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# State v. Soto2019-Ohio-4430

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Ohio Northern University
Law Review

# Student Case Notes

## State v. Soto
## 2019-Ohio-4430

I. INTRODUCTION

In *State v. Soto*,[1] the Supreme Court of Ohio was called upon to consider the prohibition against double jeopardy found in both the United States Constitution and the Ohio Constitution.[2] 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."[3] The Ohio Constitution contains a similar provision that guarantees "no person shall be twice put in jeopardy for the same offense."[4] Subsequently, the Ohio courts 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."[5]

In this case, the Court was ultimately tasked with deciding whether a defendant can be prosecuted a second time when, after a negotiated plea, that defendant has served and completed a prison sentence, yet confesses the true nature of the offense after he is released.[6] On October 31, 2019, the Supreme Court of Ohio handed down the merit decision on this issue.[7] The Court held

1. 2019-Ohio-4430 (2019).
2. *Id.* at ¶ 11.
3. U.S. CONST. amend. V.
4. OH. CONST. ART. I, § 10.
5. *State v. Gustafson*, 76 Ohio St.3d 425, 432 (1996) (citing *United States v. Halper*, 490 U.S. 435, 440 (1989)).
6. *Soto*, 2019-Ohio-4430.
7. *Id.*



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that because the charge in dispute was dismissed prior to the empaneling of a jury or the taking of evidence, jeopardy never attached to that charge.[8] Therefore, the double-jeopardy prohibition did not prevent the state from prosecuting the defendant a second time.[9]

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In February 2006, Travis Soto's two-year-old son, Julio, was killed.[10] Soto initially told investigators that he had accidently caused the boy's death while driving an all-terrain vehicle (ATV).[11] Later, Soto gave authorities another account of what had happened.[12] In this later version, Soto told authorities that Julio had been riding with him on the ATV and was struck after he fell off.[13] Subsequently, the Lucas County Coroner's office conducted an autopsy and found that Julio's injuries were consistent with injuries that would be sustained from an ATV accident.[14]

Soto was charged on two counts – child endangering under R.C. 2919.22(A) and involuntary manslaughter under R.C. 2903.04(A).[15] Ultimately, Soto negotiated a plea deal with the prosecutor's office in which he pleaded guilty to child endangering, and the involuntary manslaughter charge was dismissed.[16] After the plea was entered, Soto was sentenced to five years in prison, which he served.[17]

In a shocking turn of events, it turned out that Julio's death may not have been accidental as authorities were initially led to believe.[18] In July 2016, Soto went to the Putnam County Sheriff's Office where he told authorities that he had fabricated the ATV accident in an attempt to cover up the true reason for his son's death.[19] He then confessed that he had beaten his son to death.[20] A pediatric abuse specialist reviewed the 2006 autopsy report from the Lucas County Coroner's Office and photographs taken at the time and concluded that the child's injuries were more consistent with Soto's recent account of the story.[21] Specifically, the doctor pointed to the fact that the autopsy report and photographs contained no indication of bone fractures,

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8. *Id.* at ¶ 22.
9. *Id.* at ¶ 17.
10. *Id.* at ¶ 1.
11. *Soto*, 2019-Ohio-4430 ¶ 1.
12. *Id.* at ¶ 5.
13. *Id.*
14. *Id.*
15. *Id.* at ¶ 6.
16. *Soto*, 2019-Ohio-4430 ¶ 6.
17. *Id.*
18. *Id.* at ¶ 7.
19. *Id.*
20. *Id.*
21. *Soto*, 2019-Ohio-4430 ¶ 7.

which would normally be expected in an ATV accident.[22] Subsequently, authorities indicted Soto on five counts – aggravated murder, murder, felonious assault, kidnapping, and tampering with evidence.[23]

Three months later, in October 2016, Soto filed a motion to dismiss the aggravated murder and murder charges.[24] He asserted that these two charges violated the Fifth Amendment to the U.S. Constitution.[25] He argued that involuntary manslaughter, a charge that was brought against him in 2006 and ultimately dismissed, is a lesser included offense of aggravated murder and murder, and therefore, the state was barred from bringing these new charges.[26]

