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

# APPENDIX

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# APPENDIX A

IN THE

# ARIZONA COURT OF APPEALS

**DIVISION ONE**

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JEFFREY R. MARTINSON, *Petitioner,*

*v.*

THE HONORABLE JAY ADLEMAN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge,*

STATE OF ARIZONA ex rel. ALLISTER ADEL, Maricopa County Attorney, *Real Party in Interest.*

No. 1 CA-SA 21-0017
FILED 3-9-2021

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Petition for Special Action from the Superior Court in Maricopa County
No. CR2018-002279-001
The Honorable Jay R. Adleman, Judge

**JURISDICTION ACCEPTED; RELIEF DENIED**

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COUNSEL

Varcoe Law Firm, PLLC, Phoenix
By Robyn Greenberg Varcoe
*Co-Counsel for Petitioner*

Willmott & Associates, PLC, Phoenix
By Jennifer L. Willmott
*Co-Counsel for Petitioner*

Maricopa County Attorney's Office, Phoenix
By Michael A. Minicozzi, Joseph Hinrichsen
*Counsel for Real Party in Interest*

Arizona Voice for Crime Victims
By Colleen Clase, Thomas E. Lordan
*Counsel for Crime Victims*

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**MEMORANDUM DECISION**

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Randall M. Howe joined.

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**C R U Z**, Judge:

**¶1** In this special action petition, Jeffrey R. Martinson requests this court review the decision of the superior court denying his motion to dismiss for double jeopardy violations. For the following reasons, we accept jurisdiction and deny relief.

**JURISDICTION**

**¶2** While our acceptance of special action jurisdiction is highly discretionary, "a petition for special action is the appropriate vehicle for a defendant to obtain judicial appellate review of an interlocutory double jeopardy claim." *State v. Moody*, 208 Ariz. 424, 438, ¶ 22 (2004) (quoting *Nalbandian v. Superior Court*, 163 Ariz. 126, 130 (App. 1989)). Accordingly, we accept jurisdiction of Martinson's interlocutory double jeopardy claim.

**FACTUAL AND PROCEDURAL HISTORY**

**¶3** In 2004, a grand jury returned an indictment charging Martinson with first degree felony murder and child abuse of his son. Trial began in 2011, and the jury returned guilty verdicts as to both charges. Martinson moved for a new trial, and in 2012, the superior court granted his motion for new trial based on juror misconduct and error in admitting expert testimony. In ordering the new trial, the court specifically rejected Martinson's claims of prosecutorial misconduct.

**¶4** In 2012, the State obtained a new indictment against Martinson, which, in addition to felony murder, alleged premeditated murder. The State moved to dismiss the 2004 indictment without prejudice.

Martinson moved to dismiss the 2012 indictment on the basis that it could not properly be filed before dismissal of the 2004 indictment. The superior court granted Martinson's motion and denied the State's motion, and the State filed a special action petition challenging the denial. This court accepted jurisdiction and granted relief, finding the State had established good cause for dismissing the 2004 indictment without prejudice, but we did not decide whether the State's attempt to dismiss the 2004 indictment was made in bad faith. *State ex rel. Montgomery v. Duncan*, No. 1 CA-SA 12-0217, 2012 WL 5867379, at *5, ¶¶ 20-22 (Ariz. App. Nov. 20, 2012) (mem. decision) ("*Martinson I*").

¶5 On remand, the superior court ruled the State had engaged in prosecutorial misconduct and bad faith, and it dismissed the 2004 indictment with prejudice. The State appealed, and in *State v. Martinson*, 241 Ariz. 93 (App. 2016) ("*Martinson II*"), this court vacated the superior court's order dismissing the 2004 indictment with prejudice and ordered the superior court to dismiss the indictment without prejudice. *Id.* at 102, ¶ 44.

¶6 In 2018, the State initiated grand jury proceedings, and the grand jury returned an indictment charging Martinson with first degree murder and child abuse. The superior court did not immediately dismiss the 2004 indictment and instead scheduled hearings and discovery to consider a motion Martinson filed to disqualify the entire prosecutorial agency from the matter. The State filed a special action, alleging the superior court was not following the mandate of *Martinson II*. *State ex rel. Montgomery v. Duncan*, No. 1 CA-SA 18-0284 (Ariz. App. Jan. 9, 2019) (order) ("*Martinson III*"). This court found the superior court was violating the remand in *Martinson II*, and it clarified that its prior orders had "vacated the superior court's findings regarding prosecutorial misconduct and bad faith," and effectively recognized that the prosecution could proceed with the 2018 indictment. *Id.* at *2, ¶¶ 2-3.

¶7 After the 2004 indictment was dismissed without prejudice and the 2018 indictment was obtained, Martinson challenged the grand jury proceedings, and he filed a motion to remand to the grand jury for a new finding of probable cause, which the superior court denied. Martinson then filed a special action, alleging the proceedings were deficient due to the State's failure to (1) inform Martinson it was returning to the grand jury to seek a new indictment, (2) provide clearly exculpatory evidence, and (3) adequately instruct the grand jury on the law. This court accepted jurisdiction but denied relief, finding the proceedings complied with the

law. *Martinson v. Adleman*, No. 1 CA-SA 19-0295 (Ariz. App. Jan. 21, 2020) (order) ("*Martinson IV*").

¶8 In 2020, Martinson filed a motion to dismiss the 2018 indictment on double jeopardy grounds, which the superior court denied. Martinson filed this special action, seeking review of that ruling.

## DISCUSSION

I. A Second Trial is Not Barred by the Double Jeopardy Clause Due to Multiple Prosecutions

¶9 A defendant is protected from being tried twice for the same offense under the double jeopardy clause of the Fifth Amendment and Article 2, Section 10, of the Arizona Constitution. *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 27 (2002). Jeopardy attaches once the jury is impaneled and sworn, and generally once it attaches the defendant may not be subject to a second trial for the same offense. *State v. Espinoza*, 233 Ariz. 176, 179, ¶ 6 (App. 2013). Retrial is prohibited "only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* (internal quotation marks and citations omitted). But "[w]hen no terminating event has occurred, the jeopardy continues unabated." *Id.* (internal quotation marks and citation omitted). "Whether double jeopardy bars retrial is a question of law, which we review de novo." *Moody*, 208 Ariz. at 437, ¶ 18.

¶10 Although Martinson was tried and convicted in 2011, the double jeopardy clause does not ordinarily bar retrial when a court grants a mistrial on the defendant's motion. *See State v. Wilson*, 134 Ariz. 551, 554 (App. 1982). Martinson concedes that "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." Martinson does not object to his retrial based on the superior court's grant of a new trial in 2012. Instead, Martinson argues the superior court's dismissal of the 2004 indictment with prejudice bars retrial under the double jeopardy clause, because the order "intended to end all prosecution of Martinson for the offense charged." However, the State appealed the superior court's dismissal, it was subsequently vacated by this court, and we remanded with instructions for the superior court to dismiss the State's indictment *without* prejudice. *See Martinson II*, 241 Ariz. at 102, ¶ 44; *see also Nielson v. Patterson*, 204 Ariz. 530, 533, ¶ 12 (2003) ("A vacated judgment lacks force or effect and places parties in the position they occupied before entry of the judgment."). The State was free to refile the

dismissed charges following a dismissal without prejudice. *See State v. Schneider*, 135 Ariz. 387, 389 (App. 1982).

**¶11** Martinson argues the State's appeal of the dismissal with prejudice was improvidently granted and this court's findings in *Martinson II* are invalid, because the dismissal of the 2004 indictment functioned as an acquittal and was therefore unappealable. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("[A] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.") (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)). We disagree with Martinson's characterization of the superior court's dismissal.

> [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."

*Evans v. Michigan*, 568 U.S. 313, 318-19 (2013) (internal citations omitted). The dismissal did not speak on Martinson's guilt or innocence, nor did it establish there was insufficient evidence to convict him. Contrary to Martinson's claims, the order did not resolve the issue of intent or any other elements of the charges against him.

**¶12** The superior court's order held that prosecutorial misconduct justified dismissal, which functioned as a procedural dismissal rather than a merits-related ruling. "Procedural dismissals include rulings on questions that are unrelated to factual guilt or innocence, but which serve other purposes, including a legal judgment that a defendant, although criminally culpable, may not be punished because of some problem." *Id.* (internal quotation marks and citations omitted). And "termination of the proceedings against [a defendant] on a basis unrelated to factual guilt or innocence of the offense of which he is accused," does not bar retrial under the double jeopardy clause. *Id.* at 319 (internal quotation marks and citation omitted).

**¶13** Martinson alternatively contends that even if the court's dismissal did not resolve factual issues in his favor, factual elements were previously resolved when the court granted the motion for retrial in 2012

and the jury convicted him pursuant to the 2004 indictment. Martinson claims that "[i]t is not necessary that resolution of the factual elements occur at the same time as the dismissal," and so once the superior court dismissed the case with prejudice, jeopardy was terminated. We find this argument to be without merit. Once Martinson's conviction was reversed, "the original conviction has been nullified and the slate wiped clean." *Bullington v. Missouri*, 451 U.S. 430, 442 (1981) (internal quotation marks and citation omitted). Any prior resolution of issues is unrelated to the new proceedings based on the 2018 indictment. And again, the dismissal with prejudice was vacated and it could not terminate jeopardy; vacating the order dismissing the 2004 indictment placed the parties in the same position they occupied before entry of the dismissal with prejudice. *See Nielson*, 204 Ariz. at 533, ¶ 12.

**¶14** Martinson was tried and convicted for the 2004 indictment. But Martinson successfully moved for a new trial in 2012, at which point he "agreed to forego his right to a final determination by the first tribunal." *Minnitt*, 203 Ariz. at 438, ¶ 28. Although the 2004 indictment was dismissed with prejudice by the superior court, that order was subsequently vacated. Since 2011, there has been no merits-based ruling on the charges against Martinson, and there has been no event that has brought finality to the case and terminated jeopardy. The court did not err in finding that a second trial is not barred by the double jeopardy clause.

II. A Second Trial is Not Barred by the Double Jeopardy Clause Due to Bad Faith and Pervasive Prosecutorial Misconduct

**¶15** Martinson also claims that prosecutorial misconduct bars retrial under the double jeopardy clause. This issue is normally presented when a defendant moves to dismiss the second prosecution on double jeopardy grounds because he claims the prosecution intentionally forced a mistrial of the original prosecution. *Moody*, 208 Ariz. at 437, ¶¶ 19-20; *see also Pool v. Superior Court*, 139 Ariz. 98, 105-09 (1984). When a prosecutor knowingly engages in "improper and prejudicial" conduct "with indifference to a significant resulting danger of mistrial or reversal," jeopardy will attach and bar retrial. *Pool*, 139 Ariz. at 108-09. Before jeopardy will bar a retrial after a mistrial, the court must find that the prosecutor's conduct was intentional conduct that caused prejudice to the defendant and "cannot be cured by means short of a mistrial." *Id.*

**¶16** Here, however, Martinson raises allegations of prosecutorial misconduct that occurred in grand jury proceedings,[1] and Martinson cannot argue that the prosecutors forced mistrial and have acted "with indifference to a significant resulting danger of mistrial or reversal," because the second trial has not yet begun. It is too premature to make a ruling on double jeopardy grounds regarding alleged prosecutorial misconduct on pretrial matters and proceedings.

**¶17** Martinson argues we must also look at the prosecutorial misconduct that occurred in the trial of the 2004 indictment and prior proceedings to consider the "cumulative effect." But Martinson was granted a new trial in 2012 not because of prosecutorial misconduct, but due to other trial errors. This court has already addressed Martinson's claims of misconduct that took place during trial, but we found Martinson was unable to prove prejudice. *Martinson II*, 241 Ariz. at 99-100, ¶¶ 27-30. Further, after Martinson was granted a new trial, "the slate was wiped clean," and any allegations of misconduct prior to the issuing of the new indictment in 2018 involved different prosecutors and different, independent proceedings that are unrelated for double jeopardy purposes. To the extent Martinson asks us to revisit and reverse the findings in *Martinson II*, we will not, and cannot, do so.

**¶18** Prosecutorial misconduct does not bar retrial in this case.

## CONCLUSION

**¶19** For the foregoing reasons, we accept special action jurisdiction and deny relief.


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

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[1] We note that most of Martinson's allegations of prosecutorial misconduct and errors in the State's presentation of evidence during grand jury proceedings have already been reviewed by this court in *Martinson IV*, in which we denied Martinson relief and found the proceedings comported with due process. *See Martinson IV*, No. 1 CA-SA 19-0295.

# APPENDIX B

# Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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

TRACIE K. LINDEMAN
Clerk of the Court


June 30, 2021

**RE: JEFFREY R MARTINSON v HON. ADLEMAN et al**
Arizona Supreme Court No. CR-21-0131-PR
Court of Appeals, Division One No. 1 CA-SA 21-0017
Maricopa County Superior Court No. CR2018-002279-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 2021, in regard to the above-referenced cause:

**ORDERED: Petition for Review of a Special Action Decision of the Court of Appeals = DENIED.**

**Justice Montgomery did not participate in the determination of this matter.**

Tracie K. Lindeman, Clerk

TO:
Linley Wilson
Michael Minicozzi
Jennifer L S Willmott
Robyn Greenberg Varcoe
Hon Jay R Adleman
Amy M Wood
nm

# APPENDIX C

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/28/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-124662-001 SE

03/27/2012

HON. SALLY SCHNEIDER DUNCAN

CLERK OF THE COURT
J. Bower
Deputy

STATE OF ARIZONA

FRANKIE LYNN GRIMSMAN
STEPHANIE DANICA LOW
KELI B LUTHER

v.

JEFFREY RICHARD MARTINSON (001)

MICHAEL TERRIBILE
TREASURE L VANDREUMEL

CAPITAL CASE MANAGER
EXHIBITS-SE
VICTIM SERVICES DIV-CA-SE

**RULING**

The court has received and reviewed the legal memoranda, motions, exhibits, court file, relevant trial and post-verdict evidentiary hearing transcripts and the argument of counsel related to Defendant's motion for new trial. The court has also received and reviewed the court-ordered briefing on the impact, if any, that Division One of the Court of Appeals recent ruling in State v. Sosnowicz, 2012 WL 749984, may have on the verdicts in the case.

During the guilt phase of this trial, the Defendant moved to preclude Dr. Hu from testifying about the manner[1] of death, namely homicide. The court wrestled with this issue when the Defendant raised and argued the motion but, nevertheless, denied the motion. Following the return of the verdicts and while a motion for new trial has been pending, the Court of Appeals, Division One, issued its opinion in State v. Sosnowicz. In Sosnowicz, the trial court, over the Defendant's objection, permitted a medical examiner to testify about the manner of death, homicide. The Court found that when a medical examiner's opinion regarding the manner of

[1] A medical examiner's findings regarding "cause of death" deal with why someone died, i.e., gunshot wound, knife wound, blunt force trauma while "manner of death" findings address how someone died, i.e., suicide, homicide, natural causes.

death is based on evidence the jury can determine without the aid of expert testimony, an expert's opinion about manner of death is inadmissible. Id. at ¶26. More specifically, in Sosnowicz, the Court ruled that in a circumstance where "the medical examiner's opinion regarding the manner of death is based largely on the testimony of lay witnesses whose credibility the jury can determine without the aid of expert testimony, an expert's opinion regarding the manner of death would normally be inadmissible." Id. The Court further found that "even if the testimony was otherwise admissible, it was apt to mislead or confuse the jury and should have been excluded under Rule 403." Id at ¶25. While the Court of Appeals found that the trial court erred when it permitted the medical examiner to testify about manner of death, the Court found that the error was harmless based on the overwhelming evidence of the Defendant's guilt. In reaching its decision, the Court of Appeals noted that "the admissibility in a criminal case of a medical examiner's opinion regarding the manner of death depends on the particular facts and circumstances of each case." Id. at ¶22.

Generally, expert testimony is admissible if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702. An expert may testify to an opinion on an ultimate issue to be decided by the jury if the testimony is otherwise admissible. Further, even if testimony is relevant and admissible, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Ariz. R. Evid. 403. In Sosnowicz, the State argued that "medical examiners are permitted to testify regarding the manner of death even if such testimony goes to the ultimate issue in the case." Id. at ¶18. The State also argued that the medical examiner was "only stating his opinion 'regarding the cause and manner of death from a medical perspective not in the context of whether [defendant] committed a criminal offense.'" Id. at ¶19. In response to the State's argument, the Court of Appeals noted that the Rules of Evidence do not "invariably permit a medical examiner to testify to the manner of death in a murder case." Id. at ¶18.The Court was more focused on how the medical examiner's testimony would be understood by a "typical juror" than on the "intended meaning" of the testimony. Id. at ¶19.

The threshold question for a trial court is whether an expert's opinion will assist the jury in understanding the evidence or determining a fact in issue and whether, even if admissible, the evidence is apt to mislead or confuse the jury or is unduly prejudicial. See State v. Sosnowicz at ¶25; Ariz. R. Evid. 702 and 403. Following a verdict, the question before a trial court is whether the "court has erred in the decision of a matter of law to the substantial prejudice of a party." Ariz. R. Crim. P. 24.1(c)(1). This court specifically finds that it erred as a matter of law to the substantial prejudice of the Defendant when the court denied Defendant's motion to preclude Dr. Hu from testifying about the manner of death.

Dr. Hu's testimony that the victim died as the result of a homicide went to a key issue in the case. In some murder cases both the cause and manner of death are in dispute. In some

murder cases it is only one or the other which is disputed. In some, neither is in dispute and the question for the jury is whether the charged defendant committed the murder. In this case, the Defendant challenged Dr. Hu's findings regarding both the manner and cause of death.[2] In testifying about the manner of death, the court finds that Dr. Hu did not rely on any specialized knowledge in making his findings. Instead, he based his opinion on information that he was no more uniquely qualified to determine than the triers of fact. Specifically, Dr. Hu based his opinion on information he learned from the police, including but not limited to: an "on-going custody battle," "an unfavorable court ruling," information that the Defendant was "upset," the fact that the Defendant failed to call 911, the fact that the Defendant had overdosed on drugs and was found unresponsive, the Defendant's text message to a former girlfriend saying "I love you, miss you," the location of the Carisoprodol when law enforcement officers entered the Defendant's residence and his observation that the victim had an abrasion on the inside of his upper lip. None of these facts required an expert to interpret. None of these facts required specialized training to understand. By allowing Dr. Hu to testify about the manner of death, the court improperly allowed an expert witness to tell the jury how to decide the case. See State v. Sosnowicz at ¶25.

Even if Dr. Hu's testimony was otherwise admissible, the court erred in admitting the testimony because it was apt to mislead or confuse the jury and it caused undue prejudice. As the Defendant has noted in his Post Hearing Supplement to Motion For New Trial that was ordered by the court and filed on March 16, 2012, the error "saturated the trial." Supplement, p. 22. Over the course of three separate days, Dr. Hu testified. His testimony was central to the case and impacted other witness' testimony and how the jury perceived or otherwise analyzed the evidence admitted at trial. In addition, not only did Dr. Hu opine about the manner of death, but he also testified that the Medical Examiner's on-scene investigator believed the manner of death was homicide, thereby compounding the error and allowing another expert or quasi-expert to tell the jury how to decide the case. Id. "Although an expert may 'embrace' an ultimate issue under Rule 704, an expert is not permitted to tell a jury how to decide a case." Id.

By allowing Dr. Hu to testify as to the manner of death and in light of the Court of Appeals' ruling in State v. Sosnowicz , this court erred as a matter of law and caused substantial prejudice to the Defendant. Consequently, the court is granting the Defendant a new trial pursuant to Ariz. R. Crim. P. 24.1(c)(4).

The Defendant has raised numerous grounds for a new trial based on allegations of juror and/or prosecutorial misconduct pursuant to Ariz. R. Crim. P. 24.1(c)(1),(2),(3) and (5). The court finds that juror misconduct did occur and, therefore, an independent basis exists to grant

[2] The Defendant requested that the court hold an evidentiary hearing pursuant to Daubert v. Merrel Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) and Rule 702 et. seq. Ariz. R. Evid. to challenge Dr. Hu's findings and testimony regarding cause of death. The court denied Defendant's request.

the Defendant a new trial. The court's ruling focuses on the limited grounds that independently and collectively require that relief be granted.[3]

The court is aware that granting relief on the basis of juror misconduct is rare and limited to specifically enumerated grounds. Ariz. R. Crim. P. 24.1(c)(3)(i)-(vi) and 24.1(c)(5). The need to protect the privacy of the jury room and the mental thoughts of jurors is a cornerstone of our system of justice and courts must guard against unnecessary and baseless intrusion to protect "the finality of verdicts" and to prevent "undue harassment of jurors." State v. Callahan, 119 Ariz. 217, 219, 580 P.2d 355, 357 (App. 1978). The rule "specifically forbids the reception of any testimony or affidavits which inquire into the subjective motive or mental processes which led a juror to his verdict." Id. However, when a juror has been guilty of misconduct, relief is warranted in the form of a new trial. Ariz. R. Crim. P. 24.1.

Juror misconduct occurs when a juror willfully fails to respond fully to a direct question posed during the *voir dire* examination. Ariz. R. Crim P. 24.1(c)((3)(iii). In this case, jurors participated in a two-part *voir dire* process. First, jurors responded to an extensive written questionnaire that covered topics ranging from jurors' work histories to their views on the death penalty. The questionnaire also included questions about whether jurors had ever been crime victims and whether they or their family members had ever been arrested or charged with, or convicted of any crime other than minor traffic violations. After completing the questionnaire, jurors were then invited back to court in small groups so that counsel and the court, if necessary, could ask jurors follow-up questions based on their questionnaire responses. *Venire* person 184, who was selected for the jury, seated as Juror 14, and later selected as the jury foreperson ("Juror 14"), failed to disclose that she was the victim of a seventeen-count theft indictment prosecuted by the Maricopa County Attorney's Office and that her daughter was the defendant charged in the case. Juror 14 further failed to disclose on the questionnaire and during *voir dire*, that her daughter entered a plea bargain whereby fifteen of the seventeen counts in the indictment were dismissed.

During the small group *voir dire*, Juror 14 *may* have attempted to make this disclosure but her efforts were thwarted. Specifically, when the court posed a question to the jurors asking whether any of the jurors knew the lawyers representing the State or anyone at the Maricopa County Attorney's office, Juror 14 indicated that her daughter had appeared before a court and

[3] The court rejects the following grounds as a basis for relief including , but not limited to: 1) The evidence was insufficient and the verdicts are contrary to the weight of the evidence; 2) Allegations that the State engaged in prosecutorial misconduct; 3) The basis for the jurors' decision, i.e., that some jurors appeared to have convicted the Defendant because they found that the Defendant intentionally killed the victim; 4) Whether the jury did or did not discuss and deliberate on lesser-included offenses (only available on Count 2, Child Abuse); 5) Violations of the admonition that did not impact final juror deliberations; 6)Personality conflicts among and between jurors; and 7) Whether there was a valid and separate vote on both counts, each uninfluenced by the other.

dealt with a prosecutor. RT 7/22/11. She added that the appearance was in Superior Court sometime in the previous eight months. Id. When asked if she would share what the issues were with her daughter, Juror 14 indicated that she "would rather not have that in the court document." Id. The court advised Juror 14 that "we may talk to you later in private about that" but failed to follow through on arranging a private audience with Juror 14 and counsel. Id. It is unclear from the record what Juror 14 planned to share with the court and counsel. The court fully intended to return to juror 14 and allow for more private *voir dire* than small group *voir dire* permits.[4]

Because the court did not arrange for a more private audience with Juror 14, the Defendant was unable to question Juror 14 on something so personal and troublesome that she willfully failed to share the information in two separate places on her questionnaire. This failure deprived the Defendant of the opportunity to probe Juror 14 regarding any possible bias she might have as a result of her daughter's contact with the criminal justice system. While this information was unavailable to the Defendant, the State possessed this information because the Maricopa County Attorney's Office was the prosecuting agency.

Juror 14's failure to disclose information on her questionnaire and during *voir dire* was not limited to her daughter's criminal record. Tragically, Juror 14's husband, who was a federal law enforcement officer, was killed by a fellow officer. Juror 14 did indicate on her questionnaire that her "late husband was murdered by a corrupt police officer/agent in Florida in 1997." During *voir dire*, however, Juror 14 minimized the impact of her husband's death, indicated that in the 13 years since her husband's death she had time to process it, and explained that she could set aside the experience emotionally and make a fair and impartial decision.

In connection with the court-ordered evidentiary hearing on juror misconduct, the following information came to light: Juror 14 had publicly proclaimed that the justice system had let her and her family down, she appeared on an episode of 20/20 and expressed anger over the sentence imposed by the court, and spoke about her husband's death with her fellow jurors including the ordeal she had endured. By not sharing the true extent of the impact that her husband's death still had on her, Juror 14 impermissibly deprived the Defendant of the opportunity to explore her true biases, the very purpose for which the *voir dire* process exists.

Finally, while Juror 14 disclosed that her husband not only had served as a federal law enforcement officer and as a Maricopa County Probation Officer, she failed to disclose that he had also previously served as a Maricopa County Sheriff's officer. Juror 14 explained this omission by pointing out that he had served as a Sheriff's Deputy before the two had met.

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[4] Juror 14 disclosed in her questionnaire that her daughter had been "arrested for drug violations and probation violation." Whether Juror 14 would have limited herself to this answer during individual *voir dire* or otherwise disclosed the full extent of her daughter's criminal history is unknown, and at this point, unknowable.

The record is clear that Juror 14 engaged in a pattern and practice of withholding material information from the court and counsel during the *voir dire* process. The question then for the court is whether these omissions and falsehoods undermine the impartiality of the jury. See Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998).

The post-verdict evidentiary hearing revealed that during an early stage of the trial, Juror 14 shared with other jurors that the Defendant was a "piece of sh_t," repeatedly shared her own experiences as a victim calling the defendant's expert's presentation on grief "bullsh-t,"[5] indicated to other jurors that "police don't lie" based on her late husband's law enforcement experience, commented to other jurors that it was the defense's job to mislead and/or confuse the jurors, and represented herself to have more legal experience as a paralegal than her qualifications and work experience justified in order, it appears, to gain other jurors' confidence in her legal expertise. The fact that Juror 14 was selected as the foreperson provides evidence of the success of her efforts. The inference that can be drawn from Juror 14's pattern of misconduct is that she first sought to secure a seat on the jury and then successfully sought to position herself to be selected as its foreperson.[6] See e.g., Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). At bottom, Juror 14 was not indifferent to jury service. Juror 14 frustrated the *voir dire* purpose and process by concealing her personal biases which ultimately, as the record plainly reveals, blossomed into prejudice that infected the trial to the Defendant's substantial prejudice. It is not relevant whether Juror 14 intended to subvert the process. That fact remains that she did. Id.

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [Defendant's] right to a fair trial. See, e.g., United States v. Hendrix, 549 F.2d 1255, 117 (9th Cir. 1977); United States v. Mitchell, 568 F.3d 1147, 1150 (9th Cir. 2009). "The subjective state of mind [of a juror] is not dispositive when the circumstances create an inference of bias." Dyer v. Calderon, 151 F.3d 970, 985 (9th Cir. 1998).

