In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2025-0093
	:	
Appellee,	:	On Appeal from the
	:	Knox County
v.	:	Court of Appeals,
	:	Fifth Appellate District
DANIEL G. THOEN,	:	
	:	Court of Appeals
Appellant.	:	Case No. 23CA15

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE

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INTRODUCTION

Daniel Thoen raped his granddaughter when she was less than ten-years-old. *See State v. Thoen*, 2024-Ohio-5720, ¶¶1–2 ("App.Op."). He is now attempting to use the Fifth Amendment's Double Jeopardy Clause to prevent the State from holding him accountable for his actions. *Cf. Ohio v. Johnson*, 467 U.S. 493, 502 (1984). Thoen seeks to capitalize on an ambiguous initial charging document, along with a mistake that the State and the trial court each separately made when they informed him of the maximum penalty for his offense. He uses these flaws to argue that he could not be tried for the crime that he committed. The Court should not let him avoid accountability so easily.

Although Ohio law requires that offenders like Thoen receive a sentence of fifteen-years-to-life in prison, *see* R.C. 2971.03(B)(1)(b), the trial court, before accepting a guilty plea from Thoen, told him that he faced only a maximum of eleven years, plus an additional fifty percent of that term, *see* Tr.R.7, Thoen Motion to Dismiss at 2. Normally, an incorrect statement of the maximum penalty for an offense means that a defendant's plea was not made knowingly and voluntarily and therefore provides a basis for the defendant to seek to withdraw that plea (provided he can show prejudice). *See State v. Dangler*, 2020-Ohio-2765, ¶¶11–12, 15, 23; *see also State v. Drake*, 2017-Ohio-4027, ¶11 (9th Dist.). Had the trial court imposed the sentence that Ohio law requires, Thoen would have therefore had a strong argument on appeal that his plea should be vacated and that the case should be remanded to the trial court. Rather than wait for the inevitable reversal and retrial, the State sought to cure the error by dismissing the pending case against Thoen and properly indicting him in a manner consistent with the requirements of Ohio law. *See* Tr.R.1, Indictment.

The Double Jeopardy Clause did not prevent the State from doing so and Thoen is wrong when he argues otherwise. To succeed on his Double Jeopardy claim, Thoen would have to show two things. He would have to first show that jeopardy attached when he entered his original plea. And he would also have to show that jeopardy terminated in a way that barred a second prosecution. Specifically, Thoen would have to show that the State's dismissal of the first prosecution was not manifestly necessary. He can make neither showing.

The U.S. Supreme Court has not definitively addressed when jeopardy attaches to a defendant's guilty plea. It has *assumed* "that jeopardy attache[s] at least when" a defendant is sentenced. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). But it has also noted that "the taking of a guilty plea is not the same as an adjudication on the merits after a full trial." *Johnson*, 467 U.S. at 500 n.9. It has emphasized that defendants like Thoen "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from" receiving "one full and fair opportunity to convict those who have violated its laws." *Id.* at 502. Many courts have relied on this language to hold that jeopardy does not always attach when a court accepts a guilty or no contest plea. *See, e.g., United States v. Brune*, 991 F.3d 652, 658 (5th Cir. 2021). And while this Court *has* held that jeopardy attaches when a court accepts a plea, *State ex rel. Leis v. Gusweiler*, 65 Ohio St. 2d 60, 61 (1981) (per curiam), the Court never revisited those early decisions in light of *Johnson*, *see State v. Rader*, 55 Ohio App. 3d 102, 105 n.4 (1st Dist. 1988) (per curiam). It can and should do so now; it is not bound to follow its earlier pre-*Johnson*, decisions. Stare decisis principles have "less force" where, as here, "intervening decisions 'have removed or weakened the conceptual underpinnings from [a] prior decision.'" *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 104 (1993) (Scalia, J., concurring) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)); *cf. also Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 183 (6th Cir. 1990) (noting that intervening U.S. Supreme Court precedent allows a federal appellate court to revisit otherwise-binding panel precedent).

