APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. CR-18-0380-PR

[Filed August 9, 2019]

STATE OF ARIZONA, *Appellee*,	)
v.	)
PHILIP JOHN MARTIN, *Appellant.*	)

Appeal from the Superior Court in Mohave County
The Honorable Billy K. Sipe, Jr., Judge *Pro Tempore*
No. CR201201326
VACATED AND REMANDED

Opinion of the Court of Appeals, Division One
245 Ariz. 42 (App. 2018)
VACATED

COUNSEL:

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JUSTICE BOLICK authored the opinion of the Court, in which VICE CHIEF JUSTICE BRUTINEL, and JUSTICES TIMMER, GOULD, LOPEZ, BALES (RETIRED), and PELANDER (RETIRED) joined. JUSTICE GOULD filed a concurring opinion.

JUSTICE BOLICK, opinion of the Court:

¶1 Philip John Martin was tried for first-degree murder in 2013, but the jury marked the verdict form "[u]nable to agree" on that charge and instead found him guilty of the lesser-included offense of second-degree murder. After successfully appealing that conviction, Martin was retried and convicted of first-degree murder. We hold that double jeopardy barred Martin's retrial for first-degree murder because the State had a full and fair opportunity to try him on that charge in the first trial and the jury, after full deliberation, refused to convict.

BACKGROUND

¶2 Martin shot and killed his neighbor with a single shotgun blast as the neighbor approached Martin's house to speak with him. Martin admitted that he shot his neighbor, contending he believed the victim was armed and coming to harm him after the victim ignored his demands to leave. The State charged

Martin with premeditated first-degree murder under A.R.S. § 13-1105(A)(1).

¶3 At Martin's first trial for first-degree murder, the trial court provided the jury with a standard instruction on the lesser-included offense of second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437 (1996). The court advised:

> You may find the defendant guilty of the less serious crime if all of you agree that the state has failed to prove the defendant guilty of the more serious crime beyond a reasonable doubt, or if after reasonable efforts you are unable to agree unanimously on the more serious crime, and you do all agree that the state has proven the defendant guilty of the less serious crime.

The jury returned the verdict form with the box marked "[u]nable to agree" on the first-degree murder charge but found Martin guilty of second-degree murder. He was sentenced to sixteen years in prison.

¶4 Martin appealed on procedural grounds, and the court of appeals reversed the conviction and remanded for a new trial. *State v. Martin*, No. 1 CA-CR 13-0839, 2014 WL 7277831, at *5 ¶ 19 (Ariz. App. Dec. 23, 2014) (mem. decision).

¶5 Before the second trial, the trial court granted the State's motion to retry Martin for first-degree murder, over Martin's objection that doing so would violate double jeopardy. The court ruled that no "implied acquittal" occurred in the first trial, that the jury was genuinely deadlocked, and that the State demonstrated a "manifest necessity" for continuing

Martin's jeopardy for first-degree murder. Therefore, jeopardy did not terminate on the first-degree murder charge. The court expressed its misgivings over the ruling, however, observing that the State had the opportunity to convict Martin of first-degree murder and failed, that the State could not have retried Martin for first-degree murder had he not appealed the second-degree murder conviction, and that by doing so Martin essentially forfeited his sixteen-year sentence and was now exposed to a life sentence by having exercised his appellate rights.

¶6 In the subsequent retrial, the jury found Martin guilty of first-degree murder and the court sentenced him to natural life in prison. The court of appeals affirmed Martin's conviction and sentence. *State v. Martin*, 245 Ariz. 42, 46 ¶ 18 (App. 2018).

¶7 We granted review because whether double jeopardy prevents a retrial on the greater offense in these circumstances presents a recurring question of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution. Whether double jeopardy bars retrial is a question of law that this Court reviews de novo. *State v. Moody*, 208 Ariz. 424, 437 ¶ 18 (2004).

DISCUSSION

¶8 "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *see* U.S. Const. amend. V ("No person shall . . . be subject

for the same offence to be twice put in jeopardy of life or limb . . . ."). The protection embraces a defendant's "valued right to have his trial completed by a particular tribunal" wherever possible to prevent prolonged or repeated proceedings. *Arizona v. Washington*, 434 U.S. 497, 503–04 (1978) (internal quotation marks omitted). The "general rule" is that the prosecution is entitled to only one complete opportunity to prove the case, but retrial on the same charge may be permissible if the "proceeding is terminated without finally resolving the merits of the charges against the accused." *Id.* at 505.

¶9 Martin primarily relies on *Green v. United States* to argue that the first trial fully resolved his guilt on the first-degree murder charge such that the State could only retry him for second-degree murder at his subsequent trial. In *Green*, the United States Supreme Court barred retrial on a first-degree murder charge after the first jury was silent on that charge but returned a guilty verdict on the lesser-included offense of second-degree murder, and that conviction was overturned on appeal. 355 U.S. at 186, 198. Martin contends that by checking "[u]nable to agree" on the verdict form here, the jury, as in *Green*, impliedly acquitted him on the first-degree murder charge, thus preventing retrial on that charge.

¶10 By contrast, the State cites *Richardson v. United States* for the proposition that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." 468 U.S. 317, 324 (1984). In *Richardson*, the Court permitted retrial on two narcotics charges when the jury was unable to reach verdicts and the trial court declared a mistrial on those counts because "a

trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy." *Id.* at 318–19, 326. When the jury in Martin's first trial indicated it was unable to agree on the first-degree murder charge, the State argues, it reflected a hung jury, thus entitling the State to retry that offense.

¶11 We agree with Martin that *Green* guides the analysis here. The Court observed that it is not "essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green*, 355 U.S. at 188. Granted, the jury in *Green* was silent on the first-degree murder charge; whereas here it specified that it was "[u]nable to agree." But in *Green*, as here, there were no unforeseeable circumstances, such as mistrial, that made completion of the first trial impossible. *Id.* Rather, the jury considered both the greater and lesser offense and "refused to find [the defendant] guilty" of the greater charge. *Id.* at 190.

¶12 The Court in *Green* observed that in such circumstances, "the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder," but the Court concluded that a finding that jeopardy for first-degree murder terminated upon conviction of the lesser-included offense "need not rest alone" on the implied-acquittal assumption. *Id.* at 190–91. Rather, jeopardy ended when the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing

so." *Id.* at 191. Thus, the defendant's jeopardy for first-degree murder "came to an end when the jury was discharged [after entering a verdict] so that he could not be retried for that offense." *Id.* The rule of *Green* is that where the state had a full and fair opportunity to try the defendant on a charge and the jury refused to convict, jeopardy terminates when the jury is dismissed following its verdict, and therefore the state may not place the defendant in jeopardy again for that same charge.

¶13 The Court expressly reaffirmed *Green*'s holding in *Price v. Georgia*, 398 U.S. 323, 329 (1970). The Court acknowledged the "concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Id.* at 326. In *Price*, the defendant was indicted for murder, and while remaining silent as to the charge of murder, the jury returned a guilty verdict on the lesser-included crime of voluntary manslaughter. *Id.* at 324. As here, the defendant appealed based on procedural grounds and the conviction was overturned. *Id.* He was retried for murder and again found guilty of voluntary manslaughter. *Id.* While the Court held that double jeopardy did not bar retrial on the lesser offense as the defendant had successfully appealed the conviction, it stated that "the first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense." *Id.* at 327.

¶14 The Court further clarified the applicable principles in *Arizona v. Washington*. In that case, the trial judge declared a mistrial because of defense counsel's improper remarks during opening

statements. 434 U.S. at 498. The Court rejected the defendant's argument that another trial would be barred by double jeopardy. *Id.* at 515–16. The Court noted the "general rule" that "the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505. That rule is grounded in the defendant's right to have the trial completed by a particular tribunal and can apply "[e]ven if the first trial is not completed." *Id.* at 503. However, "retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." *Id.* at 505. Specifically, a prosecutor may seek a mistrial over a defendant's objection if a "manifest necessity" exists to do so, which the Court characterized as a "heavy" burden. *Id.* The Court concluded that defense counsel's inappropriate comments could have led to a jury "tainted by bias," which satisfied the prosecutor's burden and justified retrial following the mistrial. *Id.* at 516.

¶15 The Court also observed that the general rule of a single opportunity to prosecute a charge does not apply where a trial court declares a mistrial based on a finding of "a genuinely deadlocked jury." *Id.* at 509. In that circumstance, the court may "require the defendant to submit to a second trial" because of "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Id.*; *cf. Richardson*, 468 U.S. at 323–24 (emphasizing that "failure of the jury to agree on a verdict" constitutes a "manifest necessity" justifying a mistrial).