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[5] During the post-verdict evidentiary hearing, a number of jurors testified that conversations about the trial were held in violation of the court's admonition not to discuss the case until the end of the presentation of evidence, closing arguments by both parties and until jurors had received the final instructions on the law. Juror 14 was identified as one of the jurors who participated in these improper conversations or otherwise made comments in violation of the admonition. Even though the court has not found that these comments or conversations form a basis for relief, their content does provide further evidence of Juror 14's biases and prejudices.

[6] The court notes that evidence adduced during the post-verdict evidentiary hearing indicates that Juror 14 withheld from the deliberating jury an answer to a juror's question on "premeditation" and "murder 1." See Exhibit 1, post-verdict evidentiary hearing. A majority of deliberating jurors testified to this fact. The court places little weight on Juror 14's denial that she withheld the answer. The court mentions this event because even though such conduct may not provide an independent basis for relief, juror 14's conduct underscores her bias in the case.

The court finds that Juror 14 engaged in willful misconduct by improperly concealing her personal biases and that these biases were injected into the jury's deliberative process thereby depriving the Defendant of his Sixth Amendment right to a fair trial.

Accordingly,

IT IS ORDERED granting the Defendant a new trial.

IT IS FURTHER ORDERED setting the last day as May 21, 2012.

IT IS FURTHER ORDERED setting a Status Conference before this Court on April 10, 2012 at 9:15 a.m.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

# APPENDIX D

DIVISION ONE
FILED: 11/20/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, ex rel., WILLIAM G. MONTGOMERY, Maricopa County Attorney<br>Petitioner,<br>v.<br>THE HONORABLE SALLY S. DUNCAN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,<br>Respondent Judge,<br>JEFFREY RICHARD MARTINSON,<br>Real Party in Interest. | 1 CA-SA 12-0217<br>DEPARTMENT D<br>**MEMORANDUM DECISION**<br>(Not for Publication-Rule 28, Arizona Rules of Civil Appellate Procedure) |

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. CR 2004-124662-001

The Honorable Sally S. Duncan, Judge

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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William G. Montgomery, Maricopa County Attorney — Phoenix
By Frankie M. Grimsman, Deputy County Attorney
Attorneys for Petitioner

Michael Terribile — Phoenix
And
Law Office of Treasure VanDreumel, PLC — Phoenix
By Treasure L. VanDreumel
Attorneys for Real Party in Interest

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**G O U L D**, Judge

¶1 In this special action, we review the trial court's order denying the State's motion to dismiss the subject indictment. For the reasons that follow, we reverse the trial court's order.

***Factual and Procedural Background***

¶2 On September 8, 2004, a grand jury returned an indictment (the "2004 Indictment") charging Defendant with first degree felony murder and child abuse. The alleged victim as to both counts was Defendant's son. The state subsequently filed a notice of intent to seek the death penalty.

¶3 The trial began with jury selection on July 12, 2011. On July 29, while the parties were still engaged in jury selection, the court held a brief hearing in chambers regarding the 2004 Indictment. Citing *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993), the court noted its concern about a potential "merger" problem between the felony murder count and the child abuse count if the State presented a theory that Defendant intentionally murdered his son. Without setting any specific deadlines, the court directed counsel to research and brief the issue. The court did not make any ruling regarding the admissibility of evidence showing Defendant intentionally murdered his son. Rather, the court concluded the hearing by stating:

> [W]e'll be talking a lot about this at the beginning of next week...[A]ll I can tell you is that this is something that is - it may end up being much ado about nothing. But the fact that I'm concerned about it and I'm the judge means you need to be concerned about it. Fair enough? And maybe all you will bring something to my attention sooner rather than later that tells me, 'Stop worrying about this Judge. This isn't a problem.'

**¶4** On August 8, after the jury was sworn and prior to the State's opening statement, defense counsel made an oral motion to preclude admission of any evidence suggesting that Defendant intentionally murdered his son.[1] The court granted Defendant's motion,[2] reasoning that pursuant to *Styers* and the State's reliance on a felony murder theory, such evidence was inadmissible.[3]

**¶5** The trial proceeded, and on November 14, 2011, the jury returned verdicts finding Defendant guilty of first degree felony murder and child abuse. During the penalty phase the jury was hung, and the court declared a mistrial. Defendant then moved for new trial based on juror misconduct and various other trial

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[1] Neither party has provided this court with a transcript of the August 8 hearing.

[2] We do not address whether the trial court erred in its interpretation of *Styers* or in granting Defendant's motion in limine based on *Styers*. These issues are not before us in this special action.

[3] At oral argument, counsel referenced there was further briefing on this issue and a hearing on October 6. Neither the briefing nor the transcript of the October 6 hearing was provided to us as part of this special action.

errors. On March 27, 2012, the court granted Defendant's motion and later set a new trial for July 16, 2012.

¶6 On June 5, 2012, the state obtained a new indictment in Maricopa County Case No. CR 2012-007335-001 (the "2012 Indictment"). In addition to charging Defendant with first degree felony murder, the 2012 Indictment[4] also charged Defendant with first degree premeditated murder.

¶7 In deciding to obtain the 2012 indictment, the State relied on the statements made by several jurors during the hearing on the motion for new trial. According to the State, these jurors expressed the belief that Defendant intentionally murdered his son. The State recognized, however, it could not present evidence of an intentional murder at a second trial because of the court's previous evidentiary ruling. As a result, the State obtained the 2012 Indictment under the assumption that with the addition of the premeditated murder charge, evidence of intentional murder would be admissible.

¶8 The State attempted to formally dismiss the 2004 Indictment on August 6, 2012.[5] On that date, the State also

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[4] The 2012 Indictment also charged Defendant with two counts of child abuse.

[5] The State contends that its delay in moving to dismiss the 2004 indictment was based on its mistaken belief the court dismissed the 2004 Indictment at the June 7, 2012 status hearing.

moved to dismiss the notice of death penalty. Thereafter, the court continued the trial date on both the 2012 Indictment and the 2004 Indictment to October 1, 2012. Defendant then moved to dismiss the 2012 indictment.

¶9 On September 19, the court granted Defendant's motion to dismiss the 2012 Indictment on the ground the state could not obtain the 2012 Indictment without first dismissing the 2004 Indictment. On September 27, the State filed a motion to dismiss the 2004 indictment[6] without prejudice for the purpose of obtaining a new indictment, *e.g.*, an indictment containing a premeditated murder charge. The State argued that pursuant to Rule of Criminal Procedure 16.6(a), there was good cause to dismiss the 2004 Indictment and that it was not seeking dismissal to avoid the speedy trial provisions of Criminal Procedure Rule 8.[7] In his response, Defendant asserted the motion should be denied because the State failed to show there was good cause for the dismissal.

¶10 On October 1, the court held a hearing on the State's motion to dismiss the 2004 Indictment. At the conclusion of the

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[6] The state had previously urged the court to dismiss the 2004 Indictment in lieu of the 2012 Indictment, but withdrew this request at the September 19, 2012 hearing.

[7] Prior to the October 2 trial, the State avowed to the trial court it was ready to go forward with the 2012 Indictment, and was not seeking a continuance of the trial.

hearing, the court denied the State's motion. In support of this decision, the court stated:

> [T]he court finds that absent new evidence or, frankly, any other legally permissive basis ... the State cannot seek to indict the defendant after a trial and after the granting of a mistrial where the State has previously argued that there is no evidence to support a premeditated murder charge.

¶11 Based on this ruling, the 2004 indictment remained in place, meaning that the State had to proceed to trial on the 2004 Indictment. On October 2, prior to commencing jury selection, the court clarified/added further findings in support of its order denying the State's motion to dismiss the 2004 Indictment. The court found that the State, rather than seeking appellate review of its evidentiary ruling, attempted to circumvent its ruling during the first trial by "continuing to advance" the argument Defendant intentionally murdered his son. The court considered the State's efforts to obtain a new indictment as another attempt to circumvent its evidentiary ruling. The court also found that

> [t]he State has acknowledged that there is no new evidence to present to the grand jury . . . that absent new evidence, there is no good cause for the State to dismiss the 2004 indictment for the stated purpose of seeking to have a premeditated murder charge returned against the defendant when the State has previously taken the position that it does not have sufficient evidence to support a premeditated murder charge.

The State then brought a special action from this order and asked us to stay the trial, which we did.

***Jurisdiction***

**¶12** We accept jurisdiction over this special action because the State has no equally plain, speedy and adequate remedy by appeal, given that the denial of a motion to dismiss is a non-appealable order. Ariz. Const. art. 6 §§ 5, 9; Ariz. Rev. Stat. ("A.R.S.") §§ 12-2021, 13-4032 (West 2012)[8]; Ariz. R.P. Spec. Act. 1(a), 3(c).

***Discussion***

**¶13** The State argues that the trial court abused its discretion in denying the State's motion to dismiss the 2004 indictment. We review the denial of such a motion for an abuse of discretion. In applying an abuse of discretion standard, our role is not to second-guess the trial judge, or to substitute our judgment for that of the trial judge. *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 (1983); *State v. Jones*, 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002). Instead, unless "the reasons cited by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice," we will defer to the judgment of the trial judge. *Chapple*, 135 Ariz. at 297 n.18, 660 P.2d at 1224 (internal citations omitted).

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[8] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

**¶14** In general, a court may not interfere with a prosecutor's discretion to decide which crimes and criminals to prosecute. *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976) (explaining that a court has no power to interfere with the discretion of the prosecutor in determining "whether to file criminal charges and which charges to file"). "[T]he duty and discretion to conduct prosecutions for public offenses rests with the county attorney." *Murphy*, 113 Ariz. at 418, 555 P.2d at 1112; *see also* A.R.S. § 11-532(A)(1)(2012); *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992) ("It is within the sound discretion of the prosecutor to determine whether to file criminal charges and which charges to file.").

**¶15** However, a trial court may prevent a prosecutor from dismissing criminal charges when no good cause supports the prosecutor's motion to dismiss. According to Rule of Criminal Procedure 16.6(a), upon a "motion of the prosecutor showing good cause therefor, [a court] *may* order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8." Ariz. R. Crim. P. 16.6(a) (emphasis added). Because the operative word is "may," not "shall," the language of this rule indicates that dismissal is left to the court's discretion. This interpretation is confirmed by the comment following Rule 16.6(a), which explains that "section (a) retains the policy of the 1956 Arizona

Rules of Criminal Procedure, Rule 239, that a case filed may not be dropped at the discretion of the prosecutor, but only by order of the court."

¶16 Arizona case law also demonstrates that a prosecutor may not unilaterally dismiss a case. Absent a showing of good cause, the court retains the discretion to deny a motion by the State to dismiss a case. *State v Johnson*, 122 Ariz. 260, 265, 594 P.2d 514, 519 (1979).[9] *See also State v. West*, 173 Ariz. 602, 845 P.2d 1097 (App. 1993) (holding that pursuant to Rule 16.5(a), the predecessor to current Rule 16.6(a), a court retains discretion to deny a motion to dismiss by the prosecutor); *Application of Parham*, 6 Ariz. App. 191, 193, 431 P.2d 86, 88 (1967) (same).

¶17 The "good cause" requirement in Arizona's Rule of Criminal Procedure 16.6(a) implicitly requires that the motion to dismiss not be made "in bad faith." On this basis, we find the jurisprudence analyzing Federal Rule of Criminal Procedure 48(a) persuasive. This rule provides that "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a). Federal courts have interpreted this rule to require a finding of something that is tantamount to "bad faith" in order for a trial court to be

[9] The decision in *Johnson* was based on Rule 16.5(a), the predecessor to current Rule 16.6(a). The language of both rules is identical.

justified in denying a prosecutor's motion to dismiss. *See U.S. v. Cowan*, 524 F.2d 504, 513, 515 (5th Cir. 1975) (reversing trial court's denial of prosecutor's motion to dismiss and explaining that while the trial judge had the discretion to consider whether dismissal was clearly contrary to the public interest, nothing in the record overcame the presumption that the prosecutors had acted in good faith); *U.S. v. Dupris*, 664 F.2d 169, 174-75 (8th Cir. 1981) (reversing denial of motion to dismiss because there was no finding of bad faith regarding government's claim that the evidence needed for conviction had been lost or misplaced and the memories of clear witnesses had faded; the court also noted that there was no assertion of prosecutorial harassment or that the motion to dismiss was prompted by considerations clearly contrary to the public interest); *U.S. v. Hamm*, 659 F.2d 624, 630 (5th Cir. 1981) (reversing denial of motion to dismiss because there was no evidence that the prosecutor was motivated by any considerations other than his evaluation of the public interest when prosecutor moved to dismiss the indictments of the principal informants and witnesses against leaders of a large drug-smuggling conspiracy).

**¶18** Here, the trial court determined the State failed to establish good cause to dismiss the 2004 indictment. In making this determination, the court noted the State delayed in filing its motion until after the Defendant was tried and convicted of

felony murder. In addition, the court found, based on the representations of the State, that there was no evidence to support a charge of premeditated murder.

¶19 However, the State avers it did not anticipate the court's ruling based on *Styers*, and by the time the court issued its ruling, it was too late to obtain a new indictment in the middle of trial.[10] Once the court granted Defendant's motion for new trial, the State attempted to address the court's ruling by obtaining a new indictment. In addition, the State avowed that it was not until after hearing the statements of the jurors that it concluded that there was sufficient evidence to prove Defendant intentionally murdered his son. After reaching this conclusion, the State obtained a new indictment that included premeditated murder because the 2004 indictment did not include a charge for premeditated murder and the court had precluded the State from presenting any evidence concerning intentional murder based on the State's felony murder theory.

¶20 Under these circumstances, the State established good cause to dismiss the 2004 indictment and file a new criminal charge for premeditated murder. *Tsosie*, 171 Ariz. at 685, 832 P.3d at 702. It was thus error for the court to deny the State's

[10] We note the State did not seek to obtain special action relief from the ruling.

motion to dismiss. *See State v. Mieg*, 225 Ariz. 445, 449-50, ¶¶ 16-22, 239 P.3d 1258, 1262-63 (App. 2010).

**¶21** We do not reach the issue of whether good cause would have been lacking if the trial court had determined the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8. The court did not make any such findings in the record, and if it desires to make such findings, it may amend its findings or hold further hearings on this matter.

**¶22** Accordingly, we reverse the trial court's order denying the state's motion to dismiss.

/S/
ANDREW W. GOULD, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
DONN KESSLER, Judge

# APPENDIX E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY



CR2004-124662-001 SE

11/19/2013

HON. SALLY SCHNEIDER DUNCAN

CLERK OF THE COURT
C. Castro
Deputy

STATE OF ARIZONA

FRANKIE LYNN GRIMSMAN
STEPHANIE DANICA LOW
COLLEEN CLASE

v.

JEFFREY RICHARD MARTINSON (001)

MICHAEL TERRIBILE
TREASURE L VANDREUMEL

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-CCC
DISPOSITION CLERK-CSC
VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

Pending before the Court are two motions: (1) "Defendant's Motion to Dismiss: Prosecutorial Misconduct/Double Jeopardy" filed February 1, 2013; and (2) "State's Motion To Dismiss."[1] There are numerous motions *in limine* pending.

On October 3, 2013, the Court heard oral argument and took the matter under advisement. The Court has reviewed the briefs and the entire file. The Court will: (1) grant "Defendant's Motion to Dismiss: Prosecutorial Misconduct/Double Jeopardy," filed February 1, 2013; and deny "State's Motion to Dismiss." The remaining motions will be denied as moot.

[1] On November 20, 2013, the Court of Appeals granted relief from this Court's decision denying the Motion to Dismiss (filed September 27, 2013) *Memorandum Decision*, 1-CA-SA 12-0217 (November 20, 2012) ("Memorandum Decision"), pp. 8-12. The Court of Appeals found that the State demonstrated good cause to dismiss under Rule 16.1 of the *Arizona Rules of Criminal Procedure. Id.* The Court of Appeals expressly observed that it did "not reach the issue of whether good cause would have been lacking if the trial court had determined that the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8." Memorandum Decision at p. 12. The parties have now fully briefed this issue and it is ready for ruling.

**A. Prosecutorial Misconduct and Rule 16: The Legal Standard**

The Defendant alleges that the Prosecutors engaged in misconduct and acted vindictively and/or in bad faith. These are all terms of art which may be conflated at times but form independent and sometimes related bases for relief.

The due process clauses of the United States Constitution and Arizona Constitution ensure that defendants receive a fair trial. Where a prosecutor's conduct operates to defeat that fairness, a trial court must impose sanctions. U.S. Const., Amend. V; Ariz. Const. Art. 2, § 10. Moreover, where that conduct violates the double jeopardy clause, dismissal with prejudice may be warranted. *Pool v. Superior Court*, 677 P.2d 261, 272-73 (Ariz. S.Ct. 1984).

Prosecutorial misconduct is a broad concept. For example, misconduct arises when the prosecutor knows her actions are improper and prejudicial and not the result of legal error, negligence, mistake or insignificant impropriety. *Id.* Further, actionable misconduct occurs if a prosecutor knows her "conduct is improper and prejudicial and either intends or is *indifferent to [the danger] of resulting mistrial or reversal.*" *See id.; State v. Jorgenson*, 10 P.3d 1177, 1178 (Ariz. S. Ct. 2000) (emphasis in the original). *See Pool.*at 272 (noting that a prosecutor's indifference to her duty to see that all defendants receive a fair trial is sufficient for relief). This is especially true where the indifference is pervasive and the stakes are high. (*See Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (noting that "death is different").[2]

"Prosecutorial vindictiveness" is a type of prosecutorial misconduct with a precise and limited meaning. *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987). Vindictive prosecution arises in a "situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights" and more commonly attaches to a prosecutor's charging decision. *See generally Id.*; *see also United States v. LaDeau*, ___ F.3d ____, 2013 WL 5878214 (6th Cir.) (October 3, 2013) ("[p]rosecutiorial discretion is restrained by the Due Process Clause which prohibits the prosecution from punishing a defendant from exercising a protected statutory or constitutional right.") *LaDeau* at p.3.

[2] Only after the Prosecutors, through improper means, convicted the Defendant of first degree murder, only after a mistrial was granted on other grounds, and only after the Prosecutors re-indicted the Defendant adding new and more charges, *see* discussion *infra*, did the Prosecutors withdraw the notice of death. This withdrawal could be viewed as a tactic used by the Prosecutors to draw attention away from their misconduct. By reducing the stakes, their conduct might appear less blameworthy.

Arizona courts have held that there are two ways in which a defendant can demonstrate prosecutorial vindictiveness. "First, a defendant may show *actual* vindictiveness, i.e., he 'may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights.'" *See State v. Mieg*, 239 P.2d 1258, 1260 (Ariz. Ct. App. 2010) (emphasis in original). "Second, because [the prosecutor's] motives are complex and difficult to prove, [] a defendant may rely on a presumption of vindictiveness, if the circumstances establish a realistic likelihood of vindictiveness.'" *Id.* at 1261 (citation omitted). Once a defendant makes a *prima facie* showing that a charging decision is more likely than not attributable to vindictiveness, the burden shifts to the prosecutor to overcome the presumption "by objective evidence justifying the prosecutor's action." [3] *Id.*

The Rule 16 issue on remand implicates these concepts. More specifically, Rule 16.6(a) of the *Arizona Rules of Criminal Procedure* provides that a court may dismiss a prosecution only upon motion of the prosecutor showing good cause and a finding that the purpose of the dismissal is not to avoid Rule 8 (Speedy Trial rights).[4] Here, the Prosecutors seek dismissal of the prosecution for the specific purpose of re-indicting the Defendant.

The Court acknowledges that the State has broad discretion in making charging decisions. Often, prosecutors make "their initial charging decisions prior to gaining full knowledge or appreciation of the facts involved in a given case. In addition, officials often make charging decisions before analyzing thoroughly a case's legal complexities." *Meyer*, 810 F.2d at 1247. However, when the State moves to dismiss an indictment following a mistrial (after the defendant has exercised a constitutionally protected right), the Court will scrutinize the decision more closely. Indeed, the good cause standard under Rule 16 requires the Court to examine whether the State has acted in bad faith or vindictively. Stated another way, the good-cause requirement "implicitly requires that the motion to dismiss not be made in 'bad faith.'" *Memorandum Decision* at p. 9.

The timing of a charging decision is a "significant factor" in the Court's consideration. *Mieg*, 239 P.3d at 1261. It is not surprising therefore, that a State's motion to dismiss made after a trial "is much more likely to be improperly motivated than is a pretrial decision. This is so because the 'institutional bias inherent in the judicial system against the retrial of issues that have

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[3] "Because 'a certain amount of punitive intent . . . is inherent in any prosecution,' a claim of vindictive prosecution presents 'the delicate task of distinguishing between the acceptable 'vindictive' desire to punish [a defendant] for any criminal acts, and 'vindictiveness' which violates due process." *Mieg*, 239 P.3d at 1261 (citation omitted).

[4] Rule 8 of the *Arizona Rules of Criminal Procedure*, in turn, provides, in relevant part:

> **New Trial.** A trial ordered after mistrial or upon the motion for a new trial shall commence within 60 days of the entry of the order of Court.

*Ariz. R. Crim. Proc.* 8.2(c) (2013).

already been decided,' gives the prosecutor and the court a stake in avoiding 'to do over what it thought it had already done correctly.'" *Id.* (citations omitted).

To be clear, in this case the alleged misconduct and bad faith involve allegations of pre-trial acts, trial acts, post-trial acts and charging decisions and, therefore, does not fit neatly within any specific paradigm. The Court finds that the best approach is to examine the totality of circumstances in order to determine the prosecutor's intent and/or bad faith. *Accord Mieg,* 239 P3d at 1262 (*citing Blacklidge v. Perry,* 411 U.S. 21 (1974); *United States v. Goodwin,* 457 U.S. 268 (1982); *Alabama v. Smith,* 490 U.S. 794 (1989)).

This Court will "measure" what the Prosecutors knew or intended by objective factors which include: (1) the situation which the Prosecutors found themselves in; (2) evidence of their actual knowledge and intent; (3) any other factors which may give rise to an appropriate inference or conclusion; and (4) the Prosecutors' own explanations of their "knowledge" and "intent" and the extent that such explanation can be credible in light of the minimum requirements expected of all lawyers. *Pool,* 677 P.2d at 272, n. 9.

Under this broad approach, the Court benefits from hindsight. Thus, the Court's failure to sustain objections and/or overrule defense motions during or directly after trial is irrelevant. *See State v. Minnitt,* 55 P.3d 774, 782 (Ariz. S. Ct. 2002) ("The protections afforded by the due process clause do not turn on whether the state's overreaching is apparent during trial.")

The Court finds that the Prosecutors in this case intentionally and willfully engaged in misconduct. Further, the Court finds that the Prosecutors violated Rule 16 by acting in bad faith.

## B. Prosecutorial Misconduct and Rule 16: The Facts

### 1. Overview

The Court finds that the Prosecutors committed misconduct by purposefully pursuing an alternate theory of culpability for which the defendant had not been charged. As more fully described in this ruling, the Prosecutors charged the defendant with felony murder but also sought to convict him of intentional murder, an uncharged theory. This conduct violates the Defendant's Federal and State Constitutional rights. *See State v. Martin,* 679 P.2d 489 (Ariz. Sup. Ct. 1984).

The *Martin* Court explained:

> Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. *Dunn v. United States,* 442 U.S. 100, 106, 99 S. Ct. 2190,

> 2194, 60 L.Ed.2d 743 (1979). The Arizona Constitution sets out certain rights of the accused in criminal prosecutions. Consistent with these guarantees, *Ariz. Rule of Crim. Proc.* 13.2(a) states that an indictment 'shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged.'
>
> . . .
>
> These rules seek to give substance to the constitutional guarantees that an accused stand trial with clear notice of the crime with which he is charged.

*Martin*, 679 P.2d at 494 (footnote omitted citing to Ariz. Const., art. 2 §§24 & 30).[5] This type of misconduct is not susceptible to a harmless error analysis. *Martin,* 679 P.2d at 472 (Where "the jury returned a verdict of guilty after the prosecution had argued a theory of guilt based on acts not charged. It is inconceivable that such an error could be harmless."). Moreover, it is impossible to know upon what charge the jury convicted the Defendant. *Id.* Finally, this misconduct violates a defendant's constitutional right to a unanimous verdict. *See* Ariz. Const. art. II, § 23.

Furthermore, the Prosecutors repeatedly violated this Court's orders to stop pursuing an uncharged intentional-murder theory of prosecution. When viewing the totality of circumstances, the Court finds that during trial the Prosecutors engaged in a pattern and practice of misconduct designed to secure a conviction without regard to the likelihood of reversal.

Following a conviction at trial, the Defendant successfully obtained a mistrial based on other grounds. The Prosecutors responded by engaging in even more obvious misconduct. What has become clear is that the Prosecutors viewed Defense counsels' vigorous representation as a roadblock to conviction. They similarly viewed this Court's rulings about the uncharged intentional-murder theory as a roadblock. Accordingly, the Prosecutors relentlessly sought to remove defense counsel and the assigned judicial officer specifically to avoid the risk of acquittal during any retrial. The Court views this post-trial misconduct as part of the totality of the circumstances that support the Court's findings of prosecutorial misconduct and bad faith.

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[5] The *Martin* Court's citation to *Dunn* underscores the Federal Due Process rights implicated. ("[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.") *Dunn,* 442 U.S at 107 (*citing Cole v. Arkansas,* 333 U.S. 196, 201 (1948).

Additionally, the State moved to dismiss an 8-year-old Indictment ("2004 Indictment") in order to pursue new charges ("2012 Indictment"). Their motion followed the Defendant's exercise of his constitutionally protected right to challenge the first trial based on juror misconduct. Because the first trial was infected with prosecutorial misconduct, the Court finds that the State sought to profit from the misconduct in seeking the 2012 Indictment and, in so doing, acted in bad faith.

**2. More Specific Fact Findings**

A totality of circumstances analysis requires that the Court objectively examine the relevant facts to determine whether the Prosecutors engaged in misconduct and/or acted in bad faith. In this case, an exhaustive analysis of the facts and sequence of events substantiates the Courts findings. Those more specific findings are:

- On September 8, 2004, the State sought and the grand jury returned an indictment charging the Defendant with one count of first degree murder. The State also charged one count of child abuse.

- The State alleged that Defendant unlawfully killed his five-year-old son during the course of a felony, specifically, child abuse.

- The State charged felony murder and sought the death penalty.

- Under Arizona law, a person commits child abuse if he ***intends to injure*** the child under circumstances likely to produce death or serious physical injury. *See* Ariz. Rev. Stat. Ann. §13-3623(A)(1) (emphasis added); *see also State v. Payne*, 306 P.3d 17 (Ariz. S. Ct. 2013); *State v. Styers*, 865 P.2d 765 (Ariz. Sup. Ct. 1993); *see also State v. Milke*, 865 P.2d 779 (Ariz. S. Ct. 1993).

- Notably, intent to kill is not an element of the statute. *Styers, Milke.* The Prosecutors repeatedly advised this Court that the State not did charge first degree murder with an intent-to-kill theory and advised the Court that it had no evidence to support that theory. *See, e.g.*, RT 8/9/11, 17:13-18.

- By charging the Defendant with felony murder--with child abuse as a predicate--Arizona law necessarily precluded the State from offering evidence of intent to kill and/or arguing that the Defendant intended to kill the victim. *See State v. Styers*; *see also State v. Milke.*

- The State's charging decision foreclosed the possibility of the Defendant asking for and/or the jury finding any "lesser-included" offenses on the first-degree-murder charge.

