No. 19-756

IN THE
Supreme Court of the United States

LOUIS TAYLOR,
Petitioner,

v.

COUNTY OF PIMA; CITY OF TUCSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND OTHER CRIMINAL JUSTICE ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Arizona Attorneys for Criminal Justice (AACJ), the Arizona affiliate of the National Association of Criminal Defense Lawyers, is a not-for-profit membership organization of criminal defense lawyers and associated professionals. Its mission is to give a voice to the criminally accused and those who defend them. To that end, AACJ is dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the role of the criminal defense lawyer.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts,

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[1] All parties have consented in writing to the filing of this brief. No entity or person aside from amici curiae made any monetary contribution supporting the preparation or submission of this brief. No counsel for any party to this proceeding authored this brief in whole or in part.

seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Innocence Project ("Project") provides pro bono representation to indigent prisoners whose innocence can be established through DNA and other post-conviction evidence. The Project seeks to prevent future miscarriages of justice by researching their causes, participating as amicus curiae in cases of broader significance, and pursuing reforms to enhance the truth-seeking function of the criminal justice system. Of the 367 DNA-based exonerations, over 10 percent plead guilty to crimes they did not commit. In addition, several of the innocent clients we have represented were offered and made the difficult choice to accept the state's offer of an Alford or other plea in order to obtain relief from wrongful imprisonment. The Project has a compelling interest in ensuring that wrongly convicted individuals are compensated.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including § 1983 actions. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

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

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of indigent defense representation. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members, including training on the utmost importance of providing vigorous indigent defense advocacy.

The Human Rights Defense Center (HRDC) is a non-profit charitable corporation headquartered in Florida that advocates in furtherance of the human rights of incarcerated people, and works to eliminate

racism and classism in the criminal justice system. HRDC's advocacy efforts include publishing two monthly publications, Prison Legal News, which covers national and international news and litigation concerning prisons and jails, as well as Criminal Legal News, which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners, and engages in state and federal court litigation on prisoner rights issues. HRDC has spent decades advocating for the rights of prisoners, including those who have been wrongfully convicted.

California Attorneys for Criminal Justice (CACJ) is the second largest organization of criminal defense lawyers in California, and the largest statewide affiliate of NACDL. CACJ has more than 1,500 members, most of whom are lawyers who practice law in the federal and state courts throughout California. CACJ's members include public defenders as well as lawyers in private practice. Among CACJ's stated purposes is the defense of individuals' rights under the U.S. and California Constitutions. Throughout its more than 35 years of existence, CACJ has appeared as an *amicus curiae* in matters of importance to its membership.

The New Mexico Criminal Defense Lawyers Association is a voluntary membership organization whose members spend their time actively engaged in practice on behalf of the accused in the state and federal courts. The NMCDLA's mission is to advocate for fair and effective criminal justice in the courts, legislature, and community. NMCDLA members have advocated at trial, on direct appeal, in post-conviction proceedings, and in civil rights actions on behalf of the actually innocent.

Amici's interest in this matter arises from their involvement in representing and advocating for those wrongfully convicted and ensuring that those who have been wrongfully convicted are fully protected and able to seek redress for the wrong they suffered at the hand of the state. Wrongful convictions based on fabricated evidence and willful law enforcement misconduct present stark reminders of the importance of civil legal remedies to deter future governmental misconduct and to compensate wrongfully convicted individuals. Civil remedies for the wrongfully convicted do not give the defendants the lost years of life back, but they are often the only remedy that can help ensure the state suffers a consequence for wrongful incarceration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Louis Taylor's petition presents the Court with an opportunity to answer an important question that has split the circuits and caused disparate treatment of the wrongfully convicted: Whether a local government should be immunized from civil liability when it extorts the defendant into entering a plea of no contest in exchange for immediate freedom.

The Ninth Circuit's opinion in this case has devastating effects on innocent defendants who are given the Hobson's Choice between years of additional wrongful incarceration or a plea of no contest for immediate release. It incentivizes the coercive practice of forcing a defendant into a no contest plea for immediate release in order to avoid civil liability for the years of wrongful conviction suffered by the defendant. This procedure by prosecutors has harmed criminal defendants in Arizona and around the country, and has made it more difficult for criminal defense

lawyers to protect their clients from government overreaching. These issues are of great importance not only to the protection of the wrongfully convicted who have been grievously and irreversibly wronged but also to the integrity of our criminal justice system.

