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IN THE SUPREME COURT
STATE OF ARIZONA

THE STATE OF ARIZONA, Plaintiff, vs. **Philip John Martin,** Defendant.	Supreme Court No. CR-18-0380-PR 1 CA-CR 16-0551 **PETITION FOR REVIEW** Mohave County CR 2012-01326

Appellant, Philip John Martin, through counsel, petitions the Arizona Supreme Court under the Arizona Constitution, Article 6, §5(3), A.R.S. §12-120.24, and Rule 31.19, Arizona Rules of Criminal Procedure, to grant review in this case, because the Court erred in its decision regarding important issues of law.

I. ISSUES PRESENTED FOR REVIEW

Was the prosecution barred by double jeopardy from re-trying Appellant for first degree murder after a conviction for second degree murder in a prior trial?

Did the court err by failing to grant a motion for mistrial based upon the numerous prejudicial statements made by multiple potential jurors which likely tainted the entire panel?

Did the court violate Appellant's confrontation clause rights by admitting inadmissible hearsay as dying declarations?

II. FACTS RELEVANT TO PETITION FOR REVIEW

This appeal arises from a conviction for first degree murder after a re-trial subsequent to a reversal on appeal for instructional error. In a first trial, the jury convicted Phil of the lesser included offense of second degree murder after indicating on a verdict form that they were "unable to agree" on the greater offense. (R.O.A. at 60-61).

The matter was tried a second time. The court granted the state's motion to try the defendant on the greater offense of first degree murder, since the jury instructions and verdict form in the first trial indicated that the jury was "genuinely deadlocked" as to the greater offense of first degree

murder, and thus there was no implied verdict of acquittal on first degree murder. (R.O.A. at 121). The jury convicted Appellant of first degree murder in the second trial.

In the attached Opinion and Memorandum Decision, a panel of Division One of the Court of Appeals again denied relief.

III. REASONS WHY THE COURT SHOULD GRANT REVIEW

1. The prosecution was barred by double jeopardy from re-trying Appellant for first degree murder after a conviction for second degree murder in a prior trial.

Here, the court gave the standard Arizona *LeBlanc* jury instruction. This instruction allowed the jury to move on to the lesser included offense if "you all agree that the state has failed to prove the defendant guilty of the more serious crime beyond a reasonable doubt, or if after reasonable efforts you are unable to unanimously agree on the more serious crime." (R.O.A. at 60-61, 121). In this case, the verdict form indicated that the jury foreman checked the box that stated "unable to agree," and then convicted the defendant on the lesser offense. Id.

When a defendant is tried on a greater offense and convicted on a lesser-included offense, the conviction may operate as an acquittal of the greater

offense. *See Green v. United States*, 355 U.S. 184, 191 (1957); U.S. Const. Amend. 5, 14; Ariz. Const. Art. 2, Sec. 10. *See Brown v. Ohio*, 432 U.S. 161, 169, (1977); *State v. Maloney*, 105 Ariz. 348, 357, 464 P.2d 793, 802 (1970).

In *State v. LeBlanc*, 186 Ariz. 437, 440, 924 P.2d 441, 444 (1996), the Arizona Supreme Court abandoned the former "acquittal first" procedure. The *LeBlanc* court adopted a "reasonable efforts" approach to reach a verdict on the greater offense before considering lesser-included offenses. *Id.* One benefit of the *LeBlanc* procedure is that "it reduces the risks of false unanimity and coerced verdicts." *Id*. at 438, 924 P.2d at 442. Another is that it "diminishes the likelihood of a hung jury, and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered." 186 Ariz. at 438-39, 924 P.2d at 442-43. And finally, "because such an instruction would mandate that the jury give diligent consideration to the most serious crime first, *the state's interest in a full and fair adjudication of the charged offense is adequately protected.*" *Id*. at 439, 924 P.2d at 443 (emphasis added).

Where there is a conviction on the lesser included offense pursuant to a

LeBlanc reasonable efforts instruction in Arizona, the state has had its full and fair opportunity, regardless of whether the form is silent or indicates that it was unable to agree. *See Lemke v. Rayes*, 213 Ariz. 232, 238, ¶15, 141 P.3d 407, 416 (App. 2006) (finding no jeopardy for collateral estoppel on retrial of felony murder even if implied acquittal of predicate, as in a multi-count indictment, versus finding jeopardy attached to a greater offense after conviction of a lesser, pursuant to *LeBlanc*, where based on the facts, it had to assume that the jury likely hung on the greater offense rather than implicitly acquitted, and stating that a contrary holding would raise significant questions regarding whether a defendant convicted of a lesser-included offense in Arizona under the *LeBlanc* instruction is constitutionally protected from retrial on the greater offense, an eventuality that we doubt the *LeBlanc* court intended when it abandoned use of the "acquittal-first" instruction in favor of the "reasonable efforts" approach); *Lemke v. Ryan*, 719 F.3d 1093 (9th Cir. 2013); *Green v. United States*, 355 U.S. at 190-91. *See also Brazzel v. Washington,* 491 F.3d 976, 981 (9th Cir. 2007) (A defendant's jeopardy on the greater charge ends when the first jury was given a full opportunity to return a verdict on that charge and instead

