No. 23-618

In the Supreme Court of the United States

DELANO MARCO MEDINA,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

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

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QUESTION PRESENTED

Whether it violates due process to accept a guilty plea from someone who maintains his innocence and for whose guilt the government has produced not even a scintilla of evidence.

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INTEREST OF *AMICUS CURIAE*[1]

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

This case interests Cato because the rule embraced by the Colorado Supreme Court—and a handful of other courts—empowers the government to convict an individual of a crime even when that individual protests his innocence and there is no evidence that he actually committed that crime. Such a perverse outcome of the plea bargaining process is utterly incompatible with the founders' concept of due process, as enshrined in the Constitution.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

If there is no evidence that someone committed a crime, can a court find that person guilty and convict him nevertheless? The answer to that question should be "obviously not"—at least in the United States of America, where the Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law[.]"[2] But due to the outsized role that plea bargaining currently plays in our criminal justice system, a handful of courts have endorsed this unsound and unjust practice.

Delano Medina was arrested and charged with the crime of menacing after he allegedly threatened his wife with a knife during an argument. Pet. Br. 3. In exchange for prosecutors dropping other unrelated charges, Medina entered an *Alford* plea—a guilty plea in which a defendant maintains that he is factually innocent of the crime. *Id*. at 3–4. Because the only witness against Medina recanted her allegation while he was in jail, Medina later sought to have his guilty plea withdrawn, and the case eventually made its way to the Colorado Supreme Court. *Id*. at 4–5.

Remarkably, the Colorado Supreme Court held that the Constitution does not require a court to find any factual basis to support an *Alford* plea. *Id*. at 6. According to the court, so long as a plea is "voluntary, knowing, and intelligent," a court may accept it—*even if the plea lacks a factual basis*. *Id*.

This result cannot be reconciled with *Alford*'s rationale or with the bedrock requirements of due

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[2] U.S. CONST. amend. XIV, § 1.

process. The bottom line is that Delano Medina has been convicted of a crime without any admission or evidence of guilt. Most courts hold—correctly—that this is unconstitutional, but a handful take the opposite view. Whether the government must present evidence (and if so how much) when a court accepts an *Alford* plea is a matter of grave concern for many Americans—approximately six percent of the over 18 million state criminal adjudications that take place each year result in *Alford* pleas. *Id.* at 29–30. The Court should resolve the disagreement among lower courts over this vital question of due process without further delay.

ARGUMENT

I. THE CONSTITUTION MANDATES THE STRONGEST DUE PROCESS PROTECTIONS WHEN RESOLVING CRIMINAL CHARGES BECAUSE OF THE STAKES FOR THE DEFENDANT AND THE PUBLIC.

Nothing in the American legal system receives a greater amount of attention, or enjoys a greater number of procedural protections, than the resolution of criminal charges.

Thus, the right to a jury trial in criminal cases is the only right that the Constitution mentions twice—first in the body of the unamended Constitution, and again in the Bill of Rights.[3] And the Bill of Rights devotes more words to criminal procedure than to any other subject.

Besides jury trials, due process in criminal cases includes such robust protections as "proof beyond a reasonable doubt"[4] (the highest standard in American law, or it appears in any country); jury unanimity,[5] and the non-appealability of acquittals, which flows from the rule against double jeopardy.[6] A criminal defendant cannot be compelled to be a witness against himself.[7] And a defendant has the right to confront the witnesses against him, the right to have compulsory process for obtaining witnesses in his favor, and the

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[3] U.S. CONST. art. III § 2; U.S. CONST. amend. VI.

[4] *See In re Winship*, 397 U.S. 358 (1970).

[5] *See Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

[6] U.S. CONST. amend. V.

