No. 23-

In the Supreme Court of the United States

FAVION LARA,

Petitioner,

v.

NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a plea agreement includes the prosecutor's promise that the State will recommend a particular sentence, does a police officer's recommendation of a longer sentence violate the Due Process Clause by breaching the plea agreement?

RELATED PROCEEDINGS

Supreme Court of Nebraska: *State v. Lara*, No. S-23-167 (Feb. 2, 2024)

Hall County (Nebraska) District Court: *State v. Lara*, No. CR 22-504 (Feb. 1, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Favion Lara respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nebraska.

OPINION BELOW

The opinion of the Supreme Court of Nebraska is published at 315 Neb. 856, 2 N.W.3d 1 (Neb. 2024).

JURISDICTION

The Supreme Court of Nebraska entered its judgment on February 2, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Most criminal convictions result from plea agreements. One common provision in these agreements is a promise by the prosecutor that the government will recommend a particular sentence to the court. The lower courts are divided over a recurring question: Is the prosecutor the only agent of the government who is bound by the government's promise, or does the promise bind police officers as well? In other words, does the government breach the plea agreement if a police officer recommends a sentence longer than the one the prosecutor promised that the government would recommend?

This case is an excellent vehicle in which to resolve the conflict.

1. As police officers prepared to search a house in Grand Island, Nebraska, they heard two gunshots. App. 7a-8a. The shots were fired in their direction from a nearby corner by 17-year-old Favion Lara, whose goal was not to shoot the officers but rather to distract them, in the hope of allowing his friends, who were inside the house, to evade apprehension. *Id.* at 8a. Lara was charged as an adult with fourteen felonies and one misdemeanor. *Id.*

Under a plea agreement, Lara pled no contest to five of the counts—two counts of attempted first degree assault on an officer, two counts of attempted use of a firearm to commit a felony, and one count of conspiracy to commit a felony. *Id.* at 8a-10a. The state agreed to dismiss the remaining counts. *Id.* at 9a. As part of the plea agreement, the prosecutor promised in court that "at the time of sentencing, the State has agreed that the State will recommend a total sentence of 15 to 20 years." *Id.* The court accepted Lara's plea and set the case for sentencing. *Id.* at 10a.

At sentencing, however, the defense was in for a surprise. The court received a letter from Ryan Sullivan, one of the police officers Lara had attempted to distract with his gunshots, and one of the officers who played a role in Lara's arrest. *Id.* In the letter, Officer Sullivan urged the court to impose a much longer sentence than the one the state had promised to recommend. "In 12 years of policing," Sullivan told the court,

> I've never been shot at. I've had some very bad people go as far as removing a gun from a holster, but they never made the choice to shoot at me. This should illustrate Favion Lara's men-

> tality. Favion's defense will likely say Favion is "young and dumb". They're not wrong. He's 18. I think that is also his downfall. If Favion is willing to shoot at two police officers at the age of 18, what will he be willing to do when he has more "street cred" and experience as a criminal on the streets in the future[?]
>
> ....
>
> Your Honor, you have a chance at this sentence hearing to put away a very dangerous person for a significant amount of time. This is also an opportunity to show the city of Grand Island, we will not tolerate shooting at police officers, and we are done with the ongoing gun crime in this city. Favion can be made the example for this age group. I'm told the sentencing recommendation will be around 15 years. I don't think jamming out after 7-8 years is enough punishment for shooting at police officers. I ask that you consider exceeding the recommendation, and sentence Favion to a more appropriate number of years, closer to the max sentence.

