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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

V

Appeal No. 2015AP001195 CRLV
Circuit Court Case No. 2014CF004520

JOSHUA BERRY,

Defendant-Appellant.

ON APPEAL FROM A NON-FINAL ORDER
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
HON. THOMAS J. McADAMS PRESIDING,
DENYING A MOTION TO DISMISS

REPLY BRIEF OF DEFENDANT-APPELLANT

Scott F Anderson
State Bar No. 1013911
Attorney for Defendant-Appellant
207 E Buffalo Suite 514
Milwaukee WI 53202
(414) 271-6040; Fax (414) 271-9840

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ARGUMENT

I. THIS SECOND PROSECUTION FOR THE SAME FIREARM POSSESSION IS NOT ALLOWED BY THE PRINCIPLE OF CONTINUING JEOPARDY.

There are exceptions to the principle of continuing jeopardy, State v. Henning, 2004 WI 89, par. 22, and one applies to this case. Double jeopardy principles prevent a defendant from being retried when a court, as here, overturns a conviction due to *insufficient* evidence. Id., citing Burks v. United States, 437 U.S. 1, 11 (1978). “Where the evidence is found insufficient to convict the defendant at trial, the defendant cannot again be prosecuted.” Id.

The trial court ruling dismissing this case after trial was a finding that the evidence upon which the original conviction was based was *insufficient* to support that conviction. Call it what you will--the state prefers “mistake”--the trial court ruling found the evidence insufficient to convict Berry, triggering the exception to the principle of continuing jeopardy that bars this subsequent prosecution. That is why United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977), is important to this case, despite the state’s protest: what constitutes an “acquittal” is not to be

controlled by the form of the judge's action but whether it is a ruling on the sufficiency of the evidence offered at trial.

The state's brief argues that even if continuing jeopardy does not apply, the charges here are not identical in law and that they could have been brought in the same proceeding. However, the "common sense" reading of Wis. Stat. s. 941.29 that State v. Church, 223 Wis.2d 641, 659, 589 N.W.2d 638 (Ct. App. 1998), requires indicates that the object of the legislature was to ban a firearm's possession if one, two or all of the listed statuses under s. 941.29(2) applied to that single instance of possession. The crime the legislature is targeting is the act of that *particular possession* while prohibited, regardless of why the person is prohibited under the law.

The state here chose to originally prosecute Berry under s. 941.29(2)(a), even though it could have chosen to prosecute him, instead, under (2)(b). Now that the evidence has been found to be insufficient after trial on its chosen route, double jeopardy bars this second attempt at prosecuting the same act of possession.

CONCLUSION

Because this second prosecution of Berry after trial violates his right to be free from double jeopardy, the complaint and information should be ordered dismissed with prejudice.

Dated at Milwaukee WI this 15th day of October, 2015.

LAW OFFICE OF SCOTT F ANDERSON

By: SCOTT F ANDERSON
State Bar No. 1013911
Attorney for Joshua Berry
207 E Buffalo Suite 514
Milwaukee WI 53202

CERTIFICATION OF CONFORMITY WITH S. 809.19(8)(B)

I, Scott F. Anderson, hereby certify that this brief conforms to the rules in accordance with s. 809.19(8)(b) for a brief produced with proportional serif font. The length of this brief is 444 words, according to the word count function of the word processor available in Microsoft Works.

SCOTT F ANDERSON
State Bar No. 1013911

CERTIFICATION OF COMPLIANCE WITH S. 809.19(12)

I, Scott F. Anderson, hereby certify that I have submitted an electronic copy of the brief which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 15th day of October, 2015.

SCOTT F ANDERSON
State Bar No. 1013911