No. 19-756

IN THE

Supreme Court of the United States

LOUIS TAYLOR,
Petitioner,
v.
PIMA COUNTY, ARIZONA, et al.,
Respondents.

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

BRIEF OF LUCIAN E. DERVAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is an Associate Professor of Law and the Director of Criminal Justice Studies at Belmont University College of Law in Nashville, Tennessee. *Amicus* is a member of the Florida and Georgia Bar Associations. Prior to joining the legal academy, *Amicus* practiced both criminal and civil law. Since joining the legal academy in 2009, *Amicus* has authored over a dozen articles regarding plea bargaining, including pieces about the history of plea bargaining and about the phenomenon of false pleas of guilty. *Amicus* has also conducted psychological studies that demonstrate that a majority of individuals will falsely confess to misconduct in which they did not engage in return for the benefits of a bargain. The interest of *Amicus* in this case is simply that of a friend of this Court.

SUMMARY OF ARGUMENT

Louis Taylor, the petitioner, accepted an offer to plead no contest and go home after spending 42 years behind bars following his wrongful conviction.

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[1] This Brief is filed after having provided notice to counsel of record for all parties as required by Rule 37.2.a. *Amicus* has also received consent from all parties to file this Brief. No person other than the *Amicus* and his counsel have authored or contributed to this Brief in whole or in part. Further, no person or entity, other than the *Amicus* and his affiliated institution, Belmont University College of Law, has made a monetary contribution toward its preparation or submission.

As Judge Schroeder stated in the lower court, "He accepted the offer, since his only alternative was to stay in prison and wait for his petition for collateral relief to wend its way through the courts, a process that could take years." *Taylor v. County of Pima*, 913 F.3d 930, 939 (2019) (Schroeder, J., Dissenting). That after over four decades the Taylor case should conclude with a plea is not surprising. As acknowledged by this Court in *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), "[C]riminal justice today is for the most part a system of pleas, not a system of trials." In granting petitioner's request for Writ of Certiorari, the Court has the opportunity to address the important issue of whether a person should be barred from recovering damages for wrongful imprisonment because, as a condition of immediate release, he or she pleaded no contest to time served.

In granting petitioner's request and examining the above issue, the Court also has the opportunity to correct an unsupported and erroneous assumption about the reliability of plea bargaining, one that has permeated case law in this area since the Court approved of plea bargaining in the 1970 case *Brady v. United States*, 397 U.S. 742 (1970). For example, in 1975 in the case of *Menna v. New York*, 423 U. S. 61, 62 n.2 (1975), the Court stated, "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." Recent psychological research, however, has demonstrated that individuals plead guilty for many

reasons, some of which have little or nothing to do with their actual guilt. The Taylor case is one such example, where obtaining immediate release from prison, rather than waiting years for collateral relief, was the determinative issue. Accepting the Taylor case for review, therefore, affords the Court an important opportunity to acknowledge that plea bargaining is not a reliable indicator of actual guilt and that, as anecdotal cases, empirical evidence, and psychological studies now demonstrate, innocent defendants plead guilty in our system. Whatever result the Court ultimately reaches in Taylor, the decision should be contemplated and delivered in a manner that acknowledges and considers this reality of our modern criminal justice system.

Amicus, therefore, urges the Court to grant Taylor's petition for a Writ of Certiorari.

ARGUMENT

I. Plea bargaining is a relatively modern American creation, the inner workings and psychological aspects of which are only now beginning to be understood.

As acknowledged by this Court in *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), "[C]riminal justice today is for the most part a system of pleas, not a system of trials." Almost 98 percent of criminal convictions in the federal system and 94 percent of

criminal convictions in the state systems result from a plea of guilty. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012). While the exact number of these pleas resulting from "plea bargaining" is unknown, the government has estimated that approximately 75 percent of such pleas of guilty in the federal system are induced by threats of further punishment if a defendant proceeds to trial, by offers of leniency in return for waiving the constitutionally protected right to trial, or both. *See* Transcript of Oral Arg. at 61–62, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

