

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

*On a Writ of Certiorari to the
Supreme Court of Kentucky*

PETITIONER'S RESPONSE TO RESPONDENT'S
MOTION TO DISMISS

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SUMMARY OF RESPONSE

This Court granted the Commonwealth's Petition for Writ of *Certiorari* on September 27, 2010. On October 28, 2010, Respondent filed a motion to dismiss this Court's *Certiorari* grant as improvidently granted. Respondent claims the case is now moot because the Fayette County Circuit Court dismissed the case prior to this Court's grant of *Certiorari*. (Motion to Dismiss (Motion), p. 5). Next, Respondent argues that the Fayette Circuit Court's dismissal amounted to an adjudication on the merits so that further prosecution is barred by double jeopardy. (Motion, p. 5). Finally, Respondent claims the case is not ripe for review. (Motion, p. 5). Respondent's claims are meritless. Just because the Fayette Circuit Court dismissed Respondent's case prior to this Court's grant of *Certiorari* does not render the case moot. *United States v. Villamonte-Marquez*, 562 U.S. 579 (1983). The claim is, therefore, ripe as well. Moreover, double jeopardy concerns are not present here since a reversal by this Court of the Kentucky Supreme Court's opinion would have the effect of reinstating Respondent's judgment of conviction. *Id.*, 562 U.S. at 581 n. 2.

FACTS AND PROCEDURAL HISTORY

1. This case made its way through the Kentucky appellate system based on a conditional guilty plea wherein Respondent reserved the right to appeal the trial court's denial of his motion to suppress evidence seized from his apartment.¹ At issue in the case was

¹At the outset it would be helpful to explain to the Court that Kentucky operates as a unified prosecutorial system. Local

"whether exigent circumstances existed, which justified the warrantless entry of the apartment occupied by [Respondent]." *King v. Commonwealth*, 302 S.W.3d 649, 651 (Ky. 2010). The Kentucky Supreme Court determined that "with regard to the imminent destruction of evidence, any exigency was police-created." *Ibid.* Therefore, the Kentucky Supreme Court reversed the denial of Respondent's motion to suppress and vacated Respondent's judgment of conviction. *Id.* at 657. The Court further remanded the case to the circuit court "for proceedings consistent with" the Kentucky Supreme Court's opinion. *Ibid.* The opinion of the Kentucky Supreme Court was issued on January 21, 2010, and became final twenty days later on February 11, 2010.

2. Following the Kentucky Supreme Court's opinion, the Commonwealth began drafting a Petition for Writ of *Certiorari* with this Court. The due date for the Petitioner's Writ was April 21, 2010. Petitioner filed its Petition with this Court on April 19, 2010.

3. While the Office of Attorney General was drafting the Petition for Writ of *Certiorari*, the Fayette Circuit

prosecutors and local public advocates handle the case at circuit court, Kentucky's trial court level. Once an appeal is filed, the Attorney General's Office, Office of Criminal Appeals, represents the Commonwealth. The Department of Public Advocacy has a similar appellate division that handles all appeals for indigent defendants. If a case is remanded to circuit court, the local prosecutor assumes control over the case once again. Ordinarily, the local public advocate likewise assumes control over the case on behalf of the defendant.

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Court, unbeknownst to the Attorney General's office, docketed Respondent's case on remand.² At a hearing on March 4, 2010, the Fayette Circuit Court then granted Respondent's motion to suppress. Having had the evidence suppressed, the Commonwealth, via the local prosecutor, moved to dismiss the case without prejudice. However, the trial court dismissed the case with prejudice.

4. Appellate counsel for Respondent likewise was unaware of the Fayette Circuit Court's actions and filed several pleadings on Respondent's behalf with this Court, including a waiver of right to respond (May 17, 2010), an extension motion, motion to proceed in forma pauperis (August 24, 2010), and a brief in opposition to the Writ of *Certiorari* (August 24, 2010).

5. On September 28, 2010, this Court granted the Commonwealth's petition for a Writ of *Certiorari*.

6. On October 4, 2010, Respondent's counsel contacted the undersigned counsel and informed them that she would be filing a motion to dismiss the action in this Court because the Fayette Circuit Court had dismissed Respondent's case with prejudice on March 8, 2010.

7. Following counsel's conversation with Respondent's counsel, the undersigned filed a motion pursuant to

²Undersigned counsel did not inform the local prosecutor that a Petition for Writ of *Certiorari* was being drafted.

