IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-3956 & 20-2427

OUSMAN DARBOE,
Petitioner,
v.
WILLIAM P. BARR, United States Attorney General,
Respondent.

On Petition for Review of a Final Decision
of the Board of Immigration Appeals, No. A 201 119 754

BRIEF OF AMICUS CURIAE OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE INNOCENCE PROJECT, INC. IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW OF A FINAL DECISION OF THE BOARD OF IMMIGRATION APPEALS

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CORPORATE DISCLOSURE STATEMENT

Amici curiae hereby certify that they have no parent corporation and have not issued any shares of stock to any publicly held corporation.

STATEMENT OF INTEREST

Amici curiae – the Center for Constitutional Rights and The Innocence Project, Inc. – are national legal and advocacy organizations committed to protecting the rights of marginalized individuals entangled within the United States' policing and criminal justice systems.

The Center for Constitutional Rights ("CCR") advances and protects the rights guaranteed by the United States Constitution and international human rights law. CCR has challenged discriminatory policing for decades, recognizing that discrimination and police violence do not arise as isolated incidents but are deeply embedded within the U.S. criminal justice system. CCR has challenged both local law enforcement (most notably the New York Police Department) and federal agencies on behalf of communities of color, Muslims, LGBTQI people, and immigrant communities. CCR successfully litigated a landmark federal class action lawsuit, *Floyd, et al. v. City of New York, et al.*, that challenged the racially discriminatory and unconstitutional stop-and-frisk policies of the New York Police Department. In a historic ruling on August 12, 2013, following a nine-week trial, a federal judge found the New York City Police Department liable for a pattern and practice of racial profiling and unconstitutional stops. *See Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013). The *Floyd* case built on a previous landmark racial profiling case—*Daniels, et al. v. City of New York*, filed by CCR in 1999.

CCR won a settlement in *Daniels* that required the Police Department to provide CCR with stop-and-frisk data on a quarterly basis from 2003 to 2007. CCR continues to participate in a Joint Remedial Process to implement a set of reforms with the direct input of the people most affected by the NYPD's discriminatory stop-and-frisk practices.

The Innocence Project, Inc. (the "Innocence Project") provides *pro bono* legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 375 individuals who post-conviction DNA testing has shown were wrongly convicted. In addition to its work on individual cases, the Innocence Project seeks to prevent future wrongful convictions by researching the causes of wrongful convictions. Seventy percent of individuals exonerated by DNA were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Of these DNA exonerations involving eyewitness identification, at least 42 percent involved identification by a witness who was of a different race or ethnicity than the individual who was wrongfully convicted, and nearly one-third of these mistaken eyewitness identification cases involved multiple witnesses misidentifying the same innocent person. Mistaken eyewitness identifications are a principal contributing

cause of wrongful convictions, and cross-racial misidentifications pose a further, enhanced risk of error.

Together, *amici* have relevant, first-hand knowledge of the discriminatory nature of the U.S. policing and criminal justice systems. Accordingly, the Center for Constitutional Rights and the Innocence Project have a compelling interest in ensuring that this court recognizes the error in deeming an individual not credible for denying criminal wrongdoing due to race-based policing and an unreliable and coercive criminal justice system.

SUMMARY OF ARGUMENT

The Board of Immigration Appeals ("BIA") erroneously affirmed the Immigration Judge's determination that Ousman Darboe ("Mr. Darboe") was not credible due to the number of times Mr. Darboe has been arrested and his refusal to admit to conduct alleged in charging documents. When viewed in their proper context of the race-based policing and the systemic anti-Blackness and coercion of the criminal legal system that Mr. Darboe experienced throughout his youth, neither his claims about his arrest history nor his denial of criminal wrongdoing evince a lack of truthfulness on his part

To the contrary, Mr. Darboe is credible in stating that his arrests and single criminal conviction were results of racially-targeted police harassment, unreliable eyewitness identification, and a coercive plea-bargaining system. As a young Black

man growing up in the Bronx during the height of the New York Police Department's ("NYPD") aggressive, discriminatory and unconstitutional stop-and-frisk program, it is very plausible, if not likely, that Mr. Darboe was repeatedly subjected to racial profiling and suspicionless stops and frisks that resulted in questionable arrests. Moreover, any contact with the criminal legal system leads to a higher probability of a conviction due to the weight given to unreliable witness identifications and the coercive plea-bargaining system that dominates the criminal process in the United States.

