A Deal Is a Deal: Plea Bargains and Double Jeopardy After *Ohio v. Johnson*

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I. INTRODUCTION

On March 10, 2004, Pedro Cabrera made a statement that cost him fourteen years of his life: he proclaimed his innocence. Mr. Cabrera pleaded guilty to one count of armed robbery in exchange for the dismissals of one count of armed robbery, two counts of aggravated unlawful restraint, two counts of burglary, as well as a recommended six year sentence. The court accepted this plea and ordered a finding of guilty. However, during an exchange that followed, Mr. Cabrera asserted that he was actually innocent but that he preferred "to take the time" instead of proceeding to trial. The judge then refused to accept Mr. Cabrera's guilty plea, vacated the entry of the plea, and set the matter for trial in order to give Mr. Cabrera "a chance to prove [his] innocence." Eventually, Mr. Cabrera was convicted of all counts at a bench trial and sentenced to twenty years.

In 2010, Mr. Cabrera filed a habeas corpus petition in the United States District Court for the Northern District of Illinois, alleging that his conviction violated the Fifth Amendment prohibition on double jeopardy because his guilty plea had been vacated and he had been forced to stand trial.⁷ In addressing his claim, the court noted a split among the circuits

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^{1.} People v. Cabrera, 402 Ill. App. 3d 440, 442-43 (Ill. App. Ct. 2010).

^{2.} Id. at 442.

^{3.} *Id*.

^{4.} Id. at 443.

^{5.} *Id*.

^{6.} *Id*.

^{7.} Cabrera v. Acevedo, No. 11 C 1390, 2012 WL 716906, at *2 (N.D. Ill. Mar. 6, 2012).

over "whether double jeopardy prevents a court from sua sponte vacating the plea and proceeding to trial." Thus, Mr. Cabrera could not make the required showing that the state court proceedings "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." Mr. Cabrera's petition was denied. 10

The Double Jeopardy Clause provides that no person will "be subject for the same offence to be twice put in jeopardy of life or limb." This protection has been applied to state proceedings through the Fourteenth Amendment as "a fundamental ideal in our constitutional heritage." The District Court for the Northern District of Illinois correctly noted that the Supreme Court has not directly addressed the question of whether a court's decision to sua sponte vacate a defendant's guilty plea and proceed to trial violates double jeopardy protections. Instead, there is a clear circuit split. Mr. Cabrera's case indicates that the current split over the constitutionality of a court accepting a guilty plea and then sua sponte vacating that plea, forcing the defendant to stand trial, has ramifications beyond trial courts: the uncertainty itself dooms habeas corpus petitions to fail.

The traditional rule, which generally understands jeopardy to attach at the point that a guilty plea has been accepted, ¹⁴ is the appropriate rule. Such a rule would prevent a court from sua sponte vacating an already-accepted guilty plea and forcing the defendant to stand trial, thereby depriving the defendant of the finality that comes with his guilty plea, and, if there was a plea bargain, depriving both the prosecution and defendant the benefits of their bargain.

Part II examines the underpinnings of the traditional Double Jeopardy rule. Part III analyzes the circuit split that developed in the wake of *Ohio v. Johnson*. ¹⁵ Part IV discusses and evaluates the policy justifications and implications for both the traditional rule and the new rule. Part IV also assesses whether jeopardy has attached based on an evaluation of the defendant's finality interest and the potential for prosecutorial overreaching. Part V provides a brief conclusion.

9. 28 U.S.C. §2254(d)(1) (2013).

^{8.} Id.

^{10.} Cabrera, 2012 WL 716906, at *3.

^{11.} U.S. CONST. amend. V.

^{12.} Benton v. Maryland, 395 U.S. 784, 794 (1969).

^{13.} Cabrera, 2012 WL 716906, at *2.

^{14.} United States v. Jerry, 487 F.2d 600, 606 (3d Cir. 1973); United States v. Vaughan, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983); see also Mark Hammond, United States v. Patterson: When Does the Double Jeopardy Clause Protect Defendants in Federal Court?, 29 Am. J. TRIAL ADVOC. 467, 468 (2005)

^{15.} Ohio v. Johnson, 467 U.S. 493 (1984).

II. THE TRADITIONAL RULE

Under the traditional rule, jeopardy is understood to attach when a court accepts a guilty plea. The justification for the traditional rule, perhaps most precisely stated by Justice Stevens, is that "[a] conviction based on a plea of guilty has the same legal effect as a conviction based on a jury's verdict." Therefore, "[j]eopardy attaches with the acceptance of a guilty plea." Because the Double Jeopardy Clause was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense," forcing a defendant to stand trial after being convicted by guilty plea is impermissible under this logic.

The court in *United States v. Cruz*²⁰ applied the traditional rule and declined to adopt an absolutist position "that jeopardy must attach automatically and irrevocably in all instances when a guilty plea is accepted." The defendant had been indicted on charges related to cocaine distribution but accepted a plea bargain, which required him only to plead guilty to a misdemeanor charge of possessing cocaine. The court unconditionally accepted the plea bargain but on the day of sentencing, rejected it based on its review of the pre-sentencing reports of the defendant and two co-defendants, who had also pleaded guilty. After the original indictment was reinstated, the defendant filed an interlocutory appeal, arguing that the continued prosecution violated his protection against double jeopardy.

The First Circuit attempted to balance judicial flexibility with the understanding "that jeopardy must attach somewhere and bar reconsideration at some point." The court explicitly rejected the view that jeopardy only attached at the point of sentencing. ²⁶ The court concluded that the preferable balance would be a holding that acceptance of a guilty plea

^{16.} United States v. Patterson, 381 F.3d 859, 864 (9th Cir. 2004) (citing *Vaughan*, 715 F.2d at 1378 n.2).

^{17.} Johnson, 467 U.S. at 503 (Stevens, J., dissenting).

^{18.} United States v. Sanchez, 609 F.2d 761, 762 (5th Cir. 1980).

^{19.} Green v. United States, 355 U.S. 184, 187 (1957).

