No. 16-424

IN THE

Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

M. CHRIS FABRICANT
VANESSA POTKIN
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5340

JAMES C. DUGAN
Counsel of Record
TIMOTHY J. MCGINN
STEVEN J. BALLEW
PATRICIA O. HAYNES
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
jdugan@willkie.com

ELIZABETH J. JONAS
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006

Counsel for Amicus Curiae

May 19, 2017

271948

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES

OTHER AUTHORITIES

Cited Authorities

Page

Page

Page

Page

Page

Page

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project is an organization dedicated primarily to providing pro bono legal and related investigative services to prisoners for whom evidence discovered post-conviction can provide proof of innocence. The Innocence Project also seeks to prevent future wrongful convictions by researching their causes and pursuing reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's work serves as an important check on the awesome power of the state over criminal defendants and helps to ensure a safer and more just society.

The advent of forensic DNA testing and the use of that testing to review criminal convictions have provided scientific proof that our system is susceptible to convicting the innocent and that wrongful convictions are not isolated events. To date, 350 wrongfully convicted individuals have been exonerated through DNA testing. Over ten percent of those wrongfully convicted defendants pleaded guilty to crimes they did not commit. Despite their innocence

---

1. The parties have consented to the filing of this brief. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus curiae* briefs. Respondent's consent is filed herewith. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

and despite being charged with serious violent felonies, these individuals took pleas that resulted in lengthy prison sentences. The pressures that led these innocent defendants to plead guilty are also brought to bear in cases involving lesser criminal offenses, and those same pressures can likewise compel a guilty plea for conduct that is constitutionally protected. Because over ninety-five percent of criminal cases are resolved through plea bargaining, and because both legally and factually innocent people nevertheless plead guilty, such convictions should be reviewable for constitutional infirmities. The Innocence Project thus has a strong interest in ensuring that courts retain the ability to review the constitutionality of convictions secured through guilty pleas.

SUMMARY OF ARGUMENT

The American criminal justice system has evolved from a system of trials into a system of plea bargains. At both the state and federal level, the overwhelming majority of defendants who are convicted enter guilty pleas rather than risk a trial. As the Court has recognized previously, any decision concerning the scope of a defendant's rights must account for the central role that plea bargaining plays with respect to conviction and sentencing.

Today, many defendants—including innocent defendants—plead guilty primarily to receive less severe sentences. The criminal justice system places these defendants under tremendous pressure to plead guilty. Prosecutors charge these defendants with offenses punishable by lengthy sentences, then offer to reduce the charges and maximum sentences significantly in exchange for guilty pleas. Defense attorneys, trying

to spare their clients from unnecessarily long prison terms, often counsel in favor of guilty pleas, even when the defendants assert their innocence. In many cases, the defendants are indigent, unable to make bail, and likely to face lengthy periods of pre-trial incarceration. As a result of these pressures, questions of guilt and innocence or the constitutionality of the underlying statutes are often secondary, with the decision to plead guilty driven by the desire to leave jail as soon as possible.

The Court should hold that a defendant who has pleaded guilty may nevertheless challenge the constitutionality of the statute of conviction on direct review. Such a ruling would stand as an important check against legislative and prosecutorial overreach and misconduct. Given the sheer number of defendants who plead guilty instead of proceeding to trial, criminal convictions that offend the Constitution would in many cases be unreviewable in the absence of a rule permitting a defendant to bring a post-plea challenge to the constitutionality of the statute of conviction. Such a result cannot be reconciled with the Court's prior recognition that its jurisprudence should account for the primacy of plea bargaining in the criminal justice system.

ARGUMENT

I. THE AMERICAN CRIMINAL JUSTICE SYSTEM IS A SYSTEM OF PLEA BARGAINS, NOT TRIALS.

Constitutional protections around the plea-bargaining process are in many respects more critical to the proper and fair functioning of the American criminal justice

system than those that protect criminal defendants during arrest or at trial. The American criminal justice system is "for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). During Fiscal Year 2016, 97.3 percent of federal convictions were the result of guilty pleas. U.S. Sentencing Comm'n, 2016 Sourcebook of Federal Sentencing Statistics, Figure C. This was no aberration. In each of the last ten fiscal years, at least 95.8 percent of federal convictions were the result of guilty pleas. *Id.*; U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, Figure C. And in every fiscal year since 1994, more than ninety percent of federal convictions were the result of guilty pleas. *Id.*; U.S. Sentencing Comm'n, 2006 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 2001 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics, Figure C. A similar percentage of state-level convictions are the result of guilty pleas. *See Missouri v. Frye*, 566 U.S. 133, 143 (2012) ("ninety-four percent of state convictions are the result of guilty pleas") (citations omitted).[2]