- The State filed its first notice of intent to seek the death penalty on October 22, 2004, and notice of aggravating circumstances.

- On December 29, 2005, the State filed an amended notice of its intent to seek the death penalty and notice of aggravating factors.

- In both instances, among other aggravators, the State alleged that the murder was committed in an especially heinous, cruel or depraved manner pursuant to Ariz. Rev. Stat. Ann. § 13-703(F)(6) ("F(6) Aggravating Factor"). This aggravator, if found, requires the jury to make factual findings consistent with the charge of felony murder relying on child abuse as the predicate. Indeed, the State alleged that the death penalty was appropriate due to the senselessness of the murder or the helplessness of the victim.[6] Under this aggravator, a murder "is senseless only if it is unrelated to the defendant's goal." *State v. Carlson*, 488 P.3d 1130 (Ariz. S. Ct. 2002). Thus, by alleging senselessness as an aggravator, the State acknowledged its understanding of Arizona law, that is, a defendant's ***intent to kill*** cannot not form the basis for a felony-murder charge that relies on child abuse as the predicate.

- Further underscoring the State's knowledge and understating of *Styers*, *Milke* and *Carlson,* the State requested aggravation-phase jury instructions citing these cases.

- Pretrial proceedings spanned the course of the next 7 years. During that lengthy period, defense attorneys changed, judicial officers changed, but the lead Prosecutor remained the same.[7]

- On March 11, 2009, the case was assigned to this judicial officer.

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[6] The Court notes that these two factors alone cannot meet the F(6) standard. The State must also provide evidence of a special relationship between the defendant and the victim. *State v. Styers*, 865 P.2d 765 (Ariz. S. Ct. 1993).

[7] The lead prosecutor attended the Victim's autopsy. The Court's does not intend to imply that a prosecutor should not attend an autopsy or that the Prosecutor's presence was somehow inappropriate. Rather, the Court is looking at all objective facts that bear upon the Prosecutor's intent.

- With an October 5, 2009 trial date looming, the State filed its 404(b) notice. Without explanation, the State sought to introduce evidence to support an improper theory: intent to kill. *See* "State's Notice of Intent to Use Defendant's Other Crimes, Wrongs or Acts, Pursuant to Rule 404(b), Arizona Rules of Evidence" (June 5, 2009). The State failed to cite or distinguish *Styers* in the Notice, a case of which it was plainly aware.

- Unfortunately, the impact of this important change went unnoticed by then-assigned defense counsel and this newly assigned judge. The State clearly exploited the constantly shifting landscape of defense counsel and judicial officers. While the Court and defense counsel are presumed to know the law, their oversight does not excuse the State's advancement of this impermissible theory, especially when the record demonstrates the State's knowledge of the law. Even after the Court ordered briefing on the admissibility of the 404(b) evidence following the evidentiary hearing, the Prosecutors persisted in their efforts to exploit this oversight by continuing to advance the improper intent-to-kill theory without citing or distinguishing *Styers*.

- By December 2010, the Court had appointed current defense counsel to represent the Defendant.

- On July 28, 2011, the legal problems created by the State championing inconsistent and untenable legal theories crystalized for the Court. With jury selection underway, before jeopardy attached, the Court held an oral argument on the propriety of the F(6) Aggravating Factor. During the hearing, the State properly cited *Styers* to support its position, that senselessness was a consistent aggravator for a felony murder charge with child abuse as it predicate. The problem was that the State was improperly pursuing the inconsistent theory of intent-to-kill, as reflected in the 404(b) notice and memoranda. Alarmed about the inconsistency, the Court pressed the Prosecutors about the State's theories. Referring to the State's prosecution theory, the Court observed:

> And, I'm still not clear what the argument's going to be. You're arguing both, that he intended to kill the child and/or [the death] was inflicted as an unintended consequence? I---I still am trying to figure out what horse the State is riding.
>
> RT 7/28/11, 10:8-15.

- With Court's concern now heightened, the following day (and still before jeopardy attached) the Court called an impromptu conference to discuss the State's theory of prosecution. The Court expressly pointed out that the State had inconsistent theories. Defense counsel supported the Court in its effort to ferret out the State's theory of prosecution.

- Despite having cited and argued *Styers* repeatedly, the Prosecutors deliberately evaded the Court's inquiry. The lead Prosecutor stated she needed a lot of time to research the issue. Evaluating the circumstances objectively, it is now clear that the Prosecutors feigned confusion and concealed their actual knowledge of the law.

- What did the State have to gain by this strategy? The Court has concluded that presenting evidence of the impermissible theory of intent to kill a child victim was simply too tempting for the State. The Prosecutors wanted to incite the passion of jurors. The State's tactic created the risk that: (1) the jury would convict the defendant on an uncharged theory; and (2) the jury would return a non-unanimous verdict. The State sought to "win-by-any means" by advancing an intent-to-kill theory. *See State v. Jorgenson*, 10 P.3d at 1178.

- On August 1, 2011, the Court again directed the Prosecutors to review *Styers* and *Milke* and again they refused to clarify the State's position. Plainly, the Prosecutors continued to advance the impermissible theory even after the Court placed them on notice. It is unimaginable that seasoned prosecutors, who previously cited *Styers et. al.* correctly, can be objectively viewed as innocently confusing the law and its application to the case.

- Trial began and jeopardy attached on August 8, 2011.

- Defense counsel urged the Court to require the State to steer clear of an intentional murder theory. The Court agreed. Nonetheless, the State (employing the Court's metaphor) refused to ride the horse it picked—felony murder with child abuse as the predicate. *See, e.g.*, RT 8/8/11, 5:17-6:16; 7:10-8:15.

- On August 9, 2011, during opening statements, the State marshaled facts in a manner designed to draw the inference of intent-to-kill rather than intent-to-injure. The defense moved for a mistrial. RT: 8/9/11, 49:10-20. The Court improvidently denied the motion.

- Before denying the motion, the Court found itself wrestling with the State again over the meaning of *Styers*.

- The Court's frustration is apparent from the record. The Court emphasized that creating an inference of an intentional killing was prejudicial. The Court warned the Prosecutors that it would not tolerate "a pattern and practice of using that type of evidence" to create an improper "atmosphere in the courtroom." That "cloud," noted the Court, would allow the jury to convict the Defendant on the basis of the uncharged theory of intent to kill. *See* RT: 8/9/11, 53:13-54:9.

- During this colloquy, the lead Prosecutor finally articulated the State's contrived interpretation of *Styers*. The State posited that *Styers* permitted an intentional murder theory and only precluded a premeditation theory. The lead Prosecutor asserted:

> Now, the difference is we can't say that up until the moment when he decided to commit the intentional child abuse, he thought this out, he planned it, that it occurred to him beforehand, so we cannot charge him with premeditated murder, and we've never represented this case as premeditated murder. RT: 8/9/11, 17:13-18.[8]

- Thus, only after jurors were seated and trial was underway did the Prosecutors' obfuscation end. It bears emphasizing that these experienced Prosecutors' revelation about how to apply *Styers* came 7 years after presenting the case to the grand jury, 7 years after filing the State's notice of aggravating circumstances, 5 years after filing the State's first requested aggravation phase jury instructions and only after having been pressed by the Court to declare the State's theory of prosecution. This was no accident.

- The Court immediately rejected the State's position: "[I]intent to kill is not a theory [upon] which the State can operate in this trial." RT 8/9/11, 40:4-7.

[8] The State argued that it could present evidence of intent-to-kill when the State alleges that a defendant's acts toward the victim--at some point--convert from an intent-to-injure to an intent-to-kill but without premeditation. The Court stated that "there is no spectrum here. You lost that opportunity when you didn't charge premeditated murder." The Court's use of the term "spectrum" was an effort to characterize the State's argument. Notably, the *Styers* Court analogized child abuse to assault and rejected the State's position. *Styers*, 865 P.2d at 771.

- The Court could not have been clearer:

> So, I'm now warning the State. This is a warning to the State, okay?
>
> . . .
>
> You may disagree with my reading of [the] *Styers Milke* decision and line of cases, but that's how I read them.
>
> . . .
>
> So, you're warned. That's my warning to you. Proceed knowing where I think the line is. The line is the italics in the *Styers* decision.

*See* RT 8/9/11, 53:13-54:9,55:5-12.

- In fact, the Court read portions of *Styers* on the record. RT 8/9/11:20: 4-21:22.

- Thus, if there came a time to stop advancing the impermissible theory, August 9, 2011, establishes a bright line. By then, the State's win-by-any-means strategy should have stopped.

- Undeterred, the Prosecutors used every opportunity to challenge the Court's *Styers* ruling and present evidence of intent to kill.

- What is now apparent from the record is that the Prosecutors were attempting to "avoid an acquittal, prejudice the jury, and obtain a conviction with indifference to the danger of mistrial or reversal." *Minnitt*, 55 P.3d at 781 (*citing Pool,* 677 P.2d at 272).

- Rather than accepting the *Styers* evidentiary limitation, ("[I]intent to kill is not a theory [upon] which the State can operate in this trial."), RT 8/9/11, 40:4-7), the Prosecutors violated the Court's ruling on *Styers*. The Prosecutors wanted to secure a conviction without regard to whether the jury convicted based on an intent to kill or felony murder.

- The record is replete with examples of the Prosecutors' efforts to circumvent the Court's *Styers* ruling, including but not limited to:

- On August 25-26, 2011, the Prosecutors introduced a lengthy videotape of Defendant's interrogation that, in hindsight, had no place in this trial. *See* "Defendant's Motion to Dismiss: Prosecutorial Misconduct/Double Jeopardy," p.10 (filed February 1, 2013). The interrogation was laden with innuendo and questions designed to provoke the Defendant's admission that he intended to kill the victim. For example, the detective asked:

  - "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 son?";
  - "did you do this because you hated him?";
  - "is this something you planned out?";
  - "Why did you kill your little boy Jeffrey? Why did you kill him?";
  - "Jeffrey, you killed him and you know it."

  While an isolated comment may be viewed as relevant when considering whether the Defendant intended to injure the victim, the sequence and context of these questions reveals that the Prosecutors' only purpose was to raise an inference of intent to kill.

- The State introduced plastic garbage bags found in the laundry room and the Defendant's bedroom. Forensic analysis of hair and DNA found in the bags did not connect the victim to the evidence. Nonetheless, the State asked questions for the sole purpose of having the jury draw the improper inference that the Defendant intentionally asphyxiated the victim with garbage bags. This evidence is particularly susceptible to retrospective analysis for the simple reason that that the Court could only appreciate in hindsight the implication of all of the evidence taken together.

- Having succeeded in introducing the garbage-bag evidence, the State next attempted to bolster its intent-to-kill theory with evidence that the victim had a small abrasion on his inner lip. The medical examiner, Dr. Hu, became the vehicle through which the Prosecutors continued to advance the intent-to-kill theory.

- The abrasion, according to the State, supported its theory that the Defendant suffocated the victim. On September 13, 2011, the Court held an evidentiary hearing outside the presence of the jury. The Court ruled that the evidence was inadmissible because: (1) Dr. Hu conceded that he lacked the proper foundation to opine that smothering or suffocation was the cause of death; and (2) the evidence violated the Court's earlier ruling on *Styers*.

- At that hearing, the Prosecutors heard the following colloquy between defense counsel and Dr. Hu:

  Q: Now, when someone is smothered to death, the blocking of the air supply must last longer than a period of unconsciousness; am I right?

  A. That's correct.

  . . .

  Q. When all is said and done, you don't have quite enough information to conclude that the cause of death was smother or – cause of death was smother or suffocation; you just can't eliminate it?
  A. That's correct.

  . . .

  Q. And that's the importance of the picture of the lip and the garbage bag?
  A. Yes.

  *See* RT 9/13/11, 87:25-89:1.

- The following day, purportedly testifying about foundation, Dr. Hu testified that he reviewed a law enforcement report that mentioned that "the decedent may have been overdosed or suffocated by his father in the homicide attempt." RT 9/14/11, 16:15-20. This line of questioning, coyly disguised as foundational evidence, was intended to draw an inference of intent to kill. It had no other purpose.

- Not available on consecutive days, Dr. Hu resumed his testimony on September 20, 2011. At that time he testified that the cause of the death was "acute carisoprodol toxicity." RT 9/20/11, 10:12-13.

Notwithstanding the Court's earlier ruling that the evidence was inadmissible under *Styers* and notwithstanding Dr. Hu's own admission that he lacked the foundation to testify that asphyxiation or suffocation was the cause of death, the Prosecutors elicited the following testimony:

> Q: Were there any on 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?
> . . .
> RT 9/20/11, 10:23-11:18.

- The Prosecutors knew exactly what they were doing. The Court had established a clear line not to cross with respect to the Medical Examiner's testimony. The Prosecutors, yet again, crossed that line. Piece by piece, they relentlessly introduced evidence of intent to kill.

- When the lead detective testified, the Prosecutors elicited testimony about text messages that the Defendant exchanged with a former girlfriend that read "we'll miss you." The detective testified about her interview of the former girlfriend. The Prosecutor elicited testimony from the detective about the girlfriend's interpretation of the text. RT 9/15/11, 32:124. Notably, the Court had expressly precluded any testimony by the girlfriend regarding the Defendant's intent. *See* "Defendant's Motion in Limine to Preclude Introduction of Improper Testimony and Argument," pp.6-9 (filed 5/27/11); *Minute Entry*, (6/15/11). The Court also precluded the detective from testifying regarding the Defendant's intent. *Id.* The

only purpose for this evidence was to present more evidence of intent to kill.

- The detective, who sat with Prosecutors at counsel table throughout trial, knew or should have known of the limitations the Court placed on the evidence. She too employed a win-by-any-means strategy, working in concert with the Prosecutors. On direct examination:

  > 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.

  RT. 9/15/11, 14:13-16. The detective's opinion testimony was not only suggestive, but it was irrelevant. Moreover, the testimony prompted an unpredictable and totally improper outburst on cross examination. Based on the testimony about the detective's suspicions, defense counsel asked the detective whether these suspicions precipitated her failure to process the scene more carefully. Rather than answering "yes" or "no," as called for by the question, the detective advanced the Prosecution's agenda:

  > 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.**

  RT: 9/30/11, 90:23-91:2 (emphasis added.)

- When the Defendant called an expert witness, Dr. Cunningham, to testify about sudden trauma's impact on memory as well as suicidal ideation arising from a parent's loss of a child, the Prosecutors again shifted the focus on intent to kill. The Defendant testified that his child drowned in the bathtub and he responded by attempting suicide. The Prosecutors asked the doctor about intentional "murder" theories involving the attempted suicide. *See* R.T. 9/28/13, 112:23-117:24.

- When the defense introduced evidence of its grief expert, Dr. Wortman, the Prosecution 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 type[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 they may do now in treating somebody who has experienced sudden traumatic loss.
. . .
Q: Now, I want to talk to 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.

RT: 10/19/11, 88:15-22; 10/19/11, 96:5-14; *see also*10/19/11, 104:24-105:8 (emphasis added).

The State was fully aware that the only relevant grief response to "murder" would have been to felony murder. A proper inquiry would have focused on the Defendant's grief response to an *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. *See* RT: 10/19/11, 106:7-18.

- On November 3, 2011, Counsel presented their closing arguments to the jury. The State focused on motive draped in intent to kill imagery, which allowed the jury to convict based on an uncharged theory.

- While the arguments could also support a felony-murder conviction, the Prosecutor deliberately left the jury with the impression that it could convict on the additional theory of intent to kill. Even though the Prosecutors repeatedly argued that they were adhering to the Court's *Styers* ruling, they painted a dual image for the jury. The Court is reminded of the famous perceptual illusion of the "Young Girl-Old Woman," from an anonymous German postcard where the observer can see two equally clear but different images.[9]

- The Court finds that the Prosecutors planned the dual imagery.

- Prosecutors may undertake their best efforts to obtain a conviction, however, they may only do so lawfully.[10]

- As the Arizona Supreme Court has observed: "It is the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction." *See Pool v. Superior Court*, 677 P.2d at 266 (*quoting, in part, Berger v. United States*, 295 U.S. 78, 88 (1935)). The *Pool* Court further observed:

> Our system represents a rule of law based upon the principle that officers of the law are bound by and must act within the law, even

[9] *See* http://mathworld.wolfram.com/YoungGirl-OldWomanIllusion.html (1888).

[10] Prosecutors have special ethical responsibilities to ensure that an accused receives a fair trial. *See generally Rules of the Supreme Court of Arizona*, 42 (E.R. 3.8) (2013).

> though the necessity of so doing may put them at a disadvantage in dealing with criminals or those accused of crime. Any other system is a step which will inevitably lead us, as it has led others, to a society where the worst criminals are often those who govern and administer law. Thus, to paraphrase the words of Justice Sutherland, the prosecutor is not the representative of an ordinary litigant; he is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. The prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." Thus, "while he may strike hard blows, he is not at liberty to strike foul ones."
> *Id.*

- The cumulative effect of the Prosecutors' misconduct became apparent immediately after the jury started deliberating on guilt. The jury foreperson sent a note to the Court:

> I have a juror who is refusing to focus on the charges as presented instead wants to focus on premeditation and murder 1. We're not doing that right?

*See* Docket, CR 20004-124662-001 (11/9/2011).

- Although the Court answered the question "no", the juror's confusion persisted even *after* deliberations began for the aggravation phase of the Trial. The Court received another juror note:

> The instructions state we can change our opinion if we believe it is wrong. Does this apply to our previous decision on count 1, First Degree Murder?

*See* Docket, CR 20004-124662-001 (11/28/11). Plainly, the jury was attempting to retreat from its guilt finding. Clearly, the jury could not shake the optical illusion created by the Prosecutors' misconduct.

- After the jury found the presence of aggravators, the penalty phase began and the perceptual dual imagery persisted. By now, the Prosecutors knew there were jurors who believed that intent to kill was a proper theory to consider. Like the

> Court and the Defendant, the Prosecutors saw the jury's notes. Undaunted, the Prosecutors' continued to pursue a death sentence using the same improper tactic they previously employed. During penalty-phase closing arguments, the Prosecutors argued facts supporting the intent-to-kill theory:
>
> Prosecutor: What does it mean to you as juror that ***a biological father takes the life of his own son? Not in a shaking in a moment of rage, in a blow to the abdomen, as the defense described, [but rather] with the administration of drug that by all evidence was up in a medicine cabinet.*** You, as jurors, must evaluate that.

*See* RT 12/19/11, 87:24-88:5 (emphasis added). What conceivable purpose, other than implying intent to kill, could the Prosecutors have desired through this argument? There is no proper purpose.

- The case proceeded through the penalty phase and the jury hung, 10-2 for life. Thereafter, the Court declared a mistrial on the penalty phase of the proceedings.

- On November 22, 2011, the Defendant moved for a mistrial on all phases of the trial. The Defendant alleged, among other things, that a juror lied during *voir dire* in order to secure a seat on the jury and then, as foreperson, improperly affected the outcome of the proceedings.

- The Court held an evidentiary hearing on Defendant's motion for a mistrial on all trial phases based on Juror misconduct.[11]

- On March 28, 2012, the Court granted the Defendants' motion.[12]

- The evidentiary hearing on juror misconduct had the unintended consequence of exposing that the Prosecutors had convinced at least some jurors that the Defendant intended to kill the victim. At that hearing, some jurors testified they had voted to convict the Defendant based on an intent-to-kill theory, including at least one juror who convicted based on premeditation. The fact the Prosecutors succeeded in convincing jurors to convict the Defendant based on an intent-to-kill theory demonstrates the very prejudice warned of in *Martin*, *supra*. Moreover, the evidentiary hearing exposed the lack

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[12] The Court, *sua sponte*, added a second ground for the mistrial based on the scope of the medical examiner's testimony. *See State v. Sosnowicz*, 270 P.3d 917 (Ariz. Ct. App. 2012).

of unanimity of the verdict, a risk intentionally created by the Prosecutors' disregard for the Court's rulings.

- On April 12, 2012, the Court had set a new trial date for July 16, 2012, which was continued until October 1, 2012.

- The events following the Court declaring a mistrial based on juror misconduct are inextricably intertwined with the totality of circumstances analysis that objectively establishes that the Prosecutors engaged in intentional misconduct. These events also have a direct bearing on whether the Court finds the State acted in bad faith under Rule 16.6 of the *Arizona Rules of Criminal Procedure* when it moved to dismiss the 2004 Indictment, the subject of the appellate remand. These events include:

  - On April 12, 2012, the Court ordered the parties to participate in a mandatory settlement conference and to attempt to reach settlement in good faith.

  - On April 27, 2012, the parties failed to reach settlement. Defense counsel immediately sent the Prosecutors a letter discussing settlement terms. Foreshadowing what was to follow, the Defense counsel also warned the Prosecutors that they should not attempt to remove defense counsel. Defense counsel also filed a "Motion of Determination of Bad Faith Participation for Settlement and for Sanctions" heard by the Criminal Presiding Judge. On May 8, 2012, the Criminal Presiding Judge denied that motion. While the Criminal Presiding Judge denied the Motion to seal both the letter and that motion, it appears that that the Motion was sealed.

  - On May 10, 2012, the Court held a status conference and affirmed the trial date of July 16, 2012.

  - On June 5, 2012, the Prosecutors returned to the Grand Jury and obtained the 2012 Indictment for: (1) First Degree Premeditated and/or Felony Murder; and (2) two counts of child abuse which require mandatory consecutive sentences to be served day for day. *See* Indictment, CR 2012-007335-001 (June 5, 2012) ("2012 Indictment.") *See* Ariz. Rev. Stat. Ann. § 13-705(M) (2013).

  - On June 7, 2012, the Lead Prosecutor appeared at the Defendant's initial appearance on the 2012 Indictment and allowed the Court Commissioner

to assign a new judge in violation of the Local Rules of the Maricopa County Superior Court, R.4.1(d) ("[a]ll cases pertaining to the same defendant shall be assigned to one division whenever possible") and assign new attorneys in violation of Defendant's constitutional rights.

- On June 7, 2012, the same prosecutors appeared before the Court at a scheduled status conference in the 2004 case and advised the Court that she had just attended the Defendant's initial appearance. She further advised that: (1) a new judge had been assigned to the 2012 case; (2) new defense attorneys had been appointed; and (3) the 2004 case had been dismissed.
- At that same hearing, the Lead Prosecutor announced that the Commissioner had appointed the Legal Defender's Office. The Lead Prosecutor knew that the Legal Defender's Office had previously been conflicted off the case and was not eligible to serve as counsel for the Defendant. As a seasoned prosecutor, she also knew that a new indictment should not disrupt the attorney-client relationship that already existed, yet she chose to say nothing to the Initial Appearance Commissioner. When the Court raised the conflict with the Prosecutors, the Lead Prosecutor revealed that her strategy included removing the assigned judicial officer. She wanted to have all matters regarding the appointment of counsel referred to the Presiding Criminal Judge, prompting the following colloquy:

| | |
|---|---|
| The Lead Prosecutor: | Well, as it stands right now, Your Honor, the IA Court has appointed the Legal Defenders' Office. She was aware there was a pending case, but under the circumstances did not know if it would go to the assigned attorneys. A million dollar cash bond was set. |
| | . . . |
| | I assume that what we would do next is go before the presiding criminal so that he could make all those decisions. |

| | |
|---|---|
| The Court: | Well, I don't I don't know that it requires that it go before the presiding criminal. I think I'd be making those decisions in terms of determination of counsel. At present, it's still my case . . . |
| Lead Prosecutor: | I would respectfully request the Court make-- |
| The Court: | Okay. |
| Lead Prosecutor: | --presiding make those decisions, because I don't want overstep. |
| The Court: | I can take care of those issues, but is the 2004 case dismissed? |
| Lead Prosecutor: | It is, your honor. |
| The Court: | Okay, so this matter is dismissed, okay. |

. . .

RT 6/7/12, 4:25-6:10-11.

- The Court vacated the 2004 trial date based on the Prosecutor's representations. The Court accepted the statements made by the Prosecutor assuming that the Prosecutor had somehow involved another judicial officer (the Presiding Criminal Judge or Associate Criminal Judge) in the dismissal of the case.

- The Court did not *initiate* the dismissal nor would it have done so absent the misrepresentation. To suggest otherwise strains all credibility. Indeed, the Court would not have granted an oral motion on an issue of this magnitude without briefing and without making findings under Rule 16.6 of the *Arizona Rules of Criminal Procedure*. The Court would have been far more deliberative about dismissing a long-standing capital prosecution on the eve of a second trial. In addition, defense counsel most assuredly would have reacted differently if they thought the State was orally moving to dismiss the case rather than announcing its dismissal.

- Furthermore, the June 7, 2012 transcript does not reflect the Prosecutor's inflection and tone of voice when she announced that the case had been dismissed. The Prosecutor did not move for dismissal of the 2004 case. Rather, she announced its dismissal as a *fait accompli.* To suggest otherwise tortures the facts and distorts reality.

- After the hearing, the Court examined the docket and found no evidence of the dismissal represented by the Lead Prosecutor. Believing that the docket did not reflect the events that had occurred just hours earlier, [13] and relying on the Lead Prosecutor's representations, the Court included the dismissal in the June 7, 2012 Minute Entry.

- The Court finds that the Lead Prosecutor intentionally and falsely misrepresented that the case had been dismissed to avoid: (i) providing a good-cause basis for dismissal; (ii) addressing the Defendant's objections; (iii) moving forward with the impending trial, which was just weeks away; and (iv) questioning by the Court regarding the basis for dismissal.

- On June 26, 2012, the Court explained its understanding of the June 7th discussion and reinstated the case. Incredibly, the Prosecutor immediately challenged the Court's veracity and orally moved for recusal.[14] The Prosecutor accused the Court of misrepresenting the record. The Court denied the oral motion.

- Having reinstated the 2004 case, the Court set both cases for trial on October 1, 2012.

- The Prosecutors then embarked upon an aggressive and systematic effort to remove the Court and defense counsel:

[13] For reasons unknown to this Court, the Clerk did not file the Initial Appearance Packet until September 19, 2012, more than three months later. *See* "IAD-Initial Appearance Document" (filed September 19, 2012).
[14]The Lead Prosecutor was not present for the June 26, 2012 hearing but both assigned Prosecutors attended the June 7, 2012 hearing.

**Chart of Attempts to Remove the Court and Counsel**

| Date | Attempts to Remove the Court | Attempts to Remove Counsel | Comments |
|---|---|---|---|
| June 26, 2012 | State's Oral Motion for Court to Recuse itself (2004 and 2012 cases) | | Denied by Court, June 26, 2012 |
| July 24, 2012 | State's Notice of Change Case under Rule 10.2(a) (2012 case) | | Denied by Criminal Presiding Judge on July 25, 2012 |
| July 24, 2012 | | State's Motion to Determine Counsel in 2012 case | Denied by Criminal Presiding Judge on September 18 2012 after State withdraws motion |
| July 24, 2012 | State's Request for Court to Recuse Itself | | Denied by Court on July 31, 2012 |
| August 3, 2012 | State's Motion to Reconsider State's Notice of Change of Judge under Rule 10.2(a) (2012 case) | | Denied by Criminal Presiding Judge on August 6, 2012 |
| September 4, 2012 | State's Request to Remove Judge Duncan in 2012 case for Cause under Rule 10.1 (2004 case) | | Denied by Criminal Presiding Judge on September 6, 2012 |

| | | | |
|---|---|---|---|
| September 4, 2012 | State's Request to Remove Judge Duncan in 2012 case for Cause under Rule 10.1 (2012 case) | | Denied by Criminal Presiding Judge on September 12, 2012 |
| September 13, 2012 | State's Notice of Change in 2012 Case under Rule 10.2(a) | | State withdraws Notice after questioning by Criminal Presiding Judge on September 18, 2012 |

- As demonstrated above, the Prosecutors baselessly sought to remove the Court **7 times** and to remove defense counsel.