^{20.} United States v. Cruz, 709 F.2d 111 (1st Cir. 1983). For a discussion of the facts and holding of *Cruz*, see Hammond, *supra* note 14, at 472–74.

^{21.} Cruz. 709 F.2d at 114.

^{22.} Id. at 111-12.

^{23.} Id. at 112.

^{24.} *Id*.

^{25.} Id. at 114.

^{26.} Id. at 113-14.

causes jeopardy to attach but that the court could vacate the plea before sentencing if manifest necessity²⁷ was shown.²⁸

The court's analysis in *Cruz* shows some consideration of the policies underlying the Double Jeopardy Clause. The court noted that "the ordeal of a [Federal Rules of Criminal Procedure] Rule 11 proceeding is significantly different from the ordeal of a trial," particularly when, as in *Cruz*, the plea was to a lesser included offense which "carries no implied acquittal of the greater offense." Ultimately, the First Circuit found that jeopardy had attached in *Cruz* because under Federal Rule of Criminal Procedure 11 (Rule 11), a court may accept, reject, or defer a decision on a plea pending the court's review of a pre-sentence report. Thus, the trial court's acceptance of the plea caused jeopardy to attach.

In *United States v. Patterson*, the Ninth Circuit applied the traditional rule in a way that emphasized the importance of the discretion afforded trial courts under Rule 11.³² In *Patterson*, the defendant pleaded guilty to one count of manufacturing marijuana, but the plea agreement did not specify the quantity of plants.³³ While the agreement originally provided for the quantity of plants to be determined at sentencing, an intervening Supreme Court case³⁴ called the validity of the plea into question. On the government's motion, the court vacated Mr. Patterson's plea; he was convicted at trial of manufacturing 100 or more marijuana plants, and sentenced to 188 months in prison and five years of supervised release.³⁵ The court remanded Mr. Patterson's case with orders to reinstate his guilty plea and sentence him accordingly.³⁶ In doing so, the court discussed the limits placed on trial courts by Rule 11.³⁷ It concluded that "[o]nce the court accepted the plea and deferred acceptance of the plea agreement . . . the court was not free to vacate the plea on the gov-

^{27.} A showing of manifest necessity is required for a retrial after a mistrial declared over the defendant's objection. Arizona v. Washington, 434 U.S. 497, 505 (1978). The classic example of manifest necessity is the deadlocked jury. *Id.* at 509.

^{28.} Cruz, 709 F.2d at 114.

^{29.} Id. (internal quotation marks omitted).

^{30.} Id.; FED. R. CRIM. P. 11(c)(3).

^{31.} Cruz, 709 F.2d at 114-15.

^{32.} United States v. Patterson, 381 F.3d 859 (9th Cir. 2004). For a discussion of the facts and procedural history of *Patterson*, see Hammond, *supra* note 14, at 468–71.

^{33.} Patterson, 381 F.3d at 861. The maximum sentence for manufacturing an unspecified amount of marijuana was five years. Id. at 863.

^{34.} Apprendi v. New Jersey, 530 U.S. 446 (2000) (holding that the jury must determine beyond a reasonable doubt any fact that increases penalty for a crime beyond statutory maximum, except for prior convictions).

^{35.} Patterson, 381 F.3d at 862.

^{36.} Id. at 865-66.

^{37.} This rule governs the acceptance of guilty pleas.

ernment's motion."³⁸ However, the court also noted that a defendant can move to have his guilty plea set aside and stand trial for the same offense without implicating double jeopardy concerns.³⁹

Morris v. Reynolds, 40 which arose in the context of a habeas corpus petition, applies the traditional rule and provides a useful discussion of its development. In that case, petitioner Morris was indicted on two counts of criminal possession of a weapon: a felony third degree count and a misdemeanor fourth degree count. 41 The felony count was dismissed on June 4, 1994, because of the insufficiency of the grand jury's evidence. 42 Mr. Morris pleaded guilty to the misdemeanor charge on August 1, 1994, with the understanding that he would receive a probationary sentence, and the prosecution did not object. 43 In a rather confusing turn of events, the trial judge—who had dismissed the felony count due to the insufficiency of the grand jury's evidence—issued an order that appeared to have been backdated to July 29, 1994. 44 The order found that there was sufficient evidence to reinstate the felony count. 45 On October 21, 1994, when Mr. Morris was to be sentenced, the trial judge reinstated the felony count. 46 Mr. Morris then petitioned to set aside the reinstatement of the felony count and be sentenced in accordance with the plea deal for his guilty plea to the misdemeanor count. 47 Mr. Morris's petition was granted by the Appellate Division, but the New York Court of Appeals ultimately rejected his petition.⁴⁸ Mr. Morris then pleaded guilty to the felony count and received a sentence of two and a half to five years of incarceration.⁴⁹

In granting Mr. Morris's petition, the Second Circuit held that "after a court accepts defendant's guilty plea to a lesser included offense, prosecution for the greater offense violates the Double Jeopardy Clause." In effect, this not only prevents a trial court from reinstating a dismissed felony after accepting a guilty plea to a lesser offense, but also prevents the court from vacating a guilty plea to reinstate a greater of-

^{38.} Id. at 863-64.

^{39.} Id. at 864.

^{40.} Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001).

^{41.} Id. at 41-42.

^{42.} Id. at 42.

^{43.} Id. at 43.

^{44.} Id.

^{45.} Id.

^{46.} Id. at 43.

^{47.} Id.

^{48.} Id.

^{49.} Id.

^{50.} Id. at 49.

fense.⁵¹ The Second Circuit, while acknowledging "that a court has the power to correct its own errors," further explained that that power cannot infringe on "a defendant's rights under the Double Jeopardy Clause to finality and repose."⁵²

Significantly, the Second Circuit in *Morris* found that the state court's decision was "contrary to . . . clearly established Federal law, as established by the Supreme Court of the United States." Specifically, the court concluded that the state courts had applied a rule where jeopardy did not attach until sentencing. This rule was held to be contrary to prior Supreme Court rulings, which the Second Circuit said established that "the double jeopardy bar arises, after a conviction but before sentencing, when a defendant pleads guilty to a lesser included offense, the prosecutor did not object to the plea, and there was no greater offense pending at the time the plea was accepted." While this holding focuses on situations where a defendant is charged in a multi-count indictment consisting of greater offenses and lesser included offenses, it is derived from the broader rule that "the [Double Jeopardy] Clause prohibits a second prosecution for the same offense following a guilty plea."

