

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY R. MARTINSON

Petitioner

vs.

STATE OF ARIZONA

Respondent

On Petition for a Writ of Certiorari
to the Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED.

Whether the Double Jeopardy Clause of the Fifth Amendment bars retrial where the trial court dismissed the case with prejudice for bad faith prosecutorial misconduct after granting a new trial following a conviction at trial.

LIST OF PARTIES.

- (i). All parties appear in the caption of the case on the cover page.
- (ii). This petition is not filed by or on behalf of a nongovernment corporation.
- (iii). List of proceedings of courts directly related to this case:
 1. State v. Jeffrey Martinson, CR2004-124662-001. Maricopa County Superior Court, Arizona. Judgment entered March 27, 2012.
 2. State ex rel. Montgomery v. Duncan, No. 1 CA-SA 12- 0217 (mem. decision). Arizona Court of Appeals. Judgment entered November 30, 2012.
 3. State v. Jeffrey Martinson, CR2004-124662-001. Maricopa County Superior Court, Arizona. Judgment entered November 19, 2013
 4. *State v. Martinson*, 241 Ariz. 93, 384 P.3d 307 (App. 2016). Arizona Court of Appeals. Judgment entered September 22, 2016.
 5. State v. Jeffrey Martinson, CR2018-002279-001, Maricopa County Superior Court, Arizona. June 13, 2018. Case currently pending trial.
 6. Martinson v. Adelman, ex rel State of Arizona, 1 CA-SA 21-0017 (mem. decision), Arizona Court of Appeals. Judgment entered March 9, 2021.
 7. Martinson v. Adelman, ex rel State of Arizona, CR-21-0131-PR, Arizona Supreme Court. Judgment entered June 30, 2021.

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Appendix E. November 19, 2013. Order Dismissing Case with Prejudice.

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Appendix H. October 16, 2020. Superior Court Order Denying Motion to Dismiss For Double Jeopardy Violation.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW.

The unpublished decision of the Arizona Court of Appeals, the highest state court to review the merits, was decided on March 9, 2021. A copy of that decision appears at Appendix A.

JURISDICTION.

The Arizona Supreme Court denied a timely petition for review on June 30, 2021. A copy of the order denying review appears at Appendix B. Pursuant to the Court's order dated July 19, 2021, granting 150 days within which to file a petition for cases that were final before July 19, 2021, the current due date for the filing of this petition is November 29, 2021. S.Ct.R. 13.1.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This is an interlocutory appeal. While piecemeal litigation is not favored, Martinson's claim stems from a pre-trial motion to dismiss the indictment on Fifth Amendment

Double Jeopardy grounds. Therefore, it presents a recognized exception to the disfavor for piecemeal litigation.

In *Abney v. United States*, 431 U.S. 651 (1977), the Court permitted interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds. Discussing the relevant factors, the Court recognized “the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.” *Id.* at 660. Further, “[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.” *Id.* at 662.

The *Abney* Court found that while the pretrial denial of a motion to dismiss an indictment on double jeopardy grounds is obviously not “final” in the sense that it terminates the criminal proceedings, nevertheless, 28 U.S.C. § 1291 does not bar an immediate appeal from such a pretrial order. *Id.* at 657.

Such pretrial orders fall within the so-called “collateral order” exception to the final-judgment rule first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and are thus “final decisions” within the meaning of § 1291.

Id.

The *Cohen* Court observed that a “final decision” was to be given a “practical rather than a technical construction.” 337 U.S. at 546. The Court identified three factors to determine if the decision was final. First, the District Court’s order had fully disposed of the question of the state security statute’s applicability in federal court; in no sense, did it leave the matter “open, unfinished or inconclusive.” *Id.* Second, the decision was not simply a “step toward final disposition of the merits of the case (which would) be merged in final judgment”; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.* And, finally, the decision had involved an important right which would be “lost, probably irreparably,” if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.* Utilizing the *Cohen* factors, the *Abney* Court held that pretrial orders rejecting claims of former jeopardy, were “final decisions” and thus satisfy the jurisdictional prerequisites of § 1291. 431 U.S. at 662.

