20-1916

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ARCHIE COSEY,

Petitioner-Appellant,

—against—

LYNN LILLEY, SUPERINTENDENT OF WOODBOURNE CORRECTIONAL FACILITY,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* THE INNOCENCE PROJECT AND CENTURION MINISTRIES, INC. IN SUPPORT OF PETITIONER-APPELLANT

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Innocence Project and Centurion Ministries, Inc., d/b/a Centurion ("Centurion"), by and through their undersigned attorney, certify that they are 501(c)(3) non-profit organizations organized in New York and New Jersey respectively. The Innocence Project and Centurion have no parent corporations and no publicly traded stock.

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INTERESTS OF *AMICI CURIAE*[1]

The Innocence Project is a 501(c)(3) legal nonprofit organization dedicated to exonerating wrongly convicted individuals using DNA evidence, as well as working to reform the criminal justice system to prevent further conviction of innocent defendants. Centurion Ministries, Inc., d/b/a Centurion ("Centurion") is a 501(c)(3) legal nonprofit organization dedicated to the vindication of the wrongly convicted, including in cases that do not have a scientific element available that would be probative of innocence. The Innocence Project and Centurion have collectively exonerated hundreds of innocent men and women.

The Innocence Project and Centurion have extensive experience in post-conviction litigation involving actually innocent defendants, including the use of federal habeas petitions to collaterally attack wrongful convictions. It is the view of these organizations that, should the District Court's decision be allowed to stand, many wrongful convictions will be nearly impossible to remedy. As explained in this brief, the District Court's decision would foreclose the possibility of a

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

freestanding actual innocence claim in a manner inconsistent with both Supreme Court precedent and the circumstances surrounding many wrongful convictions. Further, the District Court's decision places far too much weight on the probative value of a guilty plea. The Innocence Project and Centurion, therefore, have a strong interest in the outcome of this litigation, on behalf of both their innocent clients and their mission of ending wrongful convictions.

INTRODUCTION & SUMMARY OF ARGUMENT

Innocent people are convicted of crimes they did not commit. Innocent people even plead guilty to committing crimes they did not commit. These are incontrovertible facts. The federal writ of habeas corpus is critical to the protection of the innocent.[2] The "great writ" of habeas corpus is an essential equitable power of the federal courts to remedy the injustice of a wrongful conviction. This case presents the issue of whether this avenue—in the case of many innocent defendants, the only avenue—remains for innocent people to challenge their convictions in the courts of the United States.

If the District Court decision is allowed to stand, innocent people will remain in prison for crimes they did not commit. Specifically, those who only discover

[2] *See* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. Rev. L. & Soc. Change 343, 377 (2002).

evidence proving their innocence after having exhausted their initial challenges would be left without any forum for relief unless they can also demonstrate a separate constitutional violation undermining their conviction. Furthermore, it would uphold guilty pleas as essentially conclusive, even when those pleas are contradicted by evidence of actual innocence.

To avoid such a grave and unjust result, this brief presents two principal arguments.

First, a defendant must be able to bring a freestanding claim of actual innocence through a successive habeas corpus petition. The conviction of an innocent defendant is, in and of itself, a violation the Eighth and Fourteenth Amendments. In endorsing an "innocence plus" framework, which interprets the Antiterrorism and Effective Death Penalty Act ("AEDPA") to require evidence of actual innocence plus an additional constitutional violation in order to bring successive petitions, the District Court ignored what decades of exonerations have shown: innocent people are convicted even under otherwise constitutionally fair processes, and evidence of their innocence often does not arise until long after their appeals and petitions have been exhausted. Furthermore, the District Court's decision misapprehends Supreme Court precedent in foreclosing such a remedy. Such a remedy is entirely consistent with legal precedent, and the equitable nature of habeas corpus must allow for such a challenge.

Second, a defendant must be able to raise a claim of actual innocence even in the face of a guilty plea. In giving undue weight to the Appellant's guilty plea, the District Court ignored the uncomfortable truth that, in a modern criminal justice system largely designed to extract guilty pleas rather than test evidence at trial, innocent people plead guilty. Giving conclusive weight to guilty pleas, even in the face of compelling evidence of actual innocence, would undoubtedly preserve erroneous convictions. Courts cannot shut their eyes to this reality, and a guilty plea should not serve as a functional bar to actual innocence claims.

