No. 24-1063

IN THE

Supreme Court of the United States

MUNSON P. HUNTER III,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE PLEA BARGAINING INSTITUTE AS *AMICUS CURIAE* *IN SUPPORT OF PETITIONER*

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 2022, the Plea Bargaining Institute (PBI) was established to provide a global intellectual home for researchers, practitioners, policymakers, and advocacy groups to share knowledge and promote collaboration related to plea bargaining and its role in criminal processes. In a criminal system that is dominated by guilty pleas, the need for sustained research on these issues is imperative. The PBI strives to ensure that practitioners, policy makers, advocacy organizations, and courts have access to important research findings and case developments so that this information might assist them in their work. *Amicus* seeks to share academic plea bargaining research with this Court relevant to this case.

SUMMARY OF ARGUMENT

That the *Hunter* case concluded with a plea of guilty 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." It is also unsurprising that Hunter's plea bargain included a waiver of the

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[1] No person other than the *Amicus* and its counsel have authored or contributed to this Brief in whole or in part. Further, no person or entity, other than the *Amicus* and its counsel and affiliated institution, Belmont University College of Law, has made a monetary contribution toward its preparation or submission.

right to appeal his conviction and sentence. As noted by the American Bar Association in the Plea Bargain Task Force Report (2023), demands for waivers during plea bargaining that go well beyond the trial right are common. *See* ABA CJS, *Plea Bargain Task Force Report*, at 25 (Feb. 22, 2023). In accepting the *Hunter* case, the Court has the important opportunity to consider the validity of waivers of rights, including appellate rights, in return for plea bargains. In contemplating this issue, *Amicus* encourages the Court to recognize that plea bargaining is not inherently reliable and, therefore, the imposition of limitations and guardrails for plea bargaining practices is vital to the establishment of an accurate, just, and constitutional plea bargaining system.

Far too often in considering issues such as those presented in the *Hunter* case, the Court has conducted its analysis from the unsupported position that plea bargaining is inherently reliable. In *Brady v. United States*, 397 U.S. 742 (1970), for example, the Court briefly considered the risk that plea bargaining might have an innocence problem but dismissed these concerns and concluded that there was no reason to doubt the accuracy of the plea. *See Brady*, 397 U.S. at 758. In 1975, in the case of *Menna v. New York*, 423 U. S. 61 (1975), the Court more explicitly described its starting point for analyzing how plea bargaining jurisprudence might evolve. In *Menna*, 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." *See Menna v. New York*, 423 U. S. 61, 62 n.2 (1975). From this flawed starting place of faith regarding the reliability of guilty pleas, it is easy to see why so few limitations and guardrails have been imposed on plea bargaining practices in the 55 years since *Brady*.

Research over the past decades, however, has now clearly demonstrated that individuals plead guilty for many reasons, some of which have little or nothing to do with their actual guilt. This research has also added meaningfully to our understanding of plea bargaining's innocence problem and the psychological forces behind the significant number of false pleas of guilty by the innocent. Finally, research during this time has also raised troubling questions regarding defendants' actual knowledge and understanding of the plea bargaining process and the deals into which they enter. These findings lead squarely to the conclusion that plea bargaining is far from a reliable indicator of actual guilt.

In undertaking its review of the *Hunter* case, therefore, the Court should correct the unsupported assumption that plea bargaining is inherently reliable. Instead, the Court should begin its analysis of this and all future plea bargaining cases by acknowledging that plea bargaining is not inherently reliable. The Court should also take this opportunity to recognize, as encouraged by the American Bar Association *Plea Bargain Task Force Report* (2023) and ABA Resolution 502 (2023), that "innocent people

sometimes plead guilty to crimes they did not commit." *See* ABA CJS, *Plea Bargain Task Force Report*, p.20 (Feb. 22, 2023); ABA Resolution 502 (2023); *see also* American Bar Association, *The Cost of Plea Bargains: Reflections and Recommendations from the ABA Plea Bargain Task Force* (Lucian E. Dervan, Russell D. Covey, & Thea Johnson eds. 2024).

This new starting position from which to undertake plea bargaining jurisprudential analysis will have important positive impacts on the criminal system. A plea bargaining system that is not inherently reliable, one in which innocent defendants falsely plead guilty, and one in which defendants lack true knowledge regarding the process and to what they have agreed is a plea bargaining system in need of meaningful limitations and guardrails. That work can begin in the *Hunter* case as the Court considers how to protect a defendant's constitutional rights and the Constitution itself in a system where most people, including the innocent, plead guilty to an agreement containing a non-negotiable blanket waiver of appellate rights. Whatever result the Court ultimately reaches in *Hunter* regarding where the limits and guardrails should fall, *Amicus* urges the Court to deliver its opinion in a manner that acknowledges and considers the realities of our modern plea bargaining system.