reached a verdict on the lesser charge).

In *Brazzel*, the State charged Brazzel with, among other charges, attempted first degree murder and the lesser alternative charge of first degree assault. Id. at 979. The trial court gave the jury the "unable to agree" instruction discussed above, instructing the jury that if it unanimously agreed on a verdict for attempted first degree murder, it must fill in the verdict form. Id. at 979-90. The jury was further instructed that only if it could not agree on a verdict for attempted first degree murder should it leave the form blank. *Id*. The jury left the verdict form blank for attempted first degree murder and instead convicted Brazzel of first degree assault. Id. at 979. After Brazzel's case was remanded for a new trial and the prosecutor reinstated the attempted first degree murder charge, the Ninth Circuit found that double jeopardy barred the State from retrying Brazzel on that charge. Id. at 979, 984-5. The Ninth Circuit found that the jury's inability to reach a verdict "'after full and careful deliberation on the charge of attempted murder in the first degree' … was an implied acquittal." Id. at 984 (quoting the trial court's instructions). The Ninth Circuit reasoned that the jury must be "'genuinely deadlocked'" about the verdict in order for the State to avoid

the double jeopardy bar on retrial, and "[g]enuine deadlock is fundamentally different from a situation in which jurors are instructed that if they 'cannot agree,' they may compromise by convicting of a lesser alternative crime, and they then elect to do so without reporting any splits or divisions when asked about their unanimity." *Id*. (quoting *Arizona v. Washington*, 434 U.S. 497 (1978).

That is the situation here. They were allowed, if unable to agree, to compromise or convict of a lesser crime. This is not the same as a genuine deadlock, where a hung jury is released and a mistrial declared. In rejecting *Brazzel*, the Court of Appeals' ignores the fact that the court instructed the jury that if it was "unable to agree," it was to leave the greater blank. (Opinion, p. 6). Thus, the blank verdict form in *Brazzel* is akin to the situation in this case.

In contrast to an implied acquittal, retrial is permitted where there is a mistrial declared due to the "manifest necessity" presented by a hung jury. *See United States v. Perez*, 22 U.S. 579, 580 (1824). A hung jury occurs when there is an irreconcilable disagreement among the jury members. A "high degree" of necessity is required to establish a mistrial due to the

hopeless deadlock of jury members. *See Arizona v. Washington,* 434 U.S. at 506. The record should reflect that the jury is "genuinely deadlocked." *Richardson v. United States,* 468 U.S. 317 (1984) (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial); *see also Selvester v. United States,* 170 U.S. 262, 270 (1989) ("But if, on the other hand, after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution.").

The Washington Supreme Court has identified avoidance of hung juries as one of the purposes of the "unable to agree" instruction, suggesting that a conviction for the lesser charged offense pursuant to such instruction does not render the "inability to agree" on the greater charge "jury hanging." *See State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26, 34 (Wash. 1991) (noting that unable to agree instructions serve a variety of purposes, among them reducing the incidence of hung juries). The jury did not *actually* acquit the defendant on the attempted murder charge because it did

not fill in the box with a "not guilty" notation. Instead, the jury "[could] not agree" on that charge, and convicted of a lesser alternative offense. Under *Green* and *Price*, "petitioner's jeopardy on the greater charge had ended when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge." *Price v. Georgia*, 398 U.S. at 323, 329 (1970) (quoting *Green*, 355 U.S. at 191).