Id. at 11a. The signature line beneath Sullivan's letter read "Investigator Ryan Sullivan #442." *Id.* at 12a. Next to the signature line was a stamp of a Grand Island Police Department badge. *Id.*

Defense counsel objected to and moved to strike the portion of Officer Sullivan's letter arguing in favor of a sentence greater than the one the state had promised to recommend. *Id.* Counsel explained that "it violates the plea agreement for the State to offer an exhibit by another officer of the State, an agent of the State, that specifically argues for something that

exceeds the recommendation that was made pursuant to the terms of the plea agreement." *Id.* The court overruled the objection. *Id.*

The prosecutor recommended a total sentence of 15 to 20 years, but the court followed Officer Sullivan's advice, not the prosecutor's, and imposed a sentence far longer than the one the state had promised to recommend. *Id.* at 13a. Lara was sentenced to a prison term of 30 to 50 years on the conspiracy count, to be served consecutively with four concurrent terms of 15 to 30 years on the other counts, for a total sentence of 45 to 80 years. *Id.* In the plea agreement, the state had promised to recommend a sentence of 15 to 20 years, but at sentencing the state spoke with two voices, one of which broke the state's promise. As a result, Lara received a prison term much longer than the one for which he bargained away his constitutional right to a jury trial.

2. The Nebraska Supreme Court affirmed. *Id.* at 2a-31a.

The court acknowledged that "both the U.S. Supreme Court and this court have held that 'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" *Id.* at 18a-19a (quoting *Santobello v. New York*, 404 US. 257, 262 (1971)). The court explained that "[w]hen a defendant establishes that a plea agreement has been breached, available remedies include (1) ordering specific performance of the agreement or (2) allowing withdrawal of the plea." *Id.* at 20a (citing *Santobello* along with the Nebraska Supreme Court's own cases).

The court recognized that it had to decide a question it had "not previously considered[:] whether law enforcement officers are agents of the prosecution for purposes of binding them to the prosecution's promises under a plea agreement." *Id.* at 26a. The court observed that courts in other jurisdictions have reached conflicting views on this question. *Id.* at 24a-26a. It noted that some courts hold "that law enforcement officers are agents of the prosecution bound to comply with the prosecution's promises under a plea agreement." *Id.* at 24a (citing cases from Washington, Ohio, Wisconsin, and Florida). Other courts, by contrast, "conclude law enforcement officers are not agents of the prosecution for purposes of plea agreements." *Id.* at 25a (citing cases from Utah, Arizona, Wisconsin, Idaho, and Indiana).

The Nebraska Supreme Court decided to adopt neither of these rules. "Even though we acknowledge that other jurisdictions have adopted blanket rules deciding as a matter of law whether prosecuting attorneys and law enforcement officers have a principal-agent relationship for purposes of binding officers to plea agreements," the court concluded, "we are not persuaded it is appropriate to decide the agency issue as a matter of law when construing and enforcing plea agreements." *Id.* at 27a. "[W]e decline to adopt any blanket rule." *Id.* Rather, "when construing and enforcing plea agreements, we treat the existence of any principal-agent relationship, and the scope of authority under any such a relationship, as questions of fact to be determined from the evidence properly before the court." *Id.*

The court then applied this framework. Although the prosecutor had promised that "the State will rec-

ommend a total sentence of 15 to 20 years," *id.* at 9a, the court held: "we see nothing in the record suggesting that the parties to this plea agreement expressly agreed to restrict the sentencing recommendations of any party other than the prosecution." *Id.* at 28a. The court continued: "Nor do we see any evidence to support a finding, under established contract principles, that Sullivan was acting as an agent of the prosecution for purposes of the plea agreement." *Id.*

The court accordingly concluded that "Lara has failed to prove that Sullivan's sentencing remarks resulted in a breach of the plea agreement." *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

The Due Process Clause requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971).

The lower courts are divided over how to apply this rule in one recurring situation. A standard promise in plea agreements is a promise by the prosecutor that the government will recommend a particular sentence to the court. Defendants often agree to plead guilty in exchange for this promise. At sentencing, however, the prosecutor may not be the only agent of the government who offers a sentencing recommendation. Police officers sometimes chime in as well, and when they do, they often suggest sentences longer than the one the prosecutor promised that the government would recommend.