This Court should therefore reverse the decision below and hold that innocent defendants may challenge erroneous convictions, even absent a separate constitutional violation and after a guilty plea.

ARGUMENT

I. Without a Freestanding Actual Innocence Claim, Innocent Defendants Will Be Left Without A Remedy for Their Wrongful Convictions, Even if They Have Proof of Their Innocence

A. The conviction and incarceration of an innocent person is itself a violation of the Eighth and Fourteenth Amendments.

"[I]t would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person." *In re Davis*, 557 U.S. 952, 952-53 (2009) (Stevens, J., concurring) (internal quotation omitted). So, too, to incarcerate an innocent person offends constitutional principles and societal standards of decency. *Robinson v. California*, 370 U.S. 660, 667 (1962); *People v.*

Hamilton, 115 A.D.3d 12, 26 (2d Dept. 2014) ("Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution. Moreover, because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments."); *see also* 4 William Blackstone, Commentaries *352 ("[I]t is better that ten guilty persons escape, than that one innocent suffer."). As Justice Blackmun explained, the Supreme Court "has ruled that punishment is excessive and unconstitutional if it is 'nothing more than the purposeless and needless imposition of pain and suffering,' or if it is 'grossly out of proportion to the severity of the crime.'" *Herrera v. Collins*, 506 U.S. 390, 431 (1993) (Blackmun, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Any punishment of an innocent person—especially incarceration or death—is grossly disproportionate and in violation of the Eighth Amendment.

The Due Process Clause "prevents the government from engaging in conduct that shocks the conscience" or "interferes with rights implicit in the concept of

ordered liberty." *Herrera*, 506 U.S. at 435-36 (Blackmun, J., dissenting) (internal quotations omitted). To convict and incarcerate the innocent surely shocks the conscience and interferes with the most essential of liberty interests.

B. The equitable nature of the "Great Writ" must allow the wrongfully convicted to remedy the constitutional violation of their unjust convictions.

The equitable nature of the writ of habeas corpus, and the Supreme Court's precedent, must provide an avenue for actual innocence claims. The Supreme Court has repeatedly recognized, "[i]n appropriate cases the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration." *Murray v. Carrier,* 477 U.S. 478, 495 (1986) (internal citations omitted). "[A] habeas court must adjudicate even a successive habeas claim when required to do so by the 'ends of justice.'" *Schlup v. Delo*, 513 U.S. 298, 319 (1995).

As the District Court acknowledged, Supreme Court precedent does not preclude habeas relief based on the existence of a freestanding actual innocence claim. SPA0032-33. In fact, the Court in *Herrera* explained "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417. The implicit import of this discussion is a concession that, regardless of the procedural posture, it would be unconstitutional to put an innocent person to death for a crime they did not commit. *Id*. at 419. ("I cannot disagree with the fundamental

legal principle that executing the innocent is inconsistent with the Constitution.") (O'Connor, J., concurring).

Although it is true that "death is different," nothing in *Herrera* or its progeny gives any indication that it would *not* be a miscarriage of justice for an innocent person to spend years of life imprisoned based on a wrongful conviction. In fact, recent Supreme Court case law recognizes that non-capital sentences result in an "alter[ation of] the offender's life by a forfeiture that is irrevocable." *Graham v. Florida*, 560 U.S. 48, 69 (2010).

Indeed, the equitable principles underpinning *McQuiggin v. Perkins* support the finding that procedural bars must give way to prevent the injustice of a wrongful conviction. 569 U.S. 383 (2013). In *McQuiggin*, the Court explained "that a prisoner 'otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence.'" *Id*. at 392 (citing *Herrera*, 506 U.S. at 404.). The nature of habeas is such that "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is [AEDPA requirements]." *Id*. at 393.

C. The District Court's "Innocence Plus" framework will deny innocent defendants an avenue to challenge their wrongful convictions.

The District Court has endorsed the flawed "innocence plus" framework[3] requiring second or successive habeas petitions brought in a district or circuit court to put forth both: (1) compelling evidence of actual innocence and (2) an additional underlying constitutional violation. SPA0033-34. This framework fails for three reasons: First, as explained *supra*, a wrongful conviction is, itself, a constitutional violation. Second, defendants may have had constitutionally "fair" trials yet be factually innocent. Third, the nature of post-conviction work is that it is slow, and most innocent defendants who eventually obtain competent post-conviction counsel have already filed a first, failed, habeas petition.

