

Supreme Court No. 78465-5  
(COA No. 55745-9-I)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WRIGHT,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED FOR REVIEW

1. The State originally charged Mr. Wright with second degree murder in violation of RCW 9A.32.050(1) under both statutory alternatives: (a) second degree intentional murder; and (b) second degree felony murder. The jury found Mr. Wright guilty of second degree murder as charged. His conviction was reversed in light of *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). On remand, the trial judge precluded the State from re-filing second degree intentional murder charges, ruling double jeopardy prohibits the State from re-prosecution of second degree intentional murder – an alternative theory of culpability for the same offense not found by the initial trier of fact. Did the trial court properly prohibit the State from proceeding on remand with second degree murder charges as barred on double jeopardy grounds?

2. The Double Jeopardy Clauses of the state and federal constitutions prohibit repeated prosecutions by the government until a proper conviction is obtained. Here, the State charged and placed the defendant in jeopardy with one crime under two alternative theories (second degree intentional murder and second degree felony murder), but abandoned the intentional murder

theory after all the evidence was presented and elected to instruct the jury only on felony murder predicated on assault. The jury convicted Mr. Wright of second degree felony murder and was discharged without considering intentional murder. Does double jeopardy bar reprosecution on the State's abandoned theory following reversal of the jury's verdict?

B. STATEMENT OF THE CASE.

The State charged Mr. Wright with second degree murder under both intentional murder and degree felony murder, as follows:

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse OLIVER MENARD WRIGHT of the crime of Murder in the Second Degree, committed as follows:

That the defendant OLIVER MENARD WRIGHT in King County, Washington on or about April 6, 1993, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with the intent to cause the death of another person, did cause the death of Jeff Oscar Evans, Jr., aka, Aisa Cameron, a human being, who was not a participant in said crime, and who died on or about April 6, 1993;

Contrary to RCW 9A.32.050(1)(a) and (b). . .

CP at 1.

At trial, Woody Kees testified he and Greg Asa Cameron lived on the streets together and occasionally consumed drugs

together. 7/27/93RP at 197. On April 6, 1993, Kees and Cameron took a taxicab to purchase cocaine. 7/27/93RP at 198-200. Upon arriving at 26<sup>th</sup> and Cherry in Seattle, Kees and Cameron immediately saw two men who looked like they would sell them drugs. *Id.* at 202-03. When Kees and Cameron approached one of the men, Mr. Wright, Mr. Wright became aggressive after Mr. Cameron started to call him "Cuz." *Id.* at 204, 206. Mr. Wright then grabbed Mr. Cameron around the neck and brought him closer. *Id.* at 206.

Mr. Kees retreated across the street, heard the "clicking sound" of a gun and heard Mr. Wright say to Mr. Cameron, "don't you know I shoot you." *Id.* at 206-09. Then Mr. Kees heard multiple gunshots and witnessed Mr. Wright run with his friend, jump into a car, and drive away. *Id.* at 209-10. Mr. Cameron died six hours later at Harborview Hospital. *Id.* at 156, 211-12.

Dr. Michael Dobersen, a forensic pathologist for the King County Medical Examiner's Office, conducted the autopsy of Mr. Cameron's body. 7/27/93RP at 155. Dr. Dobersen testified the fatal wound was a bullet fired from against Mr. Cameron's body starting in the lower chest – upper abdomen area of the left side,

which traveled through the abdominal aorta (a major blood vessel to the heart). 7/27/93RP at 161, 166-69.<sup>1</sup>

Washington State Crime Laboratory forensic scientist Frank Lee testified a .25 gun was used, which requires the slide to be pulled back first before the first gunshot. 8/3/93RP at 602-03.

Following the presentation of evidence, the State proposed only felony murder jury instructions. CP 20, 21. Mr. Wright proposed an intentional murder definitional instruction, which provided,

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

CP 58. The court only instructed the jury on second degree felony murder. CP 96; 8/4/93RP at 717.

During closing arguments, the deputy prosecutor argued something Mr. Cameron said “set off” Mr. Wright. 8/4/93RP at 737.

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<sup>1</sup> Dr. Dobersen testified Mr. Cameron had three bullet wounds, as follows:

1. left lower side of leg, the angle of which was consistent with a bullet ricocheting from the sidewalk and entering the leg; (7/27/93RP at 157)
2. entrance from the left side of Mr. Cameron’s trunk with gun muzzle against his body when fired, traveling up from the upper abdomen, through the stomach, liver, abdominal aorta, chest and lung, and then lodging in the back of the right chest cavity; (*Id.* at 161, 166-68)
3. entrance from the right shoulder consistent with firing a gun as a person pulls back after making the previous shot. (*Id.* at 176-77).

Whatever Mr. Cameron did – look at him funny, use the wrong tone of voice, the Defendant responded with, not on my street; and he grabbed Mr. Cameron in that bear hug that Mr. Kees very graphically told you about. He heard the – a round getting chambered some point in this sequence. I believe he said that was before the bear hug actually occurred, or simultaneously with the bear hug. Things happened fairly quickly. He saw a round fall out, fall to the ground, and then, Mr. Cameron was shot. And he saw Mr. Cameron drop.

8/4/93RP at 737-38. The State explained to the jury to convict Mr. Wright of second degree murder, it had to find the elements of an intentional second degree assault, a shooting, and the death of the victim. 8/4/93RP at 741. The prosecutor argued this was second degree felony murder, wherein the State had to prove an assault but did not have to prove any intent to kill the other person. *Id.* at 741.

Mr. Wright was convicted of second degree murder as charged. Supp. CP 1; Slip op. at 2 (a copy of the Opinion is attached as Appendix A). Mr. Wright's felony murder conviction was later vacated by this Court in the consolidated cases of *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). The case was remanded to the trial court for "further lawful proceedings." *Hinton*, 152 Wn.2d at 861.

On remand, the State filed an amended information, re-charging Mr. Wright with second degree intentional murder. CP 127. Mr. Wright moved to dismiss the amended information as barred by double jeopardy and mandatory joinder. CP 131-90.