Here, all three of the *Cohen* factors are present. The Arizona court of appeal’s decision left nothing “open, unfinished or inconclusive.” Next, the decision was not a step toward final disposition of the case, but rather, is an issue collateral to the cause of action asserted. Lastly, the decision involved an important right which would be “lost, probably irreparably,” if review had to await

final judgment. To be effective, appellate review in this special, limited setting must be immediate.

As a result, the Arizona court's decision here constitutes a final decision. Therefore, jurisdiction is proper under § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution provides in relevant part, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V.

STATEMENT OF THE CASE.

Jeffrey Martinson is facing a second trial for the premeditated/felony murder and child abuse of his five-year old son. Martinson was convicted at trial, granted a new trial based on juror misconduct and improper expert opinion, and then had his case dismissed with prejudice because of bad faith prosecutorial misconduct.

In 2004, Martinson was indicted for one count of felony murder and one count of child abuse. He was convicted at trial on November 14, 2011. However, on March 27, 2012, the trial court granted Martinson's motion for mistrial based on juror misconduct and the admission of improper expert opinion testimony.

Appendix C.

In June 2012, the State obtained a new indictment. However, the trial court dismissed that indictment as having been obtained while the 2004 indictment was still pending in violation of the rules of criminal procedure. The State filed a special action.

The court of appeals granted relief finding the State had established good cause for dismissing the 2004 indictment. The court left open whether the State's attempt to dismiss the 2004 indictment was done in bad faith. Appendix D, *State ex rel. Montgomery v. Duncan*, No. 1 CA-SA 12- 0217 (mem. decision).

On remand, the trial court conducted a hearing on whether the State had acted in bad faith in attempting to dismiss the 2004 indictment. On November 19, 2013, the trial court dismissed the 2004 indictment with prejudice based on bad faith prosecutorial misconduct. Appendix E.

The State appealed. In 2016, the court of appeals reversed the trial court's dismissal with prejudice finding "the State was entitled to pursue a theory that Martinson committed the predicate felony of child abuse with intent to kill J.E.M., not merely injure him." Appendix F, *State v. Martinson*, 241 Ariz. 93, 99, 384 P.3d 307, 313 (App. 2016). The court found the superior court's contrary ruling was legally erroneous. *Id.* The court vacated the order dismissing the 2004 indictment with prejudice and remanded with instructions to grant the State's motion to dismiss the indictment without prejudice. *Id.* at 102, ¶ 44.

Reindicted in 2018, Martinson moved to dismiss for the violation of his rights under the Double Jeopardy Clauses of both the U.S. and Arizona Constitutions. Appendix G. On October 16, 2020, the trial court denied Martinson's motion. Appendix H. Martinson filed a special action, which was denied on March 9, 2021. Appendix A. On June 30, 2021, the Arizona Supreme Court denied Review. Appendix B.

REASONS FOR GRANTING THE PETITION.

I. The Arizona Court of Appeals Decision That the Trial Court's Dismissal with Prejudice For Bad Faith Prosecutorial Misconduct was Merely a Procedural Hearing Conflicts with This Court's Settled Precedent.

A. Double Jeopardy Doctrine Regarding Dismissals.

The Double Jeopardy Clause of the Fifth Amendment commands that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

When, such as here, a defendant persuades the court to declare a mistrial, jeopardy continues and retrial is generally allowed. *Evans v. Michigan*, 568 U.S. 313, 326 (2013), citing *United States v. Dinitz*, 424 U.S. 600 (1976). Yet, jeopardy continues only so long as it is not terminated. *Richardson v. United States*, 468 U.S. 317, 325 (1984).

