No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has yet to resolve the question lying at the core of this appeal, which has produced a split amongst this country's federal and state judiciary: 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, or may the defendant be re-indicted later for charges constituting the same offense. The absence of a clear answer has resulted in three discrete doctrines applied by the lower courts.

Petitioner Travis Soto ("Soto") claimed in 2006 that he had accidentally killed his young child in an all-terrain vehicle ("ATV") accident. He was indicted for involuntary manslaughter predicated on a separate felony charge of child endangering. Soto and Respondent, the State of Ohio, negotiated an agreement providing for entry of a guilty plea to child endangering in return for dismissal of the involuntary manslaughter charge. Soto served his five-year sentence, was released, and resumed a normal life.

Well after Soto completed the sentence for his crime, he proceeded to the Putnam County Sheriff's Office to state that he had beaten his child to death and staged the purportedly fatal ATV accident to hide the crime.

Despite the earlier plea arrangement and the sentence he had fully served, Soto was charged with aggravated murder and murder predicated on a separate charge of felonious assault. He moved to dismiss these charges, claiming that any further prosecution would be barred by the Double Jeopardy Clause.

The Supreme Court of Ohio held that the rights preserved by the Double Jeopardy Clause had not attached to the involuntary manslaughter charge before it was dismissed in 2006 and concluded that the motion to dismiss the new murder charges was properly denied. *App. 7-8.* If this is the rule, of what value is dismissal of a charge to a defendant who in return bargains away and waives the fundamental right to a trial by a jury of his or her peers? If jeopardy does not attach under such circumstances, vital finality interests protected by the Double Jeopardy Clause will be undermined. In a criminal justice system in which nearly all criminal cases are resolved by plea agreement, this Court's answer to the question presented would have enormous national impact. The Ohio Court's opinion thus raises an important question of federal law that has not been, but should be, settled by this Court.

PARTIES TO THE PROCEEDING

Petitioner is Travis Soto, a citizen of the United States of America. Respondent is the State of Ohio.

DIRECTLY RELATED PROCEEDINGS

State v. Soto, No. 2018-0416, Supreme Court of Ohio. Judgment entered Oct. 31, 2019.

State v. Soto, No. 12-17-05, Court of Appeals of Ohio for the Third Appellate District. Judgment entered Feb. 5, 2018.

State v. Soto, No. 2016 CR 00057, Court of Common Pleas for Putnam County, Ohio. Judgment entered Apr. 13, 2017.

State v. Soto, No. 2006 AP 00017, Court of Appeals of Ohio for the Third Appellate District. Judgment entered Nov. 3, 2006.

State v. Soto, No. 2006 CR 00019, Court of Common Pleas for Putnam County, Ohio. Judgment entered Sept. 5, 2006.

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The opinion of the Supreme Court of Ohio in docket number 2018-0416 was issued on October 31, 2019, and it is published. *State v. Soto*, __ Ohio St.3d __, 2019-Ohio-4430, __ N.E.3d __, 2019 WL 5606913. The opinion of the Court of Appeals of Ohio for the Third Appellate District in docket number 12-17-05 was issued on February 5, 2018, and it is published. *State v. Soto*, 2018-Ohio-459, 94 N.E.3d 618. The judgment entry and decision of the Court of Common Pleas for Putnam County, Ohio, was entered Apr. 13, 2017, and it is not published.

STATEMENT OF JURISDICTION

This Court's jurisdiction is drawn from 28 U.S.C. § 1257(a). On January 17, 2020, Justice Sotomayor granted an application to extend the time to file a petition for a writ of certiorari from January 29, 2020, to February 28, 2020. *Soto v. Ohio*, United States Supreme Court No. 19A797.

STATUTORY AND CONSTITUTIONAL AUTHORITY INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

On the date that Soto was indicted under this section, Ohio Revised Code § 2903.01 stated in pertinent part:

> (C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.
>
> . . .
>
> (F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

On the date that Soto was indicted under this section, Ohio Revised Code § 2903.02 stated in pertinent part:

> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.
>
> . . .
>
> (D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

On the date that Soto was indicted under this section, Ohio Revised Code § 2903.11 stated in pertinent part:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn[.]
>
> . . .
>
> (D)
>
> (1)

> (a) Whoever violates this section is guilty of felonious assault.

On the date that Soto was indicted under this section, Ohio Revised Code § 2903.04 stated in pertinent part:

> (A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.
>
> . . .
>
> (C) Whoever violates this section is guilty of involuntary manslaughter.

On the date that Soto was indicted under this section, Ohio Revised Code § 2919.22 stated in pertinent part:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.
>
> . . .
>
> (E)
>
> > (1) Whoever violates this section is guilty of endangering children.
> >
> > (2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following:

. . .

> (c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree[.]