The Honorable Ronald Kessler agreed, ruling double jeopardy precluded the State from re-prosecuting second degree intentional murder. 2/17/05RP at 16. Judge Kessler concluded,

Okay, I am still persuaded that the decision of the Court was correct with respect to the jeopardy issue. I don't see a constitutional distinction between modes and – separate modes and separate crimes. I also have a hard time distinguishing this from what occurred in *Hiscock* (phonetic) and so I will not permit the State to proceed with murder in the second – intentional murder in the second degree.

2/17/05RP at 16.

On discretionary review in the Court of Appeals, the State argued double jeopardy does not apply because Mr. Wright's felony murder conviction was vacated and the jury never decided whether or not he was guilty of second degree intentional murder. Appellant's Opening Brief (AOB) at 6-13. Mr. Wright responded jeopardy attached when the State charged him with second degree murder (under both alternatives) and he was put to trial on both alternatives; jeopardy terminated as to intentional murder upon his conviction for felony murder. Respondent's Brief (BOR) at 3-8.

Furthermore, because the State's evidence was legally insufficient to prove him guilty of felony murder, double jeopardy bars a second trial under another alternative theory for the same crime. BOR at 9-12. Mr. Wright also argued double jeopardy barred the State from re-filing charges it forced the defendant to defend against at trial but abandoned before submitting to the jury. BOR at 16-19.

The Court of Appeals ruled that since the original felony murder conviction was vacated upon Mr. Wright's behest in his personal restraint petition, the slate was wiped clean and the State could re-file charges. Slip op. at 4-5. The Court of Appeals disagreed that this Court's *Andress* decision stood for the proposition that the State presents legally insufficient evidence to prove felony murder when it attempts to prove felony murder with the predicate offense of second degree assault; therefore the reversal was not tantamount to an acquittal under *Burks v. United States*.<sup>2</sup> Slip op. at 5. The Court of Appeals found that while federal caselaw prohibited re-prosecution for charges the State chose to abandon at trial, the instant case was unique since "25 years of unbroken precedent established that felony murder

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<sup>2</sup> 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

predicated on assault was a sound and sufficient theory” and failing to submit an intentional murder instruction was therefore not unreasonable. Slip op. at 9.

C. ARGUMENT.

DOUBLE JEOPARDY PROHIBITS THE STATE FROM RE-FILING SECOND DEGREE MURDER CHARGES ON REMAND

1. Double jeopardy prohibits the State from trying Mr. Wright twice for the same offense originally charged. The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. 5. Article 1, § 9 of the Washington Constitution similarly provides, “No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense.” RCW 10.43.050 codified constitutional double jeopardy principles, “Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such a crime, or any degree thereof.” A conviction or acquittal is, therefore, a bar to another prosecution for that offense or any lesser or included offense. RCW 10.43.020.

The Double Jeopardy Clause protects accused individuals from three distinct types of abuse by government:

- (1) a second prosecution for the same offense after acquittal;
- (2) a second prosecution for the same offense after conviction;
- (3) multiple punishments for the same offense.

*State v. Hescoek*, 98 Wn.App. 600, 603-04, 989 P.2d 1251 (1999);

*North Carolina v. Pearce*, 295 U.S. 711, 717, 89 S.Ct. 2072, 23

L.Ed.2d 656 (1969).

The United States Supreme Court has explained the rationale behind the Double Jeopardy Clause as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense...

*Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2

L.Ed.2d 199 (1957).<sup>3</sup> Jeopardy attaches once a jury is empanelled

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<sup>3</sup> Former Justice Philip A. Talmadge stated,

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to "be brought into danger for the same offense more than once." Few principles have been more deeply "rooted in the traditions and conscience of our people."

and sworn and is “put to trial;” the defendant need not show that the jury actually reached a verdict. *Crist v. Bretz*, 437 U.S. 28, 51-52, 98 S.Ct. 2156, 57 L. Ed. 2d 24 (1978); *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

“The Double Jeopardy Clause bars the reprosecution of a criminal defendant on the same charges after a judgment of conviction or acquittal.” *Illinois v. Vitale*, 447 U.S. 410, 415, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Venson v. Georgia*, 74 F.3d 1140, 1145 (C.A.11, 1996), citing *United States v. Wilson*, 420 U.S. 332, 342-43, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975) (quoting *North Carolina v. Pearce*, 395 U.S. at 717); *State v. Ervin*, 158 Wn.2d 746, 753, 147 P.3rd 567 (2007) (holding acquittal terminates jeopardy). The jury’s failure to make a finding has the same effect as an acquittal. *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957).

In *Green*, the jury found the defendant guilty of arson and second degree murder but failed to find him guilty or not guilty on the first degree murder charge – the verdict was simply silent on

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Phillip Talmadge, Double Jeopardy: The Civil Forfeiture Debate, 19 Seattle Univ. L. R. 209, 209-210 (1996).

that charge. *Id.* at 186. The trial judge accepted the verdict, entered judgments, dismissed the jury, and did not declare a mistrial. *Id.* Green appealed and his conviction was overturned. On remand he was retried for first-degree murder and convicted. *Id.* The Supreme Court held that double jeopardy prohibited retrial on the first-degree murder charge even though the jury made no finding on that charge:

[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that *a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be charged again.*

(emphasis added.) *Id.* at 188. The *Green* Court did not rely on the assumption that the jury implicitly acquitted Green of murder in the first degree:

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implied acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the

jury was dismissed without returning any express verdict on that charge and without Green's consent.

*Green*, 355 U.S. at 190-91 (internal citations omitted).

As early as 1937, this Court ruled where the jury rendered a verdict on one count but was silent as to the other two, and the record did not show why the jury was discharged before rendering a verdict on those counts, such action was "equivalent to acquittal."

*State v. Davis*, 190 Wash. 164, 166-67, 67 P.2d 894 (1937).