When presented with this motion, the trial court turned to the Supreme Court case of *Blockburger v. United States*[27] for guidance.[28] Under the test set forth in *Blockburger*, the Court reasoned that involuntary manslaughter with a child-endangering predicate is not the same offense as murder with a felonious-assault predicate.[29] Ultimately, the trial court denied the motion and concluded that the Fifth Amendment does not bar Soto from being prosecuted for aggravated murder and murder.[30] As a result of this ruling, Soto filed an interlocutory appeal asserting a single assignment of error: "The trial court erred [in] over[ruling] Defendant's Motion to Dismiss on Double Jeopardy Grounds."[31]

The Third District Court of Appeals, in a two-to-one decision, reversed the trial court's denial of Soto's motion to dismiss and held 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."[32] The majority reasoned that although the involuntary manslaughter charge was ultimately dismissed in 2006, Soto was still "in jeopardy of being tried and convicted of Involuntary Manslaughter but-for the plea agreement."[33] In his dissenting opinion, Judge Zimmerman concluded that the Fifth Amendment does not bar Soto from being prosecuted for aggravated murder and murder.[34] He argued that because the involuntary

22. *Id.*
23. *Id.*
24. *Id.* at ¶ 8.
25. *Id*.
26. *Soto*, 2019-Ohio-4430 ¶ 8.
27. 284 U.S. 299 (1932).
28. *Soto*, 2019-Ohio-4430 ¶ 9.
29. *Id.*
30. *Id.*
31. *Id.* at ¶ 10.
32. 2018-Ohio-459 (2018) ¶ 34.
33. *Id.* at ¶ 22.
34. *Id.* at ¶ 38 (Zimmerman, J. dissenting).

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manslaughter charge was dismissed, jeopardy did not attach to that charge.[35] Soto then appealed to the Supreme Court of Ohio to clarify whether a defendant can be prosecuted a second time when, after a negotiated plea, that defendant has served and completed a prison sentence, yet confesses the true nature of the offense after he is released.[36]

## III. COURT'S DECISION AND RATIONALE

### *A. Majority Opinion by Justice DeWine*

The majority began with an examination of double-jeopardy principles.[37] Next, the Court addressed three previously accepted propositions of law in this case.[38] The Court concluded by reversing the Third District Court of Appeals' judgement and remanding the case to the trial court for further proceedings.[39]

In part II of the opinion, the Court acknowledged the Fifth Amendment guarantee that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb."[40] It explained that the Ohio Constitution contains a similar provision that guarantees: "no person shall be twice put in jeopardy for the same offense."[41] Since these provisions are so similar in their verbiage, the Supreme Court of Ohio reads them together and interprets them 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."[42]

The Court went on to explain the Third District Court of Appeals decision in greater detail.[43] It explained that the Court of Appeals determined that the aforementioned first wrong, a second prosecution for the same offense after acquittal, was violated.[44] The Court of Appeals treated the dismissal of Soto's 2006 involuntary manslaughter charge as an acquittal and concluded that further prosecution would violate the Fifth Amendment because under the test set forth in *Blockburger*, aggravated murder and murder constitute the same offense as involuntary manslaughter.[45] However, the majority was

35. *Id.*
36. Soto, 2019-Ohio-4430.
37. *Id.* at ¶ 12.
38. *Id.* at ¶ 18.
39. *Id.* at ¶ 22.
40. *Id.* at ¶ 12, *see* U.S. CONST. amend. VI.
41. *Soto*, 2019-Ohio-4430 ¶ 12, *see* OH. CONST. ART. I, § 10.
42. *Id.*, *see State v. Gustafson*, 76 Ohio St.3d 425, 432 (1996) (citing *United States v. Halper*, 490 U.S. 435, 440 (1989).
43. *Id.* at ¶ 13.
44. *Id.*
45. *Id.*

quick to point out the Third District Court of Appeal's mistake – a dismissal is not equivalent to an acquittal.[46]