When the government speaks with more than one voice at sentencing, does the government breach the plea agreement if a police officer's recommended sentence is longer than the one the prosecutor promised that the government would recommend? The lower courts have split three ways on this question. Some courts have adopted a rule that the police officer is an agent of the government for these purposes and have accordingly held that the officer's recommendation breaches the plea agreement. On the other side of the split, some courts have adopted the opposite rule; they have held that the police officer is an independent actor, not an agent of the government, and that the officer's recommendation does not breach the plea agreement. Below, the Nebraska Supreme Court took a third approach. The court declined to adopt either rule. Instead, the court decided to resolve the issue on a case-by-case basis as a question of fact.

Two of these three approaches must be wrong. This case provides an excellent vehicle for resolving the conflict.

I. The lower courts are divided over whether the government breaches a plea agreement where a police officer recommends a sentence longer than the one the prosecutor promised that the government would recommend.

The lower courts are split nearly evenly on whether the government breaches a plea agreement when a police officer's recommended sentence is longer than the sentence that the prosecutor promised the government would recommend.

A. Some courts hold that a promise in a plea agreement to recommend a particular sentence binds the government as a whole, not merely the prosecutor.

Two state supreme courts have held that where the prosecutor promises in a plea agreement to recommend a particular sentence, that promise is binding on all agents of the government, including police officers.

In *State v. MacDonald*, 346 P.3d 748, 751 (Wash. 2015), the prosecutor promised in a plea agreement to recommend a five-year suspended sentence. At sentencing, however, a police officer recommended the maximum sentence of five years, not suspended. *Id.* The Washington Supreme Court held that the state had breached the plea agreement and remanded for the defendant to elect whether he would withdraw his plea or seek specific performance of the plea agreement. *Id.* at 752. "[I]nvestigating officers cannot make sentence recommendations contrary to a plea agreement," the court explained. *Id.* "[T]he same due process concerns precluding an investigating officer from undermining a plea agreement bar that officer from making unsolicited remarks on a victim's behalf to the court at sentencing that are contrary to the plea agreement." *Id.* The court observed that "the constitutional due process concerns that adhere when the prosecutor undercuts a plea bargain apply with equal force when the prosecution undercuts that agreement by proxy." *Id.* at 755.

The Washington Supreme Court explained that the reason for this rule is that "defendants waive significant rights when they agree to plead guilty.

This waiver of rights obligates the State to comply with any promises that it makes." *Id.* at 755-56. A police officer's recommendation of a sentence longer than the one promised in a plea agreement "could render the prosecution's agreement meaningless, and that could deter future plea agreements." *Id.* at 756 (citation and internal quotation marks omitted). When prosecutors promise to recommend sentences, the court concluded, "prosecutors may not do indirectly through their investigating officers what they are prohibited from doing directly." *Id.* (citation, brackets, and internal quotation marks omitted).

The Florida Supreme Court reached the same holding in *Lee v. State*, 501 So. 2d 591 (Fla. 1987). In *Lee*, the plea agreement provided that the state would recommend probation, but at sentencing a police officer recommended incarceration. *Id.* at 591-92. The Florida Supreme Court reversed on the ground that "once a plea bargain based on a prosecutor's promise that the state will recommend a certain sentence is struck, basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's recommendation." *Id.* at 593. The court explained that "[t]he state's failure to adhere to the terms of a plea agreement even when the noncompliance is purely inadvertent constitutes good cause for withdrawal of a plea under this provision." *Id.* at 592 (citing *Santobello*, 404 U.S. at 262). Thus, "a promise contained in a plea agreement that the state will recommend a given sentence … precludes other state agents, such as state law enforcement officers, from making sentencing recommendations contrary to the

terms of the agreement[]." *Id.* (internal quotation marks omitted).