Accordingly, where a defendant has been put to trial and due to the State's election the jury is discharged without rendering a verdict on one means and a reviewing court reversed the jury conviction on sufficiency grounds on the alternative means, the defendant is deemed acquitted of the charges and the State may not re-prosecute for the offense.

2. Because the State presented insufficient evidence to prove Mr. Wright guilty under the former felony murder statute, the successful appeal acts as an acquittal and bars re-filing the original charges. A reversal on appeal based on the State's failure to present sufficient evidence to convict a defendant of a charged crime acts as an acquittal and bars the State from re-filing charges:

Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, *the only "just" remedy available for that court is the direction of a judgment of acquittal*. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

(emphasis added.) *Burks v. United States*, 437 U.S. at 17-18.

Accordingly, once a conviction is reversed because the reviewing court found the State's evidence legally or factually insufficient to sustain a conviction, reprosecution is barred and a judgment of acquittal is required.

For purposes of double jeopardy, when a reviewing court reverses a conviction based on legal insufficiency of the evidence, it is deemed to be an acquittal because it "means that the government's case was so lacking that it should not have even been submitted to the jury." *Burks*, 437 U.S. at 16.<sup>4</sup> As recently as February 2005, the United States Supreme Court has held

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<sup>4</sup> See also, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573-74, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) (holding acquittal on insufficiency of the evidence grounds for double jeopardy purposes includes legal and factual insufficiency, including a directed verdict); *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986) (holding insufficiency of the evidence for double jeopardy purposes includes insufficiency of the evidence based on facts as well as insufficiency as a matter of law); *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (holding acquittal includes judgments by the court that the evidence is insufficient to convict).

evidence insufficient to convict as a matter of law is an acquittal because it “actually represents a resolution . . . of some or all of the factual elements of the offense charged.” *Smith v. Massachusetts*, 543 U.S. 462, 468, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005).

Accordingly, when a reviewing court finds the evidence factually or legally insufficient to satisfy the elements of the offense charged, double jeopardy bars reprosecution of the offense.

In *Andress*, this Court found assault as a predicate crime for second degree felony murder was legally insufficient. *Andress*, 147 Wn.2d at 604. A person cannot be found guilty of second degree felony murder based on a predicate felony of assault, because the former statute did not include assault in the list of predicate offenses and assault would make the “in furtherance language” absurd. *Andress*, 147 Wn.2d at 610, 614. In so ruling, this Court vacated Mr. Andress’s conviction because the State could not prove second degree felony murder with a predicate offense of assault – a nonexistent crime.

The reversal of Mr. Wright’s second degree felony murder conviction must similarly be viewed as an acquittal because the State presented insufficient evidence to sustain the conviction where it was predicated on assault. *Burks*, 437 U.S. at 16.

Following that reversal based on insufficiency, the State was barred from re-prosecuting the same second degree murder charge. *Id.*

The Court of Appeals incorrectly concluded this Court had decided *Andress* solely on statutory construction and not a sufficiency argument and therefore concluded Mr. Wright's felony murder conviction was not reversed because it was legally insufficient under *Andress*, but instead because he was convicted of a nonexistent crime under a statutory construction analysis. Slip op. at 5-6, citing *Montana v. Hall*, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987)(defendant erroneously convicted of incest under statute that did not go into effect until after date of crime; reversal did not bar retrial on charge of sexual assault under more general statute).<sup>5</sup>

First, the Court of Appeals reliance on *Hall* is deeply flawed, since the opinion specifically states that the State should be allowed to re-file assault charges originally charged as the *only*

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<sup>5</sup> This Court can take judicial notice of the fact that the issue presented for review in *Andress* was: "Can the crime of second degree assault support a charge of felony murder under RCW 9A.32.050(1)(b), under current law?" Mr. Andress specifically argued, "A criminal conviction which there is insufficient evidence to support violates due process." Brief of Petitioner, Section 1(A)(3).

*reason* the State changed its charging document to the not yet enacted incest statute *was because the defendant himself requested the prosecutor to amend* the information to reflect the charge:

Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. *In these circumstances*, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

(Emphasis added.) *Montana v. Hall*, 481 U.S. at 403. Accordingly, the only reason the double jeopardy clause did not bar retrial was the fact the *defendant* requested the non-existent incest charges. Otherwise double jeopardy would certainly have barred retrial had the State charged and prosecuted the then nonexistent incest charge. No such invited error was present in Mr. Wright's case. He certainly never insisted the State charge him with a non-existent crime. Accordingly, recharging him with second degree intentional murder does offend the Double Jeopardy Clause even under *Hall*.

Secondly, reversal of a conviction for a nonexistent crime is based on a due process violation that insufficient evidence exists to convict the defendant as charged, since the facts of the case do not satisfy the elements of a crime. In *State v. Hembd*, the

Montana Supreme Court held double jeopardy prohibits the State from re-filing charges after the conviction for a nonexistent crime is reversed on appeal. 197 Mont. 438, 643 P.2d 567 (1982). The defendant was charged with negligent arson, and the jury found the defendant guilty of “attempted misdemeanor negligent arson.” *Id.* at 439. The Court first found that “attempted misdemeanor negligent arson” and “attempted felony negligent arson” (like felony murder based on assault in Washington) were nonexistent crimes. *Id.* The *Hembd* Court then found the jury’s verdict on the nonexistent crime constituted an implied acquittal of the charged crimes of misdemeanor negligent arson and felony negligent arson. *Id.* Importantly, the Court held double jeopardy barred the State from retrying Mr. Hembd of the charged crimes. 197 Mont. at 439-40.