Thoen cannot prevail in this case even if the Court reaffirms its earlier decisions about when jeopardy attaches, however. Regardless of whether jeopardy attached in the first prosecution, it did not terminate in a way that prevented the State from later indicting Thoen in a manner consistent with Ohio law. The Double Jeopardy Clause does not prevent the State from pursuing a second prosecution when it was manifestly necessary to discontinue the first one. *See Wade v. Hunter*, 336 U.S. 684, 689–90 (1949). Such a necessity exists, the U.S. Supreme Court has held, when a first prosecution, "at best would have produced a verdict that could have been upset at will by one of the parties." *Illinois v. Somerville*, 410 U.S. 458, 471 (1973). That is all that the first prosecution would have produced here. Had the trial court followed Ohio law when it sentenced Thoen, then Thoen could have upset that sentence—and his guilty plea—on appeal by arguing that the trial court had failed to comply with Crim.R.11(C)(2) and that his plea was therefore not knowing, intelligent, and voluntary.

Finally, it is worth briefly considering the consequences of Thoen's argument in this case. The State has already dismissed its first criminal case against Thoen. And Thoen is arguing that the second case is now barred by the Double Jeopardy Clause. That means that if Thoen is right, he would likely argue that he should walk free. And if he did, he would avoid *any* accountability for raping a young family member. That is not an outcome that the Double Jeopardy Clause demands.

STATEMENT OF AMICUS INTEREST

As the State's chief law officer, R.C. 109.02, the Ohio Attorney General is interested in an interpretation of the Fifth Amendment's Double Jeopardy Clause that protects defendants' constitutional rights while also ensuring that the State has "one full and fair opportunity to convict those who have violated its laws." *See Johnson*, 467 U.S. at 502.

STATEMENT OF THE CASE AND FACTS

Thoen's granddaughter was four years old when she told her mother that she had put Thoen's penis in her mouth. App.Op.¶2. The child's mother called the police and eventually took her to Nationwide Children's Hospital for a medical examination and forensic interview. App.Op.¶¶2–3. A pediatric sexual assault nurse examiner ordered DNA testing. That testing failed to identify any foreign DNA in the child's mouth, but did reveal male DNA on her thighs, mons pubis, and underwear. App.Op.¶4. There was not enough DNA to permit further testing or to identify to whom the DNA belonged, however. *Id.*

Thoen admitted to allowing his granddaughter to touch his genitals and place his penis in her mouth. App.Op.¶5. After receiving a *Miranda* warning from Knox County Sheriff's detectives, he told them that it was a one-time situation that occurred on a Sunday morning while the rest of the family was either getting ready for church or was at church. *Id.*

The State filed a complaint in municipal court in which it charged Thoen with the rape of a person less than thirteen years of age. App.Op.¶6. The case was bound over to common pleas court and, after negotiations with the State, Thoen agreed to plead guilty to a bill of information charging one count of rape. *Id.* The bill of information stated that Thoen had violated R.C. 2907.02(A)(1)(b) and identified his victim's birthdate. *See* Tr.R.7, Thoen Motion to Dismiss at 2. It did not, however, contain a more explicit statement that the victim was under the age of ten. *See id.*

Neither the State nor the trial court properly advised Thoen of the maximum penalty that he would face as a result of a guilty plea. Although Ohio law requires that courts sentence a defendant who is convicted of raping a victim under the age of ten to between fifteen years and life in prison, *see* R.C. 2971.03(B)(1)(b), Thoen's written plea stated that Thoen faced a possible term of imprisonment of only between three and eleven years, plus fifty percent of whatever prison term the trial court imposed. App.Op.¶6. The trial court similarly misstated the maximum penalty for the offense. Like the written plea, it failed to inform Thoen that he would be subject to a fifteen-year-to-life prison term. App.Op.¶7.

The State realized the error before the trial court sentenced Thoen. It filed a new bill of information and moved to dismiss the earlier one. App.Op.¶8. The State then presented the case to a grand jury which returned a single count indictment that again charged Thoen with the rape of a victim under the age of thirteen and that again listed his victim's birthdate. *See* Tr.R.1, Indictment. The only difference between the new indictment and the original bill of information is that the new indictment explicitly stated that the victim was "also less than ten years of age." *See id.*; Tr.R.7, Thoen Motion to Dismiss at 2; *see also* Bill of Information, *State v. Thoen*, Knox County Case No. 23CR03-0085.

