NO. 19-7834

IN THE SUPREME COURT OF THE UNITED STATES

TRAVIS SOTO,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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BRIEF FOR THE PUBLIC DEFENDER ASSOCIATION, OHIO JUSTICE & POLICY CENTER, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONER'S WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Justice Kennedy, writing for the Court, stated what is now the obvious reality of all criminal justice systems in the United States:

> "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." … In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

Missouri v. Frye, 566 U.S. 134, 143-144 (2012) (internal citations omitted). In the instant case, the Ohio Supreme Court embraced a concept of double jeopardy in the negotiated plea context that may easily undo the decades of this Court's jurisprudence regarding our guilty plea-dominant adjudicatory systems. By allowing claims negotiated away to be re-charged in future prosecutions, the court below has undermined one of the most important promises

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[1] In accordance with Supreme Court Rule 37.6 undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief. All parties were given timely notice regarding the intent to file this brief. Written notice of consent to file this brief of *amici* was given by the counsel of record for each party in the case.

of the negotiated plea infrastructure – the finality of that agreement.

Each *Amicus* joining this brief believes that the issues presented regarding negotiated pleas and the scope of the double jeopardy protections afforded defendants in that process is critical to the administration of justice throughout all criminal law jurisdictions, state and federal. *Amici* are a collection of National, State-wide and local Criminal Justice advocates and Public Defender Organizations. *Amici* urge this Court to grant the Petition for Writ of Certiorari in order to thoughtfully address the issues presented. A list of the *amici curiae* are attached at Appendix A.

SUMMARY OF ARGUMENT AND RESTATEMENT OF QUESTIONS PRESENTED

This case offers the Court an opportunity to consider two issues that are of utmost importance to the administration of criminal justice, both in state courts and throughout the federal system. First, the case presents a question of first impression:

> **Whether the double jeopardy clause ought to apply to all counts in a single indictment resolved by plea agreement under the Fifth and Fourteenth Amendment to the United States Constitution**.

In the instant case, Petitioner Soto was charged in a single indictment with two counts. He pleaded guilty to the second count for which he received both

a dismissal of the first count of the single indictment and a five-year prison sentence which he served. The State now seeks to try Mr. Soto for a crime which all parties below agree would be barred if jeopardy attached to the abandoned count.

Second, this case offers the Court an opportunity to craft a rule on another issue that the Court has yet to address:

> **Whether the doctrine of "merger of offenses," precludes the subsequent trial of a felony murder charge to which the state has already secured a negotiated conviction on the predicate felony as a violation of the Fifth and Fourteenth Amendments to the United States Constitution.**

In Mr. Soto's case, the state negotiated a plea to an underlying felony of "Endangering Children"[2] in return for dismissing a felony murder count of "Involuntary Manslaughter" which relied on the Endangering Children charge as the predicate felony. After Mr. Soto's negotiated plea was accepted for which he served his full sentence, the State is now seeking to charge Mr. Soto with homicide charges that rely on either the actual felony pleaded to or the factual basis for that plea's acceptance by the trial court. Soto Plea Agreement, at App. 8 ("By pleading guilty I admit to committing the offense and

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[2] Although Mr. Soto's 2006 Indictment and plea agreement refer to "Child Endangering, the actual statutory title is "Endangering Children." Ohio Rev. Code § 2919.22 (c.f. Appendix B at App. 3; C at App. 5)

will tell the Court the facts and circumstances of my guilt") This Court is therefore presented with the opportunity to settle law surrounding the issues of merger of offenses and to clarify the doctrine's application in all criminal law jurisdictions.

Regardless of outcome, both these issues are serious and implicate the charging, prosecution, adjudication and punishment of individuals throughout the jurisdictions supervised by this Court. Failing to address these issues at this time leaves prosecutors, defense attorneys, courts, and those charged with crimes in the position of not being able to make intelligent or knowing waivers in any plea agreement in which one charge is abandoned by the prosecution in return for a guilty plea on another count in the same indictment. Considering the fundamental role and reliance on the finality of negotiated settlements in all criminal cases resolved short of trial, this Court ought to grant the Writ in order to fully consider these important issues.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DOUBLE JEOPARDY CLAUSE OUGHT TO APPLY TO ALL COUNTS IN A SINGLE INDICTMENT AFTER A NEGOTIATED PLEA AGREEMENT

As Justice Kennedy pointedly observed: "To a large extent … horse trading [between prosecutor and defense] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the

criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 143-144 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992)).

A plea is the exchange of official concessions by the government for the defendant's act of self-conviction. In all criminal courts under this Court's jurisdiction, the plea agreement is the dominant and therefore most critical aspect of criminal case resolution. This Court should grant certiorari in this case to determine whether double jeopardy attaches to the whole of an indictment at the time of a court's acceptance of a negotiated plea agreement.