Rule 11 of the Ohio Rules of Criminal Procedure states:

> (C) Pleas of guilty and no contest in felony cases.
>
> . . .
>
> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> . . .
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

STATEMENT OF THE CASE

Early in 2006, Soto was investigated regarding the death of his young son. *App. 47-48.* He made varying admissions to law enforcement, but in every story his son was accidentally killed after being struck by an ATV that Soto operated. *App. 4.* After hearing this, and after conducting an autopsy, the Lucas County Coroner "concluded that the child died of multiple blunt force trauma caused by an ATV accident." *App. 48.*[1] Soto was indicted on March 31, 2006 ("2006 Indictment"), for involuntary manslaughter, which was predicated on a separate charge of child endangering. *App. 29, 47-48.* Involuntary manslaughter is defined under Ohio Revised Code § 2903.04(A) as causing "the death of another . . . as a proximate result of the offender's committing or attempting to commit a felony." *App. 39.* Under the version of Ohio Revised Code § 2919.22(A) and (E)(2)(c) in effect at the time, the child endangering charge was elevated to a third-degree felony by virtue of the "serious physical harm" that Soto had caused. *Id.*

The State of Ohio negotiated an agreement with Soto providing that he would enter a guilty plea to child endangering and the involuntary manslaughter charge

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1 The parties did not disagree at any earlier phase regarding the facts of the prior litigation, and the record in this matter does not include the record of Soto's 2006 prosecution. *App. 3.* This statement of the facts has relied upon the judgment entry and decision of the Court of Common Pleas for Putnam County, Ohio, which does not differ from the representations of the State of Ohio before that court.

would be dismissed. *App. 48.* The trial court accepted Soto's plea and sentenced him to a five-year term in prison, which he served. *App. 3, 48.*

Several years after his release from prison, Soto arrived at the Putnam County Sheriff's Office on July 25, 2016. *App. 48.* He announced that he had killed his son and fabricated the ATV accident. *Id.* Using this statement, and after reviewing photographs and the 2006 coroner's report, an expert "pediatric abuse specialist . . . concluded that the child died of multiple blunt force trauma" caused by Soto. *Id.*

The State of Ohio acquired a new indictment ("2016 Indictment"), which charged aggravated murder and murder predicated on a separate charge of felonious assault. *App. 48-49.* The aggravated murder count specifically alleged under Ohio Revised Code § 2903.01(C) that Soto had caused "the death of another who is under thirteen years of age." *Id.* The 2016 Indictment charged murder, alleging that he had caused "the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree." *Ohio Revised Code § 2903.02(B); see App. 49.* The underlying charge was felonious assault under Ohio Revised Code § 2903.11(A)(1), a first-degree felony, alleging that he had "knowingly" caused "serious physical harm" to another. *See App. 49.*

On October 11, 2016, Soto filed his Motion to Dismiss on the Grounds of Double Jeopardy ("Motion"), which sought dismissal of the 2016 Indictment under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *App. 4, 47.* After the State of Ohio opposed the Motion, the trial court denied it. *App. 53.*

The trial court held that under this Court's decision in *Blockburger v. United States*, 284 U.S. 299 (1932), Soto had not been charged in the 2016 Indictment with the "same offense" as he had been in the 2006 Indictment. *App. 49-50.*

Soto filed a lawful interlocutory appeal to the Court of Appeals of Ohio for the Third Appellate District and assigned as error that the Motion should not have been overruled. *App. 32-34.* He argued that under *Blockburger* the charge of involuntary manslaughter in the 2006 Indictment was a lesser included offense of the murder and aggravated murder charges in the 2016 Indictment. *App. 33-36.* The Third District Court of Appeals reversed the trial court's order overruling the Motion and remanded the matter for further proceedings. *App. 44.* The appellate court held that although Soto "was not convicted of Involuntary Manslaughter, he was in jeopardy of being tried and convicted of Involuntary Manslaughter but-for the plea agreement, resulting in his conviction and sentence for the predicate offense of Child Endangering." *App. 37.* The court determined that involuntary manslaughter was a lesser included offense of murder and aggravated murder—the trial court had misapplied *Blockburger*, finding only that murder and aggravated murder had elements not found in involuntary manslaughter. *App. 38.* And it was observed that "a dismissal of the Involuntary Manslaughter in the context of such a plea agreement is akin to the double jeopardy protection and finality afforded to an acquittal." *App. 38.*

The State of Ohio sought and was granted discretionary review in the Supreme Court of Ohio. *See App. 2.* The state's High Court reversed the judgment of the court

of appeals and remanded the matter to the trial court for further proceedings. *App. 3, 11.* The Court first held that jeopardy had not attached to the involuntary manslaughter charge because "[f]or charges to which the defendant did not plead guilty, jeopardy does not attach until a jury is empaneled or, in a bench trial, when the judge starts taking evidence." *App. 8.* In the absence of these triggering events, jeopardy had attached "only as to the child-endangering charge to which [Soto] pleaded guilty" according to the Court's majority. *Id.* Because Soto had never "argued that child endangering constitutes the same offense as murder and aggravated murder," and because the majority was convinced that each of these crimes had an element that the other did not, the Court held that Soto could be prosecuted for murder and aggravated murder. *App. 9.*

Justice Michael P. Donnelly dissented, highlighting that the parties on each side of a negotiated plea agreement receive benefits and expect finality. *App. 16-17, 23.* Justice Donnelly also registered agreement with the appellate court's decision, observing that "while Soto was not convicted of involuntary manslaughter, he would have been in jeopardy of being tried and convicted of involuntary manslaughter but for the plea agreement resulting in his conviction and sentence for the predicate offense of child endangering." *App. 24.*

REASONS FOR GRANTING THE PETITION

Petitioner Soto now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted.

