

IN THE SUPREME COURT OF OHIO  
Case No. 2015-381

CITY OF CLEVELAND	:	
Plaintiff- Appellee	:	
-vs-	:	On Appeal from the
TROUSSAINT JONES	:	Cuyahoga County Court
Defendant-Appellant	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 100598

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

With this appeal, Troussaint Jones asks this Court to reverse the Eighth District's 2-1 decision which permitted the City to appeal a final verdict and which *sua sponte* vacated a no contest plea based on alleged non-compliance with Traf. R. 10. As explained in Jones' initial brief, this Court should hold:

- 1) The City (or State) cannot appeal a final verdict after a no contest plea (*State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St. 2d 380 applied);  
  
*or, in the alternative,*
- 2) An appellate court cannot sua sponte vacate a plea for noncompliance with procedural rules designed to protect the rights of a criminal defendant and subject the defendant to a second criminal prosecution.

The City and its Amicus Curiae Ohio Attorney General (hereafter "Amicus") take different approaches to this case. The City accepts this Court's prior decision in *Sawyer* as good law and agrees that "the prosecution in a criminal matter has no authority to appeal or disturb a final verdict." (City's Br. at 3-4). However, it argues that *Sawyer* is inapplicable because "a plea of no contest was never entered," or Jones no contest plea was *void* because the trial court did not comply with Traf. R. 10. The City's first contention is simply not supported by the record because Jones pled no contest to the original charges. And the City's argument that an inadequate plea colloquy renders that plea *void* finds no support in the law. Additionally, it would wreak havoc on the justice system. While such a holding might give the City the opportunity to re prosecute the misdemeanor in this case, the effect of such a holding would quickly lead to an onslaught of post-conviction litigation in which criminal defendants will seek to vacate *void* convictions due to inadequate plea colloquies.

Although Amicus initially joins the City's position that Jones did not plead no contest to the original charges, it then goes further and contends that the prosecution can disturb a final verdict

after a no contest plea, sentencing, and judgment of conviction. Amicus maintains that this Court must “reconsider” its decision in *Sawyer* alleging that its validity has been called into question by the United States Supreme Court’s decision in *Ohio v. Johnson*, 467 U.S. 493 (1984). Amicus is wrong, as its analysis of *Johnson* ignores a fundamental distinction. In *Johnson*, the defendant pled not guilty to the two most serious charges of a four-count indictment (murder and aggravated robbery) while pleading guilty to the lesser two offenses of involuntary manslaughter and theft. *Id.* at 494. He then sought and obtained dismissal of the two more serious charges on Double Jeopardy grounds. *Id.* The United States Supreme Court reversed, finding that no Double Jeopardy violation would occur “by continuing prosecution on the remaining charges brought in the indictment” because the defendant “has not been exposed to conviction on the charges to which he pleaded not guilty.” *Id.* at 501. Here, Jones pled no contest to *all* of the charges brought against him and was “exposed to conviction” on each of those charges. Thus, *Johnson* is inapplicable and *Sawyer* remains good law.

In place of this Court’s bright-line rule in *Sawyer* that a no contest plea to a particular count followed by a conviction and sentence precludes further prosecution on that count, Amicus invites this Court to engage in an analysis of whether the trial court’s verdict was correct; whether the trial court appropriately “determined that the evidence was insufficient to support the [OVI] charge against Jones.” (Amicus Br. at 21). Such an inquiry into the trial court’s verdict is precisely what is prohibited both by statute, R.C. 2946.67, and by state and federal constitutional prohibition on Double Jeopardy. Amicus’ concerns about “the specter of judicial nullification” in one misdemeanor case hardly justifies ignoring statutory and constitutional law. Moreover, the prosecution is not without a remedy. Although the prosecution cannot disturb the verdict in that particular case, it can always seek leave for a *Bistricky* appeal to obtain an advisory opinion of

“substantive law rulings.” *See State v. Bistricky*, 51 Ohio St. 3d 157, 159-60, 555 N.E. 2d 644 (1990).