In the instant case, Petitioner Soto exchanged his plea of guilty to Count II of a single indictment for a significant prison sentence and the end of prosecution on the more serious charge contained in Count I of the same indictment.

Two types of plea agreements dominate the process in today's criminal justice system: charge pleas and sentence pleas. Charge pleas allow a defendant to plead guilty to a lesser charge than originally arraigned/indicted on and sentencing pleas enable a defendant to try and minimize the sentence he/she faces. In the current case, the plea entered by Mr. Soto was a combination of both types – charge and sentence pleas – as he received the maximum allowable sentence (five years in prison) for acceptance of responsibility on the lesser charge.

A. Negotiated Pleas are now a Fundamental Procedural Aspect of the Criminal Justice System in the United States.

Despite negotiated plea agreement's dominant place in the modern-day criminal justice system, it is a procedure developed primarily in the last century to adapt to other significant changes within the system. Albert W. Alschuler, *Plea Bargaining and its History*, 79 Colum. L. Rev. 1, 6 (1979). The first cases of plea agreements appeared in appellate courts during the Civil War, where they were often overturned as not being knowing and voluntary confessions. 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). Guilty pleas, like all confessions at that time, were discouraged by the courts due in large part to the lack of defense counsel able to advise clients. Alschuler at 20-23. Additionally, most penalties for serious crimes were prescribed, and therefore defendants did not always receive any concession in return for the plea. Id. Both factors acted as strong barriers to plea "bargaining" as a valid method of disposing criminal cases.

At the turn of the 20th century as graft, corruption, and patronage systems took hold in most major cities, plea agreements began to proliferate in criminal justice systems. Agreements to pardon, dismiss or lessen charges, and commute punishments were offered by politicians and judges in return for personal gain. Alschuler at 24. *See also* Lucian E. Dervan and Vanessa E. Edkins, *The*

Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem, 103 J. Crim. L. & Criminology 1, 8-9 (2013). During the Prohibition Era, plea bargaining became prolific not due to corruption, but in order to handle the huge number of newly minted federal criminals who were charged with violating the Prohibition Act of 1919. Dervan at 5. For example, at the height of federal prosecutions during prohibition, the criminal docket was nearly eight times what it would be in a much larger national population at the start of the country's entry into World War II. Dervan, at 4-5. The courts and prosecutors began to use plea agreements as a vehicle to increase efficiency and clear dockets quickly. The rise in federal negotiated pleas was astounding, moving from roughly 50% of cases concluded by a pre-trial admission of guilt at the turn of that century to approximately 90% resolution of criminal cases by pleas short of trial by 1925. Id.

Although the number of federal criminal cases declined significantly after the passage of the 21st Amendment ending prohibition, the percentage of cases resolved by negotiated plea agreements remained remarkably steady through the 1970s. After that, the country saw an explosion of criminal offense legislation, adoption of sentencing guidelines, imposition of mandatory minimum sentences, parole release options either reformed or eliminated, and significant increases in collateral consequences for sentenced defendants. It was during this era that the process of negotiated pleas became formalized and viewed as "a means of preserving the integrity of trials in systems overwhelmed by criminalization."

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty 2* (1968). The concomitant explosion of cases and numbers of individuals incarcerated taxed court, prosecution and defense resources leading to an unsurprising increase in both the number and percentage of negotiated criminal case resolutions short of trial. Negotiated pleas became a fundamental and indispensable means to the continued functioning of the criminal justice system. *See* American Bar Association, *Criminal Justice Standards on Guilty Pleas*, (3d. Ed. 1999).[3]

By 2019, plea bargaining was by far the dominant form of case disposition, accounting for almost 98% of all indicted cases in the federal system.[4]

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[3] In 2001, 95% of all convictions in the federal system resulted from a plea of guilty. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary*, Table D-4. U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2001, www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2001/12/31. By 2012, it was estimated that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions [were] the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

[4] According to data compiled by the Office of the Administration of U.S. Courts only 2% of defendants in federal court convicted and sentenced as the result of an actual trial by jury or judge. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary*, Table D-4. U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2019, www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2019/12/31.

