

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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TREVOR WALLACE,

*Petitioner,*

vs.

STATE OF TENNESSEE,

*Respondent.*

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**On Petition For Writ Of *Certiorari*  
To The Tennessee Court Of Criminal Appeals  
At Nashville**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

May a state appellate court revive a case that was dismissed with prejudice after a jury was sworn merely because the appellate court disagrees with the trial court's announced dismissal with prejudice and comply with the Fifth Amendment of the U.S. Constitution as interpreted by *Lee v. U.S.*, 432 U.S. 23, 30 (1977)?

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## OPINIONS BELOW

Trevor Wallace, (“Mr. Wallace”), was charged with Driving Under the Influence, (“DUI”), and a jury trial was set to begin on June 28, 2017 in Erin, Tennessee.<sup>1</sup> [App. 2 and App. 15: Reporter’s Note]. Due to an improperly worded indictment and the jury being sworn, the Trial Court dismissed this case with prejudice. [App. 21-23: Court Ruling]. The State of Tennessee appealed this dismissal with prejudice and the Tennessee Court of Criminal Appeals reversed the Trial Court’s announcement that the case at hand was dismissed with prejudice and remanded the case to the lower court for a second jury trial. [App. 2 and 13]. The Tennessee Supreme Court denied Mr. Wallace’s T.R.A.P. 11 petition for permission to appeal on September 13, 2018. [App. 1 and 24]. This is the third stage of direct appeal from the Trial Court’s dismissal with prejudice of this case and the Tennessee Court of Criminal Appeal’s reversal of the Trial Court’s decision.

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## STATEMENT OF JURISDICTION

The Tennessee Court of Criminal Appeals decision was rendered on May 17, 2018. [App. 1]. The Tennessee Supreme Court denied T.R.A.P. 11 permission to appeal on September 13, 2018. [*Id.* and App. 24]. This

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<sup>1</sup> Erin, Tennessee is the capitol city for Houston County, Tennessee. This proud county is one of the smallest, least populated, and most rural counties in the Great State of Tennessee. [Hargett, *Tennessee Blue Book 2013-2014*, at pages 722-723 (Tenn. Sec. of State, 2013)].

Honorable Court has jurisdiction to review this state court decision under a writ of *certiorari* pursuant to 28 U.S.C. § 1257(a).

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## **CONSTITUTIONAL PROVISIONS INVOLVED**

### **Fifth Amendment, U.S. Constitution:**

“No person shall . . . for the same offense be twice put in jeopardy of life or limb . . .” (Double Jeopardy Clause).

### **Fourteenth Amendment § 1, U.S. Constitution:**

“ . . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive a person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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## **STATEMENT OF THE CASE**

Petitioner, Trevor Wallace, was charged with a single count of DUI in violation of Tenn. Code Ann. § 55-10-401(2), which says DUI is “The alcohol concentration in the person’s blood or breath is eight-hundredths of one percent (0.08%) or more.” The indictment against Mr. Wallace read as follows:

That Trevor Wallace . . . did unlawfully, while under the influence of an intoxicant, and/or drug, and while having an alcohol concentration in his blood of ***ten hundredths of eight-hundredths*** of one percent (.08%) or greater.

[App. 2, Emphasis added]. Basically, the indictment did not state facts that are illegal because **.008%** of one percent of alcohol in one's blood system does not violate Tenn. Code Ann. § 55-10-401(a)(2). [App. 20: Court Ruling]. The Trial Court noted this problem, stating that the language of the indictment was "*Confusing at the very least. In order to insure that the Defendant is given a fair trial and that there's no confusion about the charge is what the State's burden is, that has to be correct.*" [App. 22: Court Ruling]. The Trial Court, in dismissing the case with prejudice, specifically told the jury, in open court and on the record, the following:

**As a tactical strategy, the Defendant has every right to wait until the Jury is sworn because that means this case can never be brought back again.**

[App. 22: Court Ruling]. The Trial Court went on to declare to the jury, "*... I have granted the Defendant's Motion to Dismiss the Indictment because of the fact that the language of the indictment does not comport with the statute that we have to deal with . . .*" [App. 22-23: Court Ruling]. This statement clearly indicates a ruling on the merits due to insufficiency of the evidence. The jury was sworn in before the motion to dismiss was argued. [Compare, App. 15: Jury Swear-In vs. App. 17-18: Motion to Dismiss].

