Impanelment of a second jury for sentencing purposes in defendant's case will not violate double jeopardy guarantees.

> Empanelling a second jury to sentence the defendant would not constitute double jeopardy. Dismissing the trial jury that determined guilt, over the defendant's objections, was not the functional equivalent of a mistrial. Jeopardy as to the death penalty did not attach when the jury was empanelled and sworn because, at that time, the jury had nothing to do with the sentencing decision. Dismissing the guilt-phase jury after it rendered its verdict was required by law.

The defendant claims that impaneling a second jury for sentencing purposes in his case would violate his right to be free from double jeopardy. Before the United States Supreme Court issued its opinion in *Ring v. Arizona*, __ U.S. __, 122 S.Ct. 2428 (2002), the defendant moved to have the "guilt-phase" jury determine his sentence before the jury was dismissed. The State opposed that motion; this Court denied the defendant's motion and dismissed the jury. The defendant now claims that jeopardy regarding his death sentence had attached at that point, and that the State took a chance by opposing his motion for jury sentencing. He argues that because there was no "manifest necessity" mandating dismissal of the first jury, impanelment of a second jury would violate principles of double jeopardy. This claim is without merit.

The Double Jeopardy Clause prohibits a state from placing a defendant in jeopardy twice for the same offense. *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (citing *Benton v. Maryland*, 395 U.S. 784 (1969)). This constitutional protection "unequivocally prohibits a second trial following an acquittal." *Arizona v. Washington*, 432 U.S. at 503.

Included in this right is “The valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him.” *Id*. It is this aspect of double jeopardy that is implicated when a trial judge declares a mistrial, which ends the proceedings before a verdict is reached. *United States v. Scott*, 437 U.S. 82, 92 (1978); *Crist v. Bretz*, 437 U.S. 28, 33-34 (1978).

The defendant claims that, when the trial court dismissed the jury that decided his guilt, over his objection, the dismissal was the equivalent of the declaration of a mistrial. The defendant argues that the impanelment of a new jury to determine his sentence will violate his right, guaranteed by the Double Jeopardy Clause, to have his trial completed before a particular tribunal. However, the defendant’s claim fails because it assumes that jeopardy attached regarding his death sentence at the time the original jury was impaneled, and that claim is unsupported in law or logic. Further, even if jeopardy had attached regarding the defendant’s sentence before the guilt-phase jury was dismissed, this Court dismissed that jury as a matter of “manifest necessity;” therefore impanelment of a second jury to determine the defendant’s sentence will not violate double jeopardy guarantees.

Jeopardy attaches in the trial context when the jury is selected and sworn. *Downum v. United States*, 372 U.S. 734, 736-38 (1963), *cited in Illinois v. Somerville*, 410 U.S. 458, 466-468 (1973). Double jeopardy guarantees have been held to apply to capital sentencing proceedings. *See Arizona v. Rumsey*, 467 U.S. 203, 209-211 (1984) (*citing Bullington v. Missouri*, 451 U.S. 430 (1981)). Unlike in the trial context, however, jeopardy concerning the death

penalty in the defendant's case did not attach at the time the guilt-phase jury was impaneled and sworn. This is because jeopardy only attaches when an accused is actually placed at risk of penalty or harm. *State v. Seefeldt*, 256 Wis.2d 410, __, 647 N.W. 2d 894, 901 (Wis. App. 2002). The defendant was not placed at risk of the *death penalty* when the original jury was sworn – he was only placed at risk for a *conviction for first-degree murder*. In other words, under the law at that time, the only issue before the jury was his guilt or innocence, not his sentence. The law did not provide for jury sentencing at that time. Jeopardy cannot attach for a charge or penalty that is not even before a jury at the time it is impaneled.

The sentencing phase of capital proceedings is viewed as a separate trial in itself, which can result in an acquittal or conviction of the death penalty, or it can result in mistrial. *Bullington* 451 U.S. at 444-446. Jeopardy regarding the death penalty for the defendant therefore must attach at the time the sentencing jury is empanelled and sworn. *See State ex rel. Carlile v. Frost*, 326 Or. 607, 613-15, 956 P.2d 202, 206-07 (1998) (stating that jeopardy attaches in capital sentencing proceedings when the penalty phase jury is empanelled and sworn).

Even if this Court should hold that jeopardy attached, for purposes of the death penalty in the defendant's case, when the original guilt-phase jury was impaneled and sworn, the defendant's claim that impanelment of a second jury to determine his sentence violates his right to be free from double jeopardy still must fail. Assuming *arguendo* that this Court's decision to dismiss the original jury after their verdicts, over the defendant's objection, constituted the equivalent

of the granting of a mistrial, the impanelment of a new jury will not violate the defendant's double jeopardy rights.

The defendant's right to have his case considered by a single tribunal, although included in his right to be free from double jeopardy, is not absolute. That right has been held to be subordinate at times "to the public's interest in fair trials designed to end in just judgments." *Washington*, 434 U.S. at 505, n.11 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Retrial is not automatically barred whenever circumstances compel discharge of a jury before the verdict. For example, retrial is not barred where a defendant requests or consents to a mistrial, unless the prosecutor engaged in conduct that was intended to achieve that result. *See Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982). Also, retrial is always permitted when the mistrial was granted due to a "manifest necessity." *Washington*, 434 U.S. at 505; *Kennedy*, 456 U.S. at 672.

The concept of "manifest necessity" under these circumstances does not require that a mistrial be "necessary" in the strictest sense of that word. Instead, there must exist a "high degree" of necessity for a mistrial. *Washington*, 434 U.S. at 506-07. A classic example of circumstances creating a "manifest necessity" for a mistrial is a case in which the jury is unable to reach a verdict. *Id*., 434 U.S. at 509 (citing *Downum v. United States*, 372 U.S. 734, 735-36 (1963)). "[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require a defendant to submit to a second trial." *Washington*, 434 U.S. at 509. This rule "accords recognition to society's interest

in giving the prosecution one complete opportunity to convict those who have violated its laws." *Id*.

This Court's decision to dismiss the guilt-phase jury in the defendant's case after their verdicts, over the defendant's objection, is analogous to a court's decision to dismiss a deadlocked jury and declare a mistrial. This Court rightfully dismissed the defendant's guilt-phase jurors from service after they rendered their verdicts,[1] under the law regarding the imposition of the death penalty as it existed at that time. The defendant's guilt-phase jurors were not able to render a decision regarding the defendant's sentence, because that issue could not be legally put before them at that time.

Like dismissal of a deadlocked jury, dismissal of the defendant's guilt-phase jury after it rendered its verdict was a "manifest necessity;" in fact, the law required the trial court to dismiss the jury. The fact that the law regarding the jury's role in capital sentencing proceedings has since been changed as a result of *Ring*, does not demonstrate that this Court was not required to follow the law as it existed at the time of the defendant's conviction. Thus, impanelment of a