To further this point, Justice DeWine reemphasized that the involuntary manslaughter charge was dismissed through plea negotiations – Soto was never tried for involuntary manslaughter, and he was never convicted nor punished for that crime.[47] The Court thus criticized the Third District Court of Appeals treating the dismissal of the involuntary manslaughter charge as an acquittal.[48] It said the appellate court ignored the principle that a dismissal entered before jeopardy attaches does not function as an acquittal, and more importantly, does not prevent further prosecution of the offense.[49]

The majority opinion then addressed the dissent's proposition that double jeopardy does attach to a charge dismissed under the plea agreement.[50] To bolster its argument, the dissent pointed to cases that held that jeopardy attaches when a court accepts a guilty plea.[51] However, Justice DeWine stated that the dissent neglected to cite a single case that adopted its view that double jeopardy applies to a charge, like the one at issue here, that was dismissed under a plea negotiation before the empaneling of a jury.[52]

After addressing the dissent's proposition, the Court reemphasized that it is self-evident that when a charge is dismissed before jeopardy attaches, the Fifth Amendment does not prevent subsequent prosecution for the dismissed charge.[53] The Court explained that jeopardy does not attach until a jury is empaneled or a judge starts taking evidence in a bench trial.[54] In this case, because Soto accepted the plea negotiations and the involuntary manslaughter charge was dismissed before either a jury was empaneled or before the judge started taking evidence, jeopardy did not attach to the involuntary manslaughter charge.[55] Soto's only charge that jeopardy attached to in 2006 was the child-endangering charge to which he pleaded guilty.[56]

Next, Justice DeWine discussed three propositions of law that were previously accepted in this case.[57] The first two propositions challenged the Court of Appeals' conclusion that Soto's prosecution is barred by the Fifth

46. *Soto*, 2019-Ohio-4430 ¶ 13.
47. *Id.* at ¶ 14.
48. *Id.*, *see C.K. v. State*, 145 Ohio St.3d 322, 325 (2015); *Bucolo v. Adkins* 424 U.S. 641, 642 (1976).
49. *Id.*
50. *Id.* at ¶ 15.
51. *Soto*, 2019-Ohio-4430 ¶ 15.
52. *Id*.
53. *Id.* at ¶ 16, *see C.K.*, 145 Ohio St.3d at 325.
54. *Id.*
55. *Id.*
56. *Soto*, 2019-Ohio-4430 ¶ 18.
57. *Id*.

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Amendment.[58] The third proposition stated: "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."[59] The Court accepted the first two propositions of law; however, it was hesitant to accept the third.[60]

Justice DeWine explained that the third proposition of law did not relate to the Fifth Amendment double-jeopardy protection and instead related to a claim for relief based on the substance of Soto's plea agreement.[61] Simply stated, the plea agreement may bar further charges based on principles of contract law, not the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.[62] Justice DeWine asserted that the underlying premise here is that when a plea agreement rests on a promise made by the prosecutor, that promise must be fulfilled.[63]

After review of the third proposition of law, the Court dismissed it as having been improvidently accepted.[64] To support this decision of dismissal, Justice DeWine noted that Soto did not raise a claim related to the content of his plea agreement but instead sought relief based solely on the prohibition against double jeopardy.[65] Further, Justice DeWine noted that when Soto appealed to the Third District Court of Appeals, he did not raise an assignment of error identifying the plea agreement as a basis for relief.[66] Due to these errors, Justice DeWine stated that the issue was not properly before the Supreme Court of Ohio, and therefore, the third proposition had to be dismissed.[67] Justice DeWine then briefly turned to the dissent's argument ultimately stating that the dissent improperly conflated the contractual-plea-agreement argument with the separate double-jeopardy argument.[68]

In closing, Justice DeWine concluded by reversing the Third District Court of Appeals' judgment and remanding the case to the trial court for further proceedings.[69]

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58. *Id.*
59. *Id.*
60. *Id.* at ¶ 20.
61. *Soto*, 2019-Ohio-4430 ¶ 19.
62. *Id.*
63. *Id.*
64. *Id.* at ¶ 20.
65. *Id.*
66. *Soto*, 2019-Ohio-4430 ¶ 20.
67. *Id*.
68. *Id.* at ¶ 21.
69. *Id.* at ¶ 22.

