No. 21-4229

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRAVIS SOTO,
Petitioner-Appellant,

v.

SHERIFF BRIAN SIEKFER,
Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio, No. 3:21-cv-00167-DCN

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE INNOCENCE PROJECT, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONER-APPELLANT SOTO

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici curiae make these disclosures under Sixth Circuit Rule 26.1:

1. Is any amicus a subsidiary or affiliate of a publicly owned corporation?

No. The American Civil Liberties Union Foundation, the American Civil Liberties Union of Ohio Foundation, the National Association of Criminal Defense Lawyers, and the Innocence Project, Inc., are nonprofit entities. No entity has a parent company and none has issued stock.

2. Is there a publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome?

No.

/s/ *Derek C. Reinbold*
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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union Foundation is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. Since its founding more than 100 years ago, the ACLU has appeared in state and federal court in many cases, both as direct counsel and as amicus curiae. **The ACLU of Ohio Foundation** is a statewide ACLU affiliate, with more than two hundred thousand members.

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of over 10,000 direct members and about 40,000 total members with affiliates. NACDL is the only nationwide professional bar association for

[1] Both parties have consented to the filing of this brief. No counsel for a party authored any portion of this brief, no party or party counsel contributed money to prepare or submit this brief, and no one other than counsel to amici curiae contributed money to fund or prepare this brief.

private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

The Innocence Project, Inc., is a nonprofit organization whose principal mission is to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Recognizing that nearly 30% of exonerations last year involved innocent defendants who took guilty pleas, *see* The National Registry of Exonerations, *2021 Annual Report* 5 (Apr. 12, 2022), the Innocence Project has an interest in maintaining constitutional protections—like the Double Jeopardy Clause—that help prevent the coercive extraction of false guilty pleas.

This case involves matters at the core of each amicus's mission and practical expertise.[2] The plea-bargaining system, already tilted in the government's favor, would be further unbalanced if, as the district court held, the Double Jeopardy Clause does not bar prosecutors from reviving charges they agreed to dismiss to secure a guilty plea. That rule precludes

[2] *See* ACLU, *Issues: Criminal Law Reform*, https://www.aclu.org/issues/criminal-law-reform; NACDL, *Overcriminalization*, https://www.nacdl.org/Landing/Overcriminalization; Innocence Project, *Improve Law Through the Courts*, https://innocenceproject.org/reform/.

the finality that double jeopardy aims to secure and on which plea bargains rely. And it allows prosecutors to overcharge defendants at no cost, which will likely increase the already-too-high number of innocent defendants who plead guilty.

INTRODUCTION

A criminal defendant tried by a jury is "put in jeopardy of life or limb" under the Fifth Amendment's Double Jeopardy Clause when the jury is empaneled. One tried by a judge is put in jeopardy when the judge begins to hear evidence. And one who pleads guilty—as nearly all present-day defendants do—is put in jeopardy at the plea hearing. At that hearing, as at a trial, the tribunal hears evidence and determines guilt. A defendant who, like Travis Soto, pleads guilty to some charges and not others may hope to be found guilty only of the crimes to which he confesses. But if the charges are pending when the hearing begins, he is in jeopardy as to all of them.

Because Soto was in jeopardy at his plea hearing, he cannot be prosecuted a second time for any offense resolved there—including charges dismissed as part of a plea agreement with the state of Ohio. That means double jeopardy bars the state's current prosecution of Soto for murder

and aggravated murder. A charge of involuntary manslaughter was pending against Soto when his plea hearing began in 2006 and when he testified at that hearing. Had the trial court not accepted his plea, he could ultimately have been convicted of that charge. And both sides agree that the present murder charges count as "the same offense," U.S. Const. amend. V, as the dismissed involuntary manslaughter one.

The district court's contrary conclusion—that double jeopardy poses no bar to the state's prosecution because jeopardy does not attach to charges dismissed at a plea hearing—strikes at the heart of the Double Jeopardy Clause. That Clause protects defendants by making the results of criminal proceedings final. But the district court's rule robs plea-bargaining defendants of that protection by letting the government reprosecute charges it agreed to dismiss—even when, without that dismissal, the defendant likely would have declined to plead guilty. Double jeopardy ensures fair trials by barring the government from seeking a do-over after seeing the defense's evidence. But the district court's rule lets the government secure a plea by agreeing to dismiss charges, get the defendant's self-incriminating testimony supporting the bargained-for plea, and then reprosecute the dismissed charges with the benefit of that testimony.