I. INTRODUCTION

In the history of this Court's jurisprudence regarding the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, there has never been a definitive answer to the determinative question in these proceedings: whether the rights preserved by the Double Jeopardy Clause attach to charges that are dismissed as a condition of and during execution of a plea agreement. The nature of the fundamental protection against successive prosecutions and its history both weigh in favor of taking up this appeal and answering the question presented in the affirmative.

The issue should be settled nationally because a split between the decisions of federal courts of appeals has developed and the Supreme Court of Ohio has now taken a side. *See United States v. Faulkner*, 793 F.3d 752, 758 (7th Cir. 2015). Moreover, the rule adopted by the State of Ohio thwarts any finality to judgments reached through a plea agreement, which is the most pervasive manner by which criminal prosecutions are resolved in our nation. The rule that jeopardy does not attach to charges dismissed during execution of a plea deal risks eroding the common expectation among the public that when one agrees to enter a guilty plea to some charges in an indictment in return for dismissal of other charges, one will not later

be prosecuted for the dismissed portions of the indictment. Accordingly, the question in this appeal has taken on national significance, and this Court should therefore issue a writ of certiorari to the Supreme Court of Ohio.

II. THE ORIGIN AND PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution directs that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." This provision was ratified and incorporated into the text of the United States Constitution along with the rest of the Bill of Rights on December 15, 1791. But it has been recognized that the protections preserved by the Double Jeopardy Clause have far older roots in the common law of England, the Judeo-Christian legal tradition, and even the law of the Greco-Roman period. *Benton v. Maryland*, 395 U.S. 784, 795 (1969); David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 Wm. & Mary Bill Rts. J. 193, 196-221 (2005). Protections against being twice put in jeopardy of criminal punishment made their way into the codified laws of some of the British colonies and several of the early state constitutions, which served as a model for the Double Jeopardy Clause of the United States Constitution. Rudstein at 221-26. The right is now regarded as fundamental, and the Double Jeopardy Clause has been incorporated through the Fourteenth Amendment to the United States Constitution

and rendered applicable against the states. *Benton* at 795-96. The constitutional provision finds several applications:

> The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

This Court has explained the longstanding conceptual underpinning of the protections preserved by the Double Jeopardy Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that 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, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). The rule "represents a constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). The "heavy personal strain which a criminal trial represents for the individual defendant" has justified defining "jeopardy" with significant breadth: "These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *Id.*

To the end of securing the finality of a prosecution, "courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.' " *Serfass v. United States*, 420 U.S. 377, 388 (1975) (quoting *Jorn* at 480). This Court has decided that for "a jury trial, jeopardy attaches when a jury is empaneled and sworn," and for "a nonjury trial, jeopardy attaches when the court begins to hear evidence." *Id.* This rule "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Green* at 188. But this Court has not yet considered whether attachment occurs during execution of a negotiated plea agreement and acceptance of a guilty plea. The principle of attachment "is an integral part" of the federal constitutional doctrine that cannot be altered by state laws. *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

This Court has given "absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision." *Burks v. United States*, 437 U.S. 1, 16 (1978). But court action may also be given the effect of an acquittal. Much like a judgment of acquittal by a trial court on the basis of insufficient evidence, a reversal of a conviction for lack of sufficient evidence on appeal bars retrial under the Double Jeopardy Clause. *Id.* at 17-18. This Court has "emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action," but rather the determinative factor is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

Convictions after a guilty plea have been given the same effect as convictions by a jury's verdict—both bar a second prosecution for the same offense. *E.g., Brown*, 432 U.S. 161. "Undeniably, a defendant is considered to be convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him, and jeopardy therefore attaches with acceptance of his guilty plea." *United States v. Hecht*, 638 F.2d 651, 657 (3d Cir. 1981).

III. THE OPINION OF THE OHIO SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF A UNITED STATES COURT OF APPEALS

Whether the rights preserved by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution attach to charges that are dismissed as a condition of and during execution of a plea agreement is an unsettled question that has engendered disagreement between the United States courts of appeals. Having taken a position in this conflict, the Supreme Court of Ohio "has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals." *Sup. Ct. R. 10(b).*

In *Faulkner*, 793 F.3d 752, the United States Court of Appeals for the Seventh Circuit highlighted the conflict. The court observed that the United States Court of Appeals for the Second Circuit, on the one hand, has held that jeopardy does not attach to a charge dismissed with prejudice pursuant to a plea agreement, while the Tenth Circuit had applied double jeopardy protections to a charge that was dismissed

with prejudice as part of a plea agreement prior to trial. *Id.* at 758. *Compare United States v. Dionisio*, 503 F.3d 78 (2d Cir. 2007), *with United States v. Mintz*, 16 F.3d 1101 (10th Cir. 1994), *and United States v. Holland*, 956 F.2d 990 (10th Cir. 1992). The *Faulkner* panel concluded that it did not need to "wade into this debate" given that an answer would not determine the outcome in that case. *Faulkner* at 758.