The Ninth Circuit's holding is a deep injustice that bars Taylor from recovering compensation for his 42 years of racially motivated imprisonment for what apparently was no crime at all, making it an ideal vehicle for this Court to clearly establish the boundaries of *Heck v. Humphrey*, 512 U.S. 477 (1994), and the interplay with § 1983[2] claims. As evidenced by the growing number of exonerations each year, the deterrent factor in § 1983 claims is essential to curving the abuse by prosecutors in obtaining convictions. Allowing the prosecution to confer immunity on itself for misconduct resulting in wrongful convictions by allowing a practice of coercing innocent defendants into no-contest plea in order to avoid further incarceration condones even greater misconduct by the government.

The Ninth Circuit opinion threatens to diminish the applicability of § 1983 claims for the people most needing of its protections after suffering the most egregious constitutional violations. In many cases, including Taylor's, prosecutors have used the tactic of requiring no-contest pleas for immediate release despite acknowledgement that the government lacks evidence to sustain the conviction. Prosecutors use the threat of ongoing appeals, requiring many more years of wrongful incarceration, as leverage to coerce a defendant into entering a plea of no contest. If the Ninth Circuit's opinion stands, such tactic will be-

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[2] 42 U.S.C. § 1983.

come an even more commonplace means by which local governments can foreclose recovery for exonerated defendants. It will incentivize and provide a virtually fail-safe mechanism for granting immunity from the consequences of misconduct. A wrongfully convicted inmate is left with the impossible choice of languishing even longer in prison or waiving the right to be compensated for the theft by the government of years of their life. As Judge Schroeder observed, "our law is not that unjust." *Taylor v. Pima County*, 913 F.3d 930, 939 (9th Cir. 2019) (Schroeder, J., dissenting in part).

The purpose of *Heck* was to prevent prisoners who had not (or not yet) established that their convictions were wrongful from using § 1983 to evade the limits on relief that Congress imposed in the federal habeas statute. Denying Taylor's opportunity to bring a § 1983 claim, however, stretches *Heck* past its breaking point.

ARGUMENTS

I. THE QUESTIONS PRESENTED IN THE PETITION ARE IMPORTANT AND IN URGENT NEED OF RESOLUTION

A. **Applying *Heck* as a bar to individuals where habeas relief is unavailable will result in unjust results and will diminish the intent behind § 1983.**

One of the key purposes of § 1983 is to provide a federal forum for the protection of federal constitutional rights. "[T]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing

Carey v. Piphus, 435 U.S. 247, 254-57 (1978)). The federal habeas statute, 28 U.S.C. § 2254, is likewise a pillar for the protection of constitutional rights. *Muhammad v. Close*, 540 U.S. 749, 750 (2004). "It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). "The right of access to the courts…is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id*.

Habeas relief under 28 U.S.C. § 2254 requires an individual to be "in custody" in order to sustain jurisdiction for the claim. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). In cases where habeas relief is not available because the individual is not "in custody," the only avenue remaining to challenge constitutional violations is through § 1983. There is no deterrent effect against governmental misconduct if those that need § 1983 the most are excluded from its relief. Taylor, as many other exonerated individuals, was immediately released upon a plea of no contest.

In *Heck*, this Court held that a § 1983 action was barred where it would imply the invalidity of a conviction. 512 U.S. at 486-87. In a concurrence joined by Justices Blackmun, Stevens, and O'Connor, Justice Souter expressed that the "favorable termination" requirement by the majority would not extend to § 1983 actions where habeas relief was unavailable. *Id*. at 500 (Souter, J., concurring in the judgment). Justice Scalia, on the other hand, suggested that it would. *Id*. at 490 n.10. The conflict between these competing positions has resulted in a circuit split, which in turn has led to incongruous outcomes where some wrongfully convicted individuals are compensated through

§ 1983 claims while others are barred from seeking redress from the violation of their constitutional rights. Extending *Heck* to habeas-ineligible plaintiffs would "deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling." 512 U.S. at 500. *Heck* was aimed at collateral attacks on sentences that were open to challenge through a writ of habeas. It was not aimed at granting immunity for constitutional violations simply because those individuals are no longer "in custody" as a result of a no-contest plea.

"[I]ndividuals not 'in custody' cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights." *Heck*, 512 U.S. at 500 (Souter, J. concurring in the judgment). Taylor successfully challenged his 1972 conviction after overwhelming evidence showed both official misconduct and no arson actually occurred. Pima County then sought, under threat of significantly continued incarceration, to have him enter a no contest plea in exchange for immediate release. Taylor was never able to challenge his 2013 conviction through habeas because he was no longer "in custody" for federal habeas relief. The Ninth Circuit now seeks to bar him from raising any claim of the constitutional violations against him.

