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6 IN THE SUPREME COURT
7 STATE OF ARIZONA

9 CHRISTOPHER LYNN ELLSWORTH,
10 Defendant/Petitioner,

12 Vs.

14 The Superior Court of Arizona,
In and For the County of Gila:
15 and the Honorable Robert Duber, II,
16 Judge;

17 Respondents;

17 and

18 The State of Arizona,

19 Respondent / Real Party In Interest.
20

) Case No. CV13-0089-PR

) Court of Appeals, Division II
) Case No. 2 CA-SA 13-0009

) Gila County
) Superior Court
) Case No. S0400 CR2012 00371

) PETITION FOR REVIEW

21 Petitioner / Appellant Christopher Lynn Ellsworth, through counsel, petitions the
22 Supreme Court to review the Decision of the Court of Appeals, Division II, in the above-entitled
23 cause entered on February 20, 2013.

24 **A. Issues Presented for Review.**
25

1 **Trial Judge Robert Duber, II Abused His Discretion, Caused Prejudicial**
2 **Error and Violated Defendant's Constitutional Rights Involving Double Jeopardy:**

3 1. By failing to recognize that the San Carlos Apache Tribe Criminal
4 Complaint and Plea Agreement become a Final Judgment of Conviction.

5 2. By Rejecting Defendant Ellsworth's Waiver of Objections and His Voluntary
6 Consent to the Tribal Court's Jurisdiction.

7 3. By Rejecting that State of Arizona Criminal Charges are Identical
8 To Tribe's Criminal Charges

9 4. By Rejecting Tribe's Criminal Charges and Plea Agreement are
10 Identical to State's Criminal Complaint.

11 5. By Rejecting the Legal, Binding Effect of Defendant Ellsworth's
12 Voluntary Guilty Plea

13 6. By Rejecting that Defendant Ellsworth Did Not Waive his Double Jeopardy
14 Rights When He Entered into the San Carlos Apache Tribe's Criminal Plea Agreement.

15 7. By Rejecting the *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 251
16 (1932), Identical Elements In Criminal Charges Trigger Double Jeopardy Prohibition
17 Against the Same State Criminal Charges.

18 8. By Rejecting the United States Constitution and Arizona Constitution's
19 Prohibitions Against Double Jeopardy, Violating Petitioner's Rights.

20 **B. List of Additional Issues Presented to, But Not Decided by, the Court of**
21 **Appeals, Division II, Which Need to be Decided, if Review is Granted.**

22 None.

23 **C. Statement of Facts.**

24 The Parties: Defendant is the Petitioner Christopher Lynn Ellsworth ("Petitioner" or
25 "Ellsworth"). The Real Party In Interest is the State of Arizona ("State").

 On July 27, 2012, Petitioner Ellsworth was arrested in Room 242 at the Best Western Hotel
 at the Apache Gold Casino on the San Carlos Apache Tribe's Reservation ("Reservation"). He

1 was alleged to have possessed and used, including for sale, in said Hotel room, approximately
2 19.9 grams of methamphetamine and drug paraphernalia. He also possessed \$25,836.71 in cash
3 from an inheritance (hereinafter "Items"). In addition, Defendant parked his 2007 Dodge
4 vehicle ("vehicle") in the Hotel parking lot. The subject Hotel and the Apache Gold Casino
5 ("Hotel") are located on and within the territorial boundaries of the Reservation and not within
6 the State of Arizona. An acquaintance, Nikki Barber occupied Room 242 with the Defendant.
7 She admitted using methamphetamine, but the State gave her *defacto* immunity. Petitioner's
8 alleged acts took place on the Reservation but not in Arizona. Petitioner was arrested and all of
9 previously mentioned Items were seized by Officers of the Police Department of the San Carlos
10 Apache Tribe ("SCAT") inside the subject Hotel and in the scope of Indian Commerce.
11

12 **D. Arguments Regarding the Issues Presented.**

13 **San Carlos Apache Tribe's Criminal Complaint, Its Charges and Plea Agreement.**