2. More recent state-level data confirms that this conclusion remains valid today. *See, e.g.*, Judicial Council of California, 2016 Court Statistics Report, Statewide Caseload Trends 2005-2006 through 2014-2015 at 62, 75 (2016), http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf (136,017 of 139,927 felony convictions (97.2 percent) and 42,652 of 43,018 misdemeanor convictions (99.1 percent) in Superior Courts were the result of guilty and no contest pleas); M. Hall, et al., Structured Sentencing Statistical Report for Felonies and Misdemeanors: Fiscal Year 2014/15, North Carolina Sentencing & Policy Advisory Comm'n at 8 (April 2016), http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy14-15.pdf (28,617 of 29,232 convictions (97.9 percent) were the result of guilty pleas); South Carolina Department of Public

Thus, as this Court has recognized previously, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) (emphasis in original)). Accordingly, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* Consequently, the rights of the defendant—to effective assistance of counsel and otherwise—"cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *See Lafler*, 566 U.S. at 170 (remedying defense counsel's ineffective assistance in connection with plea offer).

The constitutional protections around the plea-bargaining process should include the right of a defendant

---

Safety, Office of Highway Safety & Justice Programs, Statistical Analysis Center, South Carolina Criminal & Juvenile Justice Trends at 85 (2013), http://www.scdps.gov/ohsjp/stats/cjtrends/2013%20Crime%20Book%20V11%20electronic%20version-edited.pdf (46,435 of 47,134 convictions (98.5 percent) were the result of guilty pleas); Tennessee Judiciary, Annual Report of the Tennessee Judiciary: Fiscal Year 2013-2014 at 21 (2014), http://www.tsc.state.tn.us/sites/default/files/docs/annual_report__fy2014.pdf (76,090 of 81,130 convictions (93.8 percent) were the result of guilty pleas); Office of Court Admin., Annual Statistical Report for the Texas Judiciary: FY 2015 at Detail-10 (2015), http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf (105,600 of 109,518 convictions (96.4 percent) in Texas District Court criminal cases were the result of guilty or *nolo contendere* pleas); Virginia Criminal Sentencing Comm'n, 2016 Annual Report at 26 (Dec. 1, 2016), http://www.vcsc.virginia.gov/2016Annualreportfinal.pdf (90.6 percent of convictions for felonies subject to sentencing guidelines were the result of guilty pleas).

to challenge the constitutionality of his conviction on direct appeal after pleading guilty. A ruling that defendants have no such right would encourage prosecutors to overreach, secure in the knowledge that a guilty plea renders virtually all abuses and violations of the United States Constitution immune from judicial review.

II. DEFENDANTS PLEAD GUILTY TO RECEIVE SHORTER SENTENCES EVEN WHEN THEY MAY NOT BE GUILTY.

The criminal justice system's reliance on pleas places pressure on all defendants to plead guilty. Capital defendants are pressured to plead guilty to avoid the possibility of a death sentence. Indigent defendants who are charged with misdemeanors and unable to make bail are pressured to plead guilty to avoid lengthy pretrial detention periods and secure their own release from jail. Neither innocent nor guilty defendants want to receive the most severe punishments available under the law or endure the stress and uncertainty of trial, and their decisions to plead guilty or not are informed by these pressures. Put differently, life and liberty are often the prevailing considerations, rather than guilt or innocence.

That these pressures operate on innocent and guilty defendants alike is well established. The National Registry of Exonerations identifies fifty-one Americans who pleaded guilty to murder but were later exonerated.[3]

3. National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Crime&FilterValue1=8_Murder&FilterField2=Group&FilterValue2=P (last visited May 18, 2017).

