THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Honorable Kristi Lea Harrington, Circuit Court Judge

APPELLATE CASE NO. 2018-001269

THE STATE . . . . . RESPONDENT

v.

KENNETH LAMONT ROBINSON, JR. . . . . APPELLANT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of criminal activity or misconduct. NACDL has a nationwide membership of many thousands of direct members—up to 40,000, including affiliates. NACDL's members include private criminal defense attorneys, 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 fair administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, 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. NACDL seeks to file an amicus brief in this case because it is NACDL's belief that the trial tax has a devastating and corrosive impact on criminal defendants as well as society at large.

STATEMENT OF THE CASE

NACDL is uniquely positioned to observe the criminal justice system. Over time, based on empirical data and the experiences of its members, NACDL has developed an understanding of the trial tax—the reality that individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose. It is NACDL's position that the trial tax is antithetical to the American concept of justice because it diminishes jury trials, undermines the legal system's goal of truth-seeking, relieves the government of its burden of proof, contributes to wrongful convictions, and disproportionately hurts young people. Kenneth Robinson's case in particular starkly reveals the dangers to a defendant who chooses to exercise his constitutional right to trial.

INTRODUCTION

The trial tax, also known as the trial penalty, is "the often severe and unjustifiable difference between a pre-trial offer and a post-trial sentence."[1] In many cases, the difference is substantial, and in some cases, a trial sentence may discounted as much as 95% when a defendant pleads guilty.[2] As the former president of the National Association of Criminal Defense Lawyers explained, "The process is simple and the logic inexorable: the prosecutor conveys a settlement offer to the defense attorney—very often at the outset of the case before the defense has investigated or received discovery—threatening a post-trial sentence much greater than the pre-trial offer."[3] Defendants are told: "Plead guilty and get less time; go to trial and get much more time if you are convicted."[4] "If you want a trial, the only acceptable currency is your freedom, paid in days, weeks, months, or years."[5]

In exchange for such a steep discount on their sentences, defendants bargain away rights enshrined in the Constitution, including the right to review the evidence against them; to receive any exculpatory information in the prosecutor's possession; to suppress illegally obtained

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[1] Rick Jones & Cornelius Cornelssen, *Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism*, 31 FED. SENTENCING R. 265, 265 (2019); *see also* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION & HOW TO SAVE IT 11 (2018) [hereinafter NACDL Report]; Marc A. Levin, *A Plea for Reviving the Right to a Jury Trial and a Remedy for Assembly-Line Justice*, 31 FED. SENTENCING R. 272, 272 (2019); Janeanne Murray, *Ameliorating the Federal Trial Penalty through a Systematic Judicial "Second Look" Procedure*, 31 FED. SENTENCING R. 279, 279 (2019).

[2] Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth & Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH. PUB. POL. & L. 250, 255 (2016).

[3] Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENTENCING R. 215, 215 (2019).

[4] Emma Andersson & Jeffery Robinson, *The Insidious Injustice of the Trial Penalty*: *"It is not the intensity but the duration of pain that breaks the will to resist*," 31 FED. SENTENCING R. 222, 222 (2019).

[5] *Id*.

evidence; and to appeal the conviction or sentence on any ground, including ineffective assistance of counsel.[6] This phenomenon is antithetical to the American concept of justice.

KENNETH ROBINSON

Kenneth's case is a quintessential example of why people plead guilty under the threat of a trial tax. Kenneth withstood the immense pressure to plead guilty. A child of only fifteen, charged with murder under the "hand of one, hand of all" doctrine, he exercised his right to a jury trial, foregoing a twenty-three-year offer to plea to manslaughter. He refused to relinquish his right to appeal, foregoing a thirty-year plea offer following guilty verdicts at trial. He paid the price. Most defendants plead guilty to *avoid* the trial tax; Kenneth went to trial, and the trial tax was levied against him in the form of a fifty-year sentence.

By contrast, Kenneth's co-defendants pleaded guilty and received significantly shorter sentences. Richard Simmons, who repeatedly lied to law enforcement and actually pulled the trigger, pled to the statutory minimum of thirty years. And Keon Anderson, an adult who played a role similar to Kenneth's, pled to a sentence of only fifteen years—less than one third the length of Kenneth's.