- On August 6, 2012, the State finally filed a written motion to dismiss the 2004 Indictment.
- On September 10, 2012, Defendant moved to dismiss the 2012 Indictment.
- On September 19, 2012, the Court granted the Defendant's Motion to Dismiss the 2012 Indictment.[15] The State withdrew its Motion to Dismiss the 2004 Indictment.
- The Court affirmed the October 1 trial date and ordered jury selection to commence on October 2, 2012.
- On September 27, 2012, the State renewed its motion to dismiss the 2004 Indictment.
- On October 1, 2012, the Court denied the State's motion to dismiss the 2004 Indictment and found that the prosecutor had not shown good cause pursuant to Rule 16.6(a). The State appealed and the Court of Appeals remanded for further findings on whether the State acted in bad faith in seeking to dismiss the 2004 Indictment.

[15] The State did not appeal this ruling.

**C. Conclusions of Law and Remedy**

The Court finds that the Prosecutors engaged in misconduct and acted in bad faith. From the outset, the Prosecutors deliberately attempted to secure a conviction based on an uncharged theory. They persistently violated this Court's *Styers* ruling and secured a conviction relying on a win-by-any-means strategy. Furthermore, they escalated their misconduct by attacking the Defendant for exercising his constitutionally protected right to seek a mistrial and compounded their misbehavior by groundlessly attacking the Court and defense counsel.

The Prosecutors' securing of the 2012 Indictment bolsters the Court's finding of misconduct. The Court can now see the lengths to which the Prosecutors went to avoid the possibility of acquittal. Frustrated by the Court's *Styers* ruling and by defense counsel's spirited representation, the Prosecutors attempted to wipe the slate clean. They incorrectly believed that new charges would lead to the assignment of a new judge and the appointment of new counsel. The delay occasioned by their misconduct has extended the proceedings an additional 13 months, leaving the Defendant with no valid conviction and in custody for more than 9 years.

The State relies heavily on *Mieg* as a basis for having sought the 2012 Indictment. The Court acknowledges that prosecutors may evaluate their cases following mistrial. *See Mieg; see also LaDeau.* With good cause, prosecutors may seek additional charges, add parties and increase penalties in a new indictment. However, the Prosecutors' reliance on *Mieg* is misplaced because *Mieg* bears no resemblance to this case. *Mieg* involved a pre-verdict mistrial based on an unanticipated court ruling. This case involves prosecutorial misconduct and vindictive prosecution, the combination of which occurred during pretrial proceedings, trial and post-trial proceedings.[16]

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[16] Specifically, in *Mieg* the defendant was charged with one count of possession of dangerous drugs. As trial commenced, the judge precluded evidence that the defendant had possessed a scale. The trial judge granted a mistrial after a prosecution witness violated that ruling.

Following the mistrial, the prosecutor obtained a new indictment charging the defendant with not only possession of dangerous drugs but also possession of drug paraphernalia, the scale. After undertaking a "totality of the circumstances" analysis, the *Mieg* court reversed the trial court's dismissal of the second indictment.

The *Mieg* court noted that "the trial ended before a verdict was reached" and "the State was not required 'to do over what it thought it had done correctly.'" *Mieg*, 239 P.3d at 1262. Second, the timing of the trial court's evidentiary ruling "prevented the State from reassessing its original charging decision before proceeding to trial." *Id.* "Third, and perhaps more importantly, the State is permitted to respond to an adverse evidentiary ruling by changing strategy in an effort to strengthen its case when doing so does not violate a defendant's procedural rights." *Id.* The *Mieg* court further noted that "the State's decision to pursue an indictment adding the drug paraphernalia charge to ensure that the evidence explaining defendant's arrest would be admissible at his retrial was a reasonable and legitimate response to the court's pretrial ruling." *Id.* In *Mieg*, neither the defense counsel nor the court questioned the prosecutor's motive. *Id.* at 1263.

Having found grave prosecutorial misconduct and bad faith, the Court turns to the remedy. In doing so, the Court is mindful of what is at stake in this case. The allegations against the Defendant are very serious. Our community demands justice for the victim who deserves justice. The Court is equally mindful of its unyielding duty to apply the laws of this State equally to all persons and examine the Prosecutors' unique role in that process.

The decision the Court faces is whether to grant or deny the State's motion to dismiss the 2004 Indictment, whether to grant the Defendant's Motion to Dismiss all charges based on prosecutorial misconduct, or both. Upon finding that the Prosecutors engaged in misconduct, vindictive prosecution, and acted in bad faith, the Court evaluated all possible remedies including: (1) disqualifying the Prosecutors which will inexorably lead to prejudicial delay; (2) requiring the State to proceed on the 2004 charges--which also involves prejudicial delay; (3) combining remedies number 1 and number 2; and (4) dismissing the case with prejudice.

The Court seriously considered disqualifying the Prosecutors and denying the State's Motion to Dismiss the 2004 Indictment. Arguably, this remedy would disgorge the State from gaining any advantage based on its misconduct. However, the scope and extent of the misconduct in this case leave the Court with no alternative but to dismiss the case with prejudice. The Arizona Supreme Court has instructed its trial courts that the remedy must reflect the magnitude of the misconduct.

In *Jorgensen*, the Arizona Supreme Court upheld the trial court's dismissal of a first degree murder prosecution where the State had "overwhelmed" the defendant's insanity defense not with evidence but with prosecutorial misconduct. The Court found that the "prosecutor deliberately risked a mistrial or reversal to win the case and prevent an acquittal." *Jorgenson,* 10 P.3d at 1178. In *Minnitt,* also a first-degree-murder prosecution, the trial court found that the prosecutor had engaged in misconduct but rejected the defendant's double jeopardy argument

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In this case, the Prosecutors engaged in pervasive misconduct. First, the objective evidence demonstrates the Prosecutors' intentional violation of the Court's *Styers* rulings was prejudicial because jurors returned a verdict based on an intent-to-kill theory. Second, the Court's *Styers* rulings did not result in the preclusion of otherwise admissible evidence. Rather, the rulings were an attempt to confine the State to trying the case it had charged. Third, the Prosecutors repeatedly violated the Defendant's due process right to be tried only on the specific charges of which he had been accused. *See Martin*, 679 P.2d at 494; *cf. Styers*. Fourth, the 2012 Indictment was not the product of the Prosecutors' reaction to an adverse court ruling; but, in reality, the new indictment represents their undaunted efforts to convict the Defendant based on an unsupportable legal theory. *Cf. State v. Payne*, 306 P.3d 17 (Ariz. S. Ct. 2013). (*Payne* demonstrates how a prosecution may properly proceed where child abuse has occurred and the State also has a basis to file intentional murder charges. Child abuse charges focus on the defendant's intent to injure the child whereas murder charges focus on when a defendant's intent changes from an intent-to-injure to intent-to-kill. The Prosecutors' 2012 Indictment charging both intentional murder and/or felony murder continues to violate the holding in *Styers*.)

and denied the defendant's motion to dismiss. The Arizona Supreme Court reversed and noted that "[t]here are circumstances, however, in which the double jeopardy clause will bar re-prosecution." *Minnitt*, 55 P.3d at 781. More specifically, the Court observed that dismissal with prejudice is the appropriate remedy when there is "[i]ntentional and pervasive misconduct on the part of the prosecution to the extent that the trial is structurally impaired. . . ." *Id.* Finally, in *Pool*, after considering the cumulative and prejudicial effect of the misconduct, the Arizona Supreme Court held that jeopardy barred re-prosecution. Notably, *Pool* involved allegations of both vindictive prosecution and prosecutorial misconduct.

Here, the misconduct is so egregious that the Double Jeopardy Clause protects "[the] [D]efendant from multiple attempts by the government, with its vast resources, '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. . . .'" *Minnitt*, 55 P.3d at 780 (citations omitted.) Ultimately, the Prosecutors' misconduct prejudicially impacted the integrity and fundamental fairness of the proceedings and requires imposition of the ultimate sanction. The Court does not take this action lightly but with a somber and well-considered belief that the public's confidence in the integrity of its criminal prosecutions requires no less.

Accordingly,

IT IS ORDERED dismissing this case with prejudice.

IT IS FURTHER ORDERED that all other motions are denied as moot.

IT IS FURTHER ORDERED releasing the Defendant immediately.

IT IS FURTHER ORDERED staying this order until Tuesday, November 26, 2013, at 12:00 p.m.

ISSUED: Order of Release (Tuesday, November 26, 2013, at 12:00 p.m.)

Dated: 11/19/2013

Sally S Duncan

HON. SALLY SCHNEIDER DUNCAN
JUDICIAL OFFICER OF THE SUPERIOR COURT

# APPENDIX F

241 Ariz. 93
Court of Appeals of Arizona,
Division 1.

STATE of Arizona, Appellant/Cross–Appellee,
v.
**Jeffrey Richard MARTINSON**,
Appellee/Cross–Appellant.

No. 1 CA–CR 13–0895
|
FILED 9/22/2016

**Synopsis**

**Background:** State filed special action petition challenging denial of its motion to dismiss indictment charging defendant with first degree felony murder and child abuse. The Court of Appeals, Gould, J., 2012 WL 5867379, accepted jurisdiction and reversed the Superior Court's order. Subsequently, the Superior Court, Maricopa County, Sally Schneider, Duncan, J., ruled the State had engaged in prosecutorial misconduct, and dismissed the indictment with prejudice. State appealed, and defendant cross-appealed.

**Holdings:** The Court of Appeals, Downie, J., held that:

[1] State was entitled to pursue a theory that defendant committed the predicate felony of child abuse with intent to kill five-year old victim, not merely to injure him, and therefore, Superior Court's contrary ruling was legally erroneous;

[2] assuming that prosecutors knowingly pursued an intent to kill theory in contravention of court's order, defendant suffered no cognizable prejudice, as required to bar retrial on double jeopardy grounds;

[3] Substantial evidence existed from which jurors could decide, beyond a reasonable doubt that defendant was guilty of child abuse and felony murder;

[4] evidence was sufficient to support jury finding that child's injuries occurred under circumstances likely to produce death or serious physical injury, as required for conviction for child abuse; and

[5] even if expert's testimony that fatal dosage of muscle relaxer was the cause of child's death was erroneously admitted to establish the independent causation requirement necessary to prove felony murder, it could be considered in determining whether retrial was barred by double jeopardy principles.

Vacated and remanded.

West Headnotes (15)

**[1] Criminal Law**
Amendments and rulings as to indictment or pleas

A superior court's order dismissing an indictment is reviewed for an abuse of discretion.

Cases that cite this headnote

**[2] Criminal Law**
Discretion of Lower Court

A court abuses its discretion if it commits an error of law in reaching its decision.

Cases that cite this headnote

**[3] Criminal Law**
Scope of Inquiry

**Criminal Law**
Questions of Fact and Findings

The Court of Appeals defers to the superior court's factual findings unless clearly erroneous but is not bound by its legal conclusions.

Cases that cite this headnote

  

[4] **Homicide**
Injuring or endangering child

State was entitled to pursue a theory that defendant committed the predicate felony of child abuse with intent to kill five-year old victim, not merely to injure him, and therefore, trial court's contrary ruling was legally erroneous, in prosecution for first degree felony murder and child abuse; although the predicate felony of child abuse required the State to prove only that defendant intentionally injured the victim, much of the evidence establishing an intent to injure also demonstrated an intent to kill, and evidence proving an intent to kill necessarily proves an intent to injure, as it is impossible to kill a person without causing physical injury. Ariz. Rev. Stat. Ann. § 13-1105(A)(2).

Cases that cite this headnote

[5] **Double Jeopardy**
Particular grounds for relief

Assuming that prosecutors knowingly pursued an intent to kill theory in contravention of court's order, in prosecution for first degree felony murder and child abuse, defendant suffered no cognizable prejudice, as required to bar retrial on double jeopardy grounds; even though State's conduct in violating court's order by pursuing an intent to kill theory was improper, the applicable law did permit the State to prove the felony murder charge with evidence defendant intended to kill five-year-old victim. U.S. Const.Amend. 5; Ariz. Rev. Stat. Ann. § 13-3623(A)(1).

Cases that cite this headnote

[6] **Double Jeopardy**
Multiple prosecutions

Federal and state double jeopardy protections prohibit multiple prosecutions for the same offense. U.S. Const.Amend. 5.

Cases that cite this headnote

[7] **Double Jeopardy**
Right to completion of trial by single tribunal

As part of the protection against multiple prosecutions, the double jeopardy clause protects a defendant's valued right to have his or her trial completed by the tribunal first assigned. U.S. Const.Amend. 5.

Cases that cite this headnote

[8] **Double Jeopardy**
Fault of prosecution

In determining whether double jeopardy principles bar retrial, appellate courts consider whether there was intentional and pervasive misconduct on the part of the prosecution to the extent that the trial was structurally impaired and whether the misconduct is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself. U.S. Const.Amend. 5.

Cases that cite this headnote

[9] **Criminal Law**
Review De Novo

Whether double jeopardy principles bar retrial of a defendant is reviewed de novo. U.S. Const.Amend. 5.

Cases that cite this headnote

[10] **Criminal Law**
Review De Novo

Claims of insufficient evidence are reviewed de novo.

Cases that cite this headnote

[11] **Criminal Law**
Construction of Evidence
**Criminal Law**
Substantial evidence
**Criminal Law**
Reasonable doubt

An appellate court's assessment of insufficient evidence claim is limited to whether substantial evidence supports the verdicts; "substantial evidence" is evidence that, viewed in the light most favorable to sustaining the verdict, would permit a reasonable person to find a defendant guilty beyond a reasonable doubt.

2 Cases that cite this headnote

[12] **Criminal Law**
Of Acquittal

Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury, and judgment of acquittal cannot be entered.

1 Cases that cite this headnote

[13] **Homicide**
Homicide in Commission of or with Intent to Commit Other Unlawful Act
**Infants**
Physical abuse and cruelty

Substantial evidence existed from which jurors could decide, beyond a reasonable doubt, that defendant was guilty of child abuse and felony murder; five-year old child died while in defendant's sole care, when mother left child with defendant, the child was in good health, autopsy revealed cause of death was acute toxicity caused by the administration of a muscle relaxer which had been prescribed to defendant, and there was circumstantial evidence that defendant administered the drug to the victim as a means of retaliating against the mother. Ariz. Rev. Stat. Ann. § 13-3623(A)(1).

Cases that cite this headnote

[14] **Homicide**
Predicate offenses or conduct
**Infants**
Physical abuse and cruelty

Evidence was sufficient to support jury finding that child's injuries occurred under circumstances likely to produce death or serious physical injury, as required for conviction for child abuse, as the predicate felony for felony murder conviction; evidence that child died as a result of a fatal dosage of a muscle relaxer, which defendant administered to child as a means of retaliating against child's mother, was objective evidence permitting the jury to conclude the abuse occurred under circumstances likely to produce death or serious physical injury, and that defendant caused child's death. Ariz. Rev. Stat. Ann. § 13-3623(A)(1).

1 Cases that cite this headnote

[15] **Criminal Law**
Evidence

Even if expert's testimony that fatal dosage of muscle relaxer was the cause of child's death was erroneously admitted to establish the independent causation requirement necessary to prove felony murder, it could be considered in determining whether retrial was barred by double jeopardy principles. U.S. Const.Amend. 5.; Ariz. Rev. Stat. Ann. § 13-1105(A)(2).

Cases that cite this headnote

**309 Appeal from the Superior Court in Maricopa County, Nos. CR 2004–124662–001 SE, CR 2012–007335–001, The Honorable Sally Schneider Duncan, Judge. **VACATED AND REMANDED**

**Attorneys and Law Firms**

Maricopa County Attorney's Office, Phoenix, By Gerald R. Grant, Counsel for Appellant/Cross–Appellee

Michael Terribile, Attorney at Law, Phoenix, By Michael Terribile, Co–Counsel for Appellee/Cross–Appellant

Law Office of Treasure VanDreumel, PLC, Phoenix, By Treasure VanDreumel, Co–Counsel for Appellee/Cross–Appellant

Arizona Voice for Crime Victims, Scottsdale, By Colleen Clase, Co–Counsel for Crime Victim, K.E.

University of Utah Appellate Clinic, S.J. Quinney College of Law, Salt Lake City, Utah, By Paul G. Cassell, Co–Counsel/Pro Hac Vice for Crime Victim, K.E.

Judge Margaret H. Downie delivered the opinion of the Court, in which Acting Presiding Judge John C. Gemmill (Retired) and Judge Samuel A. Thumma joined.

DOWNIE, Judge:

## *95 OPINION

¶ 1 The State of Arizona appeals an order dismissing with prejudice first degree felony murder and child abuse charges against **Jeffrey Richard Martinson** on the basis of prosecutorial misconduct. Martinson cross-appeals from the denial of his motions for judgment of acquittal.

¶ 2 Because the State was erroneously precluded from suggesting at trial that Martinson intentionally killed his son, the fundamental underpinnings for a finding of prosecutorial misconduct sufficient to warrant dismissal with prejudice are not present. We therefore vacate the dismissal with prejudice order and remand to the superior court with instructions to grant the State's motion to dismiss the pending indictment without prejudice. Treating Martinson's cross-appeal as a cross-issue, we deny his requested relief.

## FACTS AND PROCEDURAL HISTORY

¶ 3 Martinson and K.E. are the parents of J.E.M., who was born in July 1999. After their relationship ended in 2000, K.E. obtained legal custody of J.E.M., as well as an order of protection against Martinson. Martinson was awarded visitation with J.E.M.

¶ 4 In August 2004, J.E.M. was with Martinson for a scheduled weekend visit. When Martinson failed to return the child on Sunday evening or return telephone calls, K.E. contacted the police. Police officers entered Martinson's apartment to conduct a welfare check and found him in the master bedroom, unresponsive, with cuts on his wrists. J.E.M. was discovered dead in another bedroom, with a frothy substance coming from his nose. Toxicology tests revealed carisoprodol (a muscle relaxant) and a related metabolite in J.E.M.'s blood. The medical examiner concluded J.E.M.'s death was caused by acute carisoprodol toxicity.

¶ 5 In September 2004, a grand jury returned an indictment (the "2004 Indictment"), charging Martinson with one count of first degree felony murder and one count of child abuse pursuant to Arizona Revised Statutes ("A.R.S.") section 13–3623(A)(1) (A person commits child abuse if, acting knowingly or intentionally, the person, "[u]nder circumstances likely to produce death or serious physical injury ... causes a child ... to suffer physical injury."). Child abuse was the predicate felony for the felony murder count. *See* A.R.S. § 13–1105(A)(2) (a person commits felony murder if he commits child abuse in violation of A.R.S. § 13–3623(A)(1) and "in the course of and in furtherance of the offense" causes death). The State sought the death penalty.

¶ 6 Trial began in July 2011. After the jury was sworn, but before the State's opening statement,

defense counsel moved to preclude evidence that Martinson intentionally killed J.E.M. The superior court granted the **310 *96 motion, reasoning that under State v. Styers, 177 Ariz. 104, 865 P.2d 765 (1993), alleging child abuse as the predicate felony for felony murder barred the State from arguing that Martinson had intentionally killed J.E.M.

¶ 7 The jury returned guilty verdicts as to both felony murder and child abuse. Jurors could not reach a unanimous decision during the penalty phase, though, resulting in a mistrial for that phase. Martinson moved for a judgment of acquittal based on insufficiency of the evidence or, in the alternative, for a new trial as to his guilt, asserting juror misconduct and trial error. Martinson also alleged prosecutorial misconduct, claiming prosecutors repeatedly violated the court's order precluding evidence of an intent to kill J.E.M.

¶ 8 In March 2012, the superior court denied Martinson's motion for judgment of acquittal but granted his motion for new trial based on juror misconduct and error in admitting expert testimony. In ordering the new trial, the court specifically rejected Martinson's claims of prosecutorial misconduct.

¶ 9 In June 2012, the State obtained a new indictment against Martinson in Maricopa County Case No. CR 2012–007335–001 (the "2012 Indictment"). In addition to alleging felony murder, the 2012 Indictment charged Martinson with premeditated murder. After obtaining the 2012 Indictment, the State moved to dismiss the 2004 Indictment without prejudice.[1] Martinson objected and moved to dismiss the 2012 Indictment instead. The superior court granted Martinson's motion to dismiss the 2012 Indictment and denied the State's motion to dismiss the 2004 Indictment.

¶ 10 The State filed a special action petition challenging the denial of its motion to dismiss the 2004 Indictment. State ex rel. Montgomery v. Duncan, 1 CA–SA 12–0217, 2012 WL 5867379 (Ariz. App. Nov. 20, 2012) (mem. decision). This Court accepted jurisdiction and granted relief, concluding the State had established good cause for dismissing the 2004 Indictment without prejudice. Id. at *5, ¶ 20. We did not, however, "reach the issue of whether good cause would have been lacking if the trial court had determined the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8." Id. at ¶ 21. We ruled the superior court could "amend its findings or hold further hearings" if it intended to rely on bad faith. Id.

¶ 11 The superior court subsequently ordered additional briefing and held a hearing to consider whether the State acted in bad faith by seeking to dismiss the 2004 Indictment. The court ultimately ruled that the State had engaged in prosecutorial misconduct and bad faith by, among other things, "deliberately attempt[ing] to secure a conviction based on an uncharged theory" and by "persistently violat[ing] this Court's Styers ruling." Based on its findings of prosecutorial misconduct, the court dismissed the 2004 Indictment with prejudice.

¶ 12 The State timely appealed, and Martinson timely cross-appealed.[2]

## DISCUSSION

### I. Dismissal with Prejudice

[1] [2] [3] ¶ 13 We review the superior court's dismissal order for an abuse of discretion. See State v. Moody, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119 (2004) (appellate court reviews rulings on motions to dismiss criminal charges for abuse of discretion). A court abuses its discretion if it commits an error of law in reaching its decision. State v. Cowles, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369 (App. 2004). We defer to the superior court's factual findings unless clearly erroneous but are not bound by its legal conclusions. State v. O'Dell, 202 Ariz. 453, 456–57, ¶ 8, 46 P.3d 1074 (App. 2002).

**311 *97 The bad faith and prosecutorial misconduct findings that caused the superior court to dismiss the charges with prejudice are, at their core, premised on the determination that prosecutors ignored the holding in *Styers* andthe corresponding court order in this case that they not pursue an intent to kill theory at trial.[3]

¶ 15 The superior court ruled that because the State had charged "felony murder—with child abuse as a predicate—Arizona law necessarily precluded the State from offering evidence of intent to kill and/or argu[ment] that [Martinson] intended to kill" J.E.M. The court based this conclusion on what it viewed as the central holding of *Styers*: because a person cannot intentionally kill a child without also intentionally causing physical injury, the crime of child abuse necessarily merges into felony murder if based on an intent to kill. The court reasoned, though, that *Styers* permits child abuse to serve as a predicate felony if it is based on an intent to *injure* a child; under these circumstances, it concluded, child abuse constitutes a separate and independent offense from felony murder, and the two offenses do not merge. Based on this analytic framework, the court precluded the State from presenting evidence or argument that Martinson intended to kill J.E.M.

### A. Merger

[4] ¶ 16 Applying *Styers* to the facts of this case is not a straightforward proposition.

¶ 17 Styers shot a child in the back of the head and was convicted of first degree murder, conspiracy to commit first degree murder, child abuse, and kidnapping. 177 Ariz. at 108–09, 865 P.2d 765. The fatal gunshot wounds were the only evidence of child abuse. *Id.* at 110, 865 P.2d 765. The jury received separate verdict forms for premeditated and felony murder. It returned guilty verdicts on both theories. *Id.* at n.1.

¶ 18 On appeal, Styers challenged the sufficiency of the evidence for the child abuse conviction, arguing he could not be convicted of both murder and child abuse. The Arizona Supreme Court agreed, holding that the "separate child abuse conviction cannot stand on the facts of this case." *Id.* at 110, 865 P.2d 765. The court drew an analogy to aggravated assault-murder, where the convictions merge into one offense, reasoning: "If a defendant cannot be convicted for an intentional aggravated assault that necessarily occurs when there is a premeditated murder, it logically follows that he also cannot be convicted for an intentional child abuse that necessarily occurs when there is a premeditated murder of a child victim." *Id.* The court emphasized, though, that its decision was limited to premeditated murder and child abuse convictions. Indeed, anticipating charges like those against Martinson, the court added that its decision did not apply to child abuse as a predicate felony for felony murder:

> We emphasize that nothing in this opinion should be read as suggesting that child abuse may not still be a predicate felony for felony murder. If a person intentionally *injures* a child, he is guilty of child abuse under A.R.S. § 13–3623(B)(1);[4] if that injury results in the death of the child it becomes a first degree *felony* murder pursuant to A.R.S. § 13–1105(A)(2). *See State v. Lopez*, 174 Ariz. 131, 141–43, 847 P.2d 1078, 1088–90 (1992).... Although felony murder is first degree murder, it is arrived at differently than premeditated murder. The first degree murder statute, A.R.S. § 13–1105(A)(1), not the child abuse statute, applies when a person intentionally *kills* a child victim.

*Id.* at 110–11, 865 P.2d 765 (footnote added).

¶ 19 The supreme court underscored the limited holding of *Styers* in the companion ****312 *98** case of *State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779 (1993), stating:

> In the companion case involving co-defendant Styers, we have today held that, under the facts of this case, a separate child abuse offense under A.R.S. § 13–3623(B)

> (1) did not occur when [the victim] was murdered *with premeditation*.... We emphasize, as we did in *Styers*, that our holding has no effect on the use of child abuse as a predicate offense for felony murder.

¶ 20 The holding in *Styers* is limited to premeditated murder and child abuse convictions and does not address or govern the use of child abuse as a predicate felony for felony murder. In contrast, our supreme court squarely addressed whether child abuse merges into felony murder in *State v. Lopez*, 174 Ariz. 131, 847 P.2d 1078 (1992). The defendant in *Lopez* was convicted of felony murder based on the predicate felony of child abuse. *Id.* at 136, 847 P.2d 1078. Relying on *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965), Lopez challenged the conviction, arguing that child abuse, like assault, cannot serve as a predicate felony because it merges into felony murder. *Id.* at 141, 847 P.2d 1078; *see Essman*, 98 Ariz. at 235, 403 P.2d 540 ("[A]cts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder."). The supreme court rejected that argument, holding that "if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no 'merger' occurs." [5] *Lopez*, 174 Ariz. at 142, 847 P.2d 1078; *see also State v. Miniefield*, 110 Ariz. 599, 602, 522 P.2d 25 (1974) (arson does not merge into felony murder because it is designated a predicate felony under felony murder statute).