The District Court's reading of AEDPA's Section 2244(b)(2)(B)(ii) is inconsistent with both Congressional intent and the equitable nature of habeas itself. Section 2244(b)(2)(B)(ii) provides that a second or successive petition should not be dismissed when "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, *but for constitutional error*, no reasonable factfinder would have

[3] Courts of the Tenth and Eleventh Circuits have adopted the same construction, nearly guaranteeing that innocent defendants will remain imprisoned in those jurisdictions for want of a remedy for their wrongful convictions. *See In re Davis*, 565 F. 3d 810 (11th Cir. 2009); *Case v. Hatch*, 731 F. 3d 1015 (10th Cir. 2013).

found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). The District Court read the phrase "but for constitutional error" to require an additional constitutional claim beyond the showing of actual innocence. But this ignores that the conviction of an innocent person is, itself, a violation of the constitution. At the time of its passage, AEDPA was "touted as a law sensitive to the problems of the wrongfully convicted." Sussman, 27 N.Y.U. Rev. L. & Soc. Change at 358-359, n.74. Surely the constitutional error inherent in the conviction and imprisonment of an innocent person warrants the exception provided by the statute.

Even with competent counsel and a lack of prosecutorial or police misconduct, innocent people are sometimes found guilty.[4] Innocent people are wrongfully convicted for a variety of reasons not necessarily implicating a separate constitutional violation, including, witness misidentification,[5] flawed forensic

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[4]Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. Miami L. Rev. 1279, 1279 (2010) ("As a result of new technology (especially DNA testing), however, it is well recognized that innocent men and women are recurrently incarcerated and convicted even in the absence of factual or constitutional error.").

[5] The National Registry of Exonerations lists 773 cases involving witness misidentification *See Browse Cases*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Contributing%5Fx0020%5FFactors%5Fx0020&FilterValue1=Mistaken%20Witness%20ID (last visited Feb. 25, 2021); *see also* Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J.L. & Soc. Change 1, 22 (2016) ("The exoneration data stemming from the Innocence Movement has identified eyewitness misidentification as the leading contributing

science,[6] or unreliable informants.[7] As DNA exonerations demonstrate, some wrongfully convicted individuals "can nevertheless have trials technically free of procedural error and misapplication of the law." Mourer, 64 U. Miami L. Rev. at 1287.

Post-conviction work is notoriously slow and expensive, and exonerating evidence often does not come to light until many years after conviction. *See, e.g.*, *Bryant v. Thomas*, 274 F.Supp.3d 166 (S.D.N.Y. 2017) (41 years between conviction and habeas petition); *Jimenez v. Lilley*, No. 16-CV-8545 (AJN) (RWL), 2018 WL 2768644, at *5 (S.D.N.Y. June 7, 2018) (24 years between conviction and habeas petition); *Lopez v. Miller*, 915 F. Supp. 2d 373, 381 (E.D.N.Y. 2013) (23 years between conviction and habeas petition); *Yarris v. Horn*, 230 F. Supp. 2d 577, 591

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factor present in wrongful convictions, with one or more such identifications playing a role in more than 75% of the over 250 DNA exonerations that have occurred.").

[6] Duke University's DNA Exonerations Database lists 218 results for wrongful convictions secured using "flawed forensics" including bite mark evidence, hair comparison, serology analysis and bullet comparison. *Exonerations*, Convicting the Innocent, https://convictingtheinnocent.com/ (last visited Feb. 25, 2021). *Weimer v. County of Fayette, Pa.*, 972 F.3d 177 (3d Cir. 2020), is instructive on this point. There, despite the fact that the "science" of forensic odontology has been largely debunked, the Third Circuit found no constitutional error in the admission of such evidence because "[d]uring the relevant time period—from late 2002 to early 2006—the unreliability of bite-mark evidence was not widely recognized." 972 F.3d at 192.

[7] *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L. Rev. 1375 (2014) (describing jailhouse informant testimony as "arguably the single most unreliable type of evidence currently used in criminal trials").