From the cases discussed above, the traditional rule governing whether a court can sua sponte vacate a defendant's guilty plea and proceed to trial indicates that jeopardy attaches at the time a court accepts the plea. A court is prohibited from vacating the plea either on its own motion or on the prosecution's motion, which forces the defendant to either negotiate a new deal or proceed to trial. While $Cruz^{57}$ and $Morris^{58}$ both contemplate exceptions to this rule, the underlying principle seems clear: jeopardy attaches when the court accepts a guilty plea. 59 Cruz noted that the courts were "nearly unanimous" in this understanding. However, this consensus was broken following $Ohio\ v.\ Johnson$, and a circuit split developed in its wake. Of the three cases discussed in this Section, Patterson and Morris represent post-Johnson cases that adhere

^{51.} *Id*.

^{52.} Id. at 50.

^{53.} Id.

^{54.} *Id*.

^{55.} Id. at 51.

^{56.} Id. at 49.

^{57.} United States v. Cruz, 709 F.2d 111, 114 (1st Cir. 1983) (finding that a showing of manifest necessity is sufficient to allow court to sua sponte vacate plea).

^{58.} *Morris*, 264 F.3d at 51 (prosecution objection to plea or pending greater offense could be sufficient to allow court to sua sponte vacate plea).

^{59.} Cruz, 709 F.2d at 112-13.

^{60.} Id

^{61.} Ohio v. Johnson, 467 U.S. 493 (1984).

to the traditional rule, while *Cruz* has been overruled.⁶² The next Section focuses on the development of the current circuit split by analyzing *Johnson* and the subsequent decisions of the circuits that understood *Johnson* to announce a new framework for double jeopardy analysis.

III. Brown v. Ohio, Ohio v. Johnson, and the Development of the New Rule

In *United States v. Soto*, the First Circuit announced that its double jeopardy analysis in *Cruz* had been overruled by the Supreme Court's decision in *Ohio v. Johnson*. In reaching this conclusion, the court first analyzed the Supreme Court's decision in *Brown v. Ohio*, 4 as the court felt that this was necessary [f] or a proper understanding of *Johnson*. In order to properly analyze the First Circuit's post-*Johnson* shift, this Section will follow the same path. First, this Section examines the relationship of *Brown* and *Johnson*. This is followed by a discussion of *Soto* and *Gilmore v. Zimmerman*, where the Third Circuit announced its formulation of and adherence to the new post-*Johnson* rule.

A. Brown, Johnson, and Double Jeopardy

In *Brown*, the defendant stole a car on November 29th, 1973, and was arrested on December 8th, 1973.⁶⁷ After his arrest, Mr. Brown pleaded guilty to a charge of joyriding and served a corresponding sentence.⁶⁸ After being released, he was taken to a different court and charged with auto theft and joyriding based on his November 29th car theft.⁶⁹ Mr. Brown pleaded guilty to auto theft "on the understanding that the court would consider his claim of former jeopardy on a motion to withdraw the plea."⁷⁰ The trial court rejected his former jeopardy claim and gave him a suspended sentence and one year of probation.⁷¹ The Ohio Court of Appeals affirmed the conviction, noting that even though joyriding was a lesser included offense of auto theft, the second prosecu-

^{62.} United States v. Soto, 825 F.2d 616, 619 (1st Cir. 1987) (recognizing an implied overruling of *Cruz* by *Johnson*).

^{63.} *Id*.

^{64.} Brown v. Ohio, 432 U.S. 161 (1977).

^{65.} Id.

^{66.} Gilmore v. Zimmerman, 793 F.2d 564 (3d Cir. 1986).

^{67.} Brown, 432 U.S. at 162.

^{68.} Id.

^{69.} Id.

^{70.} Id. at 163.

^{71.} *Id*.

tion was permissible because the prosecutions were based on different acts. 72

On review, the Supreme Court reiterated that "[t]he Double Jeopardy Clause 'protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." The Court noted that the Double Jeopardy Clause serves the policy of protecting a defendant's finality interest so that the defendant would not be subject to "attempts to relitigate the facts underlying a prior acquittal" or "attempts to secure additional punishment after a prior conviction and sentence." Ultimately, the Court concluded that "the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." The Court determined that under Ohio law, "the theft and operation of a single car" was only one offense that could not be divided into "a series of temporal or spatial units" in order to circumvent the protections of the Double Jeopardy Clause. Thus, Mr. Brown could not be convicted of auto theft.

In Ohio v. Johnson, 78 the Supreme Court again addressed the issue of double jeopardy in the context of lesser included offenses, this time concluding that conviction on a lesser included offense is not always a bar to prosecution on the greater offense. In *Johnson*, the defendant was indicted on four counts: murder, involuntary manslaughter, grand theft, and aggravated robbery.⁷⁹ At his arraignment, Mr. Johnson pleaded guilty to involuntary manslaughter and grand theft, but he pleaded not guilty to murder and aggravated robbery. 80 Over the prosecution's objection, the trial court accepted Mr. Johnson's guilty pleas.81 Mr. Johnson then moved for the remaining murder and aggravated robbery charges to be dismissed, arguing that continued prosecution on the murder and aggravated robbery charges would violate his protections afforded by the Double Jeopardy Clause. 82 The trial court agreed and dismissed the remaining counts, reasoning that "because involuntary manslaughter and grand theft were, respectively, lesser included offenses of murder and aggravated robbery," Mr. Johnson could not be prosecuted on the re-

^{72.} Id. at 163-64.

^{73.} Id. at 165 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

^{74.} Brown, 432 U.S. at 165-66.

^{75.} Id. at 169.

^{76.} Id.

^{77.} Id. at 169–70.

^{78.} Ohio v. Johnson, 467 U.S. 493 (1984).

