

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2008-0912

The State Of New Hampshire

v.

Charles Glenn

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
HILLSBOROUGH SUPERIOR COURT—NORTHERN DISTRICT

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

Michael A. Delaney  
Attorney General

Karen E. Huntress, NH Bar No. 15146  
Assistant Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3671

(15 minutes)

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**ISSUES PRESENTED**

1. Whether double jeopardy precludes retrial of the defendant on second degree murder charges, where the jury acquitted him of first degree murder during his first trial and was unable to reach a verdict on one count of second degree murder and did not reach the lesser included offenses.

2. Whether double jeopardy and due process considerations bar retrial of the defendant based on prosecutorial misconduct, where the State did not produce to the defendant discovery which it was unaware of, and where the State became aware the day before trial that a witness had lied before the grand jury that returned the pending indictments, and immediately brought that information to the attention of the defendant and the court and sought a continuance in order to reindict the defendant, but the trial court denied the continuance.

3. Whether the doctrines of collateral estoppel and issue preclusion bar the State from presenting evidence of robbery during a second trial, where the defendant was acquitted of felony murder during his first trial, in a case where the defendant hotly contested all issues during his trial and it cannot be determined from the jury's verdict why the jury returned the acquittal.

**STATEMENT OF THE CASE**

The defendant, Charles Glenn, was charged by indictment with one count of first degree murder for knowingly causing the death of another during the commission of a felony, in violation of RSA 630:1-a (2007), and one count of reckless second degree murder, in violation of RSA 630:1-b (2007). IA 1<sup>1</sup> At trial, the jury was also instructed on the lesser-included offenses of knowing second degree murder and manslaughter, which the defendant assented to. T9 1934; D. App. 17. After a jury trial on July 11-31, 2006, in Hillsborough County Superior Court for the Northern District (*Barry, J.*), the jury found the defendant not guilty of the first degree murder charge. IA 1. The jury was unable to reach a verdict on the charge of reckless second degree murder, and never reached the lesser-included offenses. IA 1. The defendant moved for a mistrial, which the trial court granted. D. App. 18.

On October 23, 2006, the State indicted the defendant on one count of reckless second degree murder, which was identical to the count on which the jury was unable to reach a verdict, and one count of knowing second degree murder. D. App. 5-8, 18. The defendant subsequently filed various motions to preclude retrial, which were denied by the trial court. See D. App., generally. This interlocutory appeal followed.

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<sup>1</sup> Citations to the record are as follows:

“IA” refers to the defendant’s Rule 8 interlocutory appeal;

“D” refers to the defendant’s brief;

“D App” refers to the first volume of the Appendix to the defendant’s interlocutory appeal;

“D App II” refers to the second volume of the Appendix to the defendant’s interlocutory appeal;

“T2” refers to the trial transcript of July 12, 2006 (pages 1-145);

“T3” refers to the trial transcript of July 13, 2006 (pages 146-472);

“T4” refers to the trial transcript of July 14, 2006 (pages 473-775);

“T5” refers to the trial transcript of July 17, 2006 (776-1043); it should be noted that the State’s copies of T5 and T6 arrived with the covers erroneously switched, so that T5 was actually labeled as T6, and vice versa.

“T6” refers to the trial transcript of July 18, 2006 (1044-1312);

“T7” refers to the trial transcript of July 19, 2006 (1313-1618);

“T9” refers to the trial transcript of July 20, 2006 (1619-1786);

“T10” refers to the trial transcript of July 21, 2006 (1977-2070).

## STATEMENT OF FACTS

### **A. Trial Testimony**

On August 30, 2005, Chad Diaz was contacted by his sister, Wanda Diaz, who told him that the defendant (her boyfriend) had some prescription drugs that he wanted to sell. T2 12-15. Wanda Diaz wanted to know if the victim in this case, Leonard Gosselin, was interested in purchasing some of the pills from the defendant. T2 12-15. Chad Diaz owed the defendant money from a previous drug transaction, and essentially acted as a middleman for the drug sale the defendant was attempting to set up. T2 14-15. He spoke with both the victim and Joseph Salvatore regarding whether they were interested in purchasing some drugs. T2 14-15. Salvatore indicated that he was interested, so Chad Diaz relayed this information to the defendant. T2 14-15. He arranged for the defendant to meet him at an apartment on Log Street in Manchester to complete the drug sale. T2 11, 18. Chad Diaz also told Joseph Salvatore to stay in the Log Street neighborhood, so that once the defendant arrived with the drugs, they could complete the purchase. T2 18. The defendant asked Chad Diaz if he could get the money before the defendant delivered the drugs, but Diaz told him that he could not. T2 19.

When the defendant arrived at the Log Street apartment, he had a shirt tucked under his arm. T2 21. When he got inside the apartment with Chad Diaz, he unwrapped the shirt, and pulled out a handgun, and said, "Yo, dude, there's no pills." T2 21. The defendant pointed the gun at Diaz, and told Diaz that he needed to pay his drug source, and asked who the pills were supposed to be for.<sup>2</sup> T2 22-23. Diaz told the defendant the pills were for Salvatore, and the defendant indicated that he was going to rob him. T2 24. They heard a loud stereo system

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<sup>2</sup> Diaz owed the defendant money from a prior drug transaction. T2 22.

outside the apartment, which they both associated with Salvatore, and the defendant nudged him out the door with the gun. T2 24-25. When they were halfway down the hall, Diaz turned around and ran for the back staircase of the building, exited the building, and then ran into a nearby pharmacy. T2 25-26. While he was at the pharmacy, he received a telephone call from Salvatore, asking where he was.<sup>3</sup> T2 30. He heard the victim in the background, and heard him say, "What are you doing, kid—are you f'in serious?" and then the call was cut off. T2 30. He called Salvatore back, and Salvatore told him that "this kid just shot Lenny." T2 31.

Anestis Karathanasis and Ethan Webb were tossing a football around in the parking lot on Log Street at the time of the murder. T3 365-66. While they were playing with the football, Karathanasis heard a gunshot behind him. T3 367. He turned around, and saw a man stumbling from the front passenger's side of a Pathfinder sport utility vehicle, clutching his side and making noises. T3 367. He also saw a dark-skinned man run to a Caravan-type minivan, jump in, and drive off. T3 368-69. As the minivan drove past the Pathfinder, Karathanasis saw a man standing outside the Pathfinder throw something through one of the windows in the minivan. T3 370-71.

Ethan Webb saw the black Nissan Pathfinder pull into the parking lot before the shooting, and saw it pull up in front of one of the buildings on Log Street. T3 401. He saw a white male get out of the Pathfinder and greet a black male who came out of the apartment building. T3 402-04. Although Webb did not see the men get into the Pathfinder, he saw them exit a few minutes later. T3 405. He saw the front passenger door to the vehicle open, saw a white man exit the vehicle, and heard him screaming, and then saw him fall to the ground. T3 405-07. Webb saw a black man and a second white man get out of the vehicle at the same time. T3 406.