B. The Value and Necessity of Finality in Negotiated Pleas

The crux of the negotiated plea is the benefit or reward to each party within the criminal justice system, which is one reason it is favored in courts today. The plea ensures speedy resolution, finality of decisions and ensures judicial economy. *Blackledge v. Allison*, 431 U.S. 63, 72 (1971). The prosecutor finds the plea valuable because it ensures conviction and saves valuable resources. The promised benefits to the defendant are avoiding extended pretrial incarceration, speedy disposition of the case and possible reduction of sentences and dismissal of other charges. *Id.* at 71-72. By mitigating a harsher punishment, defendants can hope to avoid some harsh collateral consequences. However, this also means that the defendant cedes certain constitutional protections. Cynthia Alkon, *What's Law Got to Do With It? Plea Bargaining Reform After Lafler and Frye*, 7 Y.B. On Arb. & Mediation 1, 4-6 (2015). From the court's perspective, it is an efficient way to clear its docket and save judicial resources for those cases where there is a substantial issue of guilt or innocence or where it is unclear if the state can maintain its burden of proof. *Brady v. Maryland*, 397 U.S. 742, 752 (1970). Some courts have also found that plea negotiation serves rehabilitation purposes as well by allowing the defendant access to correctional measures better adapted to purposes of treatment with lesser sentences and more opportunities for diversion programs and probation instead of incarceration. *Santobello v. New York*, 404 U.S. 257, 261 (1971). Additionally, plea agreements often lead to sooner closure for crime victims as well

as the opportunity for quicker resolution of restitution claims. Each constituent in the criminal justice system depend on the clarity and finality of a plea agreement. Finality was a critical factor when this Court accepted the constitutionality of such pre-trial "confessions" and is the primary factor driving the procedures which has allowed negotiated pleas to become the dominant method of criminal case resolution. *Santobello*, at 261. See Alkon at 4-6.

As early as 1968, the American Bar Association (hereinafter ABA) recommended the use of "bargained justice" as a means of preserving the integrity of trials in a system starting to be overwhelmed by increased criminalization, particularly regarding narcotics prosecutions. In doing so it recognized that the process of negotiated pleas required increased formalization in order to ensure protections to the defendant. Chief among these was that prosecutors needed to be bound to the promises made in any negotiated deal and that the court could rely on the plea as having been entered into in both a knowing and voluntary way. *See* ABA Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty 2* (1968). Similarly, the Uniform Rules of Criminal Procedure (1974) (hereinafter URCP), Model Code of Pre-Arraignment Procedure and the Federal Rules of Criminal Procedure all took definitive steps to formalize the process of entering into a plea (as opposed to the negotiation itself) in order to create a contract-like product that ensured finality for all the parties.

For example, the 1974 URCP recommended model rules based on four major policies regarding

negotiated pleas: 1) centralize in the prosecutor the responsibility for initiation and control of criminal prosecutions (amend the charge, dismiss or not bring the charge at all); 2) eliminate unnecessary use of the court's time; 3) encourage disposition without trial; and 4) provide procedures for effective safeguarding of the defendant's constitutional rights. Unif. R. Crim. P., Rule 433, 444 (1974).

Subsequent to those early efforts, the ABA Criminal Justice Standards on Guilty Pleas 3rd Edition (1999) were crafted in recognition that state and federal sentencing guidelines, mandatory minimums, and a significant increase in collateral consequences faced by defendants required courts to engage in a meaningful colloquy to ensure that defendants entered into any plea knowingly and voluntarily. A consensus of judges, prosecutors, defense counsel, academics and other practitioners crafted these standards after concluding that permitting resolution of criminal cases through the entry of negotiated guilty pleas is an appropriate part of the criminal justice system and is necessary to ensure the functioning of the system. They reasoned that affording guilty pleas such protection was beneficial to the defendant and the state by protecting these agreements from later appellate or collateral attacks, hence enhancing the finality of such judgments. Steps to formalize negotiated plea procedures and protect the finality of the resulting plea agreement were both anticipatory and in response to this Court's evolving jurisprudence regarding plea agreements.

Since *Brady v. United States*, 397 U.S. 742 (1970), this Court has affirmed the constitutional legitimacy of negotiated plea agreements by affording them certain constitutional protections. In *Brady*, the defendant pleaded guilty to mitigate the possibility of the death penalty, then appealed on the ground that the concessions he made were so large that his confession was involuntary. *Id*. This Court found that the plea confession was voluntary, and the offer of leniency and punishments were permissible enticements so long as they did not overbear the will of the defendant. *Id*. at 752-758. *Brady* was a critical moment in this Court's negotiated plea jurisprudence as it recognized such agreements as constitutional in the then-evolving context of a vastly expanding criminal justice system. In its ruling, this Court enumerated three reasons for finding the plea bargain necessary and constitutional: first, the plea of guilt must be voluntary; second, that such voluntary pleas save the resources of the courts for cases where there is a substantial question of guilt or innocence as to if the state can maintain its burden and; third, it recognized that effective defense counsel is an imperative part of the reliability of such a plea in order to ensure that a properly counseled defendant will not falsely condemn themselves. *Id*. at 750, 752, 758.