¶16 The State here insists it did not have a full and complete opportunity to convict Martin of first-degree murder in the first trial because the jury indicated it was unable to agree to a verdict on that charge. The State correctly notes that "[u]nable to agree" does not equate to an implicit acquittal. *Cf. Richardson*, 468 U.S. at 325 (holding a hung jury is not the equivalent of acquittal). But as *Green* emphasizes, an implied acquittal is sufficient but not necessary for jeopardy to terminate. 355 U.S. at 190–91. Rather, the general rule is that where the state had a complete opportunity to prosecute the defendant and failed to obtain a conviction on the greater charge, retrial on that charge is barred. *Id.* at 191; *see also Washington*, 434 U.S. at 505. That is exactly what happened in this case as the State fully prosecuted the first-degree murder charge but was unable to persuade the jury to convict. *See Green*, 355 U.S. at 190 (noting that jeopardy terminates where the jury "refused to find [the defendant] guilty" on the greater charge and that charge was "in no way involved in his appeal"). Such a situation, where the jury is unable to agree on one charge and convicts on the lesser offense, cannot alone justify a finding of "extraordinary circumstances" or "genuine deadlock" required to meet the state's heavy burden to continue jeopardy. *See Gusler v. Wilkinson*, 199 Ariz. 391, 394–95 ¶¶ 17–18 (2001) (requiring that the state demonstrate "manifest necessity" to overcome the defendant's right to have his fate decided by the impaneled jury).

¶17 The only exception applicable here would be if the State had demonstrated a "manifest necessity" to support the trial court declaring a mistrial and

discharging the jury because it was deadlocked. *See Washington*, 434 U.S. at 509. The absence of that situation here distinguishes this case from *Richardson*, on which the State relies, where the prosecutor successfully sought a mistrial based on a hung jury. 468 U.S. at 326 ("[A] trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected."); *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003) (permitting second capital-sentencing proceeding after defendant moved to discharge deadlocked jury). Here the jury was not discharged because of a mistrial based on jury deadlock, but only after it had returned a complete verdict on the original indictment. *See Brazzel v. Washington*, 491 F.3d 976, 984 (9th Cir. 2007) ("Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they 'cannot agree,' they may compromise by convicting of a lesser alternative crime . . . ."); *State v. Espinoza*, 233 Ariz. 176, 179 ¶ 10 (App. 2013) ("[A] jury's mere statement that it has been unable to reach a verdict after persistent deliberations—and after proceeding to consider a lesser offense in the context of a *LeBlanc* instruction—does not, without further inquiry by the court, demonstrate a true deadlock." (footnote omitted)).

¶18 The process for fully and completely prosecuting a criminal case in Arizona is set forth in *LeBlanc*, which established a unitary process for jury consideration of greater and lesser-included offenses. 186 Ariz. 437. Before *LeBlanc*, the approved instruction required jurors to first acquit the defendant on the

charged offense before considering lesser-included offenses. *State v. Wussler*, 139 Ariz. 428, 430 (1984). *LeBlanc* changed the instruction to allow jurors to "render a verdict on a lesser-included offense if, after full and careful consideration of the evidence, they are unable to reach agreement with respect to the charged crime." 186 Ariz. at 438. Thus, the jury may render a verdict on the lesser-included offense if it either acquits the defendant on the greater offense or cannot agree on a verdict after reasonable efforts. *Id.*

¶19 The Court reasoned that the "reasonable efforts" procedure "diminishes the likelihood of a hung jury, and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered." *Id.* at 438–39. In other words, following a full and complete presentation of the evidence, the jury will first consider the greater offense, and if it is not convinced the evidence supports a guilty verdict, it will consider the lesser-included offense. The process is calculated to avoid the deadlocked jury that is a necessary predicate for a mistrial and for a second trial on the greater offense. The Court emphasized that "because such an instruction would mandate that the jury give diligent consideration to the most serious crime first, the state's interest in a full and fair adjudication of the charged offense is adequately protected." *Id.* at 439. And, as a necessary corollary in applying *Green* and *Washington*, when a verdict is reached on a lesser-included offense in accord with the *LeBlanc* instruction, jeopardy terminates for the greater offense and the defendant may not be retried on the greater offense.

¶20 The State concedes that the verdict here was reached in accord with the *LeBlanc* instruction. The jury was admonished to carefully consider whether the evidence supported conviction on the greater offense, and to consider the lesser-included offense only if it acquitted him on the greater charge or was unable to agree. Either way, the State had a full and complete opportunity to prove its case for first-degree murder, and jeopardy terminated for that crime following the jury's guilty verdict for second-degree murder. *See Green*, 355 U.S. at 190 ("[The defendant] was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him.").

¶21 We recognize that this unitary approach toward jury deliberation over greater and lesser-included offenses does not lend itself to a ready opportunity for the prosecution to seek a mistrial based on a deadlocked jury. *See Espinoza*, 233 Ariz. at 180 ¶ 12. However, the *LeBlanc* instruction is intended to expand jury options and thereby minimize the prospect of a hung jury. The State here did not ask us to reconsider *LeBlanc*, although we do not foreclose the possibility of doing so in a future case or rule petition.

¶22 Finally, the State argues that it was Martin who extended jeopardy by deciding to appeal his second-degree murder conviction. The State acknowledges that if Martin had not appealed his conviction for second-degree murder, double jeopardy would have prohibited a new trial on the first-degree murder charge, but it asserts that jeopardy continued once Martin appealed.

The State is wrong. By appealing a conviction on a lesser-included offense, a defendant does not restart the jeopardy clock on a greater charge. *Green*, 355 U.S. at 193.

¶23 Indeed, the Supreme Court expressly rejected as "paradoxical" and "wholly fictional" the notion that a defendant essentially waives double jeopardy rights by appealing a conviction on a lesser charge. *Id.* at 191–93. The Court observed that "[t]he law should not, and . . . does not, place the defendant in such an incredible dilemma" that "he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense." *Id.* at 193; *see also Price*, 398 U.S. at 327 (stating that where the first verdict was limited to the lesser-included offense and that verdict was overturned on appeal, the retrial must be limited to that offense). That dilemma is particularly pronounced where, as in Arizona, a defendant has a constitutional right to appeal. Ariz. Const. art. 2, § 24 ("In criminal prosecutions, the accused shall have . . . the right to appeal in all cases . . . .").

¶24 For the foregoing reasons, we conclude that trying Martin a second time for first-degree murder under the circumstances here violated his constitutional right to be free from double jeopardy.

CONCLUSION

¶25 The State alternatively asks us to reinstate Martin's conviction for second-degree murder. Martin argues that retrying him for first-degree murder may

have made it more likely for the jury to convict him of the lesser-included offense than if the jury had considered the second-degree murder charge alone. *See Price*, 398 U.S. at 331 (stating "we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense"). We vacate the court of appeals decision and remand to the trial court to consider in the first instance whether to reduce Martin's conviction to the lesser-included offense, or, if Martin can show prejudice, to order a new trial. *See Morris v. Mathews*, 475 U.S. 237, 246 (1986) (describing *Price* as suggesting "that a new trial is required only when the defendant shows a reliable inference of prejudice").

GOULD, J., concurring.

¶26 I concur in the Court's opinion. The Court faithfully applies the reasonable-efforts framework set out by *State v. LeBlanc*, 186 Ariz. 437 (1996), and correctly notes that "[t]he State here did not ask us to reconsider *LeBlanc*." *Supra* ¶ 21. In my view, however, its conclusion that double jeopardy attaches when a jury enters an "unable to agree" verdict raises serious concerns about *LeBlanc*.

¶27 *LeBlanc* never addressed the double jeopardy consequences of a jury reaching an "unable to agree" verdict. Generally, when a jury is hung, double jeopardy does not attach. *Richardson v. United States*, 468 U.S. 317, 324 (1984) (holding "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). However, under *LeBlanc*, a verdict of "unable to agree" may, but does not *necessarily*, mean that the jurors are hung on the greater offense. *See supra* ¶ 17.

¶28 Compounding this problem is the fact that *LeBlanc*'s approach "does not lend itself to a ready opportunity for the prosecution to seek a mistrial based on a deadlocked jury." *See supra* ¶ 21. As a practical matter, *LeBlanc* provides no opportunity for the state to seek a mistrial. For example, in the typical case, if the jurors are truly hung on a charge, they can advise the judge that they are at an impasse. However, because *LeBlanc* only requires the jurors to engage in "reasonable efforts" in considering the greater charge (rather than having to actually agree on a verdict of guilty or not guilty), it seems unlikely that they would advise the judge that they are at an impasse—

particularly when they can simply state they are "unable to agree" and move on to the lesser charge.

