
IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Appellant,

v.

TREVIN MICHAEL KING,

Defendant-Respondent.

Linn County Circuit Court
Case No. 15CR22123

SC S063810

**EXPEDITED APPEAL
UNDER ORS 138.060(2)(b)**

RESPONDENT'S ANSWERING BRIEF

Appeal from the Order of Dismissal of the Circuit Court
for Linn County
Honorable DAVID E. DELSMAN, Judge

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TABLE OF CONTENTS

STATEMENT OF THE CASE	1
Questions Presented	1
Proposed Rules of Law	2
Summary of Argument	3
Supplemental Summary of Facts	6
<i>A. Plea negotiations and agreement</i>	6
<i>B. Co-defendant's trial</i>	9
<i>C. Indictment on homicide charges</i>	10
ASSIGNMENT OF ERROR	10
The trial court correctly granted defendant's motion to dismiss.	
Preservation of Error	10
Standard of Review	11
Argument	12
I. Introduction	12
II. The interpretation of plea agreements in Oregon is controlled by contract law—including law concerning implied terms-in-fact and terms-in-law—tempered by criminal law policies.	13
<i>A. Pertinent Contract Law</i>	14
<i>B. Pertinent Criminal Law</i>	17
III. The trial court's error may be seen either as 1) concluding that the state necessarily made and breached an implied-in-fact promise not to pursue future homicide charges of 2) concluding	

that the plea agreement contained in implied-in-law promise not to pursue homicide charges and that the state breached that promise.	19
IV. The parties intended that the plea agreement would terminate the criminal prosecution arising out of the August 5 criminal episode; to effectuate that intent, the plea agreement necessarily contains an implied-in-fact promise by the state not to pursue homicide charges should the victim die.	24
A. <i>Evidence shows that defendant intended the plea agreement to terminate all criminal prosecution.</i>	26
B. <i>Evidence shows that the state intended the plea agreement to terminate all criminal prosecution.</i>	30
C. <i>Given the parties' intention that defendant's pleas would terminate the criminal prosecution, the plea agreement necessarily contained an implied-in-fact promise by the state not to pursue homicide charges; pursuing felony murder and manslaughter charges would breach that promise.</i>	32
V. In a case where the death of the victim from defendant's assaultive conduct is reasonably foreseeable, the default rule is that the state has the burden of expressing whether it intends to pursue possible future homicide charges in the plea agreement; in the absence of a statement of intent, the plea agreement contains an implied-in-law promise not to prosecute those charges.	33
A. <i>Because a defendant's plea of guilty and no contest must be intelligent, the state should plainly state its intentions regarding future prosecutions to ensure that a defendant is aware of the actual value of the state's promises and his concessions.</i>	35
B. <i>The state should have the burden of expression because it is the party with the superior bargaining power and knowledge</i>	37

<i>C. Because the state had the burden of expression under the circumstances of this case and the plea is agreement is silent regarding whether the state may file homicide charges should the victim die, the agreement should be construed as containing, as a matter of law, an implied promise by the state not to pursue homicide charges; prosecuting defendant on a felony murder and manslaughter indictment would be breach of that promise.</i>	40
VI. The state is judicially estopped from prosecuting defendant for felony murder and manslaughter.	42
CONCLUSION	45

TABLE OF AUTHORITIES

Cases Cited

<i>Abercrombie v. Hayden Corp.</i> , 320 Or 279, 883 P2d 845 (1994)	14
<i>Bagley v. Mt. Bachelor, Inc.</i> , 356 Or 543, 340 P3d 27 (2014)	39
<i>Ball v. Gladden</i> , 250 Or 485, 443 P2d 621 (1968)	12
<i>Berger v. United States</i> , 295 US 78, 55 S Ct 629, 79 L Ed 2d 1314 (1935)	43
<i>Best v. U.S. National Bank</i> , 303 Or 557, 739 P2d 554 (1987)	17
<i>Brady v. United States</i> , 397 US 742, 90 S Ct 25 1463, 25 L Ed 2d 747 (1970)	18
<i>Browne & Co. v. John P. Sharkey Co.</i> , 58 Or 480, 115 P 156 (1911)	17
<i>Card v. Stirnweis</i> , 232 Or 123, 374 P2d 472 (1962)	11, 12, 15, 16, 25, 32
<i>Drake v. Kemp</i> , 762 F2d 1449 (11th Cir 1985)	43
<i>Hallberg v. City of Portland</i> , 230 Or App 355, 215 P3 866 (2009)	43
<i>Hampton Tree Farms, Inc. v. Jewett</i> , 320 Or 599, 892 P2d 683 (1995)	42
<i>In re Marriage of Sugar</i> , 212 Or App 465, 157 P3d 1263 (2007)	43

<i>Kabil Developments Corp. v. Mignot</i> , 279 Or 151, 566 P2d 505 (1977)	15, 25
<i>Kamin v Kuhnau</i> , 232 Or 139, 374 P2d 912 (1962)	12, 17, 33
<i>Lyons v. Pearce</i> , 298 Or 554, 694 P2d 969 (1985)	18
<i>Mabry v. Johnson</i> , 467 US 504, 104 S Ct 2543, 81 L Ed 2d 437 (1984)	19
<i>Montez v. Roloff Farms, Inc.</i> , 175 Or App 532, 28 P3d 1255 (2001)	25
<i>Northwest Natural Gas Co. v. Chase Gardens, Inc.</i> , 333 Or 304, 39 P3d 846 (2002)	17
<i>Outdoor Media Dimensions Inc. v. State</i> , 331 Or 634, 20 P3d 180 (2001)	42
<i>Rose v. Wollenberg</i> , 36 Or 154, 59 P 190 (1899)	25
<i>Santobello v. New York</i> , 404 US 257, 92 S Ct 495, 30 L Ed 2d 427 (1971)	19, 26, 32, 39, 41
<i>Smith Tug v. Columbia-Pac. Towing</i> , 250 Or 612, 443 P2d 205 (1968)	34
<i>State ex rel Thompson v. Pomponio</i> , 233 W Va 212, 757 SE2d 636 (2014)	39
<i>State v. Carpenter</i> , 68 Ohio St 3d 59, 623 NE2d 66 (1993)	19, 20, 22, 23, 24, 32, 36
<i>State v. Dye</i> , 127 Ohio St 3d 357, 939 NE2d 1217 (2010)	19, 20, 21, 22, 23, 33, 36
<i>State v. Heisser</i> , 350 Or 12, 249 P2d 113 (2011)	11, 12, 14, 17, 18

<i>State v. Lemon</i> , 162 Or App 640, 986 P2d 705 (1999)	18
<i>State v. Nelson</i> , 23 Conn App 215, 579 A2d 1104(2007)	37
<i>State v. Rivers</i> , 283 Conn 713, 931 A2d 185 (2007)	35, 38
<i>State v. Vondehn</i> , 348 Or 462, 236 P3d 691 (2010)	18
<i>Tift v. Stevens</i> , 162 Or App 62, 987 P2d 1 (1999)	12
<i>Thompson v. Calderon</i> , 120 F3d 1045 (9th Cir 1977) (en banc), <i>rev'd on other grounds</i> , 523 US 538 (1998)	43
<i>Yogman v. Parrott</i> , 325 Or 358, 937 P2d 1019 (1997)	14
<i>United States v. Harvey</i> , 791 F2d 294 (4th Cir 1986)	17, 18, 19, 30

Constitutional and Statutory Provisions

U.S. Const., Amend. XIV	19
ORS 41.740	14, 24
ORS 42.230	14
ORS 135.390(2)	8
ORS 135.405(3)	37
ORS 135.405(3)(c)	26, 37

ORS 135.815(1)(c)	38
ORS 164.415(1)	29

Others

Arthur Linton Corbin, <i>Corbin on Contracts</i> (Joseph M. Perillo ed., rev. ed. 2010)	
§26.1 at 400	16
§26.3 at 426.....	16
E. Allen Farnsworth, <i>Farnsworth on Contracts</i> (3ed 3d 2004)	
§1.10	33
§3.2	34
§7.15	15, 16
§7.16	16, 33
Health Insurance Portability and Accountability Act (HIPAA)	38
Uniform Commercial Code,	
§1.10	33
§7.16	33
USAM 9-27.450	24
<i>Williston on Contracts</i> , revised edition, § 1293	25

RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Defendant accepts the state's statement of the case as adequate for review, but supplements the summary of facts.