In *Mintz*, defendants were charged in the United States District Court for the Southern District of Florida with three charges in a multi-count indictment: "conspiracy to import marijuana," "importation of marijuana," and "conspiracy to possess marijuana with intent to distribute." *Mintz* at 1102. The defendants pled guilty to the first count, and the court dismissed the other charges with prejudice. *Id.* at 1102-03. On the same day that they were sentenced to 121 months in prison by the federal court in Florida, the defendants were charged in a separate indictment in the United States District Court for the District of Kansas with conspiracy to possess marijuana with intent to distribute and possession with intent to distribute. *Id.* at 1103. They moved to dismiss the charges on double jeopardy grounds, asserting that the conspiracies charged in the two cases "were part of one continuing conspiracy." *Id.* The federal court in Kansas dismissed the conspiracy count but denied the motion as to the possession count. *Id.*

The defendants appealed the denial of their motion, and the United States cross-appealed to challenge the court's dismissal of the conspiracy charge. *Mintz* at 1103. The United States Court of Appeals for the Tenth Circuit affirmed the district court's order dismissing the conspiracy count, holding that jeopardy attaches to a

charge dismissed with prejudice at the time of a guilty plea in an earlier proceeding. *Id.* at 1103, 1106. The *Mintz* decision remains good law in the Tenth Circuit—another panel of the same court later acknowledged that "*Mintz* appears to be in tension with other decisions of th[e] court," including *United States v. King*, 581 F.2d 800, 801 (10th Cir. 1978), and *United States v. Marchese*, 46 F.3d 1020, 1022-23 (10th Cir. 1995), but it was not necessary to address the merits of the issue and the holding from *Mintz* was left undisturbed. *United States v. Angilau*, 717 F.3d 781, 787 n.1 (10th Cir. 2013).

Neither of the cases cited in the *Angilau* decision answer the question raised in this appeal. In *King*, the court considered the double jeopardy implications of a dismissal entered over the objection of the United States and before a plea or trial. *King*, 581 F.2d at 801-02. In *Marchese*, the court considered whether jeopardy had attached to mail-fraud and money laundering charges that were dismissed before a plea or trial where the court had considered some evidence regarding whether funds could be traced in support of the motion to dismiss. *Marchese*, 46 F.3d at 1022-23. The court held that because "tracing is not a requisite to establishing a case of mail fraud, the evidence surrounding this issue would not constitute a defense on the merits" and "the court's dismissal did not act as the functional equivalent of an acquittal." *Id.* at 1023.

In *Dionisio*, on the other hand, the United States Court of Appeals for the Second Circuit adopted a fact-based analysis but held that jeopardy did not attach to counts that were dismissed with prejudice as part of the plea agreement. *Dionisio*,

503 F.3d at 85-89. The defendant was charged in the United States District Court for the Eastern District of New York with multiple counts arising out of a racketeering conspiracy with the La Cosa Nostra crime family occurring from 1993 to 2001. *Id.* at 79-80. Pursuant to a plea agreement, he pled guilty to one count of substantive racketeering, and the government moved to dismiss all the other counts charged in the indictment with prejudice. *Id.* at 80. The New York federal court accepted the plea and sentenced the defendant to prison. *Id.* Years later, the defendant was again indicted in the same district court on a racketeering charge for conduct that allegedly took place from 1991 to 1999. *Id.* He moved to dismiss this second indictment on double jeopardy grounds, asserting that it "was based on the same conduct as that which formed the predicate of [his earlier] indictment." *Id.* The trial court denied the motion and held "that 'jeopardy did not attach when the racketeering conspiracy charge was dismissed with prejudice from the 2001 indictment pursuant to defendant's plea agreement.' " *Id.* at 81 (quoting *United States v. Dionisio*, 415 F. Supp. 2d 191, 199 (E.D.N.Y. 2006)).

The defendant appealed, and the Second Circuit panel affirmed the district court's order. *Dionisio*, 503 F.3d at 81, 89. After agreeing with the trial court that no authorities from this Court answer " 'whether jeopardy attaches when a charge is dismissed with prejudice pursuant to a plea agreement,' " the court of appeals detailed the way that this Court described the mechanism of attachment in *Serfass* and *Martin Linen Supply Co*. *Id.* at 82-84. Synthesizing a "framework" from those cases, the Second Circuit held that "the key issue, even in a pretrial context, is

whether the disposition of an individual's indictment entailed findings of facts on the merits such that the defendant was placed in genuine jeopardy by the making of such findings." *Id.* at 83. By way of example, the court suggested that "a plea agreement in which the court was directly involved in a defendant's decision to plead guilty to two counts, in exchange for an agreement to drop with prejudice a third count, all on the basis of findings of certain facts which support that agreement, might perhaps constitute a pretrial fact-finding that implicated jeopardy in its proper sense of risk of exposure." *Id.* at 84 (footnote omitted). Yet in light of the limited record in *Dionisio*, the court of appeals held that there was no reason to believe that the dismissal operated as "a resolution of any factual elements that went to the merits of the charges." *Id.* at 89.