[7] *Id.*

right to have the assistance of legal counsel for his defense.[8]

That the Constitution prescribes an exceptionally high level of legal protection in criminal cases is clear. Moreover, the text of the Constitution mentions no alternative method of adjudicating criminal charges, and provides no optional standard of due process. Accordingly, the Constitution's description of what constitutes due process in the criminal context is the appropriate yardstick—not a more generic, watered-down standard that the government might prefer but is absent from the Constitution.

This makes sense for at least three reasons. First, the consequences of a criminal conviction are often quite dire for the defendant. Persons convicted of a crime may face public disgrace, economic ruin, loss of liberty, and the destruction of personal relationships, along with an array of collateral legal consequences such as disenfranchisement, ineligibility for public housing or employment, deportation, and even the loss of fundamental rights like armed self-defense. Tragically, these outcomes are experienced both by the truly guilty, and by those who are innocent yet wrongly convicted. The judiciary should not embrace extra-constitutional practices like no-evidence *Alford* pleas that materially increase the risk of false convictions, no matter how efficient it might seem to do so.

Second, it is vital that the public has confidence in the criminal justice process. This is because doubt over whether innocent people are being convicted of crimes undermines the moral force of the law. John Adams

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[8] U.S. CONST. amend. VI.

emphasized the importance of this vital legal principle: if innocent people are condemned, "[people] will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security."[9] And if the public comes to believe that innocence is no protection against a criminal conviction, "there would be an end to all security what so ever."[10] The public interest in accurate criminal convictions is just as strong as the interest of individual defendants.

Third, a rigorous due process standard in criminal cases is important because governments have a well-established track record of employing criminal law as a tool of oppression against dissidents, perceived enemies, and others. This was obvious to the founders because they had witnessed (and in some cases experienced) such abuses firsthand, and they went to extraordinary lengths in the Bill of Rights and elsewhere to prevent it from happening again. The founders envisioned jury trials as the primary safeguard against such oppression. Indeed, a major grievance the founders listed in the Declaration of Independence against King George III was that he had "depriv[ed] us in many cases, of the benefits of Trial by Jury[.]"[11] While crafting the new American government, Thomas Jefferson called jury trials "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic]

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[9] John Adams, *Adams' Argument for the Defense: 3–4 December 1770*, FOUNDERS ONLINE, available at https://bit.ly/48rV9i5

[10] *Id*

[11] THE DECLARATION OF INDEPENDENCE, para. 20 (U.S. 1776).

constitution."[12] We disregard that wisdom—and we do disregard it, as the paucity of criminal and civil jury trials in our system makes plain—at our peril.

II. STANDARD PLEA BARGAINING GREATLY REDUCES CONSTITUTIONALLY PRESCRIBED PROCEDURAL SAFEGUARDS; *ALFORD* PLEAS REDUCE THEM EVEN MORE; AND *MEDINA*-STYLE NO-EVIDENCE-NO-ADMISSION PLEAS REDUCE THEM FURTHER STILL.

As noted, criminal jury trials provide the greatest amount of due process protection available anywhere in our legal system. According to the constitutionally prescribed procedure, evidence that a given defendant actually committed the crime with which he has been charged is essential to a conviction. Indeed, this Court has held that the Constitution requires the highest standard of proof, as well as jury unanimity, in order for a conviction to be valid: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[13]

As noted above and repeatedly by this Court, requiring such a high level of due process in criminal cases is paramount:

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[12] Thomas Jefferson, *Letter from Thomas Jefferson to Thomas Paine, 11 July 1789*, FOUNDERS ONLINE, available at https://bit.ly/3U88EiL.

[13] *In re Winship*, 397 U.S. 358, 364 (1970). For the requirement of jury unanimity, *see Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt *with utmost certainty*.[14]

In stark contrast to the robust procedures for conducting a criminal jury trial that are both described and prescribed by the Constitution, the process for convicting a defendant by means of a guilty plea is *ad hoc*, extra-constitutional, and vastly under-theorized. And while the Court has held that some due process protections still apply—such as the requirement that a guilty plea must be voluntary, knowing, and intelligent[15]—those minimal requirements stand in sharp and dubious contrast with the more rigorous, thoughtful, and time-tested procedures spelled out with such care in the Bill of Rights.

