IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant, v. TRAVIS SOTO, Defendant-Appellee.	Case No. 2018-0416 On Appeal from the Putnam County Court of Appeals, Third Appellate District Court of Appeals Case No. 12-07-05

BRIEF OF AMICUS CURIAE THE CUYAHOGA COUNTY PROSECUTOR'S OFFICE ON BEHALF OF APPELLANT THE STATE OF OHIO

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Travis Soto murdered his two-year-old son Julio in 2006. He then concocted a story in which he claimed that he accidentally struck and killed the boy while driving an ATV. Based on that story – and given that Soto was the only surviving witness to the incident – the State offered Soto a plea to child endangering, a felony of the third degree, and a dismissal of another count of involuntary manslaughter. Soto pleaded guilty to child endangering and served five years in prison. After his release, Soto apparently had a crisis of conscience, and in 2016, confessed that he in fact beat his son to death and staged the ATV accident to cover up the crime. Based on Soto's confession, the State indicted Soto for aggravated murder, murder, and other offenses. Soto then moved to dismiss his 2016 indictment on double jeopardy grounds.

In reversing the trial court's decision to deny Soto's motion to dismiss by a 2-1 majority, the Third District committed two crucial errors. First, the lower court held that the dismissal of the involuntary manslaughter count as part of the plea agreement was the functional equivalent of an acquittal for purposes of double jeopardy. The court then applied the elemental-comparison test of *Blockburger* between involuntary manslaughter and aggravated murder. A dismissal as part of a plea agreement, however, is not an acquittal. It represents no ruling on any element of the offense, nor a finding as to guilt or innocence. Jeopardy does not attach to a count that the court dismisses as part of a plea agreement before trial. The Third District therefore should never have applied any *Blockburger* analysis to the dismissed count of involuntary manslaughter at all. The lower court's decision to do so extended the Double Jeopardy Clause to cover, for the first time, charges dismissed without prejudice prior to the attachment of jeopardy.

Second, the lower court missed completely this Court's decision in *State v. Carpenter*, 68 Ohio St.3d 59, 623 N.E.2d 66 (1993). In *Carpenter*, this Court held that the State could not indict a defendant for murder after the defendant entered into a negotiated guilty plea to a lesser offense unless the State expressly reserved the right to bring further charges at the time of the plea. The State did not do so in this case. What the State did have was a compelling argument that *Carpenter* only applied where, at the time of the plea, "the prosecutor has knowledge of and jurisdiction over all [the] offenses[.]" *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶ 13. The prosecution did not have that knowledge in this case, and did not have it because Soto concealed it. The Third District should have analyzed Soto's case using a *Carpenter* analysis, asking whether Soto had a reasonable expectation of finality in his plea where Soto induced that plea through fraud. The court did none of that analysis.

In addition to being wrong on several fronts as a matter of law, the Third District's decision will result in an egregious miscarriage of justice. Travis Soto, who beat his own son to death, staged the scene to make it look like an accident, lied to authorities, and only admitted his guilt years later after his release from prison, will serve only five years for a plea to child endangering that he obtained through fraud. This Court cannot allow this decision to stand. Accordingly, Amicus Curiae the Cuyahoga County Prosecutor's Office asks this Honorable Court to reverse the Third District's decision.

INTRODUCTION AND STATEMENT OF AMICUS INTEREST

The Cuyahoga County Prosecutor's Office is responsible for all felony prosecutions in common pleas court in Cuyahoga County, Ohio. The Cuyahoga County Prosecutor's Office has a special interest in this case and its outcome because the Third District's decision to

expand the Double Jeopardy Clause to include counts dismissed without prejudice as part of a plea agreement will have, and is already having, significant repercussions in Cuyahoga County. That decision risks chilling the State's willingness to enter into plea agreements out of concern that the State will be unable to resurrect any charges dismissed as part of those agreements in the event that either (1) the defendant's plea is later vacated for any reason, or (2) the State learns of additional evidence that would justify the bringing of further charges. The Cuyahoga County Prosecutor's Office also has an interest in ensuring the uniform application of Ohio law to ensure consistency and to promote confidence in the justice system.

STATEMENT OF THE CASE AND RELEVANT FACTS

Amicus Curiae the Cuyahoga County Prosecutor's Office hereby adopts and incorporates by reference the Statement of the Case and Statement of Facts as set forth by the Appellant, the State of Ohio, in its merit brief. Amicus Curiae hereby submits the following additional arguments in support of the Appellant's three propositions of law.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: Involuntary manslaughter with a child endangering predicate in violation of ORC 2903.04(A) is not the same offense for double jeopardy purposes as aggravated murder in violation of ORC 2903.01(C) or murder with a felonious assault predicate in violation of ORC 2903.02(B).