¶29 Requesting the judge to poll the jury is also not a viable option. When the *LeBlanc* verdict form is returned to the court, the jury has already reached a verdict on the lesser offense. Under these circumstances, why would the prosecutor request the judge to poll the jury about their "unable to agree" verdict on the greater charge? Worse yet, what if the jury responds they are not hung, and they request assistance from the court in breaking the impasse? *See* Ariz. R. Crim. P. 22.4 & cmt. (stating the trial judge may assist a jury at an impasse by "giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures"). Would the judge allow additional arguments or evidence, and then instruct the jurors to resume their deliberations on the greater charge? Obviously not. After all, given the fact that the jury has already reached a verdict on the lesser offense, any new deliberations on the greater offense are barred by double jeopardy. *Brown v. Ohio*, 432 U.S. 161, 168–69 (1977) (holding that double jeopardy bars a prosecution for a greater offense after a conviction for a lesser-included offense).

¶30 As the Court notes, jeopardy attaches if the "state had a full and fair opportunity to try the defendant on a charge and the jury refused to convict." *Supra* ¶ 12; *see Green v. United States*, 355 U.S. 184, 191 (1957). However, is this the case when the jury states it is "unable to agree"? With such an amorphous

verdict, how can we conclude the state has indeed had a full and fair opportunity to try the defendant on the greater charge, or that the jury *refused* to convict on that charge? *See Arizona v. Washington*, 434 U.S. 497, 505 (1978) (holding that the state is entitled to one complete opportunity to prove the case, but double jeopardy does not bar retrial on the same charges if the "proceeding is terminated without finally resolving the merits of the charges against the accused").

¶31 Before *LeBlanc*, Arizona used the "acquittal-first" approach adopted in *State v. Wussler*, 139 Ariz. 428 (1984). Under that approach, the jury was required to acquit the defendant on the greater charge before considering the lesser charge. I understand *LeBlanc*'s concern with the "acquittal-first" approach, although in fairness, there are advantages and disadvantages to both the acquittal-first and reasonable-efforts approaches. *See LeBlanc*, 186 Ariz. at 439 (discussing the advantages of the reasonable-efforts approach over the acquittal-first approach); *id.* at 440–41 (Martone, J., concurring in the judgment) (compiling cases and discussing the advantages of the acquittal-first approach). Indeed, the debate about which approach is best (as well as other alternatives) existed before *LeBlanc* and persists to this day. *See United States v. Tsanas*, 572 F.2d 340, 344–46 (2d Cir. 1978) (compiling cases and discussing the advantages and disadvantages for both the government and defendant under the acquittal-first and reasonable-efforts approaches); *State v. Davis*, 266 S.W.3d 896, 904–08 (Tenn. 2008) (same); Michael K. Kaiser, Note, Blueford v. Arkansas*: Why the United States Supreme Court's Construction of Arkansas's Criminal Transitional Jury Instructions Is*

Not Binding on Arkansas Courts, 66 Ark. L. Rev. 1083, 1096–1101 (2013) (discussing the various approaches to lesser-included offense instructions and compiling cases regarding the same).

¶32 Although there is room for debate on this issue, in my view the primary weakness of *LeBlanc* is that it never addressed the problem we face today: the double jeopardy consequences of allowing a jury to proceed to a lesser charge based on a verdict of "unable to agree." In contrast, despite its faults, the acquittal-first approach plainly and clearly resolves the double jeopardy issue.

¶33 The Court states that it does "not foreclose the possibility" of reexamining *LeBlanc*'s approach "in a future case or rule petition." *Supra* ¶ 21. For the reasons discussed above, I believe the Court's openness to this possibility is wise.

APPENDIX B

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-CR 16-0551

[Filed June 19, 2018]

STATE OF ARIZONA, *Appellee*,	)
	)
v.	)
	)
PHILIP JOHN MARTIN, *Appellant.*	)
	)

Appeal from the Superior Court in Mohave County
No. S8015CR201201326
The Honorable Billy K. Sipe, Jr., Judge, *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
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OPINION

Presiding Judge James P. Beene delivered the opinion of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

B E E N E, Judge:

¶1 Philip John Martin ("Martin") was tried for first-degree murder in 2012, but the jury, after marking on the verdict form it was "Unable to agree" on first-degree murder, convicted him of the lesser-included offense of second-degree murder. Following a successful appeal, Martin was retried and convicted of first-degree murder. Martin appeals that conviction and resulting sentence, arguing double jeopardy barred his second trial for first-degree murder because the first jury's inability to agree on first-degree murder constituted an implied acquittal.

¶2 We hold that double jeopardy did not bar Martin's second trial for first-degree murder. The first jury clearly and formally stated it was unable to agree on the greater charge of first-degree murder after it was instructed that it could proceed to consider the lesser charge if after reasonable efforts it was unable to unanimously agree on first-degree murder. This constituted a genuine deadlock permitting retrial on first-degree murder, rather than an implied acquittal barring retrial. Accordingly, we affirm Martin's conviction and sentence for first-degree murder.

FACTS AND PROCEDURAL HISTORY

¶3 On appeal after the first trial, we held that the superior court had erred in refusing to give a crime

prevention instruction, reversed Martin's conviction for second-degree murder, and remanded for a new trial. *See State v. Martin*, 1 CA-CR 13-0839, 2014 WL 7277831, * 1, ¶ 1 (Ariz. App. Dec. 23, 2014) (mem. decision). Before the second trial, the superior court granted the State's motion to retry Martin for first-degree murder.

¶4 The evidence at trial, viewed in the light most favorable to supporting the conviction,[1] showed that Martin and the victim were neighbors on a dirt road in Golden Valley. Martin routinely placed railroad ties and other debris on the road in front of his driveway to cover ruts that developed after rainstorms. On the day of the incident, the victim and a friend came upon these impediments in the road. After removing a railroad tie, the victim told his friend he was "gonna go ask why he keeps throwing stuff across the road." As the victim walked toward Martin's house, the friend saw a muzzle blast from the front window of Martin's house and saw the victim fall to the ground. The victim died of shotgun wounds to his abdomen from a single shotgun blast.

¶5 Martin admitted to the first deputy sheriff to arrive that he shot the victim. He told a detective and later testified that he did so because the victim ignored his demands to get off his property and he believed the victim was armed and was coming toward him to harm him.

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[1] *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009).

¶6 The jury convicted Martin of first-degree murder, and the court sentenced him to natural life. Martin filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION[2]

¶7 Martin argues double jeopardy barred the State from trying him for first-degree murder after he had been convicted in the first trial of second-degree murder. Specifically, Martin argues the jury's inability to agree on first-degree murder was an implied acquittal and not a genuine deadlock.

¶8 Before the second trial, the superior court ruled that Martin could be retried on first-degree murder because the jury had checked the box on the verdict form, "Unable to agree" on the offense of first-degree murder after it was instructed that it could find him guilty of the lesser crime "if all of you agree that the state has failed to prove the defendant guilty of the more serious crime beyond a reasonable doubt, or if *after reasonable efforts you are unable to unanimously agree on the more serious crime,* . . . ." The court reasoned:

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[2] In a separate memorandum decision, *State v. Martin*, 1 CA-CR 16-0551, 2018 WL ____ (Ariz. App. Jun. 19, 2018), filed simultaneously with this opinion, we address Martin's arguments that the superior court erred by refusing to strike the entire jury panel on the grounds it was tainted, and that the court violated his confrontation rights by admitting the victim's dying declarations.

> Based on the jury instruction and based on the verdict form, the jury clearly indicated that they were deadlocked on the greater charge because they were unable to agree unanimously. Accordingly, there was not an implied acquittal of the greater charge and the court finds there was a genuine deadlock. Therefore, the Court finds that the State has demonstrated a manifest necessity for continuing the defendant's jeopardy for First Degree Murder.

¶9 The Double Jeopardy Clauses in the United States and Arizona Constitutions, which are coextensive, prohibit: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Lemke v. Rayes*, 213 Ariz. 232, 236, ¶ 10 and n.2 (App. 2006); U.S. Const. amend. V; Ariz. Const. art. 2, § 10. Martin argues his retrial on first-degree murder violated the prohibition against a second prosecution for the same offense after acquittal. "We review *de novo* whether double jeopardy applies." *Id.* at 236, ¶ 10.

¶10 The United States Supreme Court has held that when a jury convicts on a lesser-included offense but is silent on the greater offense, the defendant is considered to have been "impliedly acquitted" on the greater offense, thereby barring retrial. *Green v. United States*, 355 U.S. 184, 190-91 (1957); *Price v. Georgia*, 398 U.S. 323, 328-29 (1970). The Supreme Court has also held, however, that double jeopardy does not bar retrial of charges on which a jury has been unable to agree. *Richardson v. United States,* 468 U.S. 317, 324-

26 (1984); *cf. Sattazahn v. Pennsylvania,* 537 U.S. 101, 104-05, 113-15 (2003) (double jeopardy did not bar the state from seeking the death penalty on retrial after reversal of murder conviction and life sentence; neither the jury's deadlock on the penalty nor the resulting mandatory sentence of life imprisonment constituted an acquittal of the capital charge.). When a genuine deadlock exists, a defendant's right to have a particular jury decide his fate becomes "subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington,* 434 U.S. 497, 505, 509 (1978).