In a series of subsequent cases, this Court further legitimized negotiated pleas as a constitutional aspect of a prosecution while emphasizing the values of speed, economy and finality such agreements bring to the criminal justice system. *Santobello v. New York*, 404 U.S. 257 (1971), involved an appeal of a guilty plea where the state failed to keep its

commitment regarding a sentencing recommendation. The Court noted that "[d]isposition of charges after a plea discussion is not only an essential part of the process but a highly desirable part for many reasons." *Id*. at 261. Those reasons included: a prompt and final disposition of most criminal cases, avoidance of the "corrosive impact of enforced idleness during pre-trial confinement," the protection of the public from individuals prone to criminal conduct during pre-trial release and enhanced rehabilitative prospects for those who admit their guilt. *Id*. at 261-262.

Following *Santobello*, this Court considered the specific benefits of creating rules of finality regarding plea agreements. *Blackledge v. Allison*, 431 U.S. 63 (1971). In *Allison*, the defendant sought relief through habeas corpus proceedings arguing that his guilty plea was involuntary because the agreement he entered was not honored by the state. *Id.* This Court held that "[t]he advantages can be secured, however, only if dispositions by guilty pleas are accorded a great measure of finality." *Id*. at 71. This Court again reiterated the many advantages of negotiated pleas including avoiding extensive pretrial incarceration, speedy disposition of cases and the conservation of scarce and vital resources. *Id*, Additionally, this Court expressly found that the current increase in arraignments and indictments in the criminal justice system creates a larger number of cases than officers of the court and the court itself can timely resolve without negotiated pleas. *Id*.

This century, this Court further examined the constitutional rights of defendants surrounding

negotiated pleas, including the scope of the 6th Amendment Right to effective counsel in a plea negotiation. In 2010, this Court decided a case involving a lawful permanent resident who entered a guilty plea pursuant to a plea agreement. *Padilla v. Kentucky*, 599 U.S. 356 (2010). Mr. Padilla appealed his case on the grounds that his defense counsel did not advise him of the deportation consequences of his plea. *Id.* at 359. This Court agreed with the Petitioner finding that his 6th Amendment right to effective assistance had been violated. *Id.* at 369. This Court recognized that many complex factors influence a decision to enter a pre-trial plea, including the defendant's understanding of and ability to weigh the collateral consequences of such a serious decision. *Id.* at 372-373.

Two decisions followed the *Padilla* case in which this Court not only expanded the protections afforded defendants in the plea process but also made vital pronouncements regarding the role of negotiated pleas in our modern-day criminal justice system: *Lafler v. Cooper*, 566 U.S. 156 (2012) and *Missouri v. Frye*, 566 U.S. 134 (2012). In each case, this Court again considered the scope of effective assistance of counsel in the plea agreement process and reiterated the central role defense counsel has in such processes. In *Lafler*, this Court found that absent the defense attorney's ineffective assistance of counsel by wrongly advising his client that the government's case lacked strength, the defendant would have instead accepted the offered plea. *Lafler*, *supra* at 166. The Court noted that plea deals are often significant discounts from what a defendant would get if they go to trial and are convicted,

recognizing that "criminal justice today is for the most part a system of pleas, not a system of trials." *Id*. at 170. In the companion *Frye* case, in which defense counsel failed to convey the prosecution's plea offer to his client before the expiration of the offer, Justice Kennedy went further in explaining the centrality of the role of plea agreements in our criminal justice system. *Frye, supra*, at 143-144. The Court ultimately held that the 6th Amendment right to counsel was also violated when a lawyer fails to convey a plea offer to the client in a timely fashion. *Id*. at 145.

This Court continues to recognize the vital, fundamental role plea bargaining plays in the criminal justice system. In 2017, this Court again took up the issue of immigration collateral consequences in the context of plea bargaining in *Lee v. United States*, 582 U.S. ___, 137 S.Ct. 1958 (2017). As in *Padilla*, the defendant pleaded guilty on the mistaken assurance of defense counsel that he would not face deportation consequences. *Id.* In reversing the lower court's decision and finding that Mr. Lee was deprived of effective assistance of counsel, Chief Justice Roberts focused on another important aspect of the negotiated plea process, namely: "determinative issues." *Id.* In *Lee* the determinative issue was again the collateral consequence of deportation. Chief Justice Roberts wrote that where a defendant is forced to choose between not having a consequence (deportation) and "almost" having that consequence due to going to trial, the "almost" may well be the determinative issue in decision-making for a defendant. *Id*. at 1968-69. While he did not enumerate specific

determinative issues or clearly define what one is, they may be viewed as ones that have little do with the facts of the case but instead relate to the potential consequences a defendant will suffer through the decision to plea or go to trial. While *Lee* was decided on the specific facts, it reflects this Court's continued interest in defining which protections are afforded plea agreements. *Id.* at 1968-1969. See also Dervan at 7-8.