Several of the federal courts of appeals have likewise held, in slightly different factual contexts, that a prosecutor's promise in a plea agreement binds the government as a whole, not merely the prosecutor's office. For example, in *Allen v. Hadden*, 57 F.3d 1529, 1531 (10th Cir. 1995), the plea agreement promised that certain counts would be dismissed and that these counts would have no adverse effect on the defendant. Later, however, information about the dismissed counts was used in sentencing the defendant in an unrelated case, and the Bureau of Prisons relied on the dismissed counts to justify adverse classification decisions. *Id.* at 1533. The Tenth Circuit held that the prosecutor's promise in the plea agreement was binding on the government as a whole, not merely on the U.S. Attorney's office. *Id.* at 1535-36. "Whenever a United States Attorney negotiates and enters a plea agreement," the court held, "it is the Government that 'agrees' to whatever is agreed to." *Id.* at 1535 (citation omitted). The court noted that while a U.S. Attorney may reach a plea agreement explicitly obligating only certain parts of the government, "[a]bsent an express limitation on the government's obligations, a plea agreement entered on behalf of the government binds the government as a whole." *Id.*

Similarly, in *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986), the Fourth Circuit held that one U.S. Attorney's promise binds U.S. Attorneys in all districts, not merely in the district where the promise was made. "[T]hough the Government negotiates its plea agreements through the agency of specific

United States Attorneys," the court held, "the agreements reached are those of the Government. It is the Government at large—not just specific United States Attorneys or United States "*Districts*"—that is bound by plea agreements negotiated by agents of Government." *Id.* at 302-03. *See also United States v. Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002) (same). In these circuits, as in Washington and Florida, when a prosecutor makes a promise on behalf of the government as part of a plea agreement, the promise binds *the government*, not merely the prosecutor.

B. Other courts hold that a promise in a plea agreement to recommend a particular sentence is binding only on the prosecutor, and not on police officers.

Two state supreme courts have adopted the opposite rule. These courts hold that the government does not breach a plea agreement when a police officer recommends a sentence longer than the one the prosecutor promised that the government would recommend, on the ground that the prosecutor's promise binds only the prosecutor personally.

In *State v. Lampien*, 223 P.3d 750, 753 (Idaho 2009), the prosecutor promised in a plea agreement that the government would recommend probation, but at sentencing police officers urged incarceration instead. The Idaho Supreme Court held that the state did not breach the plea agreement, because the officers were "not acting as agents of the State, and therefore were not bound by the terms of the plea agreement. There is nothing in the record to suggest that the prosecutor improperly influenced the offic-

ers, called the officers to subvert the plea agreement, or otherwise acted to undermine the State's sentencing recommendation." *Id.* at 760. The court concluded that the police officers were "acting in their individual capacities as victims," not as representatives of the government. *Id.*

Likewise, in *State v. Rogel*, 568 P.2d 421, 423 (Ariz. 1977), the prosecutor promised in a plea agreement that the state would make no recommendation at sentencing, but at sentencing a police officer recommended a lengthy sentence. The Arizona Supreme Court held that the state had not breached the plea agreement. "Plea agreements are entered into by the defendant, who is usually represented by counsel, and the prosecution," the court reasoned. *Id.* "The police participate in neither negotiations nor the agreement and have no voice in dictating what terms should be considered, bargained for or included." *Id.* The court found it "evident that in entering a plea agreement containing provisions requiring certain conduct by 'the State,' it is the parties' mutual intent to use that term in referring only to the prosecutorial branch of the State." *Id.* The court thus concluded that "[t]he provision requiring the State to stand mute on sentencing here obviously refers to and binds only the county prosecutor and was not intended to prohibit police officers from airing their opinions." *Id.*

C. The Nebraska Supreme Court has adopted a third view.

In our case, the Nebraska Supreme Court "carefully studied the reasoning of the opinions" on both sides of the split and found both sides mistaken.