Questions Presented

Defendant and codefendant assaulted and robbed a man on August 5, 2013. Defendant pleaded guilty to second-degree assault and no contest to first-degree robbery pursuant to an oral plea agreement with the state. The agreement did not address whether the state would pursue homicide charges should the victim die, and the parties did not discuss that eventuality during plea negotiations. But the state knew that the victim might die.

Approximately six months later, the victim died, and the state indicted defendant for felony murder and manslaughter. The trial court dismissed the indictment after finding, as fact, that defendant believed that his pleas terminated his criminal prosecution and that, as a matter of law, the state could not pursue homicide charges unless it expressly reserved the right to do so in the agreement. That ruling raises the following two questions.

1. Does an oral plea agreement arising out of an assaultive criminal episode where the victim's death is reasonably foreseeable necessarily contain an implied promise by the state not to pursue possible homicide charges should

the victim die when both the state and defendant believed that defendant's pleas pursuant to the plea agreement terminated his criminal prosecution?

2. In those same factual circumstances, does a default rule exist such that the state is required to expressly reserve its right to pursue homicide charges in the plea agreement and, if it does not, then prosecution of those charges is foreclosed?

This case also presents a third question raised for the first time on appeal.

3. Defendant testified at codefendant's trial and took full responsibility for the assault on the victim on August 5. The state argued in closing that the jury should not believe defendant because defendant could no longer be prosecuted for that criminal conduct. Is the state judicially estopped from bringing later additional charges against defendant for his same criminal conduct?

Proposed Rules of Law

1. When both the state and defendant believe that defendant's pleas pursuant to the plea agreement terminated the criminal prosecution of his assault of a victim, then the plea agreement necessarily contains an implied-in-fact promise by the state not to pursue homicide charges should the victim die.

2. When the court accepts a defendant's guilty or no contest plea to offenses arising out of an assaultive criminal episode and the victim's death is

reasonably foreseeable at the time, the state cannot later file homicide charges upon the victim's death unless it has expressly reserved the right to do so in the plea agreement. In the absence of such a statement of intent, the plea agreement is considered to contain, as a matter of law, an implied promise by the state not to pursue homicide charges in the event of the victim's death.

3. Because the state benefited from advancing the legal position in codefendant's trial that it could no longer prosecute or punish defendant for his criminal conduct on August 5, it should be judicially estopped from taking an inconsistent position in defendant's case and pursuing additional charges based on that same conduct.

Summary of Argument

The overarching issue in this case is whether defendant's pleas of guilty and no contest pursuant to a plea agreement foreclose the filing of homicide charges in the event of the victim's death when the oral plea agreement did not explicitly address the filing of homicide charges, but the victim's death was reasonably foreseeable to the state. The resolution of that issue depends upon whether the plea agreement contains an implied-in-fact or implied-in-law promise by the state not to pursue homicide charges should the victim die. That, in turn, depends upon the interpretation of the plea agreement.

Contract law, tempered by criminal law principles, controls the interpretation of plea agreements. The trial court's ruling in this case can be seen in contract law terms in two ways: 1) as concluding that the state necessarily made and breached an implied-in-fact promise not to pursue future homicide charges in the plea agreement or 2) as concluding that the plea agreement contained an implied-in-law promise not to pursue homicide charges and that the state breached that promise. Contract law supports both interpretations of the plea agreement.

A contract includes not only its express provisions, but also all implied provisions that are necessary to effectuate the intent of the contracting parties. In this case, the trial court specifically found that defendant believed that his pleas of guilty and no contest terminated the criminal prosecution of his criminal activities on August 5, and the evidence supports that finding. The evidence also demonstrates that the state believed that defendant's pleas terminated the criminal prosecution. Therefore, the intent of the contracting parties was that defendant's pleas pursuant to the plea agreement would terminate the criminal prosecution. To effectuate that intent, the plea agreement necessarily contained an implied promise by the state not to prosecute homicide charges should the victim die. Pursuing homicide charges would breach that implied-in-fact promise.

Courts may find an implied promise in a contract based not on the intent of the parties, but as a matter of law based on a default rule. Terms based on default rules are not mandatory, and contracting parties are free to agree on contrary terms. The default rule for plea agreements where the victim's death from assaultive conduct is reasonably foreseeable to the state during plea negotiations should be that the state cannot pursue homicide charges in the event of the victim's death unless it has reserved its right to do so in the plea agreement. The state has that burden of expression because 1) it is the party with the superior bargaining power and knowledge during plea negotiations, and 2) a defendant's plea of guilty and no contest must be intelligent and defendant cannot intelligently evaluate the consequences of his pleas unless he knows whether his pleas will or will not terminate his criminal prosecution.

In this case, the plea agreement did not contain any provision regarding possible homicide charges, even though those charges were reasonably foreseeable to the state. Because the state did not expressly reserve its right to prosecute homicide charges should the victim die, it impliedly promised, as a matter of law, that it would not pursue those charges. Defendant could thus reasonably expect that his pleas terminated the criminal prosecution of his criminal activities on August 5. The state's later pursuit of homicide charges would breach that implied-in-law promise.

Due process requires that the state fulfill its promises made in the plea agreement. Although the state may have had the right to pursue homicide charges in this case, it had impliedly promised—either in fact or as a matter of law—not to do so. Accordingly, the trial court did not err when it enforced the terms of the plea agreement by dismissing the indictment charging defendant with felony murder and manslaughter. The trial court’s dismissal of the indictment is also justified by judicial estoppel.

Supplemental Summary of Facts¹

A. Plea negotiations and agreement

i. trial court’s written factual findings

“1. The defendant Mr. King was charged in Linn County Case No. 13CROS581 with one count of Assault in the Second Degree and one count of Robbery in the First Degree. The incident date for this case is August 5, 2013 and the victim is

“2. The defendant Jesse Jimenez was a codefendant in that incident and was charged in Linn County Case No. 13CR05584.

“3. The state was aware at the time of the charges that Mr. could die as a result of his injuries.

“4. The state negotiated a plea bargain with Mr. King. During plea negotiations, the state did not specifically preserve the right to bring more serious charges against Mr. King if Mr. died from his injuries.

¹ Defendant includes a supplemental summary of facts to highlight the court’s factual findings and to correct or add to the state’s factual summary.

“5. On February 27, 2014, pursuant to plea negotiations, Mr. King pled guilty to Assault in the Second Degree and no contest to Robbery in the First Degree.

“6. The Court, accepted Mr. King’s guilty plea to Assault in the Second Degree and Robbery in the First Degree, and sentenced him to 70 months to the Department of Corrections on the Assault charge and 90 months to the Department of Corrections, with 50 months consecutive to the first count, on the Robbery charge.”