When this Court first upheld the practice of plea bargaining in *Brady v. United States*, it did so on the understanding that a guilty plea was a "solemn act" whereby the defendant "admi[ts] in open court that he committed the acts charged in the indictment."[16] But practically in the same breath, the same Court in *North Carolina v. Alford* announced an exception to

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[14] *Id.* at 364 (emphasis added).

[15] *Brady v. United States*, 397 U.S. 742, 748 (1970).

[16] *Id.*

this seemingly bedrock requirement that it had previously called "the foundation for entering judgment against the defendant[.]"[17]

In *Alford*, the Court upheld the validity of a guilty plea by a defendant who refused to admit that he was guilty of murder and affirmatively maintained his innocence—but nevertheless wished to plead guilty so that he could avoid the death penalty.[18] The Court noted that "[o]rdinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him[.]"[19] The Court also expressed concern that, because the defendant's "assertion of innocence negatived any admission of guilt," "it might be argued that the conviction entered on his guilty plea was invalid[.]"[20] Yet the Court ultimately chose to uphold the validity of the guilty plea both because it was entered "voluntarily" *and* because of the "overwhelming evidence" of the defendant's actual guilt present in the record—evidence that "substantially negated his claim of innocence[.]"[21]

The procedure approved of in *Alford*—whereby a defendant may be convicted by pleading guilty even while affirming his actual innocence—represented yet another reduction in the quantum of due process accorded in criminal cases from the exceptionally robust standards prescribed by the Constitution. To be

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[17] *Id.*

[18] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[19] *Id.* at 32.

[20] *Id.*

[21] *Id.* at 37–38.

sure, in permitting *Alford*-style pleas, the Court sought to retain at least some procedural safeguards, expressly citing "the *strong factual basis* for the plea demonstrated by the State" as the first of two reasons why "the trial judge did not commit constitutional error[.]"[22] Whether such a modest safeguard against wrongful conviction is constitutionally sufficient is questionable.[23] But even this extremely limited form of due process has now been discarded by a small but growing number of tribunals, including the Colorado Supreme Court.

Most courts have held that *Alford* pleas require a factual basis in order to be valid—typically a "strong factual basis." Pet. Br. 8–20. Yet according to the Colorado Supreme Court, so long as a plea is "voluntary, knowing, and intelligent," a court may accept it even if the plea lacks the factual basis that was remarked upon in—and, a fair reading suggests, required by—*Alford*. *Id.* at 6. Thus, unlike in most jurisdictions, a defendant in Colorado may be convicted of a crime if the state induces him to plead guilty, even without any admission of guilt, and even without so much as a scintilla of evidence that the defendant is actually guilty.

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[22] *Id.* at 38 (emphasis added). The second rationale articulated by the Court was Alford's "clearly expressed" desire to enter the plea, which was scarcely surprising given his exposure.

[23] *Id.* at 40 (Brennan, J., dissenting) ("[W]ithout reaching the question whether due process permits the entry of judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime, I believe that at the very least such a denial of guilt is also a relevant factor in determining whether the plea was voluntarily and intelligently made.").

If criminal due process has a floor—and it certainly does—it's hard to imagine how *Medina*-style plea bargaining doesn't fall below it. The idea that someone can be convicted of a crime with no admission of guilt and zero evidence finds no support in the text, history, or tradition of the Constitution. What's more, that procedure is utterly irreconcilable with this Court's emphatic declaration that "every individual going about his ordinary affairs [must] have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."[24]

When the Court made this declaration in *In re Winship*, it was describing the due process requirements in criminal jury trials. Self-evidently, a plea bargain is not the same thing as a criminal trial, but even if one were to assume that due process does not require the same standards of evidence and proof for guilty pleas as it does for criminal trials, there must nevertheless be *some* basis for establishing the defendant's guilt beyond his bare desire to avail himself of a comparatively attractive plea offer. To require no evidence at all is flatly inconsistent with the Court's insistence that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[25] If a standard of proof requiring zero evidence and no admission of guilt does not leave people in doubt whether innocent men are being condemned, it is difficult to imagine what would.

