

No. 19-756

IN THE
Supreme Court of the United States

LOUIS TAYLOR,
Petitioner,

v.

COUNTY OF PIMA; CITY OF TUCSON,
Respondents.

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

**BRIEF OF *AMICUS CURIAE*
AMERICAN BAR ASSOCIATION IN SUPPORT OF
PETITIONER**

JUDY PERRY MARTINEZ
Counsel of Record
PRESIDENT
AMERICAN BAR
ASSOCIATION
321 N. Clark Street
Chicago, Illinois 60654
(312) 988-5000
AmicusBriefs@
americanbar.org

A. MARISA CHUN
CROWELL & MORING LLP
3 Embarcadero Ctr., 26th Flr.
San Francisco, CA 94111
(415) 986-2800
mchun@crowell.com

AMANDA SHAFER BERMAN
CROWELL & MORING LLP
1001 Pennsylvania Ave NW
Washington, D.C. 20004

Counsel for Amicus Curiae American Bar Association

QUESTIONS PRESENTED

1. Whether *Heck v. Humphrey*, 512 U.S. 477 (1994), applies to a former prisoner who lacked an opportunity to challenge his conviction through federal habeas while incarcerated.

2. Whether *Heck* bars a plaintiff from recovering damages for his period of incarceration if the plaintiff's conviction has been vacated and he has been released from prison pursuant to a plea of "no contest" to time served.

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INTEREST OF *AMICUS CURIAE*¹

The American Bar Association is the largest voluntary association of attorneys and legal professionals in the world. Membership is voluntary and includes attorneys in law firms, government agencies including prosecutorial and public defender offices, corporate law departments, and public interest organizations, as well as judges, legislators, and law professors. The ABA’s mission is “[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”²

This case presents one of the increasing number of instances in which a prosecutor’s office has conditioned the release of an unlawfully convicted defendant on his agreement to a new plea—rather than vacating the prior conviction before bringing any new charges. The ABA has a strong interest in this Court’s consideration of whether such a practice bars the recovery of damages under 42 U.S.C.

¹ Timely notice of intent to file this brief was provided and all parties have consented to its filing. Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity has made a monetary contribution to its preparation or submission other than the *amicus curiae*, its members, or its counsel.

Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the American Bar Association. No member of the ABA Judicial Division Council participated in this brief’s preparation or in adopting or endorsing its content.

²See ABA Mission and Goals, *available at* https://www.americanbar.org/about_the_aba/ (last accessed Dec. 16, 2019).

§ 1983, as some Circuits have held. Because the questions presented here have serious implications with respect to the duty of prosecutors to seek justice and the safeguarding of a key remedy to protect rights guaranteed by the Constitution, the ABA respectfully submits this brief.

The ABA has long played a role in setting standards for criminal prosecutions, and the ABA Standards for Criminal Justice represent a critical aspect of the ABA's efforts to improve the criminal justice system. In 1964, the ABA created the Criminal Justice Standards Project under the leadership of then-ABA president Lewis F. Powell, Jr. and, a decade later, Chief Justice Warren E. Burger described the Standards as "a balanced, practical work designed to walk the fine line between the protection of society and the protection of the constitutional rights of accused individuals." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 252 (1974).³ Since then, the ABA has revised the Standards numerous times through the work of task forces consisting of judges, prosecutors, defense lawyers, academics, and lawyers with federal, state, and local perspectives. By 2009, state and federal

³ See Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14 (Winter 2009) ("From the beginning of the project, the [ABA] Standards have reflected a consensus of the views of representatives of all segments of the criminal justice system.").

courts had cited to the ABA Standards more than 3100 times.⁴

These Standards, as well as some of the ABA Model Rules of Professional Conduct, have promoted measures to avoid or redress wrongful convictions.⁵ For example, in 2008, the ABA amended Rule 3.8 of the Model Rules of Professional Conduct to codify a prosecutor's ongoing responsibility to investigate new exculpatory evidence and to remedy wrongful convictions.⁶ The ABA's Ad Hoc Innocence Committee also proposed systematic reforms to address wrongful convictions, covering, *inter alia*, "prosecutorial practices" and "compensation for the wrongfully convicted" and recommended that all jurisdictions enact laws to ensure adequate compensation for the wrongfully convicted.⁷

The ABA's latest edition of its Criminal Justice Standards for the Prosecution Function provides further guidance regarding a prosecutor's duties to the wrongfully convicted: "The prosecutor should not defend a conviction if the prosecutor believes the

⁴ *Id.* at 11.