Amended Order Granting Dismissal, pp 1-2, App Br ER-24-25.

ii. trial court’s additional oral factual finding

“Defendant’s Trevin King’s plea agreement did not specifically address whether King would be subject to further prosecution if Mr. later died.” Tr 159.

iii. supplemental facts

The state incorrectly notes in its summary of facts that it “offered a copy of the plea agreement” at the hearing on the motion to dismiss, attached to its brief as ER 30. App Br 7. In fact, the state adduced a copy of its original written plea *offer* at the hearing, and that is the document attached at ER 30. But that was neither the offer that defendant accepted nor was it the final offer extended by the prosecution.² It was instead the starting point of the

² As evidence that the written plea offer was not the state’s final offer, defendant notes that the written plea offer expired by its own terms on November 4, 2013. App Br ER-30. Further, the written plea offer was contingent on both defendants accepting it, App Br, ER 30, but the state waived that contingency when only defendant was willing to plead guilty. Ex 9 (2/27/14 Tr 2-3). Finally, although the written plea offer required both defendants to agree to pay restitution, the plea agreement, (footnote continued)

negotiations. In its written response to defendant's motion to dismiss, the state noted that the "final plea agreement was the result of two settlement conferences, pursuant to a written plea offer, and further informed by the trial court's preliminary ruling on whether the charges in question would merge at sentencing." App Br, ER 10. That assertion was supported by the prosecutor's testimony at the motion to dismiss. Tr 37-38 (describing the first settlement conference), 41-42 (describing the second settlement conference).

Defendant's Petition to Enter Plea does not state the terms of the plea agreement. App Br, ER 31-32. The prosecutor testified that she did not see the plea petition before defendant pleaded guilty. Tr 43.

The final plea agreement, orally disclosed to the court at the time of defendant's plea,³ was that defendant agreed to plead guilty to second-degree assault and no contest to first-degree robbery and, in return, the state agreed to defendant entering conditional pleas and receiving a total prison sentence of 120 months. Tr 45-47; Ex 9 (2/27/14 Tr 6-8, 10-11).

as related as sentencing, did not require defendant to agree to pay restitution, defendant did not, in fact, agree to pay restitution, and the state told the court that it was not seeking restitution. Ex 9 (2/27/14 Tr 6-8, 10-11).

³ ORS 135.390(2) requires the trial court to determine the nature of the plea agreement at the time of sentencing.

The parties did not explicitly discuss the state's prosecutorial intentions should the victim die from the assault during either the plea negotiations or at the guilty plea hearing. Tr 40-41, 47.

B. Co-defendant's trial

i. trial court's written factual findings

"7. Mr. Jimenez entered pleas of not guilty and went to trial on May 13-14, 2014. Mr. Jimenez was ultimately convicted of both counts following his trial.

"8. Mr. King testified on behalf of Mr. Jimenez at that trial.

"9. The state did not offer Mr. King immunity for his testimony at trial. Mr. King was not advised that his testimony could be used against him in a future criminal matter.

"10. During closing arguments in Mr. Jimenez's trial the state indicated that Mr. King was not at risk of further prosecution."

Amended Order, p 2, App Br ER-25.

ii. trial court's oral factual findings

"[Defendant] testified at [codefendant's trial] apparently in the reliance that this case was concluded when he had entered his pleas and that he was not subject to further prosecution." Tr 163.

ii. supplemental facts

In closing argument, the state made the following argument to impeach defendant's testimony.

"[Defendant testified,] 'Yeah, it was all me, [the co-defendant] didn't do anything.' What is his motive? Hey, they're brothers. They have been together so long. He has already done

his thing, he not going to get into any more trouble, he knows that. So why not protect his brother.”

Ex 101. The prosecutor testified that she was giving the jury a reason to distrust defendant’s testimony. Tr 83.

C. Indictment on Homicide Charges

i. trial court’s written factual findings

“11. On August 17, 2014 Mr. _____ died as result of the injuries inflicted by Mr. King and Mr. Jimenez on August 5, 2013.

“12. Mr. _____ death was reasonably foreseeable.

“13. On May 28, 2015 the defendant Mr. King was indicted in the current case for Murder and Manslaughter in the First Degree. The incident date for these charges is August 5, 2013 and the alleged victim is

Amended Order, p 2-3, App Br ER-25-26.

ANSWER TO ASSIGNMENT OF ERROR

The trial court correctly granted defendant’s motion to dismiss.

Preservation of Error

The state’s claim of error was preserved. The trial court made the following legal conclusions.

“1. Here the state agreed to a negotiated plea. The state obtained a prison term for the defendant and avoided the risks inherent in a criminal trial.

“2. In exchange for his plea the defendant gave up rights that may have resulted in his acquittal with the belief that he was terminating this incident.

“3. In *Santobello v. New York* the Court noted that plea negotiations are an essential component of the administration of justice. 404 U.S. 257 (1971).

“4. The Court in *Santobello* went on to hold that plea negotiations require ‘safeguards to insure the defendant what is reasonably due in the circumstances[.]’ *Id.* at 262.

“5. Several states have held that when the death of the victim is a foreseeable event at the time of the plea negotiations with the defendant the state must affirmatively reserve the right to bring future charges and inform the defendant that his plea agreement would not preclude future prosecutions. *See State v. Dye*, 127 Ohio St. 3d 357 (2010), *State v. Nelson*, 23 Conn. App. 215 (1990), *State v. Lordon*, 116 N.H. 479 (1976), and *State v. Thomas*, 61 N.J.314 (1972).”

“6. This court is persuaded by the holdings in *Dye*, *supra* and *State v. Carpenter*, 68 Ohio St. 3d 59 (1993). Namely, that the application of contract law and criminal law in this particular factual setting requires the application of safeguards to insure the defendant what is reasonably due in the circumstances.

“7. This factual setting requires that the state in a negotiated plea must specifically preserve the right to re-prosecute.”

Amended Order, pp 3-4, App Br ER-27-28.

Standards of Review

A court determines the terms of a plea agreement as a matter of law. *Cf.*, *State v. Heisser*, 350 Or 12, 26-28, 249 P2d 113 (2011) (not stating, but applying that standard).

A court determines whether a contract provision is implied by necessity as a matter of law, accepting the trial court’s findings of historical fact as to the parties’ contractual intentions if supported by the record. *See, e.g., Card v. Stirnweis*, 232 Or 123, 131-37, 374 P2d 472 (1962) (not stating, but applying

that standard); *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) (appellate courts generally presume that a trial court decides disputed factual issues in a manner consistent with its ultimate conclusions).

A court determines whether a contract contains an implied term based on a default rule rather than the parties' intent as a matter of law. *See Kamin v. Kuhnau*, 232 Or 139, 152, 374 P2d 912 (1962) (recognizing implied agreement in a contract based on a default rule "as a legal conclusion").

A court reviews whether a party has breached a plea agreement as a matter of law, accepting the trial court's findings of historical fact if supported by the record. *See, e.g., Tifft v. Stevens*, 162 Or App 62, 66, 987 P2d 1 (1999), *rev den*, 330 Or 331 (2000) ("On the legal claims for breach of contract, we review for errors of law."); *Ball*, 250 Or at 487 (described above).

Argument

I. Introduction

The trial court dismissed the indictment charging defendant with felony murder and first-degree manslaughter after finding, as fact, that defendant believed that his pleas terminated his criminal prosecution and that, as a matter of law, the state could not pursue homicide charges under the circumstances unless it expressly reserved the right to do so in the agreement.

Contract law, informed by criminal law principles, controls the interpretation of plea agreements. The trial court's ruling can be seen in contract law terms in two ways: 1) as concluding that the state necessarily made an implied-in-fact promise not to pursue future homicide charges or 2) as concluding that the plea agreement contained an implied-in-law promise not to pursue homicide charges or both. Contract law and criminal law support the trial court's ruling no matter how it is characterized. Under either interpretation, trial court did not err when it enforced the terms of the plea agreement and dismissed the indictment charging defendant with felony murder and manslaughter. The trial court's dismissal of the indictment is also justified by judicial estoppel.