I. THERE IS A TRIAL TAX IN AMERICA.

Across the country, defendants face much longer sentences if they go to trial than if they plead guilty. In fact, data show that "approximately 75 percent of . . . pleas of guilty 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."[7] When considered with the fact

[6] NACDL Report, 14–15, 28.
[7] Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 FED. SENTENCING R. 239, 239 (2019).

that guilty pleas comprise well over ninety percent of all criminal convictions,[8] that figure suggests that over two-thirds of all criminal convictions in the United States are induced by the trial tax.

This is true in both state and federal courts. Post-trial sentences in federal court are "at least double the sentence imposed in cases where the defendant pled guilty, and . . . in cases involving mandatory minimum sentences, recidivist enhancements, or once-mandatory guidelines, the post-trial sentence can be much longer."[9] In 2015, "in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence."[10] Data from state courts are similar: "the median sentence for those individuals whose cases were adjudicated through guilty pleas [was] only 30% as long as the median sentence received by those who were convicted at trial."[11]

This phenomenon is cyclical and self-perpetuating. Historically, as guilty pleas became more frequent, the disparity between post-trial and post-plea sentences rose.[12] And when the disparity between post-trial and post-plea sentences rises, the "likelihood that both guilty and innocent defendants will accept a plea also increases."[13] In other words, an increase in guilty pleas leads to a greater trial tax, which in turn leads to more guilty pleas, and so on and so forth.

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[8] *See, e.g.*, Russel D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595, 596 (2013).
[9] Murray, *supra*, at 280 (emphasis removed).
[10] NACDL Report, 15.
[11] David Bjerk, *On the Role of Plea Bargaining & the Distribution of Sentences in the Absence of Judicial System Frictions*, 28 INT'L R. L. & ECON. 1, 1 (2008) (citing M. Durose & P. Langan, *State Court Sentencing of Convicted Felons, Statistical Tables*, BUREAU OF JUSTICE STATISTICIS, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS (2002)).
[12] Marjorie J. Peerce & Brad Gershel, *1980s Sentencing Reform and Its Impact on Federal Plea Bargaining and the Trial Penalty*, 31 F. SENTENCING R. 303, 306 (2019).
[13] Zottoli, *supra*, at 255.

The trial tax exists across all types of criminal offenses[14] and, unsurprisingly, reflects the racial and socioeconomic inequalities pervasive across the entire criminal justice system.[15]

South Carolina is no exception. In fact, South Carolina has an especially pernicious trial tax. Research on the South Carolina criminal justice system "demonstrates that trial conviction is associated with a *ninefold* increase in the odds of incarceration."[16] "[T]his large South Carolina trial penalty coexists with state trial rates of less than 1.5 percent."[17] "These findings support the inference of the trial penalty as an inducement to plead guilty."[18] Like in the federal system and other state systems, the trial penalty in South Carolina disproportionately impacts young black men.[19]

II. THE TRIAL TAX IS ANTITHETICAL TO THE AMERICAN CONCEPT OF JUSTICE.

The trial tax diminishes jury trials.

The trial tax is causing the death of jury trials.

The Supreme Court itself has recognized that "criminal justice today is for the most part a system of pleas, not a system of trials."[20] Approximately 97% of federal convictions[21] and 94%

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[14] Peerce, *supra*, at 306–07; Reimer, *supra*, at 216.
[15] Jones, *supra*, at 265, 268–69 ("[P]eople of color feel the impact of the trial penalty much more frequently and intensely than others[.]"); Reimer, *supra*, at 215.
[16] Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 332 (2019) (emphasis added).
[17] *Id*.; *see also* Rhys Hester & Eric L. Sevigny, *Court Communities in Local Context: A Multilevel Analysis of Felony Sentencing in South Carolina*, 39 J. OF CRIME & JUST. 55, 62, 68 (2016) (examining an older data set).
[18] Hester, *supra*, at 67 (citations omitted).
[19] *Id*.
[20] *Lafler v. Cooper*, 566 U.S. 156, 157 (2012).
[21] *See, e.g.*, Levin, *supra*, at 272; Peerce, *supra*, at 303; Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 Tul. L. Rev. 695, 700 (2001); Dervan, *supra*, at 239; Russel D. Covey, *supra*, at 596 (citing the Supreme Court's discussion of plea bargaining in *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012)).

of state convictions[22] result from guilty pleas. "[T]rial rates are at historic lows because the administration of criminal justice is designed to make that decision far too costly"—with the threat of the trial tax—"even for those with an excellent defense."[23]

The death of jury trials violates the Framers' intentions for the criminal justice system.