B. Since *Heck*, there has been an alarming number of exonerations showcasing an even greater need for the deterrent effect of § 1983 claims that will be unavailable for many of the exonerated individuals.

In the experience of *amici* and their members, governments commonly make immediate release from incarceration based on an invalid conviction contin-

gent on the defendant's willingness to enter a *post hoc* no-contest plea. This trend is growing across the nation. Governments use this tactic to limit its own liability for the wrongful conduct that led innocent people to be incarcerated often for the majority of their life.

The National Registry of Exonerations tracks the exonerations throughout the United States. Right now it shows more than 2,500 exonerations since 1989 that have resulted in 22,540 years lost to wrongful incarceration.[3] These exonerations have a large variety of contributing factors, including mistaken witness identifications, false confessions, perjury or false accusations, false or misleading forensic evidence, and many more.[4] Most alarmingly, 1,367 of the listed exonerations (more than half) involved official misconduct. *Id.* Despite dedicated defenders working tirelessly to free the wrongfully convicted, the fact remains that there are likely thousands more still wrongfully incarcerated. Even worse, some have been or will be put to death before exoneration.

Those lucky enough to be exonerated are often ill-equipped to handle life on the outside. Many have spent the majority of their life incarcerated where they lack the development needed to provide for themselves on the outside. Some have been become so institutionalized they cannot function without the

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[3] Nat'l Reg. Exonerations, Exonerations by State, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Jan. 10, 2020).

[4] According to the National Registry, *see id.*, mistaken witness identification has been a contributing factor in at least 730 exonerations; false confessions have contributed to at least 309 exonerations; perjury or false accusations contributed to at least 1,484 exonerations; false or misleading forensic evidence contributed to 605 exonerations.

prison structure they learned during their many years of wrongful incarceration. Many lack sufficient job skills or life skills to care for themselves. They often lack sufficient housing and are without financial ability to live. These are collateral consequences directly caused by the government's actions. Unfortunately, our system is not built to help the wrongfully convicted. In fact, offenders on parole or after completion of their sentence may receive more re-entry services than exonerated persons who committed no crime at all.[5] Although monetary compensation cannot make up for years of wrongful incarceration, it can help those individuals obtain helpful services and training as well as rebuild their lives.

The Hobson's Choice also causes conflict for those defending the wrongfully convicted. Even where counsel, in his or her judgment, strongly believes that an individual deserves significant compensation for extended wrongful imprisonment, counsel cannot override a client's decision to opt for immediate release.[6] Moreover, it is beyond dispute that significant costs go into exonerating the wrongfully incarcerated. Unlike the prosecution agencies, the defense organizations working feverishly to exonerate and seek release of innocent clients do not have unlimited funds

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[5] Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 429 (2009).

[6] In fact, that is what happened in this case. Ed Novak, one of Taylor's attorneys, told 60 Minutes prior to the plea: "I'm not sure I can stand in the courtroom and let a prosecutor tell a judge that there's sufficient evidence for a judge to accept a plea of no contest when I don't think a crime occurred." *See* Steve Kroft, *Arizona's Pioneer Hotel Fire Re-Examined*, CBS NEWS, March 31, 2013, at p. 4, https://www.cbsnews.com/news/arizonas-pioneer-hotel-fire-re-examined.

and resources. Many of the exonerations are funded by charitable organizations such as the Innocence Project that rely on donations in order to operate.[7] The potential of immediate release for a wrongfully convicted client when waged against the potential for significant ongoing costs of litigation desperately needed to help others wrongfully convicted puts defenders in a precarious position.

An inherently coercive no-contest plea that is required as a condition of release from wrongful imprisonment should not also serve to immunize the agencies responsible for the wrongful incarceration. The practical effect of the Ninth Circuit's interpretation of *Heck* does just that.

C. A *Heck* bar as applied by the Ninth Circuit will be detrimental to the public interest because it will suppress public knowledge of official misconduct as well as efforts to curb that misconduct.

Justice O'Connor observed that "[t]he coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole." *Town of Newton v. Rumery*, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring in part and in the judgment). The coercive power is even greater against those who have been wrongfully incarcerated because of wrongful government conduct.