## LAW AND ARGUMENT

### **A. Troussaint Jones pled no contest to the original charges in the misdemeanor complaint.**

This Court’s resolution of the legal issue in this case depends largely on its view of a key procedural fact disputed by the parties. Jones maintains that he pled no contest to all of the charges and the trial court then issued a verdict and imposed a sentence. The City argues that the trial court improperly amended the charges pending against Jones prior to his no contest plea. The City’s view is not supported by the record.<sup>1</sup>

The actual sequence of events was: 1) The defendant pled no contest to the complaint, including the two OVI charges; and 2) The trial court found Jones’ not guilty of both OVI charges but guilty of physical control:

MS. HOPP [prosecutor]: Well, Judge, from the city’s position, if he would like to plead no contest to the citation, he’s more than welcome to do that or we could set it for trial. The city is not willing to make any reductions at this time, give his prior history.

MR. EIDENMILLER [defense attorney]: Your Honor, he’ll change his plea to no contest.

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<sup>1</sup> While the City contends that the Eighth District correctly concluded that the trial court improperly amended the complaint such that Jones pled no contest to amended charges, only one judge actually reached that conclusion. Indeed, the Eighth District panel issued three different decisions on that issue. Based on the erroneous premise that Jones’ “attorney claimed Jones would ‘plead no contest’ to ‘physical control’” (something defense counsel never said), Judge Rocco concluded that “[o]bviously, the court changed ‘the name or identity of the crime’ in contravention of Crim. R. 7(D).” Opinion Below at ¶¶ 25 and 28. Neither the concurring nor dissenting judge agreed with that interpretation of the record. Judge Gallagher concluded that the trial court judge “amended the charge” *after* Jones no contest plea to the original charges. *Id.* at ¶ 41. And the dissenting judge, Judge Jones, concluded that “Crim. R. 7(D) is inapplicable” because the trial court did not amend the charge prior to Jones’ plea but rather simply found him guilty of physical control after his plea to the original charges. *Id.* at ¶ 48.

(Tr. at 14). It was only *after* Jones pled no contest that the judge found Jones not guilty of both OVI charges but guilty of physical control as a lesser offense of one of the two OVI charges. (Tr. at 14-15).

This is a distinction that makes a critical difference.<sup>2</sup> Jones acknowledges that the trial court may not amend charges over the objection of the prosecutor. If that had happened here, the trial court would have committed reversible error. However, no such amendment occurred in this case.<sup>3</sup> Rather, Jones pled no contest to the original charges and then the trial court rendered its verdict. That verdict may not be disturbed by the City on appeal.

**B. This Court's prior decision in *State ex rel. Sawyer v. O'Connor*, 54 Ohio St. 2d 280 (1978) is directly on point and controls the outcome of this case.**

The City acknowledges that this Court's decision in *Sawyer* would preclude it from appealing from a verdict rendered after a no contest plea. It simply contends that "a plea of contest was never entered" in this case. As explained above, the City is simply wrong about that. Thus, if this Court finds that Jones did plead no contest, both parties would agree that the City could not disturb the final verdict.

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<sup>2</sup> Amicus acknowledged the importance of this distinction in recognizing that "[w]hether jeopardy attached in the proceedings below depends in part on whose characterization of those proceedings are correct." (Amicus Br. at 14).

<sup>3</sup> Because the trial court did *not* amend the charges, the City's arguments regarding an improper amendment in subsections A and B of its brief (pages 3-6) completely miss the mark. Similarly, both of Amicus' propositions of law are based on the mistaken premise that the trial court "accept[ed] a no contest plea to [a] reduced charge" over the prosecutor's objection. (found on pages 8-13 of his brief).

A side-by-side comparison of the two cases illustrates that the similarities between Sawyer and the instant case:

	<i>Sawyer</i>	<i>Jones (Instant Case)</i>
<b>Plea</b>	Defendant pled no contest to OVI	Defendant pled no contest to OVI
<b>Verdict</b>	Trial court found defendant guilty of a lesser offense (reckless operation)	Trial court found defendant guilty of a lesser offense (physical control)
<b>Effect of Verdict</b>	Finding of guilt on reckless operation “constituted a finding of not guilty” of the OVI	Finding of guilt on physical control constituted a finding of not guilty of the OVI
<b>Explanation for Verdict</b>	This was a “hardship” case	This “more resembles and finds a balance of what happened.” (Tr. at 15-16)
<b>State’s challenge of the verdict</b>	Not allowed	Should not be allowed

In *Sawyer*, this Court held that: (1) “so far as the charge of driving while intoxicated is concerned, there has been a final determination of not guilty irrespective of whether, in arriving at that determination, the trial court grossly abused its discretion or erroneously determined that reckless operation is a lesser-included offense of the principal charge,” and, (2) that determination cannot be challenged by the State. 54 Ohio St. 2d at 383. Applying *Sawyer* to the instant case dictates the same result—the State cannot disturb the final verdict. This is particularly true given the explicit limitation on the State’s statutory ability to appeal in R.C. 2945.67 which prohibits an appeal of the final verdict. As discussed in part D, *infra*, this Court’s decision in *Sawyer* is also dictated by constitutional Double Jeopardy concerns.