App. 26a. "[W]e are not persuaded it is appropriate to judicially adopt a blanket rule either recognizing or rejecting a principal-agent relationship between prosecuting attorneys and law enforcement officers for purposes of construing and enforcing plea agreements," the court explained. *Id.* "Even though we acknowledge that other jurisdictions have adopted blanket rules," the court continued, "we decline to adopt any blanket rule." *Id.* at 27a. "Instead, when construing and enforcing plea agreements, we treat the existence of any principal-agent relationship, and the scope of authority under any such relationship, as questions of fact to be determined from the evidence properly before the court." *Id.* Although "other jurisdictions appear to have approached the agency issue as a matter of law rather than a question of fact," the court concluded, it would adopt a position different from these other jurisdictions. *Id.* at 29a.

D. Nebraska's attempt to reconcile the conflict is based on a misunderstanding of the cases.

In its briefing below, Nebraska argued that these conflicting cases can be reconciled, on the theory that the cases distinguish between officers who speak as officers (whose sentence recommendations can be attributed to the government) and officers who speak in their personal capacities as crime victims (whose sentence recommendations cannot be attributed to the government). Neb. Sup. Ct. State Br. at 16-17. Nebraska suggested that Officer Sullivan, who urged the court to give Favion Lara a sentence much longer than the one the prosecutor had promised the

state would recommend, spoke only in his personal capacity as a victim of the crime. *Id.*

Nebraska's theory is incorrect for two reasons. First, it misconceives the conflict among the lower courts. Second, it fails to account for the facts of this case.

First, with one exception (*Lampien*, 223 P.3d at 760), the cases constituting the conflict do not draw the distinction Nebraska attempts to draw, between officers-testifying-as-officers and officers-testifying-as-victims. These cases simply hold that police officers may (or may not) recommend sentences longer than the one the prosecutor promised that the government would recommend, without regard to the capacity in which the officer testifies. *See MacDonald*, 346 P.3d at 755-56; *Lee*, 501 So.2d at 593; *Rogel*, 568 P.2d at 423. These cases reason that police officers are (or are not) agents of the government, and thus that they are (or are not) bound by the prosecutor's promise as to what the government will recommend, without attempting to parse the situations in which police officers should be deemed to speak for the government.

Indeed, in *MacDonald*, the police officer who recommended the longer sentence did so "on behalf of the victim." *MacDonald*, 346 P.3d at 751. The Washington Supreme Court held that the officer's recommendation breached the prosecutor's promise, on the ground that a police officer may not urge the court to impose a sentence longer than the one the prosecutor promised that the state would recommend, even where the officer speaks on the victim's behalf. *Id.* at 755-56. The conflict among the lower courts thus has

nothing to do with the distinction Nebraska attempts to draw.

Second, the facts of this case do not fit Nebraska's proposed distinction. Officer Sullivan was not just any old crime victim. He was one of the police officers whose detective work led the police to arrest Favion Lara. App. 10a ("Sullivan played a role in the investigation that led to Lara's charges."). He expressly relied on his lengthy experience as a police officer in urging the court to impose a lengthy sentence. *Id.* at 11a. When the prosecutor promised in the plea agreement that "*the State* will recommend a total sentence of 15 to 20 years," *id.* at 9a (emphasis added), the defense reasonably understood the prosecutor to promise that no agent of the state, including one of the police officers who had helped apprehend Lara, would recommend a sentence longer than that.

The conflict among the lower courts is genuine. We are not the first to notice it. *See* Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 Yale L.J. 1730, 1768 (2017) ("courts are evenly split about whether the officer is bound by the prosecutor's plea offer"); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749, 829 n.360 (2003) (citing the cases constituting the split as of the date the article was published); *Lampien*, 223 P.3d at 760 (noting the "split of authority on the issue of whether a law enforcement agency is bound by a prosecutor's plea agreement and, thus, whether the agency's failure to adhere to the terms of the plea agreement constitutes good cause for withdrawal of a guilty plea"); *State v. Chetwood*, 170 P.3d 436, 441 (Kan.

