

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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BRIAN CHARLES ZELLNER, PETITIONER

V.

THE STATE OF GEORGIA, RESPONDENT

\_\_\_\_\_

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA*

\_\_\_\_\_

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

This case involves a state criminal prosecution. The indictment charges five crimes which the State previously proved in a separate prosecution of the same defendant in an action for a final adjudication in a prior conditional sentence.

Does the Double Jeopardy Clause of the 5<sup>th</sup> Amendment bar state prosecution of a defendant on substantive criminal charges based on the same conduct which triggered a criminal conviction entered as an adjudication of guilt under Georgia's "First-Offender" statute?

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## **TABLE OF CITED AUTHORITY**

*Zellner v. State*, 353 Ga.App. 527, 838 S.E. 2d 613 (2020)

*United States v. Dixon*, 509 U.S. 688 (1993)

*Blockburger v. United States*, 284 U.S. 299 (1932)

Ga. Code Ann. §42-8-60; §16-5-91

## **STATE PROCEEDINGS**

1. Superior Court case no.: SU-16-CR-0594-S
  - a. July 5, 2016: Indictment for one count of aggravated stalking in Superior Court of Athens-Clarke County, Georgia.
  - b. August 3, 2016: Guilty plea and sentence under "First-Offender Act" in Superior Court of Athens-Clarke County, Georgia.
2. Superior Court case no.: SU-16-CR-0594-R1-S
  - a. July 18, 2017: Petition for Adjudication of Guilt and Imposition of Sentence based on new criminal law violations on April 4, 2017. Superior Court of Athens-Clarke County, Georgia.
  - b. August 23, 2017: Bench trial and finding that Defendant violated the terms of his sentence by committing new crimes as alleged.
  - c. September 21, 2017: Entry of final conviction in SU-16-CR-0594-S and imposition of final sentence of ten (10) years confinement. Superior Court of Athens-Clarke County, Georgia.
3. Superior Court case no.: SU-17-CR-0674-S
  - a. August 22, 2017: Indictment for kidnapping, aggravated assault, aggravated stalking, possession of a firearm

during the commission of a felony, possession of a firearm by a First-Offender probationer. Superior Court of Athens-Clarke County, Georgia.

- b. March 22, 2019: Plea of Former Jeopardy filed in Superior Court of Athens-Clarke County, Georgia.
- c. April 11, 2019: Order Denying Plea of Former Jeopardy. Superior Court of Athens-Clarke County, Georgia.
- d. April 11, 2019: Notice of Appeal of Order Denying Plea of Former Jeopardy. Superior Court of Athens-Clarke County, Georgia.
- e. June 24, 2019: Amended Notice of Appeal filed in Superior Court of Athens-Clarke County, Georgia.
- f. February 7, 2020: Opinion from the Court of Appeals of Georgia affirming the trial court's Order of April 11, 2019. *Zellner v. State*, 353 Ga.App. 527, 838 S.E. 2d 613 (2020).
- g. August 24, 2020: Opinion from Supreme Court of Georgia denying the Petition for Writ of Certiorari to the Georgia Court of Appeals.

## **OPINIONS BELOW**

The decision by the Supreme Court of Georgia denying Petition for Certiorari to the Court of Appeals of Georgia is included in the Appendix, App. 1 *infra*.

The opinion of the Court of Appeals of Georgia, *Zellner v. State*, is reported at *Zellner v. State*, 353 Ga.App. 527, 838 S.E. 2d 613 (2020). Appendix, App. 2 *infra*.

The order from the Superior Court denying the Plea of Former Jeopardy is included in the Appendix, App. 7 *infra*.

## **JURISDICTION**

The case involves a question of a federal constitutional right as applied in a State criminal prosecution. Petitioner has exhausted his State appeals.

28 U.S.C. §1257(a) confers jurisdiction on this Court to review the Georgia Supreme Court's decision on this federal question. The Georgia Supreme Court's decision was filed on August 24, 2020, within 90 days of this Petition.

## **CONSTITUTIONAL PROVISION**

This case involves the double jeopardy clause of the 5<sup>th</sup> Amendment to the United States Constitution: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," as applied to the States by the 14<sup>th</sup> Amendment.

## **STATEMENT OF THE CASE**

### **A. Initial 2016 Prosecution under Georgia's First Offender Act**

Petitioner and his wife of over 20 years separated and divorced in 2016. During the separation Petitioner, in August 2016, pled guilty to aggravated stalking, Ga. Code Ann. §16-5-91, a felony carrying a maximum ten (10) year sentence.

The trial court sentenced Petitioner to five (5) years probation under Georgia's First Offender statute. Ga. Code Ann. §42-8-60.

Georgia's First Offender Act allows a trial court, after a finding of guilt, to withhold entry of a final conviction and impose a non-final sentence, conditioned on the defendant's compliance with court orders. If the defendant completes the First Offender sentence without violation, the court would enter a judgment of "exonerated of guilt and discharged." Ga. Code Ann. §42-8-60(e).

If, however, the court finds the defendant subsequently violated its conditions, the court retains authority to enter a final judgment of conviction and impose a new sentence, unconstrained by the original, non-final sentence terms. Ga. Code Ann. §42-8-60(d)(1).

In accordance with Petitioner's sentence, final judgment was withheld and certain conditions were imposed, among them a condition to not violate the criminal laws. Petitioner failed to meet this condition.

### **B. Final Adjudication of 2016 Prosecution**

In July 2017 the State alleged that Petitioner committed new crimes against his ex-wife including kidnapping, aggravated stalking and aggravated

assault. The State indicted Petitioner for these crimes. The State, also, separately filed a "Petition for the Adjudication of Guilt and Imposition of Sentence" in the First Offender case.