ARGUMENT

I. Plea bargaining is a relatively modern American creation, the inner workings and psychological aspects of which are better understood today.

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 more regularly 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) (plea bargaining is "hardly, if at all distinguishable in principle from a direct sale of justice.").

Despite the strong language in opposition to bargains contained in case law from the 18th and 19th centuries, examples of plea bargaining in the trenches of the American criminal justice system can be found as early as the late 1700s in sporadic geographic locations. For example, according to Professor George Fisher, forms of plea bargaining occurred in liquor law violations in Middlesex County, Massachusetts, during the late 1700s. *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford Books 2003). Professor Dan Canon's research also identifies early examples of plea bargaining in Massachusetts and, eventually, New England in the mid-1800s. *See* Dan Canon,

Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class (Basic Books 2022).

While case law continued to look with suspicion on plea bargaining in the early twentieth century, this period saw the beginnings of plea bargaining's rise to dominance in the shadows. This occurred in part because plea bargaining became a necessary tool to address the swelling dockets brought on by Prohibition and overcriminalization during the first half of the 1900s. *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).

Although little data are available regarding the widespread growth of plea bargaining in the early 20th century, data on pleas of guilty are available. These data illustrate that between the early 20th century and 1925, the guilty plea rate in federal court rose from 50 percent to 90 percent. Much of this increase is likely attributable to the growth of plea bargaining in the shadows. *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* when it stated in *Bordenkircher v. Hayes*, "[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). 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, 582 U.S. 357, 378 (2017) (Thomas, C., dissenting) (citing the above quotes from *Hill* and *Menna*). Importantly, no research was offered to support any of the statements of reliability advanced in the above cases from 1970 through 2017. These statements, rather, appear to have been *ipse dixit*.

It is understandable, of course, that one would assume that pleas of guilty are reliable indicators of actual 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. 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, will reflect the reality of modern plea bargaining, the phenomenon of false pleas of guilty, and the significant questions that exist regarding defendants' knowledge of the system and the deals into which they are entering. With the backdrop of this modern understanding of the plea bargaining system, the

importance of the right to appeal, particularly regarding alleged constitutional violations, becomes clear.

II. Research demonstrates the existence of the innocent defendant's dilemma, and that plea bargaining is not inherently reliable.

In the late 2000s, a study paradigm was developed 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). To test this aspect of defendant decision-making, Professor Lucian Dervan and Dr. Vanessa Edkins invited students to participate in a project that the students believed was designed to test individual work versus group work on LSAT-style questions. The inquiry, of course, was really a deception study designed to explore how the students would respond when accused of cheating.

Dervan and Edkins structured the study so that only about half of the students engaged in academic misconduct during the testing. Regardless of factual guilt or innocence, however, and without yet knowing which of the participants had cheated, all participants were accused of misconduct and offered a

bargain in return for confessing to the alleged offense. The benefits of pleading guilty included a reduced punishment and a faster resolution. Participants were also told that those declining the plea offer would be referred to an "Academic Review Board" for adjudication. The board was described in a manner that made it sound very similar to a criminal trial, with the right to present evidence and testify.

The results of the study were insightful regarding whether innocents will falsely plead guilty in significant numbers. In the study, 89 percent of the guilty participants took the plea offer. Regarding the innocents, 56 percent of the participants were willing to falsely confess to misconduct 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); *see also* Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, *in* CATO Supreme Court Review 2017–2018, 113, 131 (2018).

These research findings have been cited widely in both the psychological and legal communities and have been 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); Lucian E. Dervan, Vanessa Edkins, and Thea Johnson, *Victims of Coercive Plea Bargaining,* 72 American University Law Review 1919, 1949-1957 (2023) (describing a revised and more elaborate version of the original study later run by Dervan, Edkins, and Pardieck). In 2018, Dr. Miko Wilford and Dr. Gary Wells noted that there are now several "real-stakes," non-hypothetical, studies recording false plea rates near or exceeding 50 percent. *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).