¶11 The Supreme Court has not addressed the precise issue presented here. A number of other courts have held, however, that when the jury convicts on a lesser offense after stating on the record that it is unable to agree on the greater offense, double jeopardy presents no bar to retrial on the greater offense. *See, e.g., United States v. Bordeaux,* 121 F.3d 1187, 1192-93 (8th Cir. 1997) (following successful appeal of conviction on lesser-included offense, retrial on greater offense not barred where jury wrote on instruction, "[a]fter all reasonable efforts, we, the jury, were unable to reach a verdict on the charge" of the greater offense.); *United States v. Williams*, 449 F.3d 635, 645 (5th Cir. 2006) (double jeopardy did not bar retrial on greater offenses when jury convicted for lesser offenses, but, as indicated in jury notes, as well as in subsequent polling, was "hopelessly deadlocked" on the element distinguishing the lesser from the greater offenses.); *State v. Glasmann*, 349 P.3d 829, 830, ¶¶ 1-3, 834, ¶ 19 (Wash. 2015) (on remand after successful appeal,

double jeopardy did not bar retrial on greater offense when jury had convicted for lesser offense but was unable to agree on greater offense, as demonstrated by leaving verdict form on greater offense blank in accordance with instructions); *People v. Aguilar*, 317 P.3d 1255, 1259, ¶ 21 (Col. App. 2012) ("We conclude that when a jury deadlocks on a greater charge but convicts on a lesser included charge, the hung jury rule, and not the implied acquittal doctrine, applies."); *United States v. Allen*, 755 A.2d 402, 411-12 (D.C. 2000) (double jeopardy did not bar retrial on greater offense, on which defendant had requested a mistrial after jury was unable to agree, notwithstanding fact that guilty verdict had been accepted and sentence imposed on lesser-included offense.); *see also* 6 Wayne R. LaFave et al., Criminal Procedure § 25.4(d) (4th ed.) (Dec. 2016 update), 2 and n.52 ("Application of *Green* may depend on a verdict setting that indicates an implied acquittal . . . . [N]o acquittal of a greater offense is suggested by conviction of a lesser offense when the jury is unable to reach agreement on the higher offense, and this disagreement is formally entered on the record.").

¶12 We are similarly persuaded that the first jury's verdict in this case of "Unable to agree" after it was instructed that it could proceed to consider the lesser charge if "after reasonable efforts you are unable to unanimously agree on the more serious crime" constituted the "genuine deadlock" necessary to permit retrial on the greater offense, rather than an "implicit acquittal" barring retrial. The "implicit acquittal" found by the Supreme Court in *Green* and *Price* rested on significantly different circumstances. In *Green*, the jury

left the verdict form for the greater offense blank but returned a guilty verdict on the lesser-included offense, after it was "authorized to find him guilty of either first-degree murder (killing while perpetrating a felony) or, alternatively, of second-degree murder (killing with malice aforethought)." 355 U.S. at 186, 189-90. In *Price*, the court did not detail the jury instructions, but simply noted that "[t]he jury's verdict made no reference to" the greater charge of murder. 398 U.S. at 324.

¶13 In this case, in contrast, the jury was instructed that it could proceed to consider the lesser charge if "after reasonable efforts you are unable to unanimously agree on the more serious crime," and was given a single verdict form giving it the option of checking "Unable to agree" on the greater charge of first-degree murder. Martin did not object to the instruction, the verdict form, or the clerk's announcement in open court of the verdict "Unable to agree" on the charge of first-degree murder, and guilty of second-degree murder. Under these circumstances, we conclude that the jury was genuinely deadlocked on the charge of first-degree murder, and double jeopardy did not bar retrial on that charge. *See Richardson*, 468 U.S. at 325 ("[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy . . . the failure of the jury to reach a verdict is not an event which terminates jeopardy."); *cf. Renico v. Lett*, 559 U.S. 766, 775 (2010) ("[W]e have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to

consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse.").

¶14 We are not persuaded otherwise by the cases on which Martin relies: *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007); *Gusler v. Wilkinson ex rel. Cty. of Maricopa*, 199 Ariz. 391 (2001); and *State v. Espinoza*, 233 Ariz. 176 (App. 2013). In none of those cases did the verdict form itself state that the jury had been unable to agree on the greater offense. In *Brazzel*, the jury left the verdict form blank as to an attempted murder charge and convicted the defendant of the lesser-included assault charge. 491 F.3d at 979. Based on a defective jury instruction, the defendant's conviction was set aside, and the prosecutor refiled the attempted murder charge. *Id*. The trial court denied the defendant's request to dismiss the attempted murder charge and proceeded to trial, at which the defendant was again convicted only of the lesser-included assault charge. *Id*. at 980. On appeal, the Washington Court of Appeals affirmed the defendant's conviction, stating that although double jeopardy barred retrial on the greater offense, the issue was moot because the defendant was only convicted of the lesser-included offense. *Id*. On federal habeas review, however, the Ninth Circuit Court of Appeals noted that a double jeopardy violation is not to be readily disposed of as "moot" or harmless, holding that "we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the [lesser offense] rather than to continue to debate his innocence." *Id*. at 986. Thus, *Brazzel* simply provides

support for the proposition that there is a double jeopardy bar when a jury leaves the verdict form for the greater charge blank and convicts the defendant on a lesser charge. The case does not suggest a double jeopardy bar when the verdict form specifies that the jurors were unable to reach a verdict on a greater offense while convicting on a lesser-included offense.

¶15 *Gusler* and *Espinosa* are similarly distinguishable. In *Gusler*, the Arizona Supreme Court held that the superior court erred by prematurely granting a mistrial without having provided defense counsel information (questions submitted by the jurors) that might have provided a basis to object to the proposed mistrial or to have requested more specific inquiry to the jurors. 199 Ariz. at 395, ¶ 23. Under those circumstances, the State had not established that there was manifest necessity for the mistrial, meaning double jeopardy barred retrial on the greater offense. *Id.*

¶16 Similarly, in *Espinoza*, the jury submitted a pre-verdict question indicating it "may be hung on the first offense," and the trial court responded by indicating it could leave the verdict form blank and consider the lesser offense. 233 Ariz. at 178, ¶ 3. The jury then convicted the defendant of the lesser offense, but left the verdict form blank as to the greater offense. *Id.* After vacating the conviction on the lesser offense, we held that retrial was barred on the greater offense, thus treating the silent verdict on the greater offense as an acquittal. *Id.* at 178, ¶ 4, 179-180, ¶ 10. We noted that the jury's pre-verdict note demonstrated at most that the jury could not reach an agreement on the

greater charge after "reasonable efforts" at deliberation, which was not equivalent to the "genuine deadlock" necessary to permit retrial on the greater offense. *Id*. at 180, ¶ 11.[3]

¶17 The cases Martin cites are distinguishable. They do not change the law that when the jury formally states on the verdict form that it has been unable to unanimously agree on the greater offense, this constitutes the equivalent of the "genuine deadlock" such that retrial is permitted on the greater offense. Double jeopardy accordingly did not bar retrial on the greater offense.

CONCLUSION

¶18 For the foregoing reasons, we affirm Martin's conviction and sentence for first-degree murder.

AMY M. WOOD • Clerk of the Court
FILED: AA

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[3] Martin also cites *State v. Maloney*, 105 Ariz. 348 (1970), which held that double jeopardy barred a defendant's retrial on first-degree murder after he was convicted of second-degree murder as a lesser-included offense, finding the facts in *Green v. United States*, 355 U.S. 184 (1957), "completely analogous." *See Maloney*, 105 Ariz. at 356-57. In *Maloney*, however, the court did not identify what instruction the jury was given (whether "acquittal first" or "unable to agree after reasonable efforts"), or suggest that the jury reported that it was "unable to agree" on the charge of first-degree murder, which distinguishes both *Green* and *Maloney* from this case. *See Maloney*, 105 Ariz. at 357.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

NO. CR-2012-01326

[Filed April 5, 2016]

STATE OF ARIZONA,	)
Plaintiff,	)
	)
vs.	)
	)
PHILIP JOHN MARTIN,	)
Defendant.	)
	)

HONORABLE BILLY K. SIPE, JR.
COURT COMMISSIONER/JUDGE PRO TEMPORE
DATE: APRIL 1, 2016 *KL

COURT NOTICE/ORDER/RULING

On October 25, 2012, the defendant, Philip John Martin, was indicted by the Mohave County Grand Jury for First Degree Murder, a class 1 felony. The defendant plead not guilty and the jury trial commenced on October 7, 2013, and concluded on October 10, 2013. The then assigned trial court judge, the Honorable Derek Carlisle, instructed the jury regarding the definition of premeditated First Degree Murder pursuant to the Revised Arizona Jury

