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## PREVIEW; *State v. Barrows*: Double Jeopardy in Multi-Count Criminal Proceedings

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**PREVIEW; *State v. Barrows*: Double Jeopardy in Multi-Count Criminal Proceedings.**

**Caitlin Creighton**

Oral arguments are scheduled for Wednesday, June 27, 2018, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, in Helena, Montana. Assistant Appellate Defender Alexander H. Pyle is expected to argue on behalf of Appellant Barrows and Assistant Attorney General Tammy A. Hinderman is expected to argue on behalf of Appellee State of Montana.

**I. INTRODUCTION**

The sole issue before the Court is whether the district court violated Barrows' constitutional double jeopardy protections under the Fifth and Fourteenth Amendments of the United States Constitution and Article II, § 25 of the Montana Constitution. The Double Jeopardy Clauses of the United States Constitution and Montana Constitution declare that no person shall be put in jeopardy for the same offense twice.<sup>1</sup>

In 2016, Barrows was convicted of three counts of assault with a weapon and two counts of illegal possession of dangerous drugs. At trial, the district court *sua sponte* dismissed one of the drug possession charges. Despite the dismissal, the district court later instructed the jury on the dismissed drug charge, and Barrows was convicted.

Barrows appealed, providing the Court an excellent opportunity to clarify when the Double Jeopardy Clause is triggered. Specifically, the Court can resolve whether the Double Jeopardy Clause is triggered upon the dismissal of a single charge or upon the dismissal of an entire multi-count proceeding.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Barrows was pulled over after authorities received a report that he pointed a gun at another driver.<sup>2</sup> After a legitimate search of Barrows' vehicle, an officer seized a BB gun, baggies of methamphetamine, and baggies of prescription pills identified by the officer as Lorazepam.<sup>3</sup> Barrows was arrested and charged with three counts of assault with a weapon, one count of possession of

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<sup>1</sup> U.S. CONST. amend. V; MONT. CONST. art. II, § 25.

<sup>2</sup> Appellee's Response Brief at 3, *State v. Barrows*,

[https://supremecourtdocket.mt.gov/APP/connector/2/369/url/321Z246\\_03WCCVM23003NSV.pdf](https://supremecourtdocket.mt.gov/APP/connector/2/369/url/321Z246_03WCCVM23003NSV.pdf) (Mont. Mar. 22, 2018) (No. DA 17-0061).

<sup>3</sup> *Id.* at 4-5.

methamphetamine and one count of possession of Lorazepam.<sup>4</sup>

At trial, the Nineteenth Judicial District Court of Lincoln County determined that the State failed to provide sufficient evidence of Lorazepam possession during its case-in-chief.<sup>5</sup> The investigating officer identified the pills by typing the number printed on the pills into Drugs.com; believing this research was sufficient for identification purposes, the prescription pills were never sent to the State Crime Lab for testing.<sup>6</sup> Consequently, the district court dismissed the charge midtrial, telling Barrows, “You are not going to be convicted of Lorazepam possession because I am not going to give that charge . . . I will dismiss the Lorazepam case. The Lorazepam charge is off.”<sup>7</sup>

Following the *sua sponte* dismissal of the Lorazepam charge, Barrows testified.<sup>8</sup> During his testimony, Barrows admitted not only to being in possession of prescription pills at the time of his arrest, but knowing the pills were Lorazepam.<sup>9</sup> When it came time to decide jury instructions, the State proposed instructions relating to the dismissed Lorazepam charge.<sup>10</sup> Without objection, the district court read jury instructions on the definition of Lorazepam and the required elements of Lorazepam possession.<sup>11</sup> The jury convicted Barrows for all three counts of assault with a weapon and both counts of drug possession.<sup>12</sup>

### III. SUMMARY OF ARGUMENTS

Barrows brings several claims on appeal; however, the Court limited oral argument to a single issue: whether the district court violated constitutional prohibitions against double jeopardy when it convicted Barrows’ of possession of Lorazepam.<sup>13</sup> The parties’ primary dispute is with the interpretation of Mont. Code Ann. §46–16–403, which reads:

When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the *action* and discharge the defendant.

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<sup>4</sup> Appellant’s Opening Brief at 3–4, *State v. Barrows*, [https://supremecourtdocket.mt.gov/APP/connector/1/368/url/321Z246\\_03W910E6F005XJQ.pdf](https://supremecourtdocket.mt.gov/APP/connector/1/368/url/321Z246_03W910E6F005XJQ.pdf) (Mont. Nov. 20, 2017) (No. DA 17-0061).

<sup>5</sup> Appellee’s Response Brief, *supra* note 2, at 1.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Appellant’s Opening Brief, *supra* note 4, at 4.

<sup>8</sup> Appellee’s Response Brief, *supra* note 2, at 6.

<sup>9</sup> *Id.* at 6–7.

<sup>10</sup> Appellant’s Opening Brief, *supra* note 4, at 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Oral Argument Schedule*, COURTS.MT.GOV, [https://courts.mt.gov/courts/supreme/oral\\_arguments](https://courts.mt.gov/courts/supreme/oral_arguments) (last visited June 3, 2018).