Despite bargained justice's dominance today, this form of criminal case resolution is a relatively modern American creation. *See* Lucian E. Dervan, *Bargained Justice: The History, Psychology, and Future of Plea Bargaining*, 31 FEDERAL SENTENCING REPORTER 239 (2019); Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, UTAH L. REV. 51 (2012); Albert W. Alschuler, *Plea Bargaining and Its History*, 29 COLUM. L. REV. 1 (1979). In both American and English common law prior to the twentieth century, the use of threats of punishment or offers of leniency to induce a plea of guilty was impermissible. *See e.g. Bram v. United States*, 168 U.S. 532 (1897); *Rex v. Warickshall*, 168 Eng. Rep. 234 (1783). When plea bargaining began to appear in the United States after the American Civil War, therefore, appellate courts responded with sharp condemnation. *See e.g.*, *Wright v. Rindskopf*, 43 Wis. 344, 354 (1877).

Despite the existence of strong English common law traditions regarding the voluntariness of confessions and the presence of American appellate court rejections of early bargains, plea bargaining continued to grow in the shadows as the nation entered the twentieth century for at least two reasons. First, "plea agreements" were used to mask corruption in the early 1900s. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 29 COLUM. L. REV. 1, 22 (1979). Second, plea bargaining became a necessary tool to address the swelling dockets brought on by Prohibition and other forms of overcriminalization during this same period. *See* NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 100–01 (1931) (discussing the need for plea bargaining to address the overwhelming number of cases brought under Prohibition laws). The resulting impact on case resolutions can be observed in data regarding pleas of guilty in the federal system between the early twentieth century and 1925, which grew from 50 percent to 90 percent. *See* Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, UTAH L. REV. 51, 59 (2012).

Plea bargaining began emerging from the shadows in the second half of the twentieth century, particularly as this Court and institutions such as the American Bar Association began both acknowledging

the role of plea bargaining in the criminal justice system and identifying the benefits afforded by permitting these types of resolutions. *See e.g.* American Bar Association, Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty 2 (1968). A pivotal point, of course, was this Court's 1970 decision in *Brady v. United States*, 397 U.S. 742 (1970), which legitimized the concept of plea bargaining as long as the plea of guilty was voluntary and intelligent and any offers of leniency or threats of punishment did not overbear the will of the defendant. *See Brady v. United States*, 397 U.S. 742, 752–58 (1970).

Acknowledging and approving, even if tepidly, the use of plea bargaining in *Brady* created an opportunity for an already overwhelmed criminal justice system to continue to benefit from the efficiency of this process. The *Brady* decision also created an environment in which plea bargaining could leave the shadows of its rise and, perhaps, become better regulated and more regularly examined by the courts. This sentiment was expressed by this Court eight years after *Brady* in stating, "[A] rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). In many respects, cases decided since *Brady* have embarked on this course, seeking to add detail and

clarity to the operation and impact of bargained justice.

Throughout these many decades, however, decisions appear often to have been influenced by the unsupported assumption that pleas of guilty are reliable. This assumption dates back to the *Brady* decision itself, where the Court said, "[W]e would have serious doubts about this case if the encouragements of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary…." *Brady v. United States*, 397 U.S. 742, 758 (1970); *see also* Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, UTAH L. REV. 51 (2012). This unsupported assumption appeared again in the 1975 case of *Menna v. New York*, 423 U. S. 61, 62 n.2 (1975), which stated, "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." Again in the 1985 case of *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Court, quoting language from the United States Court of Appeals for the Seventh Circuit, similarly said, "[T]he concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). More recently, this concept of the reliability of pleas of guilty was echoed in a 2017 dissent in the case of *Lee*

v. United States. See Lee v. United States, 137 S.Ct. 1958, 1973 (2017) (Thomas, C., dissenting) ("In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable.").

It is understandable that one would assume that pleas of guilty are reliable indicators of guilt. We would all like to believe that if faced with an opportunity to falsely confess in return for a favorable disposition, we would nevertheless stand our ground and assert our innocence. Recent psychological research, however, demonstrates that this is not in fact how people respond in these situations and that pleas of guilty are far from reliable indicators of actual guilt. People, it turns out, plead guilty for many reasons, some of which have little or nothing to do with whether they committed the alleged offense.