**C. Even if the trial court did not substantially comply with Traf. R. 10, its failure to do so does not render Jones' plea void.**

The Eighth District ultimately reversed Jones' convictions on the basis that the trial court failed to comply with Traf. R. 10 and therefore Jones' plea was "infirm" and "void." Opinion Below at ¶¶ 29 and 42. The Eighth District reached this conclusion despite the fact that neither party raised the validity of the plea colloquy as an issue.

In Jones' opening brief, he argued that the Eighth District erred in vacating the plea pursuant to Traf. R. 10 for several reasons: 1) The trial court did, in fact, substantially comply with Traf. R. 10; 2) Only a criminal defendant can seek to vacate a plea due to alleged noncompliance with procedural rules designed to protect the defendant; and 3) Any noncompliance with Traf. R. 10 only renders a plea voidable and any arguments related to the plea are waived if not timely raised.

1. Trial Court substantially complied with Traf. R. 10.

A trial court's "duty to a defendant before accepting his guilty or no contest plea is graduated according to the seriousness of the crime with which the defendant is charged." *State v. Watkins*, 99 Ohio St. 3d 12, 16, 2003-Ohio-2419, 788 N.E.2d 635. Criminal Rule 11 requires a "more elaborate" colloquy for pleas involving felonies than misdemeanors. *See State v. Jones*, 116 Ohio St. 3d 211, 214, 2007-Ohio-6093, 877 N.E.2d 677. Indeed, there are no "constitutionally mandated informational requirements for defendants charged with misdemeanors." *Watkins*, 99 Ohio St. 3d at 17.

When, as here, a defendant is charged with a petty traffic offense, a trial court need not comply with Crim. R. 11. *Id.* In accepting a no contest plea for a petty traffic offense, a trial court must simply inform the defendant of the effect of the plea. *Watkins*, 99 Ohio St. 3d at 15. Nothing more is required. *Id.* Indeed, when a case involves a petty offense, the trial court is not even

required to address the defendant personally. *Cf.* Traf. R. 10(C) (which includes the additional requirement the trial court “address the defendant personally” before accepting the plea).<sup>4</sup>

With respect to compliance with Traffic Rule 10(D), the only question is whether the trial court adequately explained the effect of the no contest plea. Here the trial court did. Considering *only* what the trial court said directly to Jones on the day of his plea,<sup>5</sup> the trial court substantially complied with Traf. R. 10(D) by explaining that Jones could “enter a no contest plea and stipulate to the facts, and we could do a finding.” (Tr. at 14). A trial court substantially complies with its requirement of explaining the effect of a no contest plea when it informed Jones that a no contest plea constitutes a stipulation to the facts alleged and leads to a finding or verdict. There is no indication that Mr. Jones was confused by the trial court’s explanation and he did not ask any questions, and thus there was no need for further elaboration.

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<sup>4</sup> In its brief to this Court, the City contends, for the first time, that Traf. R. 10(C) applies rather than Traf. R. 10(D). Jones disagrees. Traf. R. 10(C) only applies to “serious offenses.” “Serious offense” is defined as “an offense for which the penalty prescribed by law includes confinement for more than six months.” Traf. R. 2(E). While none of Jones’ offenses carried a penalty of confinement for more than six months, the City takes the novel approach of aggregating the potential penalties of each offense and arguing that he faced a potential “confinement totaling eighteen months if run consecutively.” (City’s Br. at 6-7). The City cites no support for this aggregation approach and it contravenes the plain language of Crim. R. 2 which defines “serious offense” in the singular and does not provide for the accumulation of multiple petty offenses into a “serious offense” case. The City’s approach is also inconsistent with this Court’s rejection of the sentencing package doctrine, in *State v. Saxon*, 109 Ohio St. 3d 176, 179, 2006-Ohio-1245, 846 N.E.2d 824 (explaining that “a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense.”), and with this Court’s conclusion that a trial court need not inform a defendant during the plea colloquy that sentences can be imposed consecutively, *see State v. Johnson* (1988), 40 Ohio St. 3d 140, syllabus.