Ct. App. 2007) ("jurisdictions are split on the issue of who is bound by a plea agreement"); *State v. Thurston*, 781 P.2d 1296, 1299 (Utah Ct. App. 1989) (contrasting the conflicting views of the Florida and Arizona Supreme Courts).

A conflict of this magnitude will never be resolved without this Court's intervention.

II. The decision below is wrong.

Certiorari is also warranted because the decision below is wrong. When a prosecutor promises in a plea agreement that "the state" will recommend a particular sentence, the state breaches the plea agreement when a police officer recommends a sentence longer than the one the prosecutor promised that the state would recommend.

The Due Process Clause requires the government to abide by the promises it makes in a plea agreement. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). "It follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509. *See also Kernan v. Cuero*, 583 U.S. 1, 7 (2017) (per curiam) ("a defendant may not be bound to a plea agreement following a prosecutorial breach of an enforceable provision of such an agreement.")

Because plea agreements are "essentially contracts," *Puckett v. United States*, 556 U.S. 129, 137

(2009), they are interpreted according to the plain meaning of their terms. A promise that "the state" will recommend a sentence plainly means that *agents* of the state will recommend that sentence, because the state can act only through its agents. And there can be no doubt that a police officer is an agent of the state. Indeed, police officers are often called "state agents," precisely because they enforce the law on behalf of the state. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Maine v. Moulton*, 474 U.S. 159, 176 (1985). Where, as here, a police officer plays a role in the investigation and arrest of a defendant, the officer is unmistakably an agent of the state during the prosecution of the defendant.

When a prosecutor promises that "the state" will recommend a sentence, the promise binds *the state*, not merely the prosecutor himself. "The prosecutor's office … is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972). As the Court has explained, "[w]hen a defendant agrees to a plea bargain, *the Government* takes on certain obligations." *Puckett*, 556 U.S. at 137 (emphasis added).

When the prosecutor promised, as part of Favion Lara's plea agreement, that "the State" would recommend a sentence, the only reasonable interpretation of the promise is that it bound all agents of the state, not merely the prosecutor himself. After all, the promise would have been nearly worthless if it allowed other state agents—police officers, other prosecutors, members of the prosecutor's staff, and so on—to undercut the prosecutor's promise by showing up at sentencing and urging the court to impose

a sentence longer than the one the prosecutor promised that the state would recommend. "A citizen has the right to expect fair dealing from his government, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities." *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972) (citation omitted).

A prosecutor certainly *can* make a promise that binds only himself, and that allows others to advocate for longer sentences, simply by saying so in the plea agreement. Here, for example, instead of promising that "the State" would recommend a particular sentence, the plea agreement could have promised that the prosecutor personally would make that recommendation but that police officers might recommend longer sentences. Had the plea agreement been so worded, Favion Lara would have had no right to complain when Officer Sullivan indeed recommended a longer sentence. But the plea agreement was not worded that way. *Cf. United States v. Benchimol*, 471 U.S. 453, 455 (1985) (per curiam) (holding that plea agreements should be enforced "in terms of what the parties in fact agree to").

Below, the Nebraska Supreme Court got this point exactly backwards. The court reasoned that "[i]f the parties to a plea agreement want to negotiate terms that purport to bind third parties to promises made by the prosecution, they should do so in express terms rather than relying on implied-in-law terms." App. 28a. But the express terms of the plea agreement *did* bind "the State," not merely "the prosecution." If the parties wanted to bind only the prosecutor, they should have done *that* in express terms. The agreement they signed bound the state.