(E.D. Pa. 2002) (17 years between conviction and habeas petition).[8] Centurion estimates that it costs, on average, $350,000 to exonerate an innocent person.[9] In many cases, post-conviction investigation can involve years of re-investigation that can only be conducted by competent counsel—not an incarcerated individual—such as tracking down and re-interviewing witnesses, personally surveying crime scenes and hiring forensic experts. *See People v. Tankleff*, 49 A.D.3d 160, 166-67 (2d Dept. 2007). This burdensome undertaking is in tension with various due diligence requirements that mandate defendants act quickly or lose their opportunity to challenge their convictions. *See* Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J.L. & Soc. Change at 37-38 (discussing statutes of limitation and due diligence requirements for habeas petitions).

Advancements in forensic science make exonerations possible decades after conviction. *See, e.g.*, *Newton v. City of New York*, 681 F. Supp. 2d 473, 476 (S.D.N.Y. 2010) (actually innocent defendant exonerated with DNA evidence after

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[8] *See also* Kings County District Attorney's Office et al., *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York*, at 6 (July 9, 2020), http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf (explaining that exonerees whose cases were examined by Kings County's Conviction Review Unit have spent an average of 17 years in prison for crimes they did not commit).

[9] Centurion's work also demonstrates how time-consuming exonerations can be. Since its founding in 1983, Centurion has freed sixty-three men and women from prison, and it generally takes on one or two new cases a year. *See FAQ*, Centurion, https://centurion.org/faq/ (last visited Feb. 24, 2021).

22 years in prison). Scientific advances can both affirmatively exonerate the innocent, as in the case of DNA exonerations, and cast doubt on flawed forensic methodologies and "junk science" used to secure a conviction of an innocent defendant. *See Weimer*, 972 F.3d at 182 (describing bite mark evidence as "junk science" in exonerated individual's § 1983 claim). So too, evidence to disprove mistaken or perjured eyewitness testimony may not arise until years after the original conviction. *See State v. Lawson*, 352 Or. 724, 749 (2012) (explaining that 30 years of social science has cast doubt on identification procedures previously deemed reliable).

By the time new evidence comes to light, many defendants have already tried to attack their convictions with the best arguments and evidence available at the time and have failed, often after filing *pro se* habeas petitions. *See, e.g.*, *Letemps v. Secretary, Fla. Dept. of Corrections*, 114 F. Supp. 3d 1216 (M.D. Fla. 2015) (noting that actually innocent defendant filed more than ten petitions for post-conviction relief, including multiple federal habeas petitions, before his writ of habeas corpus was granted). Because there is no constitutional right to post-conviction counsel, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), innocent defendants are often forced to proceed *pro se* and to attempt to attack their wrongful convictions with limited resources from a prison cell. These *pro se* defendants are undoubtedly ill-equipped to handle the demands of investigating newly discovered evidence. So,

often, to bring forward new evidence, all that is left is a second or successive habeas petition.

In light of these realities, the "innocence plus" framework is wholly inconsistent with the purpose and power of the writ of habeas corpus—shutting the courthouse doors on those the writ is intended to protect. Consider the following hypothetical: in a case of mistaken identity, an innocent defendant in New York learns that the state's key witness will testify that she witnessed him commit murder. Facing the potential of life in prison, the innocent man pleads guilty in exchange for a reduced sentence. Years have passed and the defendant has filed a first, failed, habeas petition. The defendant learns that his former neighbor has a home surveillance video depicting the defendant at home, miles away from the crime scene, at the time of the murder. Under the "innocence plus" framework endorsed by the District Court, this innocent defendant would have no remedy. Even with incontrovertible proof of innocence, the District Court would require that defendant remain in prison for want of a cognizable constitutional claim. Nor would there be a remedy under state law in this case. New York's mechanism for challenging a conviction based upon new evidence of innocence other than DNA is expressly inapplicable to defendants who have pleaded guilty. N.Y. Crim. Proc. Law ("CPL") § 440.10(g) (motion to vacate judgment allowed where "[n]ew evidence has been discovered since the entry of a judgment *based upon a verdict of guilty after trial*")

(emphasis added). It cannot be that the federal courts are unable to remedy this kind of miscarriage of justice when the equitable powers of the writ of habeas corpus are available to them.

D. The last few decades, since Herrera was decided and AEDPA was passed, have shown the massive scale of the United States' wrongful conviction problem.