Noting that the Trial Court dismissed the case, but ignoring the dismissal was with prejudice, the Tennessee Court of Criminal Appeals reversed the case and remanded for further proceedings. [App. 2]. In an appellate sleight of hand, the Tennessee Court of Criminal Appeals found the motion to dismiss was merely a motion to dismiss the indictment. [App. 2 and 4]. The motion was actually a motion to dismiss based on the evidence being insufficient to convict because the charge in the indictment was not a crime in Tennessee. [App. 17-18: Motion]. The Trial Court's ruling was on sufficiency of evidence, not pretrial procedures opining:

... the Jurors, now having been sworn, would be advised as the law and they would also be given the definitions of the elements of the crime, which would include in the charge the fact that he was charged with point, you know, having operated a motor vehicle with a breath or blood alcohol of .08 or greater and that would have been spelled out as eight one-hundredths of one percent.

The State certainly had the election to indict, as is often done, Count I is just the common law of driving under the influence, and Count II is the *per se* violation of .08 percent. In this case there is no count I.

[App. 20: Court Ruling]. The Tennessee Court of Criminal Appeals, in a second sleight of hand, found that

the single court indictment charging only the statutory *per se* DUI was actually intended to be a two count/dual charge of both *per se* DUI and common law DUI, not mentioning that the Trial Court specifically found that common law DUI was not charged and if it had been, it would have been in a separate count of this single-count indictment. [App. 20-21].

Other relevant facts may be set forth in the “Reasons for Granting the Petition.”

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#### **REASONS FOR GRANTING THE PETITION**

##### **I. THIS HONORABLE COURT SHOULD GRANT THIS PETITION TO ADDRESS AN IMPORTANT QUESTION OF LAW THAT IS LIKELY TO RE-OCCUR THROUGHOUT BOTH STATE, FEDERAL AND TRIBAL COURTS, NAMELY WHETHER OR NOT A CASE THAT WAS ANNOUNCED IN OPEN COURT AS “DISMISSED WITH PREJUDICE” CAN BE REVIVED BY THE SAME JURISDICTION THAT DISMISSED SAID CASE WITH PREJUDICE VIA APPELLATE COURT FIAT.**

Former U.S. Congressman/Washington Lobbyist, Timothy J. Campbell, upon being told by President Grover Cleveland that the President would not sign a legislative bill Cleveland believed unconstitutional, replied “What’s the Constitution between friends?” [Bartlett, *Familiar Quotations* (50th ed.) 639:18

“Timothy J. Campbell” (Little, Brown & Co. 1982)]. As a practical effect, the ruling now before this Honorable Court makes the same argument – if following the U.S. Constitution renders an unsavory outcome, according to a reviewing state appellate court, may that court simply bypass constitutional mandates? Respectfully, the state court’s reasoning and answer cannot be tolerated. While the dismissal with prejudice in this case occurred prior to a sworn jury reaching a verdict, the same logic could apply if an appellate jurist disagreed with a not guilty verdict.<sup>2</sup>

Decisions of this Honorable Court, on U.S. Constitutional matters, are binding on Tennessee courts. [*State v. McKay*, 680 S.W.2d 447, 450 (Tenn. 1984)]. This Honorable Court has noted that the U.S. Constitution was intentionally drafted by the Founding Fathers to harness unbridled judicial discretion. [*Crawford v. Washington*, 541 U.S. 36, 67 (2004)].<sup>3</sup> The “marching orders” for Tennessee judges are simple and straight-forward:

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<sup>2</sup> Counsel for Petitioner have the utmost respect for **both** the Tennessee Court of Criminal Appeals **and** the U.S. Constitution’s protection of defendant’s rights in criminal proceedings.

<sup>3</sup> This Honorable Court is not the only judicial body to note that constitutional drafters had concerns regarding unbridled judicial discretion. *See, e.g., Ex Parte Owens*, 258 P. 758, 807 (Okla. Crim. App. 1927) (stating Oklahoma Constitution was partially drafted to curb excesses of an Oklahoma Territorial Supreme Court Justice).

. . . a cardinal principle of constitutional construction that the judiciary must not amend the Constitution by Judicial decision.

[*Moore v. Love*, 107 S.W.2d 982, 986 (Tenn. 1937)]. This is where the Tennessee Court of Criminal Appeals, irrespective of the intent of the decision, erred of a magnitude calling for guidance from this Honorable Court. The only way that Mr. Wallace's case could be revived after it was dismissed with prejudice is to disregard the Fifth Amendment's Double Jeopardy Clause as explained in *Lee v. U.S.*, 432 U.S. 23, 30 (1977), which applies to states through the Fourteenth Amendment.