Here, as in *Brazzel*, no inquiry was made to determine whether the jury had "genuinely deadlocked" or simply moved to the lesser alternative assault charge as a compromise after being "unable to agree." An inability to agree with the option of compromise on a lesser alternate offense does not satisfy the high threshold of disagreement required for a hung jury and mistrial to be declared. *See, e.g., Arizona v. Washington*, 434 U.S. at 509. The Supreme Court has characterized disagreement sufficient to warrant a mistrial as "hopeless" or "genuine" "deadlock." *Id.* ("[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."). Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they "cannot agree," they may compromise by convicting of a lesser alternative crime, and they then

elect to do so without reporting any splits or divisions, akin to formally entering it on the record, as in the majority of the cases relied upon by the Court of Appeals. (*See* Opinion, p. 4-5). Further, the state has the burden to prove a manifest necessity to discharge a jury over a defendant's consent, but under LeBlanc, there is never a finding of hopeless deadlock, and thus no protection of a defendant's right to a final verdict by a particular jury. *c.f. Gusler v. Wilkerson*, 199 Ariz. 391, 18 P.3d 702 (2001).

Protection from double jeopardy is a matter of substantive law. The *LeBlanc* court was very clear that it was not changing substantive law; it announced, "the change we make today is procedural in nature, adopted for purposes of judicial administration." *Id*. at 440, 924 P.2d at 444. The court stated, "we are dealing here with court-created procedure, not an interpretation of constitutional text, statutory provision, or substantive common law principle." *Id*. at 439, 924 P.2d at 443. Because *LeBlanc* was intended to have no effect on substantive law, it should be interpreted to have no such effect, and the principles of *Green* should still apply, regardless of whether or not there is an "implied acquittal," where the state had a full and fair opportunity to litigate the greater offense, and there was no

mistrial declared on the greater offense based on a jury deadlock rising to the level of manifest necessity.

Here, the trial judge and Court of Appeals relied on *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997), to support its finding here of "genuine deadlock." In *Bordeaux*, the jury was given an "unable to agree" instruction and wrote on that instruction "[a]fter all reasonable efforts, we, the jury, were unable to reach a verdict on the charge 'Attempted Aggravated Sexual Abuse.'" *Id.* at 1192. The trial judge declared a mistrial and retrial on that charge was upheld as permissible. *See id.* at 1193. The *Brazzel* court distinguished *Bordeaux*, finding that in *Brazze*l, there was no indication in the record that the jury's inability to agree was hopeless or irreconcilable--a manifest necessity permitting a retrial for attempted murder. But even though the jury may have written that they were unable to agree in both *Bordeaux* and this case, there is still no "genuine deadlock" because the jury may have simply moved on to the lesser to compromise, before a hopeless deadlock, as required before a jury is found to be hung and discharged. Thus, *Bordeaux* is wrongly decided. Further, *Bordeaux* did not deal with the *LeBlanc- Wussler* instructional history that

exists in Arizona.

In *State v. Espinoza*, 233 Ariz. 176, 310 P.3d 52 (App. 2013), as in this case, the jury indicated they "may be hung" on the greater, and were advised that they could consider the lesser offense. The jury convicted on the lesser. In *Espinoza*, on retrial, the state did not demonstrate a "genuine deadlock" on the greater. Contrary to the finding by the Court of Appeals, this is exactly the situation here. The only difference is how they communicated their inability to agree after "reasonable efforts." In *Espinoza*, it was a juror question. Here, it was the "unable to agree" interrogatory. Each demonstrated that the jury could not reach agreement on the greater after reasonable efforts. The *Espinoza* court correctly found that this was not the genuine deadlock that was needed to rise to the level of manifest necessity to avoid the double jeopardy bar. A mere statement that a jury has been unable to reach a verdict after persistent deliberations does not itself demonstrate a true deadlock. *See c.f. Gusler v. Wilkerson,* 199 Ariz. 391, 18 P.3d 702 (2001). The defendant has a right to a final verdict by a particular jury. Id. This right must be balanced with the state's right to a full and fair opportunity to litigate a charge. Id. The LeBlanc reasonable efforts procedure

does not allow for this final verdict by a particular jury on the greater before allowing a jury to compromise to a lesser.

Here, there was an insufficient record of a "genuine deadlock" or the equivalent of a hung jury, discharged, and mistrial declared on the greater offense. Thus, jeopardy barred retrial on the greater offense, and the conviction for first degree murder should be reversed.

2. The court erred by failing to grant a motion for mistrial based upon the numerous prejudicial statements made by multiple potential jurors which likely tainted the entire panel.

A prospective juror's remarks during voir dire may taint an entire panel. *See Mach v. Stewart*, 137 F.3d 630, 632-3 (9th Cir. 1997). This is especially so if the remarks are inflammatory, or comment on the defendant's guilt or innocence. *Paschal v. United States*, 306 F.2d 398, 399-400 (5th Cir. 1962); *Ohio v. Strong*, 119 Ohio App. 31, 196 N.E.2d 801 (1963).