ARGUMENT

An examination of the history of racialized policing practices in New York City and the unreliable and coercive tactics that lead to convictions in the criminal legal system underscores Mr. Darboe's characterization of his criminal history as a "mistake". CAR 55, 131. It is common within the U.S. criminal legal system for individuals to plead guilty to crimes they did not commit and to be arrested and charged with conduct that they are never convicted of. The path from police contact to conviction is heavily marred by racial bias and coercion. Accordingly, the BIA's affirmation of the Immigration Judge's assertion that Mr. Darboe was not credible and attempting to "minimize the severity of his criminal conduct" was erroneous. *Id*.

I. THE NEW YORK POLICE DEPARTMENT ("NYPD") HAS A HISTORY AND PRACTICE OF RACIAL PROFILING AND SUSPICIONLESS STOPS AND FRISKS.

Stop-and-frisk, also referred to as stop, question, and frisk, or a "Terry Stop", is a policing practice of temporarily detaining people on the street, questioning them, and possibly also frisking or searching them. *People v. De Bour*, 40 N.Y.2d 210, 223, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976) (citing *Terry v. Ohio*, 392 U.S. 1, 10, 88 S. Ct. 1868, 1874, 20 L.Ed.2d 889 (1968)). The NYPD's use of this dehumanizing practice dramatically increased between 2002 and 2011. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 590 (S.D.N.Y. 2013). However, the controversy surrounding stop-and-frisk dates back to February 1999, when members of the NYPD's Street Crimes Unit fired 41 shots and killed Amadou Diallo, an unarmed Black immigrant from Guinea, at the entry of his home in the Soundview neighborhood of the Bronx. *Id*. Diallo was shot during an incident that apparently began as a stop and his death ignited demonstrations across New York City. *See The New York City Police Department's Stop and Frisk Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999); *see also, Police Practices and Civil Rights in New York City: A Report of the United States Commission on Civil Rights* (2000), http://www.usccr.gov/pubs/nypolice/main.htm. During this time, CCR filed a class action lawsuit, *Daniels, et al. v. the City of New York*, challenging the Streets Crimes Unit's practice of conducting stops and frisks

without reasonable suspicion of criminal activity and on the basis of race in violation of the Fourth and Fourteenth Amendments. *Daniels v. City of New York*, 99 Civ. 1695 (SAS) (S.D.N.Y. Jul. 16, 2007). The case was settled in 2003 and required the NYPD to report detailed information about the stops its officers were conducting, including information about the race of persons stopped. *See* Stipulation of Settlement, *Daniels v. City of New York*, No. 99 Civ. 1695, Dkt # 114, at 6 (S.D.N.Y. Sep. 24, 2003). After four years of stop-and-frisk data showed that the problem of racially discriminatory stops and frisks had grown more widespread within the NYPD, CCR decided to file a new class-action lawsuit in 2008, this time challenging the stop-and-frisk practices of the Department as a whole. *See Floyd v. City of New York*, 08 Civ. 1034, Dkt # 1 (S.D.N.Y. Jan. 31, 2008).

Data from stops made by the NYPD in all five boroughs of New York City between 2003 and 2013 indicate that if you were a young Black or Latinx male in New York City during this period, you were more likely to be repeatedly stopped and targeted by the police.[1] Between 2003 and 2013, Black and Latinx males between the ages of 14 and 24 accounted for only 4.7 percent of the city's population, yet they accounted for 40.5 percent of those stopped by the NYPD. *See* New York

[1] While the total number of reported stops by the NYPD has dropped significantly since 2013, Black and Latinx people have continued to make up well over 80% of all stops across the city today. *See* New York Civil Liberties Union, *Stop-And-Frisk In The De Blasio Era* (March 2019), https://www.nyclu.org/en/publications/stop-and-frisk-de-blasio-era-2019.