⁵ For more on this Court's reliance on the ABA Standards in fashioning and applying constitutional criminal litigation rules, see Rory K. Little, *ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 *Hastings L.J.* 1111, 1113 (2011).

⁶ Model Rules of Prof'l Conduct, Rule 3.8(g)–(h) (Am. Bar Ass'n. 2008).

⁷ See Am. Bar Ass'n, *Achieving Justice: Freeing the Innocent, Convicting the Guilty, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process* (Paul C. Giannelli & Myrna S. Raeder eds.), reprinted in 37 *Sw. L. Rev.* 763, 766, 774-87 (2008).

defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.” ABA Standards for Criminal Justice, Prosecution Function 3.8-1 (4th ed. 2017) (hereinafter “Prosecution Function Standards”). The Standards also state that “[i]f a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h).” Prosecution Function Standard 3.8-3.

Most recently, the ABA House of Delegates adopted a resolution which recognized that, as part of that obligation, a prosecutor should not condition relief for a wrongful conviction upon “an *Alford* plea, a guilty plea, or a no contest plea by the defendant to the original or any other charge.”⁸ ABA Report with Resolution 112B (Criminal Justice Section) (2017) (hereinafter “Resolution 112B”) at 1, *available at* <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2017/2017-midyear-112b.pdf>. If a prosecutor believes new charges are supported by the evidence, she may pursue such charges and begin plea negotiations anew—i.e., only after the prior conviction has been vacated and the defendant released. *See id.* The prosecution’s conditioning of a plea in exchange for its support for a post-conviction remedy raises a host of concerns, including the risk

⁸ An “*Alford* plea” is a guilty plea in which a defendant maintains his innocence but admits that the prosecution’s evidence would likely result in a guilty verdict if the case were brought to trial.

that such pleas are likely to be, or appear to be, coerced, and also are generally unfair to the incarcerated defendant.

INTRODUCTION

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.

Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803 (1987) (quoting the ABA Model Code of Professional Responsibility, Ethical Consideration 7-13 of Canon 7 (1982)).

This Court has the opportunity to resolve a deepening circuit split, and to discourage a troubling but increasingly frequent prosecutorial practice: conditioning the release of a prisoner whose conviction the prosecutor's office acknowledges was unlawful upon the prisoner's agreement to a new guilty, no-contest, or *Alford* plea. The ABA's Standards and prosecutorial best practices discourage such conduct, but decisions interpreting this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) as holding that new pleas bar recovery of damages for unlawful incarceration under 42 U.S.C. § 1983 have encouraged the practice. This is so because it insulates the local jurisdiction from potentially significant civil damages awards.

Precluding recovery when defendants have no practical way to challenge their convictions while incarcerated is wrong. And that is always the case where, as here, a plea was entered in exchange for time served. Failing to resolve this important legal question in Petitioner's favor has substantial, practical consequences for other similarly-situated

persons. Even the Ninth Circuit majority characterized its decision as “unfortunate,”⁹ compelled by the caselaw but fundamentally unjust. Allowing that decision to stand would send a message to prosecutors’ offices around the country that their duty to seek justice can give way to financial considerations. Instead, this Court should grant certiorari and hold, as five Justices agreed in *Spencer v. Kemna*, 523 U.S. 1 (1998), that *Heck* does not bar § 1983 relief for a former prisoner who could not have challenged his conviction while incarcerated.

Unfortunately, when local jurisdictions confront cases in which fiscal and ethical considerations go head to head, fiscal considerations sometimes prevail. By granting certiorari and holding that *Heck* does not bar § 1983 claims by former prisoners who had no opportunity to pursue their claims under the habeas statute, this Court would not only resolve an intractable circuit split, but discourage prosecutors from trying to extract such pleas as a condition of release.

FACTUAL BACKGROUND

A. Taylor’s Unlawful Conviction and Forty-Two Year Incarceration.

Petitioner’s brief describes his unlawful conviction and incarceration. The ABA highlights below the role prosecutorial misconduct played.

⁹ *Taylor v. County of Pima*, 913 F.3d 930, 936 (9th Cir.), *reh’g denied*, 933 F.3d 1191 (9th Cir. 2019).