Likewise, the Innocence Project has identified thirty-seven defendants who pleaded guilty but were later exonerated by post-conviction DNA testing.[4]

Prosecutors play a central role in a defendant's decision to plead guilty. The leverage prosecutors use to induce pleas is an opportunity to plead guilty to reduced charges and accept the certainty of some—but less—time in prison or risk a trial on more serious charges and receive a longer sentence, often a significantly longer sentence or even death, if convicted. The prosecutor cannot make the decision for the defendant but has considerable influence over it. For example, a federal prosecutor may—and, under most circumstances, must—"charge and pursue the most serious, readily provable offense," *i.e.*, the offense that "carr[ies] the most substantial guidelines sentence, including mandatory minimum sentences."[5]

The prosecutor may also "'stack' charges carrying mandatory minimums in order to threaten or impose dramatic increases in mandatory sentences after a trial conviction." Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 228-29 (2007). In such a case, the difference between the maximum sentence after trial and the sentence provided for by the proposed plea "could become so large that some defendants would

4. The Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited May 18, 2017).

5. Memorandum from Att'y Gen. Jefferson B. Sessions to All Federal Prosecutors (May 10, 2017) https://www.justice.gov/opa/press-release/file/965896/download.

not accurately weigh their options and would not dare go to trial, even with a strong defense." Ronald F. Wright, *Trial Distortion and the End of Innocence In Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 109 (2005). Indeed, the likelihood of such a response from a rational defendant provides an incentive for a prosecutor to charge excessively, then offer a lesser sentence—or even a "market clearing" discount when the state's evidence is weak—in order to induce a defendant to give up his trial right and the possibility of acquittal. *See id.* Taken together, the parties' incentives and the authority given to the prosecutor create significant pressure for defendants who may not be guilty to plead guilty.

The available evidence confirms the disparity between sentences handed down after trial and those entered in connection with guilty pleas. For example, "in 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years."[6]

Likewise, a study of sentencing data in five states revealed that, as in federal courts, "the average sentence after jury trial is more severe than the average sentence after guilty plea . . . ." Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial In Five Guidelines States*, 105 Colum. L. Rev. 959, 975 (2005). For example, in one state, the sentences for heroin distribution

6. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

were 350 percent longer after trial by jury than they were after conviction by guilty plea. *Id.* at 973. *See also* David Brereton & Jonathan D. Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 Law & Soc'y Rev. 45, 56-57 (1982) (California robbery and burglary defendants more likely to be imprisoned than those who pleaded guilty).

Defense attorneys make their clients aware of these sentencing differentials in presenting the potential costs of exercising their right to trial, and "defendants would be a good deal less willing to plead guilty in the absence of a sentence-related inducement." Brereton & Casper, *supra*, at 69. Such inducements appeal to guilty and innocent defendants alike, as demonstrated by a recent empirical study that attempted to replicate the choice put to an innocent defendant who is offered a lenient plea bargain or a hearing on more severe charges. *See* Lucian E. Dervan & Vanessa A. Edkins, Ph.D., *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1 (2013). In the study, college students were falsely accused of cheating on a logic test. The students were given the option to either admit their guilt and forfeit the compensation they were promised for participating in the study or face an academic review board and risk a "sentence" in the form of a semester-long ethics course and disclosure to the school about their academic dishonesty. Approximately sixty percent of the innocent students nevertheless "admitted" guilt. *Id.* at 34.

Innocent defendants, like guilty defendants, plead guilty in exchange for lighter sentences because the benefits of doing so outweigh the costs of facing trial.

In other words, the pressures placed on these innocent defendants by the criminal justice system are so significant, and the alternatives to pleading guilty are so draconian, that it is a rational decision to plead guilty to crimes they did not commit. Many of these innocent defendants who plead guilty have been charged with minor offenses and want to "get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial." John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 173 (2014). The vast majority of felony defendants are poor, and their choices to plead guilty despite their innocence are informed by their economic circumstances. Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1344 n.165, 1346-47 (2012) (citing Caroline Wolf Harlow, Ph.D, Bureau of Justice Statistics, Special Report: Defense Counsel in Criminal Cases, U.S. Dep't of Justice 1 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf (eighty percent of felony defendants in state courts cannot afford counsel)). Often, they cannot make bail and are therefore likely to be incarcerated until they plead guilty or are tried. *Id.* "For those with children, jobs, or other obligations, the deprivations inflicted by a month in jail can be worse punishment than they would face if they were convicted at trial." *Id.*[7]