Civil Liberties Union, *Stop-And-Frisk During The Bloomberg Administration 2002-2013* (2014), https://www.nyclu.org/en/publications/stop-and-frisk-during-bloomberg-administration-2002-2013-2014. A 2013 study by the Vera Institute of Justice found that "44 percent of young people surveyed indicated they had been stopped repeatedly—9 times or more." *See* Vera Institute of Justice, *Coming of Age with Stop and Frisk: Experiences, Perceptions, and Public Safety Implications* (September 2013).

Stops and frisks are often the first encounter young people have with law enforcement. *See* Nicholas K. Peart, *Why Is the N.Y.P.D. After Me?*, The New York Times (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html. An unjustified stop, based on racial profiling, is a dangerous point of entry into ongoing involvement with the criminal legal system and can lead to disproportionate rates of arrests and convictions which, in turn, carry a wide range of damaging collateral consequences, including immigration consequences. *See* Harry G. Levine And Deborah Peterson Small, *Marijuana Arrest Crusade Racial Bias And Police Policy In New York City 1997 – 2007*, New York Civil Liberties Union (April 2008) at 51, http://marijuana-arrests.com/docs/MARIJUANA-ARREST-CRUSADE.pdf.; *see also*, Center for Constitutional Rights, *Stop and Frisk: The Human Impact: the Stories Behind the Numbers, the Effects on Our Communities*, 3 (July 2012),

https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impactreport.pdf. An arrest, even if unsubstantiated, or conviction further decreases a young person's legal employment and schooling opportunities and creates a cycle of criminalization. *Marijuana Arrest Crusade Racial Bias And Police Policy In New York City 1997 – 2007*, at 51.

A. NYPD's Stop-and-Frisk Practices Were Found to be Racially Discriminatory and Unconstitutional.

On August 12, 2013, the federal district court in *Floyd v. City of New York* found the NYPD liable for a pattern and practice of racial profiling and unconstitutional stops in violation of the Fourth and Fourteenth Amendments. The court expressly found that the NYPD (1) engaged in a widespread practice of stopping and frisking individuals without reasonable articulable suspicion in violation of the Fourth Amendment and (2) had a policy of targeting Black and Latinx young men for these stops based on their representation in unreliable crime suspect data — which the Court described as "indirect racial profiling"— in violation of the Equal Protection Clause of the Fourteenth Amendment. *Floyd*, 959 F. Supp. 2d at 659-660, 662. The court stated that "the NYPD implements its policies regarding stop-and-frisk in a manner that intentionally discriminates based on race," and that "the use of race is sufficiently integral to the policy of targeting 'the right people' that the policy depends on express racial classifications." *Id*. at 663.

In its discussion of the racially discriminatory nature of these stops, the court highlighted the fact that the NYPD made 4.4 million stops between January 2004 and June 2012, over 80% of which were of Black or Latinx people, despite the fact that in 2010 New York City's resident population was roughly 23% Black, 29% Latinx, and 33% white, and that "NYPD officers stop[ped] [B]lacks and Hispanics with less justification than whites." *Id*. at 556, 662. The court also pointed to an NYPD officer who stopped 120 Black people and 0 white people, during a single calendar quarter in 2009, despite the fact that he was patrolling a precinct with only a 43% Black population. *Id*. at 606. In fact, the highest-ranking uniformed member of the NYPD at the time stated that stops were meant to target "the right people", meaning "black and Hispanic youths 14 to 20", while then-NYPD Commissioner Raymond Kelly stated that "he focused on young [B]lacks and Hispanics 'because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.'" *Id*. at 605-606.

In its discussion of the NYPD's Fourth Amendment violations, the court notes that the Fourth Amendment permits the police to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'." *Id* at 558 (quoting *United States v. Swindle*, 407 F.3d 562, 566 (2d Cir.2005)). However, to proceed from a stop to a frisk, a police officer must "reasonably suspect that the person stopped is

armed and dangerous". *Id*. The district court relied on statistical analysis, provided by plaintiffs' expert witness Dr. Jeffrey Fagan, analyzing a database of 4.4 million UF-250s, forms that NYPD officers are required to complete for each stop, for stops made by the NYPD between January 2004 and June 2012. *Id*. at 572. Dr. Fagan's analysis indicated that at least 200,000 of the stops lacked reasonable suspicion. *Id*. at 573. For example, the NYPD officer who stopped 120 Black people and 0 white people during a sample quarter in 2009, relied on a routine set of vague and unreliable stop justifications, and only 5.5% of his stops made resulted in an arrest or summons. *Id*. at 659. The court also declared the NYPD's application of frisks as violating the Fourth Amendment because while over half of all people stopped were also frisked, less than 1.5% of those frisks revealed a weapon. *Id*. at 660.