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<sup>3</sup> At trial, the State also introduced the videotape from the pharmacy, which showed Chad Diaz inside the pharmacy. T2 32-34.

The black man got out of the rear passenger's side door of the Pathfinder, and went and got into a maroon Caravan-type minivan. T3 407-8. As the minivan drove away, Webb saw the second white man grab a metal tire iron from the back of the Pathfinder and throw it through the window of the minivan. T3 409.

On the morning of the murder, the defendant had dropped Wanda Diaz, his girlfriend, off for work and was driving her maroon Caravan minivan. T5 786-87. When he later picked her up, they went over to his mother's house. T5 788. She called her brother, Chad Diaz, for the defendant, because the defendant had some pills that he wanted to sell so that he could make some money. T5 789. Chad Diaz did not want any pills, but knew someone who did, so the defendant left and went to meet him. T5 790.

In the weeks before the murder, Wanda Diaz had twice seen the defendant with a handgun, which she described as a western-style revolver. T5 793-795. She testified that she believed the gun was a .22-caliber. T5 795. She had most recently seen the gun at the defendant's mother's house, and she had recently been with the defendant when he purchased ammunition for the gun. T5 796.

A short time after the defendant left Wanda Diaz at his mother's house, she received a frantic call from her brother Chad, who told her that the defendant had just pulled a gun on him, and he had run away. T5 799. She then called the defendant, who told her to ask Chad what had happened and then told her that "it was Seth Letendre."<sup>4</sup> T5 801. The defendant also told her that "someone lunged at him" and he "blacked out." T5 802-03. She met up with him a short

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<sup>4</sup> Anestis Karathanasis testified at trial that he knew Seth Letendre, and that Seth Letendre was not the black male who shot the victim. T3 373-74. Seth Letendre also testified at trial, and testified that he knew the defendant. T6 1053. He denied that he was the shooter. T6 1053.

time later, and he gave her the keys to the minivan. T5 808. The minivan's window was smashed out, and there was a metal pipe on the floor. T5 809.

After the murder, the defendant called his friend Thomas Williams and asked him for a ride. T6 1242. A woman named Amy Halle picked up Williams, and then they picked up the defendant from another waiting vehicle parked on Hanover Street in Manchester. T6 1245-46. After they picked the defendant up, Williams noted that the defendant seemed upset and asked him what was wrong. T6 1251-52. The defendant told Williams that "I fucked up," and that "I popped him," while making a motion with his hand like he was pulling the trigger on a gun. T6 1252-1253. A little bit later, the defendant told Williams that he was supposed to get some drugs and \$1000 from a guy, but that "the dude was getting loud [with the defendant] and he started making a scene," and the defendant said, "I popped him." T6 1257-58. The defendant also said, "Shit got out of hand." T6 1258. Halle and Williams dropped the defendant off at a housing project in Massachusetts, and returned to New Hampshire. T6 1255, 1260. In the weeks before the murder, Williams had seen the defendant with a revolver. T6 1261-62.

Steven Ostrowski, a criminalist from the New Hampshire State Police Forensic Laboratory, testified at trial that the bullet that killed the victim was consistent with being .22-caliber long rifle ammunition. T6 1193. He also testified that the bullet could not have been fired from a gun that was not a .22-caliber. T6 1204.

Wayne Neimeyer, an expert in gunshot residue analysis, testified at trial that he found evidence consistent with gunshot residue inside Salvatore's vehicle on the right headliner of the vehicle, but not the left. T7 1414, 1442-44. He also testified that he found evidence consistent with gunshot residue particles on the rear passenger's side seat, but not on the driver's seat. T7 1444. He testified that characteristic gunshot residue particles were found on the passenger's

side of the vehicle, on the headliner and the right rear seat back. T7 1461. He testified that gunshot residue will typically travel two to four feet from a discharged handgun. T7 1463. He concluded that the right (passenger) side of the vehicle was more likely associated with a weapon discharge. T7 1461.

Finally, several witnesses testified at trial regarding the defendant's flight to Colorado after the murder, which resulted in an interstate manhunt for him. T8 1623-1726, generally.

### **B. Circumstances Involving Joseph Salvatore and His Trial Testimony**

Salvatore was interviewed by the police several times in connection with the murder. D. App. 16. He initially told police that he was driving in the area, saw a black man with the victim, saw the black man grab the victim's chain, and then saw the black man shoot the victim. D. App. 16. On September 4, 2005, Salvatore then provided police with a different version of events, and admitted that he had been driving with the victim and that the victim called Chad Diaz to arrange for a drug purchase. D. App. 16. Salvatore told police that when they arrived at the apartment building, the victim got out of Salvatore's vehicle, a black man approached the victim, and the black man shot the victim. D. App. 16. Salvatore subsequently testified before the grand jury regarding the murder, and provided testimony consistent with the version of events he told police on September 5, 2005, and the grand jury returned two murder indictments against the defendant. D. App. 16.

However, on July 10, 2006, after the jury had been empaneled and one day prior to the start of trial, Salvatore spoke with the police again, and provided a third version of events. D. App. 16. Most notably, Salvatore told police that the shooting actually happened inside his vehicle. D. App. 16. He also said for the first time that the victim may have been reaching for the gun prior to being shot. D. App. 16. During this statement to the police, Salvatore also said

that he did not own a gun prior to the shooting, and that he bought a gun after the shooting. D. App. II 247; D. App. 16-17. He described the gun as a 9-mm handgun. D. App. II 248. He stated that he applied for a concealed weapons permit, but it was denied. D. App. 7. Salvatore said that after the permit was denied, he sold the gun. D. App. II 247.

Upon learning of the new statement from Salvatore on the eve of trial, the State immediately notified the court and the defendant of Salvatore's new statement, and provided both the court and the defendant with a copy of the interview. D. App. 17. The State moved for a continuance of the trial, so that it could reindict the defendant based on Salvatore's most recent account of the murder. D. App. 17. At the same time, the defendant moved to dismiss the indictments, on the grounds that the indictments were based on Salvatore's admittedly perjured grand jury testimony. D. App. 17. The defendant argued in the alternative that the State should be precluded from introducing Salvatore's testimony at trial. D. App. 17. The trial court denied both parties' motions, and the matter proceeded to trial. D. App. 17.

Prior to his testimony at trial, Salvatore was given immunity. T4 476-82. Salvatore testified at trial consistently with his July 10, 2006 statement to police. D. App. 17. In summary, he testified that the victim had set up a drug deal with Chad Diaz, and that he had driven the victim to pick up the drugs. T4 487-88. Salvatore testified that when they arrived on Log Street, the defendant came out of the apartment building and got into the rear passenger side of the vehicle. T4 487-88. He said that after the defendant got into the vehicle, he told the victim to "run your shit," referring to a large gold necklace the victim was wearing. T4 487-88. Salvatore and the victim turned around, and saw that the defendant was holding the revolver. T4 487-88. As the victim turned to his right and started to reach toward the defendant, the defendant shot him. T4 488, 530-31.