Washington caselaw also demonstrates that under a statutory construction analysis, the Court will find legal and factual insufficiency of the evidence requires reversal. In fact, Mr. Wright was one of the petitioners in the *Hinton* case, wherein this Court found the petitioners could not be guilty of second degree felony murder because assault was not a possible predicate crime for second degree felony murder. 152 Wn.2d at 859. Thus, this Court

found insufficient evidence was presented to prove the defendants were guilty of the crime charged. 152 Wn.2d at 859. This Court followed *Fiore v. White*, wherein the United States Supreme Court held it is a fundamental due process violation to convict and incarcerate a defendant for a crime without proof of all the elements of the crime. *Hinton*, 152 Wn.2d at 859, citing *Fiore v. White*, 531 U.S. 225, 228-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). Following a statutory interpretation analysis, the *Fiore* Court found the appellant's conduct did not violate the statute; therefore due process was violated by "the [State's] failure to prove all the elements of the crime, i.e., the failure to prove that the defendant lacked a permit." *Fiore*, 531 U.S. at 228-29, citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Hinton* concluded, "the same analysis applies here," ruling the *Andress* decision determined what RCW 9A.32.050 had meant since 1976, and the petitioners in *Hinton* were all convicted for crimes that did not criminalize their conduct as second degree felony murder. 152 Wn.2d at 859-60. Because *Hinton* held insufficient evidence was presented to prove Mr.

Wright was guilty of second degree felony murder based on a predicate assault, double jeopardy bars another trial that offense.

Similarly, in *State v. Argueta*, the Court examined the “eluding a pursuing police officer” statute, RCW 46.61.024, which requires that the signaling officer's vehicle be appropriately marked showing it to be an official police vehicle. 107 Wn.App. 532, 536, 27 P.3d 242 (2001). The *Argueta* Court concluded “to be ‘marked’ under the eluding statute, a vehicle must bear some type of insignia that identifies it as a police vehicle.” 107 Wn.App. at 538. The Court based its finding on statutory construction. *Id.* The Court accordingly reversed the conviction on insufficiency grounds, because the facts showed the officer’s patrol vehicle did not meet the statutory criteria:

Our conclusion that the evidence was insufficient to support Argueta's conviction is compelled by the language of the eluding statute as interpreted through application of rules of statutory construction. The logic and practicality of this result are, in our view, matters worthy of the Legislature's attention. The eluding statute, as presently worded, requires the presence of some identifying insignia in order for a vehicle to be appropriately marked. Without it, a defendant cannot be convicted under the statute as it is written.

*Argueta*, 107 Wn. App. at 538-39. Accordingly, when a reviewing Court interprets a statute and finds evidence presented fails to establish the charged crime, the defendant is thereby innocent of

the crime charged because insufficient facts support the conviction, requiring an acquittal.

3. Double jeopardy also precludes the State from re-filing the same charge upon remand but under an alternative theory.

When a defendant is charged with two alternative means of committing a single crime, double jeopardy bars retrying the defendant after reversal on one alternative theory. In *State v. Hescok*, the defendant was charged with forgery, alleging two alternative means of committing the crime, RCW 9A.60.020(1)(a) and (b). 98 Wn.App. at 602. The defendant was found guilty of violating only section (1)(a). *Id.* Hescok argued on appeal that the evidence was insufficient to support a conviction under (1)(a). The State agreed, but requested remand for a determination of whether Hescok violated (1)(b). *Id.* at 603. Hescok argued double jeopardy prevented remand for consideration of his culpability under the alternative section, (1)(b). *Id.* at 602.

The *Hescok* Court ruled that an acquittal implied by conviction on a different theory of culpability precludes a second trial. 98 Wn.App. at 604-05. The trial court's written findings and conclusions of law were unambiguous as to the source of Hescok's culpability. 98 Wn. App. at 602. While the Court noted

that remand is appropriate where a defect is found in the written findings and is not based on the State's failure to prove its case, a lack of written findings or conclusions of law on an alternative theory of culpability cannot justify remand for prosecution under that theory. *Hescock*, 98 Wn. App. at 607.

In the instant case, the Court of Appeals analysis of *Hescock* is misguided. In an attempt to distinguish Mr. Wright's case from *Hescock*, the Court of Appeals opined the jury did not have a full opportunity to find him guilty of intentional murder, since that charge did not appear in the instructions. Slip op. at 7.

*Hescock* was a juvenile bench trial, wherein judge adjudicated the juvenile guilty of committing forgery but the Court of Appeals reversed the guilty finding and ruled the State was barred from re-filing charges even when there was a lack of written findings or conclusions of law on the alternative theory of culpability. *Hescock*, 98 Wn. App. at 607.

Especially when the State elects to abandon a theory of an alternative means following presentation of the evidence, forcing the jury to be discharged without a verdict on one of the means charged, the State must be precluded from pursuing a second trial on the abandoned theory. In *Sizemore v. Fletcher*, the court ruled

that a second trial may be "barred by double jeopardy" if "the first trial ended without a verdict for reasons of the prosecution's making." 921 F.2d 667, 673 (6th Cir.1990). Similarly, in *Saylor v. Cornelius*, the Court held,

where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing reprosecution.... We believe that the Double Jeopardy Clause forbids a second trial on [an alternative] theory because such a trial would be vexatious, regardless of the outcome of the jury's deliberation on the theory charged to it. It would be vexatious because the defendant underwent the jeopardy of a full trial, which is even more vexatious than the aborted or partial trials usually involved in double jeopardy cases, and the trial failed to terminate in a verdict for reasons that cannot fairly be charged to the defendant.

845 F.2d 1401, 1403, 1408 (6th Cir.1988). Accordingly, when a prosecutor charges a person with two theories and the accused must defend against each theory, a prosecutor must either submit the proper instructions for both alternatives, or elect not to instruct and realize double jeopardy would bar a second prosecution.

In the instant case, the prosecutor elected not to submit the intentional murder theory to the jury. The choice was not Mr. Wright's. He stood and faced his accusers, who testified that Mr. Wright pulled Mr. Cameron to him, told him "don't you know I shoot you," placed the muzzle of the gun near Mr. Cameron's heart, and

pulled the trigger. 7/27/93RP at 161, 166-69, 206, 208-9. But just before closing arguments the prosecutor chose not to seek a verdict for intentional murder. CP 21. The prosecutor's abandonment of this theory of intentional murder should be treated as the State's admission that insufficient evidence existed to support the alternative.