II. The interpretation of plea agreements in Oregon is controlled by contract law—including law concerning implied-in-fact and implied-in-law terms—tempered by criminal law policies.

Contract law governing the interpretation of commercial contracts generally controls the interpretation of plea agreements, but it is not controlling; “[c]riminal cases involve constitutional and statutory rights not ordinarily found in contracts between private parties, and those rights at times may override contractual principles.” *Heisser*, 350 Or at 23. Defendant sets forth below those principles of contract law that are pertinent to this case and those principles of criminal law that temper the application of contract law to plea agreements.

A. *Pertinent Contract Law*

The first step of the interpretation of any contract is to determine which documents constitute the agreement. *Abercrombie v. Hayden Corp.*, 320 Or 279, 288-89, 883 P2d 845 (1994) (discussing completely and partially integrated writings and the parol evidence rule). The court then interprets the terms of the contract according to a three-part test. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). First, “the court examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends.” *Id.*; *Heisser*, 350 Or at 25 (“[u]nambiguous contracts must be enforced according to their terms”).⁴ Second, if a contractual provision is ambiguous, a court examines extrinsic evidence of the contracting parties’ intent. *Yogman*, 325 Or at 363. Finally, if the meaning of a contractual provision remains ambiguous after the first two steps, the court relies on maxims of construction. *Yogman*, 325 Or at 364.

If, in the first step, the court determines that no documents constitute the contract and the contract is entirely oral, then the *Yogman* three-part test would presumably be applied as much as practicable to determine the terms of the oral

⁴ This court noted that, “That method of interpretation has a statutory basis. See ORS 42.230 (courts interpreting written documents are “not to insert what has been omitted, or to omit what has been inserted”); ORS 41.740 (the parole evidence rule limits the circumstances under which courts may consider anything other than the terms of a written contract to determine its meaning).” *Heisser*, 350 Or at 25, n 9.

contract and resolve any ambiguity therein. *See Kabil Developments Corp. v. Mignot*, 279 Or 151, 157-58, 566 P2d 505 (1977) (in determining whether an oral contract exists and what its terms are, courts examine the parties' objective manifestations of intent, as evidenced by their communications and acts).

Contracts, oral or written, do not always cover every eventuality. Sometimes "disputes arise because there is no contract language that is relevant to the situation that has arisen." *See, e.g., E. Allen Farnsworth, 2 Farnsworth on Contracts* §7.15, 342 (3d ed 2004)). When there is a dispute arising from an omission of a contract term, courts resolve such disputes by "some process other than that of interpretation." *Id.*

i. implied-in-fact contract terms

Courts will sometimes supply a missing term based on the actual or reasonable expectation of the parties: such terms are "implied-in-fact." *Id.* at §7.16, 349-50 (implied-in-fact terms derive from the agreement itself or are deduced from course of performance, course of dealing, usage, or pre-contract negotiations and are treated in the same way as express terms). This court has held, "[A] contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made." *Card*, 232 Or at 134 (internal citation

and quotation marks omitted). Courts will supply “implied-in-fact” terms only when necessary to carry out the purpose of the contract. *Card*, 232 Or at 134.

ii. implied-in-law contract terms based on default rules

Courts may also supply a missing term based not upon the intent of the parties, but upon default rules. Farnsworth, 2 *Farnsworth on Contracts* §7.16 at 346. A default rule is “any term that is implied when a contract is silent on a point as long as it is defeasible and may be replaced by the parties’ agreement.” Arthur Linton Corbin, 6 *Corbin on Contracts* §26.3 at 426 (Joseph M. Perillo ed., rev. ed. 2010); Farnsworth, 2 *Farnsworth on Contracts* §7.16 at 346 (the rules that are the source of implied terms are commonly called default rules). An implied term based on a default rule “may come directly from the law, regardless of the parties’ intent.” 6 *Corbin on Contracts* §26.1 at 400. Terms based on default rules are not mandatory, and contracting parties are free to expressly agree on contrary terms. Farnsworth, 2 *Farnsworth on Contracts* §7.16 at 346. But silence is the equivalent of assent to a default rule. 6 *Corbin on Contracts* §26.3 at 426.

This court has recognized implied-in-law terms based on default rules in at least three cases. When a contract was silent with regard to time of performance, this court supplied that term by applying the default rule that completion of work must be performed within a reasonable time, as determined by reference to all the facts and circumstances. *Browne & Co. v. John P.*

Sharkey Co., 58 Or 480, 482, 115 P 156 (1911). When an inventor used a manufacturer to develop his ideas, this court found an implied agreement by the manufacturer not to appropriate the inventor's ideas to his own use. *Kamin*, 232 Or at 152 (1962). This court has also read an implied obligation of good faith and fair dealing into contracts in order to limit the actions of one party to the contract. *Best v. U.S. National Bank*, 303 Or 557, 561, 739 P2d 554 (1987) (where the depositors' agreement with a bank did not expressly limit the bank's authority to set fees for insufficient-fund checks, this court applied the rule that "there is an obligation of good faith in the performance and enforcement of every contract" and held that that obligation limited the bank's authority to set those fees).

Breach of implied-by-law terms is a breach of the contract. *See generally Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 333 Or 304, 310-13, 39 P3d 846 (2002) (treating claim of breach of implied covenant of good faith and fair dealing as claim of breach of contract); *Best*, 303 Or 561 (parties can recover for a breach of obligation based on a default rule just as for any other contractual obligation).

B. Pertinent Criminal Law

When this court noted in *Heisser* that constitutional and statutory rights may override contractual principles, 350 Or at 23, it relied on *United States v.*

Harvey, 791 F2d 294, 300 (4th Cir 1986). *Harvey* specifically identified two principles that temper the application of contract law to plea negotiations.

The first was that, “the defendant’s underlying ‘contract’ right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.” *Harvey*, 791 F2d at 300. A guilty plea is both a waiver of a defendant’s state and federal constitutional right not to incriminate himself and his state and federal constitutional right to trial by jury. *Brady v. United States*, 397 US 742, 748, 90 S Ct 1463, 25 L Ed 2d 747 (1970); *Lyons v. Pearce*, 298 Or 554, 560, 694 P2d 969 (1985). Those waivers must not only be voluntary, but must also be “intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady*, 397 US at 748; *State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010) (waiver of state constitutional right against self-incrimination must be voluntary and knowing); *State v. Lemon*, 162 Or App 640, 642, 986 P2d 705 (1999) (waiver of right to state constitutional jury trial must be voluntary and knowing). Consequently, as this court noted (but did not decide), “[t]he requirement that a defendant’s guilty plea be ‘voluntarily and intelligently made’ could impose a subjective element outside of contract law, regarding a defendant’s internal understanding of the meaning and consequences of the plea agreement.” *Heisser*, 350 Or at 24, n 8; *see also Harvey*, 791 F2d at 301 (“Unlike the private contract situation, the validity of a

bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant—and not his counsel—enters the bargained plea.”).

The second principle noted by the *Harvey* was the “honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.” *Id.* at 300 (internal quotation marks omitted). Stated as a due process requirement, a valid plea “presuppose[s] fairness in securing agreement between an accused and a prosecutor. *Santobello v. New York*, 404 US 257, 261, 92 S Ct 495, 498, 30 L Ed 2d 427 (1971); *Mabry v. Johnson*, 467 US 504, 508, 104 S Ct 2543, 81 L Ed 2d 437 (1984) (interpreting *Santobello* as applying the Due Process Clause of the Fourteenth Amendment to the United States Constitution).

III. The trial court’s ruling may be seen either as 1) concluding that the state necessarily made and breached an implied-in-fact promise not to pursue future homicide charges or 2) concluding that the plea agreement contained an implied-in-law promise not to pursue homicide charges and that the state breached that promise.