Still other federal courts of appeals have held that jeopardy does not attach to charges dismissed as a condition of and during execution of a plea agreement. *See, e.g., United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990) (emphasis added) (concluding without analysis that "[i]n the case of a plea bargain, *with respect to the offense pleaded to*, jeopardy normally attaches when the court unconditionally accepts a guilty plea"). Under this convictions-only regime, courts have permitted jeopardy to attach to a defendant's previous convictions pursuant to a plea but have summarily declined to even consider whether later charges were the same as those that had been dismissed as a part of the plea agreement. *United States v. Nyhuis*, 8 F.3d 731, 735 n.2 (11th Cir. 1993) (citing *Baggett* at 1550) ("We may disregard the . . . conspiracy charge in the Michigan indictment which was dismissed pursuant to [defendant's]

plea agreement because jeopardy did not attach to that dismissed charge."); *United States v. Soto-Alvarez*, 958 F.2d 473, 482 n.7 (1st Cir. 1992) (emphasis added) ("jeopardy ordinarily does not attach to counts which are dismissed *and on which no finding of guilty is made*."). The result is that after having accepted a plea that spares the prosecution of the time, expense, and uncertainty of a trial and potential appeals, the defendant loses any benefit of the bargain once the dismissed charges are revived or a greater version of the same offense is charged.

The Supreme Court of Ohio embraced this troubling "heads I win tails you lose" approach when weighing in on the conflict. The majority observed in conclusory fashion that "because the involuntary-manslaughter charge was dismissed prior to the empaneling of a jury, jeopardy never attached to that charge." *App. 3.* The view of dissenting Justice Donnelly was rejected:

> The dissent advances the novel proposition that double jeopardy attaches to a charge dismissed under a plea agreement—here, the involuntary-manslaughter charge. In support of this view, the dissent points to cases holding that jeopardy attaches when a court accepts a guilty plea. Dissenting opinion at ¶ 37-38. Of course, that's true. But what the dissent neglects to mention is that the principle applies only to the charges to which a defendant pleads guilty.

App. 7-8. The majority appeared to be unaware that Justice Donnelly's position was far from "novel," as it had been adopted more than twenty years ago in *Mintz*.

There are now at least three approaches reflected in the decisions of the United States courts of appeals for answering the question raised in Soto's appeal to this Court. Only the rule adopted by the Third District Court of Appeals below and in

Mintz—that jeopardy does attach to those charges dismissed during execution of a negotiated plea agreement—adequately protects the finality interests at play during such proceedings. The fact-based analysis utilized in *Dionisio* will find uneven application and invite re-litigation of the circumstances of a plea colloquy without adequately affording finality to the agreement of the parties to forego fact-finding in light of the proof available. And the convictions-only regime exemplified by *Baggett*, *Nyhuis*, *Soto-Alvarez*, and the decision of the Supreme Court of Ohio is entirely untethered from the conceptual underpinnings of the Double Jeopardy Clause. *See, e.g., Green*, 355 U.S. at 187 ("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"). Further review is appropriate in order to settle the issue nationally. *Sup. Ct. R. 10(b).*

IV. THIS DISPUTE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. THIS COURT HAS NOT SETTLED WHETHER JEOPARDY ATTACHES TO CHARGES DISMISSED DURING EXECUTION OF A PLEA DEAL

The confusion below and between the various courts that have struggled to achieve uniformity stems from the fact that this Court has not yet resolved the

question presented. Cases decided by this Court have set forth clear rules for determining when jeopardy attaches to charges resolved by trial and when cases are dismissed pretrial with no factual findings or consequences for a defendant. But this Court has not yet spoken about the interplay between the Double Jeopardy Clause and plea bargains, which are pervasive in the criminal justice system. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992) ("[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system"). Because an answer will inform the import of dismissed charges in almost every criminal case that has recently been or will be decided, this Court should take up whether charges dismissed as part of a plea agreement should be accorded the same degree of finality as charges resolved after a trial begins. *Sup. Ct. R. 10(c).*

Nearly one half-century ago, this Court held that the critical protections embodied in the Double Jeopardy Clause attach "when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence." *Martin Linen Supply Co.*, 430 U.S. at 569 (citing *Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (White, J., dissenting)). As recently as 2014, and recognizing confusion in the lower courts, this Court reaffirmed that principle. *See Martinez v. Illinois*, 572 U.S. 833 (2014).