---

7. *See also* Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117 (2008) (arguing that, in low-stakes cases where innocent defendants bear significant "process costs"—such as pecuniary loss, inconvenience, and uncertainty of outcome—by going to trial, innocent defendants act rationally by pleading guilty); Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times, at SR5 (Mar. 10, 2012) (recounting case of single mother arrested on drug charges who spent a month in jail, then pleaded guilty

Innocent and guilty defendants may also plead guilty because of the pressure imposed upon them by prosecutors, defense counsel, and even judges whose heavy caseloads require them to quickly dispose of large numbers of cases involving low-level offenses, particularly in high-volume urban courthouses. Indeed, these systemic pressures often result in an auction-like atmosphere at misdemeanor arraignments, where the prosecutor and defense attorney make competing "bids" that they try to sell to the defendant within minutes of familiarizing themselves with the facts of a case. *See* M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 Drexel L. Rev. 373, 401-06 (2011) (describing the expedited misdemeanor arraignment process in New York City Criminal Court). If a defendant resists the pressure to plead guilty at arraignment and instead asserts his innocence and pursues a trial, he runs the risk that bail will be set, he will remain in custody, and his case will drag on, in some instances for more than a year. *Id.* at 405. This process tests neither the weight of the evidence nor the constitutionality of the underlying statute. Instead, it is a test of a misdemeanor defendant's endurance, usually to no end, since the costs of a drawn-out case typically lead the defendant to plead guilty, too. *Id.*

---

in exchange for probation, despite her assertions of innocence, to return to her children); Kevin Johnson, *Who's Watching the Kids When Parents Get Arrested*, USA Today (July 31, 2014 7:55 AM) https://www.usatoday.com/story/news/nation/2014/07/31/children-left-behind-parents-arrested/13333909/ (former Deputy Attorney General James Cole "indicated that thousands of children could require" emergency placement as a result of parent's arrest).

In sum, defendants plead according to their perceptions of the risks involved, and many of these risks simply do not hinge on their actual guilt, the strength of the evidence, or, as discussed *infra*, the constitutionality of the underlying statute.

A. The Same Factors That Cause People To Confess To Crimes That They Did Not Commit Can Also Cause Them To Plead Guilty.

False confessions and guilty pleas by innocent defendants are each more likely when the defendant is given the right (typically short-term) incentive not to tell the truth. As Judge Rakoff has previously observed, "[r]esearch indicates that young, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot 'take the heat' of an interrogation." Rakoff, *supra*, note 6. In addition, police investigators are trained to present suspects with false evidence of their guilt. Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 Law & Hum. Behav. 327 (2011). The innocent who confess in response do so as "an act of social compliance when they feel trapped by the apparent strength of the evidence against them and perceive no other means of escape." *Id.* False evidence also presents "a strong form of misinformation [and] can create confusion and lead people to doubt their own beliefs, at times internalizing guilt and confabulating memories for crimes they did not commit." *Id.* at 327-28.

Similarly, innocent defendants can be and often are pressured to plead guilty, though the pressure is not entirely adversarial and thus arguably more difficult

to withstand. The deal offered by the prosecutor—the promise of a reduced sentence if the defendant will only forego his right to a trial, coupled with the threat of a longer sentence if the agreement is rejected—provides a strong incentive to plead guilty. This incentive is often coupled with the pressure placed on the defendant by his own attorney, who, in many cases, advises the client "that there is a strong case against him, that his likelihood of acquittal is low, and that he faces" a lengthy prison sentence unless he quickly accepts the plea deal. Rakoff, *supra*, note 6. Defense attorneys who believe that it is in their client's best interest to accept a guilty plea will sometimes engage in "arm-twisting" to ensure that the client takes the deal. Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to Plea*, 65 Kan. L. Rev. 271, 303 (2016). Such arm-twisting may even include "enlisting 'capital experts' who will recount stories of trials that culminated in death sentences, getting family members to implore the client to take a plea to spare the family, and using religion as a basis for arguing that the defendant could be making a difference for fellow prisoners." *Id.* at 304. Thus, just as a police officer may coerce a suspect into confessing to a crime he did not commit, the innocent defendant's own attorney may create an environment in which the defendant feels trapped and can only "escape" by pleading guilty to a crime he did not commit.