The Supreme Court's decisions in *Herrera* and *Schlup*, and the passage of AEDPA, predate the Innocence Movement. At the time of AEDPA's passage, in 1996, Congress had seen only the "tip of the iceberg" and assumed wrongful convictions were an infrequent anomaly.[10] Since then, however, there have been more than 2,700 exonerations of wrongfully convicted innocent people.[11] The underlying assumption in both *Herrera* and *Schlup* was that wrongful convictions were extremely rare. *See Schlup*, 513 U.S. at 321-22; *Herrera* 506 U.S. at 420 (O'Connor, J., concurring) (noting society's "high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled

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[10] When the Innocence Project was founded in 1992, a mere four years before AEDPA, there had been only 10 DNA exonerations and not a single state had post-conviction DNA testing statutes. *See Our Start – Innocence Project 25 Year Anniversary*, The Innocence Project (2017), https://25years.innocenceproject.org/start/.

[11] *See Browse Cases*, The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Feb. 25, 2021) (listing 2,736 known exonerations in the United States as of Feb. 25, 2021); *see also* Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J.L. & Soc. Change at 20-21 (describing the history of the Innocence Movement).

protections against convicting the innocent"). But the intervening decades have degraded this confidence and laid bare flaws in the criminal justice system that resulted in thousands of wrongful convictions.[12] Conservative assessments place the rate of wrongful conviction at between 0.5% and 1%, while other scholars estimate that as many as 5% of all criminal convictions involve factually innocent defendants.[13] Even conservative estimates, then, place the annual number of wrongful convictions around 10,000 per year.[14]

Accordingly, at the time AEDPA was passed, Congress did not understand the sheer scale of the United States' wrongful conviction problem. AEDPA was primarily concerned with addressing abuses of the writ of habeas corpus. But AEDPA did not foreclose habeas relief for the innocent whose convictions themselves violate due process. Few things could be less abusive or frivolous than a credible claim of actual innocence by one who is incarcerated due to a wrongful conviction. Sussman, 27 N.Y.U. Rev. L. & Soc. Change at 358-359, n.74.

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[12] Recognizing these flaws, District Attorney's offices across the country have created Conviction Review Units to reinvestigate and correct past errors in convictions. *See* John Hollway, *Conviction Review Units: A National Perspective*, Faculty Scholarship at Penn Law (2016), https://scholarship.law.upenn.edu/faculty_scholarship/1614/.

[13] Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 Stan. J. Civ. Rts. & Civ. Liberties 55, 72-73 (2014) (summarizing studies estimating the rate of wrongful convictions).

[14] Mourer, 64 U. Miami L. Rev. at 1283.

The sheer number of wrongfully convicted individuals also makes the District Court's suggestion that innocent defendants seek relief directly from the Supreme Court under its original jurisdiction all the more absurd. *See* SPA0033. As the Court in *In re Davis* noted, other than Davis's case, where the defendant faced a possible execution, the Supreme Court has not exercised its original habeas jurisdiction since 1962, when it did so in two cases. 557 U.S. at 952. Supreme Court Rule 20.4(a), which allows the Supreme Court to exercise jurisdiction in "exceptional circumstances" is challenging to meet, and, as we now know, wrongful convictions are far less exceptional than once thought.[15] With thousands of innocent individuals convicted each year, the Supreme Court is ill equipped to handle the problem.

Contemporary understanding of the breadth of habeas' equitable powers should reflect contemporary understanding of the truth about our criminal justice system—it is fallible. Federal courts must have the power to remedy the resulting wrongful convictions.

[15] *See* Sussman, 27 N.Y.U. Rev. L. & Soc. Change at 365; Mourer, 64 U. Miami L. Rev. at 1300.

II. It Was Unreasonable of the District Court to Accept that Cosey's Plea Allocution Outweighed Compelling Evidence of Innocence.

A. Innocent people plead guilty.

The wrongfully convicted includes an alarming number of people who pled guilty. *See United States v. Walker*, 315 F.R.D. 154, 156 (E.D.N.Y. 2016). "[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The District Court uncritically accepted the state court's choice to "rel[y] heavily on the petitioner's admissions of guilt" in the defendant's plea allocution as justification to disregard compelling evidence of innocence. *See* SPA0042. This simply does not comport with contemporary understanding of the reliability of guilty pleas. In fact, there are many reasons why an actually innocent person may plead guilty.