The violations set out in the State's Petition comprised the new criminal charges set out in the 2017 indictment in that Petitioner violated "condition #1: Do not violate the laws of any government unit." Appendix p. 12. No other violations were alleged.

In August 2017, the trial court held an evidentiary hearing on the allegations contained in the State's Petition. The State presented several witnesses including the victim, Petitioner's ex-wife. The trial court found the State proved the violations. As a result, on September 20, 2017, the trial court ordered the clerk of court to enter a final judgment of conviction in the 2016 case and it pronounced a new sentence of ten (10) years in prison, the maximum available. Appendix p. 13.

### **C. 2017 Indictment (Second Prosecution)**

Petitioner, having faced prosecution in the proceeding pursuant to the State's Petition for Adjudication for the 2017 crimes (kidnapping, aggravated stalking, aggravated assault, etc.), filed a Plea of Former Jeopardy in the trial court, claiming further prosecution would subject him to a second criminal jeopardy in violation of his rights under the 5<sup>th</sup> Amendment.

The trial court denied this Plea on April 11, 2019. This ruling was appealed to the Court of Appeals of Georgia, which affirmed the trial court in an opinion dated February 7, 2020.



The Supreme Court of Georgia denied Certiorari on August 24, 2020. This order by the Supreme Court of Georgia exhausted Petitioner's appeal in the Georgia courts and it is from this order that he seeks a Writ in this Court.

### **ARGUMENT IN SUPPORT OF WRIT**

The State alleges that Petitioner assaulted and kidnapped his ex-wife on April 4, 2017 for the purpose of taking her to his home several miles away to try to convince her to favorably alter their divorce settlement.

The State presented evidence of the assault and kidnapping to successfully obtain a conviction and sentence in one case (SU-16-CR-0594). This was done in the course of the hearing on the State's Petition for Adjudication of Guilt in the First Offender case.

Petitioner asserts that this prosecution placed him in jeopardy. The prosecution of the Adjudication of Guilt in the First Offender case resulted in a criminal conviction and a prison sentence. The State disputes that its action in this regard placed Petitioner in jeopardy for anything other than the 2016 aggravated stalking case. However, the court order that was proved in bringing finality (conviction and sentence) to that case, required proof of the offenses contained in the 2017 kidnapping event.

Petitioner asserts that the pending indictment for the same offenses (SU-17-CR-0674) thus places him in jeopardy a second time.

This case is worthy of a Writ of Certiorari for three main reasons. First, it involves application of one of the limited, explicitly-enumerated individual rights in the U.S. Constitution. Strict adherence to these limitations on the

government's power to deprive a defendant of his liberty is of primary importance to courts throughout the country.

The controversy in this case arises in the interpretation of the Petitioner's unsuccessful conclusion of the First Offender sentence. This controversy also supports granting the Writ because almost every State has a similar criminal sentencing statute, providing for some sort of conditional discharge of a conviction if certain court-imposed conditions are met. In other words, the decision here will be welcome guidance in a widely-used criminal law process.

Third, the Georgia courts' rulings conflict with this Court's binding precedent in *United States v. Dixon*, 509 U.S. 688 (1993). Petitioner's initial direct appeal was a case of first impression in Georgia. The Georgia Court of Appeals' Opinion largely avoided the federal constitutional question, and it certainly did not address the application of *Dixon*, which would have required a different result. Rule 10(c).

### ***U.S. v. Dixon Should Apply***

At the initial hearing in the trial court, neither the State nor the trial court could cite any authority to support the denial of the Plea of Former Jeopardy. Yet the trial court denied the Plea without explanation.

On appeal the Court of Appeals of Georgia made no analysis under the double jeopardy clause, and merely stated a conclusion. It cited a Georgia case related to probation revocations, which is inapplicable to Petitioner's case as a probation revocation has been referred to as "quasi-criminal" as opposed to Petitioner's case which resulted in a final conviction and imposition of a new

sentence.

That Court of Appeals Opinion, *Zellner v. State*, created a new judicial exception to a fundamental Constitutional right. Petitioner argues that the Georgia Court of Appeals is not authorized to create such an exception to the clear terms of the 5<sup>th</sup> Amendment.

By declining to accept review, the Supreme Court of Georgia has sanctioned the interpretation of Georgia's First Offender adjudication procedure to allow successive criminal prosecutions for the same offense.

This Court has held that the State prosecution violates double jeopardy in a very similar situation. *United States v. Dixon*, 509 U.S. 688 (1993).

In *Dixon*, Justice Scalia urged courts to focus on whether proof of an offense's essential elements was required in each prosecution in determining a double jeopardy claim. One of the defendants in *Dixon* was found in contempt of a trial court's bond order for his commission of a new (still pending) state crime. *Id.* at 691-2. Because the same elements of the new offense were proved in the contempt proceeding, this barred the State from further prosecution on the substantive offense. *Id.* at 712.

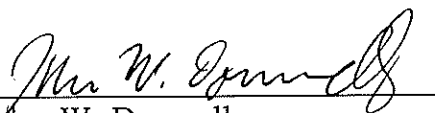
Likewise, in Petitioner's case, the trial court found that the elements of Petitioner's new offenses were established at his Adjudication hearing. Following this Court's analysis in *Dixon*, which utilized the test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), the conviction and sentence entered as a result of Petitioner's Adjudication in August 2019 placed him in jeopardy. Further prosecution will violate Petitioner's fundamental Constitutional

protection against a second criminal prosecution by the State.

**CONCLUSION**

For the reasons set out above, Petitioner requests that this Honorable Court grant a Petition for Writ of Certiorari.

Submitted this 20th day of November, 2020.

  
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