In light of the panel decision in the present case, a no-contest plea like Taylor's has the same immuniz-

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[7] The Arizona Justice Project, the state affiliate of the Innocence Project, investigated Taylor's case for many years and represented him in his 2012-2013 state collateral proceedings.

ing effect as the release-dismissal agreement evaluated in *Rumery*, where prosecutors dismissed unproved charges in exchange for a release from liability for police and other government misconduct. This Court and other courts decline to enforce release-dismissal agreements if enforcement will harm the public interest, as may occur when there is substantial evidence of police misconduct. *See Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390 (9th Cir. 1991); *Coughlen v. Coots*, 5 F.3d 970, 975 (6th Cir. 1993).

Taylor's trial involved substantial prosecutorial and police misconduct. Taylor's plea was coerced rather than voluntary, and for this 42-year-old case the prosecutor was unlikely to produce "an independent, legitimate reason to make this agreement" that "directly related to his prosecutorial responsibilities." *Rumery*, 480 U.S. at 398. The requirement that Taylor enter a no-contest plea could not survive the type of case-specific analysis that *Rumery* requires. *Id.* at 397–98. The release-dismissal agreement in *Rumery* was enforceable because the plaintiff's waiver of a "questionably valid civil action" "did not have a significant impact upon the public at large," while the agreement served an admittedly legitimate criminal justice objective: "avoidance of embarrassment to and public scrutiny of the … complainant in a sexual assault case." *Davies*, 930 F.2d at 1396–97 (citing *Rumery*, 480 U.S. at 394–95). Here, in contrast, there were no witnesses to protect from "the public scrutiny and embarrassment" of testimony. *Rumery*, 480 U.S. at 398. Rather, the only beneficiaries (other than the public treasury) were prosecutors and expert witnesses from more than four decades earlier, who had

no legitimate right to protection from well-warranted "public scrutiny."

Moreover, using a no-contest plea or release-dismissal agreement to extract a waiver of meritorious claims of governmental misconduct as a condition for freeing an innocent man is the opposite of "an independent, legitimate reason to make th[e] agreement." *Id*. This Court has long observed that a prosecutor's "interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). That interest derives from the "twofold aim" recognized by the Supreme Court: "that guilt shall not escape or innocence suffer." *Id*. As Justice Jackson observed while Attorney General, "[a]lthough the government technically loses its case, it has really won if justice has been done." Robert H. Jackson, *The Federal Prosecutor*, 24 AM. JUD. SOC'Y 18 (1940).

When a no-contest plea has been the condition of release from wrongful imprisonment, flatly barring § 1983 lawsuits disserves one of the primary purposes of that civil rights law: "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S. at 161 (citing *Carey*, 435 U.S. at 254-57). Deterrence necessarily fails if the offending agencies can relieve themselves of the consequences of their misconduct with a second abuse of authority.

The Innocence Project has documented additional benefits from § 1983 lawsuits that addressed misconduct by prosecuting authorities. Exposure through civil rights litigation can lead to prosecutorial reforms designed to prevent wrongful convictions, a benefit to all citizens. For example, after Michael Green was exonerated in a civil lawsuit, Cleveland audited its

forensic laboratory—an audit that led to the exoneration of two more men and the termination of Cleveland's forensic criminalist.[8] Similarly, the settlement of a wrongful imprisonment lawsuit by Obie Anthony led Los Angeles County to create a system for tracking and disclosing benefits to witnesses to prevent *Brady*[9] violations like the one that underlay the settlement.

II. ARIZONA PROSECUTORS CONSISTENTLY ERECT BARRIERS AGAINST CORRECTING WRONGFUL CONVICTIONS

The concern that faulty forensic science has led to wrongful convictions is nothing new. The advent of DNA testing that has led to indisputable exoneration in so many cases that many states created an "actual innocence" provision for post-conviction relief—including Arizona in 2000. In practice, however, prosecutors have generally resisted attempts to overturn such convictions in cases where there is not a DNA exoneration. This is especially true in Arizona.

To be sure, prosecutors may be reluctant to correct wrongful convictions when they played a part in those convictions. Confirmation bias plays a central part in this reticence; a prosecutor who worked so hard to obtain a conviction in the first place has difficulty viewing the evidence objectively. Others rely on principles of finality of convictions and other legal technicalities to prevent further review. In the event that a defendant succeeds in obtaining post-conviction relief in state court, however, Arizona Rule

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[8] *See* The Innocence Project, Michael Green, https://www.innocenceproject.org/cases/michael-green/ (last visited Jan. 10, 2020).