Appellant the State of Ohio demonstrates in its merit brief that the involuntary manslaughter count for which the grand jury indicted Soto in 2006 was not the same offense for purposes of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932) as the aggravated murder count for which the grand jury indicted Soto in 2016. Amicus Curiae further submits that the Third District erred by applying a *Blockburger* elemental-

comparison analysis to the charge of involuntary manslaughter in the first place. Soto was not acquitted of involuntary manslaughter. Rather, the State dismissed the involuntary manslaughter count as part of a plea agreement. Jeopardy neither attached nor ever terminated with respect to the charge of involuntary manslaughter. As such, the Third District should not have applied any double jeopardy analysis to that count at all.

1. Double jeopardy bars successive prosecutions for the same offense following an acquittal. The dismissal of a count as part of a plea agreement is not an acquittal on that count.

The Double Jeopardy Clause establishes three separate constitutional protections: (1) "against a second prosecution for the same offense after acquittal[,]" (2) "against a second prosecution for the same offense after conviction[,]" and (3) "against 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). None of these three things were at issue in this case. Soto was never "acquitted" of anything. There was no issue of allied offenses ("multiple punishments"), given that this case proceeded as an interlocutory appeal prior to trial. And the only offense of which Soto was convicted – child endangering – was not the same offense as aggravated murder using a *Blockburger* analysis. There should thus have been no double jeopardy issue in this case.

The Third District erred by treating the State's nolle of the involuntary manslaughter count as part of Soto's 2006 plea as the functional equivalent of an acquittal. *See State v. Soto*, 3d Dist. Putnam No. 12-17-05, 2018-Ohio-459, ¶ 23 ("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"). The dismissal of charges as part of a plea agreement is *not* an acquittal, express or implied, on those charges.

An acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318, 133 S. Ct. 1069, 185 L.Ed.2d 124 (2013), citing *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187, 57 L.Ed.2d 65 (1978). For purposes of double jeopardy, "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Scott* at 97, quoting *United States v. Martin Linen*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L.Ed.2d 642 (1977). An "acquittal" therefore includes "a ruling by the court that the evidence is insufficient to convict," a "factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability," and any other "rulin[g] which relate[s] to the ultimate question of guilt or innocence." *Scott* at 91.

The Supreme Court has distinguished "[t]hese sorts of substantive rulings" from "procedural rulings that may also terminate a case midtrial, which we generally refer to as dismissals or mistrials." *Evans* at 319. Such "[p]rocedural dismissals include rulings on questions that 'are unrelated to factual guilt or innocence,' but 'which serve other purposes[.]'" *Id.*, quoting *Scott* at 98, n. 11. The Court in *Scott* explained that double jeopardy is not implicated where the trial court does not render a factual determination in terminating the case. The defendant in that case "has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Scott* at 100, quoting *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L.Ed.2d 717 (1978).

The State's dismissal of a count as part of a plea agreement is not an acquittal of that count. In that circumstance, the trial court does not resolve any factual element of the charge

in the defendant's favor. There is no ruling that relates to the ultimate question of guilt or innocence of the dismissed count. It is, rather, a procedural dismissal unrelated to factual guilt or innocence that serves another purpose – namely, the facilitation of a plea agreement. The parties' agreement to dismiss that count prevents the trier-of-fact from ever considering or rendering a verdict on that count, including a verdict of acquittal.

2. Under *Ohio v. Johnson*, a defendant's plea to a lesser included offense does not bar the State from prosecuting the defendant for the greater offense.

The Supreme Court has already held in this very context that the dismissal of one count in the indictment at the time of a defendant's plea is not an "implied acquittal" on the dismissed offense. *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L.Ed.2d 425 (1984). In *Johnson*, the defendant pleaded guilty at his arraignment to involuntary manslaughter and grand theft, which were lesser-included offenses of murder and aggravated robbery charges also contained in the indictment. *Id.* at 496. The trial court accepted the pleas, over the objection of the State, and then dismissed the remaining charges. *Id.* The Supreme Court held that double jeopardy did not prohibit the State from continuing to prosecute Johnson for aggravated murder and aggravated robbery:

> "The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an 'implied acquittal' which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses."