In *Lee*, this Honorable Court discussed the impact of a dismissal with prejudice in criminal cases opining:

The critical question is whether the order contemplates an end to all prosecution of the defendant or the charged offense . . . Where a mid-trial dismissal is granted on the ground, ***correct or not***, that the defendant simply cannot be convicted of the charged offense, *Jenkins* [420 U.S. 358 (1975)] establishes that further prosecution is barred by Double Jeopardy.

[*Lee v. U.S.*, 432 U.S. at 30. *Emphasis and parenthetical added*]. *Lee* distinguishes the difference between a mistrial and a dismissal with prejudice occurring after a jury is seated and sworn. [*Id.*, citing *U.S. v. Jorn*, 400 U.S. 470, 476 (1971)]. *Lee*, as well as *Feagins v. State*, 596 S.W.2d 108, 110 (Tenn. Crim. App. 1980) and *State v. Adkins*, 619 S.W.2d 147, 149 (Tenn. 1981), all hold that once a dismissal with prejudice is entered, Fifth

Amendment Double Jeopardy bars a subsequent prosecution for the same charge.

*Adkins* was a DUI case. [*Adkins*, 619 S.W.2d at 147]. A dismissal or suppression of evidence after a jury is sworn bars the state from appealing an adverse ruling. [*Feagins*, 596 S.W.2d at 110]. Mr. Wallace's dismissal with prejudice should not have even been considered on appeal because the Trial Court's ruling was on the merits after a jury was seated and sworn and the prosecution then cannot appeal an acquittal. [See *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) and *Smalls v. Pennsylvania*, 476 U.S. 140, 145-146 (1977)]. On this point, the Tennessee Court of Criminal Appeals has declared the following:

Once jeopardy attaches, the remedies available to the State on appeal are governed by the double jeopardy clause; the effect is absolute and not susceptible to judicial examination. The state simply cannot appeal when the evidence is insufficient.

[*State v. Hulse*, 785 S.W.2d 373, 375 (Tenn. Crim. App. 1989) (a DUI case)]. The wall of protection discussed in *Hulse* was crossed by the State and ignored by the Tennessee Court of Criminal Appeals in Mr. Wallace's case. The Trial Court found the indictment was incorrectly worded, would cause confusion in the jury room, does not meet the mandate of telling the jury a correct burden of proof and since the jury was sworn the proof would be insufficient to convict so "***this cause can never be brought back again.***" [App. 22: Court Ruling]. Since the Trial Court's ruling was based on Mr.

Wallace's charge not being illegal in Tennessee, that ruling is a sufficiency of evidence basis and not procedural; so a state appeal was improper. [*Evans v. Michigan*, 568 U.S. 313, 324 (2013)]. *Certiorari* is justified and needed to address this important issue of law and public policy that impacts **every** court in the U.S. hearing criminal cases. Further, as will be discussed below, guidance is needed to help lower courts understand and apply *Lee*.

This Honorable Court, in *Sanabria v. U.S.*, 437 U.S. 54, 64 (1978), held “. . . when a defendant has been acquitted at trial, he may not be retried on the same offense even if the legal rulings underlying the acquittal were erroneous.” This finding was handed down in a mid-trial dismissal where the government was not allowed to put on proof and the U.S. Court of Appeals for the First Circuit specifically found error in dismissing that case with prejudice. [*Id.*]. This Honorable Court barred retrial of *Sanabria* on Fifth Amendment Double Jeopardy grounds declaring:

The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As *Fong Foo v. United States*, [369 U.S. 141 (1962)], makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances. The Court of Appeals thus lacked jurisdiction of the Government's appeal.

[*Sanabria*, 437 U.S. at 79, parenthetical added. *See also Finch v. U.S.*, 433 U.S. 676, 677 (1977)].