The above study, in combination with other research undertaken to learn more about specific aspects of defendant decision-making, has painted a vivid and troubling picture of modern plea bargaining and the phenomenon of false pleas of guilty by the innocent. *See* Lucian E. Dervan, Vanessa Edkins, and Thea Johnson, *Victims of Coercive Plea Bargaining,* 72 American University Law Review 1919 (2023) (summarizing the state of psychological research regarding false pleas of guilty and why defendants plead guilty falsely). A commonly understood factor that leads to false pleas of guilty are sentencing differentials. *See e.g.* Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 Psych., Pub. Pol'y & L. 250, 254

(2016) (researchers discovered that adult defendants received an eighty percent average reduction of the anticipated sentence that would result from trial); *see also* Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent'g Rep. 256, 257, 261 (2019) (holding that studies consistently show large sentencing differentials that disadvantage trial defendants). Less well-known factors that contribute to the phenomenon of false pleas of guilty are the role of counsel and pretrial detention.

Regarding the role of counsel, Dr. Kelsey Henderson and Dr. Lora Levett published a study in 2018 using a revised version of the paradigm developed by Dervan and Edkins in the *Innocent Defendant's Dilemma*. In their version, Henderson and Levett included testing for the influence of advocate participation during the decision-making process. As noted by the *Brady* Court in 1970, perhaps the presence of "competent counsel" would make plea bargaining more reliable. The research found that the effect of advocate recommendations on plea-decisions was significant, but not in the way many had imagined. Where no advocate participated, the study participants falsely pleaded guilty 35 percent of the time. Where an advocate participated and recommended proceeding to trial, the false plea rate dropped to 4 percent. Importantly, however, where an advocate participated and provided only educational information regarding the available options, 47 percent of the study participants went on

to falsely plead guilty. Where an advocate participated and recommended pleading guilty, 58 percent 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 may 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, 437 (2018).

The potential for counsel to negatively influence the reliability of plea bargaining increases further when one examines the type of advice counsel provide in the modern criminal system. In a study from 2018 regarding attorney perceptions of guilty pleas, the authors interviewed counsel in nine U.S. states (New York, Tennessee, Wisconsin, Wyoming, Vermont, Idaho, Iowa, Arizona, and Rhode Island). *See* Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz, Rachel Z. Novick, Sarah Dincin & Amanda E. Cort, *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System,* 24 Psych., Crime & L. 915, 922 (2018). Roughly 78 percent of those asked indicated that there were definitely cases in the current system where an innocent individual should plead guilty. "When asked whether they had ever been involved in a case where a client chose to plead guilty despite maintaining their innocence," almost 90

percent said yes. *Id.* at 921. Not only were the attorneys aware of this occurring, almost 45 percent admitted to having advised clients they believed were innocent to accept a favorable plea agreement. In fact, even in cases where the defense attorney felt there was less than a 50 percent chance of conviction, a significant proportion stated they would recommend to an innocent client to plead guilty. *Id.* at 926.

Regarding pretrial detention, a 2018 study considered the issues of innocence, pretrial detention, and collateral consequences using 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). 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 once again observed plea bargaining's innocence problem. Second, the study found that pretrial detention significantly influenced plea decisions. In particular, the rate of innocent individuals who pleaded guilty more than 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) ; *see also See* Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, *In the Shadows: A Review of the Research on*

Plea Bargaining, Vera Institute (2020) (discussing a study of 76,000 arrests in Delaware and finding pretrial detention increased the likelihood of pleading guilty by 46%); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & Econ. 529, 530, 536 (2017) (examining almost one million arraignments for felonies and misdemeanors in New York City from 2009-2013 and finding a link between pretrial detention and increased plea rates).

Beyond the research studies discussed above that bring the unreliability of plea bargaining and the fact that innocents are willing to falsely confess into focus, there is empirical and anecdotal 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, 66 percent of drug crime exonerations involved 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.

Consider further that by the end of 2022, the National Registry of Exonerations had 3,284 exonerations within its dataset, and 25 percent of those involved a false plea of guilty. Of the entire dataset, more than 40% are "no-crime exonerations," which are exonerations where the exoneree was convicted of a crime that never actually occurred. In this category, a startling 48 percent of the cases involved false pleas of guilty by the innocent. *See* Nat'l Registry of Exonerations, *2022 Annual Report*, at 11 (May 8, 2023); *see also* Thea Johnson, *Fictional Pleas*, 94 Indiana Law Journal 855 (2019).

Research offers a new lens through which to view plea bargaining and the picture this research presents, in combination with empirical and anecdotal data collection, is that plea bargaining is not inherently reliable. This is true even where competent counsel is present. Plea bargaining jurisprudence must be undertaken with these realities in mind, particularly when considering when and how to impose limitations and guiderails on the system.