[9] *Brady v. Maryland*, 373 U.S. 83 (1963).

of Criminal Procedure 32.9(d) states, "The State's filing of a motion for rehearing or a petition for review of an order granting a new trial automatically stays the order until appellate review is completed." The lengthy delay in achieving one's freedom is a factor that leads many innocent people to bargain for that freedom. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PENN. L. REV. 1117, 1132 (2008) ("In low-stakes cases plea bargaining is of near-categorical benefit to innocent defendants, because the process costs of proceeding to trial often dwarf plea prices."); *Lafler v. Cooper*, 566 U.S. 156, 185 (Scalia, J., dissenting) (describing plea bargaining as a "necessary evil" that "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

In Arizona, the motive to avoid correcting such manifest injustice is also financial. The elected county attorneys of Arizona's fifteen counties are tasked not only with bringing felony prosecutions but also "oppos[ing] claims against the county that the county attorney deems unjust or illegal." ARIZ. REV. STAT. § 11-532(4), (9). Because of this dual function of the office, prosecutors have an additional incentive to avoid having their convictions overturned beyond seeing their work "undone." Even if the prosecutor is otherwise willing to concede that a conviction should be overturned, such action may oppose the interest of the county attorney's sole client—the county. High profile cases such as Louis Taylor's, therefore, are not evaluated by a line attorney, but by the elected official. If a county attorney were to right a wrong that results in millions of dollars being paid by the taxpayers, the voters may turn that person out of office at the next election, or even pursue a recall election.

See ARIZ. REV. STAT. § 19-201(A); ARIZ. CONST. art. 8, § 1. Maricopa County Sheriff Joe Arpaio was denied his bid for a seventh term in large part because fueling his reputation as "America's Toughest Sheriff" became so costly to county taxpayers.[10]

In 2013 the Arizona Supreme Court adopted rule changes, based on the American Bar Association's Model Rules, for the purpose of encouraging prosecutors to correct wrongful convictions, but to no avail. ARIZ. R. SUP. CT. 42, ER 3.8(g)-(h); ARIZ. R. CRIM. P. 24.2(e). However, as one commentator noted, "Model Rule 3.8(g) and (h) set a floor of conduct," "[b]ut they fail to impose any obligation on prosecutors to actually review the many claims of innocence that cross their desks or to give those claims anything more than a perfunctory, skeptical review." Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 622, 623 (2014). Such skepticism is built into Arizona's ER 3.8(i), which insulates prosecutors who reject innocence claims from discipline.

The year after Taylor was released from prison in connection with this case, Pima County Attorney LaWall created a "Conviction Integrity Unit" (CIU).[11] As pointed out at the time, the person put in charge of the unit was not a person from outside the office who could bring objectivity to the case reviews, but a

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[10] Associated Press, *Taxpayers to pay another $13M in Arpaio Case*, May 12, 2016, https://www.abc15.com/news/region-phoenix-metro/central-phoenix/taxpayer-costs-of-sheriff-joe-arpaios-profiling-case-keep-climbing.

[11] Patrick McNamara, *County to investigate possible wrongful convictions*, Arizona Daily Star, Oct. 13, 2014, https://tucson.com/news/county-to-investigate-possible-wrongful-convictions/article_e7ea5576-2106-5446-ba1b-ed515afb6c5e.html.

longtime prosecutor from that office who would be asked to review convictions obtained by his own colleagues (and even himself). Notably, the CIU chief was also the prosecutor who appeared in court when Taylor entered his no-contest plea. *See* Boehm, 2014 UTAH L. REV. at 648 ("District attorneys signal to the office and the public their commitment to innocence through whom they choose to lead their conviction integrity efforts…"). In more than five years, the CIU has not brought a single case to court to correct a wrongful conviction—and certainly not Taylor's case.[12]

III. LOUIS TAYLOR'S CASE IS THE BEST VEHICLE FOR DECIDING THIS ISSUE BECAUSE OF THE EXTENT OF THE INJUSTICE HE SUFFERED

This Court may not again have the opportunity to review this issue in the context of a case with such egregious facts that it shocks the conscience. This case is an ideal vehicle to reach the issues presented in Taylor's petition.

