THE SUPREME COURT OF OHIO

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CLERK OF COURT

SUPREME COURT OF OHIO

State of Ohio,	Case No. 2018-0416
v.	JUDGMENT ENTRY
Travis Soto	APPEAL FROM THE
	COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Putnam County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, consistent with the opinion rendered herein.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Putnam County and the Court of Common Pleas for Putnam County.

(Putnam County Court of Appeals; No. 12-17-05)

s/ Maureen O'Connor

Maureen O'Connor

Chief Justice

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[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Soto*, Slip Opinion No. 2019-Ohio-4430.]

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SLIP OPINION NO. 2019-OHIO-4430

THE STATE OF OHIO, APPELLANT, *v.* SOTO, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Soto,* Slip Opinion No. 2019-Ohio-4430.]

Criminal law—Double jeopardy—Double Jeopardy Clauses do not bar murder prosecution of defendant whose prior involuntary-manslaughter charge was dismissed under plea agreement—Court of appeals' judgment reversing trial court's denial of defendant's motion to dismiss reversed and cause remanded.

(No. 2018-0416—Submitted March 6, 2019—Decided October 31, 2019.)

APPEAL from the Court of Appeals for Putnam County, No. 12-17-05, 2018-Ohio-459.

DeWine, J.

{¶ 1} In 2006, a two-year-old boy was killed. At the time, his father, Travis Soto, told police that he had accidentally caused the boy's death while driving an ATV. Soto was charged with child endangering and involuntary manslaughter. He entered into a plea agreement whereby he pleaded guilty to child endangering and the other charge was dismissed. He served his time in prison. That might have been the end of the story.

{¶ 2} But several years after his release, Soto told authorities that his previous account was a lie. The truth, he said, was that he had beaten his son to death. The state then charged Soto with murder and aggravated murder, among other offenses. We now must decide whether the constitutional prohibition against double jeopardy bars the murder charges.

{¶ 3} We hold that because the involuntary-manslaughter charge was dismissed prior to the empaneling of a jury, jeopardy never attached to that charge. Because of this, the double-jeopardy prohibition does not prevent the state from prosecuting Soto for murder or aggravated murder. For that reason, we reverse the judgment of the Third District Court of Appeals.

I. BACKGROUND

{¶ 4} As recounted by both parties, the relevant facts are as follows. In January 2006, Soto's son, Julio, was killed. Based on Soto's statements at the time, authorities believed that the child had died in a tragic ATV accident.

{¶ 5} In 2006, Soto gave authorities two different stories about what had happened. Initially, Soto told investigators that he had accidentally run over Julio with an ATV after turning a corner around a building on his property. Later, Soto told authorities that Julio had been riding with Soto on the vehicle and was struck after he fell off. The Lucas County Coroner's Office conducted an autopsy and concluded that Julio's injuries were consistent with an ATV accident.

{¶ 6} After being charged with child endangering under R.C. 2919.22(A) and involuntary manslaughter under R.C. 2903.04(A), Soto negotiated a plea agreement. He pleaded guilty to child endangering, and the involuntary-manslaughter charge was dismissed. Soto was sentenced to five years in prison, which he served.

{¶ 7} But it turns out that Julio's death may not have been accidental. In July 2016, Soto went to the Putnam County Sheriff's Office and confessed that he had beaten the child to death and fabricated the ATV accident. A doctor specializing in pediatric abuse reviewed the 2006 autopsy report and photographs taken at the time and concluded that the child's injuries were consistent with Soto's more recent story. Specifically, the doctor pointed to the fact that there were no bone fractures, which would normally be expected in an ATV accident. Authorities then indicted Soto for aggravated murder, murder, felonious assault, kidnapping, and tampering with evidence.

{¶ 8} In October 2016, Soto filed a motion to dismiss the murder charges. The motion argued that the charges were barred by the Fifth Amendment's prohibition against a person being "twice put in jeopardy of life or limb." Fifth Amendment to

the U.S. Constitution. He asserted that involuntary manslaughter is a lesser included offense of murder and aggravated murder and that the state is therefore barred from prosecuting those charges.

{¶ 9} The trial court denied the motion, concluding that the double-jeopardy protection does not bar Soto's prosecution for murder and aggravated murder. The court reasoned that under the test set forth in *Blockburger v. United States*, involuntary manslaughter with a child-endangering predicate is not the same offense as murder with a felonious-assault predicate. *See* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

{¶ 10} Soto filed an interlocutory appeal of the trial court's denial of his motion to dismiss—a procedural step that was appropriate based on this court's decision in *State v. Anderson*, which allowed an interlocutory appeal of a denial of a motion to dismiss on double-jeopardy grounds. 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 26; *see also Abney v. United States*, 431 U.S. 651, 659, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Soto asserted a single assignment of error in his appeal: "The trial court erred [in] over[ruling] Defendant's Motion to Dismiss on Double Jeopardy Grounds."

{¶ 11} In a two-to-one decision, the court of appeals reversed the trial court's denial of Soto's motion to dismiss. The majority concluded that "because Involuntary Manslaughter constitutes a lesser included offense of Aggravated Murder and Murder, the principles of Double Jeopardy would prevent a subsequent prosecution of Soto for Aggravated Murder and Murder in this instance." 2018-Ohio-459, 94 N.E.3d 618, ¶ 34. The majority noted that although Soto was not convicted of

involuntary manslaughter, "he was in jeopardy of being tried and convicted of Involuntary Manslaughter but-for the plea agreement." *Id.* at ¶ 22. Writing in dissent, Judge Zimmerman argued that because the involuntary-manslaughter charge had been dismissed, jeopardy had not attached to that charge. *Id.* at ¶ 38 (Zimmerman, J., dissenting). The dissenting opinion therefore concluded that double-jeopardy principles do not bar Soto's prosecution for murder and aggravated murder. As explained below, Judge Zimmerman was right.

II. ANALYSIS

A. Double-Jeopardy Principles Do Not Bar Soto's Prosecution

{¶ 12} The Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Ohio Constitution contains a similarly worded guarantee: "No person shall be twice put in jeopardy for the same offense." Ohio Constitution, Article I, Section 10.[1] We have read these provisions to protect against three distinct wrongs: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996), citing *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).

{¶ 13} The court of appeals determined that the first protection—preventing a second prosecution for the same offense following an acquittal—was violated here

[1] In the past, we have treated the two guarantees as "coextensive." *State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996). Because neither party has presented a contrary argument, we have no opportunity to revisit that determination today.

because Soto had been indicted for involuntary manslaughter in 2006 and was now facing prosecution for murder and aggravated murder. Treating the dismissal of the involuntary-manslaughter charge as an acquittal, the court concluded that further prosecution of Soto violated the Double Jeopardy Clauses because under the test set forth in *Blockburger*, murder and aggravated murder constitute the same offense as involuntary manslaughter. But a dismissal is not equivalent to an acquittal. By their plain terms, the Double Jeopardy Clauses apply only when someone would be "twice put in jeopardy." Because Soto was never put in jeopardy for the dismissed 2006 involuntary-manslaughter charge, the Double Jeopardy Clauses do not bar his subsequent prosecution for murder and aggravated murder.

{¶ 14} Because the involuntary-manslaughter charge was dismissed under his plea agreement, Soto was never tried for involuntary manslaughter nor was he convicted of or punished for that crime. In treating the dismissal of the involuntary-manslaughter charge as an acquittal, the court of appeals ignored the principle that a dismissal entered before jeopardy attaches does not function as an acquittal and does not prevent further prosecution for the offense. *See C.K. v. State*, 145 Ohio St.3d 322, 2015-Ohio-3421, 49 N.E.3d 1218, ¶ 15; *Bucolo v. Adkins*, 424 U.S. 641, 642, 96 S.Ct. 1086, 47 L.Ed.2d 301 (1976).

{¶ 15} The dissent advances the novel proposition that double jeopardy attaches to a charge dismissed under a plea agreement—here, the involuntary-manslaughter charge. In support of this view, the dissent points to cases holding that jeopardy attaches when a court accepts a guilty plea. Dissenting opinion at ¶ 37-38.