In this case, the trial court relied on two cases when it dismissed the indictment charging defendant with felony murder and manslaughter: *State v. Carpenter*, 68 Ohio St 3d 59, 623 NE2d 66 (1993) and *State v. Dye*, 127 Ohio St 3d 357, 939 NE2d 1217 (2010). Understanding the contractual law underpinnings of those two cases provides some insight into the contractual law underpinnings of the trial court’s ruling.

Carpenter relied upon a synthesis of contract law and criminal law to institute the rule that “[t]he 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.” *Carpenter*, 623 NE2d at 67. *Dye* reaffirmed that rule. *Dye*, 939 NE2d at 1220-23. Although the Ohio Supreme Court relied on contract law in both cases, it did not explicitly identify the contract law concepts at work. And, indeed, the concepts appear to be slightly different in each case.

In *Carpenter*, the defendant had stabbed someone and pleaded guilty, pursuant to a plea agreement, to attempted felonious assault. 623 NE2d at 67. At that time, the state was aware that the victim would likely die from the defendant’s assault, but the plea agreement contained no reference to additional prosecution in the event of the victim’s death. *Id.* When the victim died, the state indicted defendant for murder. *Id.* The court dismissed the indictment, because the state had not reserved its right to file additional charges. *Id.* at 67-68.

The Ohio Supreme Court affirmed the dismissal of the indictment. *Id.* at 68. It found that the defendant reasonably expected that his plea would end his criminal prosecution and that the state was aware of his expectation. *Id.* Based on that finding, it concluded, “Therefore, if the state wanted to reserve its right

to bring further charges later, should the victim die, the state should have made such a reservation a part of the record.” *Id.* Although the court did not express its reasoning in contract law terms, its decision may fairly be characterized in those terms as follows. The court found that the parties intended the defendant’s plea to terminate his prosecution and that, to effectuate that intent, the state necessarily made an implied-in-fact promise not to pursue a future murder charge. The state violated that promise when it later indicted defendant for murder. To fulfill defendant’s reasonable expectation under the plea agreement, the court enforced the agreement according to its terms—express and implied. *Dye*, 939 NE2d 1221 (stating that the court’s concern in *Carpenter* was to avoid the breaking of promises made by the prosecutor in the original plea agreement).

Dye presented a similar factual scenario. The defendant, who was drunk, hit a teenaged boy with his truck and severely injured him. 939 NE2d 1219. The state charged defendant with one count of aggravated vehicular assault with three added aggravating elements and one count of driving under the influence of intoxicants (DUII). *Id.* Defendant pleaded guilty to aggravated vehicular assault, admitted one aggravating element, and pleaded guilty to DUII. *Id.* The state dismissed the other two aggravating elements and agreed to the defendant’s release on bond pending sentencing. *Id.* Although both that state and the defendant were aware of the serious nature of the victim’s injuries, the

state did not reserve the right to file additional charges should the victim die. *Id.* at 1219, 1223. When the victim died years later, the state filed homicide charges. *Id.* at 1219. The Ohio Court of Appeals, applying *Carpenter*, dismissed those charges. *Id.* at 1220.

The issue on appeal in *Dye* was whether the defendant's guilty plea was a "negotiated plea" such that the rule in *Carpenter* would apply and bar defendant's homicide charges. *Id.* at 1220. The court held that it was, applied the *Carpenter* rule, and affirmed the dismissal of the charges. *Id.* at 1224. In arriving at its holding, the court reexamined the *Carpenter* rule. *Id.* at 1220-23. It again affirmed that its rule was based on a synthesis of contract and criminal law, *Id.* at 1221, but again did not explicitly identify the contract law concepts at issue. However, as explained more fully in section V below, it appears to have found an implied promise not to prosecute based not so much on the intent of the parties as in *Carpenter*, but upon a default rule that puts the burden of expression on the state regarding its intent to pursue homicide charges should the victim die. *Id.* at 1221-23. In that case, the implied promise would be one implied in law. Because, as *Dye* ultimately found, the state did not expressly reserve its right to file additional charges and by its silence "agreed to forego further prosecution of [the defendant]," *Id.* at 1223, the court affirmed the dismissal of the state's homicide charges in order to satisfy the defendant's

reasonable expectation that his plea of guilty would end the criminal prosecution. *Id.* at 1223-24.

When the trial court in this case relied on the “application of contract law and criminal law” in *Carpenter* and *Dye* to dismiss the indictment in this case, *Amended Order*, p 4, it was not clear whether it was concluding, as in *Carpenter*, that the state necessarily made an implied-in-fact promise not to pursue future homicide charges or concluding, as in *Dye*, that the plea agreement contain an implied-in-law promise not to pursue homicide charges or both.⁵ The court’s focus on defendant’s understanding of the plea agreement in its factual findings strongly suggests that it was following the contractual law underpinning of *Carpenter*. If that was the court’s ruling, then it is correct for the reasons set forth in section IV below. But its reliance on the general rule that the state must affirmatively inform the defendant that his plea agreement would not preclude future prosecutions in order to reserve its right to pursue

⁵ Defendant acknowledges, as the state points out, that the court stated that it “didn’t find an actual violation of the plea agreement because that was not a factor that was explicitly addressed.” Tr 165. But the court immediately thereafter stated that it was relying on the rule announced in *Carpenter* and *Dye*. Tr 165-66. Given the contractual law underpinnings of *Carpenter* and *Dye*, the trial court could not have dismissed the indictment based on those two cases without implicitly finding that the state had made either an implied-in-fact or implied-in-law promise not to prosecute defendant and that dismissal of the indictment was necessary to hold the state to its promises. The trial court’s statement that it did not find a violation of an express term in the plea agreement does not contradict that.

future homicide charges also suggests that the court was relying on the contractual law underpinnings of *Dye*. If that was the court's ruling, then it is also correct for the reasons set forth in section V below.

IV. The parties intended that the plea agreement would terminate the criminal prosecution arising out of the August 5 criminal episode; to effectuate that intent, the plea agreement necessarily contains an implied-in-fact promise by the state not to pursue homicide charges should the victim die.

Because the trial court focused on defendant's understanding of the plea agreement in its factual findings, the trial court's dismissal of the indictment was likely based, like *Carpenter*, on finding an implied-in-fact promise by the state not to prosecute future homicide charges in the plea agreement. Contract law supports the court's dismissal of the indictment on that ground.

Contrary to the state's assertion that its unaccepted written plea offer constituted the plea agreement in this case, App Br 7, 18, there was no written, integrated plea agreement in this case.⁶ The agreement was instead that orally announced before the court when defendant pleaded guilty and no contest. Therefore, the presumption that the plea agreement in this case contains all the terms of the agreement does not apply. ORS 41.740 ("When the terms of an

⁶ Oregon does not require written plea agreements, unlike the Department of Justice United States Attorneys' Manual [USAM], which requires that all negotiated plea agreements to felonies, or to misdemeanors from felonies, be in writing and filed with the court. USAM 9-27.450.

agreement have been reduced to writing by the parties, it is to be considered as containing all those terms.”).