The Nebraska Supreme Court also erred in framing the question as "whether law enforcement officers are agents of the prosecution." *Id.* at 26a. The relevant question is not whether law enforcement officers are agents of the prosecution, but whether they are agents *of the state*. The promise in the plea agreement was that "the State" would recommend a particular sentence, not that "the prosecution" would recommend it. Prosecutors and police officers are both agents of the state, so both are bound by a promise made on the state's behalf. It makes no difference whether police officers are also agents of "the prosecution," because the plea agreement included no sentencing promises made by any such entity. It only included a promise by "the State."

Under the decision below, plea bargaining becomes a trap for the unwary. After their clients have been burned once, experienced defense counsel will know the true meaning of a promise in a plea agreement that the state will recommend a particular sentence. They will understand that such a promise is scarcely worth the paper on which it is written, because police officers may appear at sentencing to advocate for sentences longer than the one the state promised to recommend. But inexperienced defense counsel will not be aware of this trick. And uncounseled defendants will certainly not be aware of it. Like Favion Lara and his attorney, they will be blindsided at sentencing by police officers who say something very different from what the prosecutor promised the state would recommend.

III. This is an important issue, and this case is an excellent vehicle for resolving it.

The rules governing plea bargaining are extremely important because most criminal cases are resolved through plea bargaining. In *Missouri v. Frye*, 566 U.S. 134, 143 (2012), the Court cited Justice Department data indicating that 97% of federal convictions and 94% of state convictions are the result of guilty pleas. As the Court has explained, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

The number of plea bargains dwarfs the number of trials, yet the Court's criminal procedure cases are nearly all about the rules governing trials, not plea bargains. The Court should devote more attention to defendants' constitutional rights during plea bargaining.

This issue is a sensible place to start. The issue has already arisen in several jurisdictions. *See* (in addition to the cases already cited that make up the split) *State v. Liskany*, 964 N.E.2d 1073, 1088 (Ohio Ct. App. 2011) (holding that where a police officer's letter to the sentencing court recommended a sentence longer than the one the state promised to recommend in the plea agreement, "because the letter was issued by an agent of the state, it constitutes an improper attempt to influence the sentencing by breaching the state's promise"); *State v. Chetwood*, 170 P.3d 436, 438 (Kan. Ct. App. 2007) (holding that where a plea agreement provided that the state would recommend probation, a police officer's recommendation of incarceration "amounted to a viola-

tion of the terms of the plea bargain."); *State v. Matson*, 674 N.W.2d 51, 57 (Wis. Ct. App. 2003) ("Because an investigative officer is the investigating arm of the prosecutor's office, principles of fairness and agency require us to bind the investigating officer to the prosecutor's bargain."); *Harris v. State*, 671 N.E.2d 864, 871 (Ind. Ct. App. 1996) ("Detective Kuzmik's sentencing statement did not represent a sentencing recommendation made by the State, but rather was based on his own personal opinion. As such, the State did not breach any portion of the written plea agreement."); *State v. Thurston*, 781 P.2d 1296, 1299 (Utah Ct. App. 1989) (noting the conflict between the Florida and Arizona Supreme Courts on this issue and concluding that "[w]e find the reasoning of the Arizona court to be persuasive").

Prosecutors and defense lawyers alike need to know whether it is consistent with due process for police officers to recommend sentences longer than those the prosecutor has promised that the state would recommend. The answer to this question will determine the wording of countless plea agreements. It will also have a profound effect on the most important decision defense lawyers must make in most cases—whether to advise their clients to accept the prosecutor's offer of a plea agreement.

This case is the perfect vehicle in which to address the question presented. The issue was squarely raised and decided below. This case has the ideal facts, because Officer Sullivan was simultaneously an investigating officer and a victim of the crime, so the Court will be able to decide whether an officer's status as a victim has any bearing on whether the officer may constitutionally undermine the prosecu-

tor's promise. And the Court's decision will have enormous consequences for Favion Lara. The Court's resolution of the question presented will decide whether Lara, who at the age of 17 fired two shots in a foolhardy attempt to distract the police, will grow old in prison or whether he will be released with much of his adult life still ahead.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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