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

REPLY BRIEF FOR PETITIONER

KRISTA A. SCHELHAAS
SCHELHAAS LAW LLC
P.O. Box 621355
Littleton, CO 80162

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

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Is it consistent with due process for a court to convict a criminal defendant without finding that the defendant is guilty? There are two schools of thought on this question.

The traditional view, which was unchallenged until the late twentieth century, is that a defendant may not be convicted without evidence of guilt. *See* 4 William Blackstone, *Commentaries on the Laws of England* 355 (Oxford, 1769) (noting that a "conviction may accrue two ways; either by his confessing the offense and pleading guilty; or by his being found so by the verdict of his country"); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) (holding that it is "a violation of due process to convict and punish a man without evidence of guilt"); *North Carolina v. Alford*, 400 U.S. 25, 38 n.10 (1970) (holding that "pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea").

The opposing view, which did not exist until the late twentieth century, is that defendants may plead guilty to crimes without any evidence of guilt, so long as the plea is the defendant's voluntary and intelligent choice. This view may justly be called the Easterbrook view, because it was devised in a law review article by then-Professor Easterbrook and it was implemented in a Seventh Circuit opinion authored by Judge Easterbrook. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Leg.

Stud. 289, 320 (1983); *Higgason v. Clark*, 984 F.2d 203, 207-08 (7th Cir. 1993).[1]

Under the traditional view, the primary purpose of the criminal justice system is to distinguish between the guilty and the innocent and to convict only the guilty. Under the Easterbrook view, by contrast, the primary purpose of the criminal justice system is to facilitate bargaining between the defendant and the government. Under the traditional view, the court's job is to ensure that innocent people aren't convicted. Under the Easterbrook view, by contrast, the court's job is merely to ratify what the parties have agreed to—in Colorado's words, to enforce the "principle that trusts individuals to do what is right for them." BIO 22.

Colorado acknowledges that the lower courts are deeply divided on this question. *Id.* at 22-24. Colorado nevertheless argues that the Court should not grant certiorari, on three grounds: first, that the decision below is correct; second, that this case is an unsuitable vehicle; and third, that this issue is unimportant. Colorado is mistaken in all three respects. The decision below is wrong. This case is an excellent vehicle. And the issue is extremely important.

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[1] Colorado has found an earlier Sixth Circuit opinion to the same effect, BIO 24 (citing *Roddy v. Black*, 516 F.2d 1380, 1385 (6th Cir. 1975)), but Easterbrook did not mention *Roddy* either in his article or in his opinion, and it was Easterbrook's opinion, not *Roddy*, that would be cited by the handful of other courts that adopted his view.

I. The decision below is wrong.

Colorado errs in arguing (BIO 9-13) that it is consistent with due process for defendants to plead guilty where there is no evidence of guilt.

In *Alford*, the Court held that "pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea." *Alford*, 400 U.S. at 38 n.10. Colorado suggests that these words don't mean what they say, on the theory that the phrase "should not" means something different from "must not" or "cannot." BIO 13. But the Court's opinion in *Alford* makes clear that evidence of the defendant's guilt is a constitutional requirement for a conviction. The Court held that a defendant may plead guilty, despite his protestation of innocence, so long as "the record before the judge contains strong evidence of actual guilt." 400 U.S. at 37. The Court observed that the trial court did not err in accepting Alford's guilty plea, "[i]n view of the strong factual basis demonstrated by the State." *Id.* at 38. Under any fair reading of *Alford*, a court may not accept an *Alford* plea unless the court is satisfied that the defendant is guilty. *Alford* expresses the traditional view of the criminal justice system, not the Easterbrook view.

Alford is hardly unusual in this respect. The Court's cases uniformly express the traditional view. The Court has never held that innocent defendants should be allowed to plead guilty. But the Court has always held that a conviction without evidence of guilt is not consistent with due process. *See, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm."). Colorado does

cite a few cases in support of its argument that courts may accept guilty pleas from innocent defendants, BIO 10-12, but these are the lower court cases on the wrong side of the conflict! This Court has never said any such thing.

Colorado errs further in arguing (*id.* at 14-17) that evidence of guilt is something that defendants may waive when they plead guilty. This argument misunderstands the nature of a guilty plea.

A valid guilty plea waives several constitutional rights, including the right to trial by jury, the right to confront one's accusers, the privilege against self-incrimination, and so on. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). But to be valid in the first place, a guilty plea must satisfy several criteria, and these criteria are not waivable. The plea must be voluntary, knowing, and intelligent. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). If the plea is part of a plea bargain, the prosecutor must fulfill any promises made. *Santobello v. New York*, 404 U.S. 257, 262 (1971). If the defendant has an attorney, the attorney must render effective assistance. *Missouri v. Frye*, 566 U.S. 134, 144 (2012). And there must be evidence that the defendant is guilty. *Alford*, 400 U.S. at 37-38. If a guilty plea does not satisfy these requirements, it is not a constitutionally valid plea.

The evidence-of-guilt requirement is no more waivable than any of the other prerequisites to a valid guilty plea. A guilty plea that purports to waive the requirements of voluntariness and intelligence would not be a constitutionally acceptable plea. Nor would a plea that purports to waive the prosecutor's obligation to fulfill promises, or a plea that purports

to waive the effective assistance of counsel. The same is true of a plea that purports to waive the requirement that there be evidence of the defendant's guilt.

