No. 17-670

In the Supreme Court of the United States

JOEL HENRIK STONE,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The State does not dispute that federal Courts of Appeals and state courts of last resort are squarely divided on the question presented: whether the Fifth Amendment's protection from double jeopardy attaches when the court accepts a defendant's guilty plea. That is a threshold question in the double jeopardy inquiry, and that was the dispositive issue in the Montana Supreme Court's decision below.

If jeopardy does attach, the next question is whether the proceeding ended in a manner that bars reprosecution. *Martinez v. Illinois*, 134 S. Ct. 2070, 2074 (2014). All of the State's arguments against granting certiorari are directed toward this second question. But that is not the question presented. That is a question to be answered on remand after this Court first decides the threshold question that has caused such disagreement in the courts below. None of the State's arguments justify ignoring the deep split on this core constitutional protection.

First, the State argues that this Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984), provides the framework for applying the double jeopardy clause to guilty pleas. BIO 8-10. But *Johnson* did not decide when jeopardy attaches to a guilty plea. And it certainly did not conclude that jeopardy categorically does not attach to a guilty plea until the court enters judgment or sentences the defendant, as the Montana Supreme Court held here. *Johnson* addressed only the second question in the analysis, and it did so in a case fundamentally different from this one.

Second, the State argues that lower courts unanimously hold that the government is not precluded

from reinstating charges when the defendant repudiates the plea agreement. BIO 11-13. Again, this argument is directed at the second question in the double jeopardy analysis rather than the question presented. Regardless, the argument is beside the point because Stone never repudiated his plea agreement. Rather, *the State* moved to have Stone's guilty plea set aside, and the court granted the State's motion *over Stone's objection*.

Third, the State argues that there is no split because the cases conflicting with the Montana Supreme Court's decision did not involve an invalid guilty plea. BIO 14-18. Yet again, the State's argument is directed at the second rather than the first question in the double jeopardy analysis. The Montana Supreme Court did not hold that jeopardy does not attach to an invalid guilty plea, but that it does not attach to a guilty plea *at all*. There is a clear split of authority on that issue, which is the question presented. A number of circuit courts and state courts of last resort have held that jeopardy *does* attach when the court accepts a defendant's guilty plea; other such courts (including the Montana Supreme Court) have held that it categorically does not.

This Court should grant certiorari to decide this "longstanding circuit split about when double jeopardy protections kick in after a guilty plea." *United States v. Patterson*, 406 F.3d 1095, 1101 (9th Cir. 2005) (Kozinski, J., dissenting from denial of reh'g en banc).

I. This Court Has Not Decided The Question Presented, Which Was The Dispositive Question Below.

1. Neither *Ohio v. Johnson* nor any other decision of this Court has resolved the question presented: whether jeopardy attaches when the court accepts a defendant's guilty plea.

For both jury trials and bench trials, this Court has determined when jeopardy attaches. *Serfass v. United States*, 420 U.S. 377, 388 (1975). And it has done so using bright-line tests: In a jury trial, jeopardy attaches when a jury is empaneled and sworn; in a nonjury trial, it attaches when the court begins to hear evidence. *Martinez*, 134 S. Ct. at 2075.

If jeopardy has attached, the Court then asks whether the proceeding ended in such a manner that bars the defendant's retrial. *Id.* at 2075-76. In contrast to the first question, here the Court has generally *not* adopted broad bright-line rules, but instead examines the specifics of the proceedings in which the defendant was in jeopardy. For instance, if the first proceeding ended in a mistrial, double jeopardy generally does not bar a second trial if the defendant moved for the mistrial, but it may do so if the prosecution intentionally goaded the defendant into so moving. *See Oregon v. Kennedy*, 456 U.S. 667, 673 (1982).