¶ 21 Neither *Styers* nor other precedent stands for the proposition that a predicate felony committed with the intent to kill merges into felony murder. Indeed, the defendant in *Styers* was charged with felony murder predicated on child abuse and felony murder predicated on kidnapping. *Styers*, 177 Ariz. at 110, 112, 865 P.2d 765. Styers argued that kidnapping could not serve as a predicate felony because it was committed pursuant to a plan to kill and therefore merged into the felony murder charge. *Id.* at 112, 865 P.2d 765. The court disagreed, holding that, "[a]lthough the jury findings in this case clearly demonstrate that the kidnapping was [committed] pursuant to a plan to kill, that does not mean that only one crime was committed." *Id.* As a result, "the merger doctrine would not apply," and "Defendant was appropriately convicted of both kidnapping and murder." *Id.* [6]

¶ 22 The court reached a similar conclusion in *Miniefield*, where the defendant threw a bottle of flammable liquid into a house, causing a fire that killed a nine-month-old child. 110 Ariz. at 601, 522 P.2d 25. The defendant was charged with felony murder based on arson as the predicate felony. *Id.* He argued arson could not serve as a predicate felony because it was, like a knife or a gun, "merely the use of fire to attempt to kill the victim," and "not so distinct as to be an ingredient of an independent offense." *Id.* Rejecting this contention, the court held that because arson is identified as a predicate felony under the felony murder statute, when "arson results in a death it is first degree murder." *Id.* at 602, 522 P.2d 25. The court further held that under the felony murder statute, there is no "distinction between a person who intends to kill another by fire" and a person who commits arson by only intending "to burn down a dwelling house and accidentally kills one of the occupants." *Id.*

¶ 23 More recently, in *State v. Moore*, 222 Ariz. 1, 13, ¶ 57, 213 P.3d 150 (2009), the defendant was convicted of felony murder predicated on burglary. The burglary charge was based on entry into the victim's home with the intent to commit murder. ****313** *Id.* at 12, ¶ 50, 213 P.3d 150. ***99** Defendant challenged his conviction, arguing burglary based on an intent to kill merges into felony murder. The court disagreed, holding that under Arizona's felony murder statute, a predicate felony is not required to be separate or independent from homicide. *Id.* at 14, ¶ 62, 213 P.3d 150; *see also State v. Hardy*, 230 Ariz. 281, 287, ¶¶ 21–26, 283 P.3d 12 (2012) (felony murder may be predicated on burglary and kidnapping undertaken with intent to murder the victim).

¶ 24 The superior court's order dismissing the charges with prejudice was also based, in part, on the fact that felony murder only requires

proof of the specific mental state for the predicate felony, and proof of an intent to kill J.E.M. was not required. *See State v. McLoughlin*, 139 Ariz. 481, 485–86, 679 P.2d 504 (1984); A.R.S. § 13–1105(A)(2). By definition, though, proof of a *more* culpable mental state proves a *less* culpable mental state. *See* A.R.S. § 13–202(C). Indeed, given that crimes are designated predicate felonies because they create a grave risk of death, and felony murder requires a close causal connection between the predicate felony and the resulting death, it logically follows that much of the evidence used to prove a predicate felony may also prove an intent to kill. *See Miniefield*, 110 Ariz. at 602, 522 P.2d 25 (Offenses are designated predicate felonies because they are "committed with such a wanton disregard for human life that there is no need to prove the elements usually necessary for a conviction for first degree murder."); A.R.S. § 13–1105(A)(2) (under felony murder statute, death must occur "in the course of and in furtherance of" a predicate felony).

¶ 25 Although the predicate felony of child abuse required the State to prove only that Martinson intentionally injured J.E.M., much of the evidence establishing an intent to injure also demonstrated an intent to kill. *Cf. State v. DePiano*, 187 Ariz. 41, 43, 45, 926 P.2d 508 (App. 1995) (sufficient evidence of intent to commit child abuse where prosecution presented theory defendant wanted to kill herself and her children as part of a "suicide gesture"), *vacated in part on other grounds*, *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996). Evidence proving an intent to kill necessarily proves an intent to injure, as it is impossible to kill a person without causing physical injury. *See State v. Barrett*, 132 Ariz. 88, 90, 644 P.2d 242 (1982) ("It cannot be seriously argued that death does not involve serious physical injury as defined by [statute]."), *overruled on other grounds by State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990).

¶ 26 For the foregoing reasons, the State was entitled to pursue a theory that Martinson committed the predicate felony of child abuse with an intent to kill J.E.M., not merely injure him. The superior court's contrary ruling was therefore legally erroneous.

**B. Prosecutorial Misconduct**

[5] [6] [7] [8] [9] ¶ 27 Federal and state double jeopardy protections prohibit multiple prosecutions for the same offense. *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 27, 55 P.3d 774 (2002). Additionally, "[a]s part of the protection against multiple prosecutions, the clause protects a defendant's valued right to have his or her trial completed by the tribunal first assigned." *Id.* These constitutional protections, though, "are not absolute." *Id.* at ¶ 28. In determining whether double jeopardy principles bar retrial, we consider whether there was "[i]ntentional and pervasive misconduct on the part of the prosecution to the extent that the trial [was] structurally impaired" and whether the misconduct "is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *Id.* at 438, ¶¶ 29–30, 55 P.3d 774. We review *de novo* whether double jeopardy principles bar retrial of a defendant. *Moody*, 208 Ariz. at 437, ¶ 18, 94 P.3d 1119.

¶ 28 Although as a matter of substantive law, the State was entitled to pursue an intent to kill theory, as counsel for the State conceded at argument before this Court, attorneys are ethically bound to abide by court rulings—even those with which they disagree. Thus, to the extent prosecutors violated the superior court's *Styers*-based orders, such conduct was improper.[7] In discussing ****314** ***100** the appropriate sanction to impose, the superior court stated:

> [T]he Prosecutors engaged in pervasive misconduct. First, the objective evidence demonstrates the Prosecutors' intentional violation of the Court's *Styers* rulings was prejudicial because jurors returned a verdict based on an intent-to-kill theory. Second, the Court's *Styers* rulings did not result in the preclusion of otherwise admissible evidence. Rather, the rulings were an attempt

> to confine the State to trying the case it had charged. Third, the Prosecutors repeatedly violated the Defendant's due process right to be tried only on the specific charges of which he had been accused.... Fourth, the 2012 Indictment was not the product of the Prosecutors' reaction to an adverse court ruling; but, in reality, the new indictment represents their undaunted efforts to convict the Defendant based on an unsupportable legal theory.

¶ 29 Assuming, without deciding, that prosecutors knowingly pursued an intent to kill theory at trial in contravention of the court's order, as a matter of law, Martinson cannot establish the requisite prejudice arising from that conduct that would bar retrial on double jeopardy grounds. *See* State v. Aguilar, 217 Ariz. 235, 238–39, ¶ 11, 172 P.3d 423 (App. 2007) (rejecting claim that prosecutorial misconduct barred retrial on double jeopardy grounds and holding there must be "intentional conduct which the prosecutor knows to be improper *and prejudicial*") (emphasis added); *see also* State v. Towery, 186 Ariz. 168, 185, 920 P.2d 290 (1996) (where there has been misconduct but no error, or the error is harmless, the proper remedy is generally not reversal but affirmance followed by appropriate sanctions against the offending actor). Because the law permitted the State to prove the felony murder charge with evidence that Martinson intended to kill J.E.M., to the extent such evidence and argument was presented at trial, Martinson suffered no cognizable prejudice.

¶ 30 For the foregoing reasons, we vacate the order dismissing the 2004 Indictment with prejudice and remand with instructions to grant the State's motion to dismiss that indictment without prejudice.

**II. Cross–Appeal**

¶ 31 The sole issue Martinson raises on cross-appeal is whether the superior court erred by denying his Rule 20 motions for judgment of acquittal. According to Martinson, even if we set aside the order of dismissal with prejudice, double jeopardy principles bar further prosecution due to insufficiency of the evidence. *See* Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

¶ 32 We lack appellate jurisdiction to consider Martinson's argument as a cross-appeal. A criminal defendant may appeal only from: (1) a final judgment of conviction; (2) an order denying a new trial; (3) an order made after judgment affecting the substantial rights of the party; or (4) an illegal or excessive sentence. A.R.S. § 13–4033(A); *see also* Campbell v. Arnold, 121 Ariz. 370, 371, 590 P.2d 909 (1979) (court of appeals' jurisdiction is dictated by statute). Martinson was successful in having all charges against him dismissed with prejudice. Consequently, his appeal does not fall within a statutorily recognized category over which this Court has appellate jurisdiction.

¶ 33 However, Martinson's challenges offer an alternative basis for affirming the superior court's order of dismissal with prejudice. *See* State v. Cañez, 202 Ariz. 133, ¶ 51, 42 P.3d 564 (2002) (appellate court will uphold trial court's ruling if legally correct for any reason), *abrogated on other grounds by* State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627 (2016). His contention that the court erred by denying the Rule 20 motions does not necessitate a cross-appeal with an independent showing of appellate jurisdiction; it is simply a cross-issue that Martinson may raise in response to the State's appeal. *See* ****315** Town of Miami v. City of Globe, 195 Ariz. 176, 177 n.1, ¶ 1, 985 P.2d 1035 (App. 1998) ***101** ("When a successful party seeks only to uphold the judgment for reasons supported by the record, but different from those relied upon by the trial court, its arguments may not be raised by a cross-appeal, as it is not an 'aggrieved' party, but are more properly designated as cross-issues."). Accordingly, we consider the merits of Martinson's argument.

**[10]** **[11]** **[12]** ¶ 34 We review claims of insufficient evidence *de novo*. State v. West, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188 (2011).

Our assessment is limited to whether substantial evidence supports the verdicts. State v. Scott, 177 Ariz. 131, 138, 865 P.2d 792 (1993); *see also* Ariz. R. Crim. P. 20(a) (requiring trial court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). Substantial evidence is evidence that, viewed in the light most favorable to sustaining the verdict, would permit a reasonable person to find a defendant guilty beyond a reasonable doubt. State v. Roseberry, 210 Ariz. 360, 368–69, ¶ 45, 111 P.3d 402 (2005). "Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." State v. Landrigan, 176 Ariz. 1, 4, 859 P.2d 111 (1993).

**[13]** ¶ 35 The State presented substantial evidence from which jurors could conclude, beyond a reasonable doubt, that Martinson was guilty of child abuse and felony murder.

¶ 36 J.E.M. died while in Martinson's sole care. When K.E. left the boy with Martinson on Friday evening, he was in good health. Postmortem toxicology tests revealed carisoprodol and a related metabolite in J.E.M.'s blood. The medical examiner who performed J.E.M.'s autopsy testified that the cause of death was acute carisoprodol toxicity.

¶ 37 There was also circumstantial evidence that Martinson administered the drug to J.E.M. *See* State v. Murray, 184 Ariz. 9, 31, 906 P.2d 542 (1995) (probative value of evidence is not reduced because it is circumstantial). To counter the suggestion that the child ingested the carisoprodol by himself, the State presented evidence that J.E.M. did not take pills easily and that K.E. never gave him medication in pill form. Moreover, an empty bottle of carisoprodol pills—prescribed for Martinson—was found on the top shelf of a medicine cabinet with the child-resistant cap intact. And the autopsy revealed a recent abrasion on J.E.M.'s upper lip that the medical examiner testified could have been caused by forcible administration of the drug.

¶ 38 The State also presented circumstantial evidence that Martinson gave the drug to J.E.M. as a means of retaliating against K.E. *See* State v. Routhier, 137 Ariz. 90, 99, 669 P.2d 68 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence."). Trial evidence established acrimony between Martinson and K.E. dating back to 2000, when K.E. called the police and had Martinson forcibly removed for assaulting her. After K.E. obtained legal custody of J.E.M. and an order of protection against Martinson, Martinson violated the protective order and visitation schedule, resulting in renewal and expansion of the protective order, and ultimately including a requirement that he participate in domestic violence counseling and undergo a psychological assessment. There was also evidence that, at the time of J.E.M.'s death, Martinson was upset because K.E. had recently filed a motion to reinstate supervised visitation exchanges. Martinson expressed fear that having to bear the expense of supervised exchanges would mean he would not be able to see J.E.M. Indeed, when officers questioned Martinson about J.E.M.'s death, he accused K.E. of wanting to limit his involvement with the child.

¶ 39 During police interviews, Martinson claimed he could not remember what happened to J.E.M. However, post-mortem lividity on the child's body indicated he had been moved and placed on the bed after his death. Additionally, Martinson sent a text message around 8:00 p.m. on Saturday to a friend who was close to J.E.M. The text read: "We love you and will miss you." When the friend called around 9:45 p.m., Martinson spoke of legal paperwork he had received about the motion for supervised exchanges. He complained that he received a letter from K.E. or her attorney every week and that K.E. would ****316 *102** just not go away. He also told the friend J.E.M. did not care about him and only wanted to talk about and be with his mother. When the friend asked about J.E.M., Martinson responded that the boy was in his bedroom with the lights out, and he did not know whether he was awake or asleep. Yet at trial, Martinson testified that he had discovered J.E.M. dead hours earlier.

¶ 40 The State also presented evidence that Martinson tried to commit suicide by taking pills, cutting his wrists, and attempting to suffocate

himself with garbage bags. Reasonable jurors could find such conduct indicative of consciousness of guilt and/or acts undertaken as part of a murder-suicide plan.

[14] ¶ 41 Martinson argues there was no evidence the child abuse occurred under "circumstances likely to produce death or serious physical injury." Proof of this element requires "objective evidence of the existence of such circumstances." *State v. Payne*, 233 Ariz. 484, 506, ¶ 70, 314 P.3d 1239 (2013). But the fact J.E.M. died as a result of the child abuse is "objective evidence" permitting the jury to conclude the abuse occurred under circumstances likely to produce death or serious physical injury. Martinson's claim of insufficient evidence of "physical injury" also fails. The evidence showing that Martinson caused J.E.M.'s death necessarily established that he caused physical injury. *Barrett*, 132 Ariz. at 90, 644 P.2d 242 (death necessarily involves serious physical injury).

[15] ¶ 42 Martinson also asserts there was insufficient proof of a causal link between ingestion of carisoprodol and J.E.M.'s death. Specifically, he argues that, "[a]side from the fact that the court erroneously admitted Dr. Hu's testimony that carisoprodol caused death, the testimony admitted at trial failed to establish the 'independent causation requirement' necessary to prove felony murder." But even if Dr. Hu's causation testimony was erroneously admitted, we may still consider it in determining whether retrial is barred by double jeopardy principles. *See State v. May*, 210 Ariz. 452, 459, ¶ 26, 112 P.3d 39 (App. 2005) ("[R]etrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence." (quoting *People v. Olivera*, 164 Ill.2d 382, 207 Ill.Dec. 433, 647 N.E.2d 926, 931 (1995)).

¶ 43 Considered in totality, the trial evidence was sufficient to support a finding of guilt beyond a reasonable doubt for knowing or intentional child abuse under circumstances likely to produce death or serious physical injury and for felony murder based on that predicate felony. As a result, double jeopardy principles do not bar retrial of Martinson.

## CONCLUSION

¶ 44 We vacate the order dismissing the 2004 Indictment with prejudice and remand to the superior court with instructions to grant the State's motion to dismiss the indictment without prejudice.

### All Citations

241 Ariz. 93, 384 P.3d 307, 748 Ariz. Adv. Rep. 4

Footnotes

1 At the same time, the State successfully moved to dismiss the notice of intent to seek the death penalty.

2 K.E. filed a "crime victim's notice of appearance" in this Court, as well as a "Crime Victim's Brief Pursuant to A.R.S. § 13–4437(A)," arguing the dismissal with prejudice order violated her constitutional rights as a victim. Martinson moved to strike K.E.'s filings. Given our determination that the dismissal should have been without prejudice, we need not resolve K.E.'s standing or her constitutional claims, and we deny Martinson's motion to strike K.E.'s filings.

3 The superior court found additional instances of prosecutorial misconduct. As we discuss *infra*, though, the primary impetus for its dismissal with prejudice order was the purported violation of *Styers* and the *Styers*-based ruling. Most of the post-trial conduct the court categorized as misconduct stems from its conclusion that prosecutors viewed the "rulings about the uncharged intentional-murder theory as a roadblock" and "used every opportunity to challenge the Court's *Styers* ruling and present evidence of intent to kill."

4 This statutory section was later re-designated as A.R.S. § 13–3623(A)(1). *See* 2000 Ariz. Sess. Laws, Ch. 50, § 4 (2nd Reg. Sess.).

5 In distinguishing *Essman*, *Lopez* noted that when *Essman* was decided, assault was not included as a predicate felony under the felony murder statute. *Id.* at 141, 847 P.2d 1078, 1088–90. Assault is not listed as a predicate felony under the current felony murder statute, whereas child abuse is. A.R.S. § 13–1105(A)(2).

6 The court did not address Styers' same argument regarding child abuse as a predicate felony because it had "reversed the child abuse conviction on other grounds." *Id.* at 117, 865 P.2d 765 n.3.

7 The record does not suggest that the State was placed on notice during trial that it was violating a court order, yet continued doing so unabated. Martinson made several motions for mistrial on the basis that prosecutors were violating the court's order by offering evidence and argument suggesting an intent to kill. Each time, the court denied the mistrial request. We leave to the superior court's discretion the question of whether lesser sanctions are appropriate on remand.

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# APPENDIX G

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

| | |
|---|---|
| THE STATE OF ARIZONA<br><br>Plaintiff,<br><br>vs.<br><br>JEFFREY RICHARD MARTINSON,<br><br>Defendant. | No. CR 2018-002279-001DT<br><br>**Motion to Dismiss for Double Jeopardy Violations – Prosecutorial Misconduct and the Prohibition against Multiple Prosecutions**<br><br>(Hon. Jay Adleman)<br><br>(Oral Argument Requested) |

The defendant, Jeffrey Richard Martinson, through undersigned counsel, and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Arizona Constitution Art. II, §§ 4, 10, 15, and 24, moves this Court to dismiss this case for the state's violation of double jeopardy based upon prosecutorial misconduct and the prohibition against multiple

prosecutions. This motion is supported by the attached Memorandum of Points and Authorities and will be supplemented at the oral argument on this motion.

RESPECTFULLY SUBMITTED this 7th day of August, 2020.

| | |
|---|---|
| **VARCOE LAW FIRM, PLLC** | **WILLMOTT & ASSOCIATES, PLC** |
| By: /s/ | By: /s/ |
| ROBYN GREENBERG VARCOE | JENNIFER L. WILLMOTT |
| Attorney for Mr. Martinson | Attorney for Mr. Martinson |

## MEMORANDUM

Martinson's retrial is prohibited by double jeopardy principles on two distinct bases. First, the prosecution's bad faith, pervasive prejudicial misconduct both in prior proceedings as well as the current case, bars retrial. Second, because the case was dismissed after Martinson's first trial was completed, that dismissal terminated the original jeopardy. Because the first trial was terminated, retrial is barred by the double jeopardy prohibition against multiple prosecutions.

### I. Procedural History.

- Martinson was indicted in CR 2004-124662-001 SE for charges of First Degree Murder and Child Abuse. The case was tried to completion and ended with a guilty verdict on November 14, 2011. The jury could not decide on penalty.
- On March 27, 2012, after a series of post-verdict evidentiary hearings, the trial court granted Martinson's motion for new trial based upon juror misconduct and error in admitting expert testimony pursuant to *State v. Sosnowicz*, 229 Ariz. 90, 270 P.3d 917 (App.2012). *State v. Martinson*, 241 Ariz. 93, 94, ¶ 8, 384 P.3d 307, 308 (App. 2016).

- In June 2012, the state obtained a new indictment against Martinson in Maricopa County Case No. CR 2012–007335–001 (the "2012 Indictment"). In addition to alleging felony murder, the 2012 Indictment charged Martinson with premeditated murder.
- After obtaining the 2012 Indictment, the state moved to dismiss the 2004 Indictment without prejudice. Martinson objected and moved to dismiss the 2012 Indictment instead.
- The superior court granted Martinson's motion to dismiss the 2012 Indictment and denied the state's motion to dismiss the 2004 Indictment because the state had maintained during trial that there was no evidence of premeditation.
- The state filed a special action petition challenging the denial of its motion to dismiss the 2004 Indictment.
- In a non-published decision, the court accepted jurisdiction and granted relief. *Id.* at ¶ 10; State ex rel. Montgomery v. Duncan, 1 CA–SA 12–0217, 2012 WL 5867379 (App. Nov. 20, 2012) (mem. decision). The court found that the state established good cause for dismissing the 2004 indictment without prejudice. *Martinson*, 241 Ariz. at 94, ¶ 8, 384 P.3d at 308.
- However, the court did not "reach the issue of whether good cause would have been lacking if the trial court had determined the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8." *Id.* The court said the superior court could "amend its findings or hold further hearings" if it intended to rely on bad faith. *Id.*
- On remand, the trial court ordered additional briefing and held a hearing to consider whether the state acted in bad faith by seeking to dismiss the 2004 Indictment. *Id.* at ¶ 11.
- The trial court found that the state had engaged in prosecutorial misconduct and bad faith.
- Based on its complete findings of prosecutorial misconduct, the court dismissed the 2004 indictment with prejudice on November 19, 2013. *Id.* (See, Exhibit A; Minute Entry 11/19/13.)

- The state appealed the trial court's dismissal of the 2004 case with prejudice arguing that the trial court abused its discretion in precluding the state from presenting at trial that Martinson had intentionally killed his son. *Id.* at ¶ 1.

- The appellate court vacated the dismissal with prejudice order and remanded to the superior court with instructions to grant the state's motion to dismiss the indictment without prejudice. *Id.* at ¶ 2. The court acknowledged that the trial court found additional instances of prosecutorial misconduct but still maintained that the "primary impetus" for the dismissal with prejudice order was the "purported violation of [*State v.*] *Styers*, [177 Ariz. 104, 865 P.2d 765 (1993)] and the *Styers*-based ruling." *Id.* at n. 3. In the *Martinson* court's view:

> Most of the post-trial conduct the court categorized as misconduct stems from its conclusion that prosecutors viewed the "rulings about the uncharged intentional-murder theory as a roadblock" and "used every opportunity to challenge the Court's Styers ruling and present evidence of intent to kill."
>
> *Id.*

- After all appeals were exhausted, on June 13, 2018 Martinson was indicted in CR 2018-002779-001 for charges of First Degree Murder and Child Abuse.

## II. <u>The Arizona Standard for Pervasive Prosecutorial Misconduct Barring Retrial.</u>

"Our system represents a rule of law based upon the principle that officers of the law are bound by and must act within the law...." *Pool v. Superior Court In and For Pima County*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984). "Any other system is a step which will inevitably lead us, as it has led others, to a society where the worst criminals are often those who govern and administer law." *Id.*

### A. The Arizona Standard is Broader than the Federal Standard of Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." The prohibition is applied to the states through the Fourteenth Amendment. See, *State v. Millanes*, 180 Ariz. 418, 420, 885 P.2d 106, 108 (App. 1994), citing *Benton v. Maryland*, 395 U.S. 784 (1969). Federal double jeopardy is limited in that it does not bar retrials for prosecutorial misconduct absent "bad-faith conduct by judge or prosecutor" aimed at preventing an acquittal. *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982) (plurality opinion) ("[T]he circumstances under which ... a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."); *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion).

The Arizona Constitution, Article II, § 10 provides a similar, albeit, broader protection than its federal counterpart with respect to a prosecutor's intentional misconduct. *Martin v. Reinstein*, 195 Ariz. 293, 307, ¶ 40, 987 P.2d 779, 793 (App. 1999) ("*Pool* discusses the policies supporting Arizona's broader constitutional protection, all of which relate to a prosecutor's intentional misconduct...") Accord, *Milke v. Mroz*, 236 Ariz. 276, 281, ¶ 10, 339 P.3d 659, 664 (App. 2014) ("Our supreme court has determined, however, that the Double

Jeopardy Clause of the Arizona Constitution affords even greater protection than the federal Constitution, barring retrial when there are instances of egregious prosecutorial misconduct that raise serious concerns regarding the integrity of our system of justice.")

Normally, our courts would interpret the state constitution double jeopardy provision, Art. II § 10, in conformity with the interpretation given by the United States Supreme Court to the same clause in the federal constitution. *Pool*, at 108, 677 P.2d at 271, citing *Malmin v. State*, 30 Ariz. 258, 261, 246 P. 548, 548-49 (1926). However, in *Pool*, the court disagreed with the plurality opinion in *Oregon v. Kennedy* that a test broader than intent to provoke a mistrial, "would offer virtually no standards." *Kennedy*, at 674. Instead, the court agreed with the opinion of Justice Stevens for the four-member minority that so specific an intent must necessarily involve a subjective inquiry. *Pool*, at 108, 677 P.2d at 271, citing *Kennedy*, 456 U.S. at 689. The court also believed that the *Kennedy* Court's decision failed to give effect to its own pronouncements regarding the purpose of the double jeopardy clause. The *Pool* court noted that the clause gives the defendant an interest in having the prosecution completed by the tribunal before which the trial is commenced. This "interest" expresses a policy against multiple trials. *Id.*, citing *Kennedy*, 456 U.S. at 670-671. The *Pool* court observed the fundamental principle that:

> [T]he 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*, citing *Green v. United States*, 355 U.S. 184, 187-88 (1957).

As a result, the *Pool* court found the resolution of the question of when jeopardy attaches should "turn upon the concept of enforcing the constitutional guarantee against double jeopardy when the right to be free from multiple trials, which that clause was meant to guarantee, would be impaired by the prosecutor's intentional, improper conduct." *Id.*

**B. The Standard of Misconduct under *Pool*.**

The court's decision in *Pool* was based on the view that a defendant's constitutional guarantee to be free from multiple trials would be severely impaired by the prosecutor's intentional misconduct. *Id.* Prosecutorial misconduct makes a trial patently unfair when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Furthermore, "even in the absence of a declared mistrial, double jeopardy bars retrial in situations where the trial became patently unfair and the conviction was obviously obtained by intentional prosecutorial misconduct." *State v. Minnitt*, 203 Ariz. 431, 438, ¶ 32, 55 P.3d 774, 781 (2002) (citing *State v. Jorgenson*, 198

Ariz. 390, 10 P.3d 1177 (2000)). Intentional and pervasive misconduct on the part of the prosecution to the extent that the trial is structurally impaired is one example. *Id.*, at ¶ 29.

The *Pool* court held that jeopardy attaches under Art. II, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

*Pool*, at 108-109, 677 P.2d at 271-272.

Therefore, in determining whether double jeopardy may bar a retrial, our supreme court has drawn a "distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *Milke v. Mroz*, 236 Ariz. at 284, ¶ 20, 339 P.3d at 667, (quoting *Minnitt,* 203 Ariz. at 438, ¶ 30, 55 P.3d at 781 (citing *Pool,* 139 Ariz. at 105–07, 677 P.2d at 268–70)). When egregious prosecutorial misconduct continues for a significant period of time, preventing a fair opportunity for acquittal or reversal on appeal,

preservation of the integrity of our system of justice is paramount. *Id.*, citing *Jorgenson,* 198 Ariz. at 393, ¶ 13, 10 P.3d at 1180.

And, while a defendant ordinarily waives his right to be free from multiple trials when he seeks a new trial because of error in the original trial, there is no such waiver "when the need for a second trial is brought about by the state's egregiously intentional, improper conduct." *State v. Jorgenson*, 198 Ariz. 390, 391, ¶ 6, 10 P.3d 1177, 1178 (2000). When the prosecutor's intentional misconduct is the reason the defendant seeks a new trial, "the State has intentionally exposed the defendant to multiple trials for the same crime," the precise harm the Double Jeopardy Clauses were "intended to prevent." *Id.* at 392, ¶ 6, 10 P.3d at 1179. Each case in which a double jeopardy claim is raised must take into account the particular facts of that case. *State v. Riggins*, 111 Ariz. 281, 283, 528 P.2d 625, 627 (1974), citing *Downum*, 372 U.S. 734 (1963).