B. The NYPD's Unconstitutional Implementation of Stop-and-Frisk Was Particularly Egregious in the Bronx.

The *Floyd* Court also found that the NYPD conducted a disproportionately high percentage of its stops and frisks in the pre-2013 period in majority Black and Latinx neighborhoods like the ones where Mr. Darboe was stopped in the Bronx. *See Floyd*, 959 F.Supp.2d at 589. Two of the *Floyd* named plaintiffs, Black men who, like Mr. Darboe, lived and/or worked in the Bronx, endured stop-and-frisk encounters similar to what Mr. Darboe has described. David Floyd, a Black man who lived in the Bronx, was subjected to unconstitutional frisks while simply

walking in his neighborhood in the Bronx and again while standing with his neighbor outside the front door of the neighbor's apartment in the middle of the day. *Id*. at 650-52. Another named plaintiff, Lalit Clarkson, also a Black man, was working as a teacher's assistant at a school in the Bronx when he was unconstitutionally stopped by the NYPD while walking near the school on his lunchbreak. *Id*. at 645-646. Like these men, Mr. Darboe was regularly harassed by the NYPD while living in the Bronx during his teenage years.[2]

During the *Floyd* trial, evidence from two officers who worked at precincts in the Bronx highlighted the pressure placed on officers to unconstitutionally target Black and Latinx youth to meet numerical enforcement goals. In an audio recording made by an officer at the 40th Precinct in the Bronx, his commanding officertells him, "the problem was, what, male blacks. And I told you at roll call, and I have no problem telling you this, male blacks 14 to 20, 21. I said this at roll call." *Id*. at 604. Another officer at the 41st Precinct in the Bronx filed an internal complaint in 2009 stating, "[W]e were handcuffing kids for no reason. They would just tell us handcuff them. And boss, why are we handcuffing them? Just handcuff them. We'll make up

[2] In addition, at least one New York state appellate court has raised similar concerns about the aggressive and constitutionally questionable stop-and-frisk activity of NYPD officers in the Bronx during this same time period. *See In re Darryl C.*, 98 A.D.3d 69, 70-71 (1st Dep't 2012) (citing *Floyd v. City of New York*, 813 F.Supp.2d 417 (S.D.N.Y. 2011)).

the charge later. Some of those kids were not doing anything. Some of those kids were just walking home. Some of those kids were just walking from school." *Id.* at 621.

Data from stops recorded and provided to CCR by the NYPD between 2009 and 2011[3] indicate that two police precincts in the Bronx, where Mr. Darboe lived and attended school, had even higher rates of racially-disparate and unconstitutional stops and frisks than the already high rates citywide. The precinct with the second highest frisk rate in the Bronx was the 46th Precinct, where Mr. Darboe lived with his family. In the 46th Precinct, 77.8 percent of people stopped were frisked, as compared to 56% citywide. In the 52nd Precinct, where Mr. Darboe attended DeWitt Clinton High School, Black people who were stopped were also frisked 70.9 percent of the time. However, in both precincts, rarely did a stop lead to an arrest. In the 46th Precinct, only about 4 percent of all stops led to arrests and in the 52nd precinct about 6 percent of stops led to arrests. In fact, in both precincts, less than 1 percent of stops led to the discovery of firearm over the three-year period. These numbers highlight

[3] Mr. Darboe had interactions with the NYPD as a teenager between 2010-2012 and was stopped and frisked by the NYPD in 2011. CAR 563.

how stop-and-frisk was insidiously used by the NYPD as a tool of harassment rather than public safety.[4]