The right to trial "was enshrined in the Magna Carta, where it was described as 'the principal bulwark of our liberties.'"[24] In the eyes of the Framers, the right to trial was among the most important rights protected by the Constitution.[25] President John Adams himself considered the right to trial on the same level as the right to representation in government: "Representative government and trial are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[26] The Supreme Court has recognized that "[w]hen the American people chose to enshrine th[e] right [to a unanimous jury trial] in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed."[27] The current system of plea bargaining in almost all criminal cases would be unrecognizable to the Founding Fathers.

The death of jury trials hurts defendants and the broader community.

The death of jury trials centralizes power in the hands of prosecutors, "effectively outsourcing the sentencing function into the hands of the very government actor responsible for

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[22] *See, e.g.*, Dervan, *supra*, at 239; Covey, *supra*, at 600.
[23] Peerce, *supra*, at 303.
[24] Levin, *supra*, at 272.
[25] Reimer, *supra*, at 215; Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 F. SENTENCING R. 316, 316, 327 (2019).
[26] Reimer, *supra*, at 215 (quoting The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000)).
[27] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020).

bringing charges against the accused in the first place."[28] Because of mandatory minimums and virtually unchecked charging discretion, prosecutors single-handedly determine the sentence defendants face by deciding what offenses to charge.[29] This power is only increased by the constitutional waivers defendants are often forced to make early in the plea bargaining process. Additionally, the "prosecutor is almost always at an informational advantage because he is not required to share information from his investigation with the defendant before offering and requiring the acceptance of a plea deal, leaving the defendant to guess what the prosecutor will be able to prove beyond a reasonable doubt."[30] Such a concentration of power in the prosecution undermines the integrity of the system.

In part because of that concentration, criminal defendants suffer when trials become so scarce. The Supreme Court has, countless times, emphasized the importance of jury trials to criminal defendants.[31] In *Duncan v. Louisiana*, the Court explained, "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[32] No protection could be more fundamental.

The death of jury trials hurts also society by diminishing community participation in the criminal justice system. Justice Scalia wrote in *Blakely v. Washington*, "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to

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[28] Reddy, *supra*, at 317.
[29] Reimer, *supra*, at 215; John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 165, 170 (2014).
[30] NACDL Report, 25.
[31] *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968).
[32] *Id*. at 156; *see also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.").

ensure their control in the judiciary."[33] In fact, "serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[34] When the jury system is compromised, all of society suffers.[35] According to the National Association of Criminal Defense Lawyers,

> the decline in jury trials deprives society of an important community check on excesses of the criminal justice system. Juries not only determine whether the prosecutors have met their high burden. They also apply their own sense of fair play—frequently convicting of lesser-included offenses or even acquitting entirely where the prosecution is perceived as over-reaching. They are a reminder that the government is not omnipotent, but instead remains subject to the will of the people. . . . The decline in the frequency of trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system.[36]

Additionally, the diminished community oversight has eroded community confidence in the criminal justice system.[37]

The trial tax undermines the criminal justice system's goal of truth-seeking.

Because of the trial tax, plea bargaining is fundamentally coercive.

"[F]or most of history the common law has rejected plea bargaining as impermissibly coercive and an affront to the truth-seeking mission of the criminal justice system[.]"[38] That concern was well-founded. "The data behind how plea bargaining is employed in practice

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[33] *Blakely v. Washington*, 542 U.S. 296, 306 (2004).
[34] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).
[35] *Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.") (examining the exclusion of women from jury panels); *see also Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).
[36] NACDL Report, 10–11.
[37] *Cf. Powers v. Ohio*, 499 U.S. 400, 413–14 (1991).
[38] Dervan, *supra*, at 239.

portrays plea bargaining as an institution far more often used as a stick rather than a carrot."[39] The "stick," of course, is the trial tax—the prospect of exponentially lengthening a prison sentence by refusing to plead.