Of course, that's true. But what the dissent neglects to mention is that the principle applies only to the charges to which a defendant pleads guilty. *See, e.g.*, *United States v. Soto-Alvarez*, 958 F.2d 473, 482 (1st Cir.1992), fn. 7 ("jeopardy ordinarily does not attach to counts which are dismissed and on which no finding of guilty is made"); *United States v. Dionisio*, 503 F.3d 78, 89 (2d Cir.2007) (holding that jeopardy did not attach to charges that were dismissed with prejudice under a plea agreement, when the dismissal did not entail a "resolution of any factual elements that went to the merits of the charges"). Tellingly, the dissent does not cite a single case adopting its view that double jeopardy applies to a charge, like the one at issue here, that was dismissed under a plea agreement before being put to a trier of fact.[2]

{¶ 16} It is axiomatic that when a charge is dismissed before jeopardy attaches, the double-jeopardy protections do not prevent subsequent prosecution for the dismissed charge. *See C.K.* at ¶ 15; *State v. Grillo*, 2015-Ohio-308, 27 N.E.3d 951, ¶ 25 (5th Dist.). For charges to which the defendant did not plead guilty, jeopardy does not attach until a jury is empaneled or, in a bench trial, when the judge starts taking evidence. *Gustafson*, 76 Ohio St.3d at 435, 668 N.E.2d 435. Because Soto entered his guilty plea prior to the empaneling of a jury or the taking of evidence, jeopardy attached—but only as to the child-endangering charge to which he pleaded guilty and not as to the dismissed involuntary-manslaughter charge.

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[2] The dissent attempts to enlist *Dionisio* in support of its novel view, but in *Dionisio*, the court held that jeopardy did not attach to charges dismissed under a plea agreement.

{¶ 17} Soto has not argued that child endangering constitutes the same offense as murder and aggravated murder. And for good reason—under the *Blockburger* test, it is plain that the child-endangering charge does not constitute the same offense as the murder charges, because each of the murder offenses contains an element not found in child endangering and child endangering contains an element not found in the murder offenses. As a result, the Double Jeopardy Clauses do not bar Soto's prosecution for murder and aggravated murder.

B. We Dismiss as Improvidently Accepted the Proposition of Law Relating to Soto's Plea Agreement

{¶ 18} We accepted three propositions of law in this case. The first two challenge the court of appeals' conclusion that Soto's prosecution is barred by the constitutional double-jeopardy protections. The third asserts: "A negotiated plea does not bar successive prosecutions where the defendant would not reasonably believe that his or her plea would bar further prosecutions for any greater offense related to the same factual scenario."

{¶ 19} This third proposition of law relates not to the constitutional double-jeopardy protection but, rather, to a claim for relief based on the contents of Soto's plea agreement. *See, e.g., State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 22. Separate and apart from the constitutional protections provided by the double-jeopardy provisions, a plea agreement may bar further charges based on principles of contract law. *Id.* at ¶ 21. The underlying premise is that when a plea rests on a promise made by the prosecutor, that promise must be fulfilled. *Santobello*

v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *see also State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50. The rule is "based on contract-law principles, not the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution." *Dye* at ¶ 20, fn. 2.

{¶ 20} Upon reflection, we dismiss the third proposition of law as having been improvidently accepted. In doing so, we note that Soto did not raise a claim related to the content of his plea agreement in the trial court—rather, he sought relief there based solely on the constitutional prohibition against double jeopardy. Further, Soto did not raise an assignment of error identifying the plea agreement as a basis for relief in the court of appeals. And while the court of appeals did discuss the negotiated plea generally, it did so in the context of the constitutional double-jeopardy prohibition and did not consider the plea agreement as a separate basis for relief. Thus, the issue is not properly before us.[3]

{¶ 21} The dissent conflates the contractual-plea-agreement argument with the separate double-jeopardy argument and is eager to hold that the agreement bars the present charges against Soto. Dissenting opinion at ¶ 54. The dissent also asserts that under our analysis, "no plea bargain is necessarily conclusive and any plea

[3] We further note that this court has never addressed whether an interlocutory appeal may be brought based on the denial of a motion to dismiss on the basis of a plea agreement (as opposed to the constitutional double-jeopardy prohibition). *Compare State v. Anderson*, 8th Dist. Cuyahoga No. 106304, 2018-Ohio-3051 (allowing interlocutory appeal) *with State v. Ammons*, 9th Dist. Summit No. 28675, 2019-Ohio-286 (concluding that that issue was not ripe for review in an interlocutory appeal). We have no occasion to do so today, because Soto never sought an interlocutory appeal on that basis.

agreement can be negated." *Id.* at ¶ 53. But this misconstrues our holding. We take no view about whether Soto's plea agreement might serve as a bar to the murder charges. Soto did not present a plea-agreement claim to the trial court, and the agreement was never put into the record. Nor did he raise an assignment of error relating to the plea agreement in the court of appeals. It would be improper for us to reach that issue under the present procedural posture of the case. Further, to do so would require us to speculate about the contents of a plea agreement that is found nowhere in the record before us.

III. CONCLUSION

{¶ 22} We reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

Judgment reversed

and cause remanded.

O'CONNOR, C.J., and KENNEDY, FRENCH, and FISCHER, JJ., concur.

STEWART, J., concurs in judgment only.

DONNELLY, J., dissents, with an opinion.

DONNELLY, J., dissenting.

{¶ 23} The constitutional prohibition against double jeopardy bars appellee Travis Soto's prosecution for murder and aggravated murder; because the majority concludes otherwise, I respectfully dissent. I would affirm the judgment of the court of appeals.

BACKGROUND[4]

{¶ 24} On January 23, 2006, Travis Soto's two-year-old son, Julio, was found dead. Julio was in Soto's care that day. When questioned by the police, Soto told two separate versions of how Julio had died. First, Soto explained that he had accidently run over Julio with his all-terrain vehicle ("ATV") after turning a corner around a building on his property. Later, Soto told authorities that Julio had been riding on the ATV and was struck by the ATV after he fell off it. Soto told the detectives that he had carried Julio inside the house, cleaned him, rocked him until he stopped crying, and put him to bed. Soto did not call 9-1-1 or attempt to get any medical care for Julio. Two or three hours later, when Julio's mother returned home, Soto informed her that Julio had died.

{¶ 25} Based on Soto's explanations, an autopsy was conducted, and it was concluded that Julio's injuries were consistent with an ATV accident.

{¶ 26} On March 31, 2006, a grand jury returned a two-count indictment against Soto for causing the death of his son. Count one charged a violation of R.C. 2903.04(A), involuntary manslaughter, for causing the death of another as a proximate result of committing or attempting to commit a felony, and count two charged a violation of R.C. 2919.22(A) and (E)(1)(c), child endangering. On August 31, 2006, the trial court accepted a negotiated plea agreement between the state and Soto whereby in exchange for his guilty plea to child endangering, the state dismissed

[4] The facts are taken from the representations made by the parties in their respective briefs.

the involuntary-manslaughter charge. The court sentenced Soto to five years in prison.

{¶ 27} On July 25, 2016, several years after he was released from prison, Soto went to the authorities and gave a third version of Julio's death.[5] In this account, Soto said that he had beaten Julio to death and fabricated the ATV accident. A pediatric-abuse specialist reviewed the 2006 autopsy report and photographs taken at the time and concluded that Julio's injuries were consistent with Soto's new version of the facts. Armed with this new version, the state quickly went back to the grand jury.

{¶ 28} On August 15, 2016, the state again indicted Soto for causing the death of his son. This time, the state charged Soto with aggravated murder, in violation of R.C. 2903.01(C), for purposely causing the death of another under the age of 13; murder, in violation of R.C. 2903.02(B), for causing the death of another as a proximate result of committing or attempting to commit a felony of the first or second degree that is an offense of violence; felonious assault, in violation of R.C. 2903.11(A)(1); kidnapping in violation of R.C. 2905.01; and tampering with evidence in violation of R.C. 2921.12(A)(1).