Kentucky Civil Rule (CR) 60.02³ in Fayette Circuit Court asking the trial court to rescind its March 8, 2010, order.⁴ The trial court declined to rescind the

³CR 60.02 is a procedural mechanism that provides relief from orders entered in the circuit court. It provides:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

⁴At the time Commonwealth filed the CR 60.02 motion in the Fayette Circuit Court, it was unsure of what effect the dismissal would have on the case before this Court. Since the Commonwealth's deadline for filing its merits brief in this Court was fast approaching, counsel determined that the CR 60.02 motion should be filed out of an abundance of caution. Counsel also had a duty to the Commonwealth of Kentucky to rescind the trial court's void judgment. Upon further research, however, counsel now knows that the trial court's dismissal does not affect the case before this Court. See *Villamonte-Marquez*, 562 U.S. at 581 n. 2.

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order, but did remove the "with prejudice" language from the March 8, 2010, order.

ARGUMENT

A. This Case Is Not Moot

It is well established that the dismissal of an indictment following an appellate court's reversal of a conviction does not moot the government's appeal of that appellate court ruling. The leading case is *United States v. Villamonte-Marquez*, 562 U.S. 579 (1983). In *Villamonte-Marquez*, a district court convicted two foreign nationals on drug smuggling charges. The Fifth Circuit invalidated the search that led to the incriminating evidence because it violated the Fourth Amendment. *Id.* at 583 - 84. "[S]ubsequent to the issuance of the mandate by the Court of Appeals vacating [the Respondent's] convictions, the indictments against them were dismissed." *Id.* at 581 n.2. Therefore, the Respondents argued that their case before this Court was moot. *Ibid.* This Court "reject[ed] the contention." *Ibid.*

The Government has sought review of the Court of Appeals' decision reversing respondents' convictions. Ordinarily our reversal of that decision would reinstate the judgment of conviction and the sentence entered by the District Court. See *United States v. Morrison*, 429 U.S. 1, 3, 97 S.Ct. 24, 25, 50 L.Ed.2d 1 (1976) (Per Curiam). The fact that the Government did not obtain a stay, thus

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permitting issuance of the mandate of the Court of Appeals, would not change the effect of our reversal. See *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 467, 67 S.Ct. 798, 799, 91 L.Ed. 1024 (1947); *Carr v. Zaja*, 283 U.S. 52, 51 S.Ct. 360, 75 L.Ed. 836 (1931). Under our reasoning in *Mancusi v. Stubbs*, 408 U.S. 204, 205 207, 92 S.Ct. 2308, 2309 2310, 33 L.Ed.2d 293 (1972), the absence of an indictment does not require a contrary conclusion. Further, it is settled law that the preliminary steps in a criminal proceeding are "merged" into a sentence once the defendant is convicted and sentenced. See *Parr v. United States*, 351 U.S. 513, 518 519, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956); *Berman v. United States*, 302 U.S. 211, 58 S.Ct. 164, 82 L.Ed. 204 (1937). Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences, thus obviating any need for a separate reinstatement of the original indictment.

* * *

At this juncture, for reasons explained above, the indictment was merged into the judgment, and a successful effort on the part of the Government to reverse the judgment of the Court of Appeals would have the effect of reinstating the judgment of conviction.

Ibid.

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A similar result is warranted in this case. Like the government in *Villamonte-Marquez*, the Commonwealth failed to seek a stay of the Kentucky Supreme Court's decision reversing the trial court's denial of Respondent's motion to suppress. Such a stay was not necessary to preserve this Court's jurisdiction. R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 17.10, p. 770 (8th ed. 2002). Also, like *Villamonte-Marquez*, the indictment had been dismissed. Nevertheless, this Court retains jurisdiction because "the absence of an indictment [does] not render the case moot." *United States v. Perez*, 110 F.3d 265 (5th Cir. 1997), citing *Villamonte-Marquez*, 462 U.S., at 581 n. 2. See also *Carr v. Zaja*, 283 U.S. 52, 53 (1931) (where respondent argued that "the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court . . . [and] therefore the case is finished[.]" this Court disagreed and held that issuance of the mandate "does not defeat [this Court's] jurisdiction."); *Aetna Cas. Co. v. Flowers*, 330 U.S. 464, 467 (1947) ("Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction."); *Louisville v. Nashville R.R. Co. v. Behlmar*, 169 U.S. 644, 648 (1989) ("When cases are brought here from the circuit courts of appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below; but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court by appeal, writ of error, or *Certiorari*."); Stern, Gressman, & Shapiro, *supra*, § 17.10, at 770 ("Nor will

the Court be prevented from reviewing and reversing the decision below if the lower court judgment is obeyed, unless the nature of the case is such that reversal by the Supreme Court could then have no effect.").