Johnson at 502. The Court stressed that "the taking of a guilty plea is not the same as an adjudication on the merits after full trial[.]" *Id.* at 500, n. 9. Collateral estoppel therefore could not bar prosecution on the remaining charges – regardless of whether the count to which the defendant pleaded guilty was a lesser-included offense of the dismissed count. *Id.*

It is true that the defendant in *Johnson* entered his plea over the objection of the State, whereas the defendant in this case entered into a plea agreement with the State (albeit in bad faith). But the Sixth Circuit found that fact not dispositive in *United States v. Schuster*, 769 F.2d 337, 340-343 (6th Cir.1985):

> "Appellant argues that *Johnson* is not dispositive here because in *Johnson* the guilty pleas were entered * * * over the objection of the prosecution. We find no basis for distinguishing *Johnson* on that theory. The discussion in *Johnson* does not emphasize the prosecution's opposition to the plea, but the lack of a final adjudication on the merits. Acceptance of the guilty pleas in the present case did not operate as a final adjudication that would bar continued prosecution on the remaining counts."

This Court has long held that "[t]he protections afforded by the Ohio and United States Constitutions' Double Jeopardy Clauses are coextensive." *State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, 82 N.E.3d 1141, ¶ 15. If this Court follows the Supreme Court's lead in *Johnson*, this Court must hold that the dismissal of a count as part of a plea agreement is not an "acquittal" on that count.

3. Jeopardy does not attach to charges terminated by plea agreement before the jury is empaneled and sworn.

The Third District could not apply a double jeopardy analysis to the involuntary manslaughter count that the State dismissed as part of Soto's 2006 plea agreement because jeopardy never attached to that count. "The protections afforded by the [Double Jeopardy] clause are implicated only when the accused has actually been placed in jeopardy. This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence." *United States v. Martin Linen Supply Co.*, 430 U.S. at 569, 97 S. Ct. 1349, 51 L.Ed.2d 642. Where the court dismisses a charge before the jury is empaneled and sworn, or before the court begins to hear evidence, jeopardy does not attach.

> "It is unnecessary to determine whether the charges against the defendant in Cleveland Municipal Court in the present case were lesser included offenses of the charges contained in the felony indictment. For those charges were nolled in accordance with the terms of the plea bargain. The entry of a *nolle prosequi* restores an accused to the status of a person against whom charges have never been filed[.] * * * [N]o jeopardy attaches where a *nolle prosequi* is entered before a jury is sworn."

State v. Frost, 8th Dist. Cuyahoga No. 45561, 1983 Ohio App. LEXIS 13860, *3-4 (June 23, 1983). "Because jeopardy had not attached to the pretrial procedure, the defendant was precluded from asserting a double jeopardy defense." *State v. Larabee*, 69 Ohio St.3d 357, 359, 632 N.E.2d 511 (1994). *See also In re M.C.H.*, 5th Dist. Delaware No. 12-CA-131, 2013-Ohio-2649, ¶ 20 ("As jeopardy has not attached and the accused can be re-prosecuted for the same offense, a dismissal or nolle is not the functional equivalent of an acquittal").

4. The involuntary manslaughter count was not dismissed "with prejudice" in part of the 2006 plea agreement.

The Third District's decision to treat the State's nolle of the involuntary manslaughter count as an "implied acquittal" was even more egregious in this case given that the State did not dismiss that count with prejudice. Soto acknowledged in the appellate court that "the judgment entries and transcripts from that case did not address whether the matter would be dismissed with or without prejudice[.]" *State v. Soto*, 3d Dist. Putnam No. 12-17-05, 2018-Ohio-459, ¶ 8. "When an indictment or citation is dismissed without any indication of whether the dismissal is with or without prejudice, we presume the dismissal to be without prejudice." *City of Cleveland v. Primm*, 8th Dist. Cuyahoga No. 104963, 2017-Ohio-7242, ¶ 8.

5. Double jeopardy did not bar the 2016 prosecution because child endangering is not the same offense as aggravated murder.

This left Soto with only the second type of protection afforded by the Double Jeopardy Clause: protection "against a second prosecution for the same offense after conviction."

North Carolina v. Pearce, 395 U.S. at 717, 89 S. Ct. 2072, 23 L.Ed.2d 656. The only offense of which Soto was convicted was child endangering. The Third District should have applied a *Blockburger* analysis only to the child endangering count determine whether the 2016 prosecution involved that same offense for purposes of double jeopardy. *See State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, 82 N.E.3d 1141, ¶ 17 (*Blockburger* applies to a successive prosecutions double jeopardy claim).