<sup>5</sup> As explained in Jones’ motion to resubmit a corrected merit brief, he mistakenly sought inclusion of and referred to a general orientation video frequently shown at arraignments in Cleveland Municipal Court. Counsel now recognizes that, because Jones was arraigned in Courtroom D, he did not view that orientation video but rather received his initial orientation from a Public Defender assigned to that courtroom. Accordingly, Jones does not rely on anything stated in the general orientation video.

2. Only a criminal defendant can seek to vacate a plea due to alleged non-compliance with Traf. R. 10.

Even if the trial court did not technically comply with Traf. R. 10, the Eighth District erred in *sua sponte* relying on alleged noncompliance as a basis for vacating the plea. Because the procedural rules in Traf. R. 10 (like Crim. R. 11) are designed to protect the rights of the defendant, only a criminal defendant has the right to raise a challenge to a plea's non-compliance with these rules. *Cf. Watkins*, 99 Ohio St. 3d at 16 (describing Traf. R. 10 and Crim. R. 11 as defining a “judge’s *duty to the defendant*”) (emphasis added); *State v. Ballard* (1981), 66 Ohio St. 2d 473, 480-81 (explaining that plea colloquy requirements are designed to “assure that the defendant is informed.”)

Other than its argument that a lack of substantial compliance renders a plea “void,” an argument which will be addressed in the following section, the City makes no attempt to explain how or why someone other than the criminal defendant can seek to vacate a plea because *the criminal defendant* was not provided all the information to which he is entitled.

3. Alleged noncompliance with Traf. R. 10 only renders a plea voidable; not void.

The City contends that Jones’ plea is “void” due to the trial court’s alleged noncompliance with Traf. R. 10. The City does not identify a single case to support that contention and, in fact, the City’s argument conflicts with several cases from this Court. If a trial court’s failure to substantially comply with Crim. R. 11 or Traf. R. 10 rendered a plea void and the proceedings a nullity (as argued by the City), then a criminal defendant could raise that issue at any time and a criminal defendant would not need to establish that he was prejudiced by the noncompliance. However, it is well-established that neither is the case.

This Court has held that the failure to comply with procedural requirements of Crim. R. 11, even in the context of a death penalty case, render a judgment merely voidable and not void. *Pratts*

*v. Hurley*, 102 Ohio St. 3d 81, syllabus, 2004-Ohio-1980, 806 N.E.2d 992 (concluding that a trial court's failure to convene a three-judge panel in a death penalty case where there is a jury waiver as required by R.C. 2945.06 and Crim. R. 11(C)(3) renders a judgment merely voidable). Appellate courts regularly reject criminal defendants' attempts to challenge the sufficiency of a plea colloquy in post-conviction proceedings on the basis of *res judicata*. See e.g. *State v. Smith*, 8th Dist. No. 94063, 2010-Ohio-3512, ¶¶ 19-20. And, because *res judicata* is inapplicable to void judgments, See *State v. Fischer* (2010), 128 Ohio St. 3d 92, paragraph one of the syllabus and 93, it is clear that courts have consistently treated errors in the plea colloquy as voidable errors, as opposed to errors that create the circumstance of *void ab initio*.

There is a second line of cases from this Court that clearly establish that noncompliance with plea colloquy rules do not automatically render a plea void or a nullity. This Court has consistently held that lack of compliance with Crim. R. 11 or Traf. R. 10 is not enough, by itself, to vacate a plea. In addition to noncompliance, there must be a showing that the *criminal defendant* has been prejudiced by the noncompliance. *Jones*, 116 Ohio St. 3d at 219 ("Failure to comply with nonconstitutional rights [such as the information in Crim. R. 11(B)(1)] will not invalidate a plea unless the defendant thereby suffered prejudice."); *State v. Veney*, 120 Ohio St. 3d 176, 179, 897 N.E. 2d 621, 2008-Ohio-5200. The requirement that prejudice be shown by the defendant before a plea is vacated for noncompliance illustrates that these procedural rules are designed for the protection of the criminal defendant and that failure to comply with these rules does not automatically render a plea valid.