## III. The Limited Scope of the Decision in *State v. Martinson*, 241 Ariz. 93, 384 P.3d 307 (App. 2016).

The *Martinson* court did not consider or resolve the trial court's expanded findings and reasons for dismissing the case with prejudice based on prosecutorial misconduct, and as such, that issue is currently justiciable and ripe for determination. The trial court's extensive review of the totality of the circumstances reveals the prosecutors' misconduct was pervasive and justified dismissal with prejudice to prevent retrial based on double jeopardy.

Furthermore, the *Martinson* court only addressed Martinson's sole double jeopardy claim raised at that time—that double jeopardy principles barred further prosecution due to insufficiency of the evidence. *Id.* at ¶ 31. Rejecting Martinson's claim on that basis, the court found the state had presented substantial evidence from which jurors could conclude, beyond a reasonable doubt, that Martinson was guilty of child abuse and felony murder. *Id.* at ¶ 35.

### A. The *Martinson* Court only Addressed the *Styers* "Intent to Kill" Issue.

A fair reading of the record belies the *Martinson* court's summary of the reasons for the trial court's dismissal. The "additional instances" of prosecutorial misconduct set forth by the trial court, and disregarded by the *Martinson* court aside from the "intent to kill" issue, well warranted the trial court's dismissal with prejudice. Quoting *Martinson*, 241 Ariz. at 102, n. 3, 384 P.3d at 316.

As ably and thoroughly recounted by the trial court's dismissal order, the "primary impetus" for the trial court's dismissal with prejudice was not the prosecutors' violation of the *Styers*-based ruling. Quoting *Martinson*, *Id.* Instead, the dismissal was based on the entirety of the prosecutors' conduct in the case. The trial court carefully analyzed the case and found that the totality of the circumstances warranted dismissal with prejudice. (Exhibit A; Exhibit B, Other Actions Trial Court Considered in Dismissing with Prejudice.)

Unlike the *Martinson* court's abridged examination, the trial court's findings went far beyond the *Martinson* court's evaluation of the state's "intent to

kill" theory that was barred by the trial court. The trial court's findings were much more broadly based. The trial court made clear that in this case, "the alleged misconduct and bad faith, involve allegations of pre-trial acts, trial acts, and post-trial acts and charging decision..." (Exhibit A at 4.) Consequently, by excising and focusing solely on the state's "intent to kill" theory, the *Martinson* court failed to examine the larger picture presented by the state's conduct in the case. Assuredly, the trial court did not so constrain its own analysis, which reviewed the entirety of the state's conduct throughout the case.

Moreover, the *Martinson* court discussed double jeopardy only peripherally. It was merely in terms of the court's truncated view of the prosecutorial misconduct for violating the trial court's order barring the state from arguing or suggesting that Martinson intentionally killed his son. *Martinson*, 241 Ariz. at ¶ 27. On that account, the court determined Martinson could not show the requisite prejudice required for prosecutorial misconduct because the state's intent to kill theory was permissible under the law. *Id.*

**B. Trial Court's Finding of Prosecutorial Misconduct Encapsulated Far More than just the *Styers* Ruling.**

The other bases for the trial court's conclusion that the prosecutors' misconduct was so pervasive so as to bar a second trial under double jeopardy, while raised by the state on appeal, were neither analyzed, nor decided by the *Martinson* court. Even allowing that the trial court abused its discretion in banning the state's use of the intent to kill theory at trial, the other misconduct

found by the trial court, supported by its broader analysis, is more than sufficient to meet both the federal as well as the *Pool* standard of egregious misconduct sufficient to bar retrial.

As the *Martinson* court acknowledged, the superior court's factual findings are entitled to deference unless clearly erroneous. *Martinson*, 241 Ariz. at 96, ¶ 13, 384 P.3d at 310. The *Martinson* court did not find any of the trial court's factual findings to be erroneous.

The trial court's dismissal order, issued November 11, 2013, carefully articulated the legal standards for a finding of prosecutorial misconduct as well as prosecutorial vindictiveness. (Exhibit A at 2-4.) Once the trial court granted a new trial, the judge observed:

> The events following the Court declaring a mistrial based on juror misconduct are inextricably intertwined with the totality of the circumstances analysis that objectively establishes the Prosecutors engaged in intentional misconduct. These events also have a direct bearing on whether the Court finds the State acted in bad faith under Rule 16.6 of the Arizona Rules of Criminal Procedure when it moved to dismiss the 2004 Indictment.

(Exhibit A at 20.)

Thus, the trial court made clear that the actions of the prosecutors were not limited to their advancement of the intent to kill theory that had been precluded by the trial court. Instead, the prosecutors' violation of the court's order prohibiting them from presenting evidence of "intent to kill," was only one part of the totality

of the circumstances considered by the trial court in finding pervasive prosecutorial misconduct that mandated dismissal with prejudice. Exhibit B outlines the multitude of other actions the trial court considered in its decision to dismiss the case with prejudice.

These facts, as found by the trial court in Exhibits A and B, far exceed the *Martinson* court's abbreviated findings. Clearly, the trial court found "additional instances" of misconduct independent of the trial court's preclusion of the state's intent to kill theory. The facts reveal that the state did view the trial court's rulings about the uncharged intentional-murder theory as a roadblock, and they did use every opportunity to challenge the court's *Styers* ruling and present evidence of intent to kill. But, the facts disclose the state's conduct went far beyond that acknowledged by the *Martinson* court. The facts disclose bad faith, pervasive misconduct, and a "win at any cost" attitude that infected the entirety of the proceedings and prevented a fair trial.

### C. The *Martinson* Court Did Not Address the Trial Court's Additional Findings of Prosecutorial Vindictiveness.

A criminal defendant's constitutional right to due process protects him from prosecutorial decisions that are "motivated by a desire to punish him for doing something that the law plainly allowed him to do." *State v. Mieg*, 225 Ariz. 445, 447, ¶ 10, 239 P.3d 1258, 1260 (App. 2010), quoting *United States v. Goodwin*, 457 U.S. 368, 384 (1982). In other words, the Constitution's due process guarantees prevent prosecutors from punishing defendants for exercising their

protected legal rights by subsequently subjecting them to more severe charges. *Id.* citing *Goodwin* at 372.

A valid claim of prosecutorial vindictiveness limits a prosecutor's otherwise broad discretion over charging decisions. *Id.* at ¶ 10, citing *Blackledge v. Perry*, 417 U.S. 21, 27-29 (1974). There are two ways in which a defendant can demonstrate prosecutorial vindictiveness. First, a defendant may show actual vindictiveness, i.e., he "may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights." *Id.* at ¶ 11, 239 P.3d at 1260-1261, citing *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987) citing *Goodwin*, 457 U.S. at 380-81. Second, because "motives are complex and difficult to prove," *Goodwin*, 457 U.S. at 373, a defendant may rely on a presumption of vindictiveness if the circumstances establish a "realistic likelihood of vindictiveness." *Id.* at ¶ 12, 239 P.3d at 1261, quoting *Blackledge*, 417 U.S. at 27.

Here, the trial court found the state engaged in a vindictive prosecution in the filing of the 2012 indictment. (Exhibit A at 26.) ("This case involves prosecutorial misconduct and vindictive prosecution, the combination of which occurred during pretrial proceedings, trial and post-trial proceedings.") The *Martinson* court failed to discuss any of the trial court's findings of prosecutorial vindictiveness, even though the trial court dismissed the 2012 indictment for that

reason. The prosecutor's vindictive actions thus support a broader examination of the pervasive effect of continued prosecutorial misconduct.

The trial court, citing *Mieg*, noted that the timing of a charging decision is a "significant factor" in the court's consideration of prosecutorial vindictiveness. Unsurprisingly, a state's motion to dismiss made after a trial is much more likely to be improperly motivated than is a pretrial decision. "This is because the 'institutional bias inherent in the judicial system against the retrial of issues that have already been decided,' gives the prosecutor and the court a stake in avoiding 'to do over what it thought it had already done correctly.'" (Exhibit A at 3-4, quoting *Mieg*.)

Viewing the prosecutors' conduct in the totality of the circumstances, including all of the facts as set forth by the court, the trial judge determined that the prosecutors engaged in a pattern and practice of misconduct designed to secure a conviction without regard to the likelihood of reversal. (Id. at 5.) As a result, the trial court's finding of prosecutorial vindictiveness is well supported by the specific factual findings and the record. Exhibit C details the instances of prosecutorial vindictiveness found by the trial court.

### D. The *Martinson* Court Did Not Address the Trial Court's Determination that the State Violated Martinson's Right to Speedy Trial under Ariz. R. Crim. P. 8.

The speedy trial violation was not addressed by the *Martinson* court despite being briefed by both parties in the state's special action. This violation alone

mandates the case be dismissed with prejudice. In State ex rel. Montgomery v. Duncan. No. 1 CA-SA 11-0195 (App. 2012) (memo decision), the court reversed the trial court. The court found the state had established good cause to dismiss the 2004 indictment. Nevertheless, the appellate court observed:

> We do not reach the issue of whether good cause would have been lacking if the trial court had determined the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8. The court did not make any such findings in the record, and if it desires to make such findings, it may amend its findings or hold further hearings on this matter.

Id. at ¶ 21.

It was after hearings on the issues of bad faith and dismissal to avoid the speedy trial provisions of Rule 8 that the trial court dismissed the 2004 indictment with prejudice based on prosecutorial misconduct.

And, although the trial court's decision on the speedy trial violation was grounded upon Rule 8, the violation also meets the standards for a Sixth Amendment violation of speedy trial. See, *Barker v. Wingo*, 407 U.S. 514 (1972). The Sixth Amendment to the United States Constitution, and Art. II, § 24 of the Arizona Constitution guarantee defendants the right to speedy, public trial. Those principles are embodied in Rule Ariz. R. Crim P., 8. Additionally, Rule 16.4(a) permits the court to dismiss a case on motion of the state for good cause. The court may order the case dismissed without prejudice if it finds the dismissal is not to avoid Rule 8 time limits.

The *Barker* factors to determine a constitutional speedy trial violation include, "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. In *Doggett v. United States*, 505 U.S. 647 (1991), the Court found a six-year delay to be presumptively prejudicial. Martinson was originally charged in 2004. The first seven years of delay were caused by an overzealous County Attorney who dramatically increased the number of capital filings in Maricopa County that could not be met by the limited number of qualified capital defense counsel. From 2011 on, however, the delay was caused by the state's misconduct. Martinson has consistently maintained his right to a speedy trial. He announced ready for the first retrial in July 2013 only to be disrupted by the state's attempt to re-indict him under the 2012 case.

In *Moore v. Arizona*, 414 U.S. 25 (1973), the Court observed:

> wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.' (citation omitted.) These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.'

*Id.* at 27. (sic.)

Here, in dismissing the case with prejudice, the trial court found that the prosecutors went to extraordinary lengths to avoid the possibility of an acquittal in the new trial. By securing the 2012 indictment, the state wanted to "wipe the slate

clean" hoping the new charges would lead to a new judge and appointment of new counsel. (Exhibit A at 25.) The trial court observed:

> The delay occasioned by [the prosecutors'] misconduct has extended the proceedings an additional 13 months, leaving the Defendant with no valid conviction and in custody for more than 9 years.

Id.

Hence, the trial court found the prosecutors acted in bad faith and for the purposes of avoiding the speedy trial provisions of Rule 8. The bad faith attempt to indict Martinson in the 2012 case on June 5, 2012, as the new trial in the 2004 case rapidly approached on July 16, 2012, sought only to avoid Rule 8 speedy trial provision, and keep Martinson in custody.

Now, having obtained from the *Martinson* court what they could not from the trial court—a new trial court and new defense counsel—Martinson's speedy trial right continues to be violated. He has now been in custody in violation of his constitutional right to speedy trial under the Sixth Amendment as well as Rule 8 in excess of 4100 days as of the filing of this motion. As a result, Martinson has been continually denied his Sixth Amendment right to speedy trial, as well as his right to speedy trial under Rule 8. This court should properly dismiss with prejudice based on the speedy trial violation alone.

## IV. The Trial Court's Conclusions of Law Substantiating Dismissal with Prejudice.

Instead of focusing exclusively on the state's use of an "intent to kill theory" banned by the trial court at Martinson's trial as the *Martinson* court did, the trial court broadly scrutinized the state's conduct pre-trial, during trial, and post-trial including their charging decisions. (Exhibit A at 4.) Moreover, unlike the *Martinson* court, the trial court used a "totality of the circumstances" approach in evaluating the state's conduct. This is the proper analysis approved by Arizona courts. See, *State v. Mieg*, 225 Ariz. at 448-49, ¶ 15, 239 P.3d at 1261-62, citing *State v. Tsosie*, 171 Ariz. 683, 687, 832 P.2d 700, 704 (App.1992) (applying totality of circumstances to pretrial charging decision: "[T]he critical question ... is whether the defendant has shown 'that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption.'") (quoting *United States v. Meyer*, 810 F.2d 1242, 1246 (D.C.Cir.1987)).

And while *Mieg* and *Tsosie* were specifically discussing prosecutorial vindictiveness in charging decisions, the totality of the circumstances approach is consistent with *Pool's* requirement that in evaluating the prosecutors' behavior, the court measures what the prosecutors knew or intended by objective factors including (1) the situation which the prosecutors found themselves in; (2) evidence of their actual knowledge and intent; (3) any other factors which may give rise to an appropriate inference or conclusion; and (4) the prosecutors' own explanations

of their "knowledge" and "intent" and the extent that such explanation can be credible in light of the minimum requirements expected of all lawyers. (Exhibit A at 4, citing *Pool*, 139 Ariz. at 111, n. 9, 677 P.2d at 274.) The court evaluates the conduct "taken as a whole." *Pool*, at 108-109, 677 P.2d at 271-272. It considers whether the conduct amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal...") *Id.*

As a result of her evaluation, the trial judge concluded that the prosecutors engaged in misconduct, prosecutorial vindictiveness, and acted in bad faith. (Exhibit A at 26.) The court found the prosecutors' misconduct to be pervasive. (Id. at 26-27, n. 16.) The misconduct prejudicially impacted the integrity and fundamental fairness of the proceedings. (Id. at 28.) Ultimately, the trial court concluded that the scope and the extent of the misconduct left the court with no alternative but to dismiss the case with prejudice. (Id. at 27.) The trial court found:

> When viewing the totality of the circumstances, the Court finds that during trial the Prosecutors engaged in a pattern and practice of misconduct designed to secure a conviction without regard to the likelihood of reversal.

(Exhibit A at 5.) And further:

> Accordingly, the Prosecutors relentlessly sought to remove defense counsel and the assigned judicial officer specifically to avoid the risk of acquittal during retrial. The Court views this post-trial misconduct as part of the totality of the

> circumstances that support the Court's findings of prosecutorial misconduct and bad faith.

(Id.)

Based on the court's findings of facts, legal analysis, and conclusions as set forth in the order, it is plain that the trial court did not rest its decision exclusively, substantially, or even primarily on the state's use of the intent to kill theory at trial, as did the *Martinson* court. Instead, the order reflects a comprehensive, broad-based analysis of the totality of the prosecutors' conduct in the case. Consequently, the court's order meticulously assessed the wide-ranging conduct that warranted dismissal with prejudice.

Even parsing out the *Martinson* court's view on the viability of the "intent to kill" theory used by the state, but prohibited by the trial court, still leaves the indisputability of the trial court's conclusion that the prosecutors' misconduct in the case was intentional, pervasive, and warranted dismissal with prejudice.

## V. Misconduct in the 2012 Grand Jury Proceedings.

On March 28, 2012, the trial court granted a new trial based on juror misconduct. The trial court added a second ground that the medical examiner's testimony as to manner of death was precluded by *State v. Sosnowicz*, 229 Ariz. at 96, ¶ 21, 270 P.3d at 92. ("[W]e conclude that the medical examiner's testimony was not admissible pursuant to [Ariz. R. of Evidence], Rule 702.") (Exhibit A at

19.) On April 12, 2012, the trial court set a new trial date for July 16, 2012. (Id. at 20.)

However, unbeknownst to the trial court or defense counsel, on June 5, 2012, the state returned to the grand jury and obtained a new indictment charging Martinson with both premeditated and felony murder, as well as two counts of child abuse. (Id. at 20.) On June 7, 2012, the prosecutors appeared at a scheduled conference in the 2004 cause number, and advised the trial court of the new indictment and told the court the 2004 indictment had been dismissed. (Id. at 22.) On June 26, 2012, with a correct understanding that the 2004 case had not been dismissed by the initial appearance commissioner as represented by the state, the trial court reinstated the 2004 case, and set both matters for trial on October 1, 2012. (Id. at 23). Despite seven years of intense pre-trial litigation, extensive evidentiary hearings, a trial that lasted almost six months, and post-verdict evidentiary hearings, the state, at the 2012 grand jury proceeding, continued to rely on inaccurate facts, misleading omissions, and disproven theories. (Exhibit D.)

On September 10, 2012, the state moved to dismiss the 2012 indictment, which was granted on September 19, 2012. The state also withdrew its motion to dismiss the 2004 case, which had been filed August 6, 2012. On September 27, 2012, the state renewed its motion to dismiss the 2004 case, which was denied October 1, 2012.

The state filed a special action and in a memorandum decision the court of appeals found the state had established good cause to dismiss the 2004 indictment, but remanded to the trial court for a determination of whether the 2004 matter was dismissed in bad faith, or to avoid the speedy trial limits under Ariz. R. of Crim. P., 8. State ex rel. Montgomery v. Duncan (App. 2012) (memo decision.) It was from this order, after further proceedings, the trial court found the prosecutors had engaged in bad faith and pervasive misconduct, and dismissed the case with prejudice.

Notwithstanding the fact that the 2012 case was dismissed first on motion of the state, and then by the dismissal of the 2004 case with prejudice, the prosecutors' conduct before the grand jury in the 2012 indictment is nevertheless important in assessing the totality of the prosecutors' conduct throughout the pendency of this case under its various cause numbers. For instance, the prosecutors' return to the grand jury in 2012 to obtain a new indictment against Martinson demonstrates their refusal to comply with even the most basic procedural safeguards afforded to defendants in grand jury proceedings. Review of the grand jury transcript also show the prosecutors' failings, which were raised by Martinson in his motion to dismiss filed August 14, 2012. (Exhibit E.)

Overall, the state's grand jury presentation denied Martinson substantial due process. And, while the trial court dismissed the 2012 indictment, nevertheless, the state's presentation is insightful of the state's "win at any cost"

approach to the prosecution here. Moreover, the similarities between the inaccuracies presented to the grand jury in the 2012 case, and those presented in the 2018 indictment are striking. It demonstrates ongoing prosecutorial misconduct from the inception of the case through the present proceedings.

## VI. The Prosecutors' Misconduct has Continued in the Current Indictment.

Having ostensibly barely survived dismissal with prejudice, the current prosecutors, not the same prosecutors whose conduct was at issue in *Martinson*, apparently learned nothing from their colleagues' behavior. Perhaps emboldened by the former prosecutors' perfunctory trip to, and quick dismissal by the Arizona State Bar for review of their ethical behavior, the current prosecutors have engaged in the same type of behavior as the former prosecutors in their presentation to the 2018 grand jury in this case.

The quandary is, having seen the problems caused by the former prosecutors' conduct, the current prosecutors were well aware from the record, including Martinson's prior remand motions and the litigation they involved, what was permissible and impermissible conduct. Still, the current prosecutors have stayed the course, engaging in conduct eerily similar to the first team of prosecutors' misconduct with full knowledge of the possible outcomes. Their conduct demonstrates the continued "win at any cost strategy" that constitutes pervasive misconduct. Their actions amply demonstrate why dismissal is warranted.

### A. Misconduct in the 2018 Grand Jury Proceedings.

The prosecutors' problematic actions in the 2018 grand jury proceedings were detailed in Martinson's Motion to Remand. Both the trial court and the court of appeals on special action found the evidence presented at grand jury supported probable cause to indict. However, neither court addressed nor resolved the prosecutors' actions in plainly misleading grand jurors in response to direct questions, failing to correct inaccurate testimony when it appeared, as well as their failure to comply with ethical obligations to present the facts in a fair and impartial manner. See, *Maretick v. Jarrett*, 204 Ariz. 194, 197, ¶¶ 8, 962 P.3d 120, 123 (2003) ("the grand jury must receive a fair and impartial presentation of the evidence."). (Exhibits F and G.)

### B. Misconduct in Failing to Provide Sufficient Notice of the Alleged Offense So That Martinson Can Defend.

As this case has progressed, the current prosecutors have continued using questionable tactics. For example, Martinson requested additional specificity in what evidence the state thought showed premeditation. The state objected. (Exhibits H and I.)

At a hearing on the matter on November 1, 2019, the state continued to resist any attempt by the court or counsel to assist their understanding as to proof of premeditation the state intended to introduce. (Exhibit J at 27.) The trial court agreed that it did not want anyone to engage in trial by surprise, and understanding the discovery rules, nevertheless was concerned about the state's responsibility in

interpreting the rules. (Id. at 27-28.) Because the first trial would not provide any guidance on premeditation, the court wanted to ensure that the defense knew what the state's arguments were going to be on premeditation. (Id. at 28, 31.)

Defense counsel asked if the state could simply provide sufficient facts to upon which to defend. In terms of whether they needed to consult with experts, counsel asked if they needed to retain consultants in the areas of drowning, or toxicity, or asphyxiation. (Id. at 34.) Because of the various possibilities the state postulated in their response, the defense was merely requesting more guidance. (Id.)

In response, deputy county attorney Minicozzi stated, "it might be contributing from that toxicity, or it might say that it was one part of it, but I don't believe we're required to do that." (Id. at 36.) He continued:

> So I do believe that we might proceed with a theory that asphyxiation was a contributing cause of death in this case, but I cannot say for sure that when we step into the courtroom for trial that's what it is, because I don't know yet. But I don't think we're required to either. So I think going beyond what *Arnett* requires is not permitted by law.

(Id. at 37.) The trial judge tried again:

> And so in coming up with the preliminary determination that there was a reasonable likelihood of conviction on child abuse, there must have been an underpinning theory at least....So if I'm hearing you correctly, it is, yes, that's it or may be it, and it may go beyond that as well. Is that -- am I saying it correctly?

(Id. at 37-38.) Mr. Minicozzi replied, "Yes. But I'm not sure yet. I'm not sure I understand what Your Honor is saying." (Id. at 38.)

The trial judge tried once more:

> ...MCAO having gone through a trial on this once and then having presented it to the grand jury multiple times, there must have been a theory that the State had underpinning its draft indictment on Count 2. And I'm guessing that theory was what I told you before, toxicity levels related to carisoprodol. Is that a fair statement?

(Id. at 38.)

Mr. Minicozzi responded, "That is a fair statement as to that could be a theory, but we're not bound by that theory." (Id.)

Trying to assist, the trial judge noted:

> I just want them to have some level of notice as to what it is they're defending against. Because they're right. They need to hire experts and do that sooner rather than later.

(Id. at 39). Mr. Hinrichsen then revealed, "So it starts at the very basis of carisoprodol toxicity but not limited to it." (Id.)

The judge followed with the obvious:

> But I guess the question is, asphyxiation due to what? Carisoprodol toxicity? Blunt force trauma? Something else?

(Id.)

Noting that the state's underpinning theory was that Martinson gave JEM carisoprodol, which "should not have happened," Mr. Hinrichsen elaborated:

> What also may have happened, however, is that the defendant may have, at some point, suffocated the boy. And it would not have been hard since the boy is already under that toxic level of carisoprodol. It would have been easy without any struggle at that point. So, for example, they could -- he could have put a garbage bag over the boy's head and stopped the breathing. We note that there is certainly circumstantial evidence to support such a theory. The defendant himself had a garbage bag over his own head. There were multiple garbage bags found in the actual house. Then we find that there's one of the boy's hairs inside one of the garbage bags. That is additional circumstantial evidence which could support the theory that the defendant hastened the boy's death with asphyxiation.

(Id. at 40-41.)

When defense counsel asked if the prosecutors were saying asphyxiation was a cause of death, the judge responded, "It sounds like that's under investigation, I guess, would be my understanding." (Id. at 41.) Ultimately, the trial judge observed, "And it sounds like asphyxiation is one thing that, you know, may need to be prepared -- that you may need to be preparing for. (Id. at 44.)

In the end, the court requested the state to file a pleading confirming that they had complied with their discovery obligations under Rule 15, to which deputy county attorney Hinrichsen responded, "Of course." (Id. at 29.) When the court reconfirmed that it was simply looking for a notice that to the best of their abilities

the prosecutors had complied with their discovery obligations, Mr. Hinrichsen answered, "Understood." (Id. at 30.)

Later, after a conference on December 9, 2019, in its minute entry the court specifically directed the prosecutors:

> IT IS ORDERED directing counsel for the State to meet and confer with Dr. Hu, the assigned PPD case agent, and/or any other law enforcement personnel, as well as counsel for the next of kin, in order to review whether the State has in fact complied with all of its discovery obligations consistent with Rules 15.1 and 15.7, Arizona Rules of Criminal Procedure; moreover, counsel for the State shall file a notice of compliance with this Court no later than January 24, 2020

The state did not file the court ordered notice of compliance by January 24, 2020. In fact, to date, the prosecution has filed no such pleading. On July 8, 2020, Mr. Hinrichson advised the defense via e-mail:

> I know your motion seemed to think we had discovered something new when we charged premeditated murder – but I can assure you we are not hiding anything from you. Which is why I repeatedly stated we are, as far as I know of in the sense of a lengthy record with thousands of documents, in complete compliance with Rule 15.1.

The case relied on by the state at argument, *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988), held there is no requirement that the defendant receive notice of how the State will prove his responsibility for the alleged offense. *Id.* at 18, 760, P.2d at 1067. However, the *Arnett* court also observed, consistent with Ariz. R. Crim. P. 13.1(a), that Arizona law requires that the indictment be a plain, concise statement of the facts sufficiently definite to inform the defendant of the

offense charged. *Id.* Accord, *State v. West*, 176 Ariz. 432, 443, 862 P.2d 192, 203 (1993), overruled on other grounds by *State v. Rodriguez*, 192 Ariz. 58, 64 n. 7, 961 P.2d 1006, 1012 (1998) (also cited by the state in its argument.)

"An indictment is legally sufficient if it informs the defendant of the essential elements of the charge, is definite enough to permit the defendant to prepare a defense against the charge, and affords the defendant protection from subsequent prosecution for the same offense." *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 187, ¶ 36 (App. 2010) (citation omitted). "In considering whether an indictment provides sufficient notice, the indictment 'must be read in the light of the facts known by both parties." *Id.*

Thus, Arizona law is clear that an indictment must include a concise statement of the facts sufficient to inform the defendant of the offense charged. But, here, the indictment contains no such statement of facts. Moreover, the *Arnett* court noted that the defendant did not claim surprise as a result of the failure to specifically designate which of the possible theories of first degree murder the state was relying on, or assert he was prejudiced. *Id.* at 19, 760, P.2d at 1068.