Without a written, integrated plea agreement, this court must look to other evidence to determine the intended purpose of the plea agreement, its terms, and whether it contains implied promises or obligations necessary to effectuate its purpose. *See Kabil Developments Corp.*, 279 Or at 157-58 (as noted above, the parties’ objective manifestations of intent, as evidenced by their communications and acts, determines the existence and the terms of an oral contract); *cf.*, *Rose v. Wollenberg*, 36 Or 154, 159, 59 P 190 (1899) (“There was no evidence of an express contract by defendant to indemnify plaintiff * *

*. It must be implied from the conduct of the parties and the circumstances of the case, if it existed at all.”). Courts typically consider three types of evidence:

1) the circumstances under which the contract was made, *Card*, 232 Or at 136;

2) “any promises which a reasonable person in the position of the promisee would be justified in understanding were included.” *Card*, 232 Or at 135 (citing *Williston on Contracts*, revised edition, § 1293); and

3) the parties’ conduct at the time the contract was made and afterwards, *cf.*, *Montez v. Roloff Farms, Inc.*, 175 Or App 532, 536-37, 28 P3d 1255 (2001) (regarding implied-in-fact contracts, court recognized that parties may manifest assent to an agreement not just at the beginning but through their actions over an extended period of time).

If the purpose of the plea agreement in this case was to terminate all criminal prosecution of defendant's acts on August 5 against the victim, then the plea agreement, by necessity, contained an implied promise that the state would not prosecute defendant should the victim die. If the purpose was to resolve only the two charges in the indictment, then the plea agreement would not contain such a promise. Extrinsic evidence in this case shows that the parties intended the plea agreement to terminate all criminal prosecution arising out of the August 5 criminal episode.

A. Evidence shows that defendant intended the plea agreement to terminate all criminal prosecution.

The trial court found that defendant believed that his plea would terminate the criminal prosecution. Two circumstances surrounding the making of the plea agreement and defendant's subsequent conduct supported the court's finding regarding defendant's belief.

The first circumstance was the fact that the state never raised the possibility of the victim's death and possible homicide charges during negotiations. A defendant reasonably expects plea negotiations to encompass all criminal charges potentially arising from a criminal episode—including those charges that the state may lawfully prosecute if circumstances change. *See generally* ORS 135.405(3)(c) (contemplating that the prosecutor will consider whether to refrain from filing potential charges during plea

negotiations); *Santobello*, 404 US at 261 (“Disposition of charges after plea discussion is not only an essential part of the process, but a highly desirable part [because] [i]t leads to prompt and largely final disposition of most criminal cases.”). Accordingly, a defendant would reasonably expect the state during plea negotiations to indicate how it intended to dispose of the charges set forth in the indictment as well as any other potential charges that it could file based on defendant’s criminal activity. When the state does not mention potential additional charges during plea negotiations, a defendant may reasonably expect that the state is satisfied with the charges currently pending against defendant and will not file additional charges after he pleads guilty or no contest. In other words, the defendant may justifiably rely on a presumption of fair dealing by the state to assume that his plea will dispose of any and all charges that the prosecutor could bring and will terminate his criminal prosecution.

In this case, the state, although aware of the victim’s possible death, never discussed that fact with defendant nor indicated that it intended to pursue homicide charges should the victim die. No evidence established that defendant himself was aware that the victim might die. Thus, when defendant was negotiating with the state, he could reasonably believe that his plea of guilty and no contest to the two indicted charges terminated his criminal prosecution for the August 5 criminal episode and that no additional charges would be brought.

The second circumstance supporting the trial court's finding regarding defendant's belief was that no reasonable defendant would have assented to the plea agreement in this case if he had known that he would remain exposed to possible charges for manslaughter and felony murder. Defendant received two benefits in exchange for his plea of guilty to second-degree assault and no contest to first-degree robbery; he received a firm 120-month sentence for both crimes (instead of a possible 160-month sentence for both crimes if he had gone to trial and been found guilty of both crimes) and he reserved the right to appeal the trial court's refusal to merge the two crimes. Those benefits are, of course, meaningless if the state is allowed to proceed on manslaughter and felony murder charges.

On the other hand, the detriment to defendant from the plea bargain has substantially increased now that the state is pursuing homicide charges. At the time that defendant pleaded guilty, his waiver of his right to trial and against self-incrimination and his subsequent confession to assault resulted in one adverse consequence: his conviction for second-degree assault. But, after indictment for manslaughter and felony murder, his confession to assault has now become a virtual confession to manslaughter and an admission to one

element of first-degree robbery—causing serious physical injury⁷—which is itself an element of felony murder.

What might have been an acceptable plea bargain to a defendant facing two felony charges became a detrimental concession with no conceivable advantage and great cost to a defendant facing homicide charges. It is thus reasonable to believe that defendant assented to the plea bargain with the understanding that his plea was terminating the criminal prosecution—and not providing a crucial building block for the state’s case in a possible homicide trial foreseeable to the state but not defendant.

Finally, defendant’s subsequent conduct in litigation involving the August 5 criminal episode indicates that he believed that the plea agreement would terminate his prosecution. Defendant testified at codefendant’s trial about the events on the night of August 5, and, as noted in the state’s closing argument, he took full responsibility for the assault. The trial court found that defendant testified without being advised that his testimony could be used

⁷ ORS 164.415(1) defines first-degree robbery as:

“(1) A person commits the crime of robbery in the first degree if the person [commits third-degree robbery] and the person:

“* * * * *

(c) Causes or attempts to cause serious physical injury to any person.”

against him in a future criminal matter and in the belief that he was no longer subject to future prosecution. Few factual circumstances could more strongly indicate that defendant believed that his pleas ended his criminal prosecution for the events of August 5.

B. Evidence shows that the state intended the plea agreement to terminate all criminal prosecution.

The state also believed that defendant's pleas terminated the criminal prosecution of his criminal activities on August 5. That is evident not only from the plea negotiations, but also from the state's conduct at codefendant's trial.

If the state did not believe that the plea agreement would terminate the prosecution, then the state's behavior during plea negotiations risks being characterized as, in the words of *Harvey* quoted above, "dishonorable." If the victim's death was reasonably foreseeable and the state intended to pursue future homicide charges, then the prosecutor should have told defendant of those two facts so that defendant could fairly evaluate the plea agreement, which, as explained above, was beneficial to defendant only if the agreement terminated the prosecution. The fact that the prosecutor did not do so means one of two things: 1) that the prosecutor, by silence, intended to induce the factually uninformed defendant into taking a deal which cost little to the state if the victim should live but promised great rewards should the victim, as was

foreseeable, die; or 2) the prosecutor simply believed, like the defendant, that the plea agreement terminated the prosecution. The latter interpretation is the more reasonable one—and the only one that meets *Santobello*'s requirement of fairness in plea negotiations.

The same prosecutor's conduct at codefendant's trial confirms that she—as the state's representative in the matter—believed that defendant's pleas terminated the criminal prosecution. In closing argument, the state made the following argument to impeach defendant's testimony.

“[Defendant testified,] ‘Yeah, it was all me, [the co-defendant] didn’t do anything.’ What is his motive? Hey, they’re brothers. They have been together so long. *He has already done his thing, he not going to get into any more trouble, he knows that.* So why not protect his brother.”

Ex 101 (emphasis added). Unless, again, one is willing to impute dishonorable motives to the prosecutor, the only interpretation of the prosecutor's argument is that both parties understood that the plea agreement ended defendant's criminal prosecution for the events of August 5.⁸

⁸ And if the prosecutor's argument does not reflect its understanding of the plea agreement, then the state should be judicially estopped from proceeding on the manslaughter and felony murder charges, as argued below.

C. Given the parties' intention that defendant's pleas would terminate the criminal prosecution, the plea agreement necessarily contained an implied-in-fact promise by the state not to pursue homicide charges; pursuing felony murder and manslaughter charges would breach that promise.

The evidence established, consistent with the trial court's findings, that the parties intended that defendant's guilty and no contest pleas pursuant to the plea agreement would terminate the criminal prosecution of defendant's conduct on August 5. A contract includes not only its express terms but also "all such implied provisions as are indispensable to effectuate the intention of the parties." *Card*, 232 Or at 134. To effectuate the intention of the parties in this case, the plea agreement must necessarily contain an implied promise by the state not to prosecute homicide charges should the victim die.