Therefore, when the trial court here granted the new trial in 2012 based on the improper admission of expert opinion evidence and juror misconduct, jeopardy continued, and retrial was not barred. However, when the trial court later dismissed the case with prejudice on November 19, 2013, based on bad faith prosecutorial misconduct, that order terminated jeopardy. Appendix E.

B. The Trial Court Intended the Dismissal to Bar Further Prosecution.

In determining the preclusive effect of the trial court's dismissal, the critical question is whether the order contemplated an end to all prosecution of the defendant for the offense charged. *Lee v. United States*, 432 U.S. 23, 30 (1977). A mistrial ruling invariably rests on grounds consistent with re-prosecution, *United States v. Jorn*, 400 U.S. 470, 476 (1976), while a dismissal may or may not do so. *Lee*, at 30. It is the circumstances surrounding termination of the first trial that

dictate whether the double jeopardy clause bars retrial. *Oregon v. Kennedy*, 456 U.S. 667, 678-679 (1982).

Here, while the grant of mistrial in 2012 contemplated a re-prosecution, the trial court's dismissal with prejudice in 2013 was intended to end all prosecution of Martinson for the offenses charged. The trial court's dismissal order thoroughly and scrupulously made detailed findings of facts, and conclusions. Appendix E.

After considering all possible remedies, the trial court ultimately concluded that the prosecutors' misconduct was so egregious that double jeopardy protected Martinson from the State's multiple attempts to convict him. *Id.* at 28. The court found that the prosecutors' misconduct prejudicially impacted the integrity and fundamental fairness of the proceedings and required imposition of the ultimate sanction—dismissal with prejudice. *Id.* Consequently, the trial court intended the case be dismissed with preclusive effect.

C. The Trial Court's Order Dismissing This Case With Prejudice Constituted An Acquittal Under These Circumstances.

The trial court's dismissal here meets the test for the functional equivalent of an acquittal as expressed in *United States v. Scott*, 437 U.S. 82 (1978). In *Scott*, the defendant moved once before trial and twice during trial to dismiss the

indictment based on pre-indictment delay. At the close of all evidence, prior to conviction or acquittal, the trial court granted the defendant's motion. *Id.* at 84. The Government appealed.

The *Scott* Court determined that where a defendant successfully seeks to *avoid his trial prior to its conclusion by a motion for mistrial*, the Double Jeopardy Clause is not offended by a second prosecution. *Id.* at 93. (Emphasis added.) Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. *Id.* “The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.” [sic]. *Id.* at 93-94, quoting *United States v. Dinitz*, 424 U.S. at 609. The Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. *Scott*, at 99.

With these principles in mind, the *Scott* Court held:

A defendant is acquitted only when “the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.”

Id. at 97, quoting *United States v. Martin Linen Supply Company*, 430 U.S. 564, 571 (1977). This principle was later reiterated in *Evans v. Michigan*, 568 U.S. 313 (2013) where the Court observed:

Thus an “acquittal” includes “a ruling by the court that the evidence is insufficient to convict,” a “factual finding [that] necessarily establish[es] the criminal defendant’s lack of criminal culpability,” and any other “rulin[g] which relate[s] to the ultimate question of guilt or innocence.”

Id. at 319, quoting *Scott*, at 91, 98, and n. 11.

D. The Trial Court’s Dismissal Resolved Factual Issues in Martinson’s Favor Thus Functioning as an Acquittal Barring Further Prosecution Under Double Jeopardy Principles.

Here, the trial court’s dismissal resolved issues related to the ultimate question of guilt or innocence. The court dismissed the case with prejudice based on bad faith prosecutorial misconduct. Appendix E. The court found that the prosecutors’ actions violated the court’s pretrial order precluding the State from introducing evidence of intent to kill as the murder charge was based on felony murder. In doing so, the court resolved factual elements in Martinson’s favor. For instance, the trial judge found:

- On August 25-26, 2011, prosecutors introduced Martinson's statements to police that were designed to provoke an admission that Martinson intended to kill his son. The detective asked Martinson:
 - ❖ Did you do this because you hate him?
 - ❖ Is this something you planned out?
 - ❖ So, you don't have any remorse for killing your son at all?
 - ❖ Why did you kill your little boy?
 - ❖ You killed him and you know it.