At trial, the State elicited from Salvatore that he lied repeatedly to the police and prosecutors throughout the investigation. T4 490-92. The State went over his various statements to the police at length, and Salvatore admitted that he had lied to the police about a number of points, including whether the shooting had happened inside or outside his vehicle. T4 482-552. Salvatore also admitted on direct examination that he had lied to the grand jury about some of the facts of the case. T4 507.

Additionally, Salvatore was cross-examined at length at trial, and heavily impeached regarding his different statements to the police and his perjured grand jury testimony. T4 553-762; D. App. 17, 26. During cross-examination, Salvatore testified that he was so fearful for his life after the murder that he tried to get a concealed weapon permit, but was denied. T4 616. The defendant elicited from Salvatore that Salvatore purchased a gun after the murder, but that he had not owned one before the murder. T4 732.

### **C. Procedural History**

Once the jury acquitted the defendant of first degree murder, but could not reach a verdict on the reckless second degree murder charge, the defendant moved for a mistrial, which the trial court granted. D. App. 18. In October 2006, the State reindicted the defendant on a count of reckless second degree murder which was identical to the one on which the jury had been unable to reach a verdict. Compare D. App. 3, 5. The State also indicted the defendant on one count of knowing second degree murder, which the jury had been instructed on as a lesser-included offense during the first trial, but had not reached. D. App. 7, 17.

After trial, the defendant requested a copy of the concealed handgun permit that Salvatore had said he had applied for, and the State produced the permit to the defendant. D. App. 26, D. App. II 180-181. The gun permit was filled out on August 5, 2005, approximately three and a

half weeks before the murder. D. App. II 181. The permit was denied on September 15, 2005. D. App. II 180. Although Salvatore had stated one day before trial and testified during trial that he had applied for the permit, the State was not aware of the actual existence of the permit until after the first trial. D. App. 26.

At the time of trial, the defendant was being held only on bail related to his homicide charges, and was not being held on a probation violation. See State v. Charles Glenn, No. 2006-0757, Notice of Appeal at 3 (N.H. filed 10/6/06). On July 27, 2006, during jury deliberations in the homicide trial, a probation violation charge was filed. Id. The probation violation hearing was held on September 11, 2006, at which time the defendant was sentenced to 3½ to 7 years at the New Hampshire State Prison. Id.

After the defendant's homicide trial concluded, the defendant filed a motion to dismiss the remaining indictment from the first trial, alleging that it violated double jeopardy. D. App. 45-50. He filed a motion to dismiss all of the pending indictments, also alleging that they violated double jeopardy. D App. 55-67. Additionally, he filed a motion to exclude evidence of the robbery during any subsequent trial. D. App. 93-103. Finally, he filed a motion to dismiss based on prosecutorial misconduct, regarding Salvatore's testimony and the gun permit application. D. App. 122-263.

The State objected to each of the defendant's motions, D. App. 51-54, 68-85, 104-121; D. App. II 264-85, and the trial court denied the defendant relief. D. App. 13-29, 30-44.

**SUMMARY OF THE ARGUMENT**

1. Where the jury was instructed on a number of offenses during the defendant's first trial, and the jury acquitted the defendant of one charge, hung on a second charge, and never reached the remaining two charges, double jeopardy does not bar retrial on the three outstanding charges, because original jeopardy has not terminated on those charges. Where original jeopardy has not terminated, it is proper for the State to retry the defendant on those charges.

2. Where there is no evidence of prosecutorial misconduct during the defendant's first trial, double jeopardy and due process do not bar retrial of the defendant. Although the State learned that the indictments were based in part on untruthful grand jury testimony, the indictments were still valid. Moreover, upon learning of the untruthful grand jury testimony, the State immediately brought the issue to the attention of the trial court and the defendant, and moved for a continuance of the trial so that the State could reindict, such that there was no misconduct. Finally, even if this Court determines that there was prosecutorial misconduct, it does not rise to the level that warrants dismissal of the indictments with prejudice.

3. The doctrines of collateral estoppel or issue preclusion do not bar the State from presenting evidence or argument during a second trial that the defendant was engaging in a robbery at the time of the murder, where no essential issue was necessarily determined in the defendant's favor during the first trial. Because it is impossible to determine from the jury's verdict whether it determined any essential issue in the case in the defendant's favor, the State is not precluded from presenting such evidence during a second trial.

ARGUMENT

**I. REGARDLESS OF WHETHER THE SECOND DEGREE MURDER CHARGES ARE A LESSER-INCLUDED OFFENSE OF THE FIRST DEGREE MURDER CHARGE IN THIS CASE, WHERE THE DEFENDANT WAS CHARGED WITH BOTH OFFENSES DURING HIS FIRST TRIAL, AND THE JURY WAS ADDITIONALLY INSTRUCTED ON KNOWING SECOND DEGREE MURDER AND MANSLAUGHTER BUT DID NOT REACH THOSE CHARGES, DOUBLE JEOPARDY DOES NOT BAR RETRIAL ON THE MANSLAUGHTER AND SECOND DEGREE MURDER CHARGES, BECAUSE ORIGINAL JEOPARDY HAS NOT TERMINATED ON THOSE CHARGES.**

The defendant asserts that double jeopardy bars the State from continuing to prosecute this matter, because he was tried and acquitted of the first degree murder charge.<sup>5</sup> D 8.

However, the defendant's argument must fail because original jeopardy has not terminated on the second degree murder charges or the manslaughter charge, such that double jeopardy does not prohibit retrial on those charges. See State v. Nickles, 144 N.H. 673, 677-78 (2000) ("jury deadlock prevents original jeopardy from terminating on that charge").

"The Double Jeopardy Clauses of the New Hampshire and United States Constitutions protect an accused 'against multiple prosecutions and multiple punishments for the same offense.'" State v. Anderson, 142 N.H. 918, 919 (1998). "Incorporated within the Double Jeopardy Clause are three separate guarantees: it protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." Id. at 920 (citation omitted).

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<sup>5</sup> The defendant also argues that the two second degree murder charges were lesser-included charges of the first degree murder charge. The State agrees that the knowing second degree murder charge is a lesser-included offense of the first degree murder charge. However, the State disagrees that the reckless second degree murder indictment is a lesser-included offense of the first degree murder indictment, as actually charged in this case. However, this Court need not decide this issue in order to resolve the double jeopardy claim in this case, as the result is the same either way.

“In some circumstances, however, the State may pursue a second prosecution if the defendant was acquitted of the greater offense in the first prosecution and the charge in the second prosecution constitutes a lesser-included offense of the first charge.” Nickles, 144 N.H. at 677; see also State v. Pugliese, 122 N.H. 1141, 1147 (1982) (“Double jeopardy only prohibits reprosecution where the second offense charged is the same as the first, both in law and in fact”; acceptable for defendant to be prosecuted for lesser-included offense of negligent homicide after acquittal for manslaughter). “When a mistrial is granted on one charge due to jury deadlock, an acquittal on the other [during the same trial] does not, in itself, bar retrial for the deadlocked charge because jury deadlock prevents original jeopardy from terminating on that charge.” Nickles, 144 N.H. at 677-78.