### *B. Dissenting Opinion by Justice Donnelly*

Justice Donnelly expressed disapproval of the Court's holding.[70] Instead, Justice Donnelly would have found the constitutional prohibition against double jeopardy to be a bar to Soto's prosecution for aggravated murder and murder.[71] In his dissent, Justice Donnelly focused his analysis on the majority opinion, the double jeopardy clause, and Soto's guilty plea.[72] Justice Donnelly concluded by stating he 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."[73]

Justice Donnelly began with a recitation of the facts of the case.[74] He then briefly discussed the error he believed the majority opinion made.[75] Justice Donnelly asserted that in framing the issue, the majority ignored the procedural nature of the case and stopped short of answering the actual question before the Court.[76] He believed that the majority determined the issue to be "whether the constitutional prohibition against double jeopardy bars the murder charges."[77] Justice Donnelly believed that the correct issue to be addressed was "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."[78]

After setting forth what he believed to be the correct issue before the Court, Justice Donnelly began an in-depth analysis of the Double Jeopardy Clause of the United States Constitution citing cases that support his view.[79] He explained that the Fifth Amendment "serves the fundamental policy of protecting a defendant's finality interest so that a defendant will not be subject to the state's attempts to relitigate the facts or secure additional punishment after a conviction and sentence."[80] After setting forth the three critical protections the Fifth Amendment guarantees – "(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"[81] –

70. *Id.* at ¶ 23 (Donnelly, J., dissenting).
71. *Soto*, 2019-Ohio-4430 ¶ 23.
72. *Id.* at ¶ 32, ¶ 47.
73. *Id.* at ¶ 55.
74. *Id.* at ¶ 24.
75. *Id.* at ¶ 33.
76. *Soto*, 2019-Ohio-4430 ¶ 33.
77. *Id.* at ¶ 32.
78. *Id.* at ¶ 33.
79. *Id.* at ¶ 34.
80. *Id.* at ¶ 35.
81. *State v. Gustafson*, 76 Ohio St.3d 425, 432 (1996) (citing *United States v. Halper*, 490 U.S. 435, 440 (1989)).

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Justice Donnelly criticized the majority's finding that jeopardy did not attach to the charge of involuntary manslaughter based on the fact that a jury was not empaneled and evidence was not taken by the trial court.[82] Justice Donnelly did agree that Soto's case was not decided by a jury or bench trial.[83] However, he reemphasized what he believed to be a crucial fact - Soto's criminal case was resolved by a guilty plea.[84]

Justice Donnelly, citing cases he believed bolstered his argument, was quick to cite to the case of *United States v. McIntosh*.[85] Justice Donnelly used *McIntosh* to explain that although jeopardy attaches when a jury is empaneled or the court begins to hear evidence, different rules apply when the defendant has elected not to proceed to trial.[86] In this situation, jeopardy attaches when the court accepts the plea of guilty. In *McIntosh* it was explained that, "[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.'"[87]

Next, Justice Donnelly cited to *United States v. Soto-Alvarez*[88] and *United States v. Dionisio*.[89] He explained that the majority used these two cases to stand for the proposition that jeopardy attaches only to the charges to which a defendant pleads guilty.[90] However, Justice Donnelly believed this to be an incorrect interpretation of the cases warranting a closer look at each.[91]

After a careful reading, Justice Donnelly believed that *Soto-Alvarez* does not contain any analysis that would support the majority's proposition and found the case unpersuasive.[92] Next, Justice Donnelly asserted that *Dionisio* actually undermines the majorities holding and supports his conclusion that jeopardy attached in this case.[93] In *Dionisio*, the court noted 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."[94] Justice Donnelly then explained that Soto initially faced exposure to "risk of conviction in a pretrial plea proceeding" for both

82. *Soto*, 2019-Ohio-4430 ¶ 36.
83. *Id.*
84. *Id.* at ¶ 37.
85. *Id.*; 580 F.3d 1222 (11th Cir. 2009).
86. *Id.*
87. *McIntosh*, 580 F.3d at 1228.
88. 958 F.2d 473 (1st Cir. 1992).
89. 503 F.3d 78 (2d Cir. 2007).
90. *Soto*, 2019-Ohio-4430 ¶ 39.
91. *Id.*
92. *Id.* at ¶ 40.
93. *Id.* at ¶ 41.
94. *Dionisio*, 503 F.3d at 83.

