in one provision that appears in other provisions is "generally presumed" to reflect a deliberate legislative judgment).

The history of Rule 11 and the Advisory Committee notes to subdivision (h) confirm that Rule 11(h) does not apply to judicial exhortation errors and that those errors cannot be deemed harmless. This Court has described the Advisory Committee notes as "a reliable source of insight into the meaning of" the Rule. *Vonn*, 535 U.S. at 64 n.6; *see also* Gov't Br. 12.

Rule 11(h) came in response to a series of appellate court decisions that had held that even slight deviations from Rule 11's plea-colloquy procedures required a conviction to be reversed. Those decisions purported to apply *McCarthy v. United States*, 394 U.S. 459 (1969), in which this Court addressed a defendant's claim that the district court had violated Rule 11 by accepting the defendant's guilty plea without first personally addressing the defendant to ensure that he understood the nature of the charge to which he was pleading. This Court unanimously ruled in the defendant's favor, holding that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *Id.* at 463-64. The Court did not make this relief contingent on a specific finding of prejudice.

The Court decided *McCarthy* at a time when Rule 11 was "very brief." Rule 11 advisory commit-

tee's note (1983). In 1975, amendments were adopted that "increased significantly the procedures [courts must] undertake[] when a defendant tenders a plea of guilty." *Id.* As a result, it became more likely that "a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require." *Id.*; *see also Vonn*, 535 U.S. at 70 (noting that the 1975 amendments "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified"). The drafters of Rule 11(h) sought to clarify that "a minor and technical" departure from Rule 11's newly elaborated plea-colloquy procedures could be written off as harmless error. Rule 11 advisory committee's note (1983); *see also Vonn*, 535 U.S. at 70. At no point in its lengthy discussion did the Advisory Committee mention the Rule's ban on judicial participation or suggest that Rule 11(h) provided a device for treating clear violations of Rule 11(c)(1) as harmless.

Even if the text of Rule 11(h) could be read to encompass Rule 11(c)(1) violations, that still would not make the mode of prejudice analysis that applies to plea-colloquy errors applicable to judicial exhortation errors. The text of subdivision (h) merely says a variance from the rule's requirements "is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h). Given that judicial exhortation errors differ substantially from plea-colloquy errors, it is entirely reasonable that the proper technique for deciding whether each class of error "affect[s] substantial rights" would differ as well. Indeed, having criticized those courts that had "felt bound to treat all Rule 11 lapses as equal and to read *McCarthy* as

mandating automatic reversal for any one of them," *Vonn*, 535 U.S. at 70, the Advisory Committee presumably did not mean to go to the opposite extreme and make all Rule 11 lapses equally subject to the defendant-specific harmlessness inquiry the government advocates.

The Advisory Committee notes lend strong support to the view that judicial exhortation errors are not subject to the same remedial analysis as plea-colloquy errors. First, while the Advisory Committee criticized "expansive reading[s]" of *McCarthy*, *Vonn*, 535 U.S. at 66, it never suggested that *McCarthy* itself had been wrongly decided or was at odds with "the harmless error rule of Rule 52(a)." Rule 11 advisory committee's note (1983). To the contrary, the Advisory Committee accepted that "the *McCarthy* per se rule may have been justified at the time" when Rule 11 "required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight." *Id.*; *see also Vonn*, 535 U.S. at 69 (noting that subdivision (h) was precipitated not "by *McCarthy* so much as by events that subsequently invested that case with a significance beyond its holding"). Thus, while subdivision (h) marked a retreat from the blanket policy of automatic reversal for *all* Rule 11 errors, Rule 11(h) did not create a per se rule against per se rules.

Second, the Advisory Committee used an "important cautionary note[]" to "emphasize" that some categories of Rule 11 error would remain automatically reversible. Rule 11 advisory committee's note (1983). "[S]ubdivision (h)," the Advisory Committee wrote, "should *not* be read as supporting extreme or

speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards." *Id.* It offered the following example: "[I]t would *not* be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this 'results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11.'" *Id.* (quoting *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976) (per curiam)). The Committee continued: "Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited." *Id.*

If the exemplar of the "kind[] of Rule 11 violation[]" that "would *not* be harmless" is a case in which the court blurs the judicial-prosecutorial line by delegating plea-colloquy duties to the prosecutor, then surely a case in which the court blurs the line by exhorting a defendant to plead guilty falls into the same category. The Advisory Committee's express approval of the Fifth Circuit's decision in *Crook* to remedy a prosecutorial participation error without insisting on a specific showing of prejudice necessarily implies approval for that court's nearly contemporaneous decision in *Adams* to take the same approach to judicial participation errors. *See* 634 F.2d at 839. By virtually any measure, a judge who presses a defendant to plead guilty taints the proceedings far more palpably than one who merely allows the prosecutor to conduct the Rule 11 colloquy after a plea deal has been reached. While the coercion in the latter case is "subtle," in the former it is anything but. In both scenarios, there is no point

speculating about what might have happened had everyone played their proper role. The process has been corrupted, and a new opportunity to plead is required.