This Court's history of examining plea agreements from the perspective of constitutional due process protections demonstrates the significance it places on the defendant's finality interest. The swift yet certain disposition of criminal charges is an essential component of the administration of justice. *Santobello*, *supra* at 261.

> This [negotiated plea] phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonable due in the circumstances.

Id., at 262. The "adjudicative element" in most cases includes criminal conviction, collateral consequences and – in many cases like Mr. Soto's – significant periods of incarceration. With a court's acceptance of a plea agreement, the defendant waives certain constitutional protections including the right to a jury trial, the right to remain silent and regarding most issues, the right to a further appeal. Considering these serious consequences, such agreements should be afforded an assurance of

finality -- not only to the specific count to which a defendant pleads, but at a minimum to the whole of the indictment that contains that count or charge.

Such a scope of finality benefits the entire criminal justice system. As this Court pointedly stated in *Allison*, negotiated pleas "properly administered, [] can benefit all concerned." *Allison*, *supra* at 71. Proper administration of such convictions ought to include the assurance that a defendant will not risk prosecution twice when waiving the right to trial once. However, without "accord[ing] a great measure of finality," to plea agreements all the players within the system are at a disadvantage. *Id.* The government relies on plea agreements to secure convictions and save resources. *Id.* at 71. The courts view these agreements as an efficient way to reduce the docket and preserve resources for cases where there is substantial issues of guilt or innocence. *Id.* The defendant relies on the promises made in the process to mitigate punishment and dispose of other charges. *Id.* Recognizing that the defendant is the only one ceding constitutional protections in an "essential component of the administration of justice," the issue of the scope of negotiated plea finality is ripe for determination. In order to preserve our modern criminal justice system's attendant values of efficiency, accuracy and individual liberty; this Court ought to grant certiorari in this case to consider the scope of finality protections that attach to knowing and voluntary negotiated plea agreements.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE CRIMINAL LAW DOCTRINE OF "MERGER OF OFFENSES" IS S PROTECTED ANCILLARY TO THE DOUBLE JEOPARDY CLAUSE.

Although this Court, lower federal courts, and state courts often deal with issues related to the double jeopardy bar to subsequent punishments and prosecutions, courts also are required to occasionally consider two ancillary doctrines in criminal law: collateral estoppel and the merger of offenses. This Court dealt with the former doctrine in *Ashe v. Swenson*, 397 U.S. 436 (1970), in which it held the Fifth Amendment guarantee against double jeopardy, applicable to the states through the Fourteenth Amendment, includes the collateral estoppel of relitigating settled issues as part of the constitutional protections afforded any defendant. *Id.* at 446 ("after a jury determined by its verdict that the petitioner was not one of the robbers, the State could [not] constitutionally hale him before a new jury to litigate that issue again"). This Court should now take the opportunity of this case to consider the second criminal law doctrine ancillary to double jeopardy – That of the "merger of offenses."

The legal doctrine of merger of offenses is studied by most every first-year law student in their introductory Criminal Law course. However, because it is understood as a well settled limitation on a state's power to charge, particularly in felony murder indictments, cases implicating the merger doctrine rarely come to the attention of appellate courts. Although the merger doctrine has been

relied upon in both federal court and state court criminal cases, this Court has never conclusively determined that the merger doctrine is an aspect of fundamental fairness in criminal charging required by both the Fourteenth and Fifth Amendments to the United States Constitution. This court should take this opportunity to both answer the question regarding the due process rights relating to merger of offenses as well as articulate a test for uniform application of the doctrine in all state and federal courts.

A. Mr. Soto's Past and Present Charges

In the instant case, Mr. Soto was originally charged with two counts in a single indictment. Appendix B. Count I was for Involuntary Manslaughter which in this case, is an Ohio version of a felony murder rule and is a first-degree felony. See, Ohio Rev. Code § 2903.04. Count II was for the Ohio crime of "Endangering Children" which was categorized as a third-degree felony. See, Ohio Rev. Code, § 2919.22

In the 2006 indictment, the underlying felony for Count I -- the involuntary manslaughter charge -- was simply Count II – The Endangering Children felony: "**Travis D. Soto** did cause the death of another … [his son] as a proximate result of committing felony Child Endangering…." App. at 3. The only difference between Count I (Involuntary Manslaughter) and Count II (Felony Child Endangering) is the result of "death" versus that of "serious physical harm" of which result death is certainly included. There is no question in this case that Mr. Soto's verdict of guilty on Count II stands in

a double jeopardy relationship with Count I and a guilty verdict on felony Child Endangering precludes conviction on the felony murder version of Involuntary Manslaughter. Or, to put it another way, Mr. Soto was already punished for the Involuntary Manslaughter charge of Count I.