III. Research raises significant questions regarding defendants' knowledge and understanding of plea bargaining and their plea agreements

Research has not only demonstrated the presence of plea bargaining's innocence problem but has also raised significant concerns regarding whether defendants understand the plea bargaining process or the specifics of the agreements into which they are entering. *See* Allison Redlich, *The Validity of Pleading Guilty*, *in* Advances in Psychology and Law, 1-27 (M. K. Miller and B. Bornstein eds., 2016).

As a starting place, research indicates that 70% of adult inmates read at or below the 6th grade level. *See id.* This is particularly significant in jurisdictions where defendants read and sign tender-of-plea forms. In a study from 2015, the authors examined 208 sample forms and concluded that a reading level of 11th-12th grade was required to fully understand the material. *See* Allison Redlich and Catherine Bonventre, *Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 Law and Human Behavior 162 (2015).

Judicial plea colloquies are also hard for the typical defendant to understand. The sample plea colloquy questions from the *Benchbook for U.S.*

District Court Judges (2013) require a reading grade level of 13.3, college level. *See* Allison Redlich, *The Validity of Pleading Guilty*, *in* Advances in Psychology and Law, 1-27 at 10 (M. K. Miller and B. Bornstein eds., 2016). In one study researchers concluded that many defendants would not understand the questions even when the questions were read to the defendants. "Although there is limited research on defendants' oral comprehension, one study found that the average listening comprehension ability of recently arrested jail detainees was 9th grade." *Id.*

Research has also explored the comprehension of defendants engaged in the plea process itself. In a 2016 study, researchers measured the vocabulary comprehension of participants 13-24 years of age using words from a tender-of-plea form and judicial plea colloquy. The study concluded that "adults lacked adequate comprehension." Allison Redlich, *The Validity of Pleading Guilty*, *in* Advances in Psychology and Law, 1-27 at 10 (M. K. Miller and B. Bornstein eds., 2016). As an example, more than 90% of the adults could not accurately define the word "concession." However, when asked if they understood the plea form and had no questions, the participants responded "yes." *See* Allison Redlich and Reveka Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 Law and Human Behavior 611 (2016).

Finally, another study interviewed individuals after pleading guilty. When asked questions about the process, similar to what they are asked in plea hearings, "89% said they understood the plea process, 96% said they understood the possible penalties associated with the plea, and 87% said they understood the legal proceedings." Allison Redlich, *The Validity of Pleading Guilty*, *in* Advances in Psychology and Law, 1-27 at 11 (M. K. Miller and B. Bornstein eds., 2016). However, when a comprehension test was administered, two-thirds of the participants answered 60% or more of the questions wrong. Importantly, these individuals had just entered their pleas. *See* Allison Redlich and Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 Psychology, Public Policy, and Law 626 (2012).

Pleas of guilty must be entered knowingly. *See Boykin v. Alabama*, 395 U.S. 238, 244 (1969). Yet research raises important questions regarding whether this burden is faithfully being satisfied before pleas are accepted. In a system in which 95-98 percent of convictions come from pleas of guilty, uncertainty regarding whether defendants understand the plea bargaining process, the agreements into which they are entering, and the rights that they are waiving raises significant issues around fairness, justice, and accuracy. These questions are particularly pronounced in matters such as the Hunter case where the district court judge made statements regarding the defendant's appellate

rights that contradicted the written plea agreement and counsel for the government did not correct the record. Plea bargaining jurisprudence must be undertaken with these realities in mind, particularly when considering when and how to impose limitations and guardrails on the system.

CONCLUSION

The Hunter case presents an important and necessary opportunity for the Court to acknowledge that plea bargaining is not an inherently reliable indicator of actual guilt. Further, the Hunter case offers the opportunity to finally acknowledge that, as anecdotal cases, empirical evidence, and psychological studies demonstrate, innocent defendants plead guilty in numbers that are cause for concern and significant questions exist regarding defendants' knowledge of the system and of the plea agreements into which they are entering.

The Hunter case and all future plea bargaining jurisprudence should be examined through the lens of these realities, rather than with the false and unsupported 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 way efficiency impacts accuracy.

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 defendants 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 Hunter 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 unsupported 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 can create a fairer and more just system of pleas while still allowing for the beneficial aspects of bargains. Such a process will also place accuracy and concerns regarding constitutionality above efficiency.

For the foregoing reasons, *Amicus* urges the Court to establish appropriate limitations and guiderails for waivers of rights as part of plea bargaining.

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