^{79.} Id. at 495.

^{80.} Id. at 496.

^{81.} Id.

^{82.} Id.

maining charges due to the acceptance of his guilty pleas.⁸³ The Ohio Court of Appeals and Ohio Supreme Court affirmed the dismissal of the murder and aggravated robbery charges.⁸⁴

On review, the U.S. Supreme Court disagreed with the Ohio Supreme Court's reasoning that continued prosecution would violate the "double jeopardy protection prohibiting multiple punishments for the same offense." The Court noted that multiple punishments would only arise if Mr. Johnson was convicted on the dismissed charges, and in that situation, the trial court would "have to confront the question of cumulative punishments as a matter of state law." However, the Court emphasized "the [Double Jeopardy] Clause does not prohibit the State from prosecuting [Mr. Johnson] for such multiple offenses in a single prosecution." The Court then proceeded to address Mr. Johnson's alternative argument for affirming the judgment of the Ohio Supreme Court: that continued prosecution of the dismissed counts would impermissibly result in "a second prosecution following conviction."

The Court distinguished this case from *Brown* by noting that the concerns addressed in the *Brown* Court were not present in *Johnson*. Specifically, the Court identified "finality and prevention of prosecutorial overreaching" as the principles underlying its holding in *Brown*. The Court emphasized that Mr. Johnson had "offered only to resolve part of the charges against him" over the State's objection, that the State had not attempted to subject Mr. Johnson to multiple trials, and that his guilty plea did not show an implied acquittal on the greater offenses in the way that a jury verdict would if the jury was "charged to consider both greater and lesser included offenses." Thus, Mr. Johnson did not have an interest in finality or in protection from prosecutorial overreaching in this case. The Court refused to permit Mr. Johnson "to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges."

^{83.} *Id*.

^{84.} Id

^{85.} Id. at 497 (internal quotation marks omitted).

^{86.} Id. at 498.

^{87.} Id. at 500.

^{88.} *Id*.

^{89.} Id. at 501.

^{90.} Id.

^{91.} *Id*.

^{92.} Id.

^{93.} Id. at 501-02.

^{94.} Id. at 501.

^{95.} Id. at 502.

B. The Development of the New Rule

In the wake of *Johnson*, circuit courts reconsidered their double jeopardy analysis in the context of guilty pleas that are sua sponte vacated by a trial court. The Third Circuit⁹⁶ and the First Circuit⁹⁷ were the earliest to adopt a new analysis that broke away from the previous consensus on the issue.⁹⁸

The first indication of a split after Johnson came in the Third Circuit's decision in Gilmore v. Zimmerman. 99 In Gilmore, the defendant, Dr. Gilmore, woke up on November 27, 1980, to find his wife dead in their bed. 100 His wife was determined to have died of the combination of alcohol and meperidine, the latter of which had been injected into her right buttock.¹⁰¹ Dr. Gilmore was charged in Pennsylvania state court with criminal homicide, aggravated assault, and recklessly endangering another person, based in part on incriminating statements that he made after his wife's death. 102 Dr. Gilmore agreed to plead guilty to involuntary manslaughter with the understanding that the prosecution would make a sentencing recommendation based on a pre-sentencing report to be prepared later. 103 The trial court initially accepted the plea but vacated it at sentencing due to an insufficient factual basis. 104 Dr. Gilmore received a change of venue upon his request and asserted double jeopardy protections in a motion to dismiss the case. 105 But the trial court denied his motion to dismiss, finding that the judge did not abuse his discretion in vacating Dr. Gilmore's plea for lack of a sufficient factual basis. 106

Dr. Gilmore then filed a habeas corpus petition in federal court, arguing that the decision of the trial judge to sua sponte vacate his guilty plea and proceed toward trial violated the Double Jeopardy Clause. ¹⁰⁷ After he had been denied relief in district court, Dr. Gilmore appealed to the Third Circuit. ¹⁰⁸ Directly addressing Dr. Gilmore's claim that jeopardy had attached at the trial court's acceptance of his guilty plea, the court held that *Ohio v. Johnson* foreclosed the possibility of double jeop-

^{96.} Gilmore v. Zimmerman, 793 F.2d 564 (3d Cir. 1986).

^{97.} United States v. Soto, 825 F.2d 616 (1st Cir. 1987).

^{98.} United States v. Cruz, 709 F.2d 111, 113 (1st Cir. 1983).

^{99.} Gilmore, 793 F.2d 564.

^{100.} Id. at 564.

^{101.} Id.

^{102.} Id. at 565.

^{103.} Id. at 565-66.

^{104.} Id. at 566-67.

^{105.} Id. at 567.

^{106.} Id.

^{107.} Id. at 564.

^{108.} *Id*; see also Gilmore v. Zimmerman, 619 F. Supp. 859 (E.D. Penn. 1985) (district court decision denying Dr. Gilmore relief).

ardy interests being implicated in single prosecution situations. ¹⁰⁹ The court understood that the criminal homicide charge was pending at the time of Dr. Gilbert's guilty plea, ¹¹⁰ and thus understood his situation to be similar to the situation in *Johnson*—a defendant pleaded guilty to a lesser included charge while the greater charge remained pending and asserted a double jeopardy bar to prosecution of the greater offense. ¹¹¹ The court dismissed the fact that in this case, and unlike in *Johnson*, the prosecution did not object to the plea, stating that this fact "should have no legal significance" in terms of the defendant's double jeopardy interests. ¹¹²

Shortly after the Third Circuit initiated the rejection of the traditional rule in the wake of *Johnson*, the First Circuit reevaluated its prior holding in *Cruz*, which had applied the traditional rule. In *U.S. v. Soto*, the defendant, a postal service inspector, pleaded guilty to a misdemeanor charge of obstructing the passage of correspondence. However, upon learning that Mr. Santiago Soto professed his innocence, the judge sua sponte dismissed the charge after having previously expressed doubts about whether Soto acted with criminal intent. About four months later, on February 12, 1986, Mr. Soto was indicted by a grand jury on two felony charges related to the previous allegations: theft of mail matter and obstruction of correspondence. Mr. Soto sought to have the charges dismissed, but his motion was denied and he was found guilty by a jury. It

On review, the First Circuit backtracked from its position in *Cruz* that "jeopardy attaches upon acceptance of the guilty plea," but determined instead that a court could vacate the plea any time prior to sentencing if manifest necessity is shown. The court noted that "[u]nderlying *Johnson* is the proposition that an acceptance of a guilty plea is legally different from a conviction based on a jury's verdict. The court noted *Johnson*'s focus on the policy goals of protecting defendants' finality interests and preventing prosecutorial overreaching, and proceeded to consider these goals in affirming Mr. Soto's convic-

^{109.} Gilmore, 793 F.2d at 571. In this case, only one charge was originally filed. Id. at 569.