Appendix E at 12.

- The State introduced plastic garbage bags found in the laundry room and Martinson's bedroom. DNA analysis on the bags did not connect JEM to the evidence. Nonetheless, the State asked questions for the sole purpose of having jurors draw the improper inference that Martinson intentionally asphyxiated JEM.

Id.

- Along with introduction of the garbage bag evidence, the State attempted to bolster its intent to kill theory with evidence that JEM had a small abrasion on his upper lip. The State used the medical examiner to advance its intent to kill theory.

Id.

- The State argued that the lip abrasion supported its theory that Martinson had suffocated JEM. The court found this evidence inadmissible because 1) the medical examiner acknowledged and the State was aware that he lacked the proper foundation to opine that the cause of death was smothering or suffocation, and 2) the evidence violated the trial court's order prohibiting evidence supporting an intent to kill.

Id. at 13.

- At the same hearing the prosecutors heard defense counsel question the medical examiner concerning suffocation. The medical examiner acknowledged that he did not have enough information to conclude JEM had been suffocated. He admitted that was the importance of the garbage bag and lip abrasion evidence.

Id.

- The next day, purportedly asking the medical examiner foundational questions, the prosecutors elicited that he reviewed a police report that said, “the decedent may have been overdosed or suffocated by his father in the homicide attempt.” The court found this evidence, coyly disguised as foundational, was intended to draw an inference of intent to kill.

Id.

- The medical examiner, not available for testimony on consecutive days, returned six days later and opined the cause of death was “acute carisoprodol toxicity.”

Id.

- Notwithstanding the court’s ruling forbidding intent to kill evidence and the medical examiner’s testimony that he had no foundation to conclude JEM was suffocated or asphyxiated, the prosecutors elicited the following testimony:

Q: Were there any other pathological diagnoses that you couldn’t rule out as being a component?

A: Asphyxia due to smothering or suffocation, I cannot rule these two out.

Q: And what about that and what couldn’t—what indications did you have that you couldn’t rule that out?

A: The presence of abrasion on inner surface of upper lip and suspicious circumstance.

Q: Explain to me why you can’t rule out a component of asphyxiation or smothering when you’ve got a drug, a possible drug overdose situation?

...

Q: Are the findings, the findings—how are the findings for a drug overdose similar to what you might see if there was a component of asphyxia or suffocation?

Id. at 14.

When the lead detective testified, the prosecutors elicited testimony about text messages that Martinson had exchanged with a former friend that read, “we’ll miss you.” The prosecutors then elicited testimony from the detective concerning the former friend’s interpretation of the text. The trial court had expressly precluded any testimony by the friend or the detective regarding Martinson’s intent. The only purpose of this testimony was to show evidence of intent to kill.

Id.

- The lead detective, who knew or should have known the limitations the court placed on the evidence, instead worked in concert with the prosecutors in their win-by-any-means strategy. On direct examination the prosecutor asked:

Q: At that point in time [at the scene], did you already have an opinion on what was going on in the inside of that house.

A: I kind of suspected what might have occurred.

The opinion testimony was not only suggestive, but it was also irrelevant. It also prompted an unpredictable and improper outburst on cross examination.

Asked whether her suspicions precipitated her failure to process the scene more carefully, instead of answering yes or no, the detective advanced the State's agenda, responding:

Q: In fact, you made up your mind before the report came back for carisoprodol. You've told us that already.

A: **Yes, I had decided he had been murdered.**

Id. at 15. (Emphasis in the original.)