Using that *Blockburger* analysis, both child endangering and aggravated murder each contain an element not contained in the other offense. *See State v. Richey*, 64 Ohio St.3d 353, 369, 595 N.E.2d 915 (1992) ("The elements of child endangering are the defendant's custody or control of a child under eighteen and his creation of a substantial risk to the health or safety of the child by violating a duty of care or protection. Aggravated murder is a purposeful killing in the course of one of nine specified felonies, none of which is child endangering. These offenses have entirely different elements"). Accordingly, the only count of which Soto was ever convicted – child endangering – was not an allied offense to aggravated murder under *Blockburger*. This should have been the end of the lower court's double jeopardy analysis.

6. Conclusion.

To hold, as the Third District did in this case, that double jeopardy bars successive prosecutions of counts dismissed as part of a plea agreement, with or without prejudice, and without any adjudication on the merits, would be a dramatic expansion of the Double Jeopardy Clause. It would create a new, fourth category of double jeopardy protections never contemplated by the Supreme Court or by any authority of which Amicus Curiae is aware. It will prevent prosecutions and deter the State's willingness to enter into plea bargains. This

Court must reverse this case and hold that the dismissal of a count in an indictment as part of a plea agreement is not an acquittal of that count for purposes of double jeopardy.

> ***PROPOSITION OF LAW NO. 2: Additional facts necessary to sustain a new charge that have not been discovered despite the exercise of due diligence acts as an exception to Blockburger to allow subsequent prosecution.***
>
> ***PROPOSITION OF LAW NO. 3: 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.***

It is clear from the Third District's opinion that what the lower court was truly troubled by was the prospect of the State re-indicting a defendant for additional offenses arising from the same incident following a plea:

> "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."

State v. Soto, 3d Dist. Putnam No. 12-17-05, 2018-Ohio-459, ¶ 23. This may be a valid concern, but the Third District did not need to stretch double jeopardy to cover this situation. The scenario that the Third District described is exactly the fact pattern that this Court addressed in *Carpenter*. The Third District should therefore have simply applied *Carpenter* to this case. Had the court done so, its analysis would have been completely different.

1. ***State v. Carpenter* only bars the State from prosecuting a defendant for additional offenses arising out of the same transaction where a defendant has an objectively reasonable expectation of finality in his plea.**

   In *Carpenter*, at syllabus, this Court held the following:

   > "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."

The Third District noted that the State did not reserve the right to bring additional charges at the time of Soto's 2006 plea. *See Soto*, ¶ 30, citing *Carpenter*. The court should therefore have applied *Carpenter* in its decision. No sooner did the lower court raise the *Carpenter* issue, however, than the court seemed to declare it irrelevant. *Id.*, ¶ 31 ("Regardless of the status of the record as to any reservation of rights by the State at the original plea * * *"). The Third District did not discuss *Carpenter* any further in its opinion.

Carpenter "is not based on the Double Jeopardy Clause of the Constitution, but on contract law." *City of Cleveland v. Evans*, 8th Dist. Cuyahoga No. 100721, 2014-Ohio-4567, ¶ 32. "The holding in *Carpenter* is essentially a synthesis of contract and criminal law in a particular factual setting." *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶ 11; *see also State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 30 (Lundberg Stratton, J., dissenting) ("At the outset, the holding in *Carpenter* is not compelled by the Double Jeopardy Clause"). Contract law generally requires a meeting of the minds. "In order to declare the existence of a contract, both parties must consent to its terms, there must be a meeting of the minds of both parties; and the contract must be definite and certain." *Episcopal Retirement Homes v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991) (internal citations omitted).

This Court premised its decision in *Carpenter* on its finding that "under the circumstances of that case, the defendant reasonably 'anticipated that by pleading guilty to attempted felonious assault, and giving up rights which may have resulted in his acquittal, he was terminating the incident and could not be called on to account further on any charges regarding this incident.'" *Zima*, ¶ 11, quoting *Carpenter* at 61-62. "The key to the continued

validity of the plea agreement in *Carpenter* was the reasonableness of the defendant's expectation that the prosecution would end[.]" *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 43.

The crucial inquiries in any *Carpenter* claim are thus (1) whether the defendant expected that his plea would terminate all charges arising from the incident, and (2) whether that expectation was objectively reasonable. If the answer to both questions is yes, *Carpenter* requires dismissal of any subsequent charges. By contrast, if the State reserves the right to bring additional charges at the time of the plea, any expectation of finality by the defendant is irrelevant, and the court need not consider those questions.