^{110.} Id. at 569-70.

^{111.} *Id*.

^{112.} Id. at 570 n.2.

^{113.} United States v. Cruz, 709 F.2d 111, 115 (1st Cir. 1983).

^{114.} United States v. Soto, 825 F.2d 616, 617 (1st Cir. 1987).

^{115.} *Id*.

^{116.} *Id*.

^{117.} Id.

^{118.} Id. at 618-19 (quoting Cruz, 709 F.2d at 114).

^{119.} Soto, 825 F.2d at 619.

tions.¹²⁰ Specifically, the court determined that Mr. Soto's finality interests were diminished because the trial court's "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." While the court noted that prosecutorial overreaching could be a concern, the diminished finality interest caused the court to conclude that "jeopardy did not attach when the district court accepted the guilty plea to the lesser included offense and then rejected the plea without having imposed sentence and entered judgment." ¹²²

Together, *Gilmore* and *Soto* launched the development of the new rule that jeopardy no longer necessarily attaches when the court unconditionally accepts a guilty plea. A precise formulation of the rule can be found in Judge Kozinski's dissent from the Ninth Circuit's order¹²³ denying a petition for a panel rehearing and for a rehearing en banc of *Patterson v. United States*,¹²⁴ which was discussed in Part II of this Note. Kozinski stated that in *Johnson*, "the Court provided a framework . . . for determining whether jeopardy attaches when a defendant pleads guilty. A court must consider the twin aims of the Double Jeopardy Clause: protecting a defendant's finality interests and preventing prosecutorial overreaching." This framework is understood to dispose of the "previous rule that jeopardy attached when the district court accepted a guilty plea." 126

This framework traced the development of the circuit split over the question of whether jeopardy attaches when a defendant pleads guilty—starting with the Supreme Court's holdings in *Brown* and *Johnson*, and continuing through the development and articulation of the new rule, which inquires into whether jeopardy has actually attached in a given case. ¹²⁷ In the next Part, the policy justifications and ramifications of each rule are discussed and evaluated, particularly in the context of situations that are dissimilar to the facts in *Johnson*, where the usefulness of the new rule is questionable.

121. Id. at 620.

^{120.} Id.

^{122.} Id.

^{123.} United States v. Patterson, 406 F.3d 1095, 1097 (9th Cir. 2005).

^{124.} United States v. Patterson, 381 F.3d 859 (9th Cir. 2004).

^{125.} Patterson, 406 F.3d at 1097 (Kozinski, J., dissenting).

^{126.} Id. at 1098.

^{127.} Hammond, supra note 14, at 475.

IV. PLEAS AND POLICY: EXAMINING THE IMPLICATIONS OF THE TRADITIONAL RULE AND THE NEW RULE

Before turning to the merits of the competing rules, it is necessary to first discuss the overwhelming prevalence of guilty pleas in the criminal justice system. The Supreme Court has recognized that plea bargaining "is the criminal justice system." 128 Accordingly, the courts "have proceeded to construct a body of contract-based law to regulate the plea bargaining process." For the prosecution, a plea bargain is beneficial because it conserves resources; for the defendant, a plea bargain offers "more favorable terms at sentencing." This focus on efficiency, as well as the staggering proportion of convictions that are obtained via guilty pleas, is indicative of a criminal adjudication system that operates under what has been termed the "crime control model." Specifically, the high rate of guilty pleas signifies widespread judicial acceptance of the assumption "that the screening processes operated by police and prosecutors are reliable indicators of probable guilt." ¹³² If this assumption of accuracy is correct and a defendant is guilty of the crime charged, then plea bargaining is indeed mutually beneficial and the crime control model is appropriate.

A. Incentivizing Guilty Pleas—Why an Innocent Defendant Pleads Guilty

For defendants who are both guilty of the crimes they are charged with and likely to be convicted at trial, plea bargaining can be quite beneficial. However, for defendants who are innocent of the charged crimes, there is a different set of considerations. While a court must find a factual basis for a guilty plea before accepting it, ¹³³ this requirement does not bar a court from accepting a guilty plea from a defendant who maintains his innocence. ¹³⁴ Indeed, the Supreme Court has held that "[a]n individual

^{128.} Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (emphasis in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (2009) (internal quotation marks omitted)). The Court recognized that 97% of convictions in the federal system and 94% of convictions in the state system result from guilty pleas. *Id*.

^{129.} Scott & Stuntz, *supra* note 128, at 1910; *see also* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea.").

^{130.} Frye, 132 S. Ct. at 1407.

^{131.} Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 10–11 (1964). The crime control model is contrasted against the due process model, which focuses on "formal, adjudicative, adversary factfinding [sic] processes." *Id.* at 14. While "the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course." *Id.* at 13.

^{132.} Id. at 11.

^{133.} FED. R. CRIM. P. 11(b)(3).