All the parties agree in this case that if Mr. Soto had in fact been found guilty of Count I (Involuntary Manslaughter), he would have prevailed on his claim to a double jeopardy bar to his prosecution. Relying on the Ohio Supreme Court's previous double jeopardy analysis from *State v. Thomas*, 40 Ohio St.3d 213, 216-217 (1988), the Ohio intermediate appellate court reasoned:

> While Aggravated Murder does contain the language of "prior calculation and design," which Involuntary Manslaughter does not have, the Supreme Court of Ohio has held that "[A]ggravated [M]urder with prior calculation and design, * * * is defined as [M]urder with an enhanced mental state. Thus the only distinguishing factor between R.C. 2903.01(A) [Aggravated Murder] and [I]nvoluntary [M]anslaughter is, as in the case of murder, the mental state involved." *Thomas*, 40 Ohio St.3d at 216. The Supreme Court of Ohio reasoned that "one cannot criminally cause another's death without committing an underlying felony or misdemeanor." *Id.* at 216. Put another way, under the Supreme Court of Ohio's construction that prior calculation and design is not an additional element but only an "enhancement" of the state of mind

> required for both homicide offenses, an Aggravated Murder could not be committed without at least committing an Involuntary Manslaughter. As a result, under this construction, Involuntary Manslaughter does not contain an "element" of the offense that is not subsumed within Aggravated Murder, even if a rote matching test of language of the statute might differ.

State v. Soto, 2018-Ohio-459, ¶ 27 (2019) (Pet. App. at 40). The Ohio Supreme Court took no issue with this holding and restatement of the settled law of Ohio regarding the double jeopardy impact of an Involuntary Manslaughter conviction. Rather, the only dispute between the intermediate appellate court and the Ohio Supreme Court was whether jeopardy had in fact attached to the Involuntary Manslaughter charge.[5]

B. Double Jeopardy and Lesser Included Offenses

This Court defined the primary analysis for double jeopardy issues in the seminal case *Blockburger v. United States*, 284 US 299 (1932). However, it was not until decades later that this Court held that the

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[5] See, *Soto*, at para 13, Pet. App. at 7:

> Treating the dismissal of the involuntary-manslaughter charge as an acquittal, the [intermediate appellate] court concluded that further prosecution violated the Double Jeopardy Clauses because under the test in *Blockburger*, murder and aggravated murder constitute the same offense as involuntary manslaughter. But a dismissal is not equivalent to an acquittal.

federal interpretation of the Double Jeopardy Clause of the Fifth Amendment would be "incorporated" through the Fourteenth Amendment Due Process Clause. *Benton v. Maryland,* 395 U.S. 784 (1969). Since the *Benton* incorporation decision, *Blockburger* has been the constitutional analytic construct for most double jeopardy claims. *Blockburger* held:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, supra at 304.

Although *Blockburger* has generally stood the test of time, the statutory criminal law world of today is much different than it was in 1932. The proliferation of criminal laws, specialty crimes, and legislative acts reflecting momentary societal concerns combined with imprecise language and the lack of consensus regarding the meaning of words and phrases used in state and federal statutes, has made *Blockburger*'s proof requirement of "an additional fact which the other does not" often difficult to determine. One method courts employ to address this difficulty is the doctrine of merger of offenses.

In its simplest form, merger of offenses can be considered as a way of precluding certain crimes from acting as predicate offenses in felony murder cases. The most common example is that an

Involuntary Manslaughter charge cannot act as a predicate felony to a Felony Murder charge because each Manslaughter (which shares both act and result with Felony Murder) could then be charged by the unscrupulous prosecutor as a felony murder. In such a case, the manslaughter charge is said to "merge" with the felony murder charge, preventing the trial and punishment on the greater based on the evidence relevant only to the lesser. See, generally, Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. Rev. 403, 519-551 (2011).

This simple example is not, however, the only time the merger doctrine has been employed. In cases in which one offense is so similar in definition, although perhaps not using the same exact language, Courts have found that one offense merges with another. For example, in *State v. Lucas*, 243 Kan, 462, 759 P.2d 90 (Kan. 1988) the defendant was charged with a felony of Child Abuse which was defined as "willfully torturing, cruelly beating. Or inflicting cruel or inhumane corporal punishment on any child under the age of 18 years.: The Supreme Court of Kansas held that this crime of felony Child Abuse was a "felony inherently dangerous to human life" and applied the following merger test:

> [W]hether the underlying or collateral felony is so distinct from the homicide as not to be an ingredient of the homicide. If the underlying felony does not meet this test it is said to merge with the homicide and preclude the application of felony murder….

Id. at 466.

As in the *Lucas* case, Mr. Soto was charged with, and pleaded guilty to, a charge of felony Endangering Children. Under Ohio law, felony Endangering Children is almost identical to the Kansas law as it defined in relevant part as a crime for anyone, vis a vis a child under the age of 18, to:

> (1) Abuse the Child;
> (2) Torture or cruelly abuse the child;
> (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner … under circumstances that creates a substantial risk of serious physical harm to the child….