A defendant cannot have an objectively reasonable expectation of finality in a plea agreement obtained through fraud. In that circumstance, there can be no meeting of the minds. It is undisputed in this case that Soto lied to authorities and concealed evidence of his crimes to obtain the benefit of a more favorable plea. The Third District acknowledged this in its opinion, writing that "Soto told the police [in 2016] that he had actually beat his son to death back in 2006 and that he had staged the ATV accident scene." *State v. Soto*, 3d Dist. Putnam No. 12-17-05, 2018-Ohio-459, ¶ 5. Any expectation of finality by a defendant is not objectively reasonable where the defendant enters into a plea agreement in bad faith, intending to deceive the State into offering a more lenient bargain.

The prosecution's knowledge at the time of the plea is "critical." *Zima*, ¶ 12. *Carpenter* only applies where, at the time of the plea, "the prosecutor has knowledge of and jurisdiction over all [the] offenses[.]" *Id.*, ¶ 13, quoting *State v. Lordan*, 116 N.H. 479, 482, 363 A.2d 201 (1976). In *Carpenter*, "the state was aware that the defendant's victim was likely to die of the injuries inflicted by the defendant[.]" *Harrison*, ¶ 40. Absent that knowledge, State would

not be on an equal footing with the defendant to reach an agreement to resolve all of the charges. The defendant could not reasonably expect that his plea would do so.

In *Carpenter*, it was only because "the prosecutor and the court had jurisdiction over all the charges, both actual and potential," that "the defendant's expectation that his guilty plea would terminate the incident was inherently justified[.]" *Zima*, ¶ 12. The State did not have that knowledge in this case, and did not have it because Soto manipulated evidence by staging the ATV accident and lying to authorities. This Court should hold in this case that *Carpenter* does not preclude the State from bringing additional charges against a defendant following a negotiated plea where the State was unaware of the factual basis for the additional charges at the time of the plea as a result of fraud or deception by the defendant.

2. *Jeffers v. United States* recognized that double jeopardy does not bar successive prosecutions where the defendant caused the successive prosecutions through his own actions.

This principle is in harmony with the Supreme Court's own double jeopardy jurisprudence. In *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L.Ed.2d 168 (1977), the Supreme Court recognized what was essentially an "invited error" exception to the double jeopardy bar against successive prosecutions. In *Jeffers*, the defendant was indicted in two separate cases – one for conspiracy, and one for conducting a continuing criminal enterprise. *Id.* at 141-142. The conspiracy charge was a lesser included offense of the continuing criminal enterprise charge. *Id.* at 144. The government sought to consolidate the two indictments together for a single trial. *Id.* at 142. The defendant objected. *Id.* The trial court sided with the defendant and ordered the cases tried separately. *Id.* at 143.

The Supreme Court held that the defendant's action in opposing the government's motion to consolidate the indictments acted as an exception to the double jeopardy

prohibition against successive prosecutions for the same offense. The defendant was "solely responsible for the successive prosecutions[.]" *Id.* at 154. The defendant's own actions "deprived him of any right that he might have had against consecutive trials." *Id.* The Supreme Court thus held that the government could prosecute the defendant for the greater offense, "and the only issue remaining is that of cumulative punishments upon such prosecution and conviction." *Id.*

Significantly, the Supreme Court in *Jeffers* also strongly implied that double jeopardy would not bar successive prosecutions where the State was unaware of the facts necessary to support a conviction on the greater offense at the time of the conviction on the first offense, despite the exercise of due diligence. The Court noted that "[o]ne commonly recognized exception" to the bar against successive prosecutions exists "when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun." *Id.* at 151. The Court continued: "This exception may also apply when the facts necessary to the greater were not discovered despite the exercise of due diligence before the first trial." *Id*. at 152, citing *Ashe v. Swenson*, 397 U.S. 436, 453 n. 7, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970) (Brennan, J., concurring) ("For example, where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to the 'same transaction' rule should be made"). This case presents this Court with the opportunity to recognize and define the "due diligence" exception to double jeopardy.

3. The State exercised due diligence in this case, relying on the coroner's conclusion in an autopsy report that the victim died in an ATV accident.