Even though this Court has recognized that almost all convictions are the result of guilty pleas, *Missouri v. Frye*, 566 U.S. 134, 143 (2012), it has not determined a point at which jeopardy attaches when a defendant pleads guilty. In other words, the question presented is unresolved: criminal law is missing a

clear, bright-line rule for the third circumstance in which jeopardy can attach.

The State argues that *Johnson* set out the framework for applying the Double Jeopardy Clause to guilty pleas. BIO 8-10. But *Johnson* did not address the question of when jeopardy attaches. It dealt only with the second question: whether, if jeopardy attached, further prosecution was barred. Pet. 21-22. And it did so only as applied to a defendant who pleaded guilty to the lesser charges in an indictment over the state's objection, 467 U.S. at 496, which are not the circumstances here, Pet. 22-23. *Johnson* did not suggest, much less hold, that jeopardy does not attach upon the court's acceptance of a guilty plea.

2. The State argues that the Montana Supreme Court "followed the framework and principles set forth in *Johnson*," BIO 9, but in fact the opinion below does not even mention or cite *Johnson*, let alone "follow [its] framework." Instead, the Montana Supreme Court focused on the threshold question (the question presented in this petition): "whether jeopardy has attached in the first instance." Pet. App. 7a-8a ("Before a question of double jeopardy arises, there must be an initial determination as to whether jeopardy has attached in the first instance. [Citation.] The State argues Stone's guilty plea was not a conviction or acquittal and therefore jeopardy did not attach. Stone insists jeopardy attached when the District Court accepted his guilty plea. We are not convinced.").

The State argues that the Montana Supreme Court followed *Johnson* because its decision discussed finality interests. BIO 9-10. But that discussion made no

difference to the court's reasoning, which rested solely on the court's determination that jeopardy does not attach until acquittal or conviction, and thus categorically cannot at the plea stage. Pet. App. 10a ("Jeopardy did not attach to Stone's guilty plea, as he had not been convicted of a crime per Montana statute.").

Thus, the Montana Supreme Court concluded that the Double Jeopardy Clause is never implicated when a defendant pleads guilty until the court enters judgment or sentence. Because that issue is clearly presented, has never been resolved by this Court, and divides the lower courts, certiorari is warranted.

II. There Is A Clear Split Among Lower Courts On The Question Presented.

1. The State argues that courts unanimously hold that the Double Jeopardy Clause does not prevent the government from reinstating charges where the defendant has moved to vacate an invalid plea. BIO 11-13. That there is agreement on this point is unremarkable because the rule identified by the State is essentially analogous to the rule applied to mistrials. *See Kennedy*, 456 U.S. 673. But, as with mistrials, it is a rule that concerns not whether jeopardy has attached—the question resolved by the Montana Supreme Court and presented in this petition—but whether, if jeopardy attached, the subsequent prosecution is barred.

Regardless, the State's argument rests on a faulty premise because it was not Stone who moved to vacate the plea, but the State, and Stone *objected*. Response to Brief Regarding Continued Prosecution of Count I, Montana v. Stone, No. DC-13-0395 (Dec. 23, 2013), Dkt. No. 29 (State's brief requesting that the

court void the plea agreement so that the State could proceed to trial on a different charge); Reply to the State's Response to Defendant's Point Brief, Montana v. Stone, No. DC-13-0395 (Jan. 14, 2014), Dkt. No. 31 (Stone's brief arguing that the court may not vacate his guilty plea over his objection). Thus, even if courts agree that defendants who successfully move to have their pleas set aside may generally be reprosecuted, that would not decide Stone's case (let alone the question presented).

But to be clear, this issue is ultimately not relevant to the circuit split, the question presented, or the ground on which the Montana Supreme Court resolved the case, all of which turn on when jeopardy attaches, *not* on whether, if jeopardy has attached, retrial would nevertheless be permissible.

2. The State also argues that the cases on the other side of the split of when jeopardy attaches are not in conflict with the Supreme Court of Montana. BIO 14-18.