That approach threatens both individual liberty and the functioning of the criminal justice system. Well over 90% of criminal prosecutions now end in plea bargains. And the plea-bargaining system already grants prosecutors vast, largely unchecked power. A rule allowing prosecutors to retry cases and reassert charges they bargained away would give the government an even greater advantage over nearly all criminal defendants. The Double Jeopardy Clause does not permit that result. The Court should reverse.

BACKGROUND

Today's criminal justice system no longer resembles the historical system in which guilt was determined by jury trial. Nearly all present-day criminal cases are resolved by a negotiated deal under which a defendant admits guilt to avoid facing a much harsher penalty if he exercises his constitutional right to go to trial. This shift from a system of jury trials to a system of pleas provides crucial context for courts considering questions about the constitutional rights of plea-bargaining defendants.

A. Guilty pleas were once uncommon and disfavored. In Blackstone's time, courts were reluctant to accept a guilty plea and would "gen-

erally advise" the defendant "to retract it." 4 William Blackstone, *Commentaries on the Laws of England* *324; *see also*, *e.g.*, John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 278 (1978) (discussing an English case from 1743 in which the court dissuaded the defendant from pleading guilty to robbery by refusing to commute his death sentence). And in early America, "the practice . . . was no different." Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 9 (1979). For example, in colonial Massachusetts, "even if a defendant had signed a confession upon a preliminary examination, he normally rescinded it and sought trial by jury." *Id.* at 18.

The founding generation considered the jury to be a bulwark against executive overreach. For John Adams, "trial by jury"—like "[r]epresentative government"—was "the heart and lungs of liberty." *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000). Without juries overseeing criminal trials, at least according to Adams, "we have no fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds." *Id.* Adams's contemporaries agreed: "As Thomas Jefferson famously said, 'I consider [trial by jury] as the only anchor ever yet imagined by man, by

which a government can be held to the principles of its constitution.'" Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014).

Reflecting that view, the Constitution created a federal jury-trial right in Article III, *see* U.S. Const. art. III, § 2, cl. 3, even before the Bill of Rights added other core protections like freedom of speech and due process of law. So central was the jury's constitutional status that until 1930 it was an open question whether a defendant could even pick a bench trial over a jury trial in federal court. *Patton v. United States*, 281 U.S. 276 (1930).

B. The shift from jury verdicts to guilty pleas as the main mode of criminal conviction began in the nineteenth century. In 1839, guilty pleas represented only 15% of felony convictions in urban New York counties—by 1926, that number had risen to 90%. Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97, 108 (1928). Federal numbers ended up in about the same place—by 1925, nearly 90% of federal felony convictions came from guilty pleas. Am. L. Inst., *A Study of the Business of the Federal Courts* 56 (1934).

That trend has continued, leading the Supreme Court to observe that "criminal justice today is for the most part a system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). So complete is the transformation that, "[b]y one estimate, a criminal case is disposed of by plea bargaining every two seconds during a typical work day in America." Ram Subramanian et al., Vera Inst. of Just., *In the Shadows: A Review of the Research on Plea Bargaining* 1 (Sept. 2020). As of 2018 a trial "now occurs in less than 3% of state and federal criminal cases." Nat'l Ass'n of Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 5 (2018); *see also* Nat'l Ass'n of Crim. Def. Lawyers, *The New York State Trial Penalty* 13 (2021).

This extraordinary shift means that the Constitution's principal safeguard against prosecutorial overreach—the jury—is not engaged in the vast majority of cases. So other rights of the accused, like the constitutional prohibition on double jeopardy, are what prevent "a grave encroachment on the rights of defendants." *Mitchell v. United States*, 526 U.S. 314, 324 (1999) (right against self-incrimination at sentencing).

ARGUMENT

I. The Double Jeopardy Clause Gives The State One Chance To Put A Criminal Defendant On Trial

A. A state may not put a defendant in jeopardy twice for the same offense. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Like other preclusion rules, the Double Jeopardy Clause advances society's interest in guaranteeing that litigation once ended stays ended. *See*, *e.g.*, *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821).

But double jeopardy is not "simply res judicata dressed in prison grey." Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 277 (1965). It serves not just general social interests like avoiding crowded dockets, but also specifically protects the liberties of those the government seeks to punish: It is a "constitutional policy of finality *for the defendant's benefit*." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (emphasis added). "The underlying idea," the Supreme Court has said, "is that the State with all its resources and power should not be allowed" to wage a war of attrition. *Green v. United States*, 355 U.S. 184, 187 (1957). Repeat prosecution brings "embarrassment, expense and ordeal"; "anxiety and insecurity"; and "the possibility that even though innocent [the defendant] may be

found guilty." *Id.* at 187–88. The Double Jeopardy Clause ensures the accused need only "run the gantlet once." *Id.* at 190.

And double jeopardy does not just protect the innocent; it bars the government from inflicting the "embarrassment, expense and ordeal" of repeat prosecution on any defendant, including a guilty one. It includes three constitutional protections, two of which apply after conviction: "[1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. And [3] it protects against multiple punishments for the same offense." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980).

B. Of course, "an accused must suffer jeopardy before he can suffer double jeopardy" and before double-jeopardy protections can take hold. *Serfass v. United States*, 420 U.S. 377, 393 (1975); *see Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168–69 (1873). So the point at which jeopardy begins—when jeopardy "attaches"—is "the lynchpin for all double jeopardy jurisprudence." *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

The Supreme Court has articulated a bright-line rule for how to find the attachment point: Jeopardy attaches when the accused is "put to trial before the trier of the facts." *Jorn*, 400 U.S. at 479; *Collins v. Loisel*,

262 U.S. 426, 429 (1923) ("The constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial."). While other aspects of double-jeopardy jurisprudence have been called "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator," *Albernaz v. United States*, 450 U.S. 333, 343 (1981), there are "few if any rules of criminal procedure clearer than the rule" that jeopardy attaches when trial begins, *Martinez v. Illinois*, 572 U.S. 833, 839 (2014).

Though the attachment rule is clear now, it took decades to develop. The rule at first was that jeopardy attached only after conviction or acquittal—it did not attach "if the jury have been discharged without giving any verdict." 3 Joseph Story, *Commentaries on the Constitution* § 1781 (1833). But nineteenth-century courts came to recognize "the need to protect the interest of an accused in retaining a chosen jury." *Crist*, 437 U.S. at 35; *see id.* at 34 n.10 ("[I]t had become clear at least by the time of *Kepner v. United States*, 195 U.S. 100 . . . , decided in 1904, that jeopardy does attach even in a trial that does not culminate in a jury verdict[.]"). The problem was a practical one:

> If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state

> demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right?

O'Brian v. Commonwealth, 72 Ky. (9 Bush) 333, 339 (1872). To avoid that problem—and out of respect for the "defendant's valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689 (1949)—courts developed the modern rule that "jeopardy attaches when a jury is empaneled and sworn." *Serfass*, 420 U.S. at 388.

Double-jeopardy attachment, like other aspects of double-jeopardy doctrine, is thus informed not only by the language of the Fifth Amendment but also by its judicial construction over time. Generally speaking, "the [Double Jeopardy] Clause has long been construed to mean something far broader than its literal language." *Breed v. Jones*, 421 U.S. 519, 528 (1975). For example, while "jeopardy" likely originally meant "risk," "danger," or "peril," U.S. Dep't of Just., Off. of Legal Pol'y, *Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals*, *reprinted in* 22 U. Mich. J.L. Reform 831, 841 (1989) (citing Noah Webster, *American Dictionary of the English Language* (1828)), the Supreme Court has held that jeopardy attaches when trial begins, even if,

"under the circumstances of a particular case, the defendant was not genuinely at risk of conviction," *Martinez*, 572 U.S. at 840.