The Third District acknowledged the existence of the "due diligence" exception, yet found that the State did not exercise such diligence in this case by "rely[ing] exclusively upon

[the] defendant's explanation or narrative[.]" *State v. Soto*, 3d Dist. Putnam No. 12-17-05, 2018-Ohio-459, ¶ 28. But the State did not rely exclusively upon Soto's explanation for his son's death. The Lucas County Coroner's Office "concluded that the child died of blunt force trauma caused by an ATV accident." *Id.*, ¶ 2. Even if the State was not justified in relying on Soto's explanation, it was surely justified in relying on that of a forensic pathologist. Moreover, in the 2016 prosecution, the State obtained the expert opinion of a pediatric abuse specialist, Dr. Randall Schlievert, who reviewed the Lucas County Coroner's 2006 autopsy report. Dr. Schlievert concluded that the pathologist's original finding that the child died as the result of an ATV accident was "reasonabl[e] yet faulty[.]" *Id.*, ¶ 6.

The Third District also refused to hold Soto accountable for his lies to law enforcement, writing that "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." *Id.*, ¶ 28. Soto, however, did not remain silent. Soto waived his right to remain silent and chose to give a statement to police and to the coroner that was false. If Soto simply did nothing, the question of whether there was bad faith sufficient to preclude him from having a reasonable expectation of finality in his plea might be a closer one. But that is not this case. Soto chose to inject false information into the police investigation to conceal the extent of his involvement in his son's death and to thereby obtain a more favorable plea deal. He could not have had an objectively reasonable expectation of finality in his plea under these facts.

4. Soto's plea agreement, which he entered into in bad faith and by deception, constituted a fraud on the court that deprived Soto of any objectively reasonable expectation of finality.

The trial court rightly refused to allow Soto to take advantage of his own misconduct and deception. The Third District erred by reversing that decision and by misapplying

double jeopardy law to do so. A defendant should not be allowed to benefit from the wrongfulness of his own acts; from his deceit of law enforcement authorities; and from his own bad faith in plea negotiations.

Soto entered into a plea agreement with the fingers of one hand crossed behind his back. This Court should not countenance these tactics, which will have a subversive and chilling effect on the willingness of prosecutors to enter into plea bargains to anything less than the indictment. "[F]or where fraud or collusion is practiced on a court, the court ceases to function as a court and its judgment becomes an official stamp lent to the subversive intentions of the abusing parties." *Van DeRyt v. Van DeRyt*, 6 Ohio St.2d 31, 36, 215 N.E.2d 698 (1966). This Court should reverse the Third District's decision in this case and hold that a defendant does not have an objectively reasonable expectation of finality in a plea agreement under *State v. Carpenter* where the State was unaware of the factual basis for additional charges at the time of the plea solely as a result of the defendant's wrongdoing.

5. The trial court's denial of Soto's motion to dismiss should not have been a final, appealable order.

Finally, Amicus Curiae notes that there is no precedent in Ohio that allows a defendant to bring a pretrial, interlocutory appeal of the denial of a motion to dismiss based on *Carpenter*. The Third District allowed Soto's appeal to proceed only by accepting Soto's invitation to frame his argument as a double jeopardy claim, rather than as a *Carpenter* claim. This Court has recognized that the denial of a motion to dismiss on double jeopardy grounds is a final, appealable order. *See State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 61. Had Soto correctly framed his motion to dismiss as a *Carpenter* claim, or had the Third District framed it that way, no authority (presently) exists for the proposition that the denial of such a motion is a final, appealable order. *But see State v. Sherman Anderson*,

8th Dist. Cuyahoga No. 106304 (appeal pending on the question of whether the denial of a *Carpenter* motion to dismiss is a final, appealable order; oral argument held May 22, 2018).

Given that Soto did not frame his motion to dismiss as a *Carpenter* claim, and that the parties did not raise this issue in the lower court, this is not the right case to decide whether the denial of a motion to dismiss based on *Carpenter* is a final, appealable order. But Amicus Curiae suspects that this Court will see this issue again soon.

CONCLUSION

Amicus Curiae the Cuyahoga County Prosecutor's Office therefore respectfully asks this Honorable Court reverse the Third District's decision and hold that (1) the dismissal of a count in an indictment as part of a plea agreement is not an "implied acquittal" of that count for purposes of double jeopardy, and (2) a defendant does not have an objectively reasonable expectation of finality in a plea agreement under *State v. Carpenter* where the State was unaware of the factual basis for additional charges at the time of the plea, and did not reserve the right to bring those charges in the future, solely as a result of the defendant's wrongdoing.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae the Cuyahoga County Prosecutor's Office on Behalf of Appellant* was served by email this 16th day of July, 2018 to Carly M. Edelstein (carly.edelstein@opd.ohio.gov), counsel for Defendant-Appellee Travis Soto.

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