Here, however, Martinson did claim that without more specificity as to what facts the state intended to prove, he will be surprised and prejudiced by the state's actions. The indictment must be sufficiently definite to advise him of what he must be prepared to meet. *State v. Kerr*, 142 Ariz. 426, 431, 690 P.2d 145, 150

(App. 1984), citing *State v. Van Vliet*, 108 Ariz. 162, 494 P.2d 34 (1972). Without more specificity, Martinson is prejudiced by not being sufficiently able to prepare a defense to the charges, and he likely will not be protected from further prosecution for the same offense. *Id.* Therefore, it is misconduct for the state to fail to provide a concise statement of facts sufficient to inform Martinson what he needs to defend.

As noted by the trial court, this case is highly circumstantial. The essential, known facts are that JEM was found dead in Martinson's home, and had carisoprodol in his system. Martinson testified that his son drowned in the bathtub when Martinson took the trash out to a dumpster. Instead of calling police, Martinson attempted suicide. Thus, after sixteen years of litigation and one trial, if the prosecutors are still trying to determine what happened, then additional information is absolutely warranted to permit Martinson to adequately defend and obtain protection from subsequent prosecutions for the same offense.

In truth, the prosecutors do not have a theory. They are retesting items of evidence searching for a theory. It was maybe this, or possibly that. Yet, under Ethical Rule 3.8 (a), the prosecution must refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. The comment to the rule notes that the prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon

the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

If the prosecutors do not have specific proof as to what happened, but instead are casting about for a theory, then they are prosecuting a case despite not having sufficient evidence, and denying Martinson procedural justice. Consequently, the prosecutors' actions in charging and refusing to provide adequate notice of the offense to permit Martinson to defend constitutes prosecutorial misconduct.

**C. The State's Misconduct in its Pleadings.**

The prosecutors in this case continue to mischaracterize the evidence, misrepresent the facts and mislead this Court in their pleadings. The state's intentional conduct is evident in its pleadings moving this Court to admit improper 404(b) evidence as well as the state's Motion in Limine to Admit JEM's statements.

We will not presume that the prosecutor will seek defendants' convictions at all costs, when his duty is to see that justice is done on behalf of both the victim and the defendants. *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995), citing *Berger v. United States*, 295 U.S. 78, 88 (1935); see also ER 3.8, Comment, Rule 42, Rules of the Arizona Supreme Court ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.")

### 1. Prosecutor's Ongoing Distortion of the Facts.

From the inception of this case, the prosecutors have continued to play fast and loose with the truth. Despite being confronted with the uncontested, verified, and known particulars, the prosecutors continue to fail to either respond or correct their distortions. For example, in Martinson's Response to State's Motion to Admit 404(b) Evidence, pages 24 to 47, there are countless instances of the state's skewed representation of events versus the established truths.

- Mischaracterizes meaning of supervised exchanges. The motion to change the location of the exchanges was only to facilitate continued, uninterrupted exchanges, hence KE's motion for supervised exchanges through Parenting Skills benefitted Martinson rather than harmed him. Id. at 26.
- The prosecutors allege that on September 29, 2000 Martinson strangled KE. Ultimately there was no evidence of an assault taking place as there was no bruising, no admission, and Martinson's medical condition limited his mobility. Id. at 28.
- Prosecutors portrayal of phone calls from Martinson to JEM as "harassing" to KE, when KE actually described the calls as "non-threatening, usually about custody or mundane issues." Id. at 35. Despite a family court minute entry permitting Martinson to call JEM, the prosecutor's claim that Martinson violated order of protection. Id. at 36.
- Prosecutor's claim that on April 18, 2004, Martinson grabbed JEM by the arm and dragged him to Martinson's truck. According to the police report, KE never reported any type of dragging. Id. at 39.
- Prosecutor's portrayal of the relationship between Martinson and LaFond was riddled with inaccuracies in an effort to mislead the Court. Id. at 42-46.

**2. Continuing Pursuit of Absolutely False Claims.**

- On November 11, 2002, prosecutors claim that Martinson admitted to coming within 50 feet of KE at JEM's soccer practice, thus violating an Order of Protection. However, Martinson statement to police was that although he was at the practice, he always maintained a 50 feet distance. Id. at 33.
- Intent to introduce an order of protection dated May 14, 2002 that was never served on Mr. Martinson. Id. at 47.
- The prosecutor's claim that Martinson appeared at the airport on July 1, 2004, in violation of an order of protection. There was no order in place at the time. (Defendant's Response to Motion in Limine at p. 8.)
- As described in Exhibit F, the prosecutor's knowingly interjected perjured testimony during the 2018 grand jury proceedings despite being acutely aware of indisputable facts (ie. water in JEM's lungs, ants in apartment, Martinson's suicide attempt, Martinson's statements.)

**3. Asking the Court to Ignore the Law.**

As Martinson noted in his response to the state's 404(b) motion, the state urged the trial court to use the court of appeals findings in *State v. Martinson*, 241 Ariz. 93, 384 P.3d 307 (App. 2016), as a guideline in determining the propriety of the admission of other acts evidence. (State's Motion to Admit 404(b) Evidence, at 37.) However, the prosecutors know such a consideration is patently improper.

The *Martinson* court's analysis was confined to consideration of whether the evidence was insufficient as a matter of law so that retrial was prohibited by double jeopardy. *State v. Martinson*, 241 Ariz. at 100, ¶ 31, 384 P.3d at 314. As such, the court's review was limited to whether substantial evidence supported the

verdicts. *Id.* at ¶ 34. Additionally, the court's review was viewed in the light most favorable to sustaining the verdict. *Id.* Within those confines, the court found that the state presented substantial evidence such that double jeopardy did not bar retrial based on insufficient evidence. *Id.* at ¶ 35.

Now, however, the parties have been returned to their original positions. Martinson is presumed to be innocent. It is proper 404(b) proof and analysis that serves as the court's guideline for the admission of other acts, not the court of appeal's sufficiency of the evidence review for double jeopardy purposes. Furthermore, as this Court found after the hearing on July 17, 2020, it is not bound by law of the case, nor is it bound by collateral estoppel, in determining the admission of 404(b) evidence.

Not only is the state's reliance on *Martinson* in its 404(b) motion legally incorrect, its suggestion that the court of appeal's analysis should serve as a guide to this court in deciding the issues, constitutes misconduct. The state knows the court of appeal's findings were limited. To propose that this court follow the court of appeal's assessment in deciding trial issues is highly improper. It specifically denies Martinson procedural justice in violation of ER 3.8(a). Ariz. R. Sup. Ct. 41(g) states that members of the Bar are required "[t]o avoid engaging in unprofessional conduct." This prohibition is not aspirational; rather, it is the duty of attorneys to avoid engaging in such conduct. *Matter of Martinez*, 248 Ariz.

458, 463-64 ¶¶ 20-22 (2020); *State Bar v. O'Neil*, No. CV-20-0035-SA, July 13, 2020. (Decision Order.)

To compound the inappropriate legal analysis, the prosecutors admit in their 404(b) motion that the "truth behind any one report or incident really is inconsequential to proving the defendant's motive or intent in this case" to admit as 404(b) evidence. (State's Motion to Admit 404(b) Evidence at 41, fn.43.) This proposition flies in the face of common sense, reason, and established case law that prior acts must be proven by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997). As an example, the state seeks to introduce KE's allegations of child abuse against Martinson to DCS, knowing that there was no evidence to support her claims, nor were they substantiated by DCS. (Defendant's Response to 404(b) at 40-42.) It is misconduct for the prosecutors to suggest that Martinson's other acts do not need to be proven by clear and convincing evidence.

**4. Failing to Acknowledge and Correct the Record.**

Even when presented with the irrefutable evidence and given the opportunity to correct the record regarding their misstatements and inaccuracies, the prosecutors have instead chosen to ignore their missteps and perpetuate a false narrative. As ministers of justice, "while they may strike hard blows, they are not at liberty to strike foul ones. It is as much their duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every

legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. There is a difference between writing persuasively and knowingly presenting inaccurate and false statements. The latter is misconduct.

## VII. The Prosecutors' Actions Throughout the Pendency of the Case Demonstrates Long-Standing and Pervasive Misconduct Warranting Dismissal with Prejudice.

The prosecutors' conduct throughout this case, viewed properly through the lens of the totality of the circumstances instead of the myopic "intent to kill" issue selected by the *Martinson* court, demonstrates pervasive misconduct as found first, by the trial court's order dismissing the case, and now, continued by the current prosecutors.

The importance of *Pool* and its progeny in the analysis of whether prosecutorial misconduct bars retrial under double jeopardy cannot be overstated. By rejecting the federal standard of "acts designed to provoke a mistrial," Arizona made clear that it will not tolerate conduct that "taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal," and prejudices a defendant. *Pool*, at 108-109, 677 P.2d at 271-272.

Here, the trial court articulately and thoroughly considered the former prosecutors' conduct as a whole and found the conduct so egregious that it raised concerns over the integrity and fundamental fairness of the trial itself. (Exhibit

A.) Because Arizona views the totality of the prosecutors' conduct in analyzing prosecutorial misconduct, it was error for the *Martinson* court to select out only the "intent to kill" issue and assert it was at the basis of the trial court's misconduct findings. While the trial court's *Styers* ruling may have been the impetus for the prosecutors' misconduct, it certainly was not the *sine qua non* of the totality of the prosecutors' actions. A fair reading of the trial court's order demonstrates the pervasiveness of the prosecutors' conduct that justified dismissal with prejudice.

Perhaps buoyed and emboldened by the perfunctory dismissal by the State Bar of the ethical violation claims, the current prosecutors have engaged in uncannily similar conduct as the former prosecutors. Perhaps their conduct is because they believe the *Martinson* court did not affirm the trial court's dismissal based on prosecutorial misconduct, as they argued at oral argument on July 17, 2020. (Exhibit K at 3.) In particular, the current prosecutors' presentation to the grand jury is almost as if the current prosecutors used the prior grand jury proceedings as a script to obtain an indictment, notwithstanding the lack of elemental proof. And, as did the former prosecutors, the current prosecutors failed to correct false and misleading evidence to the grand jury. This form of misconduct was not examined by, nor decided by, either the current trial court or the court of appeals. Coupled with their refusal to comply with the court's order to notice the defense that they have complied with their discovery obligations,

casting about for a theory of prosecution yet, refusing to specify their evidence so that Martinson can adequately defend, and by encouraging the court to make findings using dubious legal arguments and standards, the current prosecutors have continued the pattern of misconduct of the former prosecutors as found by the first trial judge.

A direct line exists from the former prosecutors conduct to the current prosecutors' conduct. And, each others' conduct validates Martinson's claims. When taken as a whole the entirety of the conduct comprises egregious misconduct that has continued for a significant period of time and prevented a fair opportunity for acquittal or reversal on appeal. *Milke v. Mroz*, 236 Ariz. at 284, ¶ 20, 339 P.3d at 667, (citing *Jorgenson,* 198 Ariz. at 393, ¶ 13, 10 P.3d at 1180.)

As preservation of the integrity of our system of justice is paramount, the misconduct as found by the former trial judge together with the continued misconduct of the current prosecutors warrants prohibiting retrial based on double jeopardy. Considered in their totality, the prosecutors' actions warrant dismissal with prejudice.

## VIII. Retrial is Barred by the Prohibition Against Multiple Prosecutions.

### A. Double Jeopardy is Directed at the Threat of Multiple Prosecutions.

The double jeopardy clause has been interpreted to provide three types of protection: (1) against a second prosecution for the same offense after an acquittal;

(2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. *Fitzgerald v. Superior Court In and For County of Maricopa*, 173 Ariz. 539, 845 P.2d 465 (App. 1992), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Dinitz*, 424 U.S. at 606. The development of the Double Jeopardy Clause from its common-law origins shows that it was directed at the threat of multiple prosecutions. *United States v. Wilson*, 420 U.S. 332, 442 (1975), overruled on other grounds by *United States v. Scott*, 437 U.S. 82 (1978) (discussing the right of the government to appeal).

As part of the protection against multiple prosecutions, the clause protects a defendant's valued right to have his or her trial completed by the tribunal first assigned. *State v. Minnitt,* 203 Ariz. 431, 437, ¶ 27, 55 P.3d 774, 780 (2002), citing *Kennedy*, 456 U.S. at 673. ("one of the principal threads making up the protection embodied in the double jeopardy clause is the right of the defendant to have his trial completed before the first jury empaneled to try him.") It also protects a defendant from multiple attempts by the government, with its vast resources, "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...." *Id.* (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). That protection is intended to shield defendants from acts of "governmental oppression." *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984). "The

prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *Ball v. United States*, 163 U.S. 662, 669 (1896).

The double jeopardy clause prohibition against multiple prosecutions rests upon two threshold conditions. First, the protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy. *United States v. Martin Linen Supply Company*, 430 U.S. 564, 569 (1977), citing *Serfass v. United States*, 420 U.S. 377 (1975). This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence. *Id.* citing *Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (White, J., dissenting). Second, where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended. *Martin Linen Supply Company*, at 569-570. Hence, the Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment. *Price v. Georgia*, 398 U.S. 323, 329 (1970). Accord, *United States v. Scott*, 437 U.S. 82, 86 (1978) ("A detailed canvass of the history of the double jeopardy principles in English and American law led us to conclude that the Double Jeopardy Clause was primarily 'directed at the threat of multiple prosecutions....)

**B. For Double Jeopardy to Apply Some Event Must Terminate the Original Jeopardy.**

The protections afforded by the Double Jeopardy Clause apply "only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). It is the circumstances surrounding termination of the first trial that dictate whether the double jeopardy clause bars retrial. *Minnitt*, at 438, ¶ 28, 55 P.3d at 781 (citing *Kennedy*, 456 U.S. at 672-673). In *Lee v. United States*, 432 U.S. 23, 30 (1977), the Supreme Court observed that the distinction drawn by [*United States v. Jenkins*. 420 U.S. 358 (1975), overruled on other grounds by *United States v. Scott*, 437 U.S. 82 (1978)], did not turn on whether the court labeled its action a "dismissal" or a "declaration of mistrial." The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. Accord, *State v. Choate*, 151 Ariz. 57, 58, 725 P.2d 764, 765 (App. 1986) ("It was intended that the initial proceeding would end 'all prosecution of the defendant for the offense charged.'") (quoting *Lee*, 432 U.S. at 30.)

Various circumstances permit the retrial of a defendant after jeopardy has attached without violating double jeopardy. For instance, jeopardy continues for a defendant who appeals a conviction; if the conviction is reversed, the state may retry the case. *Lemke v. Rayes*, 213 Ariz. 232, 239, ¶ 21, 141 P.3d 407, 414 (App. 2006), citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (explaining that when a defendant "appeals the conviction and succeeds in having it set aside . . .

jeopardy has not terminated," and retrial is not barred by the Double Jeopardy Clause). *Id.* at 239-240, 141 P.3d at 414-415. Also, if a defendant successfully moves for or consents to a mistrial, retrial is not barred on double jeopardy grounds. *Minnitt,* 203 Ariz. at 437, ¶ 28, 55 P.3d at 780, citing *Dinitz*, 424 U.S. at 607. Consequently, it is the circumstances surrounding termination of the first trial that dictate whether the double jeopardy clause bars retrial. *Id.* (citing *Kennedy*, 456 U.S. at 672-73.) Here, the circumstances of the termination of the case do not permit retrial.

### C. The Trial Court's Dismissal with Prejudice Terminated Original Jeopardy.

As discussed in Section I above, the trial court granted Martinson's motion for a new trial based on juror misconduct and error in admitting expert testimony. *State v. Martinson*, 241 Ariz. at 94, ¶ 8, 384 P.3d at 308. Thereafter, in June 2012, the State obtained a new indictment against Martinson in CR 2012–007335–001 (the "2012 Indictment") and moved to dismiss the 2004 Indictment without prejudice. Martinson objected and ultimately the superior court granted Martinson's motion to dismiss the 2012 Indictment and denied the State's motion to dismiss the 2004 Indictment. *Id.* at ¶ 9.

On special action and in a memo decision, the court accepted jurisdiction and granted the state relief. *Id.* at ¶ 10; State ex rel. Montgomery v. Duncan, 1 CA–SA 12–0217, (App. Nov. 20, 2012) (memo decision). The court found that the state had established good cause for dismissing the 2004 indictment without

prejudice. *Id.* However, the court did not "reach the issue of whether good cause would have been lacking if the trial court had determined the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8." *Id.* The court said the superior court could "amend its findings or hold further hearings" if it intended to rely on bad faith. *Id.*

On remand, after further proceedings, the trial court concluded, among other things, that the state engaged in prosecutorial misconduct and bad faith and dismissed the 2004 indictment with prejudice. *Id.*

Here, Martinson's trial concluded with a verdict, but his motion for a new trial was granted based on juror misconduct and the erroneous admission of medical examiner opinion testimony. Normally, if a defendant successfully moves for or consents to a mistrial, retrial is not barred on double jeopardy grounds. *Minnitt,* 203 Ariz. at 437, ¶ 28, 55 P.3d at 780, citing *Dinitz*, 424 U.S. at 607. Although Martinson was not responsible for the juror misconduct or erroneous medical examiner testimony, he agreed to forego his right to have his trial completed by the first jury for obvious reasons—the new trial undid his conviction and provided an opportunity for a new trial. See, *Dinitz*, 424 U.S. at 607-08. Therefore, had the prosecution continued with the re-trial under the 2004 cause number, there would have been no double jeopardy violation. But it did not.

Instead, the prosecutors re-indicted Martinson under the 2012 cause number and then deceived the trial judge telling her the 2004 case had been dismissed

when it had not. When the trial court would not dismiss the 2004 indictment because of the prosecutors' deception, the prosecutors made repeated attempts to have the trial judge and defense counsel removed from the case. These deceptive actions, along with prosecutorial vindictiveness and violation of Martinson' speedy trial rights, were part of the trial court's extensive analysis of the prosecutors' overall conduct that resulted in dismissal of the 2012 indictment followed by dismissal of the 2004 indictment with prejudice.

It is the dismissal that acts as the terminating event in the case. The state has also acknowledged that the prior case was terminated. Recently, in discussing law of the case and collateral estoppel as it relates to other acts evidence under Ariz. R. Evid. 404(b), the state recognized and admitted that the 2004 case was terminated. For instance, during the hearing Mr. Hinrichsen observed, "the law seems to favor the idea that once the case is dismissed and the new case is filed, the law of the case doctrine does not apply to the second version of the case." (Exhibit K at 2.) And further, "And the bottom line is, once the 2004 matter was dismissed, the 2018 matter does not rely on any ruling from that 2004 action." Id. Still further, "And I cited to Godoy v. Hantman for several reasons. But one of the things that is helpful from that case is that the Supreme Court very clearly says that once a case is dismissed. It is done. There is no reinstatement of the case. A new indictment is required to proceed forward." (Id.)

Consequently, there is no question but that the trial court's dismissal was the terminating event. The critical question, then, is whether the order contemplated an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with re-prosecution, *United States v. Jorn*, 400 U.S. 470, at 476, while a dismissal may or may not do so. *Lee v. United States*, 432 U.S. at 30. As noted above, 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. at 672-73; *Minnitt,* 203 Ariz. at 437, ¶ 28, 55 P.3d at 780 (citing *Kennedy*). Here, there is no question but that the trial judge contemplated a definitive end to the case.

The trial court's dismissal order thoroughly and scrupulously made detailed findings of facts, and conclusions. The judge was soberly "mindful of what is at stake in this case." (Exhibit A at 27.) She considered her duty to the victim, as well as her duty to apply the laws equally to all persons. Id. She considered the prosecutors' unique role in the process. (Id.)

The trial judge considered various remedies. She considered disqualifying the prosecutors but knew that would lead to prejudicial delay. She considered requiring the state to proceed with the 2004 indictment, which also involved delay. She considered combining the first two remedies. Finally, she considered dismissing the case with prejudice. (Id.) The trial court considered the Arizona Supreme Court's instruction to trial courts that the remedy must reflect the

magnitude of the misconduct. (Id.) She reviewed and considered *Pool*, *Minnitt*, and *Jorgenson*. (Id. at 27-28.)

Bearing in mind all of these considerations, 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, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity. (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.) As a result, the only conclusion to be drawn is that the trial court intended the case be dismissed with preclusive effect. She considered the matter terminated conclusively.

More importantly, Martinson did not cause the prosecutors' misconduct that resulted in the dismissal. Nothing Martinson did can be seen as consenting to, or in any way being responsible for the prosecutors' bad faith actions. In *Dinitz*, Justice Stewart stressed the importance of preserving the defendant's "primary control over the course to be followed in the event of such error." 424 U.S., at 609 (discussing that a defendant does not waive double jeopardy protections where judicial or prosecutorial error leaves him with no choice but to move for or accept a mistrial). Here, Martinson did not exercise his voluntary choice in terminating the proceedings; the prosecutors' bad faith misconduct did that.

This concept—that double jeopardy is not violated where the defendant exercises his choice in deciding whether to abort the current trial or continue it to conclusion—is consistent throughout the case law. "Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps end the dispute then and there with an acquittal.'" *United States v. Jorn*, supra, 400 U.S. at 484. "Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a sua sponte judicial declaration of mistrial." *Dinitz* at 608. *United States v. Scott*, 437 U.S. 82, 98–99 (1978) (holding that "defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence ... suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.") The analysis is the same when the defendant requests a dismissal. See *Lee v. United States*, 432 U.S. 23, (holding that the Double Jeopardy Clause did not bar a second prosecution because a first prosecution was terminated at the defendant's request).

However, in contrast to a defendant exercising deliberate choice, Martinson did not exercise his personal choice to end the case under the circumstances presented here. He did not voluntarily terminate the proceedings. And, while it might be claimed that Martinson did move for dismissal of the case thereby

exercising such choice, it must be remembered that he was forced to do so based on the prosecutors' misconduct.

### D. The *Martinson* Court's Appellate Opinion Affirmed the Trial Court's Termination of Original Jeopardy.

The state appealed the trial court's dismissal with prejudice. *Id.* at ¶ 1. Finding that the trial court abused its discretion in precluding the state from arguing at trial that Martinson had intentionally killed his son, which the court characterized as the "fundamental underpinnings for a finding of prosecutorial misconduct sufficient to warrant dismissal with prejudice," the court vacated the dismissal with prejudice order and remanded to the superior court with instructions to grant the state's motion to dismiss the pending indictment without prejudice. *Id.* at ¶ 2. The state then again re-indicted Martinson under the instant case number.

As discussed above, although the *Martinson* court peripherally discussed double jeopardy, it was only in terms of prosecutorial misconduct for violating the trial court's order barring the state from arguing or suggesting that Martinson intentionally killed his son. *Id.* at *Id.* at ¶ 27. On that account, the court determined Martinson could not show the requisite prejudice required for prosecutorial misconduct because the state's intent to kill theory was permissible under the law. *Id.* at ¶ 27.

The *Martinson* court also addressed Martinson's claim that double jeopardy principles barred further prosecution due to insufficiency of the evidence. *Id.* at ¶

31. Rejecting Martinson's claim, the court found the state had presented substantial evidence from which jurors could conclude, beyond a reasonable doubt, that Martinson was guilty of child abuse and felony murder. *Id.* at ¶ 35. Noticeably absent from the *Martinson* court's findings, however, was any analysis of whether double jeopardy's ban on multiple prosecutions barred the state from again prosecuting Martinson because his first case had been terminated by dismissal based on the state's bad faith misconduct.

Had the *Martinson* court felt there was no prosecutorial misconduct, it could have simply reversed the trial court's order of dismissal, which would have left the grant of a new trial as the last valid order of the trial court. Instead, the court vacated the dismissal with prejudice order and remanded to the superior court with instructions to grant the state's motion to dismiss the pending indictment without prejudice. *Martinson*, at 95, ¶ 2, 384 P.3d at 309. Yet, reversal of the trial court's order dismissing the case with prejudice was within the court's authority. See, *State v. Keyonnie*, 181 Ariz. 485, 487, 892 P.2d 205, 207 (App. 1995) ("The trial court erred in dismissing the charges with prejudice." "We reverse and remand for further proceedings consistent with this decision."); *State v. Merolle*, 227 Ariz. 51, 54, ¶ 16, 251 P.3d 430, 433 (App. 2011) ("For the foregoing reasons, we reverse the superior court's order dismissing this case with prejudice and remand for further proceedings.")

### E. Retrial After Original Jeopardy Has Terminated is Barred by the Double Jeopardy Prohibition Against Multiple Prosecutions.

Original jeopardy attached in the 2004 case. The trial court's dismissal with prejudice terminated the original jeopardy. By vacating the trial court's order and remanding with directions to the superior court to enter an order dismissing without prejudice, the finding that the prosecutors' engaged in intentional, bad faith prosecutorial misconduct is still extant. When the *Martinson* court agreed with dismissal rather than reverse the trial court, it affirmed the terminating event. The state also agrees that the former case was terminated. Because dismissal is still the result, and was predicated on bad faith, it stands as the terminating event, which prohibits retrial under the multiple prosecutions prohibition of the Double Jeopardy Clause of the Fifth Amendment and Art. II, § 10 of the Arizona Constitution.

## IX. Conclusion.

### A. Double Jeopardy Bars Retrial Based on the Prosecutors' Pervasive Misconduct.

Where a defendant, by requesting a mistrial exercises his choice in favor of terminating the trial, the Double Jeopardy Clause will not bar re-prosecution absent provocative or bad-faith conduct by the judge or prosecutor. *Dinitz*, 424 U.S. 600 at 611. In *Lee v. United States*, the Court observed that under *Dinitz* there was no double jeopardy barrier to petitioner's retrial unless the judicial or prosecutorial error that prompted petitioner's motion was "intended to provoke"

the motion or was otherwise "motivated by bad faith or undertaken to harass or prejudice" petitioner. 432 U.S. 23 at 33-34. Because the prosecutors' actions were motivated by bad faith, retrial is barred by the Double Jeopardy Clause of the Fifth Amendment under the federal standard.

In Arizona, the standard for prosecutorial misconduct is broader than the federal standard. Arizona mandates a subjective inquiry into the prosecutors' motivations and bars retrial based in a prosecutor's intentional, egregious misconduct. As the court observed in *State v. Jorgenson*:

> We have previously held that our state's double jeopardy clause includes the right to be free from multiple trials. See *Pool*, 139 Ariz. at 109, 677 P.2d at 272. To put it another way: the right to a fair trial to a conclusion before the impaneled jury. See id. While the defendant ordinarily waives that right when he seeks a new trial because of error in the original trial, the clause applies when the need for a second trial is brought about by the state's egregiously intentional, improper conduct.

198 Ariz. 390, 391, ¶ 6, 10 P.3d 1177, 1178 (2000). And more importantly, the court said:

> In *Pool*, we put it succinctly: We agree with the Oregon Supreme Court that when [the state's knowing and intentional misconduct is the reason for the impanelment of a new jury and the start of a new trial] the burden of another trial cannot be attributed to defendant's preference to start anew rather than "completing the trial infected by error" and is, rather, attributable to the "state's readiness, though perhaps not calculated intent, to force the defendant to such a choice." In such a situation, the State has intentionally exposed the defendant to multiple trials for the same crime and has

> destroyed his expectation of completing the proceeding before the original tribunal. This is exactly what the double jeopardy provision was intended to prevent.