Because an alleged noncompliance with Traf. R. 10 did not render Jones' plea or the trial court's subsequent sentence void, this Court should reverse the Eighth District's ruling to the contrary.

**D. The Double Jeopardy implications of a verdict based on a no contest plea.**

Because the City (or State) cannot appeal a final verdict (even with leave of court) pursuant to R.C. 2945.67, this Court should simply reverse the Eighth District's decision on statutory grounds and dismiss the City's appeal. Even if this Court finds that the City could appeal Jones' conviction, it should nonetheless reverse the Eighth District because there was no improper amendment of the charges and because the Eighth District should not have *sua sponte* vacated Jones' plea for noncompliance with Traf. R. 10. If either of Jones' nonconstitutional arguments are dispositive, then this Court need not address the constitutional implications of the Eighth District's decision. *Ohioans for Fair Representation, Inc. v. Taft* (1993), 67 Ohio St.3d 180, 183, 616 N.E.2d 905 ("Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary."); *State v. Talty*, 103 Ohio St. 3d 177, 179, 2004-Ohio-4888, 814 N.E.2d 1201 ("It is well-settled that this Court will not reach constitutional issues unless absolutely necessary.").

However, if this Court decides both that the City had a statutory right to appeal Jones' conviction for physical control and that the Eighth District properly vacated his plea as "infirm" and "void," then this Court must consider the Double Jeopardy implications of such a decision. Jones maintains that, having pled no contest to all of the charges and having been convicted and sentenced, the City is barred by State and Federal Double Jeopardy Clauses from pursuing a second prosecution of these same charges.

1. Double Jeopardy precludes the City from reprosecuting Jones for crimes to which he has already pled no contest and been sentenced.

Existing precedent from this Court establishes that state and federal Double Jeopardy precludes the City from reprosecuting Jones for the same offenses for which he has already pled no contest and been sentenced.

This Court has made clear that a defendant is “placed in jeopardy at the time the trial court exercised its discretion to accept a no contest plea.” *Sawyer*, 54 Ohio St. 2d at 382; *see also State ex rel. Leis v. Gusweiler*, 65 Ohio St. 2d 60, 61 (1981). And, when a trial court finds the defendant guilty of a lesser offense based on the no contest plea, the defendant cannot, as a constitutional matter, be placed in jeopardy a second time for the charged offense. *Sawyer*, 54 Ohio St. 2d at 382. Indeed, Double Jeopardy forecloses any further criminal prosecution for the charged offense irrespective of whether the trial court “abused its discretion or erroneously determined” that the defendant was guilty of a “lesser-included offense of the principle charge.” In *Sawyer*, the defendant pled no contest to DUI and the trial court found him guilty of reckless operation. *Id.* at 380-81. The State challenged the trial court’s verdict on the basis that reckless operation was not a lesser included offense and thus the trial court lacked authority to enter that verdict. This Court held that the State could not challenge that final judgment due to “federal and Ohio constitutional protections against double jeopardy.” *Id.* at 382. Even “if the trial court ignored the law or facts in arriving at its verdict,” the defendant, having pled no contest to DUI and found guilty of a lesser offense, could not be placed in jeopardy again for DUI. *Id.* at 383.

*Sawyer* clearly establishes that, once a trial court accepts a no contest plea and enters a final verdict, the State cannot appeal that verdict and cannot place the defendant in jeopardy again for the offense that was the basis of the no contest plea. In *Sawyer*, the Court held that the defendant could not be prosecuted again for DUI after he pled no contest to DUI and was found

guilty of reckless operation. In this case, Jones pled no contest to DUI and was found guilty of physical control. Thus, as in *Sawyer*, Jones cannot be prosecuted again for the DUI because it would “unconstitutionally place the defendant twice in jeopardy for driving while under the influence of alcohol.” *Id.* at 383.

In light of Jones’ constitutional protections against Double Jeopardy, one thing is clear—he cannot be prosecuted a second time after having pled no contest and having received a final judgment including either an acquittal or guilty verdict and sentence.