- When Martinson called an expert witness to testify about sudden trauma's impact on memory and suicidal ideation arising from a parent's loss of a child, the prosecutors again shifted the focus on intent to kill. Martinson had testified that JEM drowned in the bathtub and he responded by attempting suicide. The prosecutors asked the doctor about intentional "murder" theories involving the attempted suicide.

Id.

- When the defense introduced evidence of its grief expert, Dr. Wortman, the prosecutors attempted to elicit testimony that Dr. Wortman was currently writing a book about *murdered children*:

Q: Now I think you mentioned on direct you don't usually do these types[s] of cases, but you happened to be writing a book about murdered children?

A: Oh, no. I'm not writing a book about murdered children. I'm writing about traumatic bereavement, and it is designed to help therapists focus in and do a better job then [sic] they may do now in treating somebody who had experienced sudden traumatic loss.

...

Q: Now, I want to talk about grief response. I think you mentioned that there are various factors that will impact on the level of somebody's grief response, if I understand that correctly?

A: Yes.

Q: Okay. In kind of broad categories, its family relationships, whether there was an only child, whether there was a young child, what kind of investment there's been in that child and **whether the child was murdered** as opposed to died from a long illness?

...

Q: Okay. And there are no studies regarding grief response in a murder suicide or murder attempted suicide situation?

A: There are studies on those, but not on grief response.

Q: And that's what I'm asking specifically, because you're talking about grief response, so there are no studies regarding grief response as it relates to the murder suicide or murder attempted suicide question?

A: I don't believe so.

(Id. at 15-16.) (Emphasis in the original.)

- The State was fully aware that the only relevant grief response to “murder” would have been felony murder. A proper inquiry would have focused on the Defendant’s grief response to *intent-to-injure* the victim under circumstances likely to cause serious physical injury or death---not the Defendant’s *intent to kill* the victim. Indeed, during a pretrial interview the prosecutor explained the difference between felony murder and intentional murder to Dr. Wortman. Yet, in front of the jury, the Prosecutors were sure to leave out that critical distinction. This omission left the jury with the impression that Dr. Wortman’s answers referred to intentional murder thereby encouraging the jury to view intent to kill as a proper basis upon which to convict the Defendant. This sequence of questions prompted another admonition from the Court.

Id. at 16-17. (Emphasis in the original.)

The court’s findings thus related specifically to the prosecutors’ bad faith introduction of evidence of Martinson’s intent to kill in direct violation of the court’s order not to introduce such evidence. In finding the prosecutors committed misconduct by violating her order, the trial judge resolved factual elements of

intent in Martinson's favor. Consequently, the court's dismissal with prejudice functioned as an acquittal barring further prosecution under the Fifth Amendment's Double Jeopardy Clause. Therefore, retrial is now barred.

II. The Arizona Court of Appeals Decision Conflicts With This Court's Established Double Jeopardy Precedent.

Upon re-indictment in 2018, Martinson filed a motion to dismiss based on a double jeopardy violation. In denying Martinson's motion, the trial court found that double jeopardy principles did not preclude the prosecution under the current indictment. Appendix H, at 9. The court found that the Double Jeopardy Clause "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." (Id. at 7, quoting *Tibbs v. Florida*, 457 U.S. 31 (1982), quoting *United States v. Ball*, 163 U.S. 662, 672 (1896)). However, Martinson's case was not reversed on appeal.

Instead, when the first trial court granted the new trial in 2012 based on the improper admission of expert opinion evidence and juror misconduct, jeopardy continued, and retrial was not barred. A mistrial followed by a grant of retrial allows jeopardy to continue. See, *United States v. Dinitz*, 424 U.S. at 606 (A mistrial negates the defendant's "valued right to have his trial completed by a particular tribunal.") However, jeopardy continues only so long as it is not

terminated. *Richardson v. United States*, 468 U.S. 317, 325 (1984). Thus, when the trial court later dismissed the case with prejudice in 2013 based on bad faith prosecutorial misconduct, that order terminated jeopardy.