Here, there were several statements that went to material issues of guilt, or the defendant's credibility versus the state's credibility. Several statements attributed honesty to the prosecutor and law enforcement. Especially, the comment about the prosecutor being an "honest man." (R.T.

6/27/16 at 165). Also, the jail worker's comments, which implied that Appellant had been at the jail previously, implying that he had a history of being in trouble (rather than for a prior trial in the same case), was a troublemaker and a criminal. (Id. at 166). And, that another juror knew the prosecutor through church and the boy scouts, again prejudicing the jury in favor of the prosecution, implying that they he is a God-fearing trustworthy man that could be trusted with their children, honest, and that they should believe everything he says. (Id. at 167). And that another juror vouched for the honesty of law enforcement based upon his close relationship with an officer. (Id. at 168).

Further, there were inflammatory statements that directly commented on the belief that the defendant was already guilty, such as the juror that disbelieved any kind of self-defense where the gunshot was 40 feet away, putting in the minds of the panel that any defense was meritless. (Id. at 168). And that another was physically sickened by just being in the same room with Mr. Martin, before any evidence was presented. (Id. at 169).

These statements tainted the panel such that a fair trial was impossible. The error in failing to grant the motion for mistrial was

prejudicial reversible error. The conviction should be reversed.

3. The court violated Appellant's confrontation clause rights by admitting inadmissible hearsay as dying declarations.

Prior to the first trial, the State filed a motion in limine asking that S.J.S.'s statements to police while he was bleeding in the driveway be admitted as dying declarations. (R.O.A. at 31). Appellant argued that they should be excluded under the confrontation clause pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). (R.T. 10/1/13 at 3-14). The court found that based on the circumstances, the victim believed he was dying when he made the statements, and therefore they were admissible as dying declarations. They did not violate the confrontation clause, since they were non-testimonial.

In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Supreme Court clarified the distinction between testimonial and non-testimonial statements made to emergency personnel. Statements are non-testimonial when the "primary purpose of" the interrogation is to enable the police officers to meet an ongoing emergency. The *Bryant* Court concluded, "the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his

statements."

Here, under *Bryant*, which analyzed the statements under the confrontation clause, regardless of whether they were dying declarations or excited utterances, the first questions and answers between police and the shooting victim may have related to responding to an emergency, such as "who shot you?", "Phil," "Who's Phil," "Neighbor." However, the last questions of "How come?" ("cause I was walking up his driveway I guess,") and "Is this His Driveway?" ("Yeah."), and "Did he say Why?" were questions designed to investigate a crime, and the answers, especially to the last question, of "*He said, 'don't walk up my driveway anymore" after I was on the ground already*" were answers likely to have been known to be used in a future prosecution, and were therefore testimonial. The admission of the statements violated the confrontation clause, and were not harmless error.

The first responders were police officers, not medical personnel. Police officers are known to investigate crimes and take statements for use at future prosecutions. Police had already apprehended Phil, the shooter. The questions "how come" and "did he say why?", and the statement that he was

not warned to stop trespassing by walking up his driveway "*until he was on the ground already*" points to the police trying to solve a crime after the suspect was in custody and had admitted to being the shooter, and points to a shooting victim already considering how his actions might be viewed in a future prosecution, or whether or not there was any justification to shoot him. The statements were therefore testimonial hearsay. Whether or not Phil warned him to stop, and that he had a gun and would shoot him if he did not turn around and leave, was vital to the issue of reasonableness. This un-confronted testimonial hearsay violated the confrontation clause and should not have been admitted as a hearsay exception, either as a "dying declaration" or as an "excited utterance."

Further, it is undisputed that Phil was already handcuffed, in the patrol car, and had already told police that he was the shooter and that the victim "kept coming onto my property and I told him to stop, so I shot him." The continued questioning was not to respond to an ongoing emergency. Rather, the suspect had been caught and medical personnel were on their way. The questioning, even if in the beginning was to respond to an emergency, turned investigative as the conversation progressed.

The error in admitting the testimonial hearsay statement was not harmless. And, although the issue was raised and denied in the first appeal, the law of the case doctrine should not have precluded review in the second trial or appeal, since the first decision by the Court of Appeals was manifestly erroneous or unjust. *State v. Wilson*, 207 Ariz. 12, 82 P.3d 797 (App. 2004).

IV. CONCLUSION

For all of the foregoing reasons, it is respectfully requested that review be granted, and that the decision by the Court of Appeals be reversed, and that the matter be remanded for re-trial on the offense of Second Degree Murder.

Respectfully submitted,

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