The prosecution’s case against Louis Taylor—who was only 16 years old at the time of Tucson’s Pioneer Hotel fire in 1972—was predicated in large part on Pima County’s expert testimony that the fire was caused by arson and an accelerant had been used, and testimony from an inmate that, while in jail, Taylor had admitted to starting the fire using lighter fluid.¹⁰ Upon reexamination forty years later, that key evidence was shown to be the product of highly troubling prosecutorial decisions.

First, contrary to *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution had suppressed an expert report stating that no accelerant had been used in connection with the fire—thereby contradicting the prosecution’s theory of the case and the testimony of its two primary witnesses, the “expert” fire investigator and the jailhouse informant.¹¹ *See id.*, 373 U.S. at 87-88 (holding that prosecution’s failure to turn over exculpatory evidence to defendant “where the evidence is material either to guilt or to punishment” violates the Due Process Clause of the Fourteenth Amendment); *accord* Prosecution Function Standard 3.5-4(a) (stating that prosecutors should “diligently seek to identify” exculpatory evidence and disclose it to the defense, rather than concealing it).

Second, the brother of the now-deceased jailhouse informant testified that police had induced his brother to fabricate Taylor’s “confession” to arson in

¹⁰ *See* Appellants’ Excerpts of Record from Ninth Circuit (“ER”), No. 17-16980, Dkt. 12, at 062-065, 070, 089-090.

¹¹ *See* ER 070, 077-078, 093-095.

exchange for a plea deal.¹² The solicitation and use of that testimony was improper. *See Napue v. Illinois*, 360 U.S. 264, 268 (1959) (holding that the knowing use of false testimony by a prosecutor in a criminal case violates the Due Process Clause of the Fourteenth Amendment); Prosecution Function Standard 3-4.1(b) (“A prosecutor should not use illegal or unethical means to obtain evidence or information.”).

Third, the prosecution’s expert witness, a fire prevention officer, admitted in a 2012 deposition that he had reached “preliminary conclusions,” after only a quick walk-through of the hotel, that the fire was arson and “the culprit was probably black and . . . probably 18” because:

Blacks at that point, their background was the use of fire for beneficial purposes . . . they were used to clearing lands and doing cleanup work and things like that and fire was a tool . . . And if they get mad at somebody, the first thing they do is use something they’re comfortable with. Fire was one of them.¹³

¹² *See* ER 071-073 (also detailing prior statements made by that witness himself that the State’s investigator had threatened to charge him with crimes, if he did not testify that Taylor had confessed to starting the fire).

¹³ *60 Minutes: Arizona’s Pioneer Hotel Fire Re-Examined* (CBS News television broadcast Mar. 31, 2013), available at <https://www.youtube.com/watch?v=UKecVbSwKKw> (transcribed excerpt from deposition of C. Holmes); *see also* ER 227 (referencing C. Holmes’ comments regarding “black boys”).

Cf. Buck v. Davis, 137 S. Ct. 759, 775-776, 780 (2017) (defense counsel’s presentation of expert testimony that defendant was more likely to act violently in the future because he was black violated Sixth Amendment right to effective assistance of counsel).

Fourth, the evidence of arson relied on by Pima County’s expert has since been discredited. In 2006, an Arson Review Committee comprised of renowned fire science experts concluded that there was no scientific basis to classify the Pioneer Hotel fire as an arson.¹⁴ Even the report commissioned in response by the Pima County Attorney from the City of Tucson Fire Department concluded that “a fire cause determination is not possible.”¹⁵

Given these developments, the County conceded that new advances in fire science investigation constituted “newly discovered evidence” that would warrant a new trial for Taylor and, as such, the County would be unable to proceed with a retrial and Taylor’s prior convictions would not stand.¹⁶ But the County nonetheless insisted that Taylor plead no contest to 28 counts of felony murder, with a sentence of time served.¹⁷ Taylor, who had professed his innocence for four decades, felt he “had no choice” but to agree: after forty-two years, the

¹⁴ See ER 076-086.

¹⁵ ER 123.

¹⁶ ER 123-124, 156.