C. The Characteristics Of Judicial Exhortation Errors Confirm That An Individualized Prejudice Inquiry Is Inappropriate

This Court need not look beyond the text, clear purpose, and above-discussed history of Rule 11 to conclude that the Court of Appeals properly rejected the government's call for a counterfactual inquiry into how the plea process would have played out had the magistrate judge not pressed Mr. Davila to forgo a trial and strike a plea deal. The drafters would have expected the court to do exactly what this Court did in *McCarthy*: allow Mr. Davila to "plead anew." 394 U.S. at 472. A broader analysis of the characteristics of judicial exhortation errors bolsters this conclusion.

While a record-intensive inquiry into an error's influence on the outcome of a particular proceeding is often the right way to decide whether the error is worth correcting, this Court has found such a requirement to be unnecessary and inappropriate in numerous contexts. Some types of errors, this Court has recognized, should be said to "affect substantial rights" by their very nature. Fed. R. Crim. P. 52. Judicial exhortation errors have attributes that place them in this class.

Errors that have been held to qualify for correction without a specific showing of prejudice come under several headings. There are so-called "structural defects," which "affect[] the framework" of judicial proceedings and "defy" individualized prejudice analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).[4] There are also errors this Court has variously described as "inherently," "per se," or "presumptively" prejudicial.[5] There are, in addition, instances in which this Court has simply rejected the

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[4] *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (denial of counsel of choice); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (improperly constituted grand jury); *Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984) (denial of public trial guarantee). "At the other end of the spectrum" from errors such as these are "trial error[s]," *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993), which "occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence … to determine whether [their] admission was harmless," *Fulminante*, 499 U.S. at 307-08. The error at issue in this case plainly does not fit the "trial error" mold since there has been no trial.

[5] *See, e.g., Carey v. Musladin*, 549 U.S. 70, 72 (2008) ("certain courtroom practices," such as requiring a defendant to appear in prison clothes, are "inherently prejudicial"); *Smith v. Massachusetts*, 543 U.S. 462, 473 n.7 (2005) ("Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause."); *United States v. Olano*, 507 U.S. 725, 739 (1993) ("There may be cases where an intrusion should be presumed prejudicial."); *Strickland*, 466 U.S. at 692 ("maintain[ing] a fairly rigid rule of presumed prejudice for [attorney] conflicts of interest").

government's call for case-specific prejudice analysis without pausing to give the error a label.[6]

Looking specifically to the plea context, this Court has identified several errors that warrant relief without a case-specific prejudice analysis. Reversal is required, for instance, when a judge accepts a guilty plea without making any inquiry into whether the defendant was voluntarily waiving his trial rights. *See Boykin*, 395 U.S. at 243-44; *see also Dominguez Benitez*, 542 U.S. at 84 n.10 (indicating that "such a conviction could [not] be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless"). Similarly, a conviction cannot stand where the defendant "neither personally waived his right [to stand trial] nor acquiesced in his lawyer's attempted waiver." *Brookhart v. Janis*, 384 U.S. 1, 8 (1966). And, in *McCarthy*, this Court held that "prejudice inhere[d]" in violations of the 1966 version of Rule 11. 394 U.S. at 471.[7]

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[6] *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 81 (2003) (vacating judgment "without assessing prejudice" where non-Article III judge sat on an appellate panel); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (reversing where district court improperly assigned magistrate judge to conduct *voir dire* even though "petitioners allege[d] no specific prejudice").

[7] This Court also has held that "the interests of justice" support granting relief when the government breaches a plea agreement by failing to make a promised sentencing recommendation even if it appears that the breach was harmless. *Santobello*, 404 U.S. at 262. In *Puckett v. United States*, the Court concluded that, when a case is in a plain-error posture due to the defendant's failure to object to such a breach, the interests of justice do not "relieve the defendant of

Several considerations animate this Court's decisions to dispense with a defendant-specific inquiry into how the error affected the proceedings. These considerations should guide the Court's analysis here. First, the Court has often noted the significance of the rights threatened by the error. *See, e.g., Neder v. United States*, 527 U.S. 1, 8-9 (1999). Of course, even errors that implicate fundamental rights may be susceptible to an individualized prejudice analysis, but the greater the interest at stake, the greater the need to avoid potentially underinclusive remedial rules. Second, the Court has examined the natural tendency of the error to affect the result. Some errors are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Third, the Court has asked whether the nature of the error is such that its precise impact often will be difficult to pinpoint in specific cases. *See, e.g., United States v.*

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his usual burden of showing prejudice." 556 U.S. 129, 141 (2009). The government's attempt to analogize this case to *Puckett* is unavailing. First, as this Court emphasized in that case, an after-the-fact breach of a plea agreement does not call into question the validity of the plea and closely resembles "other procedural errors at sentencing, which are routinely subject to harmlessness review." *Id.* at 137-38, 141. Judicial exhortation errors, in contrast, directly taint the plea itself and are not amenable to defendant-specific prejudice analysis. *Puckett* did not suggest that it was disavowing *Olano*'s acknowledgement that some errors may qualify for correction, as plain errors, without a particularized prejudice inquiry. *See Olano*, 507 U.S. at 735, 739. Second, as discussed *infra* at 51-53, plain-error review should not apply at all because Mr. Davila had no real opportunity to make a contemporaneous objection.

Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006) (basing "conclusion of structural error upon the difficulty of assessing the effect of the error"). Finally, the Court has evaluated practicalities, including how the decision to dispense with an individualized prejudice inquiry might serve or disserve judicial economy and society's interest in the finality of convictions. *Cf.* Fed. R. Crim. P. 2 (requiring courts to interpret the Federal Rules "to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay").

The Court has not distilled these considerations into a formal test or demanded that all of them point in the same direction. The factors it has chosen to emphasize vary from case to case. In this case, each factor strongly supports the Court of Appeals' conclusion that the judicial participation violation at issue here warrants a remedy without a showing of "individualized prejudice." Pet. App. 5a.

1. Judicial Exhortations To Plead Guilty Threaten Fundamental Rights

To reiterate, this case does not involve a "technical violation" of Rule 11 that "lack[s] constitutional dimension." *Cf.* Gov't Br. 21, 24. It involves a limited category of grievous judicial impropriety—a judge exhorting a defendant to plead guilty. Mr. Davila was told that "there may not be a viable defense" to the charges against him, that he should not "wast[e] the Court's time … empanelling a jury to try" a supposedly "open and shut case," that the

prosecution had "all the marbles," that he "need[ed]" to admit everything and "not try[] to make [it] look like [he] really didn't know what was going on," and that he had "to come to cross" and "g[i]ve it all up." This is conduct no court has condoned. By pressuring defendants to admit their guilt and negotiate a deal, judges engage in exactly the sort of behavior they are supposed to prevent, and they "needlessly chill the exercise of" rights they are duty-bound to protect. *Jackson*, 390 U.S. at 582. Such conduct stands the criminal justice system on its head.

Judicial interference with the jury trial guarantee is particularly abhorrent. No matter how prevalent guilty pleas become, jury trials remain the constitutional default. The right to a jury trial exists precisely because "*the Constitution does not trust judges to make determinations of criminal guilt*." *Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part) (emphasis in original); *see also Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."). By imploring defendants not to exercise their trial rights, judges take cases out of the jury's hands just as surely as they do when they direct the jury to convict—something the Constitution categorically forbids. *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). At least with a directed verdict, the judge has heard all the evidence. In contrast, judges who prod defendants to plead guilty will, as in this case, often have only a superficial un-

derstanding of the applicable facts and law. The defendant who is told that there is no point in taking the case to the jury because conviction is a foregone conclusion understandably loses faith that the court will "assiduously work[] to impress jurors with the need to presume the defendant's innocence." *Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986); *see also Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.").

The affront to the privilege against self-incrimination is equally serious. In multiple contexts, this Court has long endeavored to protect individuals against coercive pressures that interfere with their ability to maintain their silence. There is, of course, the *Miranda* rule, which serves to counter the "'inherently compelling pressures' of custodial interrogation." *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). This Court has also restricted the ability of states to penalize defendants who invoke the right and refuse to incriminate themselves. *See, e.g.*, *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (a state may not impose the penalty of job forfeiture on those who remain silent because of "the coercion inherent" in that choice). And the Court has held that a trial court violates the right when it forces a defendant to testify either at the start of the defense case or not all. *See Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972). If the right against self-incrimination is impermissibly burdened (1) when the authorities seek to elicit statements without giv-

ing a *Miranda* warning, (2) when a state makes the exercise of the right more costly, and (3) when a court limits the defendant's testimonial options, then surely the same is true when a judge urges a defendant to admit his guilt.

Finally, when judges step into a prosecutorial role and become plea advocates, they deprive the defendant of the impartial adjudicator that due process guarantees. As this Court recognized long ago, "[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial," necessarily calls the integrity of the proceedings into doubt. *Tumey v. Ohio*, 273 U.S. 510, 534 (1927); *see also Adams*, 634 F.2d at 839 (judicial advocacy of guilty pleas undermines "the vital neutrality of the trial judge"); *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976) ("Rule 11 implicitly recognizes that participation in the plea bargaining process depreciates the image of the trial judge that is necessary to public confidence in the impartial and objective administration of criminal justice."); *cf. Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (noting that "[t]he citizen's respect for judgments depends … upon the issuing court's absolute probity"). A presumptively innocent defendant who hears a judge implore him to admit his guilt is as justifiably aggrieved as a defendant who appears before a judge whose "executive responsibilities for [local] finances" may give him an incentive to impose fines, *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), or a litigant who appears before a tribunal containing a member who received significant campaign support from someone affiliated with his ad-

versary, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884-86 (2009).

2. Judicial Exhortations To Plead Guilty Inherently Influence A Defendant's Plea Calculus

When an error is, by its nature, highly likely to exert an influence on the outcome of judicial proceedings, a "case-by-case inquiry into prejudice" may not be "worth the cost." *Strickland*, 466 U.S. at 692. The error a judge commits by urging a defendant to relinquish his trial rights and enter into a plea deal with the government falls squarely into this category. As one court has put it, "it is difficult to imagine a situation in which the court would find a judge's participation in the plea negotiation process to be harmless given the inherent pressure placed on the defendant." *United States v. Rodriguez*, 197 F.3d 156, 160 (5th Cir. 1999).