14
15 On September 21, 2012, the SCAT Prosecutor filed a Criminal Complaint against
16 Petitioner alleging violations of the SCAT Law and Order Criminal Code. The SCAT Criminal
17 Complaint included the following counts: Count A [Racketeering – Unlawful Use of Dangerous
18 Drugs]; Count B [Racketeering – Unlawful Use of Narcotic Drugs]; Count C [Unlawful Use of
19 Dangerous Drugs]; Count D [Unlawful Use of Narcotic Drugs]; Count E [Possession or
20 Delivery of Drug Paraphernalia]; and Count F [Endangerment]. A copy of the Complaint is
21 attached and incorporated herein as Appendix "Exhibit A". On October 16, 2012, with
22 counsel's advice, Petitioner entered into a Plea Agreement and Order with Tribe. Petitioner read
23 the Plea Agreement and Order, understood it, intelligently and voluntarily entered into said
24 Agreement and Order, and elected to plead "guilty" to Count A [Racketeering – Unlawful Use
25

1 of Dangerous Drugs]. He voluntarily waived any and all rights to appeal the Agreement
2 (Appendix Exhibit "B."). On October 16, 2012, SCAT Court Judge Edd Dawson entered the
3 Final Judgment and Sentencing Order on the Plea Agreement between Petitioner and SCAT. A
4 copy of the Order on Plea Agreement and Judgment are attached as Appendix Exhibit "C".

5 **The State's Criminal Complaint, Jury Trial and Verdict.**

6 On August 8, 2012, the State of Arizona, Gila County, secured a Grand Jury Indictment
7 against Petitioner charging him with the identical criminal charges filed by SCAT: Count 1
8 [Possession of Dangerous Drugs For Sale Above the Threshold Amount]; Count 2: [Possession
9 of Drug Paraphernalia]; and Count 3: [Use of Dangerous Drugs]. The Direct Indictment
10 ("Indictment") stated that "in Gila County, Arizona," Petitioner committed violations of the
11 aforesaid counts (emphasis added). The Indictment also cited "the San Carlos Police
12 Department, DR # 201212323," page 3 thereof. A copy of the Indictment is attached as
13 Appendix "Exhibit G."
14

15
16 On January 4, 2013, Petitioner filed his Motion to Dismiss the State's criminal action
17 based upon the constitutional defense of double jeopardy. On January 14, 2013, the State filed
18 its Response objecting to the Motion. Petitioner filed his Reply on January 17, 2013. The
19 Court denied a request for oral argument. On January 22, 2013, Judge Duber issued an Order
20 denying Defendant's Motion to Dismiss on Grounds of Double Jeopardy, citing two cases: *Duro*
21 *vs. Rena and United States v. Wheeler*. Both cases are distinguishable from the instant case on
22 the facts and law. A copy of the Court's Order is attached hereto as "Exhibit 1."
23

24 **Petitioner voluntarily consented and waived objections to the Tribal Court's**
25 **jurisdiction.**

1 Petitioner is a non-Indian who voluntarily and intelligently consented to the jurisdiction
2 to the SCAT Court. The acts which gave rise to the criminal charges against him took place
3 exclusively on the Reservation territory of SCAT, a federally recognized Native American
4 Indian Tribe. At the State Court trial, there were **no facts** that the alleged conduct occurred in
5 the State of Arizona. The only facts are that the crimes were allegedly committed in, on and
6 within the federal territorial boundaries of the Indian Reservation of the Tribe.
7

8 **Petitioner's Second Trial for the Same and Identical Charges.**

9 Petitioner was tried to a jury on the criminal charges in the Gila County Superior Court
10 on February 6 and 7, 2013. The jury returned a verdict of "Not Guilty" on the charge of
11 Possession of a Dangerous Drug for Sale and a verdict of "Guilty" on the charges of Possession
12 of a Dangerous Drug, Use of a Dangerous Drug and Possession of Drug Paraphernalia.
13 Defendant was taken into custody on February 7, 2013 and was sentenced on March 11, 2013 to
14 4.5 years in prison on the possession and use convictions and 1.75 years on the paraphernalia
15 conviction, to be served concurrently, plus several thousand dollars in fines.
16