{¶ 29} On October 11, 2016, Soto filed a motion to dismiss the murder and aggravated-murder charges based on the constitutional prohibition against double

[5] At a competency hearing, a psychiatrist and a psychologist each testified that Soto had indicated he had begun experiencing auditory hallucinations, that these voices were telling him that he had killed his son, and that Soto had gone to the police and given this third account because of these voices.

jeopardy. Soto argued that involuntary manslaughter (which was the charge dismissed by agreement in 2006 when he pleaded guilty to child endangering) is a lesser included offense of both murder and aggravated murder (which were charged in 2016) and that the plea agreement therefore precludes his subsequent prosecution on these greater charges. The state responded by arguing that the involuntary-manslaughter charge was not the same offense as murder and aggravated murder for purposes of a double-jeopardy analysis, that despite the state's due-diligence, the information necessary to charge Soto with the later charges could not have been discovered, and that Soto could not have reasonably believed that his negotiated plea based on his 2006 accounts of Julio's death would bar Soto's subsequent prosecution on greater charges.

{¶ 30} On April 13, 2017, the trial court denied Soto's motion to dismiss, concluding that involuntary manslaughter is not the same offense as murder and aggravated murder for double-jeopardy purposes; that even if they were the same offenses under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the information necessary to support the later charges could not have been discovered despite the state's exercise of due diligence; and that Soto could not have reasonably believed that his 2006 negotiated plea to child endangering and the 2006 dismissal of the involuntary-manslaughter charge based on his initial accounts of Julio's death would bar Soto's subsequent prosecution on the greater charges based on newly discovered evidence that would transform the case from one of an accidental death to a purposeful homicide.

{¶ 31} Soto filed an interlocutory appeal, and the Third District Court of Appeals reversed the trial court's judgment. In a two-to-one decision, the Third District determined that involuntary manslaughter, murder, and aggravated murder are the same offenses under the Double Jeopardy Clauses; that the due-diligence exception does not apply, because the state had failed to conduct a full and complete investigation and instead relied on Soto's purported confession; and that *State v. Carpenter*, 68 Ohio St.3d 59, 623 N.E.2d 66 (1993), bars Soto's subsequent indictment for aggravated murder and murder because at the time of the plea agreement, the state failed to reserve the right to bring additional charges against Soto. The dissenting opinion made the assumption that the state nolled the involuntary-manslaughter charge before jeopardy attached (i.e., prior to swearing in a jury or the first witness) and that the nolle of the involuntary-manslaughter charge therefore neither operated as an acquittal nor prevented Soto's further prosecution for that offense. Accordingly, the dissent concluded that Soto could be tried on the murder and aggravated-murder charges.

ANALYSIS

Majority opinion

{¶ 32} The majority determines that the issue before this court is "whether the constitutional prohibition against double jeopardy bars the murder charges." Majority opinion at ¶ 2. In resolving that issue, the majority holds that because the involuntary-manslaughter charge was dismissed prior to empanelment of a jury,

jeopardy never attached to the charge and therefore, the double-jeopardy prohibition does not prevent the state from prosecuting Soto for murder or aggravated murder.

{¶ 33} In framing the issue, the majority ignores the procedural nature of the case and stops short of answering the actual question before us. The issue to be addressed is whether the constitutional prohibition against double jeopardy bars murder charges *when the lesser included offense of involuntary manslaughter has been dismissed as a result of a negotiated plea agreement.* Given the actual question before us, I believe that the majority's determination that double jeopardy did not attach because the lesser included offense was dismissed before a jury was empaneled is irrelevant, as explained below.

Double Jeopardy Clauses[6]

{¶ 34} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Ohio Constitution conveys a similar guarantee: "No person shall be twice put in jeopardy for the same offense." Ohio Constitution, Article I, Section 10.

{¶ 35} The Double Jeopardy Clause serves the fundamental policy of protecting a defendant's finality interest so that a defendant will not be subject to the state's

[6] The state's third proposition of law presents a separate theory for reversal based on contract-law principles, asserting that Soto could not have reasonably expected based on his plea agreement that he would not face future prosecution for greater offenses relating to the death of his son. My disagreement with the majority centers instead on its interpretation of the Double Jeopardy Clauses as applied to a conviction entered by way of a guilty plea.

attempts to relitigate the facts or secure additional punishment after a conviction and sentence. *United States v. Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense.' " *Jeffers v. United States*, 432 U.S. 137, 150, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) (plurality opinion), quoting the Fifth Amendment. The clause provides critical protections against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.' " *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (plurality opinion).

{¶ 36} The majority says that jeopardy did not attach to the lesser included offense of involuntary manslaughter, based on the facts that a jury was not sworn in and evidence was not taken by the trial court. Those facts are true—and beside the point. Here, Soto's fate was not decided by a jury or bench trial. Instead, Soto's criminal case was resolved by a guilty plea. And that is what a guilty plea does: it waives a jury trial and eliminates the taking of evidence at a bench trial. Crim.R. 11(B) and (C).

{¶ 37} In *State v. Gustafson*, a case cited by the majority, this court recognized that jeopardy attaches, so as to preclude subsequent criminal proceedings, at different points in time depending on the nature of the proceeding in question. 76 Ohio St.3d 425, 435, 668 N.E.2d 435 (1996). And although jeopardy attaches when a jury is empaneled and sworn in or the court begins to hear evidence at a bench trial, a different rule applies when the defendant has elected not to proceed to trial. *See United States v. McIntosh*, 580 F.3d 1222, 1224 (11th Cir.2009). In that situation, jeopardy attaches when the court unconditionally accepts a guilty plea. *Id.*; *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir.1980).[7]

{¶ 38} As explained in *McIntosh*, "[t]he acceptance of an unconditional plea 'is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.' " *Id.* at 1228, quoting *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009 (1927); *see also United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir.1979) ("The Government makes the rather remarkable argument that, because a jury was not impaneled in respect to the earlier indictment, jeopardy did not attach. Of course, however, it is axiomatic of the double jeopardy clause that jeopardy attached once [the defendant's] guilty plea was accepted"); *United States v. Ursery*, 59 F.3d 568, 572

[7] Other courts have held there must be a judgment or sentence before a guilty plea may qualify as a conviction for purposes of double jeopardy. *See, e.g., State v. Stone*, 388 Mont. 239, 400 P.3d 692, ¶ 25 (2017). Although the United States Supreme Court has yet to decide when jeopardy attaches in a guilty-plea case, it has assumed that jeopardy attaches at least by the time of sentencing on the plea. *Ricketts v. Adamson*, 483 U.S. 1, 8, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987).

(6th Cir.1995), *rev'd on other grounds*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996); *Peiffer v. State*, 88 S.W.3d 439, 444 (Mo.2002); *State v. McAlear*, 519 N.W.2d 596, 599 (S.D.1994).

{¶ 39} The majority cites *United States v. Soto-Alvarez*, 958 F.2d 473 (1st Cir.1992), and *United States v. Dionisio*, 503 F.3d 78 (2d Cir.2007), for the proposition that jeopardy attaches only to the charges to which a defendant pleads guilty. Majority opinion at ¶ 15. However, a closer reading of these decisions is warranted.

{¶ 40} First, *Soto-Alvarez* offers no analysis to support the proposition for which the majority cites that decision. The proposition was summarily mentioned in a footnote in which the court stated that it was concerned only "with the two charges to which the defendant pled guilty since jeopardy ordinarily does not attach to counts which are dismissed and on which no finding of guilty is made." *Soto-Alvarez* at 482, fn. 7. The absence of analysis in *Soto-Alvarez* undermines its persuasive value here.

{¶ 41} *Dionisio* actually supports the conclusion that jeopardy attached in this case. In that case, the Second Circuit rejected the district court's categorical ruling that a pretrial dismissal with prejudice cannot trigger the attachment of jeopardy. *Dionisio* at 82. The appellate court recognized that it is not necessary to have an actual acquittal or conviction to trigger double jeopardy, noting that "[w]hat is crucial, instead, is whether the defendant faced the risk of a determination of guilt, and this may well include exposure to risk of conviction in a pretrial plea proceeding." *Id.* at 83.

{¶ 42} Here, Soto faced exposure to the risk of convictions for both involuntary manslaughter and child endangering as charged in the indictment. In exchange for an agreement to plead guilty to child endangering, the state agreed to drop the involuntary-manslaughter charge. But for the state's agreement to drop the involuntary-manslaughter charge, Soto unquestionably faced the risk of a determination of guilt on the involuntary-manslaughter charge. Accepting Soto's plea, the trial court conclusively determined his criminal culpability for purposes of double jeopardy.