Because Mr. Wright was tried on the charge of intentional murder, protection from double jeopardy bars retrial on that charge. *Burks*, 437 U.S. at 10-11. Accordingly, double jeopardy precludes the State from retrying Mr. Wright on a theory it abandoned during trial. *Fletcher*, 921 F.2d at 673; *Saylor*, 845 F.2d at 1408.

The Court of Appeals misunderstands *Saylor* when it suggests that the decision "is not solidly tethered to the precedents it cites." Slip op. at 9. The *Saylor* decision is a logical extension of *Green*, *Scott*, *Burks*, and *Arizona v. Washington*. This line of cases holds that where the State places the accused in jeopardy of conviction by trying him on an offense, it should not have repeated opportunities to re prosecute the defendant until the State finds a crime for which the defendant can be found guilty. "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the valued right to have his

trial completed by a particular tribunal.” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (citations and internal quotations omitted). In view of the defendant’s important right to have the trial concluded by a particular tribunal,

the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate “manifest necessity” for any mistrial declared over the objection of the defendant.

*Id.* at 505. Lastly, in *Burks*, the Supreme Court overruled the holding in *Forman v. United States*,<sup>6</sup> which had held following an appellate reversal on one theory, the State may re prosecute on an alternative theory indicated by the indictment but never properly submitted to a jury. *Burks*, 437 U.S. at 9, 17-18. The *Burks* Court overruled the *Forman* holding, ruling once the reviewing Court finds the evidence legally insufficient to support the verdict, “the only ‘just’ remedy available for that court is the direction of a judgment of acquittal.” *Burks*, 437 U.S. at 18. The *Forman* holding overruled by *Burks* is the very same theory the State posits here in this Court.

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<sup>6</sup> 361 U.S. 415, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960).

Accordingly, *Saylor* is properly grounded in United States Supreme Court precedent that the prosecution should not be able to re prosecute on charges the defendant stood trial but the jury was discharged without rendering a verdict due to the State's election. *Saylor* merely extends this rationale, holding that when the State elects to charge and place the defendant in jeopardy of conviction by trying him on the offense but then abandons a theory before the jury can render a verdict and that jury is discharged without a verdict due to the State's own making, double jeopardy bars re prosecution on the abandoned theory.

Moreover, the Court of Appeals citation to an Illinois case, *People v. Daniels*, 187 Ill.2d 301, 718 N.Ed.2d 149, 240 Ill. Dec. 668 (1999), is misplaced. Slip op. at 8. In *Daniels*, the underlying trial error was an erroneous restriction on the right to 14 peremptory challenges, which is not tantamount to an acquittal and remand for a new trial would be permissible. See *Daniels*, 187 Ill. at 313, citing *People v. Daniels*, 172 Ill.2d 154, 168, 665 N.E.2d 1221, 216 Ill. Dec. 664 (1996). This Court should follow *Saylor* and prohibit the State from recharging Mr. Wright with an offense it elected to abandon in the first trial.

Similarly, in *Lewis v. State*, the Texas Court of Appeals ruled, “[t]he dismissal or abandonment of an accusation after jeopardy attaches is tantamount to an acquittal.” 889 S.W.2d 403, 406 (1994). The Court found whenever a defendant is placed in jeopardy for offenses alleged in the complaint (at the time he enters a plea of not guilty), the State is barred from retrying the defendant on those counts it proceeded to trial on but abandoned before the jury verdict was entered. 889 S.W.2d at 407. The *Lewis* Court ruled “*If a charge is still pending at the moment jeopardy attaches, a defendant is entitled to expect the State to proceed to trial on that charge or lose the opportunity forever.*” (Emphasis in original) 889 S.W.2d at 407, quoting *Proctor v. State*, 841 S.W.2d 1, 3-4 (Tex. Crim. App. 1992). When the State abandons the prosecution of an offense after the defendant is placed in jeopardy, retrial of that accusation is barred, whether the State expressly or implicitly abandons the charge. *Id.* at 407.

*Lewis* specifically rejected the argument that the slate was wiped clean because the defendant had prevailed on appeal. 889 S.W.2d at 407. The Court recognized that when the defendant was placed in jeopardy on the later abandoned charges, the jury was discharged without having an opportunity to convict on those

charges due to the State's failure to provide to-convict instructions to the jury. *Id.* at 408. Thus, the appellant's successful appeal on charges found by the jury "could not authorize appellant's reprosecution for the offenses alleged in the other [abandoned] indictments because those causes were not before [the reviewing court]." 889 S.W.2d at 408. Accordingly, like *Saylor*, the Texas Court held State-abandoned charges cannot later be recharged following the successful appeal of offenses actually brought before the jury because that would violate the double jeopardy clause prohibition against multiple prosecutions for the same offense.

Here, the State brought intentional murder and felony murder charges against Mr. Wright, and decided after all the evidence was presented not to instruct the jury as to intentional murder, because it would not have to prove any *mens rea*. In closing argument, the prosecutor specifically argued she was only pursuing second degree felony murder as the charge does not require an intent to kill. 8/4/93RP at 741. Because of the State's election to abandon its theory of the harder-to-prove intentional murder, the jury was discharged without having an opportunity to reach a verdict on intentional murder. The State is therefore barred

from retrying Mr. Wright on this ground when it chose to abandon the theory at trial.

D. CONCLUSION.

Because the trial court properly precluded the State from re-filing second degree intentional murder charges, this Court should reverse the Court of Appeals decision, vacate Mr. Wright's conviction and dismiss the charges against him.

DATED this 9<sup>th</sup> day of April 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason B. Saunders", written over a horizontal line.