The purpose behind the double jeopardy clause is clear: “It has been established for 160 years, since the opinion of Justice Story in United States v. Perez, 6 L.Ed. 165 (1824), that a failure of the jury to agree on a verdict was an instance of “manifest necessity” which permitted a trial judge to terminate the first trial and retry the defendant, because ‘the ends of public justice would otherwise be defeated.’” Richardson v. United States, 468 U.S. 317, 323-24 (1984). The United States Supreme Court has “constantly adhered to the rule that a retrial following a ‘hung jury’ does not violate the Double Jeopardy Clause.” Id. at 324. This is because the State, “like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.” Id. at 326. In so holding, the United States Supreme Court has noted that

The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy provision is aimed.

There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Id. (citation omitted). Hence, it is clear that when a trial results in a mistrial due to a deadlocked jury, it is permissible for the State to retry the defendant on the deadlocked charge. Id.

The issue in the case at bar is somewhat complicated by the fact that the jury acquitted the defendant of the first degree murder charge before deadlocking on the reckless second degree murder charge, and never even reached the knowing second degree murder or manslaughter charges, because of the deadlock. This Court does not appear to have squarely decided whether double jeopardy bars a second prosecution when a first prosecution involving multiple alternative theory counts has resulted in an acquittal of the defendant of a greater offense and jury deadlock on the other accompanying alternative theory or lesser included offenses based on the same conduct. However, a number of other jurisdictions have confronted the situation at bar, and have concluded that double jeopardy does not prohibit a subsequent trial, even with regard to lesser-included offenses when a defendant has been acquitted in the first trial of the greater offense. See United States v. Gooday, 714 F.2d 80, 82-83 (9<sup>th</sup> Cir. 1983) (where defendant was charged with one count of first degree murder but jury was also instructed on lesser-included offenses of second degree murder and manslaughter, it did not violate double jeopardy for the prosecution to retry him on the lesser-included offenses after he was acquitted of first degree murder during the first trial), cert. denied, 468 U.S. 1217 (1984); United States v. DeVincent, 632 F.2d 155, 158 (1<sup>st</sup> Cir. 1980), cert. denied, 450 U.S. 984 (1981) (where jury acquitted defendants of one RICO conspiracy count but deadlocked on extortion count, it did not violate

double jeopardy to retry the defendants on the extortion count, even assuming that it was a lesser-included offense of the RICO conspiracy count that resulted in acquittals); Commonwealth v. Ray, 982 S.W.2d 671, 674 (Ky. App. 1998) (where defendant was charged with first degree assault and a number of lesser included offenses in his first trial, it did not violate double jeopardy to retry the defendant on lesser included assault charges after jury acquitted the defendant of first degree assault and deadlocked on the remaining lesser included offenses); State v. Grabowski, 644 A.2d 1282, 1286-87 (R.I. 1994) (where defendant was acquitted of first degree murder in first trial but jury deadlocked on second degree murder and manslaughter, it did not violate double jeopardy to retry the defendant on second degree murder and manslaughter).

In United States v. DeVincent, the United States Court of Appeals for the First Circuit held that even if the count on which a jury deadlocks is a lesser-included offense of the count upon which a jury had acquitted during a previous trial, double jeopardy did not prevent retrial of the lesser-included offense. DeVincent, 632 F.2d at 157-58. In that case, the defendants had been charged with a RICO conspiracy count and an extortion count, but the jury acquitted on the RICO count and deadlocked on the extortion count. The court found that because the two charges were originally tried together, double jeopardy did not bar retrial on the extortion count. Id. at 158-59. In so holding, the court recognized that “the key is that there is a difference between separate, successive trials of greater and lesser offenses, and the different situation in which both are tried together, there is an acquittal of the greater, and the lesser needs to be retried because of the jury disagreement.” Id. at 158. This is just the situation presented in the present case.

Similarly, the Rhode Island Supreme Court affirmed the State's right to prosecute the defendant a second time in a case that is virtually identical to the case at bar. In State v. Grabowski, the defendant was charged with first degree murder. Grabowski, 644 A.2d at 1284. The jury acquitted the defendant of first degree murder, but deadlocked on the charges of second degree murder and manslaughter. Id. As here, the defendant in that case argued that double jeopardy considerations barred the State from retrying him for second degree murder and manslaughter. Id. The court found that although second degree murder was a lesser-included offense of first degree murder, double jeopardy did not bar the subsequent prosecution. Id. at 1286. In so holding, the Rhode Island Supreme Court noted that "trial of lesser-included offenses contemporaneously with the trial for the greater offense does not violate principles of double jeopardy." Id. The court found that it necessarily followed that

the failure to reach agreement on the lesser-included offense of murder in the second degree did not constitute an acquittal of that charge or of any other lesser-included offense to which evidence in the case might apply. Consequently, the fifth amendment's double jeopardy clause does not bar the government from subjecting [the defendant] to a second trial. . .for the lesser included offenses on which the jury was deadlocked.

Id. (citation omitted).

In this case, the State merely seeks to retry the defendant on the charges which the jury could not reach a verdict on, or did not reach because they were hung on the reckless second degree murder charge. It is clear from the caselaw that it does not violate double jeopardy to retry this defendant under these circumstances, and in fact it would deprive the people of this state of justice if this Court were to rule otherwise. See, e.g., Richardson, 468 U.S. at 323-24.

It should also be noted that in making his argument for why double jeopardy bars retrial, the defendant relies on cases that are factually distinct from the present matter. The cases relied on by the defendant involve situations where the State attempted to prosecute the greater and

lesser offenses in two separate proceedings, rather than the present situation, where both charges were before the jury in a single trial initially and the jury acquitted on one charge but hung on the others. See Brown v. Ohio, 432 U.S. 161, 162-63 (1977) (defendant charged with theft of car after pleading guilty to joyriding); Ex Parte Nielsen, 131 U.S. 176, 187 (1889) (defendant charged with adultery and unlawful cohabitation and Government sought to prosecute the adultery charge after the defendant pled guilty to the unlawful cohabitation based on the same conduct; Court noted that “whether an acquittal [on the first charge] would have had the same effect to bar the second indictment is a different question, on which we express no opinion”); State v. Constant, 135 N.H. 254, 56 (1992) (after defendant convicted of misdemeanor drug possession, State subsequently attempted to prosecute him for felony possession).

The defendant also seems to assert that Yeager v. United States, 129 S. Ct. 2360 (2009) stands for the proposition that double jeopardy bars retrial of an offense on which the jury hung during a trial where there was an acquittal on a related charge. See D. 12-14. However, Yeager actually addressed the issue of collateral estoppel and issue preclusion, and the lower court’s erroneous reliance on the counts upon which the jury hung in issuing its ruling on retrial. See Yeager, 129 S. Ct. at 2366-68. To be clear, the Supreme Court did not hold in Yeager that double jeopardy bars retrial on a count on which the jury hung after an acquittal on a related count during the same trial. See id. The Supreme Court actually remanded the case and left the door open for further proceedings as to whether retrial would be permitted in that case, based on whether certain issues were necessarily decided during the first trial. See id. at 2370. As such, Yeager is inapposite for the points raised by the defendant in this portion of his brief.