Because judges occupy a special position of authority, their intervention is difficult to ignore. Defendants and their attorneys will typically give great weight to the judge's pronouncements and will be reluctant to defy the expressed wishes of "one who wields such immediate power." *Werker*, 535 F.2d at 202. The recommendations of the judge will naturally "become[] the focal point of further discussions," *id.* at 203, and will "raise[] the possibility, if only in the defendant's mind, that a refusal to accept the judge's preferred disposition [will] be punished," *United States v. Barrett*, 982 F.2d 193, 194 (6th Cir. 1992); *see also United States v. Anderson*, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (finding it "difficult to

imagine how [the defendant] could not have felt pressured" when the court made plea-related comments that "effectively threw the weight of the court behind the prosecution").

It is no wonder the Courts of Appeals uniformly describe a judge's exhortations to plead guilty as "inherently coercive." *E.g.*, *United States v. Cano-Varela*, 497 F.3d 1122, 1133-34 (10th Cir. 2007); *United States v. Baker*, 489 F.3d 366, 376 (D.C. Cir. 2007). Such involvement, they have repeatedly concluded, "inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty." *United States v. Bruce*, 976 F.2d 552, 556 (9th Cir. 1992); *see also Bradley*, 455 F.3d at 460; *United States v. Kraus*, 137 F.3d 447, 457 (7th Cir. 1998) ("Those pressures do not vary depending on the facts; they are inherent in judicial intervention.").

Thus, even those courts that purport to review judicial participation errors for harmlessness very rarely conclude that the error was not prejudicial. Some have even described "the possibility of harmless error" as "more theoretical than real." *Kraus*, 137 F.3d at 457; *see also United States v. Miles*, 10 F.3d 1135, 1141 (5th Cir. 1993) ("[T]he pressure inherent in judicial participation would seem to be reason enough to reverse a conviction when the defendant accedes to the plea suggested by the district court."). Indeed, no published appellate court decision appears ever to have let stand a guilty plea entered after a judge urged the defendant to forgo a trial and pursue a plea deal with the government. The reality is that judicial advocacy of a guilty plea

will virtually always factor into a defendant's decision-making process.[8]

The government posits that cases may arise in which "the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading." Gov't Br. 22. But comments of that nature will not typically amount to "participat[ion]" in plea "discussions" under Rule 11(c)(1).[9] This case ultimately concerns the proper remedy for an undisputed core violation of the Rule—a judicial exhortation to plead guilty. That sort of judicial impropriety inherently influences a defendant.

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[8] The two cases the government identifies as examples of "nonprejudicial" judicial participation violations are not on point. *Cf.* Gov't Br. 24. In *United States v. Pagan-Ortega*, 372 F.3d 22 (1st Cir. 2004), the judge's comments were not made until *after* "the plea agreement had been reached"; the court "assume[d]" this was error. *Id.* at 25-27. Similarly, in *United States v. Ebel*, 299 F.3d 187 (3d Cir. 2002), the judge's comments came only after the defendant had stated his desire to enter into a particular plea and did not induce the defendant to do anything "beyond what he had already stated he would agree to do." *Id.* at 191-92.

[9] *See, e.g.*, *United States v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) ("not all judicial observations expressed with respect to plea agreements violate the rule"); *United States v. Robinson*, 587 F.3d 1122, 1127 (D.C. Cir. 2009) (no violation where judge's statements "were not partial" and "did not convey a misleading impression as to the court's role"); *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996) (indicating that statements that cannot "be read as coercive" do not violate the rule); *United States v. Frank*, 36 F.3d 898, 902-03 (9th Cir. 1994) (emphasizing that the Rule "does not establish a series of traps for imperfectly articulated oral remarks").

3. The Impact Of A Judge's Improper Intervention, Though Almost Certainly Significant, Can Be Difficult To Pinpoint

The speculative nature of any attempt to pinpoint the effect of judicial pressure on the plea process further counsels against an individualized prejudice inquiry.

This Court has at times identified "the difficulty of assessing the effect of [an] error" as reason enough not to demand an individualized prejudice inquiry. *Gonzalez-Lopez*, 548 U.S. at 149 n.4. The Court, for instance, has declined to require a defendant who was involuntarily medicated at trial to attempt "to demonstrate how the trial would have proceeded differently" had the medication not been administered. *Riggins v. Nevada*, 504 U.S. 127, 137 (1992). Such an inquiry, the Court understood, "would be purely speculative." *Id.* The Court has reached the same conclusion with respect to a trial court's improper refusal to allow defense counsel to make a closing summation. "There is no way to know whether" such a denial "might have affected the ultimate judgment," even when it is a bench trial and the judge insists that nothing counsel might have said would have made a difference. *Herring v. New York*, 422 U.S. 853, 863-64 (1975); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (describing the consequences of a defective reasonable doubt instruction as "necessarily unquantifiable and indeterminate"); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (noting that "the benefits of a public trial are frequently intangible [and] difficult to prove"); *Geders v. United*

States, 425 U.S. 80, 86 (1976) (declining to require specific showing of prejudice when a defendant is denied access to counsel during an overnight recess).[10]