This rule makes eminent sense. A reversal by this Court of a lower court's opinion vacates that lower court's opinion and nullifies all that was done in reliance on that erroneous opinion. See *Villamonte-Marquez*, 462 U.S. at 581 n. 2 ("the indictment that was returned against [Respondent] merged into [his] conviction[] and sentence[], thus obviating any need for a separate reinstatement of the original indictment."); *Mancusi v. Stubbs*, 408 U.S. 204, 205 - 07 (1972) ("because petitioner did not seek a stay of the mandate of the Court of Appeals, but rather obeyed it" did not render the case moot) citing *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 33 U.S. 437, 442 (1948); *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885). Cf. *United States v. Morrison*, 429 U.S. 1, 3 (1976) (per curiam) (Government entitled to appeal from a post-conviction pre-sentence "order suppressing the evidence, since success on that appeal would result in the reinstatement of the general finding of guilt, rather than in further factual proceedings relating to guilt or innocence."). Therefore, should this Court ultimately reverse the Kentucky Supreme Court on the merits of this case, the indictment and guilty plea would automatically be reinstated. Thus, the issues in this case are still "live" and both the Commonwealth and Respondent retain "a legally cognizable interest in the outcome" of the case.

Murphy v.
omitted).⁵

Respondent's case is moot pending" with Court would guilty plea. Moreover, it would follow orders dismissed unless the judgment is appealed. Such an appeal would undermine the government's stays have in the government.

Not surprisingly, the Court held that in such situations. 202 F.2d 1. The defendant was indicted on federal charges to suppress the search and se-

⁵It should be noted that this Court's reversal of the decision by this Court based upon the Court's overturning of the dismissal of the indictment should be removed as being a plea reinstated. The Court has appealed the Court's decision with prejudice. The case is currently

Murphy v. Hunt, 455 U.S. 478, 481 (1982) (citations omitted).⁵

Respondent's contention (Motion, p. 5 - 7) that this case is moot and not ripe because "[n]o charges are pending" wholly misses the point. A reversal by this Court would simply reinstate the old indictment and guilty plea. *Villamonte-Marquez*, 462 U.S. at 581 n. 2. Moreover, if Respondent was correct on this point, it would follow that government appeals from trial court orders dismissing indictments would always be "moot" unless the judgment of dismissal was stayed pending appeal. Such an approach to appellate practice would undermine ordinary criminal appellate procedure, since stays have never been thought necessary to preserve the government's appeal rights.

Not surprisingly, therefore, lower courts have also held that appeals did not become moot in analogous situations. For example, in *United States v. Cefaratti*, 202 F.2d 13 (D.C. Cir. 1953), the defendant was indicted on four counts. *Id.* at 14. Cefaratti moved "to suppress the seized evidence on the ground that the search and seizure were illegal." *Ibid.* The trial court

⁵It should be noted that correction of the trial court's void "dismissal with prejudice" language was unnecessary to facilitate this Court's review. Under *Villamonte-Marquez*, *supra*, any decision by this Court would necessarily remove any judgments based upon the Kentucky Supreme Court's opinion. Should this Court overturn the ruling of the Kentucky Supreme Court, the dismissal of the trial court, be it with or without prejudice, would be removed as based upon a void judgment, and the original guilty plea reinstated. It is of no matter then that the Respondent has appealed the Commonwealth's victory at the trial court to remove the "with prejudice" language from the trial court's dismissal. The case is currently a live case in controversy before this Court.

granted the motion to suppress. *Ibid.* "Since this left no substantial evidence in support of counts 3 and 4, appellee would necessarily have been acquitted on these counts if the government had gone to trial." *Ibid.* Therefore, "the government moved to dismiss counts 3 and 4, and they were dismissed." *Ibid.* Cefaratti was "tried and acquitted on counts 1 and 2." *Id.* at 14 n. 2. After this, the government appealed, "not from the order dismissing the indictment, but from the order suppressing the evidence." *Id.* at 14. "No indictment, therefore, was pending at the time of appeal. . . ." *Nelson v. United States*, 208 F.2d 505, 517 n. 46 (D.C. 1954). The Court of Appeals held that the case was not moot because if the trial court's "order is reversed before the statute of limitations runs, the government plans to reindict appellee and try him." *Cefaratti*, 202 F.2d at 14.