C. Arrests Arising from *Terry* Stops Are at Best Questionable Indicators of Actual Criminal Wrongdoing.

It is unsurprising that Mr. Darboe was accused but never convicted of marijuana possession when he was stopped and frisked by the NYPD in 2011, when he was only sixteen years old. CAR 563. A 2013 report by the New York State Office of the Attorney General, found that when arrests were made during stops, a large portion of cases were dismissed or led to convictions for very minor offenses. *See* NYS Attorney General Civil Rights Bureau, *A Report On Arrests Arising From The New York City Police Department's Stop-And-Frisk Practices* (hereinafter, "2013 AG Report"), 16 (November 2013). The report analyzed over 150,000 stop-and-frisk arrests, yet almost half of the arrests did not result in a conviction, while almost one in four (24.7%) arrests resulted in a dismissal before arraignment or a non-criminal charge or infraction. 2013 AG Report at 1. Yet, collateral consequences of these

[4] The 1968 U.S. Supreme Court decision, *Terry v. Ohio*, defining a legal stop and frisk, a "Terry stop," recognized the invasiveness of a police stop and frisk. In his majority decision, Chief Justice Warren Burger wrote that Terry stops are intrusive, frightening, and humiliating especially "in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.'" *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968).

arrests created huge incentive for those arrested to plead guilty, likely inflating the already low conviction rate. *Id.* at 2.

The report also found that the practice of racial profiling and unconstitutional stops and frisks allowed the NYPD to arrest Black and Latinx New Yorkers disproportionately for minor crimes. *Id.* at 19. The analyzed data showed that the most common arrest after a stop was for marijuana possession. *Id.* at 14. However, under New York law, marijuana possession can only lead to arrest when the marijuana is "in a public place . . . burning or open to public view." PL § 221.10(1). When implementing stop-and-frisk, NYPD officers would racially target Black and Latinx young men and carry out arrests for marijuana possession following stops that were suspicionless or based on suspicion of another crime, in violation of the Fourth and Fourteenth Amendment. *See* New York Civil Liberties Union, *NYPD Stop-And Frisk Activity In 2012*, at 17 (2013). In fact, NYPD officers were incentivized to make marijuana possession arrests, during stops and frisks, in pursuit of overtime pay. *Marijuana Arrest Crusade Racial Bias And Police Policy In New York City 1997 – 2007* at 19. This practice was so integral to the NYPD that officers referred to marijuana and other misdemeanor arrests, especially at the end of a shift, as "collars for dollars." *Id*. at 20.

The NYPD also used marijuana and other low level arrests as a strategy to get as many young people as possible "in the system" – meaning having them

fingerprinted, photographed, and increasingly DNA tested. *Id.* 21; *see also*, *Collecting DNA from Juveniles*, The Urban Institute (April 2011), https://www.urban.org/sites/default/files/publication/25021/412487-Collecting-DNA-from-Juveniles.PDF. Howard Safir, the Police Commissioner from 1996 to 2000, regarded collecting information as a critical police task and became one of the most prominent national advocates for collecting what he termed "DNA fingerprints." *Marijuana Arrest Crusade Racial Bias And Police Policy In New York City 1997 – 2007*, at 22. Marijuana arrests were seen as the best and easiest way available to acquire actual fingerprints, photos and other data on young people, especially Black and Latinx youth, who have not previously been entered into the criminal justice databases. *Id*. The FBI's Combined DNA Index System (CODIS) grew from 460,000 offender profiles in 2000, to over 5,500,000 by January 2008. *Id*. at 53. Initially created only for serious sexual and violent crimes, CODIS has expanded so rapidly in part because of the increasing number of crimes of declining severity that legislation has made DNA collectable. *Collecting DNA from Juveniles*, at 2. In 2006, New York State allowed the collection of DNA data for a number of petty offenses, such as trespassing, despite the fact that many of these arrests are often false. *See Marijuana Arrest Crusade Racial Bias And Police Policy In New York City 1997 – 2007*, at 53-54; *see also Ligon v. City of New York*, 12 Civ. 2274, Dkt # 20 (S.D.N.Y. Jun. 12, 2012)(challenging a part of the NYPD's stop-and-frisk

program that allowed police officers to patrol thousands of private apartment buildings across New York City). This essentially created a suspect list based on people with any contact with the criminal system, especially young Black men, who could be continuously targeted by the NYPD.