Guidance is needed when, as here, the Trial Court clearly dismissed the matter as an insufficiency of evidence acquittal, and not merely a dismissal of a defective indictment. By way of example, if one takes Mr. Wallace's case one step past the mid-point of the Memphis/Arkansas Bridge crossing the Mississippi River, that single step changes the answer to Mr. Wallace's case. The Arkansas Supreme Court held, in 2017, (*around the same time Mr. Wallace's case was being heard in Tennessee*), the following:

The State contends that this court should permit the appeal as we did in *Richardson* and hold that the circuit court erred because an illegal arrest as a matter of law, does not warrant the dismissal of the charges against Martin. However, there is a critical distinction between the decision in *Richardson* and the present case. In *Richardson*, the circuit court granted a ***pretrial*** motion to dismiss. Here, the circuit court concluded the case in the middle of trial when it granted a directed verdict in Martin's favor. Thus in the case at bar, jeopardy had attached, whereas in *Richardson* it had not.

[*State v. Martin*, 512 S.W.3d 617, 621 (Ark. 2017)]. As North Carolina states on the other side of Tennessee, “*While the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment, a separate body of double jeopardy law also protects a defendant's interest in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made.*” [*State v. Schalow*, 795 S.E.2d 567, 574

(N.C. App. 2016), quoting *U.S. v. Scott*, 437 U.S. 82, 92 (1978). *Accord, State v. Moreno*, 294 S.W.3d 594, 600 (Tex. Crim. App. 2009). *See also U.S. v. Cooper*, 77 F.3d 471, 471 (table) (4th Cir. 1996)].

The critical question, and where err exists in Mr. Wallace's case and *certiorari* is needed, is that Mr. Wallace's Trial Court **intended** the litigation to forever be concluded. [See App. 22: Court Ruling/Announcement to Jury]. The Tennessee Court of Criminal Appeals decision did not find this key fact important. [App. 7-9]. Multiple other jurisdictions, applying the same U.S. Supreme Court line of cases and similar facts, hold the exact opposite conclusion. [See, e.g., *U.S. v. Hunt*, 212 F.3d 539, 548 (10th Cir. 2000) (*distinguishing Lee because a factual finding that an essential element of a crime was lacking*); *People of the Territory of Guam v. Camacho*, 927 F.2d 610, 610 (table) (9th Cir. 1991) ("The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense changed"); *U.S. v. Kinnings*, 861 F.2d 381, 386 (3rd Cir. 1988) (*an acquittal occurs when "the ruling of the judge, whatever its label, actually represents a resolution in the defendant's favor correct or not*")]. The Seventh Circuit has declared, "... if the judge makes a legal error during trial that leads to an acquittal – even if error is blatant, and even if the defendant induced the judge to make the error – the resulting disposition is final." [*U.S. v. Lane*, 769 F.2d 834, 839 (7th Cir. 1985), citing *Fong Foo*, 369 U.S. 141 (1962) and *Sanabria*, 437 U.S. 54 (1978)].

The vast majority of courts that address this issue hold that if the trial court, right or wrong, finds a defendant “not guilty” and the prosecution forever barred, the Double Jeopardy Clause ends the case. Tennessee found the exact opposite in Mr. Wallace’s case. Simply ignoring the Trial Court’s declaration to the jury that **“This means this case can never be brought back again,”** does not eliminate the factual finding existing. [App. 22: Court Ruling/Declaration to Jury]. Likewise, the Trial Court’s factual finding that the indictment was confusing and did not charge a crime cannot simply be ignored. [App. 21-22: Court Finding/Declaration to Jury]. Finally, the State’s election to only charge the statutory *per se* DUI, and not the common law version, cannot be rewritten by a mere declaration by an appellate court that the State, Defense and Trial Court were all mistaken that a single count indictment was actually a *de facto* two count indictment. A short pencil is better than a long memory when it comes to reviewing trial court transcripts. There was only one charge, one count, and one single intent. The appellate court cannot rewrite history to change history’s factual realities.

*Certiorari* should be granted and guidance offered from this Honorable Court for cases stemming from *Lee* and its prodigies.

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## CONCLUSION

For the foregoing reasons, this Honorable Court should grant this petition for writ of *certiorari*, and reverse the decision of the Tennessee Court of Criminal Appeals, and dismiss Trevor Wallace's pending DUI with prejudice as originally ruled by the Circuit Court for Houston County, Tennessee at Erin. In the alternative, this Honorable Court should reverse by *per curiam* order as was done to the U.S. Court of Appeals for the Ninth Circuit's decision in *Finch v. U.S.*, 433 U.S. 676, 676-677 (1977).

This is the 6th day of December, 2018.

Respectfully Submitted:

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<sup>4</sup> Admitted to the U.S. Supreme Court bar on September 18, 1992.