^{134.} See Stano v. Dugger, 921 F.2d 1125, 1140–41 (11th Cir. 1991).

accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Indeed, pleading guilty is incentivized such that an innocent defendant may even be better off pleading guilty. For example, in *Corbitt v. New Jersey*, 136 the Court upheld a New Jersey statute that provided for a mandatory sentence of life imprisonment for people convicted of first-degree murder by jury, while a defendant who pleaded *non vult* or *nolo contedere* 137 to the charge 138 would be sentenced to either life imprisonment or a maximum of thirty years (the punishment for second-degree murder). 139 While the facts of *Corbitt* involved *non vult* and *nolo contendere* pleas, the Court ultimately held that "it is not forbidden to extend a proper degree of leniency in return for guilty pleas. New Jersey has done no more than that." 140

In essence, the same principles that allow states to "encourage a guilty plea by offering substantial benefits in return for the plea" laso allow for the Federal Sentencing Guidelines to impose a harsher sentence on a defendant who is convicted at trial, as opposed to a defendant who pleads guilty. While the guidelines are no longer mandatory, trial judges imposing sentences must still consider them. These incentives are easily explained under the crime control model of criminal adjudication, where "the interest in arriving at accurate conclusions is best served through guilty pleas." Trials are disfavored under this model because their formality makes them more resource-intensive and thus less efficient. Therefore, guilty pleas are incentivized not only for defendants who are guilty of the crime charged, but also for innocent defendants who, for one reason or another, are likely to be convicted at trial. While the thought of an innocent defendant pleading guilty is unsettling, the

141. Id. at 219.

^{135.} North Carolina v. Alford, 400 U.S. 25, 37 (1970).

^{136.} Corbitt v. New Jersey, 439 U.S. 212 (1978).

^{137.} Both of these terms translate to "no contest." BLACK'S LAW DICTIONARY (9th ed. 2009). These pleas result in a conviction, much like a guilty plea. 1A ANDREW D. LEIPOLD ET AL., FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 175 (4th ed. 2012).

^{138.} Under the relevant statutes, defendants charged with murder were prohibited from pleading guilty. *Corbitt*, 439 U.S. at 215.

^{139.} *Id.* The convicting jury decided whether the murder was first-degree or second-degree based on statutory definitions. *See id.* at 214–15.

^{140.} Id. at 223.

^{142.} Daniel Givelber, Punishing Protestations of Innocence: Denying Responsibility and Its Consequences, 37 Am. CRIM. L. REV. 1363, 1368 (2000).

^{143.} United States v. Booker, 543 U.S. 220, 259 (2005) (severing and excising statutory provisions making guidelines mandatory and setting standards of review on appeal).

^{144.} Givelber, supra note 142, at 1369.

^{145.} See Packer, supra note 131, at 10-11.

structural incentives that make plea bargaining such a potent tool within the criminal justice system err on the side of over-conviction. ¹⁴⁶ By imposing costs (in the form of longer sentences or more severe charges) on those defendants who are convicted at trial, the criminal justice system has expressed a policy preference for the less resource-intensive process of plea bargaining, as opposed to a trial.

To illustrate the problems that this preference presents, consider three groups of defendants: Group A, which consists of defendants who are guilty of the crimes charged and are likely to be convicted; Group B, which consists of defendants who are innocent of crimes charged and likely to be acquitted; and Group C, which consists of both guilty and innocent defendants and it is not certain that the government will be able to obtain a conviction at trial. Under the crime control model of criminal adjudication described above, accurate results can easily and efficiently be achieved for Groups A and B. For Group A, a guilty plea is the optimal result, as it involves an accurate adjudication with minimal resource expenditure. Defendants in Group B will see their charges dismissed after screening by the police or prosecutors, which is an efficient result because of the informal handling of the case. However, the consequences of the policy choice in favor of a crime control model become apparent when analyzing the situation of defendants in Group C. For these defendants, regardless of innocence or guilt, the choice of whether to plead guilty is impacted by the incentives that come with a guilty plea. If the sentencing leniency that accompanies a guilty plea were not present, the defendants would be more likely to go to trial, which could lead to inaccuracies such as guilty defendants being acquitted. However, when the sentencing leniency is taken into account, guilty pleas become a more attractive option. This too produces inaccuracies, but in the form of innocent defendants being found guilty.

Thus, the instances in which an innocent defendant pleads guilty are indicative of a criminal justice system that necessarily produces some inaccurate results. The problem is that the system chooses to err on the side of over-conviction rather than under-conviction. Plea bargains reached in these circumstances indicate a rational response to the incentives offered; these bargains are the product of an evaluation of risks—and the risk of additional punishment following a guilty verdict is significant. While the idea of an innocent person pleading guilty initially appears problematic, the contemporary criminal justice system promotes such a result by way of incentives. The bargain reached may not reflect

^{146.} Givelber, *supra* note 142, at 1396. 147. *Id.* at 1395–96.

the defendant's actual culpability, if any, but it does reflect a mutually agreed resolution to cases that pose risks for both sides: a prosecutor acts based on the risk of an acquittal at trial while the defendant acts based on the risk of increased punishment. Under the crime control model of criminal process, once a plea bargain is reached and accepted by the court, an optimal result has been achieved.

B. Defending the Traditional Rule: Jeopardy Attaches upon a Court's Acceptance of a Guilty Plea

After the negotiation of a plea bargain that is acceptable to both the prosecution and the defendant, the court must still accept the guilty plea and the plea agreement. The question of whether a court should accept a bargain is, however, beyond the scope of this Note. 148 As discussed *supra* in Part II, under the traditional rule, jeopardy attaches when the plea is accepted. 149 This rule is appropriate for two reasons: first, the court has considerable discretion in accepting the terms of plea agreements; second, vacating an already-accepted plea deprives both the defendants and prosecution of the benefits of their bargain, and it makes the plea bargaining process less efficient and less reliable.

The Federal Rules of Criminal Procedure provide trial judges with the discretion to accept or reject the terms of plea bargains. Only one type of plea agreement contemplated within the rules is binding on the court once the agreement is accepted: an agreement in which the prosecution and defendant agree on "a specific sentence or sentencing range... or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." Two other types of plea agreements specified do not further constrain the court's discretion in sentencing: agreements to move for dismissal or not to bring other charges, and agreements to "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not

^{148.} Instead, the focus here is determining if jeopardy attaches upon a court's acceptance of a guilty plea.

^{149.} United States v. Patterson, 381 F.3d 859, 864 (9th Cir. 2004) (citing United States v. Vaughan, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983)).