Numerous other aspects of the plea bargaining process also contribute to that coercion. For starters, plea bargaining often occurs when a defendant, still presumed innocent, is in jail away from their loved ones. Hundreds of thousands of people every year are in that very situation: they remain in jail awaiting trial because they cannot afford bail.[40] Existing research, and sheer logic, "suggests that there is a real influence of pretrial detention on the probability of a defendant pleading guilty."[41] In some cases, a plea bargain is even conditioned on the promise that a defendant will not seek pretrial release, intensifying the pressure of pretrial detention.[42]

Moreover, prosecutors often threaten additional charges or charges with mandatory minimum sentences if a person refuses to plead.[43] In that situation, a defendant often has no way of knowing whether any additional charges, or even the original charges, have support in evidence or in law because the Supreme Court does not oblige prosecutors to turn over any exculpatory material before plea bargaining.[44] Prosecutors can even condition the deal on the defendant's promise not to file any motions or interview any witnesses.[45] Another particularly cunning, but not uncommon, tactic is for prosecutor's to threaten to charge a defendant's loved

[39] Jones, *supra*, at 269; NACDL Report, 11.
[40] Vanessa A. Edkins, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH. PUB. POL. & L. 204, 205 (2018).
[41] *Id*.
[42] Andersson, *supra*, at 222.
[43] Jones, *supra*, at 267.
[44] Andersson, *supra*, at 222.
[45] *Id*.

one if the defendant does not plead guilty.[46]

Even with all of this pressure, plea bargaining often occurs very quickly, leaving the accused little time to process his or her options.[47] In short, a defendant's "voluntary"[48] decision to plead guilty can come after a plea bargaining process that did not feel "voluntary" at all, but rather occurred under extreme pressure and without the supervision of a neutral judge. *Under that coercion, the adversarial process becomes an exercise in game theory, not truth-seeking.*

Because of the trial tax, plea bargaining is fundamentally coercive. As a result, it is "hardly, if at all, distinguishable in principle from a direct sale of justice."[49] When justice is for sale, it goes to the highest bidder, and when that happens, the criminal justice system cannot perform its truth-seeking function.

Several elements of the plea bargaining regime disregard pursuit of the truth. Research shows that "evidence does not influence pleas in the same manner as it does trials."[50] In fact, there is "little support for the claim that strength of evidence predicts the plea discount for those who pled guilty."[51] Another aspect of plea bargaining that has little, if any, correlation with the truth is willful mislabeling, which occurs when the defendant agrees to plead to an offense that everyone knows he did not commit to achieve the agreed-upon sentencing outcome.[52] And, perhaps most obviously, there is no trial court to rule on legal issues in the first instance and no

[46] *Id*. at 223.
[47] Zottoli, *supra*, at 251.
[48] *Brady v. United States*, 397 U.S. 742, 748 (1970).
[49] *Wright v. Rindskopf*, 43 Wis. 344, 354 (1877)
[50] Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of the Trial" a Mirage?*, 28 J. QUANT. CRIM. 437, 452 (2012).
[51] *Id*. at 440–41.
[52] John H. Langbein, *Torture & Plea Bargaining*, 46 U. CHICAGO L. REV. 3, 16 (1978).

appellate court to provide additional supervision.[53]

The existence of a trial tax causes the criminal justice system to "churn[] out sentences through pleas as if they were widgets instead of delivering justice that is tailored to both the community and the defendant."[54] And at the end of the day, "the unreliability of the plea, the mislabeling of the offense, and the underlying want of adjudication all combine to weaken the moral force of the criminal law, and to increase the public's unease about the administration of criminal justice."[55]

The trial tax relieves the government of its burden of proof.