JASON B. SAUNDERS (24963)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

## **APPENDIX A**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RECEIVED

JAN 30 2006

Washington Appellate Project

STATE OF WASHINGTON, ) NO. 55745-9-1  
 )  
 Appellant, )  
 )  
 v. ) PUBLISHED OPINION  
 )  
 OLIVER WRIGHT, )  
 )  
 Respondent. ) FILED: JANUARY 30, 2006

BECKER, J. -- The State seeks to retry, on the charge of second degree intentional murder, a defendant whose felony murder conviction was vacated under In Re Andress<sup>1</sup> because it was for a then nonexistent crime. The charge of intentional murder was left undecided in the first trial because neither the State nor the defendant asked to have it submitted in the instructions to the jury. Because the defendant has not been acquitted of the murder, and he has obtained a reversal of his first conviction for a reason other than insufficient evidence, he remains in the same jeopardy that attached during the first trial. The

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<sup>1</sup> In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

order dismissing the second prosecution on double jeopardy grounds is reversed.

### FACTS

A man was shot dead in the street in Seattle in April 1993 in the course of an argument associated with a drug transaction. The State identified Oliver Wright as the shooter, and charged him with a single count of second degree murder. The information also charged Wright with committing three counts of assault and robbery against different victims three days earlier. The information alleged the count of murder by alternative means: felony murder predicated upon second-degree assault, and intentional murder. The case went to trial later that year. At the end of the trial, both parties submitted felony murder instructions. No one proposed an instruction on intentional murder. On the charge of murder, the court instructed the jury only on felony murder. The jury found Wright guilty of felony murder, and guilty on the assault and robbery charges as well. He went to prison on a 534-month standard range sentence. His conviction was affirmed on direct appeal.

Some years later, the Washington Supreme Court interpreted the former felony murder statute, RCW 9A.32.050, and decided that the Legislature did not intend for assault to serve as a predicate felony for second degree felony murder. In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). Along with others situated similarly to the petitioner in Andress, Wright petitioned for relief from his conviction. The Supreme Court held that the petitioners were

entitled to relief because they had been convicted of a nonexistent crime. In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). The Court vacated the convictions and remanded for further proceedings.

The State then renewed its prosecution of Wright for the 1993 homicide by amending the information so that the murder count alleged only second degree intentional murder. Wright moved to dismiss the charge as barred by double jeopardy. The trial court granted that motion. The State appeals.

#### ANALYSIS

"No person shall...be subject for the same offense to be twice put in jeopardy of life or limb". U.S. Const. amend. V.<sup>2</sup>

The guarantee of the double jeopardy clause consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). There is no issue of multiple punishments in this case. The issue is successive prosecution.

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<sup>2</sup> The Washington State Constitution, article 1, § 9, makes a similar guarantee: "No person shall...be twice put in jeopardy for the same offense". No issue has been raised as to the possibility of an interpretation of the State Constitution that would differ from the United States Constitution in these circumstances.

The law "attaches particular significance to an acquittal." United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). A verdict of acquittal ends a defendant's jeopardy for that offense and bars reprosecution for the same offense even if it is not reduced to judgment and even if it appears to be erroneous. Green v. United States, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1967); Scott, 437 U.S. at 91.

A conviction, on the other hand, does not necessarily act as a bar to a second prosecution for the same offense, for "it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." United States v. Ball, 163 U.S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300 (1896). The Ball case "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." Price v. Georgia, 398 U.S. 323, 326, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970). "When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." Burks v. United States, 437 U.S. 1, 15, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The practice of retrial after reversal "serves defendants' rights as well as society's interest" because appellate courts would be less zealous in rooting out error "if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." United States v. Tateo, 377 U.S. 463,

466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964). The rationale for retrial "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." North Carolina v. Pearce, 395 U.S. at 721.

There can be no retrial, however, when the reason the appellate court reverses a conviction is insufficiency of the evidence. An appellate reversal for insufficient evidence is deemed to be an acquittal with the same effect as a verdict of acquittal because it "means that the government's case was so lacking that it should not have even been submitted to the jury." Burks, 437 U.S. at 16.

Wright contends that the appellate reversal of his murder conviction was equivalent to an acquittal. First, he argues that felony murder convictions predicated on assault under the former statute are, according to Andress, based on legally insufficient evidence. This argument lacks merit. To determine whether insufficiency of the evidence was the reason why Wright's conviction was set aside, we look to the rationale of the reversing court. See Parker v. Norris, 64 F.3d 1178, 1182 (8<sup>th</sup> Cir. 1995). Nowhere in Andress did the Supreme Court adopt or imply a rationale of evidentiary insufficiency. Rather, the Court engaged in statutory construction and concluded that Andress had been convicted of a nonexistent crime. See Hinton, 152 Wn.2d at 857. The problem of conviction for a nonexistent crime is not a failure of proof. Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) (defendant was erroneously convicted of incest under a statute that did not go into effect until

after the date of the crime; reversal did not bar retrial on a charge of sexual assault under a more general statute).

Wright next argues that the 1993 jury, by finding him guilty of only felony murder, implicitly acquitted him on the alternative charge of intentional murder. In Green, on which Wright principally relies, the government tried the defendant on charges of arson and murder. On the murder count, the instructions gave the jury the choice of first or second degree murder. The jury found the defendant guilty of second degree murder. Their verdict was silent on the charge of first degree murder. The second degree murder conviction was reversed on appeal as unsupported by the evidence. The government reprosecuted Green for first degree murder and obtained a conviction. Green asserted former jeopardy, based not on his prior conviction, but on a theory of prior acquittal. He argued that the original jury's "refusal" to convict him of first degree murder was the same as an acquittal. See Green, 355 U.S. at 190 n.11. The Supreme Court, reversing on double jeopardy grounds, agreed that the first jury's verdict was an "implicit acquittal" on the charge of first degree murder.

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder.

Green, 355 U.S. at 190.

It was critical to the rationale in Green that the first jury "was given a full opportunity to return a verdict" on the charge of first degree murder. Green, 355 U.S. at 191; Price v. Georgia, 398 U.S. at 329. A Washington case in the vein of Green is State v. Hescok, 98 Wn. App. 600, 989 P.2d 1251 (1999). After a bench trial, the court found a juvenile guilty of only one out of two charged alternative means of committing forgery. This court, after reversing that conviction for insufficient evidence, held that double jeopardy barred retrial on the other means as well because, as in Green, the trier of fact had not found the defendant guilty on that charge despite having a full opportunity to do so. Hescok, 98 Wn. App. At 611.