First, defendants often face intense pressure to plead guilty. The government has an incentive to extract guilty pleas to preserve prosecutorial and judicial resources. *See Brady v. United States*, 397 U.S. 742, 752 (1970). Prosecutors, who have broad discretion and no judicial oversight during the plea negotiation process, wield distorted bargaining power and provide significant incentives to plead guilty,

including offering pleas to lesser charges that involve lower potential penalties.[16] Additionally, defense attorneys may struggle with heavy caseloads and encourage their clients to accept plea deals where possible.[17] "The Supreme Court's suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties is a total myth: it is much more like a 'contract of adhesion' in which one party can effectively force its will on the other party." Rakoff, *supra*.

Second, an innocent defendant might plead guilty to avoid the risks and uncertainty of going to trial. *See State v. Carroll*, 767 N.W.2d 638, 642 (Iowa 2009) ("[C]riminal cases in general, and guilty pleas in particular, are characterized by considerable uncertainty[.]").[18] The decision whether to accept a plea involves a

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[16] *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Review (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; *see also Why Are People Pleading Guilty to Crimes They Didn't Commit?*, The Innocence Project (Nov. 25, 2015), https://innocenceproject.org/why-are-people-pleading-guilty-to-crimes-they-didnt-commit/.

[17] *See, e.g.*, Richard A. Oppel Jr. and Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. Times (Jan. 31, 2019).

[18] In *Carroll*, the Supreme Court of Iowa explained:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case.

767 N.W.2d at 642 (quoting *McMann* v. *Richardson*, 397 U.S. 759, 769-70 (1970)).

"cost-benefit analysis." *Schmidt v. State*, 909 N.W.2d 778, 787 (Iowa 2018). When facing the potential of a susceptible jury and a harsh sentence, "even with competent counsel, going to trial can be incredibly risky business." *Id.* (internal citations omitted).

Until recently, these concerns were compounded by New York's restrictive discovery practice, which limited access to information and allowed "prosecutors [to] wait until just before trial to turn over witness names and statements and other key evidence." Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence Until It's Too Late*, N.Y. Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html. Only starting in 2020 have prosecutors in New York been required to disclose evidence to defendants prior to the expiration of any plea offer. *See generally* CPL § 245. New York's discovery reforms underscore a troubling fact: Until very recently, many defendants in New York had to plead guilty without ever knowing what evidence might be available and, therefore, how likely they would be to prevail at trial. In light of such uncertainty of available evidence and ultimate success at trial, "many defendants plead guilty to crimes they did not commit." *United States v. Walker*, 315 F.R.D. at 156.

Third, the potential for mandatory minimum sentences or otherwise harsher penalties imposed on defendants convicted after trial makes it rational for a

defendant to accept a sentence that may be years lower than what it might be if one lost at trial. *See United States* v. *Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (noting that the plea bargaining system, "coerces guilty pleas and produces sentences so excessively severe they take your breath away."); *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, National Association of Criminal Defense Lawyers 5 (July 10, 2018) ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose."). [19] This is particularly true for defendants rightfully concerned about incompetent or lack of counsel. As Michelle Alexander explained,

> Once arrested, one's chances of ever being truly free of the system of control are slim, often to the vanishing point. Defendants are typically denied meaningful legal representation, pressured by the threat of a lengthy sentence into a plea bargain, and then placed under formal control—in prison or jail, on probation or parole. Most Americans probably have no idea how common it is for people to be convicted without ever having the benefit of legal representation, or how many people plead guilty to crimes they did not commit because of mandatory sentences.

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 10 (The New Press 2010).

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[19] Available at http://www.nacdl.org/trialpenaltyreport.

Ultimately, both innocent and guilty defendants must weigh the risks of going to trial against the risks of accepting a plea.[20] If a prosecutor offers a good enough deal, such as agreeing not to seek the maximum sentence or the death penalty, "it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent." *Rhoades v. State*, 880 N.W.2d 431, 436-37 (Iowa 2016) (internal citations omitted); *see also* Rakoff, *supra* ("If [the defendant's] lawyer can obtain a plea bargain that will reduce his likely time in prison, he may find it 'rational' to take the plea."). This rational refusal to "roll the dice" has resulted in many innocent people admitting guilt and taking pleas. In fact, eighteen percent of all exonerations have arisen from cases involving guilty pleas.[21] In this past year alone, twenty-nine individuals were exonerated after originally accepting guilty pleas.[22]

Take the case of John Dixon. *See* The Innocence Project, *John Dixon*, https://innocenceproject.org/cases/john-dixon/ (last visited Feb. 19, 2021). Dixon

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[20] John L. Kane, *Plea Bargaining and the Innocent*, The Marshall Project (Dec. 26, 2014), https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent; *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012).