17 **E. Reasons Petition for Review Should Be Granted**

18 A Petition for Review is necessary when, as here, there are Constitutional questions "of
19 law that are of statewide importance, apparently of first impression, and likely to reoccur."
20 *O'Brien v. Escher*, 204 Ariz. 459, par. 3, 65 P.3d 107, par. 3 (App. 2003); See also *State v. Fell*,
21 203 Ariz.186, par. 1, 52 P. 3d 218, par.1 (App. 2002); *State v. Nichols*, 201 Ariz. 234, par. 1, 33
22 P.3d 1172, par. 1 (App. 2001); *Sanchez v. Coxon*,175 Ariz. 93, 854 P.2d 126 (1993).
23

24 Here, Petitioner was forced to defend himself at trial a second time on **identical** criminal
25 charges with the **same elements**, in violation of the U.S. and Arizona Constitutional protections

1 afforded him not to be twice put in jeopardy or life or limb. See the *United States Constitution*,
2 *Amendment V*. The double jeopardy clause applies to the States through the *Fourteenth*
3 *Amendment*. See also the *Arizona Constitution, Article 2, Sec. 10*. See also *Blockburger v.*
4 *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932), and *Hernandez v. Superior Court of*
5 *the State of Arizona*, 179 Ariz. 515, 880 P.2d 735 (Ct. App. Div. 1, 1994). The prohibition
6 against double jeopardy is also codified in A.R.S. § 13-116 [Double Punishment].
7

8 Review is appropriate where a case presents legal questions of first impression
9 concerning issues that are of statewide importance, as this does this case. No Arizona Court or
10 Federal Court in Arizona has addressed issues of (1) a Non-Indian committing a crime identified
11 in the Major Crimes Act, a federal statute, (2) acts occurring exclusively on a recognized
12 Reservation, (3) one criminally charged by that Tribe (4) with the Defendant intelligently,
13 voluntarily and with advice of counsel waiving all objections to and consenting to the Court's
14 subject matter and personal jurisdiction and (5) entering a Plea Agreement therein (Appendix
15 Exhibit B and C). The State filed the exact same criminal charges against the Petitioner with
16 identical elements, triggering Petitioner's double jeopardy affirmative defense identified in
17 *Blockburger, supra.* and in *Hernandez, supra.*
18

19 Petitioner has already been put to great expense and his Constitutional protections against
20 double jeopardy have been violated subjecting him to irreparable harm. He has no plain, speedy
21 and adequate tool for review of the trial court's ruling denying his Motion to Dismiss by appeal,
22 and because the claim involves purely legal questions which have never been previously
23 addressed by any Arizona court. Petitioner respectfully requests that the Court accept review of
24 this action and address the merits of this constitutional protection matter.
25