Instructions [hereinafter referred to as RAJI] and instructed the jury on the less serious offense of Second Degree Murder. Specifically, the Court instructed the jury "You may find the defendant guilty of the less serious crime if all of you agree that the state has failed to prove the defendant guilty of the more serious crime beyond a reasonable doubt, or if after reasonable efforts you are unable to unanimously agree on the more serious crime, and you do all agree that the state has proven the defendant guilty of the less serious charge." The Court provided the jury with the following single Verdict Form, as recommended by RAJI:

> We, the Jury duly empanelled and sworn in the above-entitled action, upon our oaths, do find the defendant on the charge of First Degree Murder as follows (check only one):
>
> ___ Guilty
>
> ___ Not Guilty
>
> ___ Unable to agree
>
> If you find the defendant guilty of First Degree Murder, **do not** complete the remaining portion of this verdict form, except for the foreperson's signature block. Complete this portion only if you find the defendant either not guilty of First Degree Murder or you are unable to decide.
>
> We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find the defendant on the lesser-included offense of

Second Degree Murder as follows (check only one):

___ Guilty

___ Not Guilty

On October 10, 2013, the jury rendered the following verdict:

> "We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find the defendant on the charge of First Degree Murder as follows: **Unable to agree"** (emphasis added).

> "We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find the defendant on the lesser-included offense of Second Degree Murder as follows: **Guilty"** (emphasis added).

On November 18, 2013, the defendant was sentenced to the presumptive term of sixteen (16) years in the Arizona Department of Corrections. The defendant, thereafter, filed a timely Notice of Appeal and on December 23, 2014, the Arizona Court of Appeals, Division I, reversed the defendant's conviction for Second Degree Murder and remanded this case back to the trial court for retrial. The State has subsequently filed a "Motion for Order That on Retrial the Defendant Stand Trial for First Degree Murder as Originally Indicted". The defense opposes.

The defendant was indicted and tried for First Degree Murder. The jury was "unable to agree" on First

Degree Murder and convicted the defendant of the lesser offense of Second Degree Murder. The defendant's Second Degree Murder was reversed by the Arizona Court of Appeals and the defendant must now be retried. The issue is whether the defendant can be retried for First Degree Murder, as requested by the State.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" and is made applicable to the states through the due process clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Pursuant to Article 2 § 10 of the Arizona Constitution, "no person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense." The Double Jeopardy Clauses in the United States and Arizona Constitution prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. State v. McPherson, 282 Ariz. 557, 269 P.3d 1181 (App. 2012).The double jeopardy clause "serves principally as a restraint on courts and prosecutors." Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). In a frequently quoted passage in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), "The underlying idea ... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id. At 187-188.

The United States Supreme Court has recognized that, for double jeopardy purposes, an acquittal barring a second prosecution may be either express or implied by a conviction on a lesser included offense when the jury was given the opportunity to return a verdict on the greater offense. Green, 355 U.S. at 190-191; Price v. Georgia, 398 U.S. 323, 328-329, 90 S.Ct. 1757, 26 L.Ed.2d 300, 304-305 (1970). Distinct from the implied acquittal rule, the doctrine of manifest necessity justifies a retrial following a jury deadlock. In a trial by jury, the defendant is deemed to have been placed in jeopardy when the jurors have been impaneled and sworn. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). Once this occurs, if a jury is discharged without returning a verdict, the defendant cannot be retried unless the defendant consented to the discharge or manifest necessity requires it. Green, 355 U.S. at 188. The rule permitting retrial following deadlock "'accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." Arizona *v. Washington,* (1978) 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

The United States Supreme Court decisions suggest the doctrine of implied acquittal is inapplicable to cases in which the jury is expressly deadlocked, rather than merely silent, on the greater offense. In Selvester v.

United States, 170 U.S. 262, 263, 18 S.Ct. 580, 42 L.Ed. 1029 (1898), the Court affirmed the trial court's receipt of the jury's verdict of guilty on three counts, even though the jury had deadlocked on a fourth count. As the Court explained, when a jury convicts on some counts and is silent as to others, the effect of the jury's discharge is equivalent to an acquittal barring retrial on those counts on which the jury failed to render a verdict because "the record affords no adequate legal cause for the discharge of the jury." Id. at p. 269. By contrast, the Court further explained, when juror disagreement is formally entered on the record, "[t]he effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offense as to which the jury has disagreed and on account of which it has been regularly discharged would not constitute second jeopardy." Id. at 269.

In its decisions in Green, *supra,* 355 U.S. 184, and Price v. Georgia, *supra,* 398 U.S. 323, the Supreme Court again recognized a distinction, for double jeopardy purposes, between a jury's silence and its expressed inability to return a verdict. In *Green,* the defendant was charged with arson in count 1, and with murder by causing the death of a person by arson in count 2. The trial court instructed the jury it could find the defendant guilty of arson and either first degree murder or second degree murder. The jury found the defendant guilty of arson and of second degree murder, but was silent on the charge of first degree murder. The defendant's conviction was reversed on appeal and on retrial he was again charged with first degree murder, and convicted. The Supreme Court held that the retrial of the defendant on the first degree murder charge

violated the double jeopardy clause of the Fifth Amendment because the defendant had already been forced to "run the gantlet" on that charge in the first trial. Further, the failure of the jury to convict him was an implied acquittal on the charge and because the jury had been dismissed without rendering an express verdict on the first degree murder charge, but "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so," the defendant's jeopardy for first degree murder came to an end when the jury was discharged. Id. at 190-191. Pursuant to Green, a jury's silence on the greater offense does not constitute manifest necessity to discharge the jury without a verdict and retrial of the defendant is therefore barred. However, Green does not compel the conclusion that when the jury expressly deadlocks on the greater offense, but returns a verdict of conviction on the lesser, the conviction of the lesser operates as an implied acquittal of the greater. In both Green and Price v. Georgia, the verdict form was left blank as to the greater charge. Consequently, an "implied acquittal" of the greater charge occurred which precluded retrial on the greater charge. In Richardson v. United States, 486 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the defendant was acquitted in Count I and the jury was not able to agree on the other two counts; accordingly, the District Court declared a mistrial as to the remaining counts and scheduled a retrial. The Supreme Court emphasized that once a jury is unable to reach a verdict and a declaration of mistrial has been made by the court, the hung jury is not the equivalent of an acquittal. Id. At 324.

In United States v. Bordeaux, 121 F.3d 1187 (8th Circuit, 1997), the defendant was charged with Attempted Aggravated Sexual Abuse and the case proceeded to jury trial. During deliberations the jury returned a note which stated "After all reasonable efforts, we, the jury, were unable to reach a verdict on the charge of 'Attempted Aggravated Sexual Abuse.'" However, the jury found the defendant guilty of the lesser included offense of Abusive Sexual Contact by Force. The Court subsequently granted a new trial after the State notified the Court that the lesser included jury instruction failed to include the essential element of force; the Court ordered a new trial on the greater offense. The 8th Circuit held that "where the jury expressly indicates that it is unable to reach a verdict on the greater charge, a conviction on a lesser included offense does not constitute an implied acquittal of the greater offense and presents no bar to retrial on the greater offense." Id. at 1193.

The Arizona case which most closely discusses the issue in this case is State v. Espinoza, 233 Ariz. 176, 310 P.3d 52 (App. 2013). In Espinoza, the defendant was charged with Aggravated Robbery. The jury was instructed that if they found the defendant not guilty of Aggravated Robbery, or if they could not reach a verdict on Aggravated Robbery, they could consider Theft of Means of Transportation as a lesser-included offense. The jury informed the trial court that they were "hung" on the first offense and requested direction from the Court as to how to proceed. The Court advised the jury, "Pursuant to the instructions, you may leave it blank and consider the lesser-offense." Id. at 178. The jury left the Aggravated Robbery verdict form

blank and convicted the defendant of the lesser offense of Theft of Means of Transportation." The defendant's conviction was reversed because the Arizona Court of Appeals, Division II, determined that the trial court erred in instructing the jury on the lesser included offense. Id. at 178. After the mandate was issued, the defendant filed a Motion to Dismiss asserting that the guilty verdict for the lesser-included offense, which was reversed, served as an implied acquittal for the greater offense of Aggravated Robbery. The Espinoza Court held that the defendant could not be retried for the greater offense of Aggravated Robbery because the jury's silence as to the original charge of Aggravated Robbery coupled with the guilty verdict of Theft of Means of Transportation did not demonstrate a genuine deadlock on the greater charge and, accordingly, the State did not demonstrate that a manifest necessity existed for continuing the defendant's jeopardy as to Aggravated Robbery. Id. at 181. The Court held that the jury's silence, at most, demonstrated that the jury could not reach agreement as to the greater offense after a "full and careful consideration of the evidence" and "reasonable efforts" of deliberations; however, "reasonable efforts" is not the same as a "genuine deadlock". Id. at 179-180.