II. THOSE SUBJECTED TO UNCONSTITUTIONAL STOPS BY THE NYPD WERE SUSCEPTIBLE TO CONTINUED HARM BY THE CRIMINAL LEGAL SYSTEM.

The racial disparities in the NYPD's implementation of stop-and-frisk persist at and beyond the point of arrest. Racial disparities exist in arrests, charges, dispositions, and sentencing. Data analyzed from 2009 through 2012 showed that, even though only 6% of all stops result in an arrest, about one half of arrests resulting from stop-and-frisk were of Black individuals, about one third were of Latinx individuals, and one in ten were of white individuals. 2013 AG Report, at 16. The court in *Floyd* also found that Black and Latinx people who were stopped were much more likely to be arrested, while white people who were stopped for the same crimes were more likely to only receive summonses. *See Floyd*, 959 F.Supp.2d at 589. If a defendant is unable to make bail, the pressure to take a plea and avoid jail while awaiting a suppression hearing and eventual trial is great. 2013 AG Report, at 20. For those able to make bail or released on their own recognizance, the slow process of court appearances and adjournments as a case moves to trial can eventually wear defendants down due to a fear of collateral consequences. *Id*. Individuals with an

open arrest may not be able to obtain jobs, rent apartments, reside in public housing, or renew a green card, and may be forced to repeatedly miss school or work while defending a case. *Id*.

The Bronx Defenders documented the difficulties of challenging unlawful stops in a 2013 report. Bronx Defenders, *No Day In Court* (May 2013), https://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf. The report tracked the outcome of 54 cases in which defendants arrested for marijuana possession as a result of stop-and-frisk encounters between March 2011 and March 2012 attempted to challenge the validity of the charges through suppression hearings. *Id*. at 2. The defendants appeared in court an average of five times over the course of an average of eight months, but suppression hearings were not held in a single case. *Id*. at 3. Sixty percent of the cases were either dismissed or adjourned in contemplation of dismissal before a hearing could be held. *Id*. at 9. In 30 percent of the cases, the defendant eventually agreed to a negotiated plea to a non-criminal violation. *Id*. Even when the legitimacy of a search in a misdemeanor arrest is raised in court, officers often testify that they asked if the suspects minded being searched and were told "no." *Marijuana Arrest Crusade Racial Bias And Police Policy In New York City 1997 – 2007*, at 56. When a case with no other witness hinges on the word of a police officer versus that

of an arrestee – especially if the arrestee is a young Black or Latinx man – the judge almost always takes the word of the officer. *Id*.

III. UNRELIABLE EYEWITNESS IDENTIFICATION AND COERCIVE PLEA DEALS LEAD TO CONVICTIONS EVEN WHEN CHARGES ARE UNSUBSTANTIATED.

A. Eyewitness Identifications Are Among the Least Reliable Forms of Evidence.

Eyewitness evidence is increasingly understood as "among *the least reliable* forms of evidence." *See United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (citing A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 Canadian Psychology 92, 93 (May 2001)). Thus, it is hardly surprising that eyewitness misidentification is the leading cause of wrongful convictions that were overturned by DNA, factoring in 70 percent of such miscarriages of justice. *See* the Innocence Project, *Eyewitness Identification Reform*, https://www.innocenceproject.org/causes/eyewitness-misidentification. The specific circumstances surrounding a crime may impair the ability of a witness to accurately process what is observed, as well as the suggestibility of a particular identification procedure. *See Young v. Conway*, 715 F.3d 79, 81 (2d Cir. 2013); *Henderson*, 27 A.3d at 918("[T]he opportunity to view the crime, the witness' degree of attention, and the level of certainty at the time of the identification—rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by

the suggestive procedures themselves and thus may not be reliable."). Scientific studies show that wrongful conviction based on eyewitness testimony is common, given conditions of uncertainty, suggestive identification procedures, bias, and overconfidence. Thomas D. Albright, *Why eyewitnesses fail*, PNAS, July 25, 2017, https://www.pnas.org/content/pnas/114/30/7758.full.pdf. Visual uncertainty can create bias and lead witnesses to turn to prior experiences or predispositions to resolve perceptual ambiguities. *Id*.

1. Cross-Racial Identification

Mr. Darboe's sole criminal conviction was the result of a police lineup identification by a witness of a different race than Mr. Darboe. *Police: Suspect In Attack, Robbery Of Elderly Bronx Woman Responsible For 2 Other Incidents*, CBS New York (Sept. 5, 2014), https://newyork.cbslocal.com/2014/09/05/police-suspect-in-attack-robbery-of-elderly-bronx-woman-responsible-for-2-other-incidents/. The fact that the identification in Mr. Darboe's case was cross-racial cuts against reliability. Of the DNA exonerations involving eyewitness identification, at least 42 percent involved identification by a witness who was of a different race or ethnicity than the individual who was wrongfully convicted. *See Eyewitness Identification Reform*; *see also* Brandon Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (hereinafter, "*Convicting the Innocent*") 52 (2011). A phenomenon well-established in the scientific research—known as "own

race bias"—provides that "witnesses are significantly better at identifying members of their own race than those of other races" and results in a 1.56 greater likelihood of misidentification in cross-race identifications. *See Young v. Conway*, 715 F.3d. at 81. Hundreds of studies examining the effect have been published. *See, e.g.*, Roy S. Malpass and Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. Of Personality And Soc. Psychol. 330 (1969); John C. Brigham et al., *The Influence of Race on Eyewitness* Memory, Handbook Of Eyewitness Psychol. 257 (Rod C. L. Lindsey et al., eds. 2014). In his landmark study of the first 250 DNA exoneration cases, Professor Brandon Garrett found that at least 49 percent of the eyewitness misidentification cases (93/190) involved a cross-racial or cross-ethnic identification. *Convicting The Innocent*, at 52.

The case of Walter Smith highlights how mistaken cross-racial identifications can lead to wrongful convictions – even in the absence of other evidence of guilt and in the face of substantial evidence of innocence. *Walter D. Smith*, the Innocence Project, http://www.innocenceproject.org/cases/walter-d-smith/ (last visited March 1, 2017). From 1986 to 1996, Mr. Smith, a Black man from Ohio, was serving a sentence of 78 to 190 years for a series of rapes he did not commit. *Id*. His arrest hinged on a police lineup from which three rape victims, all of whom were white and had been raped by a Black man or men, identified him as their attacker. *State v. Smith*, No. 87AP-85, 1988 WL 79080, at *1 (Ohio Ct. App. 1988). During the

identification, all three women said they recognized Mr. Smith and one woman stated "that she was ninety-nine percent sure" that she had identified her attacker. *Smith*, 1988 WL 79080 at *1. Mr. Smith continually asserted his innocence and in 1996 was exonerated by DNA evidence. Geoff Dutton, *DNA: Halfway to Justice*, The Columbus Dispatch (May 4, 2008), http://www.dispatch.com/content/stories/local/2008/05/04/DNA_main.ART_ART_05-04-08_A1_BTA3NGF.html. By that time, Mr. Smith had lost ten years of his life in prison. *Id*.

2. Unconscious Transference

Another factor that makes eyewitness identification unreliable is the phenomenon of unconscious transference, which appears to have occurred in Mr. Darboe's case. Studies have found that witnesses who, prior to an identification procedure, have previously encountered a suspect in a different setting may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory. David F. Ross et al, *Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 Applied Psychol. 918. This well-established phenomenon is most problematic where, as here, a witness is vaguely familiar with a suspect but unconscious of why that is so. *Id*. The eyewitness in this case was an elderly woman who lived in the same apartment building as Mr. Darboe and had therefore encountered him previously. CAR 957.

Such circumstances are ripe for misidentification as a result having previously observed Mr. Darboe, and, as discussed *infra*, the risk is compounded by the cross-racial identification. *See* J.D. Read et al., *The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?*, 4 Applied Cognitive Psychol. 26 (1990) (noting that, to produce unconscious transference errors, a witness's familiarity with the suspect's face must not be "so high as to elicit recall of the misidentified person's correct context or identity").