This Court has specifically recognized the difficulties that can arise when it comes to assessing prejudice in the plea context. Decisions "involving plea bargains and cooperation with the government," the Court has observed, "do not even concern the conduct of the trial," and "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternative universe." *Gonzalez-Lopez*, 548 U.S. at 150. Elsewhere, the Court has noted that "the plea-bargaining process is often in flux," *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), and that there is "uncertainty inherent in plea negotiations," *Premo v. Moore*, 131 S. Ct. 733, 737 (2011). *See also id.* at 741 ("Plea bar-

[10] The Courts of Appeals have recognized additional instances in which the difficulty of pinpointing the effect of an error makes case-specific prejudice analysis inappropriate, including cases in which the district court runs afoul of Federal Rule of Criminal Procedure 23(b) by using a jury with less than 12 members, contravenes Rule 24(c) by allowing alternate jurors to participate in deliberations, or violates Rule 32(i)(4)(A)(ii) by denying the defendant an opportunity to allocute at sentencing. *See, e.g.*, *Webster v. United States*, 667 F.3d 826, 833 (7th Cir. 2011) (less than 12 jurors); *United States v. Curbelo*, 343 F.3d 273, 280 (4th Cir. 2003) (same); *Manning v. Huffman*, 269 F.3d 720, 726 (6th Cir. 2001) (participation of alternate jurors in deliberations); *United States v. Ottersburg*, 76 F.3d 137, 140 (7th Cir. 1996) (same); *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) (allocution); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001) (same).

gains are the result of complex negotiations suffused with uncertainty[.]").

With respect to judicial participation violations in particular, courts face at least four major obstacles to conducting a meaningful individualized prejudice inquiry. First, and most fundamentally, judicial participation transforms the entire complexion of the pretrial process and "taint[s] everything that follow[s]." *Cano-Varela*, 497 F.3d at 1134. As already noted, *see supra* at 21, the problem is not just that the judicial intervention alters the defendant's plea calculus; it is also that it changes the relationship between the defendant and his attorney. This subversion of the adversary process makes the precise impact of a judge's intervention extremely difficult to isolate.

Second, it is important to bear in mind that, when assessing the effect of a judge's comments, the pertinent question is not whether the defendant would have decided to enter *a* guilty plea had the judge not intervened and encouraged the plea. It is whether the comments influenced the defendant's decision to enter *the specific* plea he ultimately accepted. *Cf. Dominguez Benitez*, 542 U.S. at 76 (considering whether, but for the error, the defendant "would not have entered *the* plea" (emphasis added)). Thus, even if a reviewing court might sometimes be confident that the defendant would have pleaded guilty absent the judge's advocacy, the court will very rarely be able to conclude with any degree of certainty that the contours of the plea would have been the same. The judge's intervention may well mean that the defendant's attorney does not drive as

hard a bargain or that the defendant accepts a deal he might otherwise have rejected. Even the timing of the negotiations may make a difference. The government may be interested in the defendant's cooperation at one point in time but not another, or the perceived strength of the government's case may change as the pretrial investigation unfolds. In short, while the "pressures … inherent in judicial intervention" "will inevitably affect the parties' own efforts to craft an agreement," "[t]he actual impact will often be difficult to quantify." *Kraus*, 137 F.3d at 457; *cf. Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination [in the selection of grand jurors] did not impermissibly infect the framework of the indictment and, consequently, the nature or very existence of the proceedings to come.").

Third, the record generally will provide little insight into the negotiating process or the considerations that actually animated the defendant's decision. The court typically will not have a complete account of the discussions between the prosecution and the defense or of the defendant's internal thought processes. It is also unlikely to have access to the privileged communications of the defendant and his attorney about their strategy. A defendant, moreover, will be less likely to articulate concerns or disclose possible irregularities on the record during the Rule 11 plea colloquy if he believes the court affirmatively desires his plea.

Fourth, along similar lines, defendants do not make their plea decisions according to any set criteria. They are not like jurors who are required to focus on the evidence presented, follow the judge's instructions, and apply a specific burden of proof. Of course, defendants will often consider factors such as the likelihood of conviction at trial and possible sentencing benefits of a plea. But defendants have different appetites for risk, different attitudes about issues such as cooperation with the government, and different levels of suspicion of the various actors in the process. The record will rarely offer more than a glimpse into these personal idiosyncrasies. Ultimately, these limitations mean that a reviewing court can do little more than engage in "a process of retrospective crystal-ball gazing posing as legal analysis." *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting).

The decisions of the appellate courts that purport to review judicial participation errors for harmlessness reflect this reality. Those decisions generally do not even attempt to tease out the precise impact of the judge's intervention. Instead, they merely draw the logical inference that, when a judge urges a defendant to take a particular course of action and the defendant then does so, the defendant's "substantial rights" are "obviously affected." *Cano-Varela*, 497 F.3d at 1134; *see also Baker*, 489 F.3d at 374 (finding it "implausible" and "difficult to imagine" that "a defendant … could fail to be powerfully influenced" by the judge's comments).