B. A Defendant Is Likely To Be Ill-Equipped To Assess The Constitutionality Of His Conviction.

As this Court noted in *Brady v. United States*, 397 U.S. 742, 752 (1970), "[f]or a defendant who sees slight possibility of acquittal, the advantages of pleading

guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated." Defendants who violate a statute that is constitutionally defective are unlikely to be capable of assessing their chances of successfully challenging the statute and are thus likely to see only a slight possibility of acquittal.

To begin with, most defendants will be unable to evaluate their chances of successfully challenging the constitutionality of the statute under which they are charged. "Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Most criminal defendants are also likely to be incapable of determining for themselves whether a statute passes constitutional muster.[8] In many misdemeanor cases, defense counsel at an arraignment will advise a defendant to plead guilty after a brief interview, the substance of which is limited to informing the defendant about the standard plea bargain for the charged offense. Fabricant, *supra*, at 402. Defendants are therefore unlikely to understand the legal nuances involving the constitutionality of the statute that they are charged with violating.

---

8. *See* U.S. Sentencing Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, Table 8, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table08.pdf (more than forty-five percent of criminal defendants sentenced in federal court lack a high school education and only 6.3 percent have graduated from college).

Instead, such defendants are likely to focus on whether they will be released from custody while the charges are pending if they reject the plea offer; whether they will be able to accept the offer at a later time; and potential pressure from a defense attorney who thinks that taking a plea is in the best interest of the client. To the extent the evidence alleged in the accusatory instrument is part of the calculus, consideration is typically focused on whether those allegations demonstrate that the defendant has violated the statute at issue, rather than whether the statute itself is lawful. All of which will likely leave the defendant with the impression that he has only a slight possibility of acquittal. Furthermore, so long as there is sufficient evidence of factual guilt alleged in the charging document, the defendant may feel that he is better off pleading guilty to a statute that is constitutionally defective than taking the chance that a court will disagree with him and rule that the challenged statute is constitutional—particularly if a plea results in his immediate release from custody. To safeguard the rights of such defendants, this Court should hold that a defendant may challenge the constitutionality of his conviction on direct appeal after pleading guilty.

III. THE COURT SHOULD HOLD THAT A DEFENDANT WHO HAS PLEADED GUILTY MAY CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE OF CONVICTION ON DIRECT REVIEW.

The contours of a defendant's right to challenge the constitutionality of the statute of conviction should reflect the "central role plea bargaining plays in securing convictions and determining sentences." *See Lafler*, 566

U.S. at 170. A holding that a defendant waives his right to bring such a challenge by virtue of pleading guilty would foreclose an important avenue of exoneration under a "legal innocence" theory given that the statute of conviction is itself unlawful. Such a holding would also encourage prosecutorial overreach and potentially render convictions under unlawful criminal statutes effectively unreviewable.[9] Indeed, if post-plea appeals attacking the constitutionality of a statute of conviction are deemed to be waived by virtue of a guilty plea, only a fraction of the defendants convicted under constitutionally infirm statutes will be able to challenge them at all. Furthermore, a blanket rule that a guilty plea renders the statute of conviction unreviewable will incentivize prosecutors to overcharge defendants and threaten them with even longer sentences to ensure that plea bargains are accepted and the underlying laws are shielded from court review.

The Court has long recognized the necessity of providing defendants a check against prosecutorial overreach even after they have pleaded guilty. *See Menna v. New York*, 423 U.S. 61, 62-63 (1975) (permitting double jeopardy challenge even after defendant pleaded guilty); *Blackledge v. Perry*, 417 U.S. 21, 27-28, 31 (1974) (discussing the prosecution's motives to discourage appeals by encouraging guilty pleas and allowing due process challenges, related to vindictive or malicious prosecution, to survive guilty pleas). While there is a circuit split on how broadly to apply the rules in

9. In accordance with the question presented to the Court, the argument made herein addresses only the scenario in which a defendant has not explicitly waived his right to appeal his conviction on direct review.