However, prior to dismissal, the court may allow the *case* to be reopened for good cause shown (emphasis added).<sup>14</sup>

The parties disagree about how the words “action” and “case” are defined within the statute’s context.<sup>15</sup> Barrows argues these terms refer to a single charge, whereas the State argues these terms refer to an entire multi-count proceeding.<sup>16</sup> The focus of the oral argument will likely be clarifying when double jeopardy is triggered: the moment the court dismisses a single charge during the multi-count proceeding *or* only once the entire proceeding has reached conclusion.

#### A. *Defendant-Appellant Barrows’ Argument*

Barrows argues his post-dismissal conviction for possession of Lorazepam directly violates the holding and policy in *Smith v. Massachusetts*.<sup>17</sup> Barrows argues that he, like Smith, was convicted of a charge previously dismissed in violation of the Double Jeopardy Clause.<sup>18</sup> The United States Supreme Court’s holding in *Smith* established that, even if a defendant introduces incriminating evidence after a midtrial dismissal, the dismissal must be treated as final unless there is a pre-existing rule allowing reconsideration.<sup>19</sup> Barrows asserts his conviction was everything the *Smith* Court wanted to prevent: influencing a defendant to testify candidly after a midtrial dismissal, re-jeopardizing the defendant if the charge reappears.<sup>20</sup>

Additionally, Barrows highlights that Montana does not have a pre-existing rule establishing the availability of reconsideration.<sup>21</sup> Barrows argues that § 46–16–403 does not allow reconsideration after a case is unequivocally dismissed, as the State contends.<sup>22</sup> Barrows interprets the word “case” to mean a single charge in a multi-count proceeding.<sup>23</sup> Essentially, Barrows interprets the statute to mean that, once a court has dismissed a single charge, the charge may not be reopened, regardless of whether additional charges remain in the proceeding.<sup>24</sup>

Barrows maintains that his conviction for possession of

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<sup>14</sup> Mont. Code Ann. § 46–16–403 (2017).

<sup>15</sup> Appellant’s Opening Brief, *supra* note 4, at 12–14; Appellee’s Response Brief, *supra* note 2, at 17.

<sup>16</sup> Appellant’s Opening Brief, *supra* note 4, at 12–14; Appellee’s Response Brief, *supra* note 2, at 17.

<sup>17</sup> 543 U.S. 462 (2005); Appellant’s Opening Brief, *supra* note 4, at 10.

<sup>18</sup> Appellant’s Opening Brief, *supra* note 4, at 11.

<sup>19</sup> *Id.*; *Smith*, 543 U.S. at 473.

<sup>20</sup> Appellant’s Opening Brief, *supra* note 4, at 11–13.

<sup>21</sup> *Id.* at 12; Mont. Code Ann. § 46–16–403.

<sup>22</sup> Appellant’s Opening Brief, *supra* note 4, at 13.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Lorazepam violates §46–16–403 because the district court unequivocally dismissed the possession of Lorazepam charge.<sup>25</sup> As such, the constitutional protections from double jeopardy effectively prevent the “case” from being reopened.<sup>26</sup>

*B. Plaintiff-Appellee State of Montana’s Response*

The State argues that the Double Jeopardy Clause is not violated when a court reconsiders a previously dismissed charge; however, the State concedes this is true only when there is a pre-existing rule allowing reconsideration and additional charges in the proceeding remain.<sup>27</sup> The State maintains that because only one of Barrows’ five charges was dismissed midtrial, the Double Jeopardy Clause was not triggered.<sup>28</sup>

The State opposes Barrows’ interpretation of § 46–16–403, arguing that this statute authorizes reconsideration of a dismissed charge.<sup>29</sup> Specifically, the State interprets the words “action” and “case” to mean an entire multi-count proceeding.<sup>30</sup> The State argues that the plain language of the statute indicates that, unless a court has dismissed the entire multi-count proceeding, a court remains able to reconsider a charge after a midtrial dismissal.<sup>31</sup>

The State maintains that the legislative intent behind § 46–16–403 was not to discharge a defendant from custody unless *all* of their charges were dismissed.<sup>32</sup> The State argues that if “action” means a single charge, then under the statute, a defendant would be discharged from custody after dismissal of a single charge.<sup>33</sup> Because Barrows’ entire proceeding was not dismissed midtrial and the district court had the ability to reconsider the charge, the State contends the dismissal of the possession of Lorazepam charge was not final and the Double Jeopardy Clause was not violated.<sup>34</sup>

*C. Defendant-Appellant Barrows Reply*

Barrows reasserts his interpretation of § 46–16–403, arguing that neither the statute nor Montana case law permit the revival of a previously dismissed charge.<sup>35</sup> He further claims that “action” and

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Appellee’s Response Brief, *supra* note 2, at 22–23.

<sup>28</sup> *Id.*; *Smith*, 543 U.S. at 473.

<sup>29</sup> Appellee’s Response Brief, *supra* note 2, at 16.

<sup>30</sup> *Id.* at 25; *see State v. Forsythe*, 390 P.3d 931 (2017).