Courts have similarly developed a rule to decide when jeopardy attaches in a non-jury trial like a bench trial or military court-martial. In the influential decision of *Rosser v. Commonwealth*, 167 S.E. 257 (Va. 1933), the Supreme Court of Appeals of Virginia (now the Virginia Supreme Court) held that jeopardy attaches in a bench trial "after the accused has been indicted, arraigned and has pleaded, and the court has begun to hear the evidence." *Id.* at 259. That moment, *Rosser* reasoned, "is equivalent to the swearing of the jury where a case is tried by jury," *id.*, and attaching jeopardy then helps prevent prosecutorial overreach:

> It was certainly not intended that in a trial before a court without a jury, the Commonwealth, after introducing its evidence and finding it had failed to make a case against the accused, would be permitted to *nolle prosequi* the indictment and be entitled to subject the accused to another trial for the same offense. If this could be done the accused would be liable to conviction for the same offense, in successive trials, subject only to the whim of the attorney for the Commonwealth.

Id. Federal appellate courts soon followed *Rosser*. *See McCarthy v. Zerbst*, 85 F.2d 640, 642 & n.2 (10th Cir. 1936) (citing *Rosser*, 167 S.E. at 259). And the Supreme Court followed those cases in turn. *See Wade*, 336 U.S. at 688 (citing *McCarthy*, 85 F.2d at 642); *Serfass*, 420 U.S. at 388 (same);

see also Finch v. United States, 433 U.S. 676, 676 (1977) (per curiam) (applying the rule to a bench trial decided on "stipulated facts").

This case follows in that same tradition. It asks this Court to decide when jeopardy attaches for a defendant who pleads guilty. The same considerations that led courts to hold that jeopardy attaches when the jury is empaneled or the judge begins to hear evidence should lead this Court to hold that jeopardy attaches at the start of a plea hearing.[3]

II. Double Jeopardy Protects Plea-Bargaining Defendants Like Travis Soto Just As It Protects Those Who Go To Trial

Jeopardy attaches at the start of a plea hearing because that is the equivalent stage to the swearing of the jury or the start of evidence in a

[3] The Supreme Court has not yet settled this matter. In *Ricketts v. Adamson*, the Court "assume[d] that jeopardy attached at least when" the defendant "was sentenced." 483 U.S. 1, 8 (1987). But several state supreme courts and the Tenth Circuit have held that jeopardy attaches earlier, to charges dismissed at a plea hearing. *See*, *e.g.*, *State v. Comstock*, 485 N.W.2d 354, 367–68 (Wis. 1992) ("Allowing the state to reinstate the two felony charges in contravention of a plea agreement with which the defendant has complied violates the principles of finality and fairness underlying the double jeopardy clause."); *State v. Hutzler*, 677 S.E.2d 655, 659 (W. Va. 2009) (same); *Rush v. State*, 749 So. 2d 1024, 1027 (Miss. 1999) (same); *Commonwealth v. Diaz*, 383 A.2d 852, 855 (Pa. 1978) (same); *United States v. Mintz*, 16 F.3d 1101, 1106 (10th Cir. 1994) (same).

bench trial. At the hearing, the judge receives evidence, weighs the defendant's guilt, and—if satisfied that the evidence supports the plea—convicts the defendant. Attaching jeopardy any later than the hearing, or excepting charges dismissed at the hearing, creates precisely the opportunities for prosecutorial misconduct that the Double Jeopardy Clause aims to prevent.

A. Plea Hearings Are Where Present-Day Criminal Defendants Are Put In Jeopardy

Nearly all adjudications of criminal guilt today take place at plea hearings, which operate as the modern equivalent to trial. *First*, at a plea hearing, as at a bench trial, the judge "begins to hear evidence." *Serfass*, 420 U.S. at 388. Under Federal Rule of Criminal Procedure 11, or its state analogues, the "judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." *Santobello v. New York*, 404 U.S. 257, 261–62 (1971); *see* Fed. R. Crim. P. 11(b); Ohio R. Crim. P. 11(C)(2). This on-the-record procedure ensures that the plea is "both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 28 (1992).