2. The cases relied on by the City and Amicus are inapposite.

a. *The City’s Double Jeopardy argument lacks merit because the trial court did not amend the charges prior to Jones no contest plea.*

The City’s Double Jeopardy argument is premised on its belief that the trial court amended the charges prior to Jones no contest plea and thus analogizes this case to *State v. Malinovsky*, 60 Ohio St. 3d 20, 573 N.E.2d 22. In *Malinovsky*, the State sought to appeal an erroneous evidentiary ruling in the middle of trial. *Id.* at 22. The trial court refused to interrupt the trial to allow the State’s appeal and dismissed the State’s case for “failure to prosecute.” *Id.* at 22-24. The Ohio Supreme Court held Double Jeopardy did not bar the defendant’s “reprosecution” because the defendant “sought a termination of the proceedings on grounds other than the state’s failure of proof.” *Id.* (quoting *United States v. Scott*, 437 U.S. 82, 98 S.C. 2187, 57 L.E.2d 65 (1978)).

Jones agrees with the legal principle articulated by the City that Double Jeopardy would not bar a reprosecution if a trial court improperly amended charges over the objection of the State and then the defendant pled no contest to only those amended charges. However, he disagrees with City’s belief that such a thing happened in this case. As discussed above, Jones pled no contest to the original charges and *then* the trial court issued its finding of guilt based on his plea. (Tr. at 14-15). The charges were not amended by the court prior to Jones’ plea. Jones did not seek the

termination of the charges on procedural grounds. And the trial court did not dismiss the charges for failure to prosecute. Accordingly the City's reliance on *Malinovsky* is completely misplaced.

*b. Amicus' Double Jeopardy argument lacks merit because jeopardy attached to Jones' no contest plea and subsequent conviction.*

Amicus asks this Court to "reconsider" its holding in *Sawyer* and conclude that jeopardy does not attach to a no contest plea. It does not, however, offer this Court any compelling reason to overrule its prior decision and relies on several cases that are easily reconciled with *Sawyer*.

In seeking to overrule this Court's prior precedent, Amicus relies principally on the United States Supreme Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984). *Johnson*, however, is fundamentally distinguishable from the instant case. In *Johnson*, the defendant pled not guilty to the two most serious charges of a four-count indictment (murder and aggravated robbery) but pled guilty to the two lesser offenses of involuntary manslaughter and theft. *Id.* at 494. He then sought and obtained dismissal of the two more serious charges on Double Jeopardy grounds. *Id.* The United States Supreme Court reversed finding that no Double Jeopardy violation would occur "by continuing prosecution on the remaining charges brought in the indictment" because the defendant "has not been exposed to conviction on the charges to which he pleaded not guilty." *Id.* at 501. Here, Jones pled no contest to *all* of the charges brought against him and was "exposed to conviction" on each of those charges. Thus, *Johnson* is completely inapplicable and *Sawyer* remains good law.

Amicus does correctly point out that there is legal debate regarding the attachment of jeopardy upon a plea *prior to sentencing*. Many courts have held that jeopardy attaches merely upon acceptance of a guilty plea even if the defendant has not yet been sentenced. *See State v. Martinez-Mendoza*, 804 N.W.2d 1, paragraph two and three of the syllabus (Minn. 2011) (holding that jeopardy attached after the trial court accepted defendant's plea adjudicated him guilty on the

record); *United States v. Patterson*, 381 F.3d 859, 864 (9<sup>th</sup> Cir. 2004) (holding that jeopardy attached with the acceptance of guilty plea and rejecting the view that the trial court's acceptance of the guilty plea was "impliedly contingent" on the court's review of the pre-sentence investigation report."); *Morris v. Reynolds*, 264 F.3d 38 (2<sup>nd</sup> Cir. 2001). However, other courts have held (as pointed out by Amicus) that a trial court may, under certain circumstances, vacate a plea *prior to sentencing*:

- *United States v. Santiago-Soto*, 825 F.2d 616 (1<sup>st</sup> Cir. 1987): The First Circuit held that Double Jeopardy did not preclude the State from prosecuting a defendant on more serious charges when the trial court accepted a guilty plea to a lesser included offense but then vacated a guilty plea on the less serious offenses, without any objection by the defendant, "without having imposed sentence and entered judgment." *Id.* at 620 (emphasis added).
- *Gilmore v. Zimmerman*, 793 F.2d 564 (3<sup>rd</sup> Cir. 1986): The Third Circuit held that Double Jeopardy did not preclude the State from prosecuting a defendant on more serious charges after the trial court vacated a guilty plea to a lesser offense *prior to sentencing* because, in the trial court's view, there was "an inadequate factual basis to support the defendant's equivocal guilty plea" and there were "simply too many unanswered questions." *Id.* at 567 and 571.
- *Bally v. Karma*, 65 F.3d 104 (8<sup>th</sup> Cir. 1995): The Eighth Circuit held that Double Jeopardy did not preclude a trial court from vacating a defendant's DWI plea *prior to sentencing* when the defendant had not resolved a pending vehicular assault charge arising from the same incident and when it was discovered that the victim had died the day before the defendant's plea and thus manslaughter was warranted.
- *State v. Thomas*, 296 Conn. 375, 995 A.2d 65 (2010): The Supreme Court of Connecticut held that Double Jeopardy does not bar a trial court from vacating a previously accepted guilty plea *prior to sentencing* "if the court later determines, on the basis of new information uncovered during the presentence investigation, that the sentence contemplated by the plea agreement is inappropriate." *Id.* at 377. The Court emphasized that "when a presentence investigation is pending and the court is awaiting a victim's anticipated statement, any acceptance of the defendant's guilty plea is *conditioned* implicitly on the results of the presentence investigation report and the victim's statement." *Id.* at 391.
- *State v. Cruz*, 132 N.M. 501, 51 P.3d 1155 (2002): The Supreme Court of New Mexico held that Double Jeopardy does not bar a trial court vacating a prior previously accepted no contest plea to misdemeanor DWI *prior to sentencing* after being advised that the State wished to pursue felony DWI charges.

In *every* case cited by Amicus, the defendant's plea was vacated by the trial court *prior to sentencing*. Amicus has not cited a single case in which the State was allowed to re prosecute the defendant *for the same offenses* after the trial court *both* accepted his plea and *imposed a sentence*.

This Court need not wade into the nuances of when jeopardy attaches prior to sentencing because Jones was sentenced in this case. This is a much simpler case than those cited by Amicus. Here the trial court accepted the defendant's no contest plea, rendered a finding of guilt or acquittal, and imposed a sentence on the guilty verdicts. There is no debate—certainly not in any of the cases relied on by Amicus—that jeopardy attaches when a defendant pleads and is sentenced. Indeed, as conceded by Amicus, the United States Supreme Court has “assumed that jeopardy attache[s] *at least* when” a defendant is sentenced. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987) (emphasis added).

In short, all of the cases relied on by Amicus can be reconciled with this Court's prior decision in *Sawyer* and none require this Court to overrule it. Unlike the defendant in *Johnson*, Jones pled no contest to *all* the charges pending against him (rather than just the less serious charges) and thus “exposed” himself to conviction on every charged brought by the City of Cleveland. And unlike the defendant in *Santiago-Soto*, *Gilmore*, *Bally*, *Thomas*, and *Cruz*, the trial court *both* accepted Jones' plea and imposed a sentence. Accordingly, consistent with all of those cases, this Court can and should hold that Double Jeopardy precludes the City from re prosecuting the defendant on the same charges to which he already pled no contest and was acquitted or convicted and sentenced.

*c. Double Jeopardy precludes the prosecution from disturbing a final verdict on appeal.*

Amicus's final argument is that, even if jeopardy attached to Jones' OVI no contest plea, the City should be able to re prosecute Jones for the same offense because the trial court's decision was “akin to a mistrial granted on procedural grounds.” (Amicus Br. at 21). Amicus is wrong.

Pursuant to R.C. 2937.07, a no contest plea in a misdemeanor case authorizes a trial judge to “make a finding of guilty or not guilty from the explanation of the circumstances of the offense.” Moreover, if the trial court finds the defendant not guilty of the principal charge, the trial court then has the authority to find the defendant guilty of a lesser-included charge. *Sawyer*, 54 Ohio St. 2d at 382. Thus, there is little dispute that a municipal trial court judge has the authority to find a defendant not guilty of a charge after a no contest plea and find the defendant guilty of a lesser offense. And there is little question that *Sawyer* dictates that, when that happens, the State may not disturb the resulting verdict. *Id.*