The Court acknowledged that the Arizona Supreme Court has held that a jury's mere statement that it has been unable to reach a verdict after persistent deliberations does not, without further inquiry by the court, demonstrate a true deadlock. Gusler v. Wilkerson, 199 Ariz 391, 18 P.3d 702 (2001). The Espinoza Court held that there must be a "genuine deadlock" in order for the State to prove "manifest

necessity" allowing a retrial. Id. at 180-181. The Court recognized that that when the jury is instructed pursuant to State v LeBlanc, 186 Ariz. 437, 924 P.2d 441 (1996) [the "reasonable efforts" instruction], it may be impossible for the State to develop a record showing a genuine deadlock as to the greater offense when the jury convicts on a lesser charge; before a verdict is returned a prosecutor has no basis for seeking a mistrial and after a verdict it is procedurally inappropriate. Espinoza, 233 Ariz, at 180; 310 P.3d at 56.

In the instant case, the jury was instructed that "You may find the defendant guilty of the less serious crime if all of you agree that the state has failed to prove the defendant guilty of the more serious crime beyond a reasonable doubt, or if ***after reasonable efforts you are unable to unanimously agree on the more serious crime,*** ... "(emphasis added). The Verdict Form regarding the greater charge of First Degree Murder gave the jury three options: "Guilty", "Not Guilty", "Unable to Agree". The presiding juror checked the "Unable to Agree" option. Clearly, the jury, after reasonable efforts, could not unanimously agree if the defendant was guilty or not guilty of First Degree Murder and so indicted on the verdict form. What distinguishes this case from Espinoza is the trial court judge here instructed the jury that if after reasonable efforts they were unable to agree *unanimously* on the more serious charge they could consider the less serious offense. Further, unlike Espinoza, Green, and Price v. Georgia, the trial court here allowed the jury to indicate on the verdict form if they were unable to agree, unanimously, on the greater charge. Based on

the jury instruction and based on the verdict form, the jury clearly indicated that they were deadlocked on the greater charge because they were unable to agree unanimously. Accordingly, there was not an implied acquittal of the greater charge and the court finds there was a genuine deadlock. Therefore, the Court finds that the State has demonstrated a manifest necessity for continuing the defendant's jeopardy for First Degree Murder.

Conceptually, the Court agrees with many concerns raised by the defense. The State tried the defendant for First Degree Murder and the defendant was convicted of Second Degree Murder. The defendant was already put on trial for First Degree Murder and should not be required to continue to "run the gauntlet". The Court ponders, why should the State be allowed another opportunity to convict the defendant for First Degree Murder when they already had the opportunity to do so, and failed. Had the defendant not filed a Notice of Appeal, and had his conviction reversed, he could not have be retried for First Degree Murder. The defendant was sentenced to sixteen (16) years in prison for his conviction for Second Degree Murder. He subsequently exercised his rights and sought appellate review. The Arizona Court of Appeals determined that the trial court erred by not instructing the jury on the crime-prevention defense and reversed the defendant's conviction. It concerns the Court that the defendant has essentially "forfeited" his sixteen (16) year sentence and is now risking serving natural life in prison because he chose to exercise his appellate rights. However, despite this Court's equitable concerns, the Court is convinced that the applicable case law does

allow the defendant to be retried for First Degree Murder.

Accordingly, it is Ordered granting the State's Motion for Order That On Retrial the Defendant Stand Trial for First Degree Murder as Originally Indicted.

APPENDIX D

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-CR 13-0839

[Filed December 23, 2014]

STATE OF ARIZONA, *Appellee*,	)
	)
v.	)
	)
PHILIP JOHN MARTIN, *Appellant.*	)
	)

Appeal from the Superior Court in Mohave County
No. S8015CR201201326
The Honorable Derek C. Carlisle, Judge Pro Tem

REVERSED AND REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Mohave County Legal Advocate, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge John C. Gemmill joined.

N O R R I S, Judge:

¶1 Philip John Martin appeals from his conviction for second degree murder, arguing the superior court should have instructed the jury on the crime-prevention defense under Arizona Revised Statutes ("A.R.S.") section 13-411 (Supp. 2014),[1] and should not have admitted the victim's dying declarations over his Confrontation Clause objection. We agree with Martin's first argument and reverse and remand for a new trial for that reason. Because the evidentiary issue will recur upon retrial, we address it as well and conclude the court properly admitted the statements because they were non-testimonial.

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[1] Although the Arizona Legislature amended certain statutes cited in this decision after the date of Martin's offense, the revisions are immaterial to the resolution of this appeal. Thus, we cite to the current version of these statutes.

FACTS AND PROCEDURAL BACKGROUND[2]

¶2 Martin and the victim were neighbors and used the same rough dirt access road to reach their homes. Martin routinely placed railroad ties and other debris in the road in front of his driveway to counteract ruts that would form when motorists drove their vehicles on the road after a rainstorm. The victim removed a railroad tie from the road in front of Martin's driveway while driving home in his Jeep. The victim told his friend Brian he was "gonna go ask why he keeps doing that." As the victim started walking down Martin's driveway, Brian heard and saw "the muzzle blast of the gun out the front window" of Martin's house and saw the victim "hit the ground." The victim died of a shotgun wound to his abdomen.

¶3 A grand jury indicted Martin for first degree, premeditated, murder. Martin admitted shooting the victim, but testified at trial that he did so because the victim ignored his demands that he get off his property and because he believed the victim was armed and was coming towards his home to harm him. The superior court instructed the jury on the use of physical force and deadly physical force in self-defense pursuant to A.R.S. §§ 13-404 (2010), 13-405 (Supp. 2014), and in defense of premises pursuant to 13-407 (2010). It rejected Martin's request, however, that it also instruct the jury on the use of force and deadly force in crime-

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[2] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Martin. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

prevention under A.R.S. § 13-411 because it found the evidence insufficient to warrant that instruction. The jury found Martin guilty of the lesser included offense of second degree murder.

DISCUSSION

I. Crime Prevention Instruction

¶4 On appeal, Martin argues the trial evidence supported his requested crime-prevention instruction and, thus, the court should have instructed the jury on this defense. We agree with Martin. *See State v. Anderson*, 210 Ariz. 327, 343, ¶ 60, 111 P.3d 369, 385 (2005) (appellate court reviews trial court's refusal to give jury instruction for abuse of discretion; defendant is "entitled to instruction on any theory reasonably supported by the evidence").

¶5 Section 13-411 provides that a person "is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary" to prevent certain specified crimes, including aggravated assault as defined in A.R.S. § 13-1204(A)(1), (2) (Supp. 2014) (causing "serious physical injury to another" or using a "deadly weapon or dangerous instrument"). Here, the trial evidence supported the crime-prevention instruction based on aggravated assault.

¶6 Martin testified he feared for his safety because, as the victim walked towards his house, he saw a bulge on the victim's side, under his shirt, and feared the victim might have a gun. Martin explained he believed

he needed to act because the victim continued to walk towards his house despite his repeated warnings to the victim that he was armed and his demands that the victim leave his property. Martin further testified the victim looked "determined, like nothing was going to stop him" as he advanced toward the house, and that is when he "got scared" and thought "what's going to happen when he gets to my door" and pulled the trigger. This testimony, coupled with evidence that at the time of the shooting the victim had a .165 blood alcohol content and "always" kept a pistol in his Jeep, was sufficient to provide "the slightest evidence" for the crime-prevention instruction. *See State v. Hussain*, 189 Ariz. 336, 338, 942 P.2d 1168, 1170 (App. 1997) (defendant's version of events provided "slightest evidence" in support of crime-prevention instruction).

¶7 The State argues, however, that Martin's belief he was acting to prevent an aggravated assault was not reasonable in light of his testimony that he did not see anything in the victim's hands or see the victim reach for a weapon as he walked up the driveway. Nonetheless, whether Martin's belief was reasonable under the circumstances was a question for the jury to resolve in determining if his conduct was justified. And, it was also for the jury to resolve contradictory statements in Martin's testimony. *See, e.g., State v. Mercer*, 13 Ariz. App. 1, 2, 473 P.2d 803, 804 (1970) ("evidence is no less substantial simply because the testimony is conflicting or reasonable persons may draw different conclusions therefrom").