¹⁷ See ER 124-125.

prospect of spending “another minute, another hour, another decade” in prison was unbearable.¹⁸

B. Taylor’s Attempt to Recover Section 1983 Damages for His Unlawful Incarceration.

Upon release, Taylor sought to recover damages under 42 U.S.C. § 1983 from Pima County and the City of Tucson for the violation of his constitutional rights, which had led to 42 years of wrongful imprisonment.¹⁹ While initially holding that *Heck* did not bar a § 1983 claim by a released prisoner who could not have challenged his conviction via a habeas petition,²⁰ the district court later granted the County’s motion for reconsideration and held that Taylor was barred from recovering damages.²¹

The Ninth Circuit affirmed. In so doing, the majority made clear that it did not believe its decision to be just, but rather compelled by this Court’s precedent:

¹⁸ See *Freed Prisoner Louis Taylor on Pioneer Hotel Plea: “I had no choice”* (CBS News television broadcast Apr. 3, 2013), available at <https://www.cbsnews.com/news/freed-prisoner-louis-taylor-on-pioneer-hotel-plea-i-had-no-choice/>.

¹⁹ See ER 002-024.

²⁰ See Pet. App. 91a-93a.

²¹ See Pet. App. 54a-66a & 68a-71a. The district court followed *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), an intervening Ninth Circuit decision which adopted a contrary interpretation of *Heck*. *Lyall* held that former prisoners who could not bring a habeas suit while incarcerated could thereafter only challenge the “loss of good-time credits, revocation of parole or similar matters,” but not “their underlying convictions.” *Id.* at 1191-92 (internal citation omitted).

We take no pleasure in reaching this unfortunate result, given Taylor's serious allegations of unconstitutional actions by the County. But we cannot disregard the limitations imposed by Congress and the Supreme Court

Taylor v. County of Pima, 913 F.3d 930, 936 (9th Cir.).

The dissent disagreed. It highlighted the fundamental injustice of the majority's holding that Taylor's new plea blocked recovery, given that it "was the product of his desperate circumstances. In his 60's, he faced acceptance of the plea offer or waiting years for a habeas petition to work its way through the court." *Taylor*, 913 F.3d at 940 (Schroeder, J., dissenting). The dissent laid responsibility for the unjust plea squarely on the prosecutor's office, characterizing it as the result of "coercive tactics" which perpetuated "an abuse of power" that § 1983 should address. *Id.* The dissent closed by reminding the majority of the role prosecutors play in maintaining the integrity of our justice system:

When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined.

Id. at 940 (quoting *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005)).

SUMMARY OF ARGUMENT

This Court should grant Taylor's petition for certiorari for important legal and practical reasons. Correcting the Ninth Circuit's misapplication of *Heck v. Humphrey*, 512 U.S. 477 (1994), by confirming that *Heck* only applies where the person seeking relief under § 1983 remains incarcerated or could have sought habeas relief while incarcerated—as five Justices agreed in *Spencer v. Kemna*, see 523 U.S. at 19-21 & 25 n.8—would provide much-needed guidance to the lower courts. The Circuits have split on the circumstances in which *Heck* bars a § 1983 suit, and their decisions, and those of the lower courts, have been increasingly confused. Deciding that issue would not only provide much-needed guidance to the lower courts, but also to states, municipalities, and prosecutors' offices when they are deciding how to proceed after concluding that a prior conviction likely was unlawful.

The legal question presented by the petition also has important practical consequences. Some prosecutors' offices have required that unlawfully convicted, but still incarcerated defendants enter a new guilty, no-contest, or *Alford* plea to secure their immediate release. That practice is at odds with several of the ABA's prosecutorial standards, rules, and resolutions, and the ABA believes it undermines public faith in, and the very integrity of, our criminal justice system. By granting certiorari and holding that *Heck* does not bar § 1983 claims in such circumstances, this Court would discourage that troubling prosecutorial practice.

ARGUMENT**I. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE NINTH CIRCUIT'S MISAPPLICATION OF *HECK* V. *HUMPHREY*.**

The ABA urges the Court to grant certiorari to resolve the Circuit split over whether *Heck* bars a criminal defendant in Taylor's situation from recovering damages under 42 U.S.C. § 1983 after his conviction has been vacated and he has been released. This Court should hold that it does not.

Heck held that, to recover damages for an allegedly unconstitutional conviction or imprisonment, a § 1983 plaintiff must show that the conviction or sentence has been reversed, expunged, or declared invalid in some way. *Heck*, 512 U.S. at 486-87. The question over which courts have split is whether *Heck* applies to a prisoner who is *not* still in custody and lacked any opportunity to seek habeas relief while in custody. It should not.