Thoen moved to dismiss the indictment on double jeopardy grounds, but the trial court denied his motion. App.Op.¶10. The trial court also denied Thoen's motion to suppress his confession. App.Op.¶11. Thoen waived his right to a jury trial and, after a bench trial, the court found him guilty. App.Op.¶14. It imposed the mandatory fifteen-years-to-life sentence that Ohio law requires. App.Op.¶15.

Thoen appealed raising two assignments of error. As is relevant here, he again argued that the State violated the Fifth Amendment's Double Jeopardy Clause when it dismissed the original bill of information and obtained a new indictment. App.Op.¶¶17, 19. The Fifth District rejected his claim. It held that jeopardy did not attach when the trial court accepted Thoen's initial guilty plea. App.Op.¶40. It further held that, even if jeopardy *had* attached, it would not matter. App.Op.¶46. The Fifth District noted that the U.S. Supreme Court has allowed for "prosecution after dismissals or mistrials without offending" the Double Jeopardy Clause so long as the dismissal "was the product of 'manifest necessity.'" *Id.* (citation and quotation omitted). That standard was satisfied here, the appellate court wrote, because there "were no circumstances in which anyone could cure the error" in the original proceedings other than by dismissing and refiling the case. App.Op.¶47. It therefore held "that there was a manifest necessity to proceed by indictment and terminate any proceeding under the bill of information." *Id.*

Thoen appealed to this Court raising two related propositions of law that separately addressed the two prongs of a double-jeopardy analysis. *See* Thoen Memorandum in Support of Jurisdiction. The Court accepted both propositions. *04/01/2025 Case Announcements*, 2025-Ohio-1090.

ARGUMENT

The Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution states that "[n]o person shall be … twice put in jeopardy of life or limb." U.S. Const., 5th Amend. The Ohio Constitution contains nearly identical language. It states that "[n]o person shall be twice put in jeopardy for the same offense." Ohio Const., Art.

I, §10. The Double Jeopardy Clause provides three primary protections to defendants: "It 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." *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (alteration accepted, quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)); *see also Clark v. Adult Parole Auth.*, 2017-Ohio-8391, ¶13 (per curiam) ("The protection provided by the Ohio Constitution's Double Jeopardy Clause is coextensive with that provided by the Double Jeopardy Clause of the United States Constitution.").

Whether any of those protections are at issue here, and whether the Double Jeopardy Clause prevented the State from dismissing the original bill of information and reindicting Thoen, depends on the answer to two questions. First, did jeopardy attach when Thoen pleaded guilty to charges contained in the original bill of information? Second, if jeopardy *did* attach, would trying Thoen for the charges reflected in the later indictment violate the Double Jeopardy Clause? The answer to both questions is no.

Thoen incorrectly argues otherwise, across two different propositions of law. His first Proposition of Law asserts that jeopardy attached when he entered his original guilty plea. His second Proposition of Law argues that, assuming jeopardy attached, it was not manifestly necessary to dismiss the original bill of information and he therefore cannot be retried. The Attorney General explains, in response to Thoen's first Proposition of Law, that jeopardy did not attach. Then, in response to Thoen's second Proposition, the

Attorney General explains why the Double Jeopardy Clause did not bar Thoen's indictment and trial, even if jeopardy did attach when Thoen pleaded guilty to the first charging document, the flawed bill of information.

<u>Appellant's Proposition of Law 1:</u>

Jeopardy attaches when a trial court unconditionally accepts a defendant's guilty plea.

I. Courts disagree about when jeopardy attaches after a defendant enters a guilty or no contest plea.

The moment that jeopardy attaches when a defendant pleads not guilty and chooses to go to trial is clear. In such cases, "jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" *Serfass v. United States*, 420 U.S. 377, 388 (1975) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality op.)). When a defendant is tried before a jury, that means that "jeopardy attaches when the jury is empaneled and sworn." *Martinez v. Illinois*, 572 U.S. 833, 834 (2014) (per curiam) (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978)). And in bench trials, "jeopardy attaches when the court begins to hear evidence." *Serfass*, 420 U.S. at 388.