Amicus writes to provide the Court with information regarding our modern scientific understanding of plea bargaining and defendant decision-making processes in hopes that this and future decisions will not rely on prior assumptions regarding the reliability of pleas of guilty, but rather, reflect the reality of modern plea bargaining, the innocent defendant's dilemma, and the phenomenon of false pleas of guilty.

II. Psychological research demonstrates the existence of the innocent defendant's dilemma and the unreliability of pleas of guilty resulting from bargains.

In the late 2000s, *Amicus* and Dr. Vanessa Edkins, a psychologist, discovered that little psychological research had been done to better understand the inner psychological workings of the plea bargaining machine or the reliability of the process. In response to this realization, *Amicus* and Dr. Edkins created a study paradigm (the Edkins-Dervan Plea Bargaining Paradigm) to test how likely it might be that an innocent individual would falsely plead guilty in return for the benefits of a bargain. *See* 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 (2013); Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining's Innocence Problem*, 21 CURRENT RES. SOC. PSYCHOL. 14 (2013).

To test this aspect of defendant decision-making, *Amicus* and Dr. Edkins invited students to participate in a project that the students believed was designed to test individual work versus group work through a series of LSAT-style questions. The inquiry, of course, was really a deception study designed to explore how the students would respond when accused of cheating.

To examine this phenomenon, all of the students who participated in the test were accused of cheating on the individual work portion. Through the use of a confederate in the room, the study was structured so that only about half of the students actually engaged in cheating. The other half completed the test without any misconduct occurring. Regardless of factual guilt or innocence, and without yet knowing which of the participants had actually cheated, all of the participants were offered a bargain in return for confessing to the alleged offense. If the student admitted to cheating, they would lose their compensation for participating in the study. This was viewed as akin to probation or time served. The participant was also informed that if they refused the deal, the matter would be referred to an "Academic Review Board." This board was described to the participants in a manner that made it sound very similar to a criminal jury trial, including the right to present evidence and testify. If convicted before the board, the participants were told that they would lose their compensation, their faculty adviser would be notified,

> and they would be required to attend an ethics course.
>
> This ethics course was viewed as a loss of time, akin to a period of incarceration. While this scenario did not perfectly recreate the actual criminal justice system, the anxieties experienced by participants were similar to, though presumably not as intense as, those experienced by people facing criminal charges. Further, this research advanced our understanding of defendant decision-making in ways that earlier studies utilizing only hypothetical scenarios could not.

See Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, *in* CATO SUPREME COURT REVIEW 2017–2018, 113, 131 (2018). The results of the study were insightful and brought to an end the longstanding debate regarding whether innocents will falsely plead guilty. In the Edkins-Dervan Plea Bargaining Paradigm, 89 percent of the guilty participants took the plea offer. With regard to the innocents, 56 percent of the participants were willing to falsely confess to an offense they had not committed in return for the benefits of the bargain. *See* 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, 34-38 (2013).

These research findings have been cited widely in both the psychological and legal communities and the Edkins-Dervan Plea Bargaining Paradigm has been used and validated several times in subsequent studies by other labs. *See e.g.* Kelsey S. Henderson & Lora M. Levett, *Investigating Predictors of True and False Guilty Pleas*, 42 Law and Human Behavior 427 (2018); Miko M. Wilford & Gary L. Wells, *Bluffed by the Dealer: Distinguishing False Pleas From False Confessions*, 24 Psychology, Public Policy, and Law 158 (2018). Research by other labs has also allowed the legal and psychological communities to learn more about specific aspects of defendant decision-making. For example, in 2018 Kelsey Henderson and Lora Levett published a study using the Edkins-Dervan Plea Bargaining Paradigm that included testing the influence of advocate participation during the decision-making process. The research found that the effect of advocate recommendations on plea-decisions was significant. Where no advocate participated, the study participants falsely pleaded guilty 35% of the time. Where an advocate participated and recommended proceeding to trial, the false plea rate dropped to 4%. Importantly, where an advocate participated and provided only educational information regarding the available options, 47% of the study participants went on to falsely plead guilty. Where an advocate participated and recommended pleading guilty, 58% of the study participants went on