The City and Amicus essentially contend that the trial court reached an incorrect verdict. However, that is precisely what the City or State is precluded from appealing pursuant to R.C. 2945.67 and State and Federal Double Jeopardy. The City’s attempt to challenge the validity of the trial court’s verdict in this case after a no contest plea is no different than an attempt to challenge the correctness of a trial court’s Rule 29 ruling or verdict in a bench trial. The City simply contends that the facts and circumstances make clear that the judge *should* have found Jones guilty of OVI and could not reasonably have found him not guilty of OVI and guilty of physical control. However, no reviewing court is permitted to second-guess a verdict “irrespective of whether, in arriving at that determination, the trial court grossly abused its discretion or erroneously determined that reckless operation is a lesser-included offense of the principal charge.”<sup>6</sup> *Sawyer*, 54 Ohio St. 2d at 383. As explained by the United States Supreme Court, “it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though

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<sup>6</sup> While the City contends that physical control is not a lesser included offense of OVI, this Court need not address that question because *Sawyer* makes clear that the verdict cannot be disturbed even if the trial court was wrong on whether the offense of conviction was a lesser included offense of the principal charge.

an acquittal may appear to be erroneous.” *Green v. United States*, 355 U.S. 184, 189, 78 S.Ct. 221, 2 L. Ed. 199 (1957).

Finally, Amicus’ attempt to compare the instant case to *Lee v. United States*, 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 80 (1977) is particularly misplaced. In *Lee*, the trial court dismissed the defendant’s information midtrial based on the defendant’s pre-trial motion to dismiss because “the information had been drawn improperly.” *Id.* at 31. In analyzing whether Double Jeopardy precluded the defendant’s re prosecution, the Supreme Court emphasized that “[t]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged.” *Id.* In *Lee*, it was clear that the trial court’s order contemplated re prosecution because the trial court emphasized its belief that the case had been “proven [sic] beyond any reasonable doubt in the world” and that there was “no question about his guilt; none whatsoever” and because the trial court was clear that the only “obstacle” to conviction was the defective charging instrument. *Id.* at 28 n.4 and 31. Moreover, the trial court’s delayed ruling on the defendant’s pre-trial motion to dismiss occurred in large part due to “the last-minute timing of the motion” and defense counsel offered no objection to the trial court’s decision to “terminate the proceedings” without a final verdict. *Id.* at 33-34.

The instant case is fundamentally different in nearly every way: 1) Defendant did not file a pre-trial motion to dismiss due to a procedural defect; 2) The trial court did not dismiss the original charge due to a procedural defect; and 3) The trial court *did* terminate the proceedings *with* a formal finding of guilt or acquittal on the charges in the complaint. Unlike the trial court in *Lee*, the trial court’s order in this case—finding Jones guilty of a lesser offense—clearly “contemplated an end to all prosecution of the defendant for the offense charged.” Accordingly, *Lee* is inapposite.

### 3. Conclusion on Double Jeopardy

For Double Jeopardy purposes, this case is straightforward, and controlled by this Court's prior decision in *Sawyer*. Jones pled no contest to all four charges brought by the City and thereby exposed himself to conviction on each and every count. The trial court, having heard an explanation of the circumstances attendant to the charges, rendered the following verdict on the four charges: 1) Guilty of physical control in violation of Cleveland Ordinance 433.011 instead of DUI (count one); 2) Not guilty of DUI in violation of R.C. 4511.19(A)(2) (count two); 3) Guilty of driving under the 12-point suspension (count three); 4) Guilty of driving in the marked lines (count four). After rendering this verdict, the trial court imposed a sentence. Having been acquitted of some of the charges and convicted and sentenced on the others, Jones cannot be prosecuted a second time on these charges.

### **CONCLUSION**

Wherefore, Troussaint Jones respectfully requests that this Honorable Court adopt his proposition of law, reverse the decision of the Eighth District, and reinstate Jones' conviction for physical control.

Respectfully submitted,

/s/ Cullen Sweeney  
CULLEN SWEENEY  
Assistant Public Defender

### CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was mailed to and served via email upon Bridget E. Hopp, Counsel of Record for the City of Cleveland, at bhopp@city.cleveland.oh.us, and upon Eric E. Murphy, Counsel of Record for Amicus Curiae Ohio Attorney General, at eric.murphy@ohioattorneygeneral.gov on January 19, 2016.

/s/ Cullen Sweeney  
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