The point at which jeopardy attaches is less clear when, instead of going to trial, a defendant pleads guilty or no contest. The United States Supreme Court has never directly addressed that question. Nearly a century ago, it remarked that a guilty plea "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). But *Kercheval* did not involve the Double Jeopardy Clause. At issue in that case was whether a defendant's withdrawn guilty plea could be introduced as evidence at trial. *See id.* at 221–22. And when the United States Supreme Court was next given an opportunity to more directly address when jeopardy attaches in the context of a plea, it did not do so. It simply "assume[d] that jeopardy attache[s] *at least* when" a defendant is sentenced. *Ricketts*, 483 U.S. at 8 (emphasis added).

The United States Supreme Court decision that has come closest to addressing the point at which jeopardy attaches to a guilty or no contest plea is *Johnson*. The defendant in that case killed a man and stole property from the victim's apartment. *Johnson*, 467 U.S. at 494–95. The State charged the defendant with four crimes, a greater and lesser charge related to the murder and a greater and lesser charge related to the theft. *See id.* Attempting to avoid trial on greater charges, the defendant, over the State's objection, pleaded guilty to the lesser offenses. *Id.* at 496. The defendant then argued that, because the trial court had accepted his guilty pleas, the Double Jeopardy Clause prevented the State from trying him for the greater offenses. *Id.*

The United States Supreme Court rejected the defendant's creative reading of the Double Jeopardy Clause. It held that defendants "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from" receiving "one full and fair opportunity to convict those who have violated its laws." *Id.* at 502. And most important for purposes of this case, it walked back its earlier statement in *Kercheval* about the effect of a guilty plea. It drew a distinction between guilty pleas and trials, writing that "the taking of a guilty plea is not the same as an adjudication on the merits after a full trial." *Id.* at 500 n.9.

Johnson proved to be a major inflection point for Double Jeopardy Clause jurisprudence. Before *Johnson*, several courts had held that jeopardy attaches when a court accepts a guilty or no contest plea. The Third Circuit, for example, had concluded that a defendant "must be considered to have been 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 attached with the acceptance of his guilty plea." *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973). Several circuits followed suit. The Fifth and Eighth Circuits both cited *Jerry* when they similarly concluded that "[j]eopardy attaches with the acceptance of a guilty plea." *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980); *see also United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir. 1978) (per curiam); *but see Bally v. Kemna*, 65 F.3d 104, 107 (8th Cir. 1995) (characterizing the relevant portion of *Bullock* as dicta).

The Third Circuit changed course after *Johnson*, concluding that *Jerry* and related circuit precedents were inconsistent with that decision. *See Gilmore v. Zimmerman*, 793 F.2d 564, 571 (3d Cir. 1986). Other circuits again did the same. Like the Third Circuit, the Fifth Circuit concluded that *Johnson* "effectively rejected" its *Sanchez* decision. *Brune*, 991 F.3d at 658 (alteration accepted, quotation omitted). Even courts that had previously applied a more nuanced approach to determining when jeopardy attaches to a guilty plea concluded that *Johnson* undermined their earlier precedents. The First Circuit had previously advocated for a flexible rule that analogized "judicial abortion of a previously accepted guilty plea and plea bargain to judicial declaration of a mistrial after jeopardy has attached." *United States v. Cruz*, 709 F.2d 111, 114 (1983). But it determined that *Johnson* overruled the double jeopardy analysis for which it had advocated in *Cruz*. *United States v. Santiago Soto*, 825 F.2d 616, 619 (1st Cir. 1987).

Ohio appellate courts have not shifted as significantly as many federal courts have—but that is only because they are bound to follow this Court's precedent. Before *Johnson*, this Court had held that jeopardy attaches when a court accepts a plea. *State ex rel. Sawyer v. O'Connor*, 54 Ohio St. 2d 380, 382–83 (1978) (per curiam); *Gusweiler*, 65 Ohio St. 2d at 61. It has not revisited those decisions in any meaningful way following *Johnson*. Lower courts have understandably continued to follow those decisions. *See Rader*, 55 Ohio App. 3d at 105 n.4.