Ohio Rev. Code § 2919.22(B)(1-3). Mr. Soto's plea and sentence indicate that he "negotiated" to serve the maximum allowable punishment, 5 years in prison, for the third-degree felony based on either (2) or (3) above. App at 5.

Mr. Soto's Endangering Children count was patently a lesser included of the Involuntary Manslaughter count as that felony to which he pleaded was the requisite underlying felony for the homicide charge. Therefore, his Endangering Children guilty verdict should first be considered as related under double jeopardy to his current charges. Further, his Endangering Children charge, for which he has been punished with significant prison time, should be considered a charge that merged with the current homicide charges as it is this underlying charge, that is the

basis of any theory of his current confinement. Put in the language of *Lucas, supra*, in no arguable way is Mr. Soto's Endangering Children "underlying or collateral felony [] so distinct from the homicide as not to be an ingredient of the homicide."

This Court has yet to address the issues related to the constitutional role of the merger doctrine as applied to the broader constraints of double jeopardy concerns. As this case presents an excellent factual opportunity to do so, *Amici* urge this Court to grant certiorari in order to fully brief, argue and address this issue.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully submit this brief in support of the Petition for Writ of Certiorari to the Ohio Supreme Court filed by Petitioner Travis Soto.

Respectfully Submitted,

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APPENDIX A
List of *Amicus* Organizations

The **Public Defender Association** is a national non-profit corporation which advocates for justice system reform, developing punishment alternatives that support individual and community health.

The Ohio Justice & Policy Center is a public interest non-profit law firm that works for criminal justice reform in Ohio.

California Attorneys for Criminal Justice is a non-profit corporation and one of the largest statewide organizations of criminal defense lawyers in the country.

The **Florida Public Defender's Association, Inc.**, is a community of Public Defenders working to ensure high quality representation for people facing loss of liberty throughout Florida.

The **Georgia Association of Criminal Defense Lawyers** is a professional association of criminal advocates, which includes both public defenders and private counsel, working to improve the administration of criminal justice.

Indiana Public Defender Council is a judicial branch state agency which is mandated to "maintain liaison contact with . . . all branches of local, state, and federal government that will benefit criminal defense as a part of the fair administration of justice in Indiana." Ind. Code § 33-40-4-5.

The **Michigan State Appellate Defender Office** represents poor people in Michigan when appealing their criminal convictions.

The **Minnesota Board of Public Defense** oversees the public defender system in Minnesota to ensure that all indigent clients are treated fairly and provided effective legal defense services.

The **Washington Defender Association** is a statewide non-profit organization that represents over 30 public defender agencies and has over 1,500 members throughout Washington State.

The **Ashtabula County Public Defender's Office** represents those criminally charged in pre-trial, trial and post-trial matters in Ashtabula County, Ohio.

The **Franklin County Public Defender** is a countywide agency that provides comprehensive legal representation to indigent clients in criminal proceedings in Franklin County, Ohio.

The **Law Office of the Hamilton County Public Defender** represents indigent criminal defendants on misdemeanor and felony offenses, at the trial level and on appeal, in Hamilton County, Ohio.

The **Law Office of the Public Defender, Montgomery County**, **Ohio**, provides legal representation to indigent citizens accused of criminal conduct that can result in a loss of freedom.

APPENDIX B

INDICTMENT

Crim. Rule 6, 7

The State of Ohio
Putnam County

COURT OF COMMON PLEAS
PUTNAM COUNTY GRAND
March 31, 2006 **JURY Case No.** 06 CR 19

COUNT I

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present on or about the 23rd day of January 2006, at Putnam County, State of Ohio, **TRAVIS D. SOTO** did cause the death of another as a proximate result of the offender committing or attempting to commit a felony; to-wit: did cause the death of his son, John Doe, DOB: 11-21-2003, as a proximate result of committing felony Child Endangering in violation of Ohio Revised Code Section 2919.22(A) and (E)(1)(c), while at 5064 Road 18, Continental, Putnam County, Ohio, in violation of Ohio Revised Code Section 2903.04(A), **INVOLUNTARY MANSLAUGHTER,** a felony of the 1st degree.

COUNT II

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the

authority of the State of Ohio, do find and present on or about the 23rd day of January 2006, at Putnam County, State of Ohio, **TRAVIS** D. **SOTO** did, while being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen (18) years of age, create a substantial risk to the health or safety of the child by violating a duty of care, protection or support, and which resulted in serious physical harm to said child: to-wit: his son, John Doe, DOB: 11-21-2003, by striking him with an ATV and/or failing to seek medical attention for said child thereafter resulting in serious physical harm to said child, while at 5064 Road 18, Continental, Putnam County, Ohio, in violation of Ohio Revised Code Section 2919.22(A) and (E)(1)(c), **CHILD ENDANGERING,** a felony of the 3rd degree.