On special action to the Arizona Court of Appeals, in denying relief, the court acknowledged that retrial of a defendant is prohibited where some event, such as an acquittal, terminates jeopardy. Appendix A, at ¶ 9. However, the court disagreed that the dismissal here terminated jeopardy and functioned as an acquittal. (Id. at ¶ 11.) Under the court's reasoning, because the State appealed the dismissal and was granted relief, it was free to re-file charges against Martinson. (Id. at ¶ 10.)

This view is not sustainable. The dismissal terminated jeopardy and functioned as an acquittal. Thus, appeal by the State was, in itself, prohibited as also constituting a violation of double jeopardy. *Evans v. Michigan*, 568 U.S. 313 at 324-325. (See, section IV, below.)

Therefore, the court's view is mistaken, and inconsistent with this Court's settled precedent. The trial court dismissed the case with prejudice. It is the substance of a court's decision, not the label that controls the analysis in this context. *Evans*, 568 U.S. at 320. The dismissal resolved factual elements in Martinson's favor and was intended to terminate all proceedings against him.

Next, the court of appeals found that the dismissal with prejudice was not substantive, but rather, was procedural. Appendix A, at ¶ 12. This finding is also inconsistent with established precedent, thus constituting clear error.

The court acknowledged the distinction between substantive terminations, which function as acquittals, and procedural terminations, which normally do not bar retrial under double jeopardy principles. *Id.*, at ¶ 11. The court observed:

[A]n acquittal [encompasses] any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense. Thus an “acquittal” includes “a ruling by the court that the evidence is insufficient to convict,” a “factual finding [that] necessarily establish[es] the criminal defendant’s lack of criminal culpability,” and any other “ruling which relate[s] to the ultimate question of guilt or innocence.”

(*Id.* quoting *Evans*, 568 U.S. 313 at 318-19.)

Yet, the court of appeals found that the dismissal here “did not did not speak on Martinson’s guilt or innocence....” Appendix A, at ¶ 11. Further, the dismissal “did not resolve the issue of intent or any other elements of the charges against him.” (*Id.*) This finding is factually inaccurate and misapprehends established double jeopardy principles.

This case falls under the category of “any other ruling which relate[s] to the ultimate question of guilt or innocence.” *Evans*, at 319, quoting *United States v. Scott*, 437 U.S. 82, 91, 98, n. 11 (1978). The *Evans* Court noted the distinction

between procedural rulings, which lead to dismissals or mistrials on a basis unrelated to factual guilt or innocence, and substantive rulings that conclude proceedings absolutely, and thus raise significant double jeopardy concerns. *Id.*

In order to function as an acquittal, the ruling of the trial, whatever its label, need only represent a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged. *Scott*, 437 U.S. at 97.

Hence, contrary to the decision of the court of appeals, the dismissal resolved factual elements in Martinson's favor. Moreover, the hearing was not merely procedural. The Arizona cases on prosecutorial misconduct have said that to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that “(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.” *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004).

Utilizing the Arizona test, the trial court here found misconduct was present, and that there was a reasonable likelihood that it could have affected the jury's verdict, thus denying Martinson a fair trial. Appendix E. Therefore, the dismissal, after hearing, represents a substantive proceeding that resolved factual elements in Martinson's favor. It was intended to conclude the proceedings absolutely, and preclude further prosecution against Martinson. Consequently, the court of appeals

finding that the dismissal did not resolve the issue of intent or any other elements of the charges against Martinson is plainly erroneous.