When defendants are coerced to plead guilty for fear of the trial tax, the government's case escapes the scrutiny of the adversarial process. Fewer jury trials "means evidence and theories of criminal liability are infrequently tested by independent arbiters who do not have a vested interest in the outcome of a case. It also means that the system does not self-correct to reflect changes in community norms as quickly as it should."[56] According to some anecdotal reports, the trial tax may actually be increased in cases the prosecution perceives as weak[57]—the idea being that if the trial tax is greater, the defendant will have to plead guilty, and the case will not have to go to trial.[58] This "turning the screws" tactic can be all the more effective when the plea deal has a strict time limit, which prohibits meaningful investigation and legal testing of the prosecutor's evidence.[59] Moreover, "the size of the plea discount may also cause defendants to

[53] *See* NACDL Report, 11.
[54] Levin, *supra*, at 277.
[55] Langbein, *supra*, at 17.
[56] Levin, *supra*, at 273.
[57] Zottoli, *supra*, at 251.
[58] Blume, *supra*, at 169; *cf.* Andersson, *supra*, at 222 ("[P]rosecutors punish people for making them do the work of going to trial and proving their case beyond a reasonable doubt.").
[59] NACDL Report, 9.

perceive evidence against them as stronger than it actually is."[60] As those tactics continue to be effective, "the ease of conviction can encourage sloppiness, and a diminution of the government's obligation to fairness."[61]

The trial tax contributes to wrongful convictions.

The Supreme Court's fear in *Brady*—that "the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves"[62]—has been realized. In fact, "a guilty plea is not an uncommon outcome for innocent people who have been charged with a crime: 11 percent of the DNA exonerees recorded by the Innocence Project pleaded guilty."[63] Data from the National Registry of Exonerations shows that close to one in ten exonerated defendants actually pleaded guilty[64]—and actually, that data "almost certainly vastly undercounts the number of innocent individuals who plead guilty, as the practical barriers to exoneration following guilty pleas, including the lack of a trial record and the routine waiver of appellate and collateral review, making it far harder to obtain post-conviction relief."[65]

The size of the trial tax is directly related to the likelihood that an innocent person pleads guilty: the greater the threatened trial tax, the greater the likelihood an innocent person pleads guilty.[66] One study examined several guilty pleas by innocent people induced by police

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[60] Zottoli, *supra*, at 255.
[61] NACDL Report, 9.
[62] *Brady*, 397 U.S. at 758.
[63] Glinda S. Cooper, Vanessa Meterko, & Prahelika Gadtaula, *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENTENCING R. 234, 234 (2019); *see also* Andersson, *supra*, at 224.
[64] Covey, *supra*, at 616.
[65] *Id*.
[66] Cooper, *supra*, at 235, 237.

misconduct that was later uncovered.[67] Some felt that "the evidence they expect the state to offer at trial—which they know to be false—nonetheless would likely be compelling to neutral jurors and judges," but others pleaded simply "because the offer [wa]s too good to refuse."[68]

The National Association of Criminal Defense Lawyers has a unique perspective on this problem. No defense lawyer wants to see an innocent client convicted of a criminal offense, but "professional ethics *require* the lawyer to counsel the client as to the advisability of accepting [a plea] offer . . . to advise even an innocent client that it is in their best interests to give up solely because the price of asserting fundamental rights may be the destruction of their livelihood and their family[.]"[69] The trial tax forces innocent defendants to make the logical, and quite understandable, decision to plead guilty to crimes they did not commit and face a discounted sentence, instead of risking loss at trial followed by an extreme sentence.

The trial tax disproportionately harms young people.

The Supreme Court has recognized that youth need special protections in the criminal justice system.

"[S]tudies have found that juveniles accept plea bargains at similar rates to adults."[70] But the United States Supreme Court[71] and the South Carolina Supreme Court[72] have recognized that young people, unlike adults, have unique characteristics that require special consideration. "[D]evelopments in psychology and brain science continue to show fundamental differences

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[67] Covey, *supra*, at 616–17.
[68] *Id*.
[69] Reimer, *supra*, at 216 (emphasis added); *see also* Blume, *supra*, at 174.
[70] Erika N. Fountain & Jennifer L. Woolard, *How Defense Attorneys Consult with Juvenile Clients About Plea Bargains*, 24 PSYCH. PUB. POL. & L. 192, 192 (2018).
[71] *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) ("[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.") (internal quotation marks and citation omitted).
[72] *Aiken v. Byars*, 410 S.C. 534, 541–43, 765 S.E.2d 572, 576–77 (2014).

between juvenile and adult minds."[73] Youth "have diminished culpability and greater prospects for reform"[74]; "are more vulnerable . . . to negative influences and outside pressures[75]; and have an "inability to assess consequences."[76] They are, therefore, "constitutionally different from adults for purposes of sentencing."[77]

Young people's decision-making capabilities are not fully developed, rendering them especially susceptible to poor decision-making in a legal context such as plea bargaining.