Blackledge and *Menna*, even the federal circuit courts that have interpreted *Blackledge/Menna* to allow only a small set of constitutional challenges to survive post-guilty plea have held that defendants who plead guilty can bring malicious prosecution claims. *See, e.g.*, *United States v. Carrasquillo-Penaloza*, 826 F.3d 590, 593 & n.4 (1st Cir. 2016) ("The Supreme Court has recognized two types of nonjurisdictional errors that are not waived by an unconditional guilty plea," including double jeopardy challenges and "due process challenge[s] arising from repetitive, vindictive prosecution.").

The right to challenge the constitutionality of a statute of conviction after entering a guilty plea is the necessary and logical extension of the Court's prior holdings guarding against legislative and prosecutorial overreach. Discriminatory enforcement of certain so-called quality of life offenses demonstrates why.

In recent years, local governments have enacted statutes targeting vagrancy, loitering, and panhandling with increased frequency.[10] Historically, such statutes have been disproportionately applied against poor communities of color. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding that a vagrancy statute was "void for vagueness, both in the sense that it fail[ed] to give a person of ordinary intelligence fair notice that

10. *See* National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, 21-22, https://www.nlchp.org/documents/No_Safe_Place (last visited May 18, 2017) (showing that between 2011 and 2014 there was a twenty-five percent increase in city-wide bans of begging in public and a thirty-five percent increase in city-wide bans of loitering in public).

his contemplated conduct is forbidden by statute . . . and because it encourage[d] arbitrary and erratic arrests and convictions") (internal citations omitted).[11] Prosecutions for violation of vagrancy and loitering statutes are precisely the sort of relatively low-stakes cases in which the costs and inconvenience of standing trial are likely to encourage a defendant—particularly a defendant of limited means—to plead guilty, even if the law's application to him is unconstitutional. A ruling that a defendant waives the right to challenge the constitutionality of such a statute by pleading guilty would therefore effectively insulate the statute and the prosecutor's application of it from any sort of constitutional scrutiny.

The Department of Justice Civil Rights Division's 2015 investigative report concerning the Ferguson Police Department (FPD) demonstrates the harm that can be inflicted on minority and impoverished communities when those charged with crimes are unable to effectively raise constitutional challenges.[12] The municipal court

---

11. *See also* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero Tolerance" Policing Regimes*, 36 N.Y. Univ. Rev. of L. & Soc. Change 351, 362-63 (2011) (explaining how New York's trespassing laws are enforced in a way that disproportionately affects the City's poorest communities); Jocelyn L. Santo, Note, *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws*, 22 Cardozo L. Rev. 269, 271 (2000) ("[A]ntiloitering statutes were also enacted in the nascent American republic and continued after the Civil War" in order "to keep former slaves in a state of quasi-slavery.") (internal citation omitted).

12. *See* U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015) (hereinafter "DOJ Ferguson Report"), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

of Ferguson adopted the unconstitutional practice of issuing arrest warrants due to missed court appearances and unpaid fines originating from minor offenses, such as parking infractions, traffic tickets, or housing code violations. *See* DOJ Ferguson Report at 3. Arrests occurred even though "[j]ail time would be considered far too harsh a penalty for the great majority of these code violations." *Id.* The report also described FPD's practice of making arrests for "a variety of protected conduct . . . [such as] talking back to officers, recording public police activities, and lawfully protesting perceived injustices." *Id.* at 24. The Department of Justice opined that a provision of the Ferguson Municipal Code, which "prohibits obstruction of government operations 'in any manner whatsoever,'" is "likely unconstitutionally overbroad." *Id.* at 24 n.16. The report further noted that the abusive prosecution of such misdemeanor offenses disproportionately affected the African American population in Ferguson: "African Americans account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges." *Id.* at 62. The blanket rule that the Respondent proposes—that a guilty plea waives a defendant's right to challenge the constitutionality of a conviction—would significantly limit defendants' ability to challenge such unlawful and discriminatory conduct by law enforcement officials.