1 It is an abuse of discretion when the trial court misapplies the law. *Grant v. Arizona*
2 *Public Service Co.*, 133 Ariz. 434, 456, 652 P. 2d 507, 529 (1982) [Abuse of discretion where
3 judge commits an “error of law ... in the process of reaching [a] discretionary conclusion”].
4 This Court is not bound by the trial court’s conclusions of law on such matters when there is
5 such error. See *City of Tucson v. Superior Ct.*, 167 Ariz. 513, 809 P.2d 428 (1991). Double
6 jeopardy is a non-jurisdictional defense that can be waived. *State v. Williams*, 168 Ariz. 367,
7 813 P.2d 1376, review granted in part, denied in part, 831 P.2d 1279, 171 Ariz. 511, vacated in
8 part (Ariz. App. Div. 1 1991). Petitioner asserted double jeopardy as an affirmative defense to
9 the State’s charges to ensure protection against violation of his **Constitutional right** against
10 double jeopardy. Defendant disclosed this double jeopardy defense in his Notice of Defenses
11 disclosed on November 2, 2012. The Federal Double Jeopardy Clause provides that no person
12 shall “be subject for the same offense to be twice put in jeopardy of life or limb...” *U.S.*
13 *Constitution, Amendment V*. The double jeopardy clause applies to the States through the
14 *Constitution’s Fourteenth Amendment*. See *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct.
15 2056, 2062 (1969); also cited in *Hernandez v. Superior Court of Arizona, supra*. Double
16 jeopardy protection prohibits both successive prosecutions and successive punishments “for the
17 same offense.” *U.S. v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849 (1993). The double jeopardy
18 clauses in the U.S. and Arizona Constitutions mirror one another and prohibit: (1) second
19 prosecution for the same offense after acquittal, (2) second prosecution for the same offense
20 after conviction, and (3) multiple punishments for the same offense. See *Arizona Constitution,*
21 *Article 2, Sec. 10* and *Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (2006), review denied;
22 *Hernandez v. Superior Court of the State of Arizona, supra*. A.R.S. § 13-111 prohibits
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1 prosecution of lesser included offenses, i.e., possession of dangerous drugs by **collateral**
2 **estoppel and res judicata**. See *Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (2006). The
3 double jeopardy protections extended by the U.S. and Arizona Constitutions are co-extensive
4 with those provided by its federal counterpart, and thus Arizona courts apply the same
5 interpretations to both. *Brodsky v. State*, 218 Ariz. 508, 189 P.3d 1081 (2008). This law is
6 controlling where there are the same elements of criminal charges and the same facts supporting
7 those charges. See *Fitzgerald v. Superior Court*, 73 Ariz. 539, 845 P.2d 465 (1992). If the same
8 issues are being litigated, collateral estoppel controls to prohibit the second prosecution (*State v.*
9 *Rodriquez*, 198 Ariz. 139, 7 P.3d 148 (2000)). It is binding on Arizona courts through the due
10 process provisions of the *U.S. Constitution, Article 14. State v. Stauffer*, 552 Ariz. 26, 536 P.2d
11 1044 (1975). In *State v. Berry*, 133 Ariz. 284 (1982), involving the issue of separate sovereigns
12 (SCAT is a separate sovereign nation under Indian Civil Rights Act, *supra.*), double jeopardy
13 bars an Arizona prosecution because Petitioner entered a “guilty plea” involving the same
14 elements of crimes charged by the State. See also *State v. Poland*, 132 Ariz. 269 (1982).
15 Moreover, in *State v. Wortham*, 63 Ariz. 148 (1945), the Court held that if a person is prosecuted
16 under Arizona Narcotics Law and that person was also prosecuted and convicted under the
17 federal narcotics law on the same acts (i.e., the Arizona narcotics law mirrors federal narcotics
18 law), the State action is barred by double jeopardy, collateral estoppel, and *res judicata*.
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22 In this case, the Tribe’s criminal charges are the same as the State’s charges. Said
23 another way, the State of Arizona, a separate sovereign entity, secured a criminal indictment
24 against Petitioner which contains the same elements in the charges and conviction of the
25 Petitioner in the Tribal Court, also a separate sovereign nation’s Court. The State’s conduct

1 triggers the United States and Arizona double jeopardy constitutional rights provisions for the
2 Petitioner, requiring the dismissal of the State's action herein. See all citations presented above.
3 See also *Booth v. State*, 903 P.2d 1079 (Alaska Ct. App. 1995) and *People v. Morgan*, 785 P.2d
4 1284 (Colo. 1990). The San Carlos Apache Tribe's prosecution and conviction of Petitioner
5 bars the State of Arizona's prosecution herein on double jeopardy grounds when the crimes
6 charged contain the same elements and are the same offenses (See both Appendix Exhibits "A"
7 and "G"). The same evidence, the same witnesses, including the same police officers which
8 SCAT used to prosecute Petitioner, were employed by the State to prosecute Petitioner in its
9 State Court matter--further supporting the same elements and conduct test applicable to
10 Petitioner. See Appendix Exhibit "H".

12 Arizona adopted broad double jeopardy protections for criminal defendants in the
13 aftermath of *Oregon v. Kennedy*, 27 Ariz. Law Review, 505 (1985). See also the citations
14 therein. The double jeopardy clause of the Fifth Amendment of the United States Constitution
15 is applicable to the State of Arizona. *Klinefelter v. Superior Court in and for Maricopa County*,
16 108 Ariz. 494, 502 P.2d 531 (1972). Petitioner was placed in double jeopardy when he entered
17 the prior factual determinations supporting his "guilty" plea in the San Carlos Apache Tribe's
18 Court and prosecution. *State v. Rios*, 114 Ariz. 505, 562 P.2d 385 (1977); *State v. Rodriguez*,
19 198 Ariz. 139, 7 P.3d 148 (2000) [Prohibition against double jeopardy incorporates collateral
20 estoppel and *res judicata* principles]. By the State's commencement of litigation against
21 Petitioner, it has violated Petitioner's Constitutional protections against double jeopardy.
22 Double jeopardy prevents the State of Arizona from prosecuting Petitioner more than once for
23 the same offense. *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, opinion supplemented in *State v.*
24
25