But as the Petition explains, Pet. 9-12, the Second, Fifth, Sixth, Ninth, and Eleventh Circuits, and a number of state courts of last resort, have explicitly held that jeopardy attaches upon the court's acceptance of a guilty plea, precisely the position rejected by the Montana Supreme Court. Under that approach, any subsequent prosecution must be analyzed under Double Jeopardy Clause principles to determine whether it is permitted. See, *e.g.*, *United States v. Patterson*, 381 F.3d 859 (9th Cir. 2004) (jeopardy attached when the court accepted the defendant's guilty plea, and subsequent conviction violated double jeopardy); *Fransaw v. Lynaugh*, 810 F.2d 518 (5th

Cir. 1987) (jeopardy attached when the court accepted the defendant's guilty plea, but subsequent prosecution was not barred because the defendant repudiated the plea bargain).

The First and Third Circuits, and other state courts of last resort, including now the Supreme Court of Montana, have held the exact opposite—that jeopardy categorically does *not* attach when the court accepts a defendant's guilty plea. Pet. 12-14. Thus, no matter how the case proceeds, defendants in those jurisdictions who plead guilty have no protection from double jeopardy unless and until they reach entry of judgment or sentencing.

It is irrelevant that, as the State argues, the cases in these other courts did not "involve prosecution for charges that the government agreed to dismiss in exchange for an invalid guilty plea." BIO 14. There is no authority, either in this Court's case law or in the cases that form the circuit split, for the proposition that the question of *when jeopardy attaches* should depend on the factual circumstances surrounding the prosecution and guilty plea. Those circumstances may be relevant to the question of whether subsequent prosecution is barred, but there must be a clear, bright-line rule regarding when jeopardy attaches. See *supra* at 3.

The State does not (and cannot) deny the clear split in authority on when jeopardy attaches.

In *Patterson*, for example, the defendant pleaded guilty to intentionally manufacturing marijuana plants, but he agreed to litigate the amount of plants at sentencing, and the court accepted his plea. 381 F.3d at 861. Having the court determine the number

of plants would have been unconstitutional, however, so the court invalidated the guilty plea and scheduled a jury trial. *Id.* at 862. The jury convicted Patterson of intentionally manufacturing 100 or more marijuana plants. *Ibid.* The Ninth Circuit held that jeopardy attached when the court accepted Patterson's guilty plea, and that although the district court could reject the plea agreement, it could not vacate Patterson's plea on the government's motion. *Id.* at 864-65. Thus, the court vacated the conviction and sentence from the jury trial and reinstated the original guilty plea. *Id.* at 866.

If Patterson's case were to arise in Montana, his conviction from the jury trial would stand. A Montana court, following the opinion of the Supreme Court of Montana in this case, would stop its analysis at step one and conclude that, because jeopardy does not attach until judgment or sentence, it never attached to Patterson's guilty plea.

That the Ninth Circuit and the Montana Supreme Court disagree about this threshold question of how to apply a fundamental constitutional right in a commonplace context (guilty pleas) is particularly problematic because Montana is within the Ninth Circuit. Thus, identical conduct—a defendant's pleading guilty—has different constitutional significance depending on whether it occurs in federal or state court even though that right applies equally in both state and federal prosecutions. See *Benton v. Maryland*, 395 U.S. 784 (1969).

This split, which implicates not just Montana and the Ninth Circuit but many other courts as well, is deep, entrenched, and widely recognized. *See Bally v.*

Kemna, 65 F.3d 104, 108 (8th Cir. 1995); *Commonwealth v. Dean-Ganek*, 960 N.E.2d 262, 269 n.11 (Mass. 2012); *United States v. Patterson*, 406 F.3d 1095, 1101 (9th Cir. 2005) (Kozinski, J., dissenting from denial of reh'g en banc). This case presents a clean vehicle to resolve it because the Montana Supreme Court decided the issue categorically at the first step.

CONCLUSION

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

Respectfully submitted,

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