In *Martinez v. Illinois*, the defendant was charged with aggravated battery and mob action and was brought to trial nearly four years after the indictment. *Martinez v. Illinois* at 834. Prior to trial, the Illinois court granted numerous continuances to

allow the government adequate time to locate the complaining witnesses. *Id.* at 835. However, on the morning of trial, the complaining witnesses "were again nowhere to be found." *Id.* at 835. The parties moved forward with jury selection, hoping the complaining witnesses would arrive during that time. *Id.* Once the jurors were selected and the government was still not prepared to move forward, the court delayed swearing the jurors and instead called the other cases on the docket to allow some additional time for the complaining witnesses to arrive. *Id.* Eventually, when there were no more options for delay, the government filed a motion for continuance asserting that it could not proceed without the complaining witnesses. *Id.* The court denied the motion and the jury was sworn. *Id.* at 836-37. When trial began, the government declined to present its case and the defense moved for a judgment of acquittal. *Id.* at 837. The court granted the defendant's motion and the government appealed, arguing that "the trial court should have granted a continuance." *Id.*

On appeal, the defendant argued that the appeal itself was improper under the Double Jeopardy Clause because he had been acquitted by the trial court's directed verdict of not guilty. *Id.* Relying, in part, on this Court's holding in *Serfass*, 420 U.S. at 391, the Illinois appellate court permitted the appeal, concluding that "because no witnesses were sworn and the state presented no evidence, jeopardy never attached and, therefore, the trial court's action was an appealable dismissal of the charges rather than a nonappealable acquittal." *People v. Martinez*, 2011 Il. App. 2d 100498, 969 N.E.2d 840, 846. The Illinois Supreme Court affirmed, finding:

> Because defendant was not placed in jeopardy, the circuit court's entry of directed verdicts of not guilty did not

> constitute true acquittals. In fact, we note that, in directing findings of not guilty in favor of defendant, the circuit court itself repeatedly referred to its action as a "dismissal" rather than an acquittal: it informed the jury that the "case is dismissed" against the defendant and stated in its written order that the "matter is dismissed." Under these facts, the interests protected by the double jeopardy clause "simply are not threatened in this case."

People v. Martinez, 2013 IL 113475, 371 Ill. Dec. 315, 990 N.E.2d 215, 225 (quoting *People v. Deems*, 81 Ill. 2d 384, 389, 43 Ill. Dec. 8, 410 N.E.2d 8 (1980)).

This Court reversed the Illinois Supreme Court, concluding that it "misread [the Court's] precedents in suggesting that the swearing of the jury is anything other than a bright line at which jeopardy attaches." *Martinez*, 572 U.S. at 839. The rule was applied, and this Court concluded that the defendant had been placed in jeopardy when the jury was sworn. *Id*. at 842. The directed verdict constituted an acquittal for purposes of the Double Jeopardy analysis. *Id*. ("the trial court's action was an acquittal because the court 'acted on its view that the prosecution had failed to prove its case' ").

This Court has also confronted the issue of whether jeopardy attaches to pretrial dismissals without factual findings or agreement by the parties. *See, e.g.*, *Ohio v. Johnson*, 467 U.S. 493 (1984). In *Johnson*, the defendant was charged with four separate counts in a single indictment—grand theft, aggravated robbery, involuntary manslaughter, and murder—all arising out of the same incident. *Id*. at 494. At arraignment, and over the government's objection, he pled guilty to the two lesser offenses of grand theft and involuntary manslaughter and not guilty to the greater charges. *Id*. He then moved to dismiss the aggravated robbery and murder

charges on double jeopardy grounds. *Id*. The trial court granted the motion over the state's objection. *Id*. The Ohio Court of Appeals and the Supreme Court of Ohio affirmed that decision. *Id*.

This Court granted a writ of certiorari and reversed, concluding that "acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending . . . has none of the implications of an 'implied acquittal' which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses." *Id*. at 501-02. Therefore, this Court said, "the principles of finality and prevention of prosecutorial overreaching" that the Double Jeopardy Clause is concerned with were not implicated. *Id*. at 501.

Neither *Johnson* nor the *Martin Linen Supply Co.* line of cases answers the critical question in this case regarding the effect of executing a plea agreement between the government and a defendant that resolves all of the charges in an indictment. Although *Johnson* addresses pretrial dismissal, it is not applicable. In *Johnson*, all four counts in the indictment were brought for trial at the same time. *Id*. at 496. "[N]o more than one trial of the offenses charged was ever contemplated," and the defendant's procedural choices, not the State's actions, caused the charges to be separated. *Id*. at 502. In the context of a plea agreement on the other hand, the State's choices also cause the disparate resolution of counts.

The lower courts' confusion regarding pretrial attachment also stems from this Court's decision in *Serfass*, 420 U.S. 377. Federal courts of appeals have relied on

that case in determining that jeopardy does not attach to charges dismissed prior to trial. *E.g.*, *United States v. Vaughan*, 715 F.2d 1373 (9th Cir. 1983); *Dionisio*, 503 F.3d 78.

In *Serfass*, the Court decided the narrow question of "whether a Court of Appeals has jurisdiction of an appeal by the United States from a pretrial order dismissing an indictment based on a legal ruling made by the District Court after an examination of records and an affidavit setting forth evidence to be adduced at trial." *Serfass* at 378-79. The petitioner in *Serfass* had refused to be inducted into the armed forces after his attempt to register as a conscientious objector was rejected. *Id.* at 379. He sought an order dismissing the ensuing indictment for "willfully failing to report for and submit to induction into the Armed Forces," asserting that the local board of the Selective Service had not adequately considered the merits of his request. *Id.* After briefing and oral argument to the district court, and after the petitioner's Selective Service file was submitted for review, the indictment was dismissed. *Id.* at 380-81. The trial court held that the "petitioner was 'entitled to full consideration of his claim prior to assignment to combatant training and service,' " but that the local board's order could be " 'reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review.' " *Id.*

The United States appealed the dismissal order, but the petitioner contended that "the Court of Appeals lacked jurisdiction because further prosecution was prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution." *Serfass* at 381. The Court of Appeals determined that it did

have jurisdiction to entertain the appeal because it was authorized by statute: "since petitioner had not waived his right to a jury trial, and no jury had been empaneled and sworn at the time the District Court ruled on his motion to dismiss the indictment, jeopardy had not attached and the dismissal was an appealable order." *Id.* at 381-82.