This would be consistent with the narrower view of *Heck* outlined by the concurring opinion in *Spencer v. Kemna*, 523 U.S. 1 (1998), in which Justice Souter, writing for three other justices, agreed that a habeas petition filed by a released prisoner challenging his parole revocation was moot, but hinged that conclusion on his understanding that *Heck* would not bar a released prisoner from bringing a § 1983 claim. *See id.*, 523 U.S. at 19-21. He emphasized that the petitioner in *Heck* was "an inmate" still "in custody," and therefore required to exhaust the state appeals process and to secure a favorable termination of the incarceration either

through that process or federal habeas before seeking § 1983 damages. *Id.* at 19-20. Justice Souter explained that it would be “a patent anomaly” to apply the favorable termination requirement of *Heck* to a plaintiff *not* in custody given that such an interpretation would make a person sentenced to a short term, or convicted but not imprisoned, chronically ineligible for relief. *Id.* at 20. He clarified:

[A] former prisoner no longer “in custody” may bring a §1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable termination requirement that it would be impossible as a matter of law for him to satisfy.

Id. at 21. Justice Stevens agreed with that proposition in his dissent. *See id.* at 24 n.8 (“Given the Court’s holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983.”).

Adopting this view of *Heck* would result in a uniform, easy-to-understand rule that the lower courts can readily apply. And it would resolve Taylor’s case in a manner that avoids the unjust result reached below. Because Taylor is no longer in custody, he may challenge his incarceration through § 1983, whether or not his original conviction is

deemed to have been “favorably terminated” in light of its *vacatur*.²² ER 137.

Importantly, this Court’s holding that *Heck* applies only where the person seeking relief under § 1983 remains imprisoned would also encourage prosecutors to follow the ABA’s Prosecutorial Standards and ABA Resolution 112B. With the scope of the *Heck* bar clearly confined, state and local jurisdictions no longer would have a financial incentive to extract new no-contest or guilty pleas, before agreeing to support a motion to vacate an unlawful conviction. A decision from this Court on whether *Heck* applies to a situation like Taylor’s will not only provide guidance to lower courts, but also to states, local jurisdictions, and prosecutors.

II. TAYLOR’S PETITION PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The issue presented here—whether a state or local jurisdiction may avoid paying civil damages by conditioning the release of a person whose conviction has been shown to be unlawful on a new plea and thus insulating themselves under a broad (and incorrect) reading of *Heck*—is of exceptional importance. It is critical to the integrity of our prosecutorial system that pleas be free from coercion, particularly where a defendant is

²² As Taylor explains, it is highly doubtful whether *Heck* would bar recovery in the circumstances here, even if *Heck* applied to former prisoners generally, and that question is itself the subject of a significant split among the lower courts which merits this Court’s review. *See* Pet. 21-26, 29-32.

incarcerated pursuant to a conviction that the prosecutor's office itself acknowledges can no longer be sustained. Demanding that the incarcerated defendant enter a new guilty, no-contest, or *Alford* plea in such circumstances in order to secure release is at odds with the guidance of the ABA's prosecutorial standards, rules, and resolutions, undermines the integrity of our criminal justice system, and has long-term negative consequences for persons who, like Taylor, accept such pleas out of desperation to secure their release.

A. Conditioning the Release of a Wrongfully Convicted Person on a New Plea is Inconsistent with the ABA's Prosecutorial Guidance and Undermines the Integrity of Our Justice System.

ABA Model Rule 3.8(h) directs a prosecutor to remedy a wrongful conviction when she "knows of clear and convincing evidence establishing that [the] defendant . . . was convicted of an offense that the defendant did not commit."²³ And Prosecution Function Standard 3-4.3(a) suggests that "[a] prosecutor should seek or file criminal charges only if the prosecutor believes that the charges are supported by probable cause [and] that admissible

²³ The clear and convincing standard represents the bare minimum expected of prosecutors presented with evidence indicating a likely wrongful conviction. See Am. Bar Ass'n, Report to the House of Delegates (Criminal Justice Section) (2008) (accompanying proposed Model Rules 3.8(g) and (h) and expressing "the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum.")

evidence will be sufficient to support a conviction beyond a reasonable doubt.” These standards are well-accepted norms, reflecting decades of study and deliberation by the ABA. Together, they guide a prosecutor’s office that knows of a wrongful, or a likely wrongful, conviction to act to vacate the conviction—without conditioning such action and the defendant’s release on an agreement to a new guilty, no-contest, or *Alford* plea.