Nor would Colorado's proposed rule make any sense as a practical matter. There are good reasons our justice system has never allowed innocent people to plead guilty even when they want to. As amicus Cato Institute points out (Cato Inst. Br. 16-21), the problem of innocent defendants pleading guilty is bad enough already; it would be even worse if we abandoned the traditional requirement of evidence of guilt. Moreover, the defendant is not the only person with an interest in the outcome of a criminal case. Victims also care deeply about the criminal justice system, but they receive neither vindication nor closure by the conviction of an innocent defendant. And the public has an interest in seeing that justice is done, an interest that is undermined when defendants plead guilty who are not in fact guilty.

Ultimately, the choice between the traditional view and the Easterbrook view is a choice between two starkly different pictures of the criminal justice system. If criminal justice is merely a "market system," as Easterbrook proposed, then it makes perfect sense to allow defendants to strike whatever deals they choose, just like they buy goods and services in any other market. But if the criminal justice system is something more than that—if it is a mechanism that aims, however imperfectly, to discern the truth and to punish only the guilty—then the traditional view is the correct one.

II. This case is an excellent vehicle.

Colorado is also mistaken in asserting (BIO 17-20) that this case would be a poor vehicle.

Colorado's first argument in this vein—that Delano Medina waived his claim in his guilty plea, BIO 17-18—suffers from the same flaw as the merits argument just discussed. A valid guilty plea waives many constitutional rights, but the prerequisites that make a guilty plea valid are not themselves waivable.

Colorado also errs in suggesting (BIO 18-20) that this case is a poor vehicle because the postconviction court found that there was evidence of Medina's guilt. This contention is mistaken for three reasons.

First, both the Colorado Supreme Court and the Colorado Court of Appeals decided this case on the premise that the record does *not* contain evidence of Medina's guilt. The state supreme court explained: "We must now determine whether an *Alford* plea requires that the trial court make a finding of strong evidence of actual guilt to pass constitutional muster. We conclude that there is no such requirement." Pet. App. 3a. The state supreme court held that the only constitutional requirement for an *Alford* plea is that the plea be voluntary and intelligent, and that "evidence of actual guilt … is not a constitutional prerequisite." *Id.* at 19a. The state court of appeals held that evidence of guilt *is* a constitutional requirement, *id.* at 42a, but that Medina waived this requirement in his plea, *id.* at 43a-47a. Neither court treated the case as one in which there was evidence of Medina's guilt.

Second, the court that accepted Medina's guilty plea did not determine whether there was any evidence of his guilt. Rather, the court accepted the plea without any inquiry into Medina's guilt, on the theory that Medina's plea "waived the factual basis" for the charge to which he was pleading guilty. *Id.* at 5a.

Third, the only court that claimed to inquire into whether there was evidence of guilt was the court that denied Medina's motion for post-conviction relief. *Id.* at 64a. But even this court never determined whether there was any such evidence. All the court said on the subject was that "the Defendant was well aware of the nature and benefit he was receiving from the plea bargain." *Id.* This finding may have been sufficient to establish that the plea was voluntary, but it had nothing to do with whether there was any evidence that Medina committed the crime to which he pled guilty.

As the case arrives at this Court, therefore, it is in the ideal posture to address the Question Presented. No court below found any evidence of Delano Medina's guilt. Both appellate courts below decided the case on the premise that the record contains no evidence of his guilt. The case squarely presents the question of whether a court may convict a defendant without finding that the defendant is guilty.

III. This issue is important.

Finally, Colorado errs in suggesting (BIO 20-25) that this issue is unimportant. In fact, the issue is important from any perspective.

First, it is important in terms of the sheer number of cases it affects. Of the more than eighteen million

criminal cases resolved in the state courts each year, approximately six percent end in *Alford* pleas. *See* Pet. 29-30. That's more than a million *Alford* pleas every year. Of course, there's no way to know how many of these cases involve records lacking evidence of the defendant's guilt, but if we estimate that figure extremely conservatively at one in a thousand, the question presented in this case arises in over a thousand cases each year—many more than most issues the Court considers.

Second, the issue is important because of the way plea bargaining dominates the criminal justice system. As the Court has explained, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The number of plea bargains dwarfs the number of trials, yet the Court's criminal procedure cases are nearly all about the rules governing trials, not plea bargains. The Court should devote more attention to the ways in which the Constitution limits (or doesn't limit) the scope of plea bargaining.

Finally, the issue is important because of its fundamentality. This case raises a basic question about the nature of the criminal justice system. Is it a mechanism for adjudicating guilt and innocence? Or is it a market in which the government and the defendant can negotiate whatever deal they think best? To put the question more concretely, is it consistent with due process for defendants to plead guilty to crimes they did not commit, in exchange for the prosecutor's promise not to prosecute them for crimes they *did* commit? Until the late twentieth century, the answer would clearly have been "no."

The question in this case is whether the answer is any different today.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISTA A. SCHELHAAS
SCHELHAAS LAW LLC
P.O. Box 621355
Littleton, CO 80162

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu