No. 19-7834

IN THE
SUPREME COURT OF THE UNITED STATES

TRAVIS SOTO, PETITIONER

V.

THE STATE OF OHIO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In this period of our national history, which has busied the court system with foundational questions regarding the relationship between the different branches of government, Petitioner Travis Soto ("Soto") has asked this Court to answer a fundamental question regarding the relationship between *the people* and their government. This Court should answer the question presented not because of the importance or authority of the specific individuals involved. Rather, this appeal is nationally important because an answer to the question presented would define the rights of every citizen against their government and affect most criminal convictions that have already been rendered or will be achieved in the future. At its most basic, the question that should be answered by this Court is whether a deal is truly a deal when made between defendants and prosecutors.

The State of Ohio ("State") concedes the existence of a split between the United States courts of appeals. The State does not quarrel with the broad potential impact of a decision answering whether the rights preserved by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution attach to charges dismissed during execution of a negotiated plea agreement that avoids a jury trial. Indeed, it has been conceded that there is no such rule to be found in this Court's jurisprudence despite that our criminal justice system is "for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is

almost always the critical point for a defendant."). While recognizing that this appeal presents a question worthy of this Court's time, the State attempts to construct technical roadblocks to reviewing *this* case. But because the technical reasons the State claims review is unwarranted are unfounded, this Court should reject them and grant the requested writ of certiorari.

I. RESPONDENT STATE OF OHIO'S PROCESS COMPLAINTS MISS THE MARK

A. THERE IS NO MEANINGFUL DISAGREEMENT ABOUT THE FACTS OF THE PRIOR PROSECUTION

Despite crying foul about the adequacy of the record before this Court, Respondent State of Ohio has not identified a single fact that is the subject of any disagreement at all. *Brief in Opposition of Respondent State of Ohio docketed May 26, 2020 ("Opp. Brief"), pp. 7-9.* The State recounted the facts in a statement that parallels the statement of Petitioner Soto. *Compare Opp. Brief, pp. 3-4, with Petition for a Writ of Certiorari of Petitioner Travis Soto docketed February 27, 2020 ("Petition"), pp. 5-7.* And there has never been any disagreement about the facts during earlier litigation. *See App. 3-4, 29-30, 47-49.*

Although the State agrees with Soto that the judgment entries issued by the trial court in 2006 do not address whether the dismissal was with or without prejudice, it is vehemently argued that the dismissal must have been without prejudice as a matter of law due to the presumption of regularity. *Opp. Brief, p. 8.* It

is remarkable that the State argues for the first time to this Court that a judge's statement as to the preclusive effect of a dismissal could be dispositive of the constitutional question because there was certainly no such argument offered during the State's appeal to the Supreme Court of Ohio. *Merit Brief of Appellant State of Ohio filed July 3, 2018, pp. 1-15.*[1] In any case, the parties agree that there was no answer as to prejudice to be found in the journal entries issued during the first criminal proceeding against Soto. And an Ohio court "speaks," if at all, "through its journal entries." *E.g., State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 47. If prejudice does ultimately matter to this Court's constitutional analysis, the preclusive effect of the 2006 judgment under Ohio law may be determined by a lower court on remand based upon the silent entries. Thus, the State has entirely failed to identify what else is needed or could be provided in the record to oppose this appeal during a merits review of the constitutional question.

B. RESPONDENT SOTO WILL NOT BE ABLE TO MOUNT A SECOND CHALLENGE TO THE RULING ON ATTACHMENT OF JEOPARDY IN THE TRIAL COURT

The State falsely casts this appeal as preemptive. Due to the "interlocutory posture" of the proceeding, the State argues that Soto "can introduce evidence about

[1] available online at:

http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=848906.pdf

the circumstances of his plea agreement on remand, and come back to this Court if and when his case more clearly implicates the question presented." *Opp. Brief, pp. 2.* To the contrary, Ohio courts strictly apply the law-of-the-case doctrine and its "mandate rule." Accordingly, the "decision" of the Supreme Court of Ohio in Soto's case "remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). This is because the "Ohio Constitution does not give a court of common pleas jurisdiction to review a prior mandate of a court of appeals." *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 182, 652 N.E.2d 742 (1995). For these reasons, the Putnam County Court of Common Pleas will be bound by the decision of the Supreme Court of Ohio holding: "jeopardy attached—but only as to the child-endangering charge to which [Soto] pleaded guilty and not as to the dismissed involuntary-manslaughter charge." *App. 8.* And the trial court will be limited to conducting "further proceedings consistent with this opinion." *App. 11.*

Under these rules, there will be no fact finding in the trial court in aid of the constitutional question of attachment of jeopardy without further action by this Court. The State's entirely new argument that there is a need to supplement the record to determine the constitutional question is, if anything, a concession that this Court should at least grant certiorari, vacate the judgment below, and remand the matter for the record to be supplemented. *Lawrence v. Chater*, 516 U.S. 163, 166-68 (1996); *see Cuffle v. Avenenti*, 498 U.S. 996 (1990). Perhaps more importantly, this

Court could simply remand for further fact-finding in the trial court, if that becomes necessary, after pronouncing a new rule in response to a question of first impression. *Opp. Brief, p. 7* (agreeing that this Court has never resolved the question presented). That the Supreme Court of Ohio accepted the State's appeal even without the record that the State now claims it needs actually reflects that the lower courts could benefit from this Court's guidance on how to answer the constitutional question.

II. THE UNDISPUTED CIRCUIT SPLIT

The State agrees that there is a split among the United States courts of appeals over the question of attachment of jeopardy in the negotiated plea context. *Opp. Brief, p. 2.* The State instead grasps for a way to undermine the importance of the very real split. It is suggested that *United States v. Mintz*, 16 F.3d 1101 (10th Cir. 1994), is an outlier that was cast aside by later panels of the Tenth Circuit Court of Appeals in *United States v. Marchese*, 46 F.3d 1020 (10th Cir. 1995) and *United States v. La Cock*, 366 F.3d 883 (10th Cir. 2004). *Opp. Brief, pp. 11-12.* But that is simply not the case. Neither *Marchese* nor *La Cock* involved the dismissal of charges during execution of a plea agreement. In those instances, charges were dismissed early in the litigation due to inadequacies in the indictment. *Marchese*, 46 F.3d at 1021-22; *La Cock*, 366 F.3d at 884-88. And neither of the *Marchese* and *La Cock* panels mentioned *Mintz*. *Marchese*, 46 F.3d at 1020-24; *La Cock*, 366 F.3d at 883-89; *see Opp. Brief, p. 13.* Although a panel of the Tenth Circuit Court of Appeals questioned whether *Mintz* was still good law in a footnote in a 2014 decision, there was no

analysis nor any ruling on the question because doing so was not necessary to decide the case. *United States v. Angilau*, 717 F.3d 781, 787 n.1 (10th Cir. 2013).

The State misses the point: dismissals pursuant to a plea agreement are different. *Marchese* and *La Cock* do not account for the reasonable expectation of finality that arises when a criminal defendant pleads guilty to some charges in exchange for the dismissal of others. And without an *en banc* decision pursuant to Fed. R. App. P. 35(a)(1), *Mintz* remains good law, just as it is viewed by at least one other United States court of appeals. *See, e.g., United States v. Faulkner*, 793 F.3d 752, 758 (7th Cir. 2015). Further undermining the State's view of the federal split, *Mintz* has been cited, albeit in likely dicta, for its analysis of double jeopardy as recently as April of this year. *United States v. Nissen*, No. CR 19-0077, 2020 WL 1929526, at *14 (D.N.M. Apr. 21, 2020). And just last month, the court of last resort for the State of New York decided that after a guilty plea, jeopardy attached to a charge to which a defendant had not pled guilty:

> A defendant who pleads guilty to one count will invariably take into consideration that other counts are satisfied by the plea. Importantly, a count satisfied by a guilty plea bears the double jeopardy consequences of a judgment of conviction. The judgment in this case prevents the People from prosecuting defendant again for the October 3, 2014 burglary, even though defendant did not plead to that count.

People v. Holz, No. 33, 2020 WL 2200365, at *4 (N.Y. May 7, 2020). *Holz* deepens the growing conflict among the lower courts.

III. PREJUDICE IS NOT A FACET OF DOUBLE JEOPARDY

In a further attempt to undermine the split among the circuits, the State has made much of an irrelevant question: whether a trial court has indicated on the record that a dismissal of a charge in return for a guilty plea is with prejudice. The point presumes without any basis that this Court would only rule or has already ruled that jeopardy does not attach until and unless a court pronounces that a dismissal is with prejudice. But just as this Court has not made a rule about whether jeopardy attaches to charges dismissed in return for a guilty plea, this Court has never held that a trial court's pronouncement of prejudice causes jeopardy to attach. The State does not and cannot cite a single case adopting that rule. And although the State claims that ambiguous dismissals are presumed to be without prejudice, the State fails to cite any caselaw addressing such a presumption in the context of a negotiated plea agreement.

The State simply ignores the realities of the plea bargaining system, in which parties enter into plea agreements to achieve finality. *See, e.g.*, *United States v. Brown*, 425 F.3d 681, 682 (9th Cir. 2005); *State v. Carpenter*, 68 Ohio St.3d 59, 61-62, 623 N.E.2d 66 (1993). Over ninety percent of criminal defendants in both the state and federal systems resolve their cases by guilty pleas. *See Lafler*, 566 U.S. at 169-70; *Frye*, 566 U.S. at 143. They do so to achieve finality, and so regularity should dictate the opposite of what the State suggests. This is especially true for criminal defendants like Soto who have pled guilty to a predicate offense in exchange for dismissal of the greater offense. *App. 12-13.* Without finality, such a defendant has

admitted to a substantial part of the charge that was dismissed, but to what advantage?

For certain, the majority below did not focus on whether the incantation of "prejudice" was utilized by the trial court. *App. 6-9.* It was nonetheless decided that after a plea agreement, jeopardy attaches to the convictions but not the charges that were dismissed. *Id. But see Holz*, 2020 WL 2200365, at *4. The Supreme Court of Ohio created a bright-line rule without regard to prejudice. In reality, the State places emphasis on the words "with prejudice" in the hope that doing so is enough to distinguish the question raised in Soto's appeal from that addressed by courts on either side of the federal split.

Even if the answer is that jeopardy does not attach unless a court has explicitly dismissed charges with prejudice, then this Court should answer the question in order to dispel society's strong expectation that citizens achieve finality through the dismissal of charges in return for a guilty plea. The State makes the confused argument that "defendants can avoid being prosecuted again on a dismissed charge by demanding freedom from future charges as a condition of pleading guilty." *Opp. Brief, p. 15.* At once this statement reduces the right to finality that is protected by the Double Jeopardy Clause to a bargaining chip possessed by the State and misses the reality that the public has *not* been aware they had to pay extra to the State for permanence during a plea negotiation. The State gives awfully short shrift to a right of constitutional dimension, which is subject in the ordinary course only to "voluntary knowing relinquishment." *Green v. United States*, 355 U.S. 184, 191-94 (1957) (plea

of former jeopardy as to a greater offense was not automatically waived by the successful appeal of a conviction to a lesser-included offense). It is essentially unheard of that a defendant might be waiving their double jeopardy right during execution of a plea agreement, as such a waiver is not contemplated by Fed. R. Crim. P. 11(b)(1). *See also Ohio Crim. R. 11(C)(2)(c).* Likewise, it has never been the rule that jeopardy only attaches when a judge is willing to recognize it on the record—attachment is automatic in other instances. *See, e.g.*, *Martinez v. Illinois*, 572 U.S. 833, 839-40 (2014) (reaffirming the bright-line rule that jeopardy attaches at the moment a jury is empaneled and sworn, without any action taken by the court or the parties); *Serfass v. United States*, 420 U.S. 377, 388 (1975) (explaining that jeopardy attaches in a bench trial as soon as the judge begins hearing evidence). Insofar as the right not "to be twice put in jeopardy" for the "same offense" under the Fifth Amendment to the United States Constitution is a protection against overreach by the government, it would be absurd if its protections could only be triggered during a plea colloquy by the explicit statement of a prosecutor or judge as opposed to automatic attachment.

IV. RESPONDENT'S POLICY VIEWS ARE MISGUIDED

The State's policy argument fails to account for the current state of the law in Ohio and the on-the-ground realities of plea bargaining. Even had Soto done exactly what the State counsels—demanding freedom from future charges as a contractual

condition of pleading guilty—it is not clear he would have found an adequate remedy protecting him from facing trial on a charge he believed was finally resolved.

The Double Jeopardy Clause protects a criminal defendant from being tried twice for the same offense precisely because "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green*, 355 U.S. at 187. Yet it has only been recognized that an order denying a criminal defendant's motion to dismiss is immediately appealable if it is made on double jeopardy grounds. *See State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 40-60; *App. 10, n. 3. Compare State v. Anderson*, 8th Dist. Cuyahoga No. 106304, 2018-Ohio-3051, *with State v. Ammons*, 9th Dist. Summit No. 28675, 2019-Ohio-286. Had Soto negotiated the State's preferred finality term into his plea agreement, his first opportunity to present a contractual challenge on appeal still might have been after the expense and ordeal of a trial. This avenue would do nothing to vindicate the right to be free from jeopardy a second time.

Regardless, if Soto did not negotiate such a term with the State, it was because he did not know he had to. And Soto is not alone. A criminal defendant's expectation of finality after pleading guilty to some charges in exchange for the government's dismissal of the remaining charges in an indictment is reasonable. The only conceivable effect of such an agreement in the absence of a clear rule from this Court is to fully and finally conclude a case. Criminal defendants across the country need

an answer to the question presented so that they may act in their best interests in deciding whether to enter into a plea agreement with the government and on what terms. If the State would like to dispose of only part of a criminal case through a plea agreement, it should be the burden of the State to reach out and seek a deviation from the expectation that a plea deal puts the whole prosecution to rest. *See Carpenter*, 68 Ohio St.3d at 61-62.

This Court's double jeopardy jurisprudence evolved in a system where trial was the anticipated norm, not the shadow in which bargaining occurs. However, in *Lafler* and *Frye*, this Court acknowledged that that understanding has shifted. Like the Sixth Amendment rights implicated in *Lafler* and *Frye,* the protections of the Double Jeopardy Clause must also adapt to an era in which almost all criminal prosecutions are resolved through guilty pleas. *See Frye,* 566 U.S. at 143. And just as the Sixth Amendment "right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences," so too must other provisions of the Constitution. *Lafler*, 566 U.S. at 170. Because execution of a plea deal is the "point in criminal proceedings at which the constitutional purposes and policies are implicated," the question in this case calls out for a clear and consistent answer. *Serfass*, 420 U.S. at 388.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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