That has not stopped them from questioning whether *Johnson* changed the rules, however. The First District noted that *Johnson* appeared "to hold that there are instances when the acceptance of a plea to lesser charges does not preclude a trial of the greater charges," but declined to rely on that decision because this Court had "not, to date, changed its holdings that a plea of no contest, once filed and accepted, constitutes jeopardy under any and all circumstances." *Id.* The Eighth District similarly has continued to apply *O'Connor* and *Gusweiler* while at the same time noting that the holdings in those cases "seem questionable … in view of *Ohio v. Johnson*." *State v. Conti*, 57 Ohio App. 3d 36, 36 (8th Dist. 1989) (per curiam).

To be sure, even after *Johnson*, some courts have continued to hold that jeopardy attaches once a court accepts a guilty or no contest plea. *See Brune*, 991 F.3d at 659 (discussing split of authority). The Sixth Circuit, for example, has construed *Johnson* narrowly and has continued to hold that "[j]eopardy generally attaches when the district court accepts the defendant's guilty plea." *United States v. Bell*, 37 F.4th 1190, 1198 (6th Cir. 2022) (citing *Untied States v. Bearden*, 274 F.3d 1031, 1036 (6th Cir. 2001)). The Ninth Circuit has likewise held, even after *Johnson*, that jeopardy ordinarily attaches when a court accepts a guilty plea. *United States v. Patterson*, 381 F.3d 859, 864 (9th Cir. 2004). That decision was controversial, however, and several members of the court wrote that they believed it conflicted with *Johnson* "and the law of two other circuits." *United States v. Patterson*, 406 F.3d 1095, 1095 (9th Cir. 2005) (Kozinski, J., dissenting from denial of rehearing en banc). The Eleventh Circuit has also held that jeopardy attaches upon the acceptance of a plea and has continued to cite *Kercheval*'s statement that "an unconditional plea 'is itself a conviction'" as the basis for its decision. *United States v. McIntosh*, 580 F.3d 1222, 1228 (11th Cir. 2009) (quoting *Kercheval*, 274 U.S. at 223). Finally, a handful of circuits have avoided the issue. They have "questioned the rationale of cases holding that jeopardy attaches upon acceptance of a guilty plea," but have found it unnecessary to directly address that question. *Bally*, 65 F.3d at 108–09; *see also United States v. Wampler*, 624 F.3d 1330, 1341 (10th Cir. 2010).

Before moving on, there is one potential wrinkle in this case. The Court in *State v. Soto*, 2019-Ohio-4430 appeared to reaffirm the principle that jeopardy attaches when a court accepts a guilty plea. At issue in *Soto* was whether a defendant could be tried for murder even though the State had dismissed an earlier involuntary manslaughter charge in exchange for the defendant's agreement to plead guilty to child endangering. *See id.* at ¶1. The charges in that case all stemmed from the death of the defendant's son who was killed in what the defendant originally represented as an ATV accident. *Id.* at ¶¶4–5. A decade after he was sentenced, however, the defendant confessed that he had lied about the events that led to the original charges. The defendant admitted that he had fabricated the ATV accident and that he had instead beaten his son to death. *See id.* at ¶¶5–7.

A majority of the Court held that the Double Jeopardy Clause did not bar the second prosecution. It held that a "dismissal is not equivalent to an acquittal" and that, because the State had dismissed the involuntary manslaughter charge, the defendant was never put in jeopardy. *Id.* at ¶¶13–14. The dissent, however, would have barred the second prosecution. *See id.* at ¶23 (Donnelly, J., dissenting). In the process of responding to the dissent, the majority wrote that "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." *Soto*, 2019-Ohio-4430 at ¶15 (emphasis added).