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[24] *In re Winship*, 397 U.S. 358, 364 (1970).

[25] *Id.*

III. IT IS ESPECIALLY IMPORTANT TO GET CONSTITUTIONAL QUESTIONS ABOUT PLEA BARGAINING RIGHT BECAUSE OF THE OUTSIZED ROLE IT PLAYS IN OUR SYSTEM AND INCREASING REASONS TO BE SKEPTICAL OF ITS SUPPOSED INFALLIBILITY.

If this Court had to pick just one issue in the American legal system to get right, it would be plea bargaining, largely due to the sheer magnitude of the role it now plays in our society. According to the FBI, there were roughly six million arrests in 2022, excluding traffic offenses.[26] Nearly 80 million Americans have a criminal record resulting from arrest or conviction,[27] about 19 million have a felony conviction,[28] and roughly 5.5 million were under supervision of adult correctional systems in 2020.[29] In short, tens of millions of people have had contact with America's criminal justice system. And in the overwhelming majority of cases, criminal convictions come about through the plea bargaining process—*not* through trials.

This Court has frequently stepped in to ensure that constitutional rights are protected in the context of

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[26] FBI CRIME DATA EXPLORER, ARREST OFFENSE COUNTS IN THE UNITED STATES, available at https://bit.ly/41qusrx (last visited Dec. 18, 2023).

[27] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), available at https://bit.ly/3Rwvg9P.

[28] *Id.*

[29] BUREAU OF JUST. STAT., TOTAL CORRECTIONAL POPULATION (May 11, 2021), available at https://bit.ly/41pZwrn.

criminal trials.[30] This Court correctly saw that it was necessary to protect the due process rights of defendants in criminal trials in order to uphold the integrity of the criminal justice system as a whole. Since the amount of plea bargaining now dwarfs criminal trials, it follows that it is even more urgent for the Court to take action to ensure due process in that context—just as it has done for trials.

A. Criminal Trials Have Been Largely Replaced By Plea Bargaining.

The vast majority of criminal convictions today are obtained through guilty pleas. In 2021, the U.S. Sentencing Commission reported that 98.3 percent of all federal criminal convictions were the result of guilty pleas.[31] State-level figures are more difficult to obtain and less precise, but estimates show a similar picture: about 94 percent of state criminal convictions are the result of guilty pleas.[32] In some areas, the rate is even higher—the American Bar Association's Plea Bargaining Task Force reports that "in the last decade, states like New York, Pennsylvania and Texas have all

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[30] *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) (unconstitutionally seized evidence must be excluded at trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent criminal defendants have the right to government-appointed counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (suspects subject to custodial interrogation must be informed of their right against self-incrimination); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (guaranteeing the right to a jury trial against the states).

[31] U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56, available at https://bit.ly/482XLmq.

[32] Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), available at https://bit.ly/3GUQNDT.

had trial rates of less than 3%" and "[s]ome jurisdictions in the country report not having had a criminal trial in years."[33]

To say that most criminal convictions are the result of guilty pleas is true but says too little—*nearly all* criminal convictions in the United States are the result of guilty pleas, instead of trials. Consequently, criminal trials are now the exception in our system, not the rule.