The trial tax hurts young people in particular because their decision-making capabilities have not fully developed. Even under normal circumstances, juveniles have difficulty making informed decisions because they have not yet achieved the "greater future orientation, better risk perception, and less susceptibility to peer influence" that comes with adulthood.[78] In certain legal contexts, which inherently involve more pressure and stress, those immaturities are exacerbated, making adolescents "vulnerable to poor decision making."[79] On the other hand, adults who better understand their situations may take the opportunity to plead to a lesser sentence by throwing younger, often less culpable, individuals under the bus.

Moreover, young people involved in the criminal justice system are more likely than the general population of young people to struggle with decision-making. For example, "[j]uveniles

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[73] *Graham v. Florida*, 560 U.S. 48, 68 (2010).
[74] *Miller v. Alabama*, 567 U.S. 460, 471 (2012).
[75] *Roper v. Simmons*, 543 U.S. 551, 569 (2005)
[76] *Miller*, 567 U.S. at 472.
[77] *Id*. at 471.
[78] Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUMAN BEHAVIOR 333, 335, 362 (2003); *see also* Allison D. Redlich & Catherine L. Bonventre, *Content & Comprehensibility of Juvenile & Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 L. & HUMAN BEHAVIOR 162, 164–65 (2014) ("More than a century's worth of developmental science has indicated that preteens and adolescents are cognitively, socially, emotionally, and neurologically less mature than adults.").
[79] Fountain, *supra*, at 192, 194.

involved in the criminal justice system are significantly more likely to have a learning disability than those who are not."[80] Another study found that "approximately one third of 11- to 13-year-olds, and approximately one fifth of 14- to 15-year-olds are impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts."[81]

Kenneth was no exception. Unfortunately, Kenneth had a difficult upbringing and was low-functioning relative to his peers. As a result, he was less capable of understanding his own circumstances.

Adding to that difficulty, juveniles often do not understand the legal processes going on around them.[82] That misunderstanding may be the result of limited or nonexistent help from attorneys, especially considering that "many (as much as 80–90%) juveniles waive their right to counsel and proceed in court without attorneys present."[83] But even when juveniles have a defense attorney, they often do not understand that the attorney works for them, not the court, and must maintain confidentiality.[84] One research team noted, "[i]n our prior work with juvenile offenders who had taken plea deals in adult court, we found few who possessed basic legal knowledge about what a plea deal involved and the rights that they had waived."[85] And courts' efforts to communicate the technicalities of plea bargains, however well-meaning, often fail. For example, one study found that the standard guilty plea forms (in the sample jurisdiction, given to both adults and juveniles) tended to exceed the reading comprehension of most defendants" and

[80] Redlich, *Content*, *supra*, at 163.
[81] Grisso, *supra*, at 356.
[82] Zottoli, *supra*, at 256
[83] Redlich, *Content*, *supra*, at 165; Zottoli, *supra*, at 256.
[84] Fountain *supra*, at 194.
[85] Zottoli, *supra*, at 252.

that "[o]nly 4.3% of the forms were found to be comprehensible to persons who read at the 6th grade level."[86] The forms also often omitted information about concepts like voluntariness, waiver of rights, and collateral consequences.[87]

In Kenneth's case, immature decision-making capabilities and an inability to understand abstract legal concepts, paired together, led Kenneth to overinflate the likelihood that he would succeed at trial. Specifically, he could not understand how he—a child who did not pull the trigger and, in fact, attempted to stop Simmons from doing so—could be held accountable for the shooting. In overinflating the likelihood of success, Kenneth was unable to make a truly informed decision about whether to plead guilty when faced with the trial tax.