At first blush, it might appear that the Court in *Soto* doubled down on the principle that jeopardy attaches when a court accepts a defendant's plea. A closer examination of the *Soto* decision reveals, however, that the question of when jeopardy attaches to guilty or no contest pleas was simply not at issue in that case. The *Soto* majority's statement that "[o]f course" jeopardy attaches when a court accepts a guilty plea was therefore a "drive-by … ruling" that the Court should not feel bound to follow. *Cf. Wilkins v. United States*, 598 U.S. 152, 160 (2023) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006)). It is certainly not the type of controlling precedent that would prevent the Court from revisiting its decisions in *O'Connor* and *Gusweiler* in a case (like this one) that *does* present the question.

II. The Court should hold that jeopardy did not attach when Thoen pleaded guilty to a bill of information that failed to accurately describe the charged offense.

If the Court holds jeopardy does not automatically attach at the time a court accepts a guilty plea, it will have answered only half the question. It must still determine when jeopardy *does* attach. More important, it must decide whether jeopardy attached in this case when Thoen pleaded guilty. It should conclude that it did not.

Courts from around the country have offered different approaches to determining when jeopardy attaches if it does not attach at the time a court accepts a guilty plea. Some have held that jeopardy does not attach until sentencing. *See State v. Angel*, 132 N.M. 501, 503 (N.M. 2022). Others have held that "the acceptance of a defendant's guilty plea should not trigger double jeopardy protection unless the facts and circumstances surrounding the guilty plea implicate the policy considerations underlying the double jeopardy clause." *State v. Thomas*, 296 Conn. 375, 392 (Conn. 2010); *see also Gilmore*, 793 F.2d at 568–71; *Santiago Soto*, 825 F.2d at 618–20.

The U.S. Supreme Court, for its part, examined several factors in *Johnson* when determining whether jeopardy had attached to the plea in that case. First it considered the defendant's finality interest. Among other things, it considered whether the acceptance of the plea had the "implications of an 'implied acquittal' which results from" a jury verdict. *Johnson*, 467 U.S. at 501–02. It also considered whether any charges remained pending following the defendant's plea. *See id.* Second, it looked for signs of prosecutorial overreach. It asked whether "the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial," or whether ending the prosecution would instead "deny the State its right to one full and fair opportunity to convict those who have violated its laws." *Id.*

Adopting what is perhaps the clearest approach to determining when jeopardy attaches, the Fifth Circuit has distilled *Johnson*'s analysis into a two-part test. *Brune*, 991 F.3d at 665. The test that it has adopted considers "the twin aims of the Double Jeopardy Clause: protecting a defendant's finality interests and preventing prosecutorial overreaching." *Id.* (quoting *Patterson*, 406 F.3d at 1097–98 (Kozinski, J., dissenting from denial of rehearing en banc)). Under that test, the answer to whether jeopardy attached to a guilty or no contest plea requires is a case-specific question.

Applied here, both parts of the Fifth Circuit's test point in the same direction. Thoen had no expectation of finality in his initial guilty plea and the prosecution did not over-reach when it dismissed the initial case against Thoen and recharged him. There should therefore be no question that jeopardy did not attach to Thoen's initial guilty plea.

To begin with, Thoen's finality interest was minimal. Thoen began with a reduced finality interest in his guilty plea, as compared to a case that had gone to trial. "The mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence." *Santiago Soto*, 825 F.2d at 620. Any finality interest that Thoen might have had was reduced by the fact that the process by which he was initially charged and pleaded guilty did not comply with Ohio law.

There were at least two significant problems with that process. First, Thoen was not properly charged by way of a bill of information. The sentence for rape of a victim under the age of thirteen includes the possibility of life imprisonment, R.C. 2907.02(B), and Ohio law requires a felony that may be punished by life imprisonment to be charged by way of an indictment, Crim.R.7(A). A criminal defendant cannot waive that requirement. *See id.* Second, the written plea document misinformed Thoen about the sentence he might face. It stated that he might face a sentence of between three and eleven years, plus fifty percent of the term the court ultimate imposed. Tr.R.7, Thoen Motion to Dismiss at 2. Ohio law requires that a defendant convicted of raping a victim under the age of ten be sentenced to a term of fifteen years to life, however. *See* R.C. 2971.03(B)(1)(b).