This Court recognized a conflict among the courts of appeals on whether the Double Jeopardy Clause would permit an appeal under the Criminal Appeals Act "from a pretrial order dismissing an indictment in these circumstances" and granted a writ of certiorari. *Serfass, 420 U.S.* at 383. Answering the statutory question, it was held that "Congress intended to authorize an appeal to a court of appeals in this kind of case so long as further prosecution would not be barred by the Double Jeopardy Clause." *Id.* at 387. And turning to the constitutional question, it was held:

> Under our cases jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment. Petitioner was not then, nor has he ever been, 'put to trial before the trier of facts.' The proceedings were initiated by his motion to dismiss the indictment. Petitioner had not waived his right to a jury trial, and, of course, a jury trial could not be waived by him without the consent of the Government and of the court.

Id. at 389. In reaching this conclusion, it was observed that the District Court never had any "power to make any determination regarding petitioner's guilt or innocence." *Id.* Indeed, the trial court was only empowered to enter the order dismissing the indictment upon a pretrial motion because it could be determined "without a trial on the merits." *Fed. R. Crim. P. 12(b)(1). See also Serfass* at 389 ("Petitioner's defense was raised before trial precisely because 'trial of the facts surrounding the

commission of the alleged offense would be of no assistance in determining' its validity.") (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)).

The decision in *Serfass* is not helpful to answer whether the rights preserved by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution attach to charges that are dismissed as a condition of and during execution of a plea agreement. Unlike the petitioner in *Serfass*, Soto and every other individual who enters a plea of guilty, nolo contendere, or "no contest" as it is called in Ohio, to any part of an indictment *does waive* the right to a jury trial. *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) ("By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers."); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Fed. R. Crim. P. 11(b)(1)(C) and (F)*; *Ohio Crim. R. 11(C)(2)(c)*. In both the federal and Ohio courts, it is the act of entering the plea that actually effects the waiver. *Fed. R. Crim. P. 11(b)(1)(C) and (F)* ("the court must inform the defendant of, and determine that the defendant understands, the following: . . . (C) the right to a jury trial; . . . (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere"); *Ohio Crim. R. 11(C)(2)(c)* ("by the plea the defendant is waiving the rights to jury trial").

This mechanism of waiver is precisely why jeopardy should attach at the moment that a plea is given and accepted. It was observed in *Boykin* that a "plea of guilty is more than a confession which admits that the accused did various acts; it is

itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin,* 395 U.S. at 242. In the federal system, trial courts are required at that time to assess the factual basis of a guilty plea. *Fed. R. Crim. P. 11(b)(3).* "The judge must determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.' " *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quoting *Fed. R. Crim. P. 11*, Notes of Advisory Committee on Criminal Rules.). This rule aids the same finality interests underpinning the Double Jeopardy Clause by creating proof in the record of "a guilty plea's voluntariness . . . in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary." *Id.*

In a state like Ohio, "the court need not take testimony upon a plea of guilty or no contest." *Ohio Crim. R. 11(C)(4).* But after the right to a jury trial is waived in such proceedings, execution of a plea agreement still has the effect of determining the facts that support a judgment of conviction. *See Boykin,* 395 U.S. at 242. Moreover, the lack of an assessment of the factual basis of a guilty plea has not been seen as a barrier to placing a conviction by plea on the same footing as a conviction by a jury trial for the purpose of determining whether jeopardy would bar a second prosecution. *See Brown*, 432 U.S. 161. If jeopardy attaches to *a conviction* entered without any sort of factual findings, the difference between an acquittal by jury and a dismissal during execution of a plea agreement is arguably semantic—the same rule should apply to both. *See also Mullreed v. Kropp*, 425 F.2d 1095, 1099-102 (6th Cir. 1970) (likening the jury's decision to acquit a defendant to the government's "refusal" to

seek a conviction on one criminal charge after a guilty plea to a lesser included charge). Most of the same interests undergirding the Double Jeopardy Clause justify such a holding. The likelihood of "embarrassment, expense and ordeal" and a "continuing state of anxiety and insecurity" resulting from the possibility of "repeated attempts to convict an individual for an alleged offense" are uniquely high if, after entering a guilty plea to some charges in return for dismissal of others, a person may still be re-indicted. *Green*, 355 U.S. at 187. Because the plea waives the right to a jury trial and forecloses submission of those same facts to a jury or the bench, jeopardy should attach to all charges resolved at the time of a plea.