Given that the State only seeks to retry the defendant on charges that were pending at the time of the original trial, which the jury failed to reach, double jeopardy does not bar retrial of the defendant.

**II. DOUBLE JEOPARDY AND DUE PROCESS DO NOT BAR RETRIAL OF A DEFENDANT, WHERE THE STATE WAS UNAWARE OF CERTAIN DISCOVERY ITEMS UNTIL AFTER TRIAL, WHERE THOSE ITEMS WERE OF MINIMAL PROBATIVE VALUE, AND WHERE THE WITNESS ADMITTED AT TRIAL THAT HE HAD PERJURED HIMSELF BEFORE THE GRAND JURY.**

The defendant asserts that the State somehow engaged in misconduct when it proceeded with the defendant's trial despite the fact that the State learned the day before trial began that the indictments were based in part on perjured testimony, which the State disclosed to the defendant and the court immediately upon learning of the issue. The defendant also asserts that the State engaged in prosecutorial misconduct by failing to disclose in discovery evidence that the State was unaware of until the time of trial. The defendant's arguments are without merit.

**A. The Defendant Cannot Make Out A Claim For Prosecutorial Misconduct Regarding The Fact That The State Proceeded to Trial On The Indictments Which Were Based on Perjured Testimony, Where The Indictments Were Valid and Proper Despite The Perjured Testimony.**

In New Hampshire, "there is a presumption of regularity which attaches to grand jury proceedings." State v. Dayutis, 127 N.H. 101, 104 (1985). The United States Supreme Court has held that "an indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." United States v. Costello, 350 U.S. 359, 363 (1956). Justice Rehnquist, acting as Circuit Justice in denying an application for a stay of enforcement of a judgment of the Court of Appeals wrote that "[t]he grand jury does not sit to determine the truth of the charges brought

against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial. . . . While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of the fact finding process, its introduction before the grand jury poses no such threat.” Bracy v. United States, 435 U.S. 1301, 1302 (Rehnquist, Circuit Justice 1978). Additionally, as with the function of the court in probable cause hearings, the function of the grand jury is merely to determine whether there is probable cause to believe a crime was committed, and not to reconcile conflicting testimony or make determinations regarding the credibility of witnesses. See State v. Arnault, 114 N.H. 216, 218 (1974).

The primary difference between Salvatore’s grand jury testimony and his trial testimony was the location of the shooting (i.e., his testimony that the shooting occurred outside the vehicle rather than inside the vehicle). In both his grand jury statement and his trial testimony, Salvatore testified that the defendant killed the victim. Given this testimony, the indictments were valid even despite the fact that Salvatore may have lied to the grand jury about some aspects of the homicide, i.e., whether it took place inside or outside his vehicles. It was not improper for the State to proceed to trial on these indictments, and indeed it would not be improper for the State to retry the defendant based on the indictment which is still pending from the first trial.<sup>6</sup>

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<sup>6</sup> The defendant relies on United States v. Basurto, 497 F.2d 781 (9<sup>th</sup> Cir. 1974) for support of his allegation that the State engaged in prosecutorial misconduct when it proceeded to trial after learning that Salvatore had lied to the grand jury. In Basurto, a key witness for the prosecution that had testified before the grand jury later admitted that his entire testimony before the grand jury was perjured. However, in that case, because there had been a recent change in the law, the witness’s testimony as to when certain events occurred affected whether or not the defendant was charged under the old law or the new law. When the prosecutor found out about the perjured testimony, he informed defense counsel, but never told the court or the grand jury. The issue for the Ninth Circuit in Basurto was not whether the evidence supporting the indictment was legally sufficient in light of the perjured testimony, but rather what the duty of a prosecutor is when he becomes aware that perjury as to a material matter has been committed. Basurto, 497 F.2d at 784 n.1. The Basurto court held that “the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel – and, if the perjury may be material, also the grand jury – in order that appropriate action may be taken.” Id. at 785-86. However, the Ninth Circuit has been careful in limiting this exception to the general rule that an indictment returned by a legally constituted and unbiased grand jury, if valid on

**B. There Was No Prosecutorial Misconduct In This Case, Such That Retrial of This Defendant is Appropriate.**

In New Hampshire, “the general rule is that where a defendant requests a mistrial which is granted, a retrial on the same charge is not barred by double jeopardy. An exception to the rule obtains where the prosecution intended to provoke the defendant into moving for a mistrial. . . .” State v. Duhamel, 128 N.H. 199, 202 (1986); see also State v. Marti, 147 N.H. 168, 170 (2001) (same; also recognizing that this was the standard adopted by the United States Supreme Court in Oregon v. Kennedy, 456 U.S. 667, 679 (1982)).

As a preliminary matter, inherent in the holdings of Marti and Kennedy is the principle that the prosecutorial misconduct must actually occur during the trial. See Oregon v. Kennedy, 456 U.S. at 674-76 and State v. Marti, 147 N.H. 168, generally. In the present case, the defendant alleges prosecutorial misconduct on essentially two bases: one, that the State knew the day before trial began that witness Joseph Salvatore lied to the grand jury yet proceeded to trial anyway, and two, that the State withheld discovery from the defendant that should have been produced to the defendant before trial. Both of these issues arose prior to trial. It would be illogical to conclude that the State engaged in this conduct prior to trial in order to “provoke the defendant into moving for a mistrial.” See Duhamel, 128 N.H. at 202. The State would have no

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its face, is enough to require a trial on the merits. In United States v. Kennedy, 564 F.2d 1329 (9<sup>th</sup> Cir. 1977), the court cautioned that “only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment returned by an unbiased grand jury. In United States v. Bowers, 534 F.2d 186 (9<sup>th</sup> Cir. 1976), the Ninth Circuit once again limited Basurto and held that a prosecutor’s failure to notify the court and the grand jury of a change in a key witness’s testimony was harmless beyond any doubt because both versions of the witness’s testimony implicated the defendant. Where, as here, the State immediately notified the Court and the defendant of the potentially perjured testimony, and where both versions of Salvatore’s testimony implicate the defendant, the indictments are valid and no misconduct can be found.

reason prior to the first trial to try to orchestrate of mistrial of that trial before it had even begun. As such, this Court should not even apply the rationale of Marti and Kennedy in this case.

Even if this Court were to find that some relevant prosecutorial conduct occurred during the actual trial, as this court approvingly noted in Marti, in Oregon v. Kennedy, the United States Supreme Court reasoned that a “specific intent” standard should be applied in situations where a defendant alleges prosecutorial misconduct and was preferable to a more generalized “bad faith conduct” or “harassment” test because it is easier for courts to apply. Marti, 147 N.H. at 170 (citing Kennedy, 456 U.S. at 674-75). This Court has adopted the Kennedy test. Marti, 147 N.H. at 170.