More recently, in *In re I.J.*, 906 A.2d 249 (D.C. 2006), the trial court suppressed the challenged statement and "only moments later dismissed the charges against the appellee for want of prosecution. Without making any further filings in the Superior Court, the government filed a notice of appeal challenging the trial judge's suppression of appellee's statement to [the officer]." *Id.* at 253. The appellee challenged the government's appeal on "jurisdictional" grounds premised "on the notion that once the trial judge dismissed the charges, there was no 'charge pending' at the time appeal was taken. . . ." *Ibid.* The D.C. Court of Appeals held that it allows "government appeals where the charges against the defendant have been dismissed, but there still exists the possibility of charges being brought anew should the suppressed

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evidence be held to be admissible on appeal." *Id.* at 254. See also *United States v. Hunter*, 692 A.2d 1370, 1374 n. 3 (D.C. 1997) (holding that even though the indictment had been dismissed "the government proposes to seek a new indictment, . . . and the case is not moot").⁶

B. This Case Presents No Double Jeopardy Concerns

Respondent claims (Motion, p. 6) that "further proceedings are barred by the Double Jeopardy Clause." Obviously no double jeopardy concerns are present in this case. The indictment was dismissed prior to trial and no jurors were sworn. *Crist v. Bretz*, 437 U.S. 28 (1978) (jeopardy attaches when the jury is empaneled and sworn). "Th[is] Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass v.*

⁶Likewise, even if Respondent's guilty plea could not be reinstated upon a successful appeal to this Court, and even if the Commonwealth was barred from re-indicting the Respondent upon the original charges, contentions with which the Commonwealth disagrees, Respondent could still be indicted for possession of drug paraphernalia, second-offense, a felony at the time that he committed his offense, since digital scales were seized from the apartment and the Respondent was not originally charged with their possession. This is a charge that could lead to continued prosecution, arising from the same events and relying on the same evidence, as the current charges, and would necessarily require this Court's reversal of the Kentucky Supreme Court's ruling, suppressing the evidence in Respondent's case.

United States, 420 U.S. 377, 388 (1975) (internal quotations and citations omitted). The counts against Respondent were dismissed pretrial on grounds unrelated to the merits of the case, and before the question of the guilt or innocence of Respondent was before the trial court. *Serfass, supra*. Accordingly, jeopardy had not attached.

This is why Respondent's reliance on *United States v. Martin Linen Co.*, 430 U.S. 564 (1997) is misplaced. (Motion, p. 6). Respondent cites *Martin Linen Co.*, for the proposition that a ruling by a trial court that amounts to an acquittal attaches double jeopardy and bars retrial. (Motion, p. 6). However, *Martin* deals with trial court acquittals during trial, not pretrial. Respondent's case was dismissed prior to trial and as such double jeopardy has not attached. A case from this Court that is more on point than *Martin* is *United States v. Wilson*, 420 U.S. 332 (1975). In *Wilson* this Court stated,

Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged. *Forman v. United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 487, 4 L.Ed.2d 412, 419 (1960). If reversal by a court of appeals operated to deprive the Government of its right to seek further review, disposition in the court of appeals would be 'tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or *Certiorari* in this Court.' *Ibid.* See also *United*

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States v. Shotwell Mfg. Co., 355 U.S. 233, 243, 78 S.Ct. 245, 251, 2 L.Ed.2d 234, 240 (1957).

It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling. Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

Id. at 345. See also *United States v. Scott*, 437 U.S. 82 (1981) (government not precluded from appealing order dismissing two counts of the indictment where trial court at conclusion of evidence and on defendant's prior motion, dismissed two counts of a three-count indictment because of prejudice from preindictment delay and where jury returned not guilty verdict on third count). This Court in *Wilson* held that the Government may appeal from a post-verdict ruling favoring the defendant, even after the defendant had been found guilty, because a new trial would not result, only the reinstatement of the original verdict. This Court held that double jeopardy was not offended even under these circumstances. *Wilson* at 352-353. Similarly here, a new trial would not result. Should

this Court overturn the decision of the Kentucky Supreme Court, Respondent's guilty plea would simply be reinstated.