Indeed, this Court itself has acknowledged that our criminal justice system is now centered primarily around plea bargains instead of trials. In 2012 the Court noted that "criminal justice today is for the most part a system of pleas, not a system of trials."[34] In another opinion that same year, the Court emphasized that "[plea bargaining] is not some adjunct to the criminal justice system, it *is* the criminal justice system."[35]

Given the reality that nearly all criminal convictions today are the result of plea bargaining, it is essential that the Court take steps to ensure that the rights of defendants are safeguarded in that process, just as they are in criminal trials. Over forty years ago, legal scholar Albert Alschuler vividly described the contrast between the protections afforded to defendants who go to trial in comparison

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[33] AM. BAR ASS'N, 2023 PLEA BARGAIN TASK FORCE REPORT 36 n.2, available at https://bit.ly/487QEcn.

[34] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

[35] *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotations omitted).

with the lack of attention paid to the rights of the vast majority of defendants who plead guilty:

> In providing elaborate trials to a minority of defendants while pressing all others to abandon their right to trial, our nation allocates its existing resources about as sensibly as a nation that attempted to solve its transportation problem by giving Cadillacs to ten percent of the population while requiring everyone else to travel by foot.[36]

Decades after Alschuler first made that comparison, the situation has only gotten worse. Today, "[i]t's like trying to solve the transportation problem by giving Cadillacs to 2 percent of the population and making everybody else walk."[37]

Given that the resolution of at least 90 percent of cases now comes via guilty pleas, the Court should ensure that plea bargaining is not used as a loophole by the government to evade appropriate judicial scrutiny. The rights of defendants who accept plea deals deserve at least as much attention from the Court as it has historically given to the rights of defendants who go to trial. Indeed, given the outsized role of plea bargaining in our system, the Court would

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[36] Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 969 (1983).

[37] Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), available at https://bit.ly/3HdLSOS.

be increasingly justified in giving *priority* to plea bargaining over trial procedures.

B. Innocent People Regularly Plead Guilty To Crimes They Did Not Commit.

When the Court first upheld the practice of plea bargaining, the justices noted that they "would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants . . . would falsely condemn themselves."[38] At the time, the Court considered this unlikely, and noted its expectation that lower courts would "satisfy themselves . . . that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged."[39] Unfortunately, it has become increasingly apparent that the Court's confidence in the accuracy of plea bargaining and the ability of lower courts to properly oversee it was fundamentally misplaced. It is now beyond dispute that defendants in the U.S. criminal justice system regularly plead guilty to crimes they did not commit.

Innocent people plead guilty for a number of reasons, according to Judge Jed Rakoff of the United States District Court for the Southern District of New York. One reason is simple psychological pressure—the same reason people often give false confessions during police interrogations. "[Y]oung, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot 'take the heat' of

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[38] *Brady v. United States*, 397 U.S. 742, 758 (1970).

[39] *Id.*

an interrogation. . . . [S]imilar pressures, less immediate but more prolonged, may be in effect [when innocent people plead guilty]."[40]

Innocent people may also choose to plead guilty because they think doing so is their best option. "[A] defendant's decision to plead guilty to a crime he did not commit may represent a 'rational,' if cynical, cost-benefit analysis of his situation[.]"[41] A defendant's fear that he might be convicted at trial and receive a much harsher punishment than the offered plea bargain, may lead even completely innocent defendants to conclude that they have no other choice.

But aren't innocent people at least *less* likely to falsely plead guilty? Unfortunately, the opposite is more likely to be true. "[I]n fact there is some evidence that the pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so."[42] In other words, innocent

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[40] Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014).

[41] *Id.*

[42] *Id.*

people tend to be risk-averse, leading them to "take the deal" rather than risk greater punishment.

That innocent people falsely plead guilty is certain. The only question is how many do so. And the short but disturbing answer is that we simply have no idea.

1. At the lowest credible estimate, over one thousand people plead guilty to crimes they did not commit every year.

It is not possible to know exactly how many innocent people falsely plead guilty. But we do know that the number is not trivial or negligible. On the contrary, the number of defendants who falsely plead guilty probably numbers in the thousands each year.