Second, at a plea hearing, as at any trial, there is an "adjudicative element inherent" in the court's work. *Santobello*, 404 U.S. at 262. Plea

hearings aim to protect "a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *United States v. Lalonde*, 509 F.3d 750, 762 (6th Cir. 2007) (quoting *McCarthy v. United States*, 394 U.S. 459, 467 (1969)). "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States v. Broce*, 488 U.S. 563, 570 (1989); *see* Ohio R. Crim. P. 11(B)(1) ("The plea of guilty is a complete admission of the defendant's guilt."). It is therefore the judge's job to confirm that the conduct the accused describes fits the charges.

Finally, at a plea hearing, as at any criminal trial, the defendant is "subjected to the hazards of . . . possible conviction." *Green*, 355 U.S. at 187. If the court accepts the plea, the result is a conviction, "[l]ike a verdict of a jury." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). A guilty plea thus "supplies both evidence and verdict, ending [the] controversy." *Boykin v. Alabama*, 395 U.S. 238, 242 n.4 (1969). And the defendant's statements at the hearing remain evidence that can later be used against him—including, if he can be reprosecuted on dismissed charges,

to convict on those charges as well. Once a plea has been accepted, statements made in the preceding plea colloquy are admissible against the defendant in later proceedings. By contrast, statements made in a colloquy for a plea that is withdrawn or rejected are inadmissible. Fed. R. Evid. 410(a)(1), (3).

While plea hearings and jury trials are not identical, the distinctions make no double-jeopardy difference. A defendant pleading guilty waives certain constitutional guarantees like the right to trial by jury,[4] but does not "waive[] . . . the privileges which exist beyond the confines of the trial." *Mitchell*, 526 U.S. at 324; *see*, *e.g.*, *Iowa v. Tovar*, 541 U.S. 77, 87 (2004) (right to counsel at plea hearing); *Class v. United States*, 138 S. Ct. 798, 805 (2018) (statutory right to directly appeal conviction "cannot in any way be characterized as part of the trial") (quoting *Lafler v. Cooper*, 566 U.S. 156, 165 (2012)). And to state the obvious, the double-

[4] The defendant also forgoes (1) the right against compelled self-incrimination, *McCarthy*, 394 U.S. at 466; (2) the right to be found guilty by a unanimous jury of his peers, selected under conditions meant to prevent discrimination that could cause unfair bias in the jury's decision, *see Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Cage v. Louisiana*, 498 U.S. 39 (1990); and (3) the right to confront and cross-examine witnesses to ensure live, adversarial testing of the prosecution's case, *Crawford v. Washington*, 541 U.S. 36 (2004).

jeopardy prohibition is a privilege that persists "beyond the confines of the trial." That's the whole point: Once the defendant has gone through trial—or, here, a plea hearing—the Double Jeopardy Clause protects him from reliving the ordeal.

B. Travis Soto Was In Jeopardy At His Plea Hearing, So Double Jeopardy Bars The State's Reprosecution

Because double jeopardy protects defendants who get charges dismissed at plea hearings, Ohio's second prosecution of Soto for his involvement in the death of his son violates the Double Jeopardy Clause.

In the first prosecution, in 2006, the state indicted Soto on involuntary manslaughter and child-endangerment charges. Indictment, RE 12-1, Page ID # 76. Soto then negotiated a plea agreement under which he would plead guilty to child endangerment in exchange for getting the manslaughter charge dismissed. Plea Hr'g Tr., RE 12-1, Page ID # 80.

At the plea hearing, the trial judge probed Soto's version of the events. *Id.*, Page ID ## 85–87. Based on Soto's answers, the judge "accept[ed] the plea" and "f[ound] [Soto] guilty of a single count of child endangering." *Id.*, Page ID # 87. The judge then entered a judgment of guilt on the child-endangering charge and dismissed the involuntary manslaughter charge. Plea, RE 12-1, Page ID ## 90–93. In short, the judge

(1) "hear[d] evidence," *Serfass*, 420 U.S. at 388, (2) did the "adjudicative" work of probing Soto's testimony and confirming the acts he described met the elements of child endangerment, *Santobello*, 404 U.S. at 262, and (3) rendered a "verdict" of guilt on that charge, *Kercheval*, 274 U.S. at 223, while dismissing the involuntary manslaughter charge. Everything that adds up to jeopardy happened at the plea hearing.