to falsely plead guilty, a number higher than that found when there was no advisor at all. Contrary to earlier assumptions regarding the beneficial role of counsel in preventing false pleas of guilty, these findings demonstrate that the presence of counsel could actually exacerbate the false plea phenomenon. *See* Kelsey S. Henderson & Lora M. Levett, *Investigating Predictors of True and False Guilty Pleas*, 42 Law and Human Behavior 427, 434-35 (2018). In 2018, Miko Wilford and Gary Wells published another study applying the Edkins-Dervan Plea Bargaining Paradigm. In reporting their findings regarding significant levels of innocent participants falsely pleading guilty, they specifically noted that there are now several "real-stakes," non-hypothetical, studies recording false plea rates near or exceeding 50%. *See* Miko M. Wilford & Gary L. Wells, *Bluffed by the Dealer: Distinguishing False Pleas from False Confessions*, 24 Psychology, Public Policy, and Law 158, 166 (2018).

Beyond the numerous studies discussed above that confirm the unreliability of plea bargaining and the fact that innocents are willing to falsely confess, there is empirical evidence from actual cases. Consider, for example, a 2015 report from the National Registry of Exonerations on the issue of "Innocents Who Plead Guilty." *See* Innocents Who Plead Guilty, National Registry of Exonerations (24 Nov. 2015), available at http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf. Of the first

1,700 exonerees in the database, 15 percent had pleaded guilty to an offense they had not committed. In some types of cases, the rates of false pleas were astonishingly high. For example, drug crimes comprised 40 percent of all guilty plea exonerations, with 66 percent of exonerations involving a false plea of guilty. In Harris County, Texas, the report noted that there had been 71 drug exonerations since 2014, and the defendant in every case had pleaded guilty. According to the National Registry of Exonerations, "[M]ost of these defendants accepted plea bargains to possession of illegal 'drugs' because they faced months in jail before trial, and years more if convicted." *Id.* at 2.

Over the last several years, *Amicus* and Dr. Edkins, along with members of a large international research team, have worked to run an updated and expanded version of the Edkins-Dervan Plea Bargaining Paradigm simultaneously in the United States, Japan, and South Korea. The new version of the study contains amended aspects of the paradigm to gain deeper insights into defendant decision-making, including a uniform stigma condition regardless of whether the participant accepts the offer or proceeds to trial, a greater role for defense counsel, and a requirement of cooperation against co-defendants, including an agreement to testify against the other individual at trial. Though not yet complete, data obtained to date from this work again validates the phenomenon of false pleas of guilty. Further, data from the study indicates that participants are willing

not only to falsely implicate themselves, but also to falsely implicate others. Just as people are willing to lie to receive the benefits of a bargain, they are also willing to lie about the role of someone else to secure those benefits.

Another recent psychology study also contains information directly relevant to the decision-making process experienced by Mr. Taylor in this matter. Released in 2018, the study considered the issues of innocence, pretrial detention, and collateral consequences through the use of various hypothetical scenarios. *See* Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCHOL. PUB. POL'Y & L. 204 (2018). Participants in this study were asked to review scenarios involving a student charged with a drug offense, a nurse charged with assault, and an unemployed individual living with two children in public housing and charged with breaking and entering. Participants were then asked to decide whether to accept a plea agreement or proceed to trial. Various conditions were imposed on different portions of the study population to ascertain the influence of factors such as innocence, pretrial detention, and the collateral consequences that would emanate from their conviction. The collateral consequences described to those falling into the "aware of collateral consequences of conviction" condition prior to deciding whether to accept a plea agreement included the loss

of the right to vote, ineligibility for student loans, loss of professional licenses, and ineligibility for public housing and food stamps. The results confirmed the validity of the legal community's concerns regarding the impact of plea offers on both the accuracy of the system and the free exercise of individuals' constitutional right to trial.

> First, the study found participants assigned to both the factually guilty and factually innocent conditions electing to plead guilty, thus once again confirming the innocence phenomenon. Second, direct knowledge of relevant collateral consequences did not alter defendant decision-making, despite the sometimes life-long impact of these measures. Though disturbing, this finding is consistent with psychological research on temporal discounting, which posits that later consequences have less impact on decision-making than immediate ones. Here, more immediate considerations, such as reduced sentences or release from pretrial detention, drove the participants' choices. Third, the study found that pretrial detention significantly influenced plea decisions. Of particular importance here, the rate of innocent individuals who pleaded guilty tripled in the pretrial scenarios.

Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, *in* CATO SUPREME COURT REVIEW 2017–2018, 113, 134 (2018). Through this new study and the many others now being conducted around the world, we are beginning to better understand the forces that contribute to plea bargaining's innocence issue, including sentencing differentials, pretrial detention, and risk aversion.

III. The Taylor case presents an opportunity for the Court to acknowledge that plea bargaining is not a reliable indicator of actual guilt and that innocent defendants do plead guilty.

The Taylor case presents an opportunity for the Court to acknowledge that plea bargaining is not a reliable indicator of actual guilt and that, as anecdotal cases, empirical evidence, and psychological studies demonstrate, innocent defendants in fact do plead guilty in our system in numbers that are cause for concern. The Taylor case and all future plea bargaining jurisprudence should be examined with this reality in mind, rather than the false assumption of reliability that has pervaded cases since *Brady* in 1970. "[C]riminal 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). Therefore, we must begin creating jurisprudence regarding this fundamental aspect of our system that recognizes the

true nature of bargained justice and the manner in which efficiency now impacts accuracy. For these reasons, *Amicus* urges the Court to grant Taylor's petition for a Writ of Certiorari.

In acknowledging the inherently unreliable nature of plea bargaining, the Court need only continue down the path created in 2017 in *Lee v. United States*, 137 S. Ct. 1958 (2017). *Lee* examined whether a defendant who had agreed to plead guilty in reliance on his attorney's mistaken assurances that he would not be deported should be afforded relief. Writing for the majority, Chief Justice Roberts wrote,

> But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading guilty, as in this case, that "almost" could make all the difference.

Id. at 1968-69. Applying this logic, the Court reversed the lower court, which had denied the petitioner's

request to vacate his conviction and withdraw his guilty plea. Chief Justice Roberts's framing of the discussion as one about "determinative issues" is important because it reflects the reality that defendants plead guilty for a variety of reasons, some of which might have little to do with the underlying facts of the case, something known well to all those in the trenches of the criminal justice system. As the 2018 collateral consequences study confirms, considerations such as sentencing differentials, pretrial detention, and risk aversion often lead to pleas of guilty, even for the innocent. *See* Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCHOL. PUB. POL'Y & L. 204 (2018).

In this case, the "determinative issue" for Taylor was release from prison after spending 42 years behind bars following his wrongful conviction. As Judge Schroeder stated in the lower court, "He accepted the offer, since his only alternative was to stay in prison and wait for his petition for collateral relief to wend its way through the courts, a process that could take years." *Taylor v. County of Pima*, 913 F.3d 930, 939 (2019) (Schroeder, J., Dissenting). A starting place for an analysis of the impact of Taylor's decision to plead no contest should be the acknowledgment that his plea says little, if anything, about the merits of the underlying criminal case. Once acknowledged, the question then arises as to

whether someone should be further punished and prevented from bringing suit for alleged grievous deprivations of civil rights simply for doing the rational and now commonly accepted thing; pleading no contest or guilty in return for the benefits of the bargain, even where the individual is not actually guilty of the charged conduct. If we are to prevent someone so aggrieved from brining suit, are we not creating a mechanism and an incentive for alleged misconduct to be protected from review and consequence by the plea bargaining system? *See Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 THE JOURNAL OF LAW, ECONOMICS, AND POLICY 645 (2011).

CONCLUSION

Though plea bargaining has existed in the shadows of our criminal justice system for well over 100 years and grew to dominance in the twentieth century, we are still learning much regarding the process by which defendant's engage in decision-making within the system. Today, we know that defendants plead guilty for a variety of reasons, some of which have little or nothing to do with actual guilt. As the Court considers the Taylor matter and what the future might hold for plea bargaining jurisprudence more generally, the Court should ensure that this and future decisions are not made based on prior erroneous assumptions, but rather, that the path forward is guided by what we now know

about bargained justice. Through such an informed and considered process, the Court has the opportunity to prevent an injustice, reinvigorate the meaningfulness and presumption of innocence, and still allow for the efficiency and beneficial aspects of bargains.

For the foregoing reasons, *Amicus* urges the Court to grant Taylor's Petition for a Writ of Certiorari.

Respectfully submitted,

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