For these reasons, the government is simply incorrect when it suggests that conducting an individ-

ualized prejudice inquiry in this context "is similar to the prejudice analysis required in a number of other contexts." Gov't Br. 23. For example, a court assessing "the effect of improper prosecutorial comments on a jury's decision to convict" (*id.*) has a full trial record at its disposal and knows the criteria on which the jury's verdict was supposed to rest. Meanwhile, a court is not typically called upon to consider "the effect of a lawyer's deficient advice on a guilty-plea decision" (*id.*) except in a postconviction proceeding, during which the court can conduct an evidentiary hearing to aid its inquiry. In contrast, appellate courts reviewing judicial participation claims are stuck with the limited "existing record." *Vonn*, 535 U.S. at 74; *see also Dominguez Benitez*, 542 U.S. at 83 n.9 (noting that a "significant difference" between consideration of Rule 11 claims and ineffective assistance claims is that "the latter may be raised in postconviction proceedings," which "permit greater development of the record").

4. Requiring An Individualized Prejudice Inquiry In This Context Will Undermine The Finality Of Convictions And Increase The Burden On Courts

As the government tells it, allowing appellate courts to grant relief without requiring a specific showing of prejudice would create "unjustified inroads into [the] finality" of guilty pleas and result in too many costly remands. Gov't Br. 26. The reality is just the opposite.

Significantly, even those courts that currently purport to conduct a case-specific prejudice inquiry nearly always grant relief when a defendant enters into a plea after a judge urges that course. *See supra* at 39. Those courts will simply be relieved of the burden of evaluating competing guesses about the error's effects. Moreover, declaring that defendants may be eligible for relief without a specific showing of prejudice may well reduce the number of cases like this one by sending a stronger signal that judicial exhortations to plead guilty are truly out of bounds.

If this Court were to adopt the government's preferred approach, and if the government managed to begin convincing appellate courts to refuse to allow new pleas in cases like this one, the costs would only multiply. A loss on direct appeal, after all, is not the end of the road. Many defendants will continue to pursue relief in postconviction proceedings, and in this context their claims will often be substantial enough to warrant full-fledged evidentiary hearings. They may well be able to develop a record showing that judicial pressure rendered their plea involuntary, or that their counsel acted ineffectively by failing to object or by pushing them to accept a bad deal. And to the extent defendants ultimately succeed with such collateral attacks, finality interests will be undermined to a greater extent than they would have been had those defendants simply been given a new opportunity to plead on direct appeal.[11]

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[11] This case well illustrates the problem. If Mr. Davila is denied relief on direct appeal because of counsel's failure to

The likelihood that the government's approach will simply generate more postconviction litigation runs directly counter to this Court's expressed desire for plea-related rules that "forestall[] the spin-off of collateral proceedings that seek to probe murky memories." *Boykin*, 395 U.S. at 244. One virtue of Rule 11 is that it is supposed to help courts avoid "time-wasting," "after the fact" inquiries into whether the defendant's plea was really knowing and voluntary. *Vonn*, 535 U.S. at 68; *see also McCarthy*, 394 U.S. at 465. As this Court has pointed out elsewhere, clear rules and presumptions can help to "conserve[] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (discussing presumption of involuntariness when police elicit statements from an accused who has requested but not yet received counsel). It makes scant sense to forgo this practical benefit of a categorical rule in favor of an approach that will often require not one, but two, case-specific prejudice inquiries—a speculative one on direct appeal and then an expanded one, with additional evidence, on postconviction review.

The government's assertion that the Court of Appeals' approach "presents special problems for the government because the government has little, if any, way to prevent [judicial participation] errors from occurring" is misplaced. *Cf.* Gov't Br. 26. First, the government's inability to prevent the error is

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object to the judge's egregious remarks, he will have a strong ineffective assistance of counsel claim. His opportunity for a new plea and fair trial should not be needlessly delayed.

simply not a reason to deny relief when a defendant's rights are violated. Second, as already noted, it is highly unlikely that dispensing with an individualized prejudice inquiry will result in more cases in which the government "loses the benefit of its plea agreement." Gov't Br. 27. Third, this Court recently rejected a similar contention in a case in which the government's concern arguably had more merit. *See Frye*, 132 S. Ct. at 1407 (allowing ineffective assistance claim when defendant rejects plea agreement and proceeds to trial even though "the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene"). Finally, the government exaggerates its helplessness. A prosecutor often will be present and can guide the court away from improper commentary. And while the government may not be able to prevent all judicial impropriety, it can easily (1) tell defendants of the judicial participation ban when the parties are hammering out a plea deal, just as the government routinely informs defendants of their many other plea-related rights, *see, e.g.*, J.A. 138-39, and (2) ask whether there has been any judicial intervention so that it can be remedied without the need for an appeal.

The government also expresses concern about the possibility of defendants "reserv[ing] an objection [to judicial participation] and then strategically rais[ing] it for the first time on appeal." Gov't Br. 26. There is no claim that any such gamesmanship occurred in this case. Nor is there any evidence that it is has ever actually been a problem in those circuits that routinely grant relief even when a judicial participation claim is newly raised on appeal. As this Court has noted elsewhere, the risks inherent in an

appeal from a guilty plea limit potential abuse. Defendants who "attack their guilty pleas lose the benefit of the bargain obtained" and may end up with "*a less favorable* outcome." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485-86 (2010). To the extent there are actual indications of strategic behavior in a given case, courts are entirely capable of dealing with them, including by holding that the defendant's claim has been affirmatively waived or by holding that the interests of justice do not warrant a remedy.