Wright's case differs materially from Green and Hescok in that the jury in Wright's trial did not have a full opportunity to find him guilty of intentional murder. The charge did not appear in the instructions. It simply dropped from the case. It cannot be said that the jury refused to convict him of intentional murder. That choice was not available. We therefore conclude the 1993 verdict was not an implicit acquittal as that concept is defined in Green and applied in Hescok, and it did not terminate Wright's jeopardy on the charge of intentional second degree murder.

As an alternative to his theory of former jeopardy based on an implied acquittal, or perhaps as a variation of that theory, Wright contends that the Double Jeopardy Clause prevents the State from pursuing a charge on which there has never been a decision to acquit or convict because the State

abandoned the charge during the first trial. For this analysis, he relies on Saylor v. Cornelius, 845 F.2d 1401 (6<sup>th</sup> Cir. 1988).

Saylor is similar in that the defendant was charged with one count of murder, committed either by conspiracy or as an accomplice. The jury convicted him of conspiracy, the only theory submitted by the instructions. The conspiracy conviction was reversed for insufficiency of the evidence. The State then sought to retry the defendant as an accomplice. It was undisputed that the record contained sufficient evidence to convict the defendant as an accomplice. Nevertheless, the Sixth Circuit granted the defendant's petition to bar the retrial, reasoning that his jeopardy as an alleged accomplice terminated because "the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making":

The accomplice theory of liability was charged in the indictment, was relevant to the evidence presented during the trial, and most importantly, up until the time the jury returned from its deliberations and announced its verdict, could have been presented to the jury. Under circumstances such as these, where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing reprosecution.

Saylor, 845 F.2d at 1403.

Saylor has been found inapplicable in another state court on facts very similar to Wright's case. See People v. Daniels, 187 Ill. 2d 301, 718 N.E.2d 149 (1999) (having charged defendant with both intentional and felony murder, State submitted only intentional murder instruction; intentional murder conviction

reversed for trial error; State allowed to retry on both means). And a more recent decision by the Sixth Circuit distinguishes Saylor while retreating from it. United States v. Davis, 873 F.2d 900 (6<sup>th</sup> Cir. 1989). The prosecutor in Davis is described as having made a reasonable decision to proceed on a theory that appeared legally sound at the time, unlike the prosecutor in Saylor who is seen as having irrationally acquiesced to instructions on the one theory for which there was no evidence. Davis, 873 F.2d at 905.

If the Saylor analysis is correct in focusing on the prosecution's possibly illegitimate reasons for failing to submit the instruction as the essential justification for barring a second trial, Wright's case is distinguishable on the same basis as Davis. At the time the State allowed its case against Wright to go to the jury with only a felony murder instruction, 25 years of unbroken precedent established that felony murder predicated on assault was a sound and sufficient theory. Failing to submit an intentional murder instruction was not unreasonable.

However, we find Saylor not only distinguishable but also unpersuasive in its legal reasoning because it is not solidly tethered to the precedents it cites.<sup>3</sup>

Saylor first invokes Green for its condemnation of successive prosecutions as vexatious:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

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<sup>3</sup> This was also the view of District Court Judge Kinneary in the Davis case. See United States v. Davis, 714 F. Supp. 853, 857-862 (S.D. Ohio (1988)).

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187-88, quoted in Saylor, 845 F.2d at 1406. But Green, an implied acquittal case, does not lay down a general rule protecting against all successive prosecutions, and it does not specifically address the problem of a theory that is charged but not submitted for decision.

Saylor looks to Scott to show "what result the Double Jeopardy Clause requires when a trial ends without a final determination of the defendant's guilt or innocence on a charge contained in the indictment but not presented to the jury." Saylor, 845 F.2d at 1406. According to Saylor, Scott makes a distinction "between trials aborted as a result of the defendant's deliberate election and those ending as a result of the prosecution's action." Saylor, 845 F.2d at 1407. The prosecution should "bear the burden of the aborted outcome" if the omission of the charge from the jury instructions is attributable to the prosecution rather than to the deliberate election of the defendant. Saylor, 845 F.2d at 1407. Scott supports only part of this reasoning. Scott holds that double jeopardy does not bar retrial when it is the defendant who requests that a charge be left unresolved at the first trial (defendant Scott was "neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empanelled to try him."). Scott, 437 U.S. at 99. Scott does not hold that double jeopardy bars retrial when a

charge is left unresolved at the first trial for some reason attributable to the prosecution.

Saylor concludes, citing a law review article, that retrial is barred even if the action by the prosecutor that prevents the first jury from reaching a decision is due to mere absent-mindedness. Saylor, 845 F. 2d at 1408. This is too broadly stated, for as the cited law review article acknowledges, in a case of mistrial declared due to prosecutorial misconduct, double jeopardy bars reprosecution only if the prosecutor precipitated the mistrial intentionally. Notes and Comments, Twice in Jeopardy, 75 Yale L.J. 262, 287 and n.123, cited in Saylor, 845 F.2d at 1408. See also Oregon v. Kennedy, 456 U.S. 663, 677, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982). The law review author had in mind the very different facts of Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). At the first trial in Downum, after the jury was selected and sworn, the prosecutor failed to have on hand a witness needed for two out of the six charged counts. Over defense objection the trial court refused to proceed on the four remaining counts, and discharged the jury. A second jury, empanelled two days later despite the defendant's plea of former jeopardy, convicted the defendant. The Supreme Court reversed, reasoning that the prosecutor had entered upon the first trial without sufficient evidence to convict. Downum, 372 U.S. at 737.

Although Wright does not cite Downum, he echoes its reasoning when he theorizes that the State's failure to propose a jury instruction on intentional

murder at the first trial may have been a deliberate choice to abandon that charge for lack of evidence to support it.<sup>4</sup>

Unlike in Downum, the record of Wright's trial does not allow even an inference that the State entered upon the case without sufficient evidence. An eyewitness testified that Wright put his arm around the victim and shot him several times at close range. This testimony was sufficient to convict Wright on either of the charged alternative means of second degree murder. Far from attempting to deprive Wright of a determination by the first jury, the State proceeded with the first jury and obtained a conviction.