{¶ 43} The majority cites *C.K. v. State*, 145 Ohio St.3d 322, 2015-Ohio-3421, 49 N.E.3d 1218, and *Bucolo v. Adkins*, 424 U.S. 641, 96 S.Ct. 1086, 47 L.Ed.2d 301 (1976), for the principle that a dismissal entered before jeopardy attaches does not function as an acquittal and does not prevent further prosecution for the offense. Although these cases may support that principle, they are easily distinguishable from this case.

{¶ 44} In *C.K.*, the defendant was seeking to be declared a wrongfully imprisoned individual as defined in R.C. 2743.48 because his murder conviction had been reversed as against the manifest weight of the evidence and the state had dismissed the indictment without prejudice. In determining that C.K. could not establish he was a wrongfully imprisoned individual pursuant to the statute, this court recognized that a reversal of a conviction as against the manifest weight of the evidence does not bar retrial on the same charge.

{¶ 45} Therefore, *C.K.* simply stands for the proposition that the state has discretion to dismiss charges without prejudice to allow further investigation of the underlying crimes and to avoid putting a defendant in jeopardy on evidence of uncertain credibility. *Id.* at ¶ 17. That proposition has no relevance here, however, because the state and trial court accepted the dismissal in simultaneous exchange for Soto's pleading guilty to child endangering.

{¶ 46} Similarly, *Bucolo* has no application to the facts of this case. In *Bucolo*, the petitioners were convicted of publishing certain comic strips and pictures in violation of a state obscenity statute. The convictions were affirmed on appeal. The United States Supreme Court summarily reversed. The state then nolle prossed the charges, but on remand, the Supreme Court of Florida sent the case back to the trial court " 'for further proceedings.' " 424 U.S. at 641, 96 S.Ct. 1086, 47 L.Ed.2d 301, quoting *Bucolo v. State*, 316 So.2d 551 (Fla.1975). The petitioners then petitioned the United States Supreme Court for a writ of mandamus to prevent the state from reprosecuting them. It was in this context that the court noted that recharging the petitioners with violations of the state obscenity statute was clearly foreclosed and that the state's failure to give effect to the United States Supreme Court's prior judgment was not cured by the intervening exercise of prosecutorial discretion. Therefore, the court's statement in *Bucolo* that nolle prosequi, if entered before jeopardy attaches, neither operates as an acquittal nor prevents further prosecution of the offense, *id.* at 642, 96 S.Ct. 1086, offers no better understanding of the issue before us.

Soto's guilty plea

{¶ 47} When this case was initially investigated, Soto told two different versions of the cause of his son's death. This should have raised immediate concerns about Soto's credibility. After the child's death was investigated, the state assessed what it believed the truth to be and presented charges to the grand jury. A true bill was returned, and Soto was indicted on two counts: involuntary manslaughter with a child-endangering predicate offense and child endangering. At his arraignment, Soto pleaded not guilty to both counts.

{¶ 48} At that point, the state had accused Soto of committing involuntary manslaughter and child endangering and the judge assigned to hear the case and resolve this criminal dispute was operating under the assumption that the state was prepared to prove the truth of these allegations beyond a reasonable doubt.

{¶ 49} Soto had a constitutional right to hold the state to its burden and have a fact-finder (jury or court) decide whether he was guilty beyond a reasonable doubt of involuntary manslaughter and child endangering. Scott, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1914 (1992). Instead, Soto and the state chose to enter into a negotiated plea agreement.[8] Under that agreement, the state gave up the chance to prosecute Soto for involuntary manslaughter or any other type of murder charge with the same elements in exchange for Soto's guilty plea. *Id.* When Soto's plea was unconditionally accepted, a record was thereby created that then became

[8] Although it is true that the record does not contain a transcript of the plea or sentencing hearings in the 2006 case, the parties do not deny and, in fact, agree that they entered into a negotiated plea agreement.

the "truth" regarding the crime Soto committed resulting in the death of his son. *See* Johnson, *Fictional Pleas*, 94 Ind.L.J. 855, 897 (2019) (a "fictional" guilty plea creates a record that then becomes "truth" and serves as a permanent record of conviction).

{¶ 50} In a negotiated plea agreement, the parties trade various risks and entitlements. Scott at 1914. When a defendant enters into a plea agreement with the state, both sides intend that it fully resolve the matter. Chinn, *A Deal Is a Deal: Plea Bargains and Double Jeopardy after* Ohio v. Johnson, 37 Seattle U.L.Rev. 286, 301 (2013). The defendant forgoes fundamental constitutional rights (such as the right to a jury, the presumption of innocence, and the right to be convicted by proof beyond a reasonable doubt)[9] in exchange for the dismissal of some charges, the hope of a lesser sentence, or both. Scott at 1920; Johnson at 868. The state gives up prosecuting the defendant for all the charged offenses in exchange for a quicker, less costly resolution and a sure conviction. Johnson at 868.

{¶ 51} Here, in entering into the plea agreement, the state did not have to rely solely on Soto's questionable versions of the facts. In fact, a prosecutor is presumed to have done due diligence in conducting an investigation to ensure that a plea bargain is appropriate. Chinn at 297. Every other litigant in our justice system is expected to exercise due diligence before taking actions having conclusive judicial effect. Should the state, with its vast resources, be uniquely relieved of this responsibility?

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[9] See *Duncan v. Louisiana*, 391 U.S. 145, 157-158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

{¶ 52} A plea determines a defendant's fate with respect to the offenses arising out of the criminal episode (here, the death of Soto's son). In this case, the state obtained a conviction without having to prove beyond a reasonable doubt that Soto committed the offenses as charged in the 2006 indictment. Soto received the benefit of having the involuntary-manslaughter charge dropped. The state did not reserve any right to bring new charges. *See Carpenter*, 68 Ohio St.3d 59, 623 N.E.2d 66. Although the bargain reached in a plea agreement may not (and often does not) reflect a defendant's actual culpability, it does reflect a mutually agreed resolution.

{¶ 53} Under the majority's conclusion, no plea bargain is necessarily conclusive and any plea agreement can be negated with new information. To accept this position is to declare that a plea agreement is not worth the paper it is journalized on.

{¶ 54} I believe that the court of appeals' majority opinion got it right. Soto was charged with involuntary manslaughter in 2006, and that charge was dismissed pursuant to a plea agreement in which Soto agreed to plead guilty to child endangering, the predicate offense of the involuntary-manslaughter charge. Thus, while Soto was not convicted of involuntary manslaughter, he would have been in jeopardy of being tried and convicted of involuntary manslaughter but for the plea agreement resulting in his conviction and sentence for the predicate offense of child endangering. Because involuntary manslaughter is a lesser included offense of aggravated murder and murder, *see State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-

2284, 787 N.E.2d 1185, ¶ 79; *State v. Thomas*, 40 Ohio St.3d 213, 216, 533 N.E.2d 286 (1988), Soto's subsequent prosecution for these offenses is barred.

CONCLUSION

{¶ 55} I would hold that Soto may not be prosecuted for aggravated murder or murder, because his 2006 plea agreement disposed of the involuntary-manslaughter charge against him. Accordingly, I would affirm the judgment of the court of appeals.

Gary L. Lammers, Putnam County Prosecuting Attorney, for appellant.

Timothy Young, Ohio Public Defender, and Carly M. Edelstein, Assistant Public Defender, for appellee.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Christopher D. Schroeder, Assistant Prosecuting Attorney, urging reversal for amicus curiae, Cuyahoga County Prosecutor's Office.

IN THE COURT OF APPEALS OF OHIO

THIRD APPELLATE DISTRICT

PUTNAM COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

TRAVIS SOTO,

DEFENDANT-APPELLANT.

CASE NO. 12-17-05

JUDGMENT

ENTRY

COURT OF APPEALS

TERESA J. LAMMERS, CLERK

PUTNAM COUNTY, OHIO

2018 FEB-5 A 9:58

For the reasons stated in the opinion of this Court, the assignment of error is sustained and it is the judgment and order of this Court that the judgment of the trial court is reversed with costs assessed to Appellee for which judgment is hereby rendered. The cause is hereby remanded to the trial court for further proceedings and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R.