The state's pursuit of homicide charges would obviously breach that promise and violate defendant's reasonable contractual expectation. Due process requires that the state fulfill its promises under a plea agreement. *Santobello*, 404 US at 262 ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") To oblige the state to fulfill its promise in this case, the indictment charging defendant with felony murder and manslaughter must be dismissed. Therefore, the trial court did not err when it presumably found, as in *Carpenter*, an implied-in-fact

promise by the state in the plea agreement not to pursue homicide charges and enforced the state's promise by dismissing the indictment.

V. In a case where the death of the victim from defendant's assaultive conduct is reasonably foreseeable, the default rule is that the state has the burden of expressing whether it intends to pursue possible future homicide charges in the plea agreement; in the absence of a statement of intent, the plea agreement contains an implied-in-law promise not to prosecute those charges.

As discussed earlier, the trial court's ruling may also be characterized as relying on the contractual law underpinnings of *Dye*. If so, then the trial court dismissed the indictment because it found an implied-in-law promise by the state not to prosecute future homicide charges based on a default rule. Contract law and criminal law support dismissal of the indictment for that reason as well.

Default rules may be based on common habits, practices, and usages regularly observed in transactions in a particular area, statutes as the Uniform Commercial Code, and, most pertinent here, "basic principles of justice." Farnsworth, 1 *Farnsworth on Contracts*, §1.10 at 64; *Id.*, §7.16 at 346, 351-52; *see also Kamin*, 232 Or at 152 (finding an implied agreement by manufacturer not to appropriate inventor's ideas to his own use based on the "need for ethical practices in the commercial world"). The more detailed and comprehensive an agreement, the less likely a court will supply a missing term based on default rules. *Id.*, §7.16 at 346.

An “important factor” in fashioning default rules is determining which party has the “burden of expression.” *Id.* at 352. A court should put the burden of expression on the party that has the “superior bargaining power and drafting skill.” *Id.* at 352-53. Further, a default rule should accord with the general premise “contract law protects the promisee’s expectation interest.” Farnsworth, 1 *Farnsworth on Contracts* §3.2 at 201.

Here, the question is how to interpret an oral plea agreement that was silent regarding an eventuality that, under the circumstances, was reasonably foreseeable. That question can be resolved by identifying what default rule applied and which party had the “burden of expression.” If the default rule put the burden of expression on the state, then the absence of any statement of intent regarding future homicide charges means that the state is foreclosed from prosecuting defendant for homicide. If the default rule put the burden of expression on defendant, then the absence of any term addressing the consequences of the victim’s death means that the state is free to pursue homicide charges.

In civil contract law, the absence of a provision regarding a foreseeable risk gives rise to a default rule that the risk was assumed. *See, e.g., Smith Tug v. Columbia–Pac. Towing*, 250 Or 612, 643, 443 P2d 205 (1968) (the absence of a contractual provision concerning a foreseeable contingency indicates a willingness to assume the risk of the nonoccurrence of the contingency). But

two policy considerations based in criminal law support a default rule that requires the state, under circumstances such as this, to explicitly reserve the right to file homicide charges in plea negotiations: 1) a defendant's plea of guilty and no contest must be intelligent; and 2) the state is the party with the superior bargaining power and knowledge during plea negotiations.

A. Because a defendant's plea of guilty and no contest must be intelligent, the state should plainly state its intentions regarding future prosecutions to ensure that a defendant is aware of the actual value of the state's promises and his concessions.

As noted above, a guilty plea is both a waiver of a defendant's state and federal constitutional right not to incriminate himself and his state and federal constitutional right to trial by jury. Those waivers must not only be voluntary, but must also be intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

In order to ensure that a defendant intelligently pleads to charges arising from an assaultive criminal episode where the victim's death is reasonably foreseeable to the state, the state should clearly state that it either does or does not reserve the right to pursue future homicide charges. It is a simple thing for the state to do, and it ensures that the defendant's plea of no contest or guilty is done with sufficient awareness of the relevant circumstances and likely consequences of his plea. *See, e.g., State v. Rivers*, 283 Conn 713, 726, 931 A2d 185 (2007) ("The terms of the agreement should be stated clearly and

unambiguously, so that the defendant, in assenting to waive certain fundamental rights, knows what is expected of him and what he can expect in return.”)

That reasoning was essentially the basis of the Ohio Supreme Court’s holding in *Dye*. The *Dye* court began its analysis by recognizing that a plea agreement is contractual in nature but also subject to safeguards that ensure that a defendant receives what is “reasonably due in the circumstances.” *Dye*, 939 NE2d at 1221-22 (explaining *Carpenter*). Because “the defendant’s constitutional rights are at stake in the plea process, the concerns underlying a plea agreement differ from and go beyond those of a commercial contract.” *Id.* at 1222. One of those concerns is meeting defendant’s reasonable expectations regarding the benefit of his bargain. *Id.* (“Our concern [is] to avoid the breaking of promises made by the prosecutor in the original plea agreement” and to “enforce what [the state and defendant] perceive to be the terms of [that] agreement.”).

The Ohio Supreme Court then noted, as it had done in *Carpenter*, that, when the victim’s death from the defendant’s assaultive conduct is foreseeable and the state is silent regarding possible homicide charges, a defendant reasonably expects that his guilty plea will end the criminal prosecution. *Id.* at 1223. If the state has a different expectation, then, according to the court, it must specifically inform defendant of that fact. *Id.* (“[I]f the state had wished to reserve the right to bring further charges in the event of [the victim’s] death, it

would have so reserved on the record.”). The *Dye* court put the burden of expression on the state because, “[r]equiring the state to make this reservation under these circumstances places no unreasonable burden on prosecutors and *ensures that defendants are fully aware of the consequences of their guilty pleas.*” *Id.* at 1223 (emphasis added). In other words, it ensures that a defendant’s plea is intelligent. *See also State v. Nelson*, 23 Conn App 215, 579 A2d 1104 (2007) (under similar circumstances, court held that “it was incumbent on the state to enunciate what was and was not covered by the plea agreement lest the defendant be allowed to go to plea under the impression that the criminal portion of the [vehicular assault] was closed.”).

B. The state should have the burden of expression because it is the party with the superior bargaining power and knowledge.

ORS 135.405(3) provides a list of the powers—or, stated plainly, bargaining chips—that a state has in the bargaining process. One of those is the powers to “refrain from bringing potential charges if the defendant enters a plea of guilty or no contest to the offense charged.” ORS 135.405(3)(c). Defendant has no similar list of bargaining chips and, really, has only one chip: to impose procedural costs and the uncertainty of success on the prosecution by going to trial. And, of course, the defendant has no power over charging decisions. Because of the inferior bargaining power of the defendant, the state can—and often does—make take-it-or-leave-it plea offers.

The state is also the party with superior knowledge of whether the victim's death is reasonably foreseeable. The victim, the family of the victim, and the doctors are more likely to discuss the victim's health status and overall prognosis with the prosecutor rather than the defendant or his counsel.⁹ The defendant cannot be expected to have access to the victim or his family and cannot easily breach the confidentiality of medical records guaranteed by the Health Insurance Portability and Accountability Act (HIPAA). The defendant is, of course, entitled in discovery to such medical records as may support the current charge of assault. ORS 135.815(1)(c) (regarding discovery of medical records). But he is not entitled to ongoing updates on the victim's medical status or a medical opinion regarding the likelihood of the victim's death during plea negotiations.