That the trial court stated in dismissing the Respondents' case with prejudice, over the Commonwealth's objection, that the Commonwealth would have lacked sufficient proof to proceed to trial does not change that result. Kentucky trial courts lack the authority to grant summary judgment in criminal cases. Indeed, "prior to trial a [Kentucky] trial court cannot weigh the evidence to resolve whether the Commonwealth can or will meet its burden of proof." *Commonwealth v. Hay*, 987 S.W.2d 792, 794 - 95 (Ky. App. 1998) (citing *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (Ky. 1972)). See also *Commonwealth v. Isham*, 98 S.W.3d 59, 61 - 62 (Ky. 2003); *Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994) (holding that it was not the province of a trial judge to evaluate evidence in advance in order to decide whether a trial should be held).⁷

⁷The same holds true in federal court. *United States v. Knox*, 396 U.S. 77, 83, 84 n. 7 (1969) (stating that evidentiary questions concerning whether the defendant established a duress defense or whether his false statement was made "willfully," as required by statute, should be determined initially at trial, and not on a motion to dismiss under Federal Rule of Criminal Procedure 12(b)(1)); *United States v. Sampson*, 371 U.S. 75, 78 - 79 (1962) (noting that at the pretrial stage, "none of these charges have been established by evidence, but at this stage of the proceedings the indictment must be tested by its sufficiency to charge an offense."); *United States v. DeLaurentis*, 230 F.3d 659, 661 (3rd Cir. 2000) ("Federal Rule of Criminal Procedure 12(b)(2) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense, but such dismissals may not be predicated upon the

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Nor does it matter, for double jeopardy purposes, that the trial court's initial order dismissed the case with prejudice. The Kentucky Supreme Court has held that a trial judge does not have the authority to dismiss a charge with prejudice unless it has the Commonwealth's consent. *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009). A dismissal with prejudice must be supported by substantive law or serious governmental misconduct related to the prosecution; otherwise, dismissal of a criminal charge by a court "is not within the province of the judicial branch of our government[.]" *Id.* at 691. See also *Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000) (where the Court of Appeals observed that a trial court may dismiss an indictment (without prejudice) if prosecutorial misconduct occurred during the grand jury proceedings. However, the Court held that it was an abuse of discretion for the dismissal to be with prejudice).

Thus, Respondent's double jeopardy claim lacks merit. The case was dismissed prior to trial. No

insufficiency of the evidence to prove the indictment's charges."); *United States v. Pope*, 613 F.3d 1255, 1259-1260 (10th Cir. 2010) ("unlike their civil counterparts, criminal proceedings have no extensive discovery and summary judgment procedures requiring both sides to lay their evidentiary cards on the table before trial."); *United States v. Salman*, 378 F.3d 1266, 1267-1268 (11th Cir. 2004) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of sufficiency of the evidence."), (quoting *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam)); *Salman*, 278 F.3d at 1269 n. 5 (noting that "[t]he Third, Eighth, and Ninth Circuits have reversed dismissals of indictments based on the insufficiency of the evidence.").

double jeopardy concerns are manifested. Moreover, the trial court lacked any state Constitutional authority to dismiss the case with prejudice, and has since rectified its void dismissal. Therefore, the Commonwealth will not be barred "from prosecuting King in the event that it prevails" before this Court. (Motion, p. 6). Rather, the indictment and guilty plea will simply be reinstated. *Villamonte-Marquez*, 462 U.S., at 581 n. 2. Respondent admits as much in footnote 2 when he points out that this Court held in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1997), that double jeopardy concerns would not attach when restoration of the guilty verdict would be the outcome, as opposed to retrial; however, Respondent's contention that a new trial would result upon this Court's reversal of the Kentucky Supreme Court's opinion is without merit for the reasons discussed above. See *Villamonte-Marquez*, 462 U.S. at 581 n. 2; *Martin Linen*, 430 U.S. at 570 ("Thus a postverdict dismissal of an indictment after a jury rendered a guilty verdict has been held to be appealable by the United States because restoration of the guilty verdict, and not a new trial, would necessarily result if the Government prevailed.").

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CONCLUSION

Under the rules expressed by this Court in *Villamonte-Marquez, supra*, and *Wilson, supra*, this case is not moot and no double jeopardy has attached. As such, Respondent's motion to dismiss this Court's grant of *certiorari* as improvidently granted must be denied. It is of no concern that Respondent's indictment was dismissed by the lower court, because his indictment is part of the case now before this Court. Double jeopardy has obviously not attached, and any ruling by this Court in the Commonwealth's favor will reverse the decision of the Kentucky Supreme Court, upon which the circuit court's dismissal is based, and reinstate the Respondent's original indictment and guilty plea. This case is currently a ripe controversy primed for this Court's review.

Wherefore, Respondent's motion to dismiss should be denied.

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