If the first jury had acquitted Wright of felony murder, double jeopardy would bar a second prosecution on a theory of intentional murder whether it had been previously charged or not. The fact that Wright was not acquitted is what truly explains why he does not deserve the same outcome on appeal as the defendant in Saylor. The result obtained at trial in Saylor was actually an acquittal, not a conviction, because on appeal it was found to be based on insufficient evidence. A conviction, on the other hand, bars a retrial only if it becomes unconditionally final. When the conviction is reversed on procedural or technical grounds – as it was here, as well as in Daniels, the Illinois case – the

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<sup>4</sup> According to the law review article, Downum can be read as holding that doubts will be resolved in favor of the liberty of the citizen "where the actions of the state may have been designed to deprive the defendant of a determination by the initial jury and were not simply the result of negligence". Notes and Comments, Twice in Jeopardy, 75 Yale L.J. at 287 n.123.

first trial has not yet run its full course, and the accused remains in initial jeopardy. He "may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." Ball, 163 U.S. at 672.

Our conclusion that Wright remains in initial jeopardy for the accusation he faced during the first trial is not inconsistent with a Texas case Wright has submitted as supplemental authority. Lewis v. State, 889 S.W.2d 403 (Tex. App. 1994). Wright cites Lewis for the proposition that the abandonment of an accusation during trial amounts to an acquittal that bars later trial for the same offense. Lewis, 889 S.W.2d at 409.

As a general rule, Texas holds that in order to preserve a portion of a charging instrument for a later trial, the State must obtain permission from the trial judge to dismiss, waive or abandon that portion of the charging instrument before jeopardy attaches. The Double Jeopardy Clause does not permit "constructive abandonment" of a portion of the charging instrument. Ex parte Preston, 833 S.W.2d 515, 518 (Tex. Crim. App. 1992) (where State alleged three counts of robbery but submitted only one to the jury, and the conviction on that count was not appealed, State not permitted to retry on the two abandoned counts). But the general rule applies only if the State obtains a valid conviction in the first trial. "Although not necessarily articulated the reason for that rule is that when the State obtains a conviction for one offense out of two or more alleged in a single indictment, jeopardy has been terminated." Ex parte McAfee, 761

S.W.2d 771, 773 (Tex. Crim. App. 1988). Texas recognizes, as we do, that jeopardy has not terminated when criminal proceedings against an accused have not run their full course. McAfee, 761 S.W.2d at 773, Under McAfee and Lewis, as well as Ball, Wright's jeopardy on the single count of murder has not terminated because his conviction was reversed. This result is unaffected by the State's failure to formally preserve the intentional murder theory for a later trial.

In summary, Wright has never been acquitted, not even implicitly, for the 1993 murder. Now that he has obtained vacation of his second degree murder conviction based upon that killing, traditional double jeopardy analysis holds that the slate is wiped clean. The State may try again to establish his culpability. Under the Double Jeopardy Clause, the State's failure to request an intentional murder instruction in Wright's 1993 trial has no effect on the State's ability to proceed on that alternative now.

Aside from his double jeopardy argument, Wright also invokes the protection supplied by the court rules on mandatory joinder and speedy trial. The joinder rule, CrR 4.3.1, is a rule of pretrial procedure mandating consolidation of related offenses for trial. CrR 4.3.1(b)(3), the rule cited by Wright below, permits dismissal of a charge when a defendant has already been tried for a related offense. The State claims that Wright waived his remedy under CrR 4.3.1(b)(3) when, at the first trial, he did not move for "consolidation" of the intentional murder charge with the felony murder charge.

But the problem is not lack of pretrial consolidation of related offenses. The problem is that only one of the consolidated offenses was submitted to the jury for deliberation. We are not inclined to stretch the mandatory joinder rule and its waiver exception to cover an end-of-trial problem, as it does not appear the rule was intended to govern anything but pretrial procedure.

In a situation where the mandatory joinder rule clearly does apply, this court has already held that the "ends of justice" exception to CrR 4.3.1(b)(3) permits the State to bring new charges of manslaughter against a defendant whose felony murder conviction was vacated as the result of Andress. State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004).<sup>5</sup> If CrR 4.3.1(b)(3) did apply in Wright's situation, we would follow Ramos and hold that dismissal of the intentional murder charge would defeat the ends of justice.

The speedy trial rule, CrR 3.3, sets strict time limits within which the State must bring a defendant to trial on a pending charge. Wright's claim of a speedy trial violation depends on his premise that the time for trial on the intentional murder charge began to run back in 1993 at the time of his original arraignment.

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<sup>5</sup> Wright misreads State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), when he claims it also stands generally for the proposition that double jeopardy prohibits refiling murder charges on remand following Andress. He quotes one sentence on this subject in Ramos: "Double jeopardy prohibits retrial on the original charges." Ramos, 124 Wn. App. at 338. The sentence refers to the particular facts in Ramos. The "original charges" against both defendants were charges of first-degree murder. Ramos, 124 Wn. App. At 336. They were convicted of second degree felony murder as a lesser included offense. Double jeopardy barred retrial for first degree murder because the jury verdict acquitted them on that charge both explicitly and implicitly.

But the time for trial calculation begins anew when an appellate court issues a mandate, or an order terminating a collateral proceeding such as Wright's. CrR 3.3(c)(2)(iv) and (v). And the computation of allowable time for trial of a pending charge "shall apply equally to all related charges." CrR 3.3(a)(5). Thus, the time for trial on the renewed prosecution for intentional murder charge began to run at the time of the order dismissing Wright's conviction for the related offense of felony murder. Wright's speedy trial argument is unfounded.

The order dismissing the second prosecution for intentional murder is reversed.

WE CONCUR:

Cox, CJ

Becker, J.

Columan, J.