There was also no prosecutorial overreach here. This is not a case in which the State sought an unfair advantage or treated the initial proceedings against Thoen as a "dress rehearsal[]" in its efforts to secure a conviction. *See Currier v. Virginia*, 585 U.S. 493, 498 (2018). It did not "make repeated attempts" to convict Thoen, "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). Thoen also cannot claim to be surprised by the State's decision to dismiss the initial bill of information and seek an indictment. He knew the age of his victim and he knew the crime that the State alleged that he committed. Thus, while State may have made a mistake when it filed a bill of information rather than proceeding by way of indictment, it was not overreach for the State to seek to correct that mistake.

There is no double jeopardy problem when, as in this case, "an honest error" is "spotted and corrected by respectable prosecutors." *See United States v. Slape*, 44 F.4th 356, 361–63 (5th Cir. 2022). Even courts that have held that "jeopardy normally attaches when the court unconditionally accepts a guilty plea" have nevertheless indicated that a "fatal defect in an indictment may permit a second indictment." *United States v. McIntosh*, 580

F.3d 1222, 1227–28 (11th Cir. 2009) (quotation omitted). The U.S. Supreme Court has cautioned that the defendants should not be permitted to use "the Double Jeopardy Clause as a sword to prevent the State" from receiving one fair opportunity to obtain a conviction. *See Johnson*, 467 U.S. at 502. But that is ultimately how Thoen seeks to use it. He seeks to transform the Double Jeopardy Clause into a gotcha provision that binds the State to its mistakes even when those mistakes are contrary to Ohio law.

Appellant's Proposition of Law 2:

> *If a trial court erroneously accepts a defendant's guilty plea, there is no manifest necessity for the prosecution to dismiss and reindict the case because any such error can be resolved by restoring the parties to their pre-plea positions*.

Even if the Court concludes that jeopardy attached at the time that the trial court accepted Thoen's guilty plea, it should still hold that the Double Jeopardy Clause did not prevent the State from dismissing the original case against Thoen and seeking a new, correct, indictment. The "conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Somerville*, 410 U.S. at 467. If jeopardy *has* attached, the "remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." *Martinez*, 572 U.S. at 841.

As is relevant here, jeopardy will often terminate in a way that will bar a second prosecution if a trial ends *after* jeopardy attached but *before* a final verdict or judgment. *See Wade*, 336 U.S. at 688. This rule reflects the fact that, while the Double Jeopardy Clause is commonly understood to bar multiple punishments for a single offense, as well as retrial after acquittal, *see North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), it also protects a "separate but related interest of a defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." *United States v. Scott*, 437 U.S. 82, 92 (1978); *see also Kepner v. United States*, 195 U.S. 100, 126 (1904) (discussing the plea of autre foi acquit).

There are two significant exceptions to this rule. The first is when the defendant consents (either explicitly or implicitly) to the termination of a trial. *Scott*, 437 U.S. at 93. The second is when there is a manifest necessity to discontinue the proceedings. *Wade*, 336 U.S. at 689–90. The "manifest necessity" exception to the Double Jeopardy Clause's bar of a second prosecution recognizes that "[t]here may be unforeseeable circumstances that arise during a trial making its completion impossible," and that allowing defendants to avoid prosecution in such situations would frustrate "the purpose of law to protect society from those guilty of crimes." *Id.*

Under the "manifest necessity" standard, "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Wade*, 336 U.S. at 690 (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)). While phrased in terms of "necessity," the manifest necessity test does not demand *absolute* necessity; it requires only that there be a "high degree" of necessity to discontinue a proceeding. *Arizona v. Washington*, 434 U.S. 497, 505–07 (1978). There is "no rigid formula" for determining what constitutes a manifest necessity for discontinuing a trial. *See Wade*, 336 U.S. at 690; *see also Arizona*, 434 U.S. at 506 & n.20. Courts have recognized such a necessity in two common situations: mistrials and when a judge "terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence." *Scott*, 437 U.S. at 92.