27, and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

/s/ Stephen R. Shaw
JUDGE

/s/ John R. Willamowski
JUDGE

ZIMMERMAN, J., DISSENTS
JUDGE

DATED: February 5, 2018

[Cite as *State v. Soto*, 2018-Ohio-459.]

IN THE COURT OF APPEALS OF OHIO

THIRD APPELLATE DISTRICT

PUTNAM COUNTY

STATE OF OHIO, **CASE NO. 12-17-05**

PLAINTIFF-APPELLEE,

v. **OPINION**

TRAVIS SOTO,

DEFENDANT-APPELLANT.

Appeal from Putnam County Common Pleas Court

Trial Court No. 2016 CR 57

Judgment Reversed and Cause Remanded

Date of Decision: February 5, 2018

APPEARANCES:

***Michael J. Short* for Appellant**

***Lillian R. Shun* for Appellee**

SHAW, J.

{¶1} Defendant-appellant, Travis Soto ("Soto"), brings this appeal from the April 13, 2017, judgment of the Putnam County Common Pleas Court denying Soto's motion to dismiss on the grounds of double jeopardy.

Relevant Facts and Procedural History

{¶2} On or about January 23, 2006, Soto's toddler son was killed. Soto represented to law enforcement and the Lucas County Coroner that his son was struck while Soto was driving an all-terrain vehicle ("ATV") and that his son died as a result. Consistent with Soto's representations to law enforcement, the coroner concluded that the child died of blunt force trauma caused by an ATV accident.

{¶3} On March 31, 2006, Soto was charged with Child Endangering in violation of R.C. 2919.22(A)/(E)(1)(c), a felony of the third degree, and Involuntary Manslaughter in violation of R.C. 2903.04(A), a felony of the first degree. It was alleged that Soto committed Involuntary Manslaughter by causing the death of his son while committing the predicate felony offense of Child Endangering.

{¶4} Subsequently, Soto entered into a negotiated plea agreement wherein he agreed to plead guilty to Child Endangering and in exchange the Involuntary Manslaughter charge was dismissed. As a result of Soto's conviction, the record indicates that Soto was sentenced to serve 5 years in prison.

{¶5} On or about July 25, 2016, Soto voluntarily appeared at the Putnam County Sheriff's Office and allegedly indicated that he wanted to provide a "truthful"

account of what happened to his son. Soto told the police that he had actually beat his son to death back in 2006 and that he had staged the ATV accident scene.

{¶6} The Lucas County Coroner's original 2006 report was then reviewed by a pediatric abuse specialist who concluded that the toddler had actually died of multiple blunt force trauma due to Soto's violent actions. The expert concluded that Soto's original 2006 misrepresentations "led to the reasonably yet faulty conclusions of the Lucas County Coroner." (Doc. No. 29).

{¶7} On August 15, 2016, Soto was indicted by the Putnam County Grand Jury for Aggravated Murder in violation of R.C. 2903.01(C), an unclassified felony, Murder in violation of R.C. 2903.02(B), an unclassified felony, Felonious Assault in violation of R.C. 2903.11(A)(1), a felony of the first degree, Kidnapping in violation of R.C. 2905.01, a felony of the first degree, and Tampering with Evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree.

{¶8} On October 11, 2016, Soto filed a "Motion to Dismiss on the Grounds of Double Jeopardy." In the motion, Soto argued that in his original 2006 prosecution, a charge of Involuntary Manslaughter was dismissed when he pled guilty to Child Endangering. Soto contended that the judgment entries and transcripts from that case did not address whether the matter would be dismissed with or without prejudice, but the "entries in the record makes one think that a change of pleas [sic] to child endangering also disposed of the involuntary manslaughter charge." (Doc. No. 28). Soto contended that Involuntary Manslaughter was a lesser included offense

of both Murder and Aggravated Murder, which he argued would bar a subsequent prosecution of Soto on those charges.

{¶9} On October 18, 2016, the State filed a response. The State contended that pursuant to the United States Supreme Court's decision in *Blockburger v. United States*, 284 U.S. 299 (1932), Aggravated Murder contained different elements than Involuntary Manslaughter, which would allow multiple prosecutions. As to the Murder charge, the State argued that pursuant to *State v. Bridges*, 10th Dist. Franklin No. 14AP-602, 2015-Ohio-4480, ¶ 11, a negotiated guilty plea only barred successive prosecutions where the defendant would " ' "reasonably believe that his or her plea would bar further prosecutions for any greater offense related to the same factual scenario." ' " *Bridges citing State v. Church*, 10th Dist. Franklin No. 12AP-34, 2012-Ohio-5663, ¶8, quoting *State v. Edwards*, 8th Dist. Cuyahoga No. 94568, 2011-Ohio-95, ¶ 23.

{¶10} The State contended that because of his prior false narrative Soto could not have reasonably believed that his negotiated plea to Child Endangering would bar prosecution of subsequent homicide charges based on the truth. Further, the State argued that subsequent prosecution on a more serious crime was not barred in a situation where the State was unable to proceed on a more serious charge because the additional facts necessary to sustain the charge had not yet occurred or had not yet been discovered despite the exercise of due diligence. *See Brown v. Ohio*, 432 U.S. 161, 169, fn. 7, 97 S.Ct. 2221, 2227 (1977).

{¶11} On April 13, 2017, the trial court filed its judgment entry determining Soto's motion to dismiss. The trial court found that pursuant to *Blockburger*, Felonious Assault, Kidnapping, Tampering with Evidence, and Aggravated Murder all required proof of an element not required or included in the original prosecution of Child Endangering and Involuntary Manslaughter, which would permit multiple prosecutions. As to the Murder charge, the trial court determined that Soto could not have reasonably believed that his 2006 negotiated plea based on his prior false narrative of events would bar prosecution of a purposeful homicide. Further, the trial court indicated that Involuntary Manslaughter with a Child Endangering predicate was not the same offense as Murder with a Felonious Assault predicate. Finally, the trial court determined that the facts to support the 2016 indictment could not have been discovered in the exercise of due diligence until the additional evidence was uncovered. Thus the trial court overruled Soto's motion to dismiss.

{¶12} It is from this judgment that Soto appeals, asserting the following assignment of error for our review.[1]

Assignment of Error

The trial court erred [in] overrul[ing] Defendant's Motion to Dismiss on Double Jeopardy Grounds.

[1] The Supreme Court of Ohio has determined that the denial of a motion to dismiss on double jeopardy grounds is a final appealable order. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 61 ("We hold that an order denying a motion to dismiss on double-jeopardy grounds is a final, appealable order.")

{¶13} In Soto's assignment of error, he contends that the trial court erred by overruling his motion to dismiss on double jeopardy grounds. Specifically, Soto argues that his 2006 plea that resulted in the dismissal of the Involuntary Manslaughter charge should bar the current prosecution because Involuntary Manslaughter is a lesser included offense of Aggravated Murder and Murder. Further, Soto argues that the trial court did not support its finding that Soto could not have reasonably believed that the earlier dismissal would bar future prosecution for the death of Soto's son. Finally, Soto argues that the State did not reserve any right to bring additional charges in the original dismissal of his Involuntary Manslaughter charge.

Standard of Review

{¶14} Appellate courts review the denial of a motion to dismiss an indictment on the grounds of double jeopardy de novo, "because it is a pure question of law." *State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, ¶ 13, citing *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 16, citing *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346 (2d Dist.1992).

Relevant Authority and Analysis

{¶15} "Where successive prosecutions are at stake, the double jeopardy guarantee serves 'a constitutional policy of finality for the defendant's benefit.' " *State v. Liberatore*, 4 Ohio St.3d 13, 14 (1983), quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547 (1971). The question in this case is whether the State would violate that guarantee if it prosecuted Soto for Aggravated Murder and Murder after a

charge of Involuntary Manslaughter was dismissed pursuant to a 2006 plea agreement with Soto for actions resulting in the death of his son.[2]

{¶16} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Through the Fourteenth Amendment to the United States Constitution, this protection applies to individuals prosecuted by the State of Ohio. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 10, citing *Benton v. Maryland*, 395 U.S. 784, 786, 89 S.Ct. 2056 (1969). Similarly, the Ohio Constitution provides, "No person shall be twice put in jeopardy for the same offense." Ohio Constitution, Article I, Section 10. The Supreme Court of Ohio has described the protections afforded by the Ohio and United States Constitutions' Double Jeopardy Clauses as "coextensive." *Mutter, supra* at ¶ 15, citing *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, ¶ 7, citing *State v. Gustafson*, 76 Ohio St.3d 425, 432 (1996).