III. The Trial Court's Earlier Grant of New Trial Also Resolved a Factual Element in Martinson's Favor.

The original trial court not only resolved factual elements in Martinson's favor when it dismissed the case for prosecutorial misconduct, it also resolved a factual element in Martinson's favor when it granted the mistrial in 2012. The court granted the mistrial on two bases: 1) juror misconduct, and 2) an improper expert opinion as to the manner of death. Appendix C. The court found the medical examiner's opinion was not based on his medical examination of the body but rather he "parroted" the conclusions of the law enforcement investigation in violation of *State v. Sosnowicz*, 229 Ariz. 90, 270 P.3d 917 (App. 2012). Such an opinion amounted to an assessment of the credibility and investigatory acumen of the police. 229 Ariz. at 96, 270 P.3d at 923. Thus, the trial court's finding also resolved the factual element of *mens rea*, in Martinson's favor. *Cf., Mitrish v. Lancaster*, 569 U.S. 351 (2013) (diminished capacity as a defense negating the *mens rea* element of first degree murder.)

In *U.S. v. Black Lance*, 454 F.3d 922, 924 (8th Cir. 2006), the court found that the resolution of the some or all the factual and legal elements need not occur

at the same time as the ruling in the defendant's favor. The court determined that *Fong Foo [v. United States*, 369 U.S. 141 (1962),] establishes that the protection of the Double Jeopardy Clause turns on *whether* the judge or jury has resolved one or more factual elements of the government's case, not *when* that resolution occurs. (Emphasis added.) This principle was reinforced by the Court's subsequent decisions in *Martin Linen Supply Company*, 430 U.S. 564, at 572-576 and *Smith v. Massachusetts*, 543 U.S. 462, 473 (2005). *Black Lance*, at 924.

As a result, here, when the trial court granted Martinson's motion for new trial, it resolved the factual element of intent against the State when it found that the State had improperly admitted expert evidence as to the manner of death. Therefore, when the trial court later dismissed the case with prejudice, the court's prior ruling resolving the issue of intent against the State, also served as a factual finding in Martinson's favor supporting the dismissal as required by *Scott*.

IV. The State's Appeal Resulting in the Opinion in *State v. Martinson*, 241 Ariz. 93, 384 P.3d 307 (App. 2016), Was Improvidently Granted.

By permitting the State to appeal the trial court's dismissal with prejudice, the Arizona Court of Appeals violated Martinson's protections against double jeopardy. In *Scott*, the Court observed that to try a defendant again upon the

merits, even in an appellate court, is to put him a second time in jeopardy for the same offense. *Scott*, at 89-90, citing *Kepner v. United States*, 195 U.S. 100, 133 (1904).

Martinson was convicted at trial, and then granted a retrial, which permitted jeopardy to continue. However, the trial court's later dismissal with prejudice where factual elements were resolved in Martinson's favor terminated jeopardy and constituted the functional equivalent of an acquittal, barring not only retrial, but also appeal by the State.

Government appeals in criminal cases are exceptional and are not favored by the courts. *Carroll v. United States*, 354 U.S. 394, 400 (1957). Such appeals must be based on express statutory authority, as the government had no right of appeal at common law. *United States v. Sanges*, 144 U.S. 310 (1892).

In *United States v. Wilson*, 420 U.S. 332 (1975), the Court found that the primary purpose of the Double Jeopardy Clause was to prevent successive trials, and not Government appeals *per se*. Thus, the Court held that, where an indictment is dismissed after a guilty verdict is rendered, the Double Jeopardy Clause did not bar an appeal since the verdict could simply be reinstated without a new trial if the Government were successful. *Id.*, at 345.

Here, the trial judge contemplated a definitive end to the case. The trial court's dismissal with prejudice resolved factual elements in Martinson's favor. Hence, the trial court's dismissal terminated the jeopardy and intended the order to prohibit further prosecution. As such, the dismissal terminated jeopardy and functioned as the equivalent of an acquittal for double jeopardy purposes.