This Court has also adopted the standard set out in United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), cert. denied, 508 U.S. 939 (1993), where the Second Circuit held:

If any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.

Marti, 147 N.H. at 171 (quoting Wallach, 979 F.2d at 916). Wallach held that a retrial was not barred because it was clear from the evidence that the prosecutor did not believe the defendant would be acquitted and the prosecutor did not engage in deliberate misconduct because there was no determination that the prosecutor had actual knowledge that the government’s key witness was lying. Wallach, 979 F.2d at 916-17.<sup>7</sup>

Also implicit in Kennedy, Wallach, and Marti, is that unless exceptional circumstances apply, a defendant must first request a mistrial alleging prosecutorial misconduct in order for the

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<sup>7</sup> The court there specifically rejected the defendant’s argument to bar retrial because at most the prosecutors “should have known” of the witness’ perjury. Wallach, 979 F.2d at 917. The court refused to apply the dictates of Kennedy in such a situation. Id.

principles of Kennedy and its progeny to apply. In Beringer v. Sheahan, 934 F.2d 110 (7<sup>th</sup> Cir.), cert. denied, 502 U.S. 1006 (1991), the United States Court of Appeals for the Seventh Circuit held that a motion for mistrial in such a circumstance is required before a defendant can invoke the protections of Kennedy. Beringer, 934 F.2d at 112. The court there reasoned that the important consideration regarding the Double Jeopardy Clause is that the defendant retains primary control over the course to be followed in the event of an allegation of prosecutorial misconduct. Id. (citing Kennedy, 456 U.S. at 686-87). The court further stated that when an allegation of prosecutorial misconduct fails to prompt the defendant to move for a mistrial, the prosecutor cannot be said to have forced the defendant into sacrificing a valued right. Id. at 113 (citing Kennedy, 456 U.S. at 674). “The [D]ouble [J]eopardy [C]lause serves not to punish prosecutorial misconduct; it simply ensures that the defendant, not the government, gets to choose whether to go to verdict.” Id. (citing United States v. Buljubasic, 808 F.2d 1260, 1266 (7<sup>th</sup> Cir. 1987)).

In the present case, the defendant sought a mistrial only after the jury had been deliberating for approximately five days, and only after the jury had also stated that it could not reach a verdict. Moreover, the State was not aware of the contents of the concealed weapons permit application until after trial, and had no actual knowledge of whether Salvatore was lying at trial. As such, it cannot be said that the prosecution forced the defendant into requesting the mistrial. There is no evidence of prosecutorial misconduct, let alone misconduct that caused the defense to request a mistrial. Where, as here, the defendant did not raise a claim of prosecutorial misconduct at the time he moved for mistrial, this Court should deny his appeal.

Even if this Court determines that it will consider the defendant’s claim despite his failure to raise prosecutorial misconduct during trial, during its analysis, this Court should adopt the

“deliberate intent” standard stated in the United State’s Supreme Court’s decision in Kennedy. This Court should do so because it has already adopted the applicable test from that case regarding prosecutorial misconduct and double jeopardy, and because that test is preferable to the general “bad faith” or “harassment” test because it is easier for trial courts to apply. Kennedy, 456 U.S. at 674-75. It is clear that the State did not deliberately intend to cause a mistrial in this case, given the state of the record.

Regardless of which standard this Court applies, the Court should still deny the defendant’s appeal, because he cannot establish the requisite level of conduct on the part of the State under any standards. The facts and law at issue here demonstrate that the State did not act with “deliberate intent,” “willful disregard,” or intent to prejudice the defendant at any juncture, and there is no evidence that the defendant moved for a mistrial based on any State conduct. The State had no reason to believe that there would even be an acquittal in this case, and did not take any actions out of a fear of an acquittal. While Salvatore was an important witness in this case, he was not the only witness. The State introduced substantial evidence which corroborated Salvatore’s testimony, including the testimony of Chad Diaz, who saw the defendant with a gun and learned of his intention to rob the victim just prior to the homicide; the two eyewitnesses who were playing football nearby when the homicide occurred; and testimony regarding gunshot residue that was found inside the vehicle. The State also provided evidence of admissions the defendant made to Thomas Williams, a good friend of his, and false exculpatory statements he made to his girlfriend, Wanda Diaz. The State also introduced evidence that he fled to Colorado after committing the murder, as well as an array of other evidence. Given all of the aforementioned evidence, Salvatore’s testimony was not as critical as the defendant would have this Court believe, and the State had no reason to fear an acquittal in this case or to attempt to

force the defendant into a mistrial. There is likewise no evidence that the State did force the defendant into requesting a mistrial in this case; the mistrial was requested only after the jury had been deliberating for approximately five days, and indicated it could not reach a verdict.

Furthermore, when the State first learned on July 10, 2006—after jury selection and one day prior to the start of trial—that Salvatore had perjured himself before the grand jury, the State immediately notified the Court and defense counsel. The State also sought a continuance of the trial, so that the State could pursue new indictments, but the trial court denied the State's motion for a continuance. Although the State could in theory have nolle prossed the indictments, the State could not do so without substantial prejudice to the State and enormous danger to the public. Contrary to the defendant's assertions in his brief, the defendant was not serving a sentence on a probation violation at the time of his murder trial. State v. Charles Glenn, No. 2006-0757, Notice of Appeal at 3 (N.H. filed on 10/6/06). The defendant was not charged with a probation violation until jury deliberations were underway in his murder trial, and he was not sentenced on that probation violation until after the trial had concluded. See id. Had the State entered a nolle prosequi on the murder charges the day before trial began, the defendant would have been a free man. He had previously fled to Colorado after the murder in this case, resulting in a multi-state manhunt. T8 1623-1726, generally. The prejudice to the State and the danger to the public were so great that a nolle prosequi simply was not an option in this case.

Moreover, during Salvatore's direct examination, the State elicited from him that he had perjured himself before the grand jury, and impeached him heavily about his many inconsistent statements to the police and prosecutors. It can hardly be said that the State engaged in any kind of misconduct, where it was completely transparent with everyone involved regarding Salvatore's perjury before the grand jury.

With regard to the gun permit discovery, while Salvatore testified on cross-examination that he applied for a concealed weapons permit after the murder, and resold the gun when his permit application was denied, the State was unaware until after trial that he had applied for the gun permit prior to the murder. Furthermore, the State did not present this testimony—it was elicited on cross-examination. In fact, both sides had been unaware that Salvatore had even applied for a concealed weapons permit until just days earlier, when Salvatore had changed his statement on July 10, 2006, the day before trial began.<sup>8</sup> Moreover, the permit was not relevant until Salvatore provided the apparently incorrect testimony on cross-examination that he had applied for the permit after the murder. The State could not have known to look for the permit in order to produce it in discovery at an earlier date. That the State somehow intentionally withheld the gun permit application that it did not actually know even existed, with the intent that the jury would deadlock on the second degree murder charge, forcing the defendant to request a mistrial so that the State could get another “bite at the apple,” thus thwarting the defendant’s double jeopardy protections, strains the bounds of common sense and requires a sort of mental acrobatics that even the most tortured reading of the record does not support. Given these circumstances, the defendant cannot meet his burden of establishing prosecutorial misconduct.