B. AN ANSWER TO THE QUESTION PRESENTED WILL HAVE ENORMOUS NATIONAL IMPACT

At the time the Constitution was drafted, criminal cases were not resolved by guilty pleas. In fact, courts actively discouraged resolution of cases by guilty plea until the latter half of the nineteenth century. Albert W. Alschuler, *Plea Bargaining and its History*, 79 Colum. L. Rev. 1, 5, 8 (1979). *See also* Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 Federal Sentencing Reporter 4-5, 239 (April 2019/June 2019) ("Plea bargaining as it is known today is actually a relatively recent American invention that appeared first around the time of the American civil war, later became a tool of corruption during the early twentieth century, and eventually gained widespread use and legitimacy as a response to the burdens of overcriminalization.").

However, once adopted at the end of the nineteenth century, "plea bargaining became a dominant method of resolving criminal cases." Alschuler at 6. For example, just "[b]etween the early twentieth century and 1925, . . . pleas of guilty in the federal criminal justice system rose from 50 percent to 90 percent of convictions." Dervan, 31 Federal Sentencing Reporter at 240. These numbers remained steady into the second half of the twentieth century. *See, e.g.*, Scott & Stuntz, 101 Yale L.J. at 1909 n.1, 2. In 1964, guilty pleas accounted for approximately 90 percent of all misdemeanor and felony convictions. Dervan at 240. *See also Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) ("It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea. D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial 3 and n.1 (1966).").

That number has only increased in recent years. In 2019, "almost 98 percent of criminal convictions in the federal system and 94 percent of criminal convictions in the state systems result from a plea of guilty." Dervan at 239. According to the Pew Research Center, there were nearly 80,000 defendants in federal criminal cases in 2018. Only 2% of them went to trial, while 90% pled guilty. John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, Pew Research Center (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

As the number of both federal and state criminal prosecutions have ballooned in recent decades, the plea agreement has become even more imperative to the function of the criminal justice system. *Compare United States Attorneys Statistical Report Fiscal Year 1960*, United States Department of Justice, 1 (October 1960), https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL_REPORT_FISCAL_YEAR_1960.pdf (showing 30,617 criminal cases were filed in federal courts in 1960), *with United States Attorneys' Annual Statistical Report Fiscal Year 2010*, United States Department of Justice (2010), https://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf (showing that 68,591 criminal cases were filed in federal courts in 2010 against 91,047 defendants). Because of these numbers, it became clear as early as the mid-1960s that "[o]ur system of criminal justice has come to depend upon a steady flow of guilty pleas. There are simply not enough judges, prosecutors, or defense counsel to operate a system in which most defendants go to trial." Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 10 (1967) (citing Comment, *Official Inducement to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. Chi. L. Rev. 167 (1964)). This Court acknowledged that reality in *Santobello v. New York*, 404 U.S. 257, 261 (1971): "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."

Without guilty pleas, the criminal justice system could not function. But it has never been a part of this Court's jurisprudence that protections as carefully guarded

as those enshrined in the Double Jeopardy Clause should lose force simply because the justice system has expanded in the latter part of this century and embraced efficiency. The people still have a collective sense that justice means being put at risk of conviction a single time, and the rule adopted by the lower court shreds that expectation. Perhaps best stated by the majority of the Third District Court of Appeals panel:

> It is our view that the double jeopardy implication of a dismissal of the Involuntary Manslaughter in the context of such a plea agreement is akin to the double jeopardy protection and finality afforded to an acquittal. Under any other interpretation, and barring any special exception or reservation in the record, the State could routinely negotiate a plea agreement wherein it would dismiss the most serious charge and later, after a defendant served his sentence thinking the matter had concluded, re-indict, try, convict, and sentence him on the greater offense. There would be no finality under such a system and it would render plea agreements largely meaningless.

App. 38.

The harsh rule adopted by the Supreme Court of Ohio certainly runs this risk. Under the convictions-only regime that now governs in this state and elsewhere, there is no legal principle preventing reindictment of every crime ever dismissed during the execution of a plea agreement save for perhaps the statute of limitations. The number of such charges is flatly innumerable. And it is questionable how knowingly a plea could be entered when no court has ever been required in this state to inform a criminal defendant of the prospect for reindictment upon the dismissed charges. *Ohio Crim. R. 11.* Who would be willing to enter such a one-sided arrangement when jeopardy will attach and accord finality to a resolution of the

entire indictment simply by proceeding to trial? Under these nationally significant circumstances, this Court's review is warranted.

V. THIS DISPUTE PRESENTS A LIVE CASE AND CONTROVERSY

The present dispute remains a live one. "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). Generally, "those who invoke the power of a federal court" must "demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.*, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Petitioner Soto has been incarcerated in the Putnam County Jail during the pendency of these proceedings, and his prosecution is ongoing. On December 19, 2019, the Court of Common Pleas for Putnam County directed Soto to file "an appropriate motion for stay" after the filing of this petition. *Journal Entry filed December 19, 2019.* All pre-trial proceedings have been continued until after the due date for this petition. Because Soto maintains through these proceedings that his prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, there is a live case and controversy.

CONCLUSION

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

Respectfully Submitted,

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