1 *Harrod*, 204 Ariz. 567, 65 P.3d 948; opinion supplemented in *State v. Pandeli*, 204 Ariz. 569,
2 652 P.3d 950, cert. denied; *Arizona v. Pandeli* (2003). It is also the intent of the double
3 jeopardy protections in Arizona to guarantee the right to be free from subsequent prosecution.
4 The clause is also violated by the mere commencement of trial. *Lemke v. Rayes*, 213 Ariz. 232,
5 141 P.3d 407 (2006). Thus, the State of Arizona violated Petitioner's constitutional rights not to
6 be placed in double jeopardy when it filed its criminal complaint – indictment (Exhibit “G”) and
7 commenced litigation through pre-trial discovery (Exhibit “H”). The strong principle behind
8 double jeopardy is that the State of Arizona, with all its resources and power, should not be
9 allowed to make repeated attempts to convict Petitioner for an alleged offense, thereby
10 subjecting Petitioner to embarrassment, expense, and / or to deal with and compelling him to
11 live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even
12 though he may be deemed innocent, he may be found guilty. *State v. Aguilar*, 213 Ariz. 235, 172
13 P.3d 423 (2007). The Court cited *Duro v. Rena*, 495 U.S. 676 (1990) for its basis to deny
14 Defendant's Motion to Dismiss. *Duro*, supra. is factually distinguishable and it was overruled in
15 *United States v. Lara*, 541 U.S. 193 (2004).

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18 **F. Court of Appeals Decision.**

19 A copy of the Decision from the Court of Appeals, Division II, from which this Petition
20 of Review originates, is attached hereto as Exhibit 1.

21
22 **G. Conclusion**

23 Both Indian and Non-Indians (Petition Ellsworth) are citizens of the United States
24 of America. They are all entitled to and subject to the protections and right not to be twice put
25 in jeopardy of being criminally prosecuted for a crime under the Major Crimes Act while on an

1 Indian Reservation. Both have irrevocable rights available to them. Both are protected by the
2 supreme law of the land, the United States Constitution. Petitioner was charged with the same
3 criminal conduct and with identical criminal charges but by two (2) different sovereigns.
4 Having met the necessary grounds for dismissal of this prosecution based upon double jeopardy,
5 Petitioner Ellsworth requests that this Supreme Court to grant this Petition for Review and
6 vacate final judgment of conviction entered March 11, 2013 and order that the case be dismissed
7 with prejudice for lack of subject matter jurisdiction due the defense of double jeopardy.
8

9 RESPECTFULLY SUBMITTED this 20th day of March, 2013.

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11 LAW OFFICE OF JOHN HARRIS

12
13 By: John Harris
14 John Harris, Esq.
15 *Attorney for Defendant/Petitioner*
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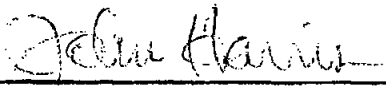
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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure, Rule 23(c), Petition for Review, I certify that the attached Petition for Review uses proportionately spaced type of 14 point or more, is double-spaced man font and contains 3,332 words.

A copy of the Court of Appeals, Division II decision filed February 20, 2013 denying Petitioner's Special Action Petition for which this Petition of Review is being taken is attached to this Petition for Review in compliance with Rules of Civil Appellate Procedure, Rule 23(c).

LAW OFFICE OF JOHN HARRIS

By: 
John Harris, Esq.
Attorney for Defendant/Petitioner

ORIGINAL of the Petition for Review of Special Action and Appendix were filed using Turbo Court procedures on March 21, 2013, with:

Clerk
Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85007

A copy of the Petition for Review of Special Action and Appendix were served by email or mail on March 21, 2013, to:

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Real Party In Interest

1 Honorable Robert Duber, II
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By: John Harris