Legislative and prosecutorial overreach are not limited to misdemeanors. Felony statutes can be overbroad and enforced beyond their intended purpose, too. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), for example, makes it unlawful for "any person

employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). Congress enacted RICO to combat organized crime. *See United States v. Turkette*, 452 U.S. 576, 589 (1981). Prosecutors instead "seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments" and used RICO "as a device to obtain federal jurisdiction to prosecute common-law crimes against persons or property that would normally be within the providence of local law enforcement." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 662 (1987); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 921 (1987). In so doing, prosecutors ratcheted up the penalties for common-law crimes in a way Congress never intended, frequently targeting minority defendants.[13] A prohibition on hearing constitutional challenges made by defendants who plead guilty will ensure that such prosecutorial overreach will rarely be corrected.

Permitting a defendant to bring a post-plea challenge to the constitutionality of the statute of conviction would hardly burden the courts. Indeed, a number of states already allow defendants to bring constitutional

13. *See* Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 Mich. J. Race & L. 303, 307-09 (2012) ("[T]he government has targeted relatively small and local groups of racial minority offenders, provided names for the groups, and labeled the groups as gangs even though the suspects disagreed with 'gang' labels.").

challenges, including facial challenges to constitutionally infirm statutes, post-guilty plea. *See, e.g., Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975) (recognizing that, under New York law, certain types of constitutional claims raised in pre-trial proceedings are not barred on direct and collateral review post-guilty plea); *Weeks v. State*, 362 P.3d 650, 654 (Okla. Crim. App. 2015) ("We have recognized that following a plea of guilty or *nolo contendere*, the *certiorari* review process permits a petitioner to raise a facial challenge to the constitutionality of the statute upon which their conviction rests."); *State v. Andrews*, 730 N.W.2d 416, 419 (S.D. 2007) ("[W]hile a guilty plea waives a claim that a statute is unconstitutional as applied, it does not waive a claim that a statute is facially unconstitutional."); *Rutti v. State*, 100 P.3d 394, 400-401 (Wyo. 2004) ("[C]hallenging the constitutionality of the statute under which the criminal defendant was charged does qualify as a jurisdictional defense," and therefore is not inherently waived by pleading guilty); *Courtney v. State*, 904 S.W.2d 907, 910 (Tex. Ct. App. 1995) ("[W]e now hold that a claim is jurisdictional . . . when it goes to the very power of the State to bring the defendant into court to answer the charge against him. This includes claims of . . . facial unconstitutionality of the statute prescribing the offense alleged," and thus the claim of facial unconstitutionality is not waived by a guilty plea.); *People v. Gertz*, 154 Misc. 2d 762, 766 (N.Y. Sup. Ct. 1992) (challenging the constitutionality of the statute the defendant is charged with violating presents a "jurisdictional issue[] which preclude[s] waiver"); *State v. Olson*, 380 N.W.2d 375, 379 (Wis. Ct. App. 1985) ("A challenge to the facial validity of a statute raises a jurisdictional defense which survives a guilty plea.").

Moreover, as the Court recognized in *Lefkowitz*, permitting constitutional challenges on appeal post-guilty plea (as New York does) is arguably more efficient than forcing a defendant to risk trial in order to preserve such a challenge. In such a regime, "[t]he guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid." 420 U.S. at 289-90. The Court recognized that "New York defendants who knew that federal habeas corpus would be foreclosed would again be dissuaded from pleading guilty and instead would insist on a trial solely to preserve the right to an ultimate federal forum in which to litigate their constitutional claims." *Id.* at 293. Given that a defendant pleading guilty acknowledges the facts at issue in the case, but does not concede the constitutionality of the statute at hand, a guilty plea should not be the singular roadblock to constitutional challenges on direct or collateral appeal.

The lack of uniformity between state and federal systems in affording criminal defendants the opportunity to raise constitutional issues after pleading guilty is fundamentally unjust. Federal criminal defendants should be afforded the same ability to bring timely constitutional challenges on direct review after pleading guilty and the opportunity for exoneration that exist under the law of many states.

CONCLUSION

For the reasons stated above, *amicus curiae* urges the Court to hold that a defendant who has pleaded guilty has not waived his right to challenge the constitutionality of the statute of conviction and may do so on direct review.

Respectfully submitted,

M. Chris Fabricant
Vanessa Potkin
Innocence Project, Inc.
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5340

James C. Dugan
Counsel of Record
Timothy J. McGinn
Steven J. Ballew
Patricia O. Haynes
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
jdugan@willkie.com

Elizabeth J. Jonas
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006

Counsel for Amicus Curiae

May 19, 2017