{¶17} Principally, "The Double Jeopardy Clauses [of both Constitutions] protect against three abuses: (1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3)

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[2] All of Soto's arguments on appeal pertain to the charges of Aggravated Murder and Murder. He does not appear to contend that the remaining charges against him are barred by Double Jeopardy. In fact, in his summary of the issue presented for review in his brief, Soto states the issue as "Whether the Defendant's earlier guilty plea to involuntary manslaughter barred prosecution for murder and aggravated murder 11 years later." Notably the prior guilty plea was not to involuntary manslaughter, making that an incorrect statement; however, this summary is consistent with the position that Soto raises no challenges regarding the remaining counts against him.

'multiple punishments for the same offense.' " *Mutter* at ¶ 15 quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989).

{¶18} "In determining whether an accused is being successively prosecuted for the 'same offense,' the [Supreme Court of Ohio] * * * adopted the 'same elements' test articulated [by the Supreme Court of the United States] in *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180[.]' " *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, ¶ 18. The *Blockburger* test applies "where the same act or transaction constitutes a violation of two distinct statutory provisions" and requires the reviewing court to evaluate the elements of each statutory provision to determine "whether *each* provision requires proof of a fact which the other does not." (Emphasis added.) *Blockburger* at 304. " 'This test focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case.' " *Zima* at ¶ 20, quoting *State v. Thomas*, 61 Ohio St.2d 254, 259 (1980), *overruled on other grounds*, *State v. Crago*, 53 Ohio St.3d 243 (1990), syllabus. The United States Supreme Court has summarized the *Blockburger* test as an inquiry that asks "whether *each* offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." (Emphasis added.) *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849 (1993).

{¶19} In this case, Soto argues that he should not be able to be prosecuted for Aggravated Murder and Murder due to the fact that his prior 2006 plea agreement disposed of a count of Involuntary Manslaughter against him. In support of his

position, Soto cites multiple cases wherein the Supreme Court of Ohio has stated that Involuntary Manslaughter is a lesser included offense of both Aggravated Murder and Murder. *See State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 79 ("Involuntary manslaughter, R.C. 2903.04, is a lesser included offense of aggravated murder with prior calculation and design * * * and murder, R.C. 2903.02 * * * because the only distinguishing factor is the mental state involved in the act."); *State v. Thomas*, 40 Ohio St.3d 213, 216 (1988). Soto argues that because Involuntary Manslaughter is a lesser included offense of Aggravated Murder and Murder, a subsequent prosecution on these offenses now violates double jeopardy.

{¶20} Both the Supreme Court of the United States and the Supreme Court of Ohio have addressed situations where government entities attempted to prosecute an individual for a greater offense after a defendant had been convicted of a lesser included offense. In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221 (1977), the State of Ohio attempted to prosecute a defendant for the greater offense of Auto Theft after the defendant had pleaded guilty to the lesser included offense of Joyriding. *Brown* at 168. In *Brown*, the Supreme Court of the United States concluded that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Id.* at 169.

{¶21} More recently, the Supreme Court of Ohio considered a situation where a defendant was prosecuted for a "misdemeanor offense that was a lesser included offense of the felony for which [he was] originally indicted." *Mutter*, *supra*, at ¶ 22. The Supreme Court of Ohio determined that "a misdemeanor conviction for a lesser

included offense bars the state from indicting the same defendant for a felony that by definition included the misdemeanor offense within it as a lesser included offense, arising from the same facts." *Id.*

{¶22} Here, Soto was never *convicted* of Involuntary Manslaughter; however, he was charged with Involuntary Manslaughter in 2006 and that charge was dismissed pursuant to a plea agreement wherein Soto agreed to plead guilty to Child Endangering, the predicate offense of the Involuntary Manslaughter. Notably, the new charges against Soto, which include Aggravated Murder and Murder, were also filed after Soto served his 5–year prison sentence on the Child Endangering conviction related to the death of his son. Thus while Soto was not convicted of Involuntary Manslaughter, he was in jeopardy of being tried and convicted of Involuntary Manslaughter but-for the plea agreement, resulting in his conviction and sentence for the predicate offense of Child Endangering. Involuntary Manslaughter is a lesser included offense of Aggravated Murder and Murder, as the Supreme Court of Ohio has stated, thus it would seem that a subsequent prosecution would be barred in these circumstances.

{¶23} The dissent argues that because the Involuntary Manslaughter count in the original prosecution was dismissed pursuant to a plea agreement Double Jeopardy should not be implicated here. In support, the dissent cites language from *State v. Bonarrigo*, 62 Ohio St.2d 7, 12 (1980), related to a State's dismissal of charges *prior to there ever being a trial or conviction on any operative offense*. Such authority has no relevance here, where the sole basis for dismissal of the Involuntary

Manslaughter was the conviction and served sentence on the predicate offense to the Involuntary Manslaughter--Child Endangering. It is our view that the double jeopardy implication of a dismissal of the Involuntary Manslaughter in the context of such a plea agreement is akin to the double jeopardy protection and finality afforded to an acquittal. Under any other interpretation, and barring any special exception or reservation in the record, the State could routinely negotiate a plea agreement wherein it would dismiss the most serious charge and later, after a defendant served his sentence thinking the matter had concluded, re-indict, try, convict, and sentence him on the greater offense. There would be no finality under such a system and it would render plea agreements largely meaningless. Notably, neither of the parties raise the same argument as the dissent, and the trial court did not make a ruling on this issue either.

{¶24} Moreover, while the trial court found that under the *Blockburger* test Aggravated Murder and Murder contained additional elements that Involuntary Manslaughter did not have, *Blockburger* actually requires that *each* offense contain an element that the other does not in order for a subsequent prosecution to be permissible. The Supreme Court of Ohio has determined that when comparing elements the

> **test is not a word game to be performed by rote by matching the words chosen by the legislature to define criminal offenses. Some offenses, such as aggravated murder and murder, lend themselves to such a simple matching test; others do not. [Citations omitted] * * * The proper overall focus is on the nature and circumstances of the offenses as**

defined, rather than on the precise words used to define them.

State v. Thomas, 40 Ohio St.3d 213, 216-217.

{¶25} Turning then to the actual elements of the crimes involved with the Supreme Court of Ohio's standards in mind, the original 2006 charge of Involuntary Manslaughter was alleged to be a violation of R.C. 2903.04(A), which reads, "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony." R.C. 2903.04(A).[3]

{¶26} The 2016 indictment alleges one count of Aggravated Murder, which requires proof that, "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." R.C. 2903.01. The 2016 indictment also alleges one count of Murder in violation of R.C. 2903.02(B), which reads, "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." The offense of violence alleged in the 2016 indictment is Felonious Assault in violation of R.C. 2903.11(A)(1), which reads, "No

[3] The felony allegedly committed was Child Endangering in violation of R.C. 2919.22(A)/(E)(1)(c), which reads, "No person, who is the parent * * * of a child * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * * If the violation * * * results in serious physical harm to the child involved, [it is] a felony of the third degree[.]"

person shall knowingly * * * [c]ause serious physical harm to another or to another's unborn."

{¶27} Based on the guidance of the Supreme Court of Ohio that an elements' test is not a "rote" matching test, we cannot agree with the trial court that *both* Aggravated Murder and Involuntary Manslaughter contain elements that the other does not. While Aggravated Murder does contain the language of "prior calculation and design," which Involuntary Manslaughter does not have, the Supreme Court of Ohio has held that "[A]ggravated [M]urder with prior calculation and design, * * * is defined as [M]urder with an enhanced mental state. Thus the only distinguishing factor between R.C. 2903.01(A) [Aggravated Murder] and [I]nvoluntary [M]anslaughter is, as in the case of murder, the mental state involved." *Thomas*, 40 Ohio St.3d at 216. The Supreme Court of Ohio reasoned that "one cannot criminally cause another's death without committing an underlying felony or misdemeanor." *Id.* at 216. Put another way, under the Supreme Court of Ohio's construction that prior calculation and design is not an additional element but only an "enhancement" of the state of mind required for both homicide offenses, an Aggravated Murder could not be committed without at least committing an Involuntary Manslaughter. As a result, under this construction, Involuntary Manslaughter does not contain an "element" of the offense that is not subsumed within Aggravated Murder, even if a rote matching test of language of the statute might differ.