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involuntary manslaughter and child endangering.[95] But for the state's agreement to drop the involuntary manslaughter charge Soto faced the risk of determination of guilt on both charges.[96] Therefore, Justice Donnelly argued, by accepting Soto's negotiated guilty plea, the trial court determined his criminal culpability for purposes of double jeopardy.[97]

Next, Justice Donnelly cited to *C.K. v. State*[98] and *Bucolo v. Adkins*.[99] Again, these cases were cited by the majority and used for the proposition that "a dismissal entered before jeopardy attaches does not function as an acquittal and does not prevent further prosecution for the offense."[100] Justice Donnelly, admitting these cases support that principle, found these cases to be easily distinguishable from the case at hand.[101]

Justice Donnelly then recited crucial facts from *C.K.* and ultimately concluded that the case stood for the proposition that the state has discretion to dismiss charges without prejudice to allow further investigation into underlying crimes.[102] By dismissing charges without prejudice, the court essentially avoids putting the defendant in jeopardy on evidence that is questionable.[103] Justice Donnelly asserted that this case had no relevance because the state and trial court accepted the dismissal in exchange for Soto's plea of guilty for child endangering.[104] Next, Justice Donnelly recited the facts and procedural history of *Bucolo* ultimately asserting that the case offered no better understanding of the issue at hand.[105]

Justice Donnelly then refocused his attention specifically on Soto's guilty plea.[106] He emphasized the fact that when this case was initially investigated, Soto gave authorities two different versions of the cause of his son's death which should have raised some serious red flags for the state about his credibility.[107] The state did not have to rely on Soto's questionable version of the facts but could and should have done its own due diligence.[108]

Justice Donnelly restated that Soto was indicted for involuntary manslaughter and child endangering and had the right to have the state prove,

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95. *Soto*, 2019-Ohio-4430 ¶ 42.
96. *Id.*
97. *Id.*
98. 145 Ohio St.3d 322.
99. 424 U.S. 641 (1976).
100. *Soto*, 2019-Ohio-4430 ¶ 43.
101. *Id.*
102. *Id.* at ¶ 45.
103. *Id.*
104. *Id.*
105. *Soto*, 2019-Ohio-4430 ¶ 46.
106. *Id.* at ¶ 47.
107. *Id.*
108. *Id.* at ¶ 51.

beyond a reasonable doubt, each and every element of each crime.[109] However, the parties chose a negotiated plea agreement.[110] Justice Donnelly asserted that in doing that, the state gave up any chance they may have had to prosecute Soto for involuntary manslaughter or any murder related offense with the same elements.[111]

Effectively, "when Soto's plea was unconditionally accepted, a record was thereby created that then became the "truth" regarding the crime Soto committed resulting in the death of his son."[112] Justice Donnelly then noted, "when a defendant enters into a plea agreement with the state, both sides intend that it fully resolve the matter . . . in exchange for the dismissal of some charges . . . The state did not reserve any right to bring new charges. Although the bargain reached in the plea agreement may not (and often does not) reflect a defendant's actual culpability, it does reflect a mutually agreed resolution."[113]

In closing, Justice Donnelly stated that he "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."[114] Therefore, Justice Donnelly does not agree with the majority and would have affirmed the judgment of the Third District Court of Appeals.[115]

## IV. ANALYSIS

Whether jeopardy has attached is significant because events that occurred before that time, such as a dismissal of the indictment, will not preclude a subsequent proceeding.[116] However, after jeopardy has attached, dismissal of the indictment or a failure to prosecute a charge will preclude future prosecution.[117] In *Soto*, the Court held that because the involuntary-manslaughter case was dismissed prior to the empaneling of a jury or the taking of evidence, jeopardy never attached to that charge.[118] Therefore, the Court asserted that the double-jeopardy prohibition does not prevent the state from prosecuting Soto for murder or aggravated murder.[119]