In 2017, the ABA House of Delegates reaffirmed that guidance by passing Resolution 112B:

When the prosecutor’s office supports a defendant’s motion to vacate a conviction based on the office’s doubts about the defendant’s guilt . . . or about the lawfulness of the defendant’s conviction, the office should not condition its support for the motion on an *Alford* plea, a guilty plea, or a no contest plea by the defendant to the original or any other charge. Nevertheless, the office may independently pursue any charge it believes is supported by admissible evidence sufficient to prove guilt beyond reasonable doubt, and may seek to resolve the matter with an *Alford* plea, no contest plea, or guilty plea to that charge.

Resolution 112B, *supra* p.4, at 1. In its Report supporting the resolution, the ABA commended the increasing number of prosecutors’ offices that had convened conviction integrity units and reviewed past convictions, but explained that it remained concerned about occasions in which prosecutors with serious doubts about a convicted defendant’s guilt had conditioned the office’s support for the release of

such a defendant upon a new guilty, no-contest, or *Alford* plea.²⁴ This is because the prosecution's conditioning of a plea in exchange for its support for a post-conviction remedy raises the risk that such pleas are likely to be, or appear to be, coerced, and are unfair to the defendant.²⁵

However, several Circuits, including the Ninth, have now effectively endorsed this practice by holding that the later convictions bar recovery of damages under 42 U.S.C. § 1983. *See Taylor*, 913 F.3d at 936; *Olsen v. Correiro*, 189 F.3d 52, 55 (1st Cir. 1999) (defendant whose murder conviction was overturned, but who then pled guilty to manslaughter in exchange for a sentence of time served, could not recover under § 1983); *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (defendant who pled guilty to lesser crime after prior conviction was vacated could only recover for years served beyond those sanctioned by new sentence). It is all the more troubling since this practice is at odds with accepted standards for prosecutorial conduct.

Extracting pleas from defendants who have essentially been exonerated also undermines public confidence in our criminal justice system. The public appearance will often be that the prosecution insisted on the guilty plea to save face or to prevent the defendant from pursuing civil remedies—not that the defendant is genuinely guilty of the new

²⁴ ABA Report with Resolution 112B (Criminal Justice Section) (2017) at 2.

²⁵ *Id.* at 3.

charge.²⁶ Indeed, avoiding liability for civil damages is often the motivating factor behind the growing practice of securing guilty, no-contest, or *Alford* pleas in exchange for the immediate release of a wrongfully convicted defendant.²⁷

Extracting a plea by withholding consent to *vacatur* of a prior unlawful conviction and release also carries a serious risk that it is, in fact, predicated on a false admission of guilt. A person facing jail time may accept a guilty plea to avoid or secure release from incarceration—even if he is innocent. And as Taylor has explained, a person who has wrongly lost decades of his life in jail will feel particularly compelled to take any opportunity to be released, even if it means pleading no contest or guilty to a crime for which he has steadfastly maintained his innocence.²⁸

²⁶ As the Ninth Circuit recognized in *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir. 1970): “It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant . . . , even where the civil case arises from the events that are also the basis for the criminal charge.”

²⁷ See, e.g., Stephanie Clifford, *Wrongly Convicted, They Had to Choose: Freedom or Restitution*, N.Y. Times (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html> (discussing financial issues faced by jurisdictions as a result of past exonerations, and providing examples where prosecutors sought new pleas to avoid such liability).

²⁸ See “*Freed Prisoner*,” *supra* n.18.

B. Pleading No Contest to Time Served to Secure Release from a Wrongful Conviction is Not Unique.

Taylor's predicament was not unique. Numerous individuals have been exonerated or had their convictions proven unlawful after years of imprisonment, and an increasing number have then had prosecutors require that they plead guilty or no contest to new charges, with a sentence of time served, in order to secure their immediate release.