{¶28} Alternatively, the State argues that even if the offenses are considered the same under *Blockburger*, there is an exception to *Blockburger* that would allow a

subsequent prosecution if the additional facts necessary to sustain a charge have not yet occurred or have not been discovered despite the exercise of due diligence. *Brown v. Ohio*, 432 U.S. 161, 169, at fn. 7. Although the trial court found this argument persuasive, we do not. Key to this exception is the "exercise of due diligence." While the State may contend that it could not have known that Soto purposely killed his son until he purportedly admitted as much in 2016, this seems to place an unlikely constitutional burden on a criminal defendant to assist the prosecution in every respect despite his right to remain silent. It also implies that the State is constitutionally entitled to rely exclusively upon a defendant's explanation or narrative in investigating a criminal offense or in determining the appropriate criminal charges in any given case.

{¶29} We do not believe either of these assumptions are constitutionally tenable in making a double jeopardy determination. On the contrary, regardless of a criminal defendant's narrative, it is the State's responsibility to properly and thoroughly investigate the matter in regard to making an accurate assessment of what happened, determining the appropriate charges based on those facts, and determining what, if any, plea negotiations to accept once charges have been brought.

{¶30} Notably, there is no evidence in the record before us, nor has the State presented any, to indicate that at the time of the original plea agreement the State reserved the right to bring additional charges related to the death of Soto's child. *See State v. Carpenter*, 68 Ohio St.3d 59, 1993-Ohio-226 ("Accordingly, we hold that the state cannot indict a defendant for murder after the court has accepted a negotiated

guilty plea to a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea.")

{¶31} Regardless of the status of the record as to any reservation of rights by the State at the original plea, the trial court determined that because Soto was not forthright in confessing his true culpability in his original statement to law enforcement, he could not have reasonably believed that his 2006 negotiated plea would have barred prosecution of the subsequent charges, citing a case from the Tenth District Court of Appeals in support. *See State v. Bridges*, 10th Dist. Franklin No. 14AP-602, 2015-Ohio-4480, ¶ 11. *Bridges* is readily distinguishable from this case as the defendant in that case essentially noted on the record that he was pleading guilty to a case in municipal court specifically to avoid charges in a felony indictment that was expected to be filed any day. Moreover, the indictment in *Bridges* for the more serious charge was filed the day after the defendant's guilty plea on the lesser charge, and the Tenth District found the timing component important.

{¶32} Furthermore, in *Bridges*, the Tenth District actually distinguished its own case in *State v. Church*, 10th Dist. Franklin No. 12AP-34, 2012-Ohio-5663, which is slightly more similar to the case *sub judice* than *Bridges*. In *Church*, the Tenth District Court of Appeals found that a defendant who pled guilty to a charge of failure to use a crosswalk in exchange for the dismissal of a possession of a controlled substance charge had a reasonable expectation, based upon his negotiated plea agreement, that he would not be subject to more serious drug charges (trafficking in

marijuana) arising out of the same incident. The case *sub judice* is more similar to *Church* than *Bridges*, though both contain different factual scenarios than the case before us.

{¶33} Finally, while we may be somewhat sympathetic to the notion that Soto's conduct, which may even constitute a separate crime, should not in any way be rewarded or might even be construed as a waiver of a defendant's constitutional rights in some circumstances, as noted earlier we are not convinced that this conduct supersedes either the duty of the State to independently investigate and prosecute crime, or the Double Jeopardy rights of the defendant where, as here, he has been convicted and served his sentenced for the offense pled to in exchange for dismissing the Involuntary Manslaughter.

{¶34} Based on these circumstances and the holding of the United States Supreme Court in *Blockburger* and the Supreme Court of Ohio in *Thomas*, we find that because Involuntary Manslaughter constitutes a lesser included offense of Aggravated Murder and Murder, the principles of Double Jeopardy would prevent a subsequent prosecution of Soto for Aggravated Murder and Murder in this instance.

{¶35} In sum, it is our conclusion that it was the responsibility of the State to thoroughly and forensically investigate the matter at the outset, and to thoroughly vet Soto's story when his son first died. The State did so to the extent it was satisfied back in 2006 and brought the original charges regarding the death of Soto's child. The State then negotiated a plea agreement based on those conclusions and dismissed the homicide charge without any indication in the record as to further reservation

regarding future developments. Finally, Soto then served his entire sentence emanating from that negotiated plea agreement. Under these circumstances we are compelled to find that Soto cannot now be prosecuted, convicted, and sentenced again for the death of the same child. Accordingly, for all of these reasons Soto's assignment of error is sustained.

Conclusion

{¶36} For the foregoing reasons the assignment of error is sustained and the judgment of the Putnam County Common Pleas Court is reversed. This cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment Reversed and

Cause Remanded

WILLAMOWSKI, P.J., concurs.

ZIMMERMAN, J., dissents.

{¶37} I start my dissent noting that our record does not contain *any* facts surrounding the defendant-appellant's original plea. Soto's underlying plea to the charge of Child Endangering and the State's voluntary dismissal of the Involuntary Manslaughter charge have relevance to the proceedings before us. Specifically, did Soto plead no contest; did the State *nolle* the charge of Involuntary Manslaughter; did the negotiated plea between Soto and the State occur after commencement of a trial? These questions are unanswered.

{¶38} However, for purposes of my dissent, I must presume that the underlying proceedings were "regular" since a "presumption of regularity" attaches

to all judicial proceedings. *See generally*, *State v. Richardson*, 3d Dist. Seneca No. 13-13-54, 13-13-55, 2014-Ohio-3541. Therefore, I will presume that Soto pled guilty to Child Endangering and the State *nolled* the Involuntary Manslaughter charge *before jeopardy attached* (i.e. prior to swearing a jury or swearing in the first witness).

{¶39} Herein, the *nolle* of the Involuntary Manslaughter count by the State neither operated as an acquittal nor prevented further prosecution of the offense. *See Bucolo v. Adkins*, 424 U.S. 641, 642, 96 S.Ct. 1086 (1976). Further, "a *nolle prosequi* dismisses the charges *without prejudice* to reindictment". *State v. Bonarrigo*, 62 Ohio St.2d 7, 12 (1980). Thus, the majority's logic (that double jeopardy applies because Soto was merely charged with Involuntary Manslaughter) is misplaced because he was not punished or convicted of that offense. Double Jeopardy "applies to both successive punishments and to successive prosecutions for the same criminal offense". *United States v. Dixon*, 509 U.S. 688, 696 (1993). Here, Soto was only punished for endangering his son, *not* for his murder. As such, and under the facts presented, jeopardy never attached in this case.

{¶40} Accordingly, I agree with the trial court's denial of Soto's motion to dismiss for different reasons, and contend that double jeopardy does not apply in this case because Soto was not convicted or punished for any offense that is a lesser included offense of the charges set forth in the new 2017 indictment.

{¶41} The *only* possible valid legal issue in this case is whether or not Soto's speedy trial rights were violated after his indictment for murder and aggravated murder charges. However, that issue is not before us.

{¶42} I therefore dissent.

/jlr

IN THE COMMON PLEAS COURT OF PUTNAM COUNTY, OHIO

OTTAWA, OHIO

STATE OF OHIO	CASE NO. 2016 CR 57
Plaintiff	
-vs-	JUDGMENT ENTRY
TRAVIS SOTO	
Defendant	

This matter came on for consideration of Defendant's previously filed **Motion to Dismiss** on the grounds of double jeopardy. The Court has reviewed Defendant's Motion and the response of the State of Ohio.

COMMONS PLEAS COURT

TERESA J. LAMMERS, CLERK

PUTNAM COUNTY, OHIO

2017 APR 13 A 11:14

FACTS

Defendant was Indicted on March 31, 2006, for Child Endangering, in violation of R.C. 2919.22(A)(E)(1)(c), a felony of the 3rd degree, and Involuntary Manslaughter, in violation of R.C. 2903.04(A), a felony of the 1st degree.