*Jorgenson* at 391-392, ¶ 6, 10 P.3d at 1178-1179, quoting *State v. Kennedy*, 295 Or. 260, 270, 666 P.2d 1316, 1326 (1983).

Where the mistrial motion was based on intentional, prosecutorial misconduct, double jeopardy bars retrial. *State v. Minnitt*, 203 Ariz. 431, 438, ¶ 32, 55 P.3d 774, 781 (2002) (citing *State v. Jorgenson*, 198 Ariz. 390, 10 P.3d 1177 (2000)). See, also, *State v. Wilson*, 134 Ariz. 551, 554, 658 P.2d 204, 207 (App. 1982), citing *City of Tucson v. Valencia,* 21 Ariz. App. 148, 517 P.2d 106 (1973); *State v. Ballinger*, 19 Ariz. App. 32, 504 P.2d 955 (1973) (A defendant's request for a mistrial does not permit retrial where the request by the defendant was necessitated by prosecutorial misconduct intentionally designed to obtain another and more favorable opportunity to convict the defendant.)

Viewed in the totality of the circumstances as required by *Pool*, the trial court found pervasive misconduct that permeated the entire proceedings—from pre-trial through post-trial proceedings—and dismissed the case with prejudice. On appeal, the *Martinson* court, rather than analyze the totality of the circumstances, as set forth in the trial court's extensive order, instead only analyzed the court's order prohibiting the state from introducing evidence of "intent to kill." The court attempted to stretch the "intent to kill" issue as the "primary impetus" for the dismissal with prejudice and asserted that "most" of the

purported misconduct stemmed from this preclusion order, in fact, the prosecutors' misconduct as found by the trial court could not even begin to be covered by the *Martinson* court's glib view. By selecting out one item from the trial court's meticulous, comprehensive order, the *Martinson* court ignored the lessons of *Pool*, *Minnitt*, *Jorgenson*, and *Milke*.

For instance, the *Martinson* court's assessment did not cover the trial court's finding of prosecutorial vindictiveness. It did not address the trial court's finding that the prosecutors' violated Martinson's speedy trial right. The *Martinson* court did not deal with the prosecutors' numerous attempts to have the trial court and defense counsel removed from the case.

Now, because the case was dismissed based on the prosecutors' bad faith misconduct, in order to determine if double jeopardy bars a second trial, the entirety of the conduct must be examined, not simply the isolated event selected out by the *Martinson* court. As set forth above, *Pool* and its progeny mandate examination of the entire conduct to determine it pervasiveness. *Pool*, at 108-109, 677 P.2d at 271-272. (The conduct "taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal....")

As part of an analysis of whether the cumulative conduct of the prosecutors constitutes misconduct warranting dismissal with prejudice, the court should also

consider the prosecutors' conduct that the *Martinson* court rejected as misconduct. Assuming, without deciding, that the prosecutors' advancement of an intent to kill theory in violation of the trial court's order constituted misconduct sufficient to dismiss the case with prejudice, the court found that Martinson had not shown that he was prejudiced by the prosecutors' actions. *Martinson*, at 100, ¶ 29, 384 P.3d at 314. Although finding no prejudice to support dismissal with prejudice, nevertheless, the *Martinson* court observed:

> Although as a matter of substantive law, the State was entitled to pursue an intent to kill theory, as counsel for the State conceded at argument before this Court, attorneys are ethically bound to abide by court rulings—even those with which they disagree. Thus, to the extent prosecutors violated the superior court's *Styers* -based orders, such conduct was improper.

*Martinson*, at 99, ¶ 28, 384 P.3d at 313.

As part of its analysis into the entirety of the prosecutors' conduct, the court should also consider the improper conduct of disregarding the trial court's order. See, *State v. Vargas*, n. 1, 2020 WL 439289, July 31, 2020 (reserving the issue of whether a claim of error that is, in fact, not error can still be considered for a finding of cumulative error.); *State v. Roque*, 213 Ariz. 193, 229, ¶ 155, 141 P.3d 368, 404 (2006) (Even if there was no error or error was harmless, an incident may nonetheless contribute to a finding of persistent and pervasive misconduct.)

Here, taken as a whole, the entirety of the prosecutors' conduct as found by the trial court here including bad faith, prosecutorial vindictiveness, and done to

avoid Martinson's speedy trial rights demonstrates that retrial is barred by double jeopardy. Even granting the state precisely what the court of appeals gave and ignoring the "intent to kill" misconduct, it is still plain the trial court made out a proper case for dismissal with prejudice. The trial court found Martinson was prejudiced by the state's vindictiveness. It found the state acted in violation of Martinson's right to speedy trial.

Martinson was also prejudiced by the state's attempts to interfere with his relationship with his attorneys. Additionally, the state in both the 2012 and 2018 grand jury proceedings ignored the basic procedural protections of *Trebus* and its progeny. At grand jury, the prosecutors directly misled grand jurors and did not correct misleading testimony when it appeared. Martinson is prejudiced by being subjected to multiple prosecutions for the same offense in violation of that double jeopardy proscription.

As found by the first trial court, and continuing into the present case, the prosecutors' misconduct is so egregious it raises concerns over the integrity and fundamental fairness of the trial itself." *Milke v. Mroz*, 236 Ariz. at 284, ¶ 20, 339 P.3d at 667, (quoting *Minnitt,* 203 Ariz. at 438, ¶ 30, 55 P.3d at 781 (citing *Pool,* 139 Ariz. at 105–07, 677 P.2d at 268–70.)).

The prosecutors' misconduct has prevented a fair opportunity for acquittal or reversal on appeal. *Id.*, (citing *Jorgenson,* 198 Ariz. at 393, ¶ 13, 10 P.3d at 1180.) In this case, the preservation of the integrity of our system of justice is

paramount. Based on the entirety of the prosecutorial misconduct here, retrial is barred by double jeopardy under the Arizona standard.

### B. Double Jeopardy Bars Retrial Based on the Prohibition Against Multiple Prosecutions.

The double jeopardy protection against multiple prosecutions shields a defendant from repeated attempts to convict him, 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. *Green v. United States*, 355 U.S. at 187-188. The rationale behind barring second prosecutions is that no one should be "forced to run the gauntlet" more than once. *Pool* at 108, 677 P.2d at 271, citing *Green v. United States*, 355 U.S. at 190. The bad faith conduct of a prosecutor threatens the "(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum*, 372 U.S. at 736; *Dinitz*, 424 U.S. at 600-601. Moreover, multiple prosecutions allow the state to hone its presentation, increasing the chance of conviction. *Taylor v. Sherrill*, 169 Ariz. 335, 339, 819 P.2d 921, 925 (1991), citing *Grady v. Corbin*, 495 U.S. 508, 518 (1990).

Here, the trial court dismissed the case with prejudice based on the intentional, egregious misconduct by the prosecutors. And, while the trial court thoroughly and extensively documented the totality of the circumstances justifying

the dismissal with prejudice, on appeal, the appellate court selected out only one issue to review—intent to kill—gamely asserted that most of the prosecutors' post-trial conduct stemmed from that single issue, and found it to be permissible conduct. Yet, the court's truncated analysis could not cover the extent of the trial court's analysis of the misconduct; there were simply too many deeds to be encompassed by the small snippet discussed by the *Martinson* court. Still, the court's opinion concluded with its order to remand to the superior court with direction to dismiss the case without prejudice. Normally, a dismissal with prejudice would permit the filing of new charges. However, the *Martinson* court did not consider the conclusive effect of the dismissal which, with or without prejudice acted as the terminating event to the case.

Had the state simply retried Martinson when the trial court granted the new trial, there would be no issue. But, the state's misconduct caused the trial court to dismiss the case with prejudice. That order terminated the original jeopardy. Here, the trial court's dismissal contemplated an end to all prosecution of Martinson for the offense charged. *State v. Choate*, 151 Ariz. 57, 58, 725 P.2d 764, 765 (App. 1986).

Moreover, had the *Martinson* court thought there was no prosecutorial misconduct it could have reversed the trial court. It did not, instead, affirming the trial court's termination of the case.

And, while Martinson moved for the dismissal, he did so based upon the prosecutors' intentional misconduct. Whether dismissed with or without prejudice, the prosecutors' misconduct was the reason for the dismissal. That misconduct terminated the original jeopardy. By now recharging Martinson, the state has intentionally exposed Martinson to multiple trials for the same crime, the exact harm the Double Jeopardy Clauses were intended to avoid. *State v. Jorgenson*, 198 Ariz. at 392, ¶ 6, 10 P.3d at 1179.

By forcing Martinson to trial a second time after original jeopardy had terminated compels him to "run the gauntlet" a second time in violation of the multiple prosecutions prohibition of double jeopardy. *Taylor v. Sherrill*, 169 Ariz. at 339, 819 P.2d at 925. It also allows the state to hone its presentation, increasing the chance of conviction. *Id.* And that is precisely what the state has been able to do.

After spending some six months in the first trial introducing evidence of "intent to kill" in direct violation of the trial court's order, the prosecutors were surprised to "learn" that some of the jurors actually thought Martinson may have intended to kill JEM. Armed with the *Martinson* court's dismissal without prejudice the state has been able to re-indict Martinson in violation of his speedy trial rights, including adding a new theory of premeditated murder. Prosecutors have been able to re-test items of evidence in an effort to gain a legal theory supporting premeditation and have been able to file a new 404(b) motion alleging

extensive other acts not asserted at the first trial. This is the exact harm the multiple prosecutions proscription is aimed at preventing.

Application of double jeopardy is not only doctrinally correct when egregious and intentional prosecutorial misconduct has prevented acquittal, it is also required as a matter of pragmatic necessity. *Jorgenson* at 393, ¶ 13, 10 P.3d at 1180.

> Any other result would be an invitation to the occasional unscrupulous or overzealous prosecutor to try any tactic, no matter how improper, knowing that there is little to lose if he or she can talk an indulgent trial judge out of a mistrial. The worst that could then happen is reversal for a new trial and another shot at a conviction. This, of course, is exactly the type of governmental abuse at which the double jeopardy clause was aimed.

*Id.*

"[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States v. Jorn*, 400 U.S. 470, 479 (1971). The conclusion that jeopardy had attached by the impaneling of the jury in that proceeding rested on the view that the Congress was concerned, in granting the Government appeal rights in certain classes of cases, to avoid subjecting the defendant to a second trial where the first trial had terminated in a manner

favorable to the defendant either because of a jury verdict or because of judicial action. *Id.* at 476.

When the prosecutors' unscrupulous efforts resulted in the case being dismissed with prejudice, the state turned to the court of appeals to save them. And it did. However, the *Martinson* court did not evaluate the terminating effect of a dismissal even without prejudice. Nor did it consider how a remand for dismissal without prejudice affected the multiple prosecution prohibition of double jeopardy. Now, Martinson is being subjected to a second trial in violation of double jeopardy for harms he did not cause or request while the state hones its case increasing its chances of convicting him. This is precisely the kind of abuse double jeopardy is designed to prevent. The first trial terminated in a manner favorable to Martinson by judicial action. Double jeopardy bars his retrial. *United States v. Jorn*, 400 U.S. at 476.

Finally, any doubt is resolved "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Downum*, 372 U.S. at 738. Consequently, Martinson may not be retried because of the double jeopardy prohibition against multiple prosecutions. His case must be dismissed.

Based on the foregoing, Martinson requests the Court to dismiss this case.

RESPECTFULLY SUBMITTED this 7th day of August, 2020.

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Copy of the foregoing e-filed
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# APPENDIX H

Clerk of the Superior Court
*** Electronically Filed ***
10/19/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2018-002279-001 DT

10/16/2020

HONORABLE JAY RYAN ADLEMAN

CLERK OF THE COURT
A. Rowe
Deputy

STATE OF ARIZONA

JOSEPH HINRICHSEN

v.

JEFFREY RICHARD MARTINSON (001)

ROBYN GREENBERG VARCOE
JENNIFER L WILLMOTT
THOMAS E LORDAN

JUDGE ADLEMAN

COLLEEN CLASE

**UNDER ADVISEMENT RULING**

The Court has reviewed and considered the Defendant's Motion to Dismiss for Double Jeopardy Violations, the State's response, and the Defendant's reply. The Court has also considered the Crime Victims' Response to the Defendant's motion.[1]

The Court heard oral argument on October 16, 2020. At the conclusion of that hearing, the Court took the Defendant's motion under advisement and indicated that it would issue a ruling in due course. This is that ruling.

[1] The Defendant additionally filed a Motion to Strike the Crime Victims' Response. The Court has reviewed all of the filings associated with the motion to strike. In short, the Court finds that the Crime Victim(s) have a right to be heard on the Defendant's efforts to seek a dismissal of the case. ***See, e.g.,*** Ariz. Const. Art 2 § 2.1 (giving victims a constitutional right "[t]o be treated with fairness, respect, and dignity"); A.R.S. § 13-4438; ***see also*** A.R.S. §§ 13-4418 (noting that victims' rights "shall be liberally construed"). The Defendant's motion to strike is therefore denied.

## I. PROCEDURAL HISTORY

The Defendant is charged with the death of his son. This case arises out of tragic events occurring in August 2004.

In the original case (CR2004-124662-001), the Defendant was charged with **Count 1:** First Degree Murder, a class 1 felony ("felony murder"); and **Count 2:** Child Abuse, a class 2 dangerous crime against children. The parties proceeded to trial in that matter, and the Defendant was convicted on both of those charges on November 14, 2011. The trial judge subsequently vacated those convictions and granted the Defendant's motion for new trial.

For the purpose of this ruling, the Court considers the following events associated with the procedural history of this case:

- **March 27, 2012:** The original trial judge granted the Defendant's motion for new trial. Although the Defendant alleged several grounds in the motion, the Court granted the motion on the basis of **(1)** the intervening appellate holding in ***State v. Sosnowicz,*** 229 Ariz. 90, 97-98, 270 P.3d 917, 924-925 (App. 2012)(limiting the scope of medical examiner's expert opinion testimony); and **(2)** additional issues with respect to juror misconduct. Notably, the trial judge specifically rejected the Defendant's claims regarding prosecutorial misconduct (***see*** ME ruling in CR2004-124662-001; at page 4, footnote 3).

- **June 5, 2012:** The State obtained a new indictment against the Defendant in CR2012-007335-001. This new indictment included – for the first time – the charge of premeditated murder.

- **September 19, 2012:** Citing procedural concerns, the trial judge dismissed the indictment in CR2012-007335-001 and denied the State's preference to dismiss the former indictment in CR2004-124662-001. In doing so, the trial judge ordered the parties to proceed to trial in the CR2004-124662-001 matter. The State filed a special action challenging the trial judge's orders.

- **November 20, 2012:** After the State sought special action relief, the Court of Appeals held that the State had established good cause to dismiss the 2004 indictment and to file the charge of premeditated murder. ***See State ex rel. Montgomery v. Duncan,*** 2012 WL 5867379 ("[u]nder these circumstances, the State established good cause to dismiss the 2004 indictment and file a new criminal charge for premeditated murder.").[2]

- **November 19, 2013:** After the Court of Appeals remanded the proceedings back to the trial court – and citing prosecutorial misconduct– the trial court entered an order dismissing the 2004 indictment with prejudice. The State appealed the trial court's orders.

- **September 22, 2016:** In a published opinion, the Court of Appeals vacated the trial court's dismissal with prejudice and directed the trial court to dismiss the matter without prejudice. ***See State v. Martinson,*** 241 Ariz. 93, 102, 384 P.3d 307, 316 (App. 2016). Once again, the Court of Appeals remanded the proceedings back to the trial court. ***Id.***

- **June 13, 2018:** The State initiated grand jury proceedings in the CR2018-002279-001 cause number. The grand jury returned the current indictment, which listed the offenses of **Count 1:** First Degree Murder, a class 1 felony and dangerous crime against children;[3] and **Count 2:** Child Abuse, a class 2 felony and dangerous crime against children.

- **January 14, 2019:** In response to another special action arising out of the CR2004-124662-001 matter, the Court of Appeals once again indicated that its prior orders had "vacated the superior court's findings regarding prosecutorial misconduct and bad faith," and effectively recognized that the prosecution could proceed in the CR2018-002279-001 matter. (COA ruling dated 1/14/19; at ¶¶ 2-4).

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[2] The Court of Appeals authorized the trial court to determine whether the State's attempt to dismiss the 2004 indictment resulted from bad faith. ***Id.*** at ¶ 21.

[3] Count 1 includes alternatives for both premeditated murder and felony murder.

* * * * *

In the present motion, the Defendant seeks a dismissal of the indictment on double jeopardy grounds. The State and the Crime Victims object to this motion in its entirety.

## II. LEGAL ANALYSIS

### A. Double jeopardy – legal standards

The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense. ***See*** U.S. Const. Amend V; Ariz. Const. Art. 2 § 10; ***United States v. Dinitz,*** 424 U.S. 600, 606 (1976); ***State v. Minnitt,*** 203 Ariz. 431, 437, 55 P.3d 774, 780 (2002).

The parties have provided ample briefing with respect to the law surrounding applicable double jeopardy principles. There are numerous examples in which the United States Supreme Court has considered the impact of the Double Jeopardy Clause. ***See, e.g., United States v. Perez,*** 22 U.S. 579, 580 (1824)(setting forth the "manifest necessity" standard); ***Ball v. United States,*** 163 U.S. 662, 669-670 (1896); ***Arizona v. Washington,*** 434 U.S. 497, 509, (1978)(authorizing retrial after a hung jury); ***United States v. Dinitz,*** 424 U.S. 600, 606 (1976)(analyzing double jeopardy when defendant urged a mistrial); ***Oregon v. Kennedy,*** 456 U.S. 667 (1982)(reviewing prosecutorial misconduct in view of double jeopardy principles).

Arizona courts have adopted similar – if not broader – protections with respect to our state's own constitutional protections for double jeopardy. ***See, e.g., Martin v. Reinstein,*** 195 Ariz. 293, 307, 987 P.2d 779, 793 (App. 1999); ***Pool v. Superior Court,*** 139 Ariz. 98, 109, 677 P.2d 261, 272 (1984)(reviewing double jeopardy in the context of mistrials caused by prosecutorial misconduct); ***see also Lemke v. Rayes,*** 213 Ariz. 232, 236-237, 141 P.3d 407, 411-412 (App. 2006); ***State v. Downey,*** 104 Ariz. 375, 377, 453 P.2d 521, 523 (1969).

**B. The rulings from the Court of Appeals – both individually and collectively – have indicated that there is no doubly jeopardy bar against a retrial of the Defendant in these proceedings.**

1. **Double jeopardy – prosecutorial misconduct**

The Court of Appeals has repeatedly addressed issues pertaining to the State's ability to continue its murder prosecution against the Defendant. Indeed, that Court has made it abundantly clear that the State retains the authority to do so.

Primarily, the Court of Appeals was clear in its orders with respect to the State's special action arising from the dismissal of the 2012 indictment. ***See State ex rel. Montgomery v. Duncan,*** 2012 WL 5867379 ("[u]nder these circumstances, the State established good cause to dismiss the 2004 indictment and file a new criminal charge for premeditated murder.").

In the aftermath of the trial court's orders dismissing the CR2004-124662-001 matter with prejudice, the Court of Appeals considered the Defendant's claims of prosecutorial misconduct in its published opinion set forth in ***State v. Martinson,*** 241 Ariz. 93, 100, 384 P.3d 307, 314 (App. 2016). In relevant part, the Court indicated the following:

> Assuming, without deciding, that prosecutors knowingly pursued an intent to kill theory at trial in contravention of the court's order, as a matter of law, **Martinson cannot establish the requisite prejudice arising from that conduct that would bar retrial on double jeopardy grounds** (citations omitted). Because the law permitted the State to prove the felony murder charge with evidence that Martinson intended to kill J.E.M., to the extent such evidence and argument was presented at trial, Martinson suffered no cognizable prejudice.

***Id.*** (emphasis added).

In reaching this conclusion, the ***Martinson*** court determined that – in an absence of prejudice to the Defendant – double jeopardy did not bar his retrial in future proceedings. ***See Pool v. Superior Court,*** 139 Ariz. 98, 108-109, 677 P.2d 261, 271-272 (1984)(requiring a finding of prosecutorial misconduct that is both "improper and prejudicial").[4]

[4] The ***Martinson*** court briefly considered the trial judge's findings with respect to any post-trial misconduct, noting that all of it related to the prosecution's struggles with the erroneous ***Styers*** ruling. ***See State v. Martinson,*** 241 Ariz. 93, 97, n.3, 384 P.3d 307, 311, n.3 (App. 2016)

The ***Martinson*** court continued its double jeopardy analysis with respect to the Defendant's cross-appeal regarding the Rule 20 motion, *i.e.*, whether there was sufficient evidence to support a conviction. ***See generally Burks v. United States,*** 437 U.S. 1, 11 (1978). In doing so, the ***Martinson*** court concluded with the following definitive language:

> Considered in totality, the trial evidence was sufficient to support a finding of guilt beyond a reasonable doubt for knowing or intentional child abuse under circumstances likely to produce death or serious physical injury and for felony murder based on that predicate felony. **As a result, double jeopardy principles do not bar retrial of Martinson.**

***Id.*** at 102, 384 P.3d at 316 (emphasis added).

* * * * *

The State's response engages in some effort to discuss the impact of collateral estoppel with respect to the prior appellate rulings (***see*** State's response at pages 39-42). It is unnecessary, however, for the Court to make any such determination. It is well established that the trial courts of this state are bound by the decisions of the Arizona Court of Appeals and the Arizona Supreme Court and do not have the authority to modify or disregard those rulings. ***See State v. Smyers,*** 207 Ariz. 314, 318, n.4, 86 P.3d 370, 374 n.4 (2004); ***Francis v. Arizona Department of Transportation,*** 192 Ariz. 269, 271, 963 P.2d 1092, 1094 (App. 1998)(the superior court is bound by decisions of the court of appeals); ***McKay v. Industrial Commission,*** 103 Ariz. 191, 193, 438 P.2d 757, 759 (1968)("Any other rule would lead to chaos in our judicial system.").

In short, the clear language from the Court of Appeals needs no additional amplification or justification from this court. ***See Francis v. Arizona Department of Transportation,*** 192 Ariz. 269, 271, 963 P.2d 1092, 1094 (App. 1998); ***McKay v. Industrial Commission,*** 103 Ariz. 191, 193, 438 P.2d 757, 759 (1968).[5]

[5] When the State later sought special action relief from the sanctions hearing in CR2004-124662-001, the Court of Appeals once again indicated that its prior opinion had "vacated the superior court's findings regarding prosecutorial misconduct and bad faith." (COA ruling dated 1/14/19; at ¶¶ 2-4).

**2. Double jeopardy – multiple prosecutions**

The Defendant's motion to dismiss further argues that – independent of any allegations of prosecutorial misconduct – the unique procedural posture of the case requires a dismissal on the basis of double jeopardy principles. The Defendant essentially maintains that jeopardy terminated after the first trial, specifically when the trial judge dismissed the CR2004-124662-001 matter with prejudice. ***See generally*** A.R.S. § 13-111.

In making this argument, the Defendant necessarily argues that the ***Martinson*** court neglected to consider this possibility.[6] In the Court's view, this seems rather unlikely. The Court of Appeals was well aware of the procedural history of the case when it issued its opinion in ***State v. Martinson,*** 241 Ariz. 93, 384 P.3d 307 (App. 2016). By issuing its opinion, the Court of Appeals plainly accepted jurisdiction based on the State's timely appeal. ***See*** A.R.S. § 13-4032(1)(authorizing the State's appeal of an order dismissing an indictment).

In short, the Court disagrees with the Defendant's analysis. It is well established 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." ***Tibbs v. Florida,*** 457 U.S. 31, 39-40 (1982)(quoting ***United States v. Ball,*** 163 U.S. 662, 672 (1896)).[7]

**C. There is no evidence of prosecutorial misconduct under the 2018 indictment to justify a dismissal based on double jeopardy.**

The Defendant's motion further argues that – in addition to any prior acts of prosecutorial misconduct – the current prosecutors are engaging in misconduct that would also justify a dismissal based on double jeopardy principles. The Defendant asserts offers several possible examples of misconduct, including but not limited to **(1)** the 2018 grand jury presentation; **(2)** the purported failure to give sufficient notice of its theory of the case; and **(3)** the alleged misstatements in the State's pleadings.

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[6] The Defendant did not raise this argument on appeal; indeed, the Defendant failed to raise this issue for more than two (2) years following his indictment in CR2018-002279-001.

[7] If this Court were to accept the Defendant's theory regarding multiple prosecutions, it would render as null and void the entire holding contained within ***State v. Martinson,*** 241 Ariz. 93, 384 P.3d 307 (App. 2016). The Court cannot permit that illogical result.

In short, the Court respectfully disagrees with the Defendant's allegations of prosecutorial misconduct. Regarding item #1 above, this Court previously addressed the Defendant's challenge to the 2018 grand jury proceedings. The Defendant's motion was denied in its entirety.[8]

Regarding item #2 above, the Court addressed the "notice" concern at the time of a status conference on November 1, 2019. The Court does not find any evidence of prosecutorial misconduct arising out of this allegation. ***See generally State v. Rivera,*** 207 Ariz. 69, 73, 83 P.3d 69, 73 (App. 2004)(noting that [t]he indictment itself need not inform the defendant of the theory by which the state intends to prove that charge so long as the defendant receives sufficient notice to reasonably rebut the allegation"); ***State v. West,*** 238 Ariz. 482, 491, 362 P.3d 1049, 1058 (App. 2015)(due process requires notice of the charge rather than the State's theory of the charge).[9]

Regarding item #3 above, little elaboration is needed. The Court disagrees that the State's pleadings in this case – standing alone – amount to a form of prosecutorial misconduct. On this record, the Court cannot find evidence of the sort of intentional or malicious improprieties required to preclude a trial on the merits. ***See, e.g., Pool v. Superior Court,*** 139 Ariz. 98, 109, 677 P.2d 261, 272 (1984); ***State v. Aguilar,*** 217 Ariz. 235, 238-239, 172 P.3d 423, 426-427 (App. 2007); ***State v. Towery,*** 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996).

This is a hard-fought case, exacerbated by the tragic death of a child, and further compounded by a tortuous procedural history. In spite of those circumstances, the Court does not believe that the current record provides any evidence of prosecutorial misconduct.[10]

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[8] This Court denied the Defendant's motion to remand in a ruling issued on October 7, 2019. The Court later denied a motion for reconsideration. On special action, the Court of Appeals accepted jurisdiction and denied relief (COA ruling dated 1/21/20).

[9] The Court inquired on 11/1/19 (and at other times) with respect to the operative facts associated with the State's theory of the case. The Court's minute entry ruling provided the State with further directives with respect to the handling of discovery. In short, the Court does not believe that the State has engaged in any misconduct with respect to this matter. ***Id.***

[10] Indeed, the Court maintains its belief that all counsel – representing the State, the Defendant, and the Crime Victims – have conducted themselves in a professional manner.

## III. CONCLUSION AND ORDERS

The Court finds that double jeopardy principles do not serve to preclude the State's prosecution of the Defendant under the current indictment. ***See*** U.S. Const. Amend V; Ariz. Const. Art. 2 § 10; ***United States v. Dinitz,*** 424 U.S. 600, 606 (1976); ***State v. Minnitt,*** 203 Ariz. 431, 437, 55 P.3d 774, 780 (2002).

Accordingly,

**IT IS ORDERED DENYING** the Defendant's motion in its entirety.