^{150.} FED. R. CRIM. P. 11(c)(3). While this rule only applies in federal courts, states that do not already have a similar rule could adopt one. As the rate of criminal convictions obtained via guilty pleas suggests, this would probably not have a significant impact on the efficiency of the criminal justice system.

^{151.} FED. R. CRIM. P. 11(c)(1)(C).

^{152.} FED. R. CRIM. P. 11(c)(1)(A).

apply." The court may defer its decision on accepting or rejecting a plea agreement—involving either moving to dismiss or not bringing additional charges, or agreeing on an appropriate sentence—pending its review of a pre-sentencing report. With this range of options, there is no need to reject the traditional rule that jeopardy attaches upon unconditional acceptance of a guilty plea. A plea agreement that only provides for a recommended sentence is not binding on the court to begin with, and the court can defer its acceptance or rejection of the other types of plea agreements if it has concerns.

Further, allowing a court to sua sponte vacate an already-accepted guilty plea needlessly deprives both the prosecution and the defendant of the benefit of their bargain. In turn, the sua sponte decision decreases the efficiency and reliability of the plea bargaining process. The courts have noted that "[p]lea bargains rest on contractual principles, and each party should receive the benefits of its bargain." Beyond the normative value of honoring accepted plea agreements as contracts, the traditional rule promotes efficiency and reliability in the plea bargaining process. When a court accepts a defendant's guilty plea, this gives the defendant a sense of finality—the guilty plea itself is an expression of the defendant's desire to admit guilt and move forward. Finality interests are heightened in the context of a plea bargain because the existence of the plea bargain itself shows a desire for finality on the part of the prosecution as well as the defendant. Specifically, a plea bargain signals a prosecutor's determination of what resources should be expended in the prosecution, as well as an acceptable outcome based on the facts and circumstances of the case. Vacating an accepted plea bargain thus imposes costs beyond what the prosecution believes appropriate for the case and upsets the heightened finality interests of the defendant. Such a result is undesirable under the crime control model, which places "a premium on speed and finality" in order to maximize the rate of conviction in light of limited resources. 156

The traditional rule that jeopardy attaches upon acceptance of a guilty plea is appropriate in a system where the court retains discretion to accept, reject, or defer a decision on a plea bargain and, in some cases, retains sentencing discretion even upon acceptance of a plea bargain. Further, a rule preventing a court from sua sponte vacating an accepted guilty plea over the objection of the defendant ensures that the bargain reached is honored, with the accompanying finality interests. This pre-

^{153.} FED. R. CRIM. P. 11(c)(1)(B).

^{154.} FED. R. CRIM. P. 11(c)(3)(A).

^{155.} United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993).

^{156.} Packer, supra note 131, at 10.

vents additional resources from being expended against the wishes of the prosecution and thus increases the efficiency of the criminal justice system.

C. Offensive Guilty Pleas and the Problems of a Broad Reading of Ohio v. Johnson

Aside from negating the benefits of the traditional rule discussed above, the new rule relies on a broad reading of *Johnson v. Ohio* that does not give proper weight to the somewhat unusual factual scenario present in that case. Specifically, *Johnson* involved the "offensive" use¹⁵⁷ of a guilty plea to lesser-included offenses in an attempt to escape prosecution on the greater charges.¹⁵⁸ The Court's analysis in *Johnson* gave great weight to the fact that the guilty plea was accepted over the objection of the prosecutor¹⁵⁹ and to the lack of an implicit acquittal that occurs when a defendant is convicted of the lesser of two possible charges.¹⁶⁰ These facts led to the Court's conclusion that Mr. Johnson's interests in "the principles of finality and prevention of prosecutorial overreaching" were not implicated by further prosecution on the greater offenses.¹⁶¹

The unique facts that led to the Court's conclusion in *Johnson* were overlooked in the development of the new rule in subsequent decisions. Specifically, in *Gilmore v. Zimmerman*, ¹⁶² the Third Circuit downplayed the significance of prosecutorial objection in concluding that jeopardy does not necessarily attach upon a court's acceptance of a defendant's plea of guilty. The *Gilmore* court acknowledged that the prosecutor had not objected to Dr. Gilmore's guilty plea but concluded that "[f]rom the standpoint of the defendant and those interests of his protected by the Double Jeopardy Clause, however, this seems to us a factual difference which should have no legal significance." While the Third Circuit did not explain its reasoning in concluding that Dr. Gilmore's finality interest was not implicated, its remark was situated within a discussion of cases that involved the offensive use of guilty pleas. ¹⁶⁴ Based on that context, a possible basis for the Third Circuit's conclusion is that when a defendant pleads guilty to lesser charges in order to escape prosecution

^{157.} See generally Sally C. Quillian, Ohio v. Johnson: Prohibiting the Offensive Use of Guilty Pleas to Invoke Double Jeopardy Protection, 19 GA. L. REV. 159 (1984).

^{158.} Id. at 160-61.

^{159.} Ohio v. Johnson, 467 U.S. 493, 501 (1984).

^{160.} Id. at 501-02.

^{161.} Id. at 501.

^{162.} Gilmore v. Zimmerman, 793 F.2d 564 (3d Cir. 1986).

^{163.} Id. at 570 n.2.

^{164.} See id. at 569-70.

on a greater charge, it is the defendant's own "action that caused the asserted 'successive' proceeding" that forms the basis of a double jeopardy claim. ¹⁶⁵

However, the lack of prosecutorial objection clearly distinguishes Gilmore from Johnson in terms of the implicated finality interests. In the context of a bargained-for plea deal, as was present in Gilmore, 166 a defendant has a finality interest that is not present when there is no plea deal. In the case of an offensive guilty plea, a defendant does not have a finality interest due to the ongoing prosecution. By contrast, a plea deal indicates that the government and the defendant have agreed upon a mutually acceptable resolution to the case. Even if the sentence recommendation or the plea agreement is not binding on the judge, as was the case in Gilmore, 167 the defendant still has a finality interest in the resolution of the charge or charges, as any sentencing discretion that the judge retains is constrained by the statutory sentencing range for the offense that the defendant pleaded guilty. 168 Thus, even in the absence of a guaranteed sentence, the resolution of the charges itself establishes a finality interest that is implicated when a court sua sponte vacates an already-accepted guilty plea.