D. Because Judicial Exhortation Errors Differ In Kind From Plea-Colloquy Defects, *Vonn* and *Dominguez Benitez* Are Inapposite

The government repeatedly suggests that *Vonn* and *Dominguez Benitez* somehow "demand" an individualized prejudice inquiry in this case. Gov't Br. 16. But, as already noted, those cases involved a very different sort of Rule 11 error. It makes no more sense to extend their analysis to judicial participation errors than it would to apply the remedial analysis for a Confrontation Clause violation to a case involving the denial of a public trial simply because both rights happen to reside in the Sixth Amendment. *Cf. Baker*, 489 F.3d at 372 ("Obviously, not all Rule 11 violations are created equal.").

While those decisions sometimes refer generically to "Rule 11 error," *see, e.g.*, *Dominguez Benitez*, 542 U.S. at 80, the Court did not suggest that every Rule 11 violation requires identical remedial analysis. To the contrary, the Court went out of its way to acknowledge that all plea-related errors are not

alike. It indicated that, if, as in *Boykin*, the record was devoid of evidence that the defendant "knew of the rights he was putatively waiving," then not even "overwhelming evidence that the defendant would have pleaded guilty regardless" would suffice to save the conviction. *See id*. at 84 n.10.

In neither *Vonn* nor *Dominguez Benitez* did the judges' omissions suggest any irregularity in the plea negotiation process that might have cast doubt on the validity of the defendants' pleas. And, in stark contrast to this case, they certainly did not inject an element of coercion into that process and interfere with the defendants' decisions about whether, when, and how to negotiate with the government about a possible plea deal. The errors did not occur until *after* the defendants had entered into plea agreements and proffered their pleas. It is entirely unsurprising that the Court in those cases would have been reluctant to allow the defendants to replead without some specific indication that the omitted information would have altered their willingness to go forward with the agreements they had reached. This case calls for a different analysis and different result.

II. MR. DAVILA WOULD PREVAIL EVEN UNDER THE GOVERNMENT'S PREFERRED APPROACH TO PREJUDICE

A. The Plain-Error Standard Should Not Apply

As an initial matter, any individualized prejudice analysis should not take place in the plain-error

framework of Rule 52(b). Because the government has conceded the first two prongs of the plain-error standard (that there is error and that the error is plain) and has never contested the fourth prong (that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks omitted)), the sole consequence of applying plain-error review in this case would be to place "the burden of persuasion with respect to prejudice" on Mr. Davila. *Id.* at 734. If review is for harmlessness, then it would be up to the government to show that prejudice is lacking. *Id.* While Mr. Davila should prevail regardless of where the burden lies, if the Court concludes that the burden may be outcome-determinative, the Court should require the government to bear it. *Cf. O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (indicating that the burden matters only when there is "grave doubt" about prejudice).

To justify plain-error review, the government points to the lack of a timely objection to the magistrate judge's improper intervention. *See* Gov't Br. 11. But unless a party has a "meaningful opportunity to make a contemporaneous objection," the failure to object cannot be held against him. *United States v. Smith*, 640 F.3d 580, 586 (4th Cir. 2011) (internal quotation marks omitted); *see* Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). In this case, it would be unrealistic to demand an objection and unreasonable to fault Mr. Davila for failing to have made one.

The objectionable conduct here occurred during a hearing called by the court to address Mr. Davila's complaints about his appointed counsel, including his complaint that counsel was pressing him to plead guilty. Because Mr. Davila was represented, the onus was on his attorney, not on him, to register objections at that hearing. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 93 (1976) (Burger, C.J., concurring) (noting that the lawyer, "not the client, has the immediate—and ultimate—responsibility of deciding if and when to object"). But given the nature of the hearing, counsel was obviously not representing Mr. Davila's interests in the usual sense. When the magistrate judge made his improper remarks, he was essentially coming to counsel's defense and amplifying counsel's own advice about pleading guilty. It is unsurprising that counsel did not object on Mr. Davila's behalf to statements that were music to counsel's ears. *See Cano-Varela*, 497 F.3d at 1132 (where "the district judge's communications with [the defendant] were intended to assist defense counsel in persuading the defendant to follow counsel's advice …, it is understandable that counsel would not object"). Considering these unusual dynamics, it hardly seems fair to penalize Mr. Davila for counsel's oversight, and doing so will do little to advance the cause of encouraging timely objections. *See id.*; *see also Baker*, 489 F.3d at 372.[12]

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[12] At the certiorari stage, the government questioned whether Mr. Davila adequately preserved the argument that the plain-error standard is inapplicable. Reply Br. 10. Because Eleventh Circuit precedent appeared to dictate plain-error review but nevertheless provided relief without a specific showing of prejudice, counsel had no reason to question the

B. The Judge's Improper Intervention Affected Mr. Davila's Plea Decision

Even under Rule 52(b), this Court should conclude, for the reasons stated in Part I, that Mr. Davila need not make a specific showing of prejudice to establish an effect on "substantial rights." Mr. Davila would plainly prevail, however, even if a particularized prejudice inquiry were required. While this case confirms that such an inquiry is inherently speculative, even the limited record below virtually compels the inference that the judge's intervention—urging Mr. Davila to "come to the cross"—affected Mr. Davila's plea calculus. This is so regardless of where the burden of persuasion lies.