<sup>31</sup> Appellee’s Response Brief, *supra* note 2., at 24.

<sup>32</sup> *Id.* at 25–26.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 25.

<sup>35</sup> Appellant’s Reply Brief at 3, *State v. Barrows*, [https://supremecourtdocket.mt.gov/APP/connector/1/368/url/321Z253\\_04JVJC3P90000T9.pdf](https://supremecourtdocket.mt.gov/APP/connector/1/368/url/321Z253_04JVJC3P90000T9.pdf) (Mont. May 2, 2018) (No. DA 17-0061).

“case” within the context of the statute cannot translate to mean an entire multi-count proceeding, although these words may refer to an entire proceeding in other contexts.<sup>36</sup>

Barrows disagrees with the State’s logic; specifically, he maintains that the State’s interpretation of the statute would suggest that courts can only dismiss an entire proceeding midtrial, not a single charge.<sup>37</sup> Simply put, because the statute indicates, “[T]he court may, on its own motion . . . dismiss the *action* and discharge the defendant,” and the State interprets “action” to mean an entire proceeding, it does not follow that this statute permits courts to dismiss a single charge.<sup>38</sup> Yet, Barrows contends Montana case law clearly establishes that § 46–16–403 allows for the dismissal of a single charge.<sup>39</sup> Barrows persists the State’s interpretation of the statute is incorrect and does not authorize his conviction for possession of Lorazepam.<sup>40</sup>

#### IV. Analysis

The issue in this case is one of first impression for the Court. Although the Court has determined that a midtrial dismissal of a single charge is permissible, it has not yet discussed the validity of a double jeopardy claim after a defendant has been convicted for a dismissed charge in a multi-count proceeding.<sup>41</sup>

The Court will likely agree with Barrows’ interpretation of § 46–16–403. Montana’s double jeopardy jurisprudence focuses on whether a defendant has previously been put in jeopardy for an offense “equivalent to the offense with which Montana now charges him.”<sup>42</sup> Therefore, the Court will likely determine Barrows was twice put in jeopardy for the same offense because he was tried for an identical charge twice. The State failed to provide sufficient evidence of Defendant’s possession of Lorazepam; yet, he was retried and convicted for this offense after the district court explicitly dismissed the charge midtrial.

In *Smith*, the Court explained: “[I]f the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible . . . subjecting the defendant to post-acquittal fact finding proceedings going to guilt or innocence violates the Double Jeopardy Clause.”<sup>43</sup> The Court will look to *Smith* for authority in this case and will likely determine that Barrows’ conviction for

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<sup>36</sup> Appellant’s Reply Brief, *supra* note 35, at 6–7.

<sup>37</sup> Appellant’s Reply Brief, *supra* note 35, at 5–6.

<sup>38</sup> Appellant’s Reply Brief, *supra* note 35, at 6.

<sup>39</sup> *Id.*; see *State v. Gregori*, 328 P.3d 1128 (2014); see *State v. Hegg*, 956 P.2d 754 (1998).

<sup>40</sup> Appellant’s Reply Brief, *supra* note 35, at 8.

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *State v. Kline*, 305 P.3d 55, 58 (2013).

<sup>43</sup> *Smith*, 543 U.S. at 466 (citing *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986)).

possession of Lorazepam was impermissible because his admission to possession of Lorazepam went directly to his guilt or innocence on that charge.

Each parties' interpretation of the statute has merit; however, Barrows will likely have the controlling argument. The State makes a strong argument that "action" and "case" refer to an entire proceeding based on the legislature's reference to discharging the defendant upon dismissal of the action. The State's argument that "discharging the defendant" refers to discharging them from an entire proceeding, not necessarily a single charge, is also persuasive. However, this argument ultimately will not convince the Court because Montana precedent clearly establishes that courts may dismiss single charges midtrial *sua sponte*.

That being said, Barrows was clearly put in jeopardy twice for the same offense. The Court's holding in *State v. Cline*<sup>44</sup> effectively established that the double jeopardy protections are triggered when a defendant is put in jeopardy for two equivalent charges. The district court unequivocally stated that the "Lorazepam charge was off"<sup>45</sup> and established that the State failed to provide evidence sufficient for the charge. Consequently, Barrows was tried for an offense that the district court had already dismissed—a direct violation of the Double Jeopardy Clause.

## V. Summary

The parties' contrary interpretations of § 46–16–403 provide the Court a great opportunity to clarify when double jeopardy protections are triggered. If the Court adopts the State's statutory interpretation, Montana defendants may be tried for the same offense twice when their charge is dismissed and they are subsequently tried again for the same charge. Adopting Barrows' argument, however, would ensure that defendants are not convicted if they candidly testify after a midtrial dismissal. If the State does not meet its burden but can nonetheless still try defendants for a charge post-dismissal, the integrity of the Double Jeopardy Clause is threatened. In sum, the Court must find § 46–16–403 does not authorize post-dismissal convictions. The Court's decision in this case has the potential to safeguard the constitutional protection defendants have under the Double Jeopardy Clause.

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<sup>44</sup> *Id.*

<sup>45</sup> Appellant's Opening Brief, *supra* note 4, at 4.