Finally, the defendant cannot claim that he was prejudiced in any way by his lack of access to the gun permit. He cross-examined Salvatore at length at trial, and repeatedly got Salvatore to admit throughout his testimony that he had repeatedly lied to the police, prosecutors and the grand jury. T4 553-762. Given the lengthy and rigorous cross-examination of Salvatore, the impeachment value of the gun permit was negligible. Additionally, given that the concealed weapons permit application is silent as to type of weapon, and given Salvatore’s statement that

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<sup>8</sup> It is worth noting that the defendant was made aware of the gun permit issue at the same time the State became aware of it, yet the defendant did not ask for its production until after trial.

he had obtained a 9mm handgun prior to applying for the permit, the gun permit had no probative evidentiary value in this case, where there was substantial evidence that the victim was killed with .22-caliber long rifle ammunition, and that such ammunition could only be fired by a .22-caliber weapon. Since a 9-mm handgun could not have fired .22-caliber long rifle ammunition, the defendant's contention that the evidence was "critical to the Defendant's theory of the case, i.e., that Salvatore and not [the defendant] had brought a gun to the scene of the drug sale to rob the Defendant and that [the victim] was shot by Salvatore in the struggle for the gun," and that this evidence "would likely have resulted in a total acquittal," are without merit.

**C. Should The Court Find Any Prosecutorial Misconduct, It Should Not Dismiss The Indictments With Prejudice.**

The defendant asserts that his allegations warrant dismissal of the indictments with prejudice. However, the allegations do not amount to extraordinary circumstance, and the defendant has not been prejudiced. "The sanction of dismissal with prejudice is . . . reserved for extraordinary circumstances." State v. Cotell, 143 N.H. 275, 281 (1998). It may only be imposed by a showing of prejudice. Id. at 279. Moreover, the remedy of dismissal with prejudice results in a windfall to the defendant and the price is paid by the public. State v. Chace, 151 N.H. 310, 314 (2004). This remedy should not be wielded where a prosecutor fails to act and the defendant is not actually prejudiced. Id.

In United States v. Gary, 74 F.3d 304 (1<sup>st</sup> Cir. 1996), the defendant alleged prosecutorial misconduct for presenting perjured testimony. However, the defendant was not convicted at that trial because the jury was not able to reach a unanimous verdict. The United States Court of Appeals for the First Circuit found that because the defendant's trial did not result in a conviction, he was not prejudiced even if the witness testified falsely. Gary, 74 F.3d at 314.

Here, any taint of Salvatore's perjury before the grand jury has been removed by reindictment subsequent to that perjury coming to light. Furthermore, any perjury committed at trial by Salvatore did not result in a conviction, and the defendant will be able to impeach Salvatore at the next trial. Finally, the evidence regarding Salvatore's gun permit application and denial is available for the defendant's next trial. For all of these reasons, the defendant did not suffer any prejudice based upon his allegations.<sup>9</sup> Therefore, this Court should not dismiss any of these indictments with prejudice.

**III. THE DOCTRINES OF COLLATERAL ESTOPPEL OR ISSUE PRECLUSION DO NOT BAR THE STATE FROM PRESENTING EVIDENCE OR ARGUMENT DURING A SECOND TRIAL THAT THE DEFENDANT WAS ENGAGING IN A ROBBERY AT THE TIME OF THE MURDER.**

The defendant asserts that the State should be precluded during a second trial from presenting any evidence that the defendant was attempting to rob the victim at the time he murdered him. D 20. The defendant's argument on this point must also fail, because no essential element was necessarily determined in the defendant's favor during the first trial, and therefore it is proper for the State to present such evidence during a second trial.

The New Hampshire Constitution's protections against double jeopardy incorporate the doctrine of collateral estoppel. State v. Crate, 141 N.H. 489, 493 (1996). "In the criminal context, collateral estoppel mandates that an issue of ultimate fact that has been fully tried and determined cannot again be litigated between the parties in a future prosecution." State v. Hutchins, 144 N.H. 669, 671 (2000). "A second prosecution. . . will be barred, however, only if an essential element of the second prosecution was necessarily determined in the defendant's

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<sup>9</sup> The defendant cannot even claim that he has been prejudiced by being incarcerated since the first trial because he is currently serving a sentence on a probation violation.

favor at the first trial.” Id. (emphasis added). “The burden is on the defendant to establish that such an issue was decided in his favor.” Id.

During a retrial, the trial court must therefore scrutinize the record of the previous trial to determine whether any issues were necessarily determined in the defendant’s favor during the first trial. See id. It has been noted that where “the jury issues a general verdict of acquittal, it is difficult to determine how the fact finder in the first trial decided any particular issue.” Id. (citation and internal quotation omitted). In order to make such a determination, the trial court must “examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational finder of fact could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration” Id. (citation omitted); accord Yeager v. United States, 129 S. Ct. 2360, 2367 (2009); see also Dowling v. United States, 493 U.S. 342, 350-52 (1990) (reviewing court must determine whether an ultimate fact was conclusively determined in a prior trial by looking at the totality of the materials available in the prior trial to see what possible reasons existed for acquittal; where jury verdict acquitting the defendant could have been based on any number of reasons, no issue was conclusively decided, such that the doctrine of collateral estoppel did not apply in second trial); Ashe v. Swenson, 397 U.S. 436, 444-45 (1970) (same; where only reason possible for acquittal in robbery case was issue of identification of defendant, that issue was conclusively decided and collateral estoppel applied). Additionally, a “hung count is not a ‘relevant’ part of the ‘record of the prior proceeding.’ Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle.” Yeager, 129 S.Ct. at 2368.

Despite clear direction from the United States Supreme Court that hung counts are not to be considered when undertaking a collateral estoppel analysis, the defendant concludes that because both the first degree murder charge and the second degree murder charge were not resolved by the jury, it can only mean that the jury must have resolved that the defendant was not engaged in a robbery at the time the victim was killed. While the defendant's analysis of the tea leaves from the jury room is suspect at best,

a hung count hardly makes the existence of any fact more probable or less probable. A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return.

Id.

The court must apply the Ashe standard, as adopted by this Court in Hastings, looking essentially at the totality of the evidence to determine whether or not any issues from the first trial are to be given preclusive effect. State v. Hastings, 121 N.H. 465, 468 (1981). As Justice Alito has noted,

This is a demanding standard. The second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question. Only if it would have been irrational for the jury to acquit without finding that fact is the subsequent trial barred. And the defendant has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.

Yeager, 129 S. Ct. at 2375 (Alito, J., dissenting).