The state's current prosecution of Soto on murder and aggravated murder charges arising from the same incident therefore violates the Double Jeopardy Clause. The state gets "one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Once jeopardy has attached, "the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense," which constitute the "same offense" for double-jeopardy purposes. *Brown v. Ohio*, 432 U.S. 161, 169 (1977). Murder and aggravated murder are greater included offenses of involuntary manslaughter under Ohio law. Soto Br. at 2 n.1. Because Soto functionally stood trial for manslaughter, jeopardy attached, and double jeopardy bars the state's prosecution of Soto for murder and aggravated murder. The district court erred when it reached the opposite conclusion.

C. The District Court's Restrictive Approach To Double Jeopardy Enables Prosecutorial Overreach

The district court concluded that jeopardy did not attach for Soto because he "has never gone to trial for murder (or any lesser included offenses)." Order Adopting R. & R., RE 22, Page ID # 794. That "narrow [and] grudging" conception of double jeopardy, *Green*, 355 U.S. at 198, puts plea-bargaining defendants in a worse position than those who go to trial. Prosecutors who dismiss charges at jury trials cannot reprosecute those charges. *See*, *e.g.*, *Humphries v. Wainwright*, 584 F.2d 702, 705 n.4 (5th Cir. 1978). But the district court's approach lets the state (1) freely revive dismissed charges, robbing defendants of the benefit of their plea bargains, and then (2) use testimony adduced at the plea hearing to win the reprosecution, enlisting defendants in self-incrimination. That implicates "the defendant's interest in finality" and raises "concern[s] about potential prosecutorial abuse." *Comstock*, 485 N.W.2d at 367–68.

1. The district court's rule allows prosecutors to bargain to dismiss charges one day then revive them the next. That poses a constitutional problem: From its earliest plea-bargaining cases, the Supreme Court has stressed that plea bargains are desirable—and constitutional—only when they are fair. *See Santobello*, 404 U.S. at 261. To that

end, "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 262.

Plea bargains ideally offer a "'mutuality of advantage' to defendants and prosecutors." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Both sides have their reasons for wanting to avoid trial: Prosecutors "conserve valuable prosecutorial resources." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). And in exchange defendants get the "promise[] of a recommendation of a lenient sentence or a reduction of charges." *Bordenkircher*, 434 U.S. at 363.

Charge dismissals are particularly common. As many as 56% of pled cases in some federal judicial districts involve such dismissals. *See* Kyle Graham, *Overcharging*, 11 Ohio St. J. Crim. L. 701, 714–18 (2014) (surveying pled cases between 2003 and 2010). The "obvious" benefit to the defendant is that these dismissals "limit[] the probable penalty." *Brady v. United States*, 397 U.S. 742, 752 (1970). Indeed, it is often "[t]he government's promise to drop some charges in exchange for a guilty plea [that] provides the consideration necessary to support the bargain contained in the plea agreement." *United States v. Snelson*, 555 F.3d 681,

685 (8th Cir. 2009). That is what happened here: At the plea hearing, the state "move[d] to dismiss" the involuntary manslaughter count, and said that "[i]n exchange for that dismissal" Soto would plead guilty to child endangerment. Plea Hr'g Tr., RE 12-1, Page ID # 80.

But the "advantages" of plea bargains "can be secured . . . only if [they] are accorded a great measure of finality," *Blackledge v. Allison*, 431 U.S. 63, 71 (1977), and the district court's rule destroys those advantages by precluding finality. It lets a prosecutor revive dismissed charges at will, ensuring defendants who plead guilty will "live in a continuing state of anxiety and insecurity" of reprosecution. *Green*, 255 U.S. at 187. And it lets a prosecutor resurrect charges after the court imposes what he considers a too-lenient sentence, which means there will be no "limit[]" to "the [defendant's] probable penalty." *Brady*, 397 U.S. at 752. Put simply, letting prosecutors break the promises they use to secure guilty pleas is unconstitutional.