In deciding whether a second trial is permissible, one must immediately confront the fact that petitioner was acquitted on the indictment. That “[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution,” has been described as “the most fundamental rule in the history of double jeopardy jurisprudence.” *Martin Linen Supply Co.*, 430 U.S. at 571, quoting *United States v. Ball*, 163 U.S. at 671. The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is “based upon an egregiously erroneous foundation.” *Fong Foo*, 369 U.S. at 143. See also, *Green v. United States*, 355 U.S. 184, 188 (1957).

In *Fong Foo* the Court of Appeals held that the District Court had erred in various rulings and lacked power to direct a verdict of acquittal before the Government rested its case. The Court accepted the Court of Appeals' holding that the District Court had erred, nevertheless it found that the Double Jeopardy Clause was “violated when the Court of Appeals set aside the judgment of acquittal and

directed that petitioners be tried again for the same offense.” 369 U.S., at 143. Thus, 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. Accord, *Sanabria v. United States*, 437 U.S. 54, 68–69 (1978).

Because the trial court’s termination functioned as an acquittal, the State’s appeal should not have been permitted, and the *Martinson* court’s findings are invalid. Even though the court felt that the trial court’s findings on prosecutorial misconduct did not warrant dismissal, the findings have no significance, as even if the trial court’s analysis was incorrect, the acquittal may not be reviewed. There is no exception permitting retrial once the defendant has been acquitted, no matter how “egregiously erroneous the legal rulings leading to that judgment might be.” *Fong Foo*, 369 U.S., at 143.

The State’s appeal was improvidently granted because the relief would necessitate another trial, or, at least, “further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged . . .” *Martin Linen Supply Company*, 430 U.S. at 570. Because a second prosecution after termination of the first prosecution in *Martinson*’s favor is precisely what is prohibited by the Double Jeopardy Clause, this case must properly be dismissed.

V. Conclusion.

“The guarantee against double jeopardy is fundamental to the American scheme of justice, designed to ensure 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.

Duncan v. Tennessee, 405 U.S. 127, 130 (1972) (internal quotations omitted).

In *Tibbs*, the Court observed that the Double Jeopardy Clause “prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction.” 457 U.S. at 41. In *Ashe v. Swenson*, 397 U.S. 436, 447 (1970), the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, “what every good attorney would do—he refined his presentation in light of the turn of events at the first trial.”

Here, honing their presentation is precisely what the prosecutors have been able to do. Even though the trial court dismissed the case partially because of the prosecutor’s misconduct in attempting to have both the trial judge and defense counsel removed from the case (Appendix E), the State has now succeeded in doing just that. Additionally, the State’s new indictment has expanded its filing to

include a premeditated murder count based on the *Martinson* court's approval of the intent to kill theory prohibited by the first trial judge.

Moreover, at his first trial, the county medical examiner testified the cause of death was due to carisoprodol toxicity. However, *Martinson* testified that he found his son submerged in the bathtub. Now, for the upcoming trial, the State retained a medical examiner who will testify that *Martinson* intentionally drowned his son. Thus, by obtaining a second trial, the State has been able to effectively sharpen and broaden its theories and presentation, now no longer limited to carisoprodol toxicity as the cause of death.

The case against *Martinson* was dismissed with prejudice based on bad faith prosecutorial misconduct. In doing so, the trial court resolved factual elements in *Martinson*'s favor. The court also earlier resolved the factual element of manner of death against the State when it granted *Martinson*'s motion for a new trial. In these circumstances, the State's appeal from the dismissal was impermissible, as reversal would necessitate another trial, which it did. Moreover, the appeal itself where the court discussed and decided the merits of the trial court's factual findings placed *Martinson* in jeopardy a second time for the same offense.

This case involves a significant double jeopardy violation. Accepting jurisdiction and barring a second trial has the dual effect of correcting the injustice

the Arizona courts have left uncorrected, as well as providing guidance to courts as to the effect of dismissals in double jeopardy jurisprudence.

Martinson prays this Court grant his petition, issue a writ of certiorari, and direct the prosecution against Martinson be dismissed as a violation of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.

Respectfully submitted,

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