The circumstances of this case do not fit neatly into either category, but they are, in meaningful ways, akin to a mistrial. *Cf. Lee v. United States*, 432 U.S. 23, 30–31 (1977) (finding no significant difference between a dismissal and a mistrial). When a court grants a mistrial, it determines that a trial cannot proceed in a manner consistent with the ends of public justice. *See Arizona*, 434 U.S. at 511–12. Something similar happened here. The State in this case dismissed the initial case against Thoen because the charging document did not comply with Ohio law and because there was no way to continue the initial proceeding in a manner consistent with principles of justice. The Court should therefore examine Thoen's double jeopardy claim through the same "manifest necessity" lens that courts use to examine mistrials.

"[N]o expectation of finality attaches to a properly granted mistrial." *Evans v. Michigan*, 568 U.S. 313, 319–20 (2013). It is well-established that there is no Double Jeopardy concern when a court grants a mistrial at a defendant's request. *Jorn*, 400 U .S. at 485 (plurality op). A different rule applies when the State asks a court to declare a mistrial. The Double Jeopardy clause "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*, 355 U.S. at 188. When the State requests a mistrial, the prosecutor must therefore "shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar." *Arizona*, 434 U.S. at 505. The prosecution must, in other words, demonstrate "'manifest necessity' for any mistrial declared over the objection of the defendant. *Id.*

There is no "rigid, mechanical rule" for determining whether a manifest necessity exists; that question must be determined on a case-by-case basis. *Somerville*, 410 U.S. at 467. The U.S. Supreme Court's decision in *Somerville* nevertheless is instructive here. The trial court in that case granted the prosecution's motion for a mistrial on the basis that the indictment contained a fatal flaw that, under state law, could not be waived. *See id.* at 459–60. Such an incurable defect, the U.S. Supreme Court held, constituted a manifest necessity for dismissal. *Id.* at 468–69. It made no sense, the court wrote, to continue with a proceeding that "at best would have produced a verdict that could have been upset at will by one of the parties." *Id.* at 471. The decision to grant the prosecution's motion for a mistrial in *Somerville* was therefore "a rational determination designed to implement a legitimate state policy." *Id.* at 469.

A similar logic supported the State's decision in this case to dismiss the bill of information under which Thoen was originally charged. As already noted, *see* above at 5–6, the statutory penalty for Thoen's offense included a possible term of life imprisonment and the State was therefore required to charge Thoen by way of an indictment—a requirement that Thoen could not waive, *see* Crim.R.7(A). Thoen's plea colloquy also did not comply with Crim.R.11. That rule requires courts to inform defendants of "the maximum penalty involved." Crim.R.11(C)(2)(a). But in this case the trial court never told Thoen that he could be sentenced to life in prison. *See* App.Op.¶¶6–7. The plea document misstated the maximum penalty, and the trial court repeated that mistake. *Id.* These technical-but-consequential legal errors created a manifest necessity to dismiss the original case against Thoen and recharge him in a way that was consistent with Ohio law.

Consider what would have happened in this case had the State not sought a new indictment against Thoen and had instead allowed the original case to proceed to sentencing. Under Ohio law, Thoen was facing a possible term of life imprisonment. But Thoen was never informed of that fact before he pleaded guilty. The requirements of Crim.R.11 were therefore never satisfied, and Thoen would have had a strong argument that he was prejudiced by the fact that no one ever told him about the maximum penalty he might face. He would have been able to make a compelling case that he would not have pleaded guilty if he knew that he could potentially spend the rest of his life in prison, rather than a maximum of eleven years. *Cf. State v. Nero*, 56 Ohio St. 3d 106, 108 (1990) (a defendant establishes prejudice by showing that a plea would not otherwise have been made).

The State was therefore in a no-win situation. It could not seek a sentence that was inconsistent with Ohio law. But it also could not ask the trial court to impose the legally required sentence on a defendant who had entered a legally deficient plea. There was therefore a manifest necessity for the State to do *something*, and it reasonably chose to begin the proceedings anew, free from any legal errors. Its decision to do so was a far cry from the types of "oppressive practices" that the Double Jeopardy Clause was designed to prevent. *See Wade*, 336 U.S. at 688–89.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth District's decision.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Brief of Amicus Curiae Ohio Attorney General Dave Yost in Support of Appellee was served on July 22, 2025, by e-mail on the following:

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