Because of the state's greater bargaining power, including its exclusive power to charge crimes, and because of the state's greater knowledge regarding the likelihood of the victim's death, the state should assume the burden of stating its intent regarding the prosecution of homicide charges should the victim die. *Cf., State v. Rivers*, 283 Conn 713, 726, 931 A2d 185 (2007) (noting in a case involving the interpretation of a plea agreement containing a cooperation clause that the state, as the party wielding disproportionate power,

⁹ In fact, in this case, the victim's brother testified that the family regularly updated the prosecutor on "how the victim was doing." Tr 113.

must memorialize any and all obligations for which it holds the defendant responsible, as well as all promises that it has made for the purpose of inducing the defendant to cooperate); *State ex rel. Thompson v. Pomponio*, 233 W Va 212, 219, 757 SE2d 636 (2014) (listing a number of state and federal cases for the proposition that the state bears the burden for ensuring that the expressed terms in a written plea agreement are clear and exact because of the state’s superior bargaining power and because of the substantial constitutional interests implicated by plea agreements).

To put the burden of expression and the assumption of risk on a relatively powerless and uninformed defendant violates *Santobello*’s requirement of “fairness in securing agreement between and accused and a prosecutor.” 404 US at 261. Further, if the state, as the party with superior bargaining power, has the burden of expression, any suggestion of unconscionable plea negotiations is avoided. *Cf.*, *Bagley v. Mt Bachelor, Inc*, 356 Or 543, 560, 340 P3d 27 (2014) (procedural unconscionability in contract formation exists when, among other things, there is inequality in bargaining power between the parties, a contract term is inconspicuous, and the contract is offered on a take-it-or-leave-it basis).

The state complains that it should not be required to express its intent regarding possible future homicide charges arising from assaultive criminal episodes because the victim’s death is not always reasonably foreseeable to the prosecutor. App Br 28-29. But, given the prosecutor’s superior knowledge of

the victim's medical status and prognosis in most cases, if the victim's death is not reasonably foreseeable to the prosecutor, then it is even less likely to be reasonably foreseeable to the defendant. So the fact that the victim's death is not readily foreseeable does not warrant putting the burden of expression on defendant. And, in any case, as mentioned above, the burden of expression is not a difficult one for the state; if the state is in doubt as to the victim's long-term prognosis, it may simply provide that it reserves the right to prosecute homicide charges should the victim die.

C. Because the state had the burden of expression under the circumstances of this case and the plea agreement is silent regarding whether the state may file homicide charges should the victim die, the agreement should be construed as containing, as a matter of law, an implied promise by the state not to pursue homicide charges; prosecuting defendant on a felony murder and manslaughter indictment would breach that promise.

In this case, the plea agreement did not contain any express provision regarding homicide charges arising out of that same criminal episode, even though those charges were reasonably foreseeable to the state. For the reasons set forth above, the default rule under those circumstances is that the state must expressly reserve its right to prosecute homicide charges in the plea agreement. If it does not, then the courts will, as a matter of law, interpret the agreement as containing an implied promise not to prosecute those charges.

The state in this case did not reserve its right to prosecute reasonably foreseeable homicide charges and, as a consequence, it impliedly promised that

it would not do so. Defendant could thus reasonably expect that his plea to second-degree assault and first-degree robbery terminated the criminal prosecution.

The state's pursuit of homicide charges would obviously breach the state's implied promise and violate defendant's reasonable contractual expectation. Due process requires that the state fulfill its promises under a plea agreement. *Santobello*, 404 US at 262 (requiring fulfillment of a prosecutor's promise). To oblige the state to fulfill its promise in this case, the indictment charging defendant with felony murder and manslaughter must be dismissed. Thus, assuming that the trial court's ruling followed the contractual law underpinning of *Dye*, the trial court did not err when it dismissed the indictment in order to enforce the state's implied-in-law promise in the plea agreement.

The state cannot claim that it would be unfairly disadvantaged by the retroactive application of the default rule in this case. The state knew that the victim might die, and, as a matter of common sense, it could have easily provided for that contingency by reserving its right to prosecute homicide charges in the plea agreement. No evidence established that defendant possessed the same knowledge and was therefore forewarned as to that possibility and the consequent need to include address possible homicide charges in the plea agreement.

And if the default rule were otherwise, if the homicide charges are allowed to proceed because defendant failed to provide for that contingency in the plea agreement, then he would be even more unfairly disadvantaged by the retroactive application of the default rule. That is because, as explained above, defendant's guilty plea to assault, which at the time of its making resulted only in his conviction for second-degree assault, would become a virtual confession to manslaughter and an admission of one element of felony murder.

VI. The state is judicially estopped from prosecuting defendant for felony murder and manslaughter.

If this court should find that the plea agreement contained no implied promise by the state not to pursue homicide charges, then it should affirm the trial court's dismissal of the homicide charges on the basis of judicial estoppel. *Outdoor Media Dimensions Inc. v. State*, 331 Or 634, 659, 20 P3d 180 (2001) (recognizing this court's prerogative to affirm a trial court when it is "right for the wrong reason").

The doctrine of judicial estoppel, "preclude[s] a party from assuming a position in a judicial proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding." *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609, 892 P2d 683 (1995). It is "primarily concerned with the integrity of the judicial process and not with the relationship of the parties[.]" *Id.* at 612. The application of judicial

estoppel depends on the existence of three predicates: (1) the party sought to be estopped must have benefited; (2) in a different judicial proceeding; (3) by means of asserting a position inconsistent with a position asserted in a later judicial proceeding. *Id.* at 611; *Hallberg v. City of Portland*, 230 Or App 355, 362, 215 P3d 866 (2009). Judicial estoppel may apply even if the earlier representation was not intended to mislead the court. *In re Marriage of Sugar*, 212 Or App 465, 470, 157 P3d 1263 (2007).

This court has not applied judicial estoppel in a criminal case, but there is no reason why it should not. The state has a duty to “refrain from improper methods calculated to produce a wrongful conviction.” *Berger v. United States*, 295 US 78, 88, 55 S Ct 629, 633, 79 L Ed 1314 (1935). And courts have held that a state violates due process when it takes inconsistent positions in prosecutions of the same crime in different judicial proceedings. *See, e.g., Thompson v. Calderon*, 120 F3d 1045, 1059 (9th Cir 1997) (en banc), *rev’d on other grounds*, 523 US 538 (1998) (the prosecutor violates due process when it “offer[s] inconsistent theories and facts regarding the same crime in order to convict two defendants at separate trials”); *Drake v. Kemp*, 762 F2d 1449, 1478-79 (11th Cir. 1985) (en banc) (Clark, J., concurring) (prosecutor violated due process when it discredited the defendant’s version of events in order to convict him, but then relied on the credibility of that version to convict the co-defendant).

In this case, after securing defendant's guilty plea to second-degree assault and no contest plea to first-degree robbery, the state tried the codefendant for the same charges. As noted, defendant testified at that trial and took full responsibility for the assault. The state argued that that the jury should not believe defendant because "[h]e has already done his thing, he not going to get into any more trouble, he knows that." Ex 101. The state thus relied on the fact that defendant's criminal prosecution was at an end in order to impeach him—the only eyewitness to codefendant's actions during the crime. The jury thereafter convicted codefendant of the crimes charges. By giving the jury a good reason to disbelieve a strong witness for codefendant, the state benefited from its position that defendant could no longer be criminally prosecuted for his actions in the criminal episode involving the victim.

Charging defendant with murder arising out of that same criminal episode is clearly an inconsistent position. This court should estop the state from taking it. The state cannot be allowed to benefit from its position in codefendant's case that defendant could no longer be prosecuted and then turn around in defendant's case and bring additional charges.

CONCLUSION

Based either on contract law informed by criminal law principles or on judicial estoppel, this court should affirm the trial court's dismissal of the indictment charging defendant with felony murder and manslaughter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,703 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Answering Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 21, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Answering Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Appellant.

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