Mr. Davila, the record reveals, was long adamant about his desire to exercise his trial rights. During his competency evaluation, he was emphatic that he wanted "to 'fight [the] charges in court with a jury trial.'" Docket Entry 38, at 8-9. He later wrote to the court to complain that his attorney was press-

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applicable standard. Despite this, counsel—the same court-appointed attorney who represented Mr. Davila in the district court and initially filed an *Anders* brief in the Court of Appeals—did expressly note that at least one other circuit had questioned the appropriateness of plain-error review. *See* 10-15310 Docket Entry at 19 n.7 (Aug. 19, 2011). In any event, if this Court decides, contrary to the Court of Appeals, that the harmless versus plain-error distinction matters, then in fairness Mr. Davila should have an opportunity to address it, particularly since "parties are not limited to the precise arguments they made below" in support of their claims (here, the claim that the judicial participation violation entitles Mr. Davila to replead). *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

ing him to plead guilty and refusing to give him any other options. *See* C.A. E.R. Ex. B. It was that complaint that prompted the in camera hearing during which the judge made his improper remarks.

The in camera hearing marked a turning point. It is difficult to imagine a defendant who would have been unaffected by the judge's insistent remarks. The judge decisively sided with Mr. Davila's appointed counsel, whose advice to plead guilty Mr. Davila had long resisted. Mr. Davila was told that "there may not be a viable defense" to the charges against him, that it would be unwise to "wast[e] the Court's time" trying "an open and shut case," that the government had "all the marbles," that he "need[ed]" an acceptance-of-responsibility reduction, and that the way to get that reduction was to "come to the cross" and admit everything.

Mr. Davila followed the judge's advice and entered into a deal with the government to plead guilty to conspiracy in exchange for the dismissal of the remaining counts. He did so despite his expressed misgivings that the conspiracy charge did not accurately describe his conduct. *See, e.g.*, Docket Entry 121, at 16. It is highly likely that he went forward with the plea at least in part because the magistrate judge had so strongly advocated that course.

None of the circumstantial evidence the government identifies supports an inference that Mr. Davila was *un*influenced by the magistrate judge's remarks. The government suggests, for instance, that the effect of the comments "was dissipated by the three-month interval between the

comments and the plea." Gov't Br. 27-28. But defendants do not forget being berated by a judge and exhorted to "come to the cross." The time lag, moreover, is easily explicable and in no way suggests that the judge's intervention did not contribute to Mr. Davila's decision to go to the bargaining table and accept the deal he did. Because the question of Mr. Davila's competency remained unresolved at the time of the in camera hearing, the parties did not have the option of immediately entering into a plea agreement. When the competency question was finally settled six weeks later, the record indicates that plea discussions quickly became active. *Cf.* Docket Entry 54, at 2 (Mar. 29, 2010) (government motion for continuance filed six days after competency determination, describing plea discussions as "ongoing"); Docket Entry 55, at 1 (Apr. 2, 2010) (response to motion for continuance, noting possibility that the case would be "resolved by agreement"). It then took several weeks for the parties to hammer out a final deal. It seems virtually inconceivable that the magistrate judge's exhortations did not have at least some influence on Mr. Davila's thinking. The government points to no *other* intervening event that may have prompted the agreement.

The government also notes that the magistrate judge did not preside over Mr. Davila's later change-of-plea and sentencing hearings. But the mere fact that someone else accepted Mr. Davila's guilty plea certainly does not show that the magistrate judge's conduct did not influence Mr. Davila's decision to enter that plea. *Cf. Vonn*, 535 U.S. at 75 (observing that there are circumstances in which "defendants may be presumed to recall information provided to

them prior to the plea proceeding"). The district court, moreover, never distanced itself from the magistrate judge's remarks or did anything else to "cure [the] error." *Cf.* Gov't Br. 28. That failure is especially problematic given that the magistrate judge conveyed the impression that he was speaking on behalf of the district court itself. *See, e.g.*, J.A. 152 (suggesting that it would be unwise to "wast[e] the Court's time" on "an open and shut case"). Where the offending comments have not been brought to light and expressly disavowed, a defendant surely cannot be said to have "effectively received th[e] remedy" he is due. *Cf.* Gov't Br. 28. As far as Mr. Davila was concerned, the district court desired a deal as much as the magistrate judge did and expected him to follow through with his change of plea.

The government's remaining arguments are equally insubstantial. The fact that Mr. Davila's attorney made a speedy trial demand after the in camera hearing says nothing about whether the magistrate judge's comments altered Mr. Davila's state of mind. There is no indication that Mr. Davila even knew that his attorney made the demand. Counsel presumably hoped that the government would negotiate with a greater sense of urgency and perhaps offer a more favorable deal if it saw the prospect of a trial on the horizon. Meanwhile, the fact that Mr. Davila did not raise the judicial participation error until the Court of Appeals flagged it may show that he and his attorney were unfamiliar with Rule 11(c)(1), but it does not show that the magistrate judge's remarks were inconsequential to Mr. Davila's decision to enter the plea. There was simply no reason for Mr. Davila to mention com-

ments he did not realize were out of bounds, especially if he believed, as he very likely did, that the district court was on the same page as the magistrate judge about the desirability of a plea.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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