With this background established, this Note focuses on (1) when jeopardy attaches and terminates; (2) what constitutes an "acquittal" in the context of

109. *Id.* at ¶ 48.
110. *Soto*, 2019-Ohio-4430 ¶ 49.
111. *Id.*
112. *Id.*
113. *Id.* at ¶ 50-52.
114. *Id.* at ¶ 55.
115. *Soto*, 2019-Ohio-4430 ¶ 55.
116. *Serfass v. United States*, 420 U.S. 377, 389 (1975).
117. *See infra* Part IV.C.
118. *Soto*, 2019-Ohio-4430 ¶ 3.
119. *Id.*

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double jeopardy; (3) pre-jeopardy "acquittals" and whether they bar subsequent prosecution, and lastly; (4) when dismissals function as acquittals.[120]

*A. When Does Jeopardy Attach and Terminate?*

Not all double jeopardy issues are complicated. Some are quite straight forward, such as those concerning the beginning of jeopardy. In a jury trial, jeopardy attaches after the jury has been empaneled and sworn in.[121] In a bench trial, jeopardy attaches when the judge begins to receive evidence.[122] In a case resolved by a guilty or no contest plea, jeopardy attaches after the trial judge enters a finding.[123] Lastly, jeopardy attaches when a defendant has been acquitted.[124]

However, it is important to note the other scenarios in which a subsequent prosecution, or retrial, is not barred. The following are examples of scenarios in which subsequent prosecutions, or retrials, are permitted: When the defendant consents to termination of the first trial;[125] if the defendant, by his own motion, voluntarily terminates the trial;[126] when certain circumstances create a "manifest necessity" for termination of the trial as in the case of a hung jury;[127] when evidence admitted at trial supports a conviction, but on appeal, it is determined that some of the evidence was improperly admitted;[128] when the holding of a case is reversed due to a trial court error and the state, in the first trial, did not present sufficient evidence;[129] when the court "terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence;"[130] if the reversal of a case was because the conviction was against the weight of the evidence instead of because the evidence was legally insufficient to support the conviction;[131] and where the trial court erred in failing to obtain an explanation of circumstances of the defendant's no contest plea before finding him guilty.[132]

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120. *See infra* Parts IV.A-D.
121. *Crist v. Bretz*, 437 U.S. 28, 29 (1978).
122. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).
123. *State v. Knaff*, 128 Ohio App. 3d 90, 92 (1998).
124. *Blue Ash v. Price*, 2018-Ohio-1062 ¶ 5 (1st Dist.).
125. *United States v. Jorn*, 400 U.S. 470, 480 (1971).
126. *Unites States v. Dinitz*, 424 U.S. 600, 610 (1976).
127. *Gori v. United Stated*, 367 U.S. 364, 369 (1961).
128. *State v. Brewer*, 121 Ohio St. 3d 202, 209 (1988).
129. *State v. Freitag*, 185 Ohio App. 3d 580, 584 (2009).
130. *United States v. Scott*, 437 U.S. 82, 92 (1978).
131. *State v. Woods*, 2016-Ohio-661 ¶ 19 (10th Dist.).
132. *State v. Cochrane*, 2017-Ohio-6948 ¶ 23 (11th Dist.) (finding that since the conviction was reversed for insufficiency of the evidence, jeopardy attaches and a remand for a new determination of guilt or innocence is barred by double jeopardy.).

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Therefore, the inquiry of whether jeopardy has attached "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial. The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried."[133] It has been a long-understood rule of Fifth Amendment jurisprudence that an acquittal, whether granted by the judge or returned by a verdict handed down from the jury, precludes subsequent prosecutions or a retrial of a defendant on the original charge.[134] Even if the acquittal is based upon a mistaken understanding or application of the facts of the case or law this rule still reigns true.[135] Even a review of a verdict of acquittal violates the Constitution by putting the defendant twice in jeopardy.[136] However, one of the utmost important things to determine is whether the judgment that terminated the proceedings is an "acquittal" in the context of "double jeopardy."[137]

### *B. What is an "Acquittal" in the Context of Double Jeopardy?*

To begin, it is important to examine the basic rule and definition of an acquittal. In the 1977 case of *United States v. Martin Linen Supply Co.*,[138] the Supreme Court of the United States stated, "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'"[139] The rationale behind this rule is that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'"[140] In sum, the essence of the double jeopardy clause is to protect from subsequent prosecution following an acquittal.