Taylor was forced to plead no contest because Pima County threatened to fight the case "all the way to

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[12] In the case of death row prisoner Barry Jones, this CIU has refused to review the case and consider a new trial even after a federal judge granted a new trial in habeas proceedings. The CIU has instead opted to wait for the state Attorney General to exhaust all its appeals. *See* Liliana Segura, "His conviction was overturned. Why is Arizona doing everything in its power to keep Barry Jones on death row?: Death and Dereliction, Part 4," The Intercept, Nov. 18, 2018, https://theintercept.com/2018/11/18/arizona-appeal-barry-jones-conviction-overturned/. The Ninth Circuit recently affirmed the grant of habeas relief to Jones, *see Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019), but the Pima County Attorney's Office still has taken no action.

the Supreme Court," forcing him to remain in custody throughout those appeals.[13] This happened despite the prosecutor's acknowledgment that it would be "extraordinarily difficult to re-convict" because witnesses had died and "much" of the evidence had been destroyed.[14] Even though clear and convincing evidence showed his innocence, and there was no reasonable likelihood of conviction at a retrial,[15] Pima County did not yield and instead threatened Taylor with continued incarceration if he pursued his claim. *Taylor*, 913 F.3d at 939. Pima County prosecutors once again chose to abandon their role as minister of justice and instead pursue a "win at all costs" scorched-earth policy. *See In re Peasley*, 90 P.3d 764, 774 (Ariz. 2004) (disbarring Pima County prosecutor for suborning perjury in multiple capital trials); *In re Zawada*, 92 P.3d 862 (Ariz. 2004) (suspending Pima County prosecutor for flagrant misconduct in a murder trial that resulted in dismissal of all charges).

Louis Taylor was 16 years old when he was charged with setting the 1970 Pioneer Hotel fire in downtown

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[13] Bill Whitaker, *Louis Taylor, freed after more than 40 years in prison: "It was shameful what they did"*, CBS This Morning, April 4, 2013, https://www.cbsnews.com/news/louis-taylor-freed-after-more-than-40-years-in-prison-it-was-shameful-what-they-did/.

[14] Jessica Boehm, *Louis Taylor freed after 42 years behind bars*, Tucson Sentinel, Apr. 2, 2013, http://www.tucsonsentinel.com/local/report/040213_taylor_pioneer_free/louis-taylor-freed-after-42-years-behind-bars/.

[15] Arizona prosecutors have repeatedly used the "reasonable likelihood of conviction" standard to determine whether charges should be filed or, if evidence is learned after filing, if the charges should be dismissed. *See, e.g.*, *Gonzales v. City of Phoenix*, 52 P.3d 184, 185 (Ariz. 2002) (discussing charges dismissed after determination there was no "reasonable likelihood of conviction").

Tucson that caused the death of 28 people. *Taylor*, 913 F.3d at 932. Taylor was nothing more than a convenient suspect in a case where police and prosecutors were desperate to resolve the disaster quickly for the public. His guilt hinged on the opinion of a fire investigator who later explained:

> Blacks at that point, their background was the use of fire for beneficial purposes. In other words, they were used to clearing lands and doing cleanup work and things like that and fire was a tool. So it was just a tool for them. In other words, you're comfortable with it. And if they get mad at somebody, the first thing they do is use something they're comfortable with. Fire was one of them.[16]

After this testimony, Pima County Attorney Barbara LaWall commissioned a new report by the Tucson Fire Department, which also showed the cause of the fire was undetermined. Yet LaWall denied there was no evidence demonstrating Taylor's guilt, choosing to rely on the fact that this same shameful evidence led "12 members of this community [to make] that determination."[17]

In Taylor's case, his exoneration was a foregone conclusion. Taylor's "first conviction was so deeply tainted that we now know the disastrous fire may not have been set by anyone, and the prosecution was without adequate foundation from the beginning." *Taylor*, 913 F.3d at 940 (Schroeder, J., dissenting). The only thing standing in the way of his release

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[16] Kroft, *Arizona's Pioneer Hotel Fire Re-Examined*, at p. 3 https://www.cbsnews.com/news/arizonas-pioneer-hotel-fire-re-examined/3/.

[17] *Id*.

from prison was the willingness of the Pima County Attorney to weaponize Rule 32.9(d) and other delay tactics to keep him locked up. Taylor had already lost 42 years of his life; he was denied a chance to have a family, a career, and a successful life. He was incarcerated as a high school student and was released from prison at an age when many people retire.

For losing nearly his entire adult life to incarceration for a crime he did not commit, he has received nothing. *Heck* was not intended to stand as a barrier to § 1983 claims in cases such as this.

CONCLUSION

For the foregoing reasons, the Court should grant review of Taylor's petition.

Respectfully submitted,

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