While the First Circuit stated that "[t]he 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" in concluding that jeopardy does not necessarily attach upon the unconditional acceptance of a guilty plea, 169 the court arrived at this conclusion due to its reading of Johnson. And similar to the Third Circuit in Gil*more*, the First Circuit failed to note the distinction between the offensive use of the guilty plea and plea bargains. While the facts of Soto—where the court vacated Mr. Soto's guilty plea over the government's objection on the basis of his mere assertion of innocence ¹⁷⁰—are different from those in *Gilmore*, neither case involved the offensive use of a guilty plea. Even if a defendant has a diminished finality interest in a guilty plea over the prosecutor's objection, this principle is inapplicable to those cases where the guilty plea is entered pursuant to a plea bargain. Indeed, the Court in *Johnson* emphasized that "ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws." This concern is simply not present in cases

^{165.} United States v. Schuster, 769 F.2d 337, 342 (6th Cir. 1985).

^{166.} Gilmore. 793 F.2d at 566.

^{167.} *Id*.

^{168.} See id.

^{169.} United States v. Soto, 825 F.2d 616, 620 (1st Cir. 1987).

^{170.} Id. at 617.

^{171.} Ohio v. Johnson, 467 U.S. 493, 502 (1984).

where plea bargains are reached because the bargain represents the prosecution's decision on the means by which it exercises its right to attempt to obtain a conviction.

The Court in Johnson also emphasized the lack of an implied acquittal¹⁷² where there is an "acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending." The Third Circuit drew a parallel between the situation in Johnson and the situation in Gilmore, concluding that further prosecution of Dr. Gilmore did not violate "the Double Jeopardy Clause's prohibition against successive prosecutions for the same offense." However, the doctrine of implied acquittal is less relevant when a defendant pleads guilty pursuant to a plea bargain. When a defendant is convicted at trial of a lesser included offense, the prosecution has been given its chance to secure a conviction on the greater charge. However, in the case of a plea bargain, the prosecution waives its chance; the prosecution is not denied a chance at securing a conviction on the greater charge. Even if the greater charge is still technically "pending" at the point when a guilty plea pursuant to a plea bargain is accepted, it is a drastically different situation than that in Johnson, where the guilty plea occurred during the arraignment on the greater and lesser included offenses. ¹⁷⁵ Specifically, the plea bargain signals an intent not to pursue the more serious charges, which suggests that those charges should no longer be viewed as pending once the guilty plea is accepted.

This is not to say that *Johnson* was incorrectly decided. Defendants should not be allowed "to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." However, the decision in *Johnson* does not require that the courts discard the traditional rule. A narrow reading of *Johnson*, permitting continued prosecution "only when the charges of greater and lesser included offenses are brought in a multi–count indictment in a single prosecution and the prosecutor objects to acceptance of the guilty plea," is more appropriate. In other words, *Johnson* should be used to create an exception to the general rule that jeopardy attaches when a guilty plea is accepted, rather than being read as a fundamental shift in Double Jeopardy Clause analysis. The concern of depriving the prosecution of its

^{172.} An implied acquittal occurs when a jury, considering both greater and lesser included offenses, chooses to convict only on the lesser charge. *Id.* at 502.

^{173.} Id. at 501.

^{174.} Gilmore v. Zimmerman, 793 F.2d 564, 569-70 (3d Cir. 1986).

^{175.} Johnson, 467 U.S. at 496.

^{176.} Id. at 502.

^{177.} Quillian, supra note 157, at 182.

chance to convict the defendant is not present in cases where conviction is obtained via plea bargain.

Furthermore, the reading of *Johnson* that the courts in *Gilmore* and *Soto* rely on fails to sufficiently protect a defendant's finality interest in plea bargains. An early commentator on *Johnson* and its ramifications warned of "a danger that lower courts will misconstrue the decision and extend it to deny an accused certain constitutionally protected rights." This concern has seemingly been validated as the development of the new rule essentially strips the protections of the Double Jeopardy Clause from defendants who plead guilty but have their guilty pleas vacated by the court on its own motion.

V. CONCLUSION

Pedro Cabrera's plight, discussed above in Part I, shows the effect of the shift from the traditional rule to the new rule in a drastic way. Before *Gilmore v. Zimmerman* and *United States v. Soto*, Mr. Cabrera probably would have been entitled to sentencing on his original plea. However, in the wake of the post-*Johnson* split, Mr. Cabrera and similarly situated defendants face uncertainty even after their plea bargains are initially accepted; whether the judge can vacate those pleas depends on where the defendants are charged.

The traditional rule, that jeopardy attaches at the point a guilty plea is accepted, provides clarity and allows for efficient plea bargaining. Prosecutors and defendants both benefit from the certainty that comes with the acceptance of a guilty plea under the traditional rule, especially in light of a judge's discretion to initially accept the plea. Further, the traditional rule is more compatible with the central role of plea bargaining in the criminal justice system.

On the other hand, the new rule, requiring a case-specific inquiry into the purposes of the Double Jeopardy Clause, is based on an overbroad reading of *Johnson* which dealt with the offensive use of plea bargains. The concerns that led to the holding in *Johnson* are not relevant in cases of plea bargains, and applying *Johnson* to those cases is inappropriate. Moreover, the cases developing and applying the new rule underestimate the defendant's finality interest in plea bargains, even if the sentence is uncertain.

The existing circuit split over whether jeopardy generally attaches upon acceptance of a guilty plea or not is ripe for resolution. The finality of an accepted guilty plea should not vary across the circuits, especially considering that a constitutional protection is implicated. The Supreme Court should clarify the applicability of *Johnson* to cases not involving offensive guilty pleas by preserving the traditional rule, with an exception for cases where the defendant pleads guilty to a lesser included offense over the prosecutor's objection. Such a decision would promote efficiency and protect finality interests while also preserving the government's right to a fair shot at convicting those accused of criminal conduct.