[21] *See* Peter A. Joy & Kevin C. McMunigal, *Post-Conviction Relief After a Guilty Plea?*, 35 Crim. Just. 53, 55 (Summer 2020).

[22] *See Exonerations in 2020*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Exonerated&FilterValue1=8%5F2020&FilterField2=Group&FilterValue2=P (last visited Feb. 25, 2021).

pled guilty in 1991 to first-degree kidnapping, first-degree robbery, two counts of first-degree aggravated sexual assault, and unlawful possession of a weapon in the third degree after he was identified as a woman's attacker in a photographic lineup. He later sought to withdraw his plea and asked the court to perform DNA testing on the rape kit, claiming that he had only pled because he feared a harsher sentence if convicted by a jury. *See id.* The New Jersey court originally refused to test the forensic evidence or withdraw his plea, and only after he spent 10 years in prison did DNA evidence prove that he could not possibly have been the attacker. *See id.* His conviction was vacated on November 29, 2001.[23]

[23] Mr. Dixon's case is not unlike that of Oneal Watts, who pled guilty in 2015 in Bronx County to one count each of third-degree criminal sale of a controlled substance, fourth degree conspiracy, and second-degree attempted robbery. *See Oneal Watts*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5915 (last updated Feb. 16, 2021). Although Watts was one mile away from the site of the crime at the time that it occurred and a co-defendant admitted Watts was not involved, the plea offer was so drastically reduced from the original charges that Watts accepted a plea deal. On July 1, 2020, Bronx County Supreme Court Justice Steven Barrett vacated Watts's conviction and dismissed the charges, noting that "DNA testing performed since the entry of [conviction], in conjunction with other exculpatory evidence, demonstrated a substantial probability that the defendant was actually innocent of the offense of which he was convicted." *Id.*

B. The pursuit of justice demands review of evidence of actual innocence even where a case involves a guilty plea.

Mr. Dixon's case, and the cases of many others, demonstrate that actually innocent people plead guilty. If the purpose of our criminal justice system is truly to seek justice, courts are entrusted with not only punishing the guilty but also ensuring the innocent do not suffer. *See United States v. Nobles*, 422 U.S. 225, 230 (1975) ("The dual aim of our criminal justice system is that guilt shall not escape or innocence suffer") (internal quotation omitted). Innocent people should not remain in prison merely because they succumbed to certain pressures inherent in our modern criminal justice system. *See Schmidt*, 909 N.W.2d at 789 ("[W]hen the court determines the police planted evidence, such as drugs, why should that defendant remain in prison simply because he or she pled guilty to a reduced charge in light of the overwhelming evidence of his or her guilt?"). Put differently, "the administration of justice would be subject to reproach if an implacable law of remedies were to close the door forever upon the hope of vindication." *In re Kaufmann*, 245 N.Y. 423 (1927). For many wrongfully convicted men and women, the District Court's decision closes that door.

CONCLUSION

For the foregoing reasons, this court should reverse the District Court's dismissal of the Appellant's petition and order reconsideration of the Appellant's actual innocence claim.

Dated: February 26, 2021
New York, New York

Respectfully submitted,

s/ *Parvin Daphne Moyne*

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 5,524 words as determined by Microsoft Word, excluding the parts of the brief exempted by 32(f) of the Federal Rule of Appellate Procedure, and thus complies with the typeface, typestyle, and type-volume requirements set forth in Rule 32(a)(5)-(7)(B) of the Federal Rules of Appellate Procedure.

Dated: February 26, 2021
New York, New York

s/ *Parvin Daphne Moyne*
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CERTIFICATE OF SERVICE

I hereby certify that, on February 26, 2021, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's CM/ECF system.

All of the participants are registered CM/ECF users and will be served copies of the foregoing motion via the CM/ECF system.

Dated: February 26, 2021
New York, New York

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