A TRUE BILL

/s/ Kimberly A. Schreiber
Grand Jury Foreperson

Office of the Prosecuting Attorney Of Putnam County, Ohio

/s/ Gary L. Lammers
By: Gary L. Lammers
Prosecuting Attorney

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF PUTNAM COUNTY, OHIO

STATE OF OHIO PLAINTIFF VS. Travis D. Soto DEFENDANT	CASE NO. 06 CR 19 PLEA OF GUILTY Hon. RANDALL L. BASINGER

I withdraw my former not guilty plea and enter a plea of guilty to the following offenses:

Count or Specification	Offense/ Specification	ORC Section	Level
II	Child Endangering	2919.22 (A) E(1)(C)	F-3

Maximum Penalty. I understand that the maximum penalty as to each count is as follows:

Offense/ Specification	Maximum Stated Prison Term (Yrs/Mos)	Maximum Fine	Mandatory Fine
II	5 yrs.	$10,000	no

License Suspension	Prison Term is Mandatory/ Consecutive	Prison Term is Presumed Necessary
no	no	no

Prison terms for multiple charges, even if consecutive sentences are not mandatory, may be imposed consecutively by the Court.

Court costs, restitution and other financial sanctions including fines, day fines, and reimbursement for the cost of any sanctions may also be imposed.

I understand that if I am now on felony probation, parole, under a community control sanction, or under post release control from prison, this plea may result in revocation proceedings and any new sentence could be imposed consecutively. I know any prison term stated will be served without good time credit.

Post Release Control. In addition, a period of supervision by the Adult Parole Authority after release from prison is required in this case. If I am sentenced to prison for a felony I or felony sex offense, after my prison release I will have 5 years of post release control under conditions determined by the Parole Board. If I am sentenced to prison for a felony 2 or felony 3 which involved causing or threatening physical harm, I will have mandatory post release control of 3 years. If I receive prison for a felony 3, 4, or 5, I may be given up to 3 years of post release control. A violation of any post release control rule or condition can result in a more restrictive sanction while I am under post release control, and increased duration of supervision or control, up to the maximum term and reimprisonment even though I have served the entire stated prison term imposed upon me by this Court for all offenses. If I violate conditions of supervision while under post release

control, the Parole Board could return me to prison for up to nine months for each violation, for a total of ½ of my originally stated prison term. If the violation is a new felony, I could receive a prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the offense.

Community Control. If this Court is not required by law to impose a prison sanction, it may impose community control sanctions or non-prison sanctions upon me. I understand that if I violate the terms or conditions of a community control sanction, the Court may extend the time for which I am subject to this sanction up to a maximum of 5 years, impose a more restrictive sanction, or imprison me for up to the maximum stated term allowed for the (offense/offenses) as set out above.

I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice and competence. I am not under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of this plea agreement stated entirely as follows; state silent as to sentence; Count 1 dismissed

I understand by pleading guilty I give up my right to a jury trial or court trial, where I could confront and have my attorney question witnesses against me, and where I could use the power of the court to call

witnesses to testify for me. I know at trial I would not have to take the witness stand and could not be forced to testify against myself and that no one could comment if I chose not to testify. I understand I waive my right to have the prosecutor prove my guilt beyond a reasonable doubt on every element of each charge.

By pleading guilty I admit committing the offense and will tell the Court the facts and circumstances of my guilt. I know the judge may either sentence me today or refer my case for a presentence report. I understand my right to appeal a maximum sentence, my other limited appellate rights and that any appeal must be filed within 30 days of my sentence. I understand the consequences of a conviction upon me if I am not a U.S. Citizen. I enter this plea voluntarily.

Signed and Dated: 7/6/06

/s/ Travis Soto
Signature of Defendant

/s/ [Illegible]
Attorney for Defendant

/s/ Gary L. Lammers
Prosecuting Attorney

JUDGMENT ENTRY OF GUILTY

The Court finds that this day the defendant, in open court, was advised of all constitutional rights and made a knowing, intelligent, and voluntary waiver of those rights pursuant to Crim. R. 11. The plea is accepted and is ordered filed. The Court finds the

Defendant guilty of each offense to which defendant has entered this plea. It is HEREBY ORDERED that a pre-sentence report be prepared. A sentencing hearing is scheduled on _____, 2006 at _____. Bond is continued.

7/6/06 /s/ Randall Basinger
Date JUDGE RANDALL L. BASINGER

cc: PROS
CBATES
PROB OFF
CUS