2. The district court's rule improperly lets the state use evidence it obtains at a plea hearing as evidence for a reprosecution on dismissed charges. This turns modern plea bargaining on its head. Plea bargaining

began as "a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." *Blackledge*, 431 U.S. at 76. But over time it became "clear that the sentencing judge must develop, on the record, the factual basis for the plea." *Santobello*, 404 U.S. at 261. So it became "[c]entral to the plea and the foundation for entering judgment against the defendant" that the defendant admit "in open court that he committed the acts charged in the indictment." *Brady*, 397 U.S. at 748. The point was "to protect the defendant from an unintelligent or involuntary plea." *Mitchell*, 526 U.S. at 322.

The district court's rule "would turn this constitutional shield into a prosecutorial sword." *Id.* When charged offenses arise out of the same conduct, their elements often overlap. So adducing an admission of guilt to one charge affects the factual basis for the other charges. But if nothing stops the state from reprosecuting dismissed charges, then nothing stops it from using what it learns during the plea hearing as evidence for its reprosecution. "The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved

by the Government, not on inquisitions conducted to enhance its own prosecutorial power." *Id.* at 325.

Double jeopardy bars this result. It prevents reprosecution because if the government may try again for a conviction, it gains an unfair "advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *DiFrancesco*, 449 U.S. at 128; *see Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Double jeopardy thus ensures that the first trial or plea hearing remains the "main event," *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), not "a dry run for the second prosecution," *Ashe v. Swenson*, 397 U.S. 436, 447 (1970). But the district court's rule gives the government an extreme version of this advantage—the government gets more than just a chance to rework its opening statement; it gets a trial with the benefit of the defendant's partial confession. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 82–83 (2004) (stressing "the particular importance of the finality of guilty pleas, which usually rest, after all, on

a defendant's profession of guilt in open court"). That unjust result underscores the conflict between the district court's rule and the principles protected by the Double Jeopardy Clause.[5]

III. Practical Realities Of The Criminal Justice System Make Plea-Bargain Finality Essential

The district court's rule is particularly ill-suited to the present-day realities of our criminal justice system, which no longer resembles the historical system in which juries determined guilt at trial. Today nearly all criminal cases are resolved at a plea hearing. And so, like other rights of the accused, the guarantee against double jeopardy "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 566 U.S. at 170. The district court's rule not only undermines the fundamental fairness of plea bargains, but also tilts an already imbalanced system further in favor of the government.

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[5] The problems are not limited to double jeopardy, either. Allowing a prosecutor to reprosecute dismissed charges using plea-hearing testimony calls into question whether the defendant's waiver of his right against self-incrimination was "an intentional relinquishment or abandonment of a known right or privilege." *McCarthy*, 394 U.S. at 466 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Three features of the plea system give the government a substantial advantage over defendants: (1) the prosecutor's discretion to pick which offenses to charge, (2) the huge and ever-growing number of offenses to pick from, and (3) the practice of stacking charges to induce a plea and then bargaining them away. These and other "pressures defendants face in the plea bargaining process are so strong even innocent people can be convinced to plead guilty to crimes they did not commit," which "casts doubt on the assumption that defendants who plead guilty do so voluntarily." NACDL, *Trial Penalty* 6. The district court's rule, by reducing the cost of dismissing charges to nothing, makes that problem even worse.

A. The key input in criminal sentencing is often which offenses are charged. That is a decision that "generally rests entirely in [the prosecutor's] discretion." *Bordenkircher*, 434 U.S. at 364. Thus "it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision." Rakoff, *Why Innocent People Plead Guilty*; *see also Frye*, 566 U.S. at 144 ("horse trading" between prosecutors and defense counsel is what largely "determines who goes to jail and for how long") (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

B. The multiplication of criminal offenses has given prosecutors many potential offenses to charge in almost any situation. The common law recognized just a few discretely defined felonies like murder and arson. Stuart P. Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* 10 (2012) (counting nine). So at the Framing "[a] single course of criminal conduct was likely to yield but a single offense." *Ashe*, 397 U.S. at 445 n.10. But in the twentieth century, the "extraordinary proliferation of overlapping and related statutory offenses" enabled prosecutors to "spin out a startlingly numerous series of [distinct charges] from a single alleged criminal transaction." *Id.*; *see also* Marlyn E. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317, 317 (1954). Since the *Ashe* Court made that observation in 1970, the numbers have become even more startling. The number of criminal offenses in the U.S. Code grew to 3,000 in the early 1980s to more than 4,000 in the early 2000s to more than 5,000 today. *See* GianCarlo Canaparo et al., Heritage Found., *Count the Code: Quantifying Federalization of Criminal Statutes*, Special Rep. No. 251, at 5–6, 10 (2022) (counting 5,199).