Exonerations are increasingly common. The National Registry of Exonerations lists 2,522 exonerations since 1989.²⁹ That number, which does not include cases like Taylor's where the defendant agreed to a new plea to secure release, amounts to over 22,315 years of wrongful imprisonment, roughly two-thirds of it served by people of color.³⁰ And while the average length of incarceration before release is just under nine years, more than a few

²⁹ National Registry of Exonerations, Univ. of Mich. Law Sch., <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Dec. 6, 2019). A project of the University of California, University of Michigan Law School, and Michigan State University College of Law, the Registry seeks to "provide comprehensive information on exonerations of innocent criminal defendants in order to prevent future false convictions" by, *inter alia*, providing data on all known exonerations since 1989 and studying the factors leading to wrongful convictions. See <https://www.law.umich.edu/special/exoneration/Pages/mission.aspx>.

³⁰ *Id.*

individuals have spent decades incarcerated for a crime they did not commit.³¹

Innocent people plead guilty or no contest to crimes for a variety of reasons,³² ranging from being falsely told that substances found on their persons tested positive for drugs,³³ to extended interrogations.³⁴ But perhaps the most powerful motivator for a false guilty plea is the desire to get out of jail. The threat of continued incarceration means that a defendant is significantly more likely to plead guilty, whether or not he is in fact guilty.³⁵

³¹ *See id.*

³² National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>.

³³ In Harris County, Texas, hundreds of persons who had pled guilty to drug possession were later exonerated by lab tests showing that the substance at issue was not drugs. *See* Radley Balko, *Faulty Drug Field Tests Bring False Confessions, Bad Convictions*, Wash. Post (Feb. 11, 2016). *See also* National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Documents/Drug_Cases_2016.pdf. Harris County is only unique in that it voluntarily reviewed past convictions; few prosecutors' offices have shown a similar commitment to redressing past mistakes. *See id.*, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx>.

³⁴ *See* Radley Balko, *Study: Sleep Deprivation Linked to False Confessions*, Wash. Post (Feb. 9, 2016).

³⁵ *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 747 (2017) (“detainees plead[] at a 25% higher rate than similarly situated releasees”); Will Dobbie et al., *The Effect of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 213-14 (Feb. 2018) (sample study of detainees in two
(continued...)

Especially for a wrongfully incarcerated person who has spent years or decades in prison, the prospect of immediate relief is understandably irresistible, particularly when the choice is to wait additional months or even years to secure full exoneration through ongoing or new proceedings. And many may not have even made an informed choice – not realizing that, by accepting a deal granting immediate freedom, they might be giving up the prospect of obtaining monetary relief for the unlawful conviction and/or incarceration.

The growing body of case law addressing the legal impact of such pleas in a wide variety of circumstances shows that this is a very real problem, and that prosecutors have used the desire of incarcerated defendants for freedom to extract new pleas even after the prior conviction has been shown to be unlawful. *See, e.g., Blumberg v. Hewitt*, 708 F. App'x 903, 904 (9th Cir. 2017) (person convicted of murder and granted habeas relief pled guilty and was sentenced to time served); *Poventud v. City of New York*, 750 F.3d 121, 135-36 (2d Cir. 2014) (person whose conviction was vacated accepted State's offer to plead guilty to a lesser charge in exchange for immediate release); *Olsen v. Correiro*, 189 F.3d 52, 55 (1st Cir. 1999) (person secured *vacatur* of murder conviction based on investigating officers' failure to disclose evidence, but pled *nolo contendere* to lesser charge of manslaughter with the State's agreement to recommend time served);

(continued...)

counties found that 44% of initially detained defendants pled guilty compared to only 20.7% of released defendants).

Dennis v. City of Philadelphia, 379 F. Supp. 3d 420, 423-24 (E.D. Pa. 2019) (person convicted for murder was granted habeas and then offered no contest plea); *Roberts v. City of Fairbanks*, No. 4:17-cv-0034-HRH, 2018 WL 5259453 (D. Alaska Oct. 22, 2018) (dismissing § 1983 claims of four persons convicted of murder who were released after presenting evidence of innocence due to stipulated agreement that vacated convictions had been validly entered).

Such pleas insulate jurisdictions from paying civil damages for wrongful incarceration.³⁶ But pleas extracted from defendants who have essentially been exonerated—and the legal impact of such pleas, including on § 1983 claims—require particular scrutiny given that we now know that prosecutors can, and do, secure guilty, no-contest, and *Alford* pleas from the innocent.