Scientific research has also identified unconscious transference in cases where a witness sees repeated photographs of the same suspect in different identification procedures. When the witness sees a particular photo of a suspect multiple times, is familiar with the suspect, they mistakenly identify the familiar face as the perpetrator of a crime. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287 (2006). This phenomenon occurs because "the witness [is] unable to partition his or her memory in such a way as to know that the suspect's increased familiarity is due to the exposure [in the photo array], rather than the suspect's presence at the time of the crime." *Id.*; *see People v. Santiago*, 17 N.Y.3d 661, 673 (N.Y. 2011) (recognizing unconscious transference); *Henderson*, 27 A.3d at 900 ("[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory

of the original event or a memory of the earlier identification procedure."). Indeed, an analysis of seventeen studies showed that while only 15 percent of witnesses made an incorrect identification when the suspects in the lineup were viewed for the first time in the lineup, 37 percent of the witnesses made an incorrect identification when they had seen a suspect in a prior mugshot. Deffenbacher et al., at 287, 299. Thus, familiarity with a suspect can actually affect the reliability of the witness' ultimate identification and create a greater risk of misidentification.

B. Coercive Plea Bargains Lead to Innocent People Pleading Guilty

Mr. Darboe pled guilty to his sole criminal conviction while in solitary confinement on Rikers Island. CAR 564. He was originally charged with seven offenses and ultimately pled to one. CAR 959. In the United States, defendants regularly plead guilty in exchange for lighter sentences because the benefits of doing so outweigh the costs of facing trial. In fact, 95 percent of all felony convictions in the United States are obtained through guilty pleas. *See Why Do Innocent People Plead Guilty To Crimes They Didn't Commit?*, The Innocence Network, https://guiltypleaproblem.org/. Many innocent defendants who plead guilty are 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 (2014).

A number of these defendants are poor, and their choices to plead guilty despite their innocence are informed by their economic circumstances. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1346-47 (2012). 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*. Perversely, these circumstances create conditions in which the decision by an innocent person to plead guilty is rational.

Additionally, as occurred in this case, a prosecutor may "'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 not accurately weigh their options and would not dare to 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). This provides an incentive for a prosecutor to charge excessively, then offer a lesser sentence in order to induce a defendant to give up his trial right and the possibility of acquittal. *Id.* Once a person has admitted guilt and

confirmed the sufficient details for the court to accept the plea, the chances of reversing such convictions are very unlikely. Judge H. Lee Sarokin, *Why Do Innocent People Plead Guilty?*, HuffPost, (May 29, 2012). For example, Brian Banks, a Black man from California, plead guilty to rape when he was only seventeen years old. *Brian Banks*¸ California Innocence Project, https://californiainnocenceproject.org/read-their-stories/brian-banks/. He was arrested and given the choice to either fight the charges and risk spending 41 years-to-life in prison, or take a plea deal and spend a little over 5 years of actual prison confinement. *Id*. In 2012, Mr. Banks was exonerated after about five years in prison. *Id*. Mr. Banks' case highlights how intimidation by the prosecution can lead a poor, frightened defendant to believe that a trial is likely to end with a conviction and a long sentence, whereas a plea will guarantee a much shorter sentence. Sarokin, *Why Do Innocent People Plead Guilty?*.

In *Missouri v. Frye*, the Supreme Court recognized that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 133, 144 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992)). 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 "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing

convictions and determining sentences." *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Accordingly, Mr. Darboe's conviction, by plea while detained pre-trial and facing felony charges – based on an inherently unreliable identification – is more so a reflection of the coercive and intimidating nature of the plea bargaining system than of guilt.

CONCLUSION

For all of the reasons stated above, as well as those submitted to this Court by Petitioner, the BIA's affirmation of the Immigration Judge's adverse credibility finding, and discretionary analysis in Mr. Darboe's case were erroneous and should be vacated and remanded for proper adjudication.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 29.1(c) because the brief contains 6,148 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using 14-point Times New Roman proportionally spaced typeface, double-spaced.

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