Hence, it is well-settled law that where the jury's verdict could have been based on something other than the issue raised by the defendant in the retrial which he seeks to bar in the retrial, collateral estoppel does not prevent the State from introducing evidence regarding that

issue during the subsequent trial. See Hutchins, 144 N.H. at 671-72 (where jury acquitted defendant of sexual assault, he could be subsequently tried for perjury for lying during his sexual assault trial and saying he had “never” sexually abused the victim; jury’s verdict in sexual assault case could have indicated that the jury believed there was sexual conduct but that the crimes charged were not otherwise proven, such that the issue of whether he had “ever” sexually abused the victim was not conclusively decided during first trial); see also Crate, 141 N.H. at 493 (jury’s acquittal of defendant of indictments charging aggravated felonious sexual assault by means of surprise does not impact State’s ability to retry the defendant on indictments charging the same crime by means of physical force; while acquittals represented a final judgment on the element of surprise, they did not represent a final judgment on the other elements of sexual assault or on the element of physical force, such that it was permissible for the State to admit such evidence during the second trial).

Importantly, where the record does not indicate the basis of a fact finder’s decision, a subsequent court cannot speculate on the basis for that decision. See Hastings, 121 N.H. at 468 (“in the absence of a record indicating that the issues to be tried [in the second trial] were necessarily resolved in the defendant’s favor [in the first trial], we cannot accept the defendant’s arguments that collateral estoppel bars the second trial”; therefore, where the defendant was acquitted in the first trial of misdemeanor receiving stolen property and the State sought to prosecute him for felony stolen property in a second trial, a record of the basis for the trial court’s decision in the first trial was required for a determination of whether the second trial could proceed).

The United States Supreme Court also confronted this issue in Dowling v. United States, 493 U.S. 342 (1990). In that case, the Government admitted evidence in a bank robbery trial that

the defendant had been involved in a burglary several weeks after the bank robbery. Id. at 344-45. The Government sought to admit that evidence to establish identification of the defendant, and to establish a link between the defendant and another party. Id. However, prior to the trial in which the Government sought to introduce this evidence regarding the burglary, the defendant had been acquitted in a separate trial on that charge. Id. at 345. The defendant subsequently appealed, alleging that the Government was collaterally estopped from introducing evidence regarding the burglary in the bank robbery trial, since the defendant had been acquitted of the burglary. Id. He argued that his acquittal meant that the first jury had conclusively decided that he was not one of the intruders involved in the burglary. Id. at 345-46. The Supreme Court held that because there were “any number of possible explanations for the jury’s acquittal verdict” in the burglary case, and the record from that trial did not “persuasively indicate that the question of identify was at issue and was determined in [the defendant’s] favor at the prior trial,” despite the acquittal, the defendant had failed to meet his burden in establishing that the first jury concluded that he was not involved in the burglary, such that the doctrine of collateral estoppel did not apply. Id. at 352.

In the present homicide case, the record is similarly devoid of a rationale for the jury’s verdict. The record reveals that the defendant contested all elements of the crime throughout his original homicide trial. Indeed, the opening lines of the defendant’s closing argument to the jury was that “now you do know that Charles did not get in the SUV with a gun and he did not get out of the SUV with a gun. Ladies and gentlemen, Charles did not shoot Lenny Gosselin.” See T10 at 1979. The defendant went on to also deny that he was involved in a robbery at the time the victim was shot, and in fact instead blamed a witness for trying to rob him. See T10 at 1980-81. As such, the defendant denied having the requisite mental state, denied having possession of a

handgun, denied that he had killed anyone, and denied that he had been in the course of a robbery at the time the victim was killed. In short, the defendant painted a picture very different from that painted by the State of the events on the day of the murder. Because the defendant hotly contested all of the elements of the crime throughout the trial, the jury had to make a decision regarding a number of factors, and could have based its decision to acquit the defendant of first degree murder on any number of factors, including but not limited to whether the defendant possessed the requisite mental state at the time of the homicide, and whether he had committed the homicide during the course of a robbery. Where the record indicates that all issues were contested at trial, and the jury could have returned a not guilty verdict on the first degree murder count for any number of reasons, it cannot be said that any particularly issue has been conclusively determined during the initial trial. See Dowling v. U.S., 493 U.S. at 352; Hutchins, 144 N.H. at 671-72. The doctrine of collateral estoppel therefore does not apply in the subsequent retrial. See Dowling v. U.S., 493 U.S. at 352; Hutchins, 144 N.H. at 671-72.

Finally, it is worth noting that this Court has held that even where an ultimate fact has been determined by a valid and final judgment, such that the doctrine of collateral estoppel prohibits the State from again relitigating that issue, such evidence may still be admissible in a subsequent trial. “An ultimate fact that must be proven beyond a reasonable doubt under one criminal charge is to be distinguished, however, from a merely evidentiary fact that is relevant but not required to be proven under a different criminal charge.” State v. Sefton, 125 N.H. 533, 535 (1984). “[T]he rule of collateral estoppel does not forbid the relitigation of an issue as one of evidentiary fact, even though the State has lost on the same issue as one of ultimate fact to be proven beyond a reasonable doubt in a prior trial.” Id. at 535-36. In other words, if the State was required to prove a fact beyond a reasonable doubt during the first trial and failed to meet

that burden, and if that fact were found to be the sole issue upon which the jury could have based its verdict such that the doctrine of collateral estoppel applies, such evidence is still admissible in a subsequent trial where it may be admissible for other purposes which do not require proof of the fact beyond a reasonable doubt. See id. (Where defendant was originally charged with driving while intoxicated and the trial court specifically found that the defendant was not guilty of that charge because the State failed to prove the element of intoxication, issue of intoxication was determined such that collateral estoppel applied; however, State could still introduce evidence of intoxication at subsequent trial for conduct after an accident, where that was relevant evidence thought not a necessary evidentiary fact); see also State v. Fielders, 124 N.H. 310, 312-13 (1983) (in trial for carrying a loaded weapon without a license, where trial court found the defendant not guilty and explicitly based its decision on its determination that the State had failed to present any evidence of whether the gun was loaded, collateral estoppel prevented the State from relitigating that issue in the defendant's subsequent trial, but the State could still introduce evidence regarding the weapon during the subsequent trial; the fact of whether the gun was loaded was not as essential element in the second trial, but rather merely an evidentiary fact in the second trial, such that the evidence was admissible).

Thus in the present case, even if this Court were to find that there was a final determination by the jury as to whether the defendant was in the course of robbing the victim at the time he murdered him, the State could still introduce evidence of the robbery in support of the second degree murder charges, since that evidence is relevant to explain what was going on at the time the defendant committed the murder, and a conviction for either count of second degree murder will not require a finding beyond a reasonable doubt that the robbery actually occurred. See Sefton, 125 N.H. at 535-36.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

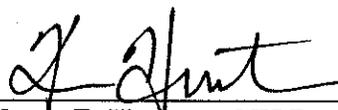
The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Kelly A. Ayotte  
Attorney General



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Karen E. Huntress, NH Bar No. 15146  
Assistant Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3671

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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Bruce Kenna and Ghazi Al-Marayati, counsel of record.



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Karen E. Huntress