C. Coerced Pleas Lead to Serious Long-Term Consequences for the Wrongfully Convicted.

Plea deals such as the one at issue here also have devastating, long-term effects on those who enter into them—impacts that an incarcerated person may not fully comprehend or properly weigh when facing the prospect of more years behind bars. In many states, a felony guilty plea will prevent the defendant from voting, finding employment, and securing housing upon release.³⁷ For example, in

³⁶ See Clifford, *Wrongly Convicted*, *supra* n.27.

³⁷ See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 700 (2002) (documenting the collateral (continued...))

Arizona, where Taylor was convicted, a felony conviction deprives a released defendant of his right to serve on a jury³⁸ and to vote,³⁹ and prevents him from receiving worker's compensation benefits, getting certain tuition waivers at state schools, and potentially retaining parental rights.⁴⁰ In addition to these state law consequences, federal law requires that convicted felons be evicted from public housing⁴¹ and authorizes housing authorities to deny later applications.⁴² These are just the tip of the iceberg. Indeed, the National Inventory of Collateral Consequences of Conviction hosts a database of more than 44,605 state and federal consequences to guilty pleas.⁴³ Taylor has suffered many of these consequences firsthand. His no contest plea in 2013 rendered him ineligible for transitional housing and

(continued...)

consequences of guilty pleas); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 633 (2006) (analyzing the impact of collateral consequences on former prisoners' ability to "move on to productive, law-abiding lives" after release).

³⁸ Ariz. Rev. Stat. § 21-201.

³⁹ Ariz. Rev. Stat. § 16-101.

⁴⁰ Ariz. Rev. Stat. §§ 23-1031, 15-1808, 8-533.

⁴¹ 24 C.F.R. § 966.4.

⁴² 24 C.F.R. § 5.855.

⁴³ National Inventory of Collateral Consequences of Conviction, <https://niccc.csgjusticecenter.org/database/results/?page=1> (last visited Dec. 6, 2019).

other services, and made it difficult for him to secure housing on his own.⁴⁴

Being labeled as a felon also has negative psychological and social consequences, making it difficult for a former prisoner to reenter society successfully.⁴⁵ Individuals like Taylor, who plead no contest to new charges in order to secure their release, are not even listed in the National Registry of Exonerations, leaving them stigmatized despite evidence of innocence.⁴⁶

In sum, when prosecutors acknowledge that a prior conviction cannot stand, yet condition the person's release on the entry of a new plea, such defendants often face long-term negative consequences which they may not fully comprehend when they accept such a deal. Those unjust consequences, as well as the broader harm to the

⁴⁴ Kimberly Matas, *Year of Freedom After 4 Decades Behind Bars Difficult for Louis Taylor*, Arizona Daily Star, May 11, 2014, online at https://tucson.com/news/blogs/police-beat/year-of-freedom-after-decades-behind-bars-difficult-for-louis/article_595cb493-574d-5d50-a3de-06e3d1741ce4.html.

⁴⁵ See Elizabeth S. Vartkessian & Jared P. Tyler, *Legal and Social Exoneration: The Consequences of Michael Toney's Wrongful Conviction*, 75 Alb. L. Rev. 1467, 1491 (2012) (comparing the emotional and social consequences of an exoneration characterized by the prosecutor's office as indicating innocence with one where the prosecutor continued to insist the defendant was guilty).

⁴⁶ See National Registry of Exonerations, at <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (defining "exoneration" as being "officially cleared" by a pardon, acquittal, or dismissal of "all charges related to the crime for which the person was originally convicted.").

integrity of our criminal justice system caused by such conduct, are contrary to the ABA's guidance to prosecutors on this important issue. This Court should grant certiorari to review the legal effect of this practice on a formerly incarcerated person's ability to vindicate his rights under 42 U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, the Court should grant the Petition.

Respectfully submitted,

JUDY PERRY MARTINEZ
Counsel of Record
PRESIDENT
AMERICAN BAR
ASSOCIATION
321 N. Clark Street
Chicago, Illinois 60654
(312) 988-5000
AmicusBriefs@
americanbar.org

A. MARISA CHUN
CROWELL & MORING LLP
3 Embarcadero Ctr., 26th Flr.
San Francisco, CA 94111
(415) 986-2800
mchun@crowell.com

AMANDA SHAFER BERMAN
CROWELL & MORING LLP
1001 Pennsylvania Ave NW
Washington, D.C. 20004

Counsel for Amicus Curiae American Bar Association

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