As charged, Defendant was alleged to have committed Child Endangering by creating a substantial risk of harm, and actually causing serious physical harm to his

child, and was alleged to have committed Involuntary Manslaughter by causing the death of his son while committing the predicate offense of felony Child Endangering.

The factual basis of the 2006 prosecution relied, in part, on Defendant's representations to law enforcement indicating he was the driver of an All Terrain Vehicle that struck his son. The Lucas County Coroner conducted an autopsy and was given Defendant's version of the events. The coroner concluded that the child died of multiple blunt force trauma caused by an ATV accident.

Ultimately, the Defendant entered into a negotiated plea whereby he pled guilty to Child Endangering. The Involuntary Manslaughter charge was dismissed. He was sentenced to five (5) years incarceration.

The State represents the following as a basis for a subsequent 2016 indictment: On July 25, 2016, the Defendant voluntarily appeared at the Putnam County Sheriff's Office and indicated that he wanted to provide the truthful account of what occurred in 2006. He proceeded to describe that he had in fact beat his child to death and staged the ATV accident scene. The Lucas County Coroner's Office report, photographs, as well as reports from 2006 to the present were reviewed by a pediatric abuse specialist previously qualified as an expert by this Court. The expert concluded that the child died of multiple blunt force trauma due to Defendant's violent actions towards his son. He also concluded that Defendant's 2006 misrepresentations led to the reasonable, yet faulty, prior conclusions of the Lucas County Coroner.

Defendant was then indicted for:

Aggravated Murder, an unclassified felony, for purposely causing the death of another under age thirteen, in violation of Ohio Revised Code Section 2903.01(C).

Murder, an unclassified felony, for causing the death of another while committing the predicate offense of felonious assault, in violation of Ohio Revised Code Section 2903.02(B),

Felonious Assault, a second degree felony, for knowingly causing serious physical harm to his son, in violation of Ohio Revised Code Section 2903.11(A)(l).

Kidnapping, a first degree felony, for restraining the liberty of his son and causing serious physical harm, in violation of Ohio Revised Code Section 2905.01.

Tampering with Evidence, a third degree felony, for altering, concealing or destroying evidence relating to an investigation being conducted by the Putnam County Sheriff's Office, in violation of Ohio Revised Code Section 2921.12(A)(l).

DECISION

"The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect the accused from being put in jeopardy twice for the same offense. These provisions protect an individual against successive punishments as well as successive prosecutions for the *same offense*." *State v. Moore* (1996), 110 Ohio App.3d 649.

In determining whether an accused is being successively prosecuted for the "same offense," the Ohio Supreme Court has adopted the so called "same elements" test articulated in *Blockburger v. United States* (1932), 284 U.S. 299; *State v. Zima* (2004), 102 Ohio St. 3d 61. Under *Blockburger*, "the Double Jeopardy Clause * * * prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes unless each statute 'requires proof of a fact which the other does not.' " *State v. Tolbert* (1991), 60 Ohio St.3d 89, 90. The test focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case. *State v. Thomas* (1980), 61 Ohio St.2d 254, 259, overruled on other grounds.

Double Jeopardy does not prohibit successive prosecutions, only successive prosecutions for the same offense. The *Blockburger* test requires a comparison of elements when determining if two offenses are the *same offense*. Here, Felonious Assault, Kidnapping, and Tampering with Evidence each requires proof of an element not required or included in the original prosecution of Child Endangering and Involuntary Manslaughter. Hence, Double Jeopardy does not prohibit the prosecution of these new charges.

Likewise, Aggravated Murder requires proof of two different elements, the *mens rea* of purposely as well as the age of the victim being under thirteen. Therefore, Double Jeopardy does not bar prosecution of this offense.

Furthermore, the 2006 negotiated plea resulting in the dismissal of the Involuntary Manslaughter charge does not prohibit a successive prosecution on the greater offense of Murder. A negotiated plea "bars successive prosecutions where the

defendant *would reasonably believe* that his or her plea would bar further prosecutions for any greater offense related to the same factual scenario." *State v. Bridges*, 2015 Ohio 4480.

The Defendant could not have reasonably believed that his 2006 negotiated plea to, and dismissal of, charges of Child Endangering and Involuntary Manslaughter based on his previous narrative of events would bar prosecution of subsequent charges based on newly discovered evidence which would transform the case from one of an accidental death to a purposeful homicide

Involuntary Manslaughter with a felony Child Endangering predicate is not the *same offense* as Murder with a Felonious Assault predicate. *State v. Resor*, 2010 Ohio 397, reviewed the *Blockburger* same offense test with respect to these two charges:

> Count I of the indictment alleges felony murder in violation of R.C. 2903.02(B). In material part that statute provides:
>
> "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *."
>
> The offense of violence specified is felonious assault, "* * * by knowingly causing serious physical harm to another * * *." The language tracks that found in R.C. 2903.11(A)(1).
>
> Count II alleges involuntary manslaughter in violation of R.C. 2903.04(A), which provides:
>
> "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."

> The felony alleged is child endangering[.]
>
> * * *
>
> With respect to Counts I and II, it is apparent that the mental state necessary for the commission of each offense differs from the other. Felonious assault, which underlies the felony murder count, requires an offender to knowingly inflict serious harm on another. Child endangering, the predicate to the involuntary manslaughter charge, requires only that the offender act recklessly. Moreover, child endangering requires that the victim be under age 18, while felonious assault contains no such element. Thus, each provision requires proof of a fact which the other does not and the *Blockburger* test is satisfied.

Hence, the 2006 Involuntary Manslaughter charge with a felony Child Endangerment predicate is not the same offense as the 2016 Murder charge with a Felonious Assault predicate. Therefore, a resolution of the Involuntary Manslaughter charge on any basis does not bar this subsequent prosecution.

To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment, a court must first apply the *Blockburger* test. Also, a further exception to the *Blockburger* test exists where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. *Grady v. Corbin* [1990], 110 S. Ct. 2084, 2090; *Brown v. Ohio* [1977], 432 U.S. 161, 169; *Ashe v. Swenson* [1970], 397 U.S. 436, 453; *Diaz v. United States* [1912], 223 U.S. 442, 448-449, applied and followed; *State v. Thomas* [1980], 61 Ohio St. 2d 254, paragraph five of the syllabus.

Here, the facts necessary to support the 2016 Grand Jury Indictment could not have been previously discovered despite the exercise of due diligence until additional evidence was uncovered, such as Defendant's appearance and confession to the actual details of his son's death. The coroner's report stated in part:

> It is understandable that Dr. Beisser certified this as an accident from the ATV at the time. After all, doctors rely heavily on parent reports of their children's injuries/problems to make proper diagnosis. When the history is false, the diagnosis can often be wrong. Some of his injuries were compatible with the reported ATV accident (liver injury, contusions of lung, hemothorax). I am struck by the lack of fractures (skull, extremity, ribs), as fractures are the most likely injuries from an ATV accident. Hence, while I could have also been fooled into thinking this was an accident (had I been involved in 2006), the lack of fractures and other items are odd.
>
> . . . What I can say is that Julio's injuries are entirely consistent with Travis' confession in July 2016. They match very well. Overall, I can state to a reasonable degree of medical certainty that Julio died from the abuse that Travis inflicted on that day in 2006.

The Court finds that the exception under *Grady vs. Corbin* also applies to the within case.

For reasons as stated, Defendant's **Motion to Dismiss** on the grounds of double jeopardy is **hereby overruled**.

/s/ Randall Basinger
JUDGE RANDALL BASINGER

cc:

Prosecuting Attorney – faxed

Joseph Benavidez – faxed to 419-228-3367

THE STATE OF OHIO

Putnam County, ss

I TERESA J. LAMMERS CLERK OF THIS COURT OF COMMON PLEAS, WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIES FROM THE ORIGINAL JUDGMENT ENTRY NOW ON FILE IN MY OFFICE

WITNESS MY HAND AND SEAL OF SAID COURT THIS 30th DAY OF May A.D. 2018

TERESA J. LAMMERS, Clerk

By /s/ Beverly P. Neise Deputy