The trial tax raises the stakes, compromising juveniles' decision-making maturity that much more.[88] And the practical logistics of plea bargaining only serve to increase pressure on young defendants. That is especially so when a child is in pretrial detention away from his or her family[89] and, as is often the case, is forced to make life-altering decisions about plea deals on short notice—sometimes even on the morning of trial.[90] Under all of that pressure, it is unlikely that juveniles possess "a sophisticated appreciation for the long-term consequences of their decisions"[91] such that they can make truly informed and voluntary decisions.

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[86] Redlich, *Content*, *supra*, at 170–72 (noting that "in investigating juveniles' understanding of tender-of-plea terms," one study "found that key terms like 'plea' and 'counsel' were correctly defined by only 10% and 7% of justice-involved juveniles, respectively, even after instruction").
[87] *Id*. at 172.
[88] Fountain, *supra*, at 194 ("Prolific research on adolescent development asserts that juveniles' decisional capacities leave them vulnerable to poor decision making in emotional and high stakes contexts.") (gathering studies).
[89] Levin, *supra*, at 273; Zottoli, *supra*, at 256.
[90] Fountain, *supra*, at 196, 199–200.
[91] *See* Zottoli, *supra*, at 252; Redlich, *Content*, *supra*, at172; Fountain, *supra*, 194.

Some juveniles choose to plead guilty. In doing so, those juveniles are at a greater risk of "mak[ing] choices that reflect a propensity to comply with authority figures, such as . . . accepting a prosecutor's offer of a plea agreement"[92] or being "overly acquiescent to attorney recommendations regarding how to plead."[93] That is even true when a juvenile is innocent because "it is well established that juvenile defendants . . . more susceptible to falsely implicate themselves in crimes or to make statements that suggest compliance with authority."[94] And it is likely that short-term considerations, such as wanting to get out of jail and go home, avoid the testimony of the state's witnesses, and circumvent a drawn-out process, will outweigh long-term considerations such as collateral consequences to criminal convictions.[95]

But the harm cuts both ways: the trial tax also harms kids like Kenneth, who refuse to plead guilty. Failing to "recognize the risks inherent in the various choices he face[d],"[96] Kenneth exercised his right to go to trial, not understanding the incredible trial tax he would inevitably pay if unsuccessful.

CONCLUSION

The prevalence of guilty pleas has numbed society to plea bargaining's most detrimental consequences, such as the trial tax. The trial tax is antithetical to the American concept of justice because it diminishes jury trials, undermines the legal system's goal of truth-seeking, relieves the government of its burden of proof, contributes to wrongful convictions, and disproportionately harms young people.

If there were ever a clear case of the unconstitutionality and extreme impact of the trial

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[92] Grisso, *supra*, at 357.
[93] Fountain, *supra*, at 193, 194.
[94] Zottoli, *supra*, at 252.
[95] Fountain, *supra*, at 198.
[96] Grisso, *supra*, at 357.

tax, it is Kenneth Robinson's. His is one of the rare cases that was preserved for review and has found the light of day. We urge this Court to uphold the mandate of *Bordenkircher v. Hayes*[97] and *North Carolina v. Pearce*[98] by ruling that the trial tax in Kenneth's case violated his constitutional rights.

Respectfully Submitted,

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[97] 434 U.S. 357, 357 (1978).
[98] 395 U.S. 711, 724 (1969).

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Honorable Kristi Lea Harrington, Circuit Court Judge

APPELLATE CASE NO. 2018-001269

THE STATE . . . . . RESPONDENT

v.

KENNETH LAMONT ROBINSON, JR. . . . . APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the enclosed Petition in the above-referenced case has been served upon Attorneys for Appellant, John Blume (at john@blumelaw.com), Megan Ehrlich (at MEhrlich@charlestoncounty.org), and Susan Hackett (at shackett@sccid.sc.gov), and Attorney for the State, Tommy Evans, Jr. (at tommyevansjr@scag.gov), pursuant to this Court's order of May 29, 2020. A copy of the email is included below.

s/ *Meredith McPhail*

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