According to the Innocence Project, of 375 individuals exonerated by DNA analysis between 1989 and 2020, 44 (or 11 percent) had pled guilty to crimes they did not commit.[43] These documented cases prove beyond doubt that innocent people do plead guilty. But the individuals exonerated through the Innocence Project are just the tip of the iceberg.

Other researchers have attempted to estimate the number of false guilty pleas overall. Law professor Lucian Dervan has summarized the studies' findings:

> At least one study has concluded that as many as 27 percent of defendants who plead guilty would not have been convicted at trial, though this estimate seems exceptionally high. . . . Other studies have placed the number of

[43] *DNA Exonerations in the United States (1989–2020)*, INNOCENCE PROJECT (Dec. 27, 2023 3:45 PM), available at https://bit.ly/3NWSzbA.

> defendants who plead guilty as a result of inducements by the government but who are factually innocent between 1.6 percent and 8 percent. Taking even the lowest of these estimates, the reality is striking and means that in 2009 there were over 1,250 innocent defendants forced to falsely admit guilt in the federal system alone.[44]

In his influential article, Judge Rakoff provided further perspective:

> How prevalent is the phenomenon of innocent people pleading guilty? The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent. The size of that range suggests the imperfection of the data; but let us suppose that it is even lower, say, no more than 1 percent. When you recall that, of the 2.2 million Americans in prison, over 2 million are there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they

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[44] Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84–85 (2012).

> pleaded guilty but did not in fact commit.[45]

These estimates raise serious concerns that due process is not being strictly followed in the plea bargaining process. U.S. District Judge John Kane put it well in his response to Judge Rakoff's estimate that between two and eight percent of convicted felons plead guilty to crimes they did not commit: "With over 2.2 million people in American prisons that is a haunting amount of injustice."[46]

2. Studies show that it is far easier to elicit false guilty pleas from innocent people than is commonly supposed.

The official position of this Court and the rest of the judiciary is that innocent people are unlikely to plead guilty.[47] Studies show that this is false; instead, it is quite clear that many if not most innocent people will falsely condemn themselves rather than face the risk of increased punishment.

Laboratory experiments focusing on false accusations have shown that a *majority* of demonstrably innocent people will agree to less severe punishments, in order to avoid the risk of losing an evidentiary hearing and receiving more severe

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[45] Rakoff, *supra* note 40.

[46] John L. Kane, *Plea Bargaining and the Innocent*, THE MARSHALL PROJECT (Dec. 26, 2014, 1:05 PM), available at https://bit.ly/3tIbwbj.

[47] *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.")

punishments.[48] In one groundbreaking study, Professors Lucian Dervan and Vanessa Edkins created a simulation in which students were invited to participate in a project that they were told was designed to test individual work versus group work.[49] Using a confederate in the room, the authors managed to get about half the students to cheat.[50] They then accused all the students of cheating and offered leniency to any who agreed to confess.[51] *Fifty-six percent* of innocent subjects chose to plead guilty to avoid the harsher punishment that they were told would be imposed had they challenged the accusation and lost.[52]

According to Professor Dervan, "[t]he results of the study were groundbreaking and brought to an end the longstanding debate regarding whether innocents will falsely plead guilty."[53] Such findings have massive implications for the integrity of the criminal justice system, and it is well past time for this Court to take them seriously. False guilty pleas are common, and due process protections must take this fact into account.

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[48] Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 34 tbl. 1 (2013).

[49] *Id*. at 28.

[50] *Id*. at 28–30.

[51] *Id*. at 31.

[52] *Id*. at 34 tbl. 1.

[53] Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 FED. SENT'G REP. 239, 242 (2019).

CONCLUSION

If due process means anything at all, it surely entails that the government must present *some* evidence that the defendant committed the crime with which he was charged when there has been no admission of guilt. The petition should be granted so this Court can clarify that the now-ubiquitous "system of pleas" must not be fully stripped of the robust procedural protections that are among the founders' proudest and most important legacies.

Respectfully submitted,

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