In almost every criminal case, the prosecutor can choose among a wide array of statutes potentially applicable to the conduct alleged. By

2000, "[t]he federal criminal code contain[ed] over three hundred separate fraud and misrepresentation offenses," William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1881 (2000), such that the same conduct could be prosecuted as a violation of the generic federal mail and wire fraud statutes, *see*, *e.g.*, 18 U.S.C. §§ 1341, 1343, and also as "bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, [or] conspiracy to defraud the government," Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* 152 (2006). The result is that a "prosecutor may, with little imagination and even less research," bring later indictments for nominally different offenses "even though the defendant is being retried for essentially the same anti-social conduct." Lugar, 39 Iowa L. Rev. at 317. And given the thousands of potential crimes, there is an immense risk to defendants that their plea to one charge may implicate them in another.

C. Under the district court's rule, nothing stops prosecutors from picking "all the above" from the now-available cornucopia of offenses. Even before, the practice was common enough to have a name—"charge

stacking." Prosecutors charge multiple overlapping offenses for the same conduct, building up a huge potential penalty if the defendant risks trial.[6]

The risks are substantial. Andrew Chongseh Kim's 2015 analysis of federal cases concluded that defendants who exercise their right to trial are penalized with sentences 64% longer than they would have received had they accepted a plea deal. *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195, 1202 (2015); *see* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes."). According to Kim, this makes trial by jury "less of a right, and more of a trap for fools." *Underestimating the Trial Penalty*, 84

[6] Some offenses exist more as bargaining chips than as actual crimes. For example, only about a third of defendants charged with federal witness tampering by force or threat of force are convicted for it; most get the charges dismissed as part of a plea deal. *See* Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 Cal. L. Rev. 1573, 1602 (2012) (witness tampering by force/threat of force, 65.2% dismissed; hostage taking, 60.1% dismissed; use of fire/explosives in a federal felony, 59.2% dismissed).

Miss. L.J. at 1250. Prosecutors' power to stack charges exerts tremendous pressure on the accused to accept a plea offer rather than maintain innocence and risk maximal punishment. *See* NACDL, *Trial Penalty* 16; Graham, 100 Cal. L. Rev. at 1582.

This is a problem for the innocent, not just the guilty. The Supreme Court has long worried about wrongful convictions resulting from heavily resourced prosecutors wearing down innocent defendants with multiple prosecutions. *Green*, 355 U.S. at 187–88; *see* William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. Rev. 411, 433 (1993) ("The essence of double jeopardy protection, prohibiting retrial following either acquittal or its functional equivalent, is that the government must not risk convicting innocent citizens by wearing down defendants through repeated trials[.]"). And the worry is justified here: Scholars who have studied the issue "have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent." NACDL, *Trial Penalty* 17.

The Double Jeopardy Clause cannot be expected to curb all such abuses of power. But the district court's rule, by reducing the cost of dismissing charges to nothing, needlessly aggravates this dynamic. At least

before, a prosecutor would have to think twice before bargaining away a charge. But under the district court's rule, that is no longer the case.

That result is unconstitutional. When prosecutors charge repetitive offenses and then dismiss some of those charges at a plea hearing, fundamental fairness and the Double Jeopardy Clause require the state to live with its choice.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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Dated: **December 12, 2022**

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I certify under Federal Rule of Appellate Procedure 25(d) and Sixth Circuit Rule 25(f) that, on December 12, 2022, I caused a true and correct copy of the foregoing Brief of the American Civil Liberties Union Foundation, the American Civil Liberties Union of Ohio Foundation, the National Association of Criminal Defense Lawyers, and the Innocence Project, Inc., as Amici Curiae in Support of Petitioner-Appellant Soto to be served on all counsel of record through the Court's CM/ECF system.

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