The question then becomes – what can constitute an acquittal? The Court has recognized that a jury's verdict of not guilty is an acquittal which prohibits further prosecution.[141] However, the most difficult area of double jeopardy law comes from determining whether a particular judicial disposition of a case is an acquittal. Just because a court labels something as

133. *Martinez v. Illinois*, 572 U.S. 833, 841 (2014).
134. *United States v. Ball*, 163 U.S. 662, 671 (1896).
135. *Scott*, 437 U.S. at 98.
136. *Martinez*, 572 U.S. 833.
137. *See infra* Part IV.B.
138. 430 U.S. 564 (1977).
139. *Martin Linen Supply Co.*, 430 U.S. at 571.
140. *Scott*, 437 U.S. at 91.
141. *See Ball*, 163 U.S. at 671.

an acquittal does not necessarily mean that is it one.[142] On the other hand, some dismissals and post-conviction events do truly function as an acquittal.[143] To help settle some legal confusion, the Court has provided a definition of an acquittal which can help analyze many judicial decrees: "[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.'"[144] In sum, there are five different types of acquittals: true acquittals, implied acquittals, pre-jeopardy "acquittals," post-verdict decisions equivalent to an acquittal, and dismissals that function as acquittals.[145] The foregoing analysis will focus on pre-jeopardy "acquittals" and dismissals that functions as acquittals.[146]

### *C. Pre-Jeopardy "Acquittals" – Do They Bar Subsequent Prosecution?*

A pre-jeopardy "acquittal" is contradictory in terms of double jeopardy jurisprudence. Logically, events that occurred before jeopardy attached cannot cause double jeopardy if a subsequent prosecution occurs, because, by definition, the defendant has not been placed in jeopardy.

The leading case on this issue is *Serfass v. United States*.[147] In this case, the trial court granted a motion to dismiss the indictment before the jury was empaneled and sworn because the evidence indicated a defense as a matter of law.[148] Therefore, because the jury was not sworn, and the judge was not in a position to determine guilt or innocence, jeopardy did not attach.[149] A dismissal that is based upon insufficient evidence or upon the recognition of a defense as a matter of law would be the functional equivalent of an acquittal if rendered after jeopardy attached.[150] However, in *Serfass*, the court granted the dismissal before jeopardy attached which consequently meant double jeopardy was not triggered thereby allowing subsequent prosecution.[151]

In the 1976 Supreme Court case of *United States v. Sanford*,[152] the Court followed the precedent set forth in *Serfass*. In *Sanford*, the first trial ended in mistrial because of a hung jury thereby prompting the trial court to grant the defendant's motion to dismiss because of a lack of evidence of guilt.[153]

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142. *See Serfass*, 420 U.S. at 392.
143. *See Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986).
144. *Scott*, 437 U.S. at 97.
145. *See supra* IV.B.
146. *See supra* IV.B.C.
147. 420 U.S. 377 (1975).
148. *Serfass*, 420 U.S. at 380.
149. *Id.* at 389.
150. *Smalis*, 476 U.S. at 142.
151. *Serfass*, 420 U.S. at 394.
152. 429 U.S. 14 (1976).
153. *Sanford*, 429 U.S. at 14.

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Subsequently, the government appealed, and the Supreme Court concluded that, although jeopardy did attach at the first trial, a hung jury does not preclude subsequent prosecution or a retrial.[154] The Court reasoned that when the trial court dismissed the indictment, the charges were once again in pretrial stages, meaning that jeopardy has not attached and the dismissal could not bar subsequent prosecution.[155] In sum, pre-jeopardy "acquittals" do not bar subsequent prosecution because logically these events occurred before jeopardy attached.