¶8 The State also argues the superior court's decision not to instruct on crime-prevention, if error,

was harmless. Error "is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993)). "We must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment." *Id.*

¶9 Unlike the self-defense and defense of premises statutes, A.R.S. § 13-411(C) establishes a presumption that a person is acting reasonably if he acted to "prevent what the person reasonably believes is the imminent or actual commission" of the specified crimes, including aggravated assault. No such presumption is contained in A.R.S. §§ 13-404, -405, or -407. Nevertheless, the State further argues the presumption has essentially been rendered redundant by statutory changes that now place the burden on the State to prove beyond a reasonable doubt that a defendant did not act with justification in all instances in which he or she raises a justification defense. *See* A.R.S. § 13-205 (2010). The Legislature, however, also specifically directed that the changes would not affect the presumption contained in A.R.S. § 13-411. *See* A.R.S. § 13-205(B) ("This section *does not affect the presumption* contained in § 13-411, subsection C.") (emphasis added). Furthermore, unlike the self-defense statute, under A.R.S. § 13-411, "the only limitation upon the use of deadly force . . . is the reasonableness

of the response" whereas the self-defense statute requires "an immediate threat to personal safety before deadly force may be used." *State v. Korzep*, 165 Ariz. 490, 492, 799 P.2d 831, 833 (1990). Thus, A.R.S. § 13-411 permits the use of deadly physical force "if and to the extent" a person reasonably believes it is necessary to prevent the commission of one of the listed offenses rather than only in response to another's use or attempted use of unlawful deadly force. *Hussain*, 189 Ariz. at 339, 942 P.2d at 1171.

¶10 On this record, we cannot say beyond a reasonable doubt that the protections offered by A.R.S. § 13-411(C) would not have caused a jury properly instructed about the crime-prevention defense to find Martin justified in shooting the victim to prevent an aggravated assault. *Bible*, 175 Ariz. at 588, 858 P.2d at 1191. Accordingly, we reverse Martin's conviction and remand for a new trial.

II. Victim's Statements to Deputies

¶11 Martin next argues the superior court should not have admitted the statements made by the victim to police officers over his Confrontation Clause objection. The superior court found the statements were dying declarations under Arizona Rule of Evidence 804(b)(2) and admissible under the Confrontation Clause because "the emergency [in this case] was still ongoing." We review de novo a superior court's Confrontation Clause decision, *State v. Tucker*, 215 Ariz. 298, 315, ¶ 61, 160 P.3d 177, 194 (2007), and, as we explain, the superior court did not violate the Confrontation Clause in admitting the victim's dying declarations.

¶12 The Confrontation Clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177 (2004), the Supreme Court held a testimonial statement by a witness who does not appear at trial must be excluded under the Confrontation Clause unless the witness is unavailable and the defendant "had a prior opportunity for cross-examination." The Court did not define "testimonial," but enumerated a "core class of 'testimonial' statements" as including "affidavits, custodial examinations, . . . depositions, prior testimony, . . . confessions, . . . [and] [s]tatements taken by police officers in the course of interrogations" and any other "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52, 124 S. Ct. at 1364.

¶13 In *Davis v. Washington*, 547 U.S. 813, 817, 126 S. Ct. 2266, 2270, 165 L. Ed. 2d 224 (2006), the Supreme Court considered whether statements made to a 911 operator were testimonial under the Confrontation Clause. The Court held statements are "nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to . . . meet an ongoing emergency." *Id.* at 822, 126 S. Ct. at 2273. Conversely, statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 822, 126 S. Ct. at 2273-74. The Supreme Court thus focused the testimonial inquiry under the Confrontation Clause to the "primary purpose" of the interrogation. *Id*.; *State v. Alvarez*, 213 Ariz. 467, 471, ¶ 15, 143 P.3d 668, 672 (App. 2006).

¶14 More recently, in *Michigan v. Bryant*, 562 U.S. 344, —, 131 S. Ct. 1143, 1156, 179 L. Ed. 2d 93 (2011), the Supreme Court clarified the "primary purpose" analysis. The Court held that determination of the "primary purpose" of the exchange required an objective analysis of its circumstances:

> An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Id.

¶15 The Court further explained that "the existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on . . . ending a threatening situation" rather than on "proving past events potentially relevant to later criminal prosecution." *Id*. at —, 131 S. Ct. at 1157.

¶16 Applying these principles here, the victim's dying declarations were not testimonial; the victim made them during an ongoing emergency and the primary purpose of his exchange with police officers was to enable them to react and respond to this emergency.

¶17 The trial evidence established that the police officers arrived at the crime scene shortly after the shooting occurred with the victim lying on the ground in a pool of blood coming from "numerous gun shot holes to his abdomen." The officers saw that the victim was in a critical condition, bleeding profusely, gasping for air and "coming in and out of consciousness." In an effort to render medical aid to the victim, one officer "started applying pressure and talking to [the victim], trying to keep him alert." Although it is not clear which officer is speaking, a voice can be heard on the recording of the exchange played to the jury urging the victim to "stay with me buddy."

¶18 It is in this context that the police officers asked the victim if he knew who shot him (the victim responded, "Phil," and identified Phil as a neighbor), why he had been shot (the victim responded, because he was "walking up [Phil's] driveway"), and whether Phil had said anything else to him (the victim

responded, "[s]aid don't walk up my driveway anymore, after I was on the ground already"). Although Martin had already told one of the officers he had shot the victim and one of the officers had placed him in a patrol car when the officers began to speak to the victim, the officers had not secured the crime scene. Viewed objectively, these circumstances reflect the primary purpose of the exchange between the officers and the victim was to enable the officers to react and respond to an ongoing emergency which included trying to keep the victim alive. Accordingly, the victim's statements to the officers were non-testimonial, and the court did not violate Martin's Confrontation Clause rights in admitting them into evidence.

CONCLUSION

¶19 For the foregoing reasons, we reverse Martin's conviction and remand for further proceedings consistent with this decision.

Ruth A. Willingham · Clerk of the Court
FILED: ama

APPENDIX E

[SEAL]

SUPREME COURT

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

[Dated July 10, 2015]

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

July 10, 2015

RE: **STATE OF ARIZONA v PHILIP JOHN MARTIN**
Arizona Supreme Court No. CR-15-0034-PR
Court of Appeals, Division One No. 1 CA-CR 13-0839
Mohave County Superior Court No. CR201201326

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 10, 2015, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review= DENIED.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Linley Wilson
Jill L Evans
Philip John Martin, ADOC #286103, Arizona State Prison, Tucson Winchester Unit
Ruth Willingham
kd

APPENDIX F

IN THE SUPERIOR COURT
MOHAVE COUNTY, STATE OF ARIZONA

CASE NO: CR-2012-01326

[Filed August 1, 2016]

STATE OF ARIZONA, Plaintiff,	)
vs.	)
PHILIP JOHN MARTIN, Defendant.	)

HONORABLE BILLY K. SIPE, JR.
JUDGE PRO TEMPORE COURTROOM: B
COURT REPORTER: LINDA CANTRELL

VIRLYNN TINNELL, CLERK OF SUPERIOR COURT
BY: TRACY DOGGETT, DEPUTY CLERK
HEARING DATE: AUGUST 1, 2016

JUDGMENT & SENTENCING PRISON

START: 11:36 A.M.

DATE OF BIRTH: June XX, 19XX

The State is represented by James Schoppmann, Deputy County Attorney; the Defendant is present with counsel, Gerald Gavin.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

The Court is presented with an email from the Victim's daughter.

The Clerk of the Court is directed to redact the Victim's email address from the original email prior to filing it in the Court's file.

The Victim's son is given the opportunity to speak.

Pursuant to A.R.S. §13-607, the Court finds as follows:

JURY VERDICT: The determination of guilt was based upon a verdict of guilty after a Jury Trial.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following Judgment and Sentence.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Arizona Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: Count 1 – First Degree Murder

FELONY CLASS: 1

IN VIOLATION OF A.R.S. §§: 13-1105(A)(1), 13-1101, 13-701, 13-702, 13-751, 13-752 and 13-801

DATE OF OFFENSE: On or about October 18, 2012

SENTENCE: Life in prison without the possibility of parole with the Arizona Department of Corrections

This sentence is to date from August 1, 2016. The Defendant is to be given credit for 1,383 days served prior to sentencing.

IT IS FURTHER ORDERED remanding the Defendant to the custody of the Sheriff.

Commissioner Court	08/01/2016 **Date**	**BILLY K. SIPE, JR, Judge Pro Tempore**

/s/
Deputy Clerk

NO. CR-2012-01326

STATE VS. Philip John Martin

The Defendant is advised concerning rights of appeal/review and written notice of those rights are provided.

[✓] **ORDERED** exonerating any bond.

[ ] **ORDERED** granting the State's Motion to Dismiss any charges/allegations pursuant to the plea agreement; all charges in _____.

ORDERED authorizing the Sheriff of Mohave County to deliver the Defendant to the custody of the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this case.

[ ] **ORDERED** allowing Counsel for the Defendant to withdraw as counsel of record.

Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

Notice of Rights of Appeal/Review signed by the Defendant.

Hearing concludes at 12:00 ~~a.m.~~/p.m.

/s/
Honorable Billy K. Sipe, Jr.

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

NO. CR-2012-1326

[Filed October 10, 2013]

STATE OF ARIZONA, Plaintiff,	)
vs.	)
PHILIP JOHN MARTIN, Defendant.	)

VERDICT

We, the Jury duly empanelled and sworn in the above-entitled action, upon our oaths, do find the defendant on the charge of First Degree Murder as follows (check only one):

___ Guilty

___ Not Guilty

__✓ Unable to agree

If you find the defendant guilty of First Degree Murder, **do not** complete the remaining portion of this verdict form, except for the foreperson's signature

block. Complete this portion only if you find the defendant either not guilty of First Degree Murder or you are unable to decide.

We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find the defendant on the lesser-included offense of Second Degree Murder as follows (check only one):

__✓__ Guilty

___ Not Guilty

APPENDIX H

**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE**

**Court of Appeals
Division One
No. 1 CA-CR 13-0839**

**Mohave County
Superior Court
No. S8015-CR-2012-01326**

[Dated October 10, 2013]

STATE OF ARIZONA, Plaintiff,	)
vs.	)
PHILIP JOHN MARTIN, Defendant.	)

Kingman, Arizona
Thursday, October 10, 2013
9:39 a.m.

BEFORE: The Honorable Derek Carlisle, Judge Pro Tempore

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Jury Trial – Day 4

Reported by: Norma Jean DeLong, RPR,
Official Reporter, 25
Certified Reporter #50717

* * *

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And by my comments I'm not saying it should take you a specific period of time to reach a verdict or even that you are going to be able to reach a verdict in this case.

All I'm saying is, if you're still deliberating at a time that you want lunch, let us know, and we'll get lunch brought in to you.

So at this point you are allowed to go to the jury room and begin your deliberations.

(The following was held outside the presence of the jury.)

THE COURT: Thank you. Please be seated.

The record should reflect the jury has left.

Make sure that you let my judicial assistant know how to get ahold of you so if the jury reaches a verdict we can let everybody know.

Anything else in this case at this point in time.

MR. BEININGEN: No, Your Honor.

MR. SCHOPPMANN: No, Your Honor.

THE COURT: All right. We'll stand at recess.

(The proceedings recessed from 11:24 a.m. to 1:41 p.m.)

(The following was held in

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the presence of the jury.)

THE COURT: Thank you. Please be seated.

This is a continuation of CR-2012-1326, State of Arizona versus Philip Martin.

Show for the record the presence of the defendant, both counsel, and the jury.

And my first question is, who is the presiding juror?

JUROR NO. 10: I am.

THE COURT: So that's Ms. Shauer, also known as Ms. Trejo?

JUROR NO. 10: Uh-huh.

THE COURT: All right. And is it Shower, S-H-O-W-E-R?

JUROR NO. 10: It's S-H-A-U-E-R.

THE COURT: Okay. That's --

JUROR NO. 10: S-H-A-U-E-R.

THE COURT: All right. Ms. Shauer, if you can give the -- all the forms of verdict to the bailiff, please. I guess there is only one form of verdict.

The clerk will read and record the verdict, omitting the caption.

THE CLERK: "We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant on the charge of first degree murder as

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follows: Unable to agree."

"We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant on the lesser-included offense of second degree murder as follows: Guilty," signed the presiding juror.

THE COURT: Does either counsel wish to have the jury polled?

MR. BEININGEN: Yes, Your Honor.

THE COURT: All right. Ladies and gentlemen of the jury, I'm going to now ask each of you if this is the verdict that you did agree to.

If this is the verdict you agreed to, you just need to tell me that.

If this is not the verdict you agreed to or if the presiding juror signed or checked the wrong box in the verdict form, now would be the time to let me know.

Juror Number 1, is such your verdict?

JUROR NO. 1: Yes.

THE COURT: Juror Number 2, is such your verdict?

JUROR NO. 2: Yes.

THE COURT: Juror Number 3, is such your verdict?

JUROR NO. 3: Yes.

THE COURT: Juror Number 4, is such your

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verdict?

JUROR NO. 4: Yes.

THE COURT: Juror Number 6, is such your verdict?

JUROR NO. 6 : Yes.

THE COURT: Juror Number 7, is such your verdict?

JUROR NO. 7: Yes.

THE COURT: Juror Number 8, is such your verdict?

JUROR NO. 8 : Yes.

THE COURT: Juror Number 9, is such your verdict?

JUROR NO. 9: Yes.

THE COURT: Juror Number 10, is such your verdict?

JUROR NO. 10: Yes.

THE COURT: Juror Number 11, is such your verdict?

JUROR NO. 11: Yes.

THE COURT: Juror Number 12, is such your verdict?

JUROR NO. 12: Yes.

THE COURT: Juror Number 13, is such your verdict?

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JUROR NO. 13: Yes.

THE COURT: All right. Can both counsel approach, please?

(A bench conference was held.)

THE COURT: All right. Ladies and gentlemen of the jury, we have one other thing that we need you to do. It's going to take me a few minutes to get everything ready.

So I'm going to give you a break at this point in time. It will probably be about a 10- or 15-minute break.

Obviously, you've already reached a verdict, so you can talk about this case if you want to with yourselves.

Don't talk to anybody else about this case. Don't discuss your verdict with anybody. I'm going to make sure nobody talks to you during this break.

And then just be back in the jury room, ready to go in about ten minutes.

And the lawyers and I will stay and talk about some things, and then we'll be ready to go in about ten minutes.

So you are excused for about ten minutes.

(The following was held outside the presence of the jury.)

* * *

APPENDIX I

IN THE SUPERIOR COURT
MOHAVE COUNTY, STATE OF ARIZONA

CASE NO: CR-2012-01326

[Filed November 8, 2013]

STATE OF ARIZONA, Plaintiff,	)
vs.	)
PHILIP JOHN MARTIN, Defendant.	)

HONORABLE DEREK CARLISLE
JUDGE PRO TEMPORE COURTROOM: B
COURT REPORTER: NORMA DELONG

VIRLYNN TINNELL, CLERK OF SUPERIOR COURT
BY: JESSICA HIPES, DEPUTY CLERK
HEARING DATE: 11/08/2013

JUDGMENT & SENTENCING PRISON

START: 10:32 A.M.

DATE OF BIRTH: June XX, 19XX

The State is represented by James Schoppmann, Deputy County Attorney; the Defendant is present with counsel, Eric Beiningen.

This is the time set for Judgment and Sentencing.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. §13-607, the Court finds as follows:

JURY VERDICT: The determination of guilt was based upon a verdict of guilty after a Jury Trial.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following Judgment and Sentence.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Arizona Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: Murder in the 2nd Degree

FELONY CLASS: 1

IN VIOLATION OF A.R.S. §§: 13-1104, 13-701, 13-710 and 13-801

DATE OF OFFENSE: October 18, 2012

SENTENCE: 16 years with the Arizona Department of Corrections.

This is a presumptive sentence. This offense is non-repetitive Class 1 Felony.

This sentence is to date from November 8, 2013. The Defendant is to be given credit for 386 days served prior to sentencing.

IT IS ORDERED reserving restitution for a reasonable amount of time.

IT IS ORDERED authorizing the Sheriff of Mohave County to deliver the Defendant to the custody of the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation repots, medical and psychological repots relating to the Defendant and involving this case.

IT IS FURTHER ORDERED remanding the Defendant to the custody of the Sheriff.

Notice of Rights of Appeal/Review signed by the Defendant.

Commissioner Court	11/8/13 **Date**	DEREK C. CARLISLE **Judge Pro Tempore**

/s/
Deputy Clerk

NO. CR-2012-01326

STATE VS. Philip John Martin

[✓] **ORDERED** exonerating any bond.

[ ] **ORDERED** granting the State's Motion to Dismiss any charges/allegations pursuant to the plea agreement; all charges in _____.

FILED: Conditions of Probation and Notice of Rights of Appeal/Review, both signed by the Defendant and copies provided to the Defendant.

[ ] **ORDERED** allowing Counsel for the Defendant to withdraw as counsel of record.

Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

The Court recesses at 11:15 a.m./~~p.m.~~

/s/
Honorable Derek C. Carlisle

[Image of Fingerprint]

[Fingerprint]

cc:

MOHAVE COUNTY ATTORNEY

/s/ LDO- Beiningen
ATTORNEY FOR DEFENDANT

MOHAVE COUNTY PROBATION

[X] MOHAVE COUNTY JAIL

HONORABLE DEREK C. CARLISLE
JUDGE PRO TEMPORE

Mohave County Sheriff/Transport
Arizona Dept. of Corrections