*D. Dismissals – Do They Function as Acquittals?*

Dismissals, such as the dismissal of the involuntary manslaughter charge in *State v. Soto*, can cause a great deal of difficulty in double jeopardy law because they are often confused with acquittals and mistrials. A true acquittal triggers double jeopardy protection against subsequent prosecution.[156] However, it is important to recognize that a dismissal is similar to an acquittal in that the issuing judge "contemplates that the proceedings will terminate then and there in favor of the defendant."[157] Therefore, dismissals pose a great deal of difficulty because a dismissal may or may not trigger double jeopardy protection depending on when and on what grounds the dismissal was issued.

A dismissal that is issued prior to the point that jeopardy attaches is not the functional equivalent of an acquittal as far as the double jeopardy clause is concerned.[158] However, if such a dismissal is overturned on appeal, subsequent prosecution is not precluded by the double jeopardy clause because no prior jeopardy has attached.[159]

On the other hand, a dismissal that has been granted after jeopardy has attached must be analyzed more closely to see whether it is the functional equivalent of an acquittal. The most useful guideline for analysis is the Court's definition of acquittal: "[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.'"[160]

In the 1978 Supreme Court case of *United States v. Scott*,[161] the court held that a post-jeopardy dismissal based on a prejudicial pre-indictment did

154. *Id.* at 15-16.
155. *Id.* at 16.
156. *Scott*, 437 U.S. at 91.
157. *Id.* at 94.
158. *Serfass*, 420 U.S. at 392.
159. *Id.* at 393.
160. *Scott*, 437 U.S. at 97.
161. 437 U.S. 82 (1978).

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not resolve the factual elements in the defendant's favor.[162] As a result, the Court reasoned that this dismissal was not an acquittal and did not trigger double jeopardy.[163] The Court further noted that, by making a motion for a dismissal, the defendant was the one who deliberately sought termination of the proceedings against him on a basis unrelated to factual guilt or innocence.[164]

In that case, the *Scott* Court correctly found the defendant's motion as a deliberate decision to forego his valued right to have his guilt or innocence determined by that particular tribunal.[165] However, at least one other court has concluded that when a trial court dismisses the case sua sponte, the double jeopardy clause precludes subsequent proceedings.[166] In this instance, the defendant is deprived of his right to be judged by that particular tribunal.[167]

Furthermore, a post-jeopardy dismissal based on insufficient evidence differs significantly from the post-jeopardy dismissal on procedural grounds that was exemplified in *Scott*.[168] A post-jeopardy dismissal based on insufficient evidence represents a resolution in the defendant's favor and, for purposes of double jeopardy, is the functional equivalent of an acquittal.[169] So, in answering the question of whether dismissals functions as acquittals or not requires an analysis of the facts because, in short, some dismissals functions as acquittals, and some do not.

## V. CONCLUSION

The language of the Double Jeopardy Clause is straight forward; however, as is true of other clauses of the Constitution, the details of its components can be extremely complex. Simple inquires, such as when jeopardy attaches, what constitutes an acquittal, and how dismissals function, yield no simple response. However, some of the difficulty may be avoided by focusing carefully on the precise issue presented by a particular case. In *Soto*, the issue was whether a defendant can be prosecuted a second time when, after a negotiated plea, that defendant has served and completed a prison sentence, yet confesses the true nature of the offense after he is released. In a 6-1 opinion, the Court held that because the involuntary-manslaughter case was dismissed prior to the empaneling of a jury or the taking of evidence, jeopardy never attached to that charge.[170] Therefore, the

162. *Scott*, 437 U.S. at 95.
163. *Id.* at 98-99.
164. *Scott*, 437 U.S. at 98-99.
165. *Id.* at 100-01.
166. *United States v. Dahlstrum*, 655 F.2d 971, 976 (9th Cir. 1981).
167. *Dahlstrum*, 655 F.2d at 975.
168. *Smalis*, 476 U.S. at 142.
169. *Id.* at 142-43.
170. *Soto*, 2019-Ohio-4430 ¶3.

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Court asserted that the double-jeopardy prohibition does not prevent the state from prosecuting Soto for murder or aggravated murder.[171] This ruling is consistent with past precedent and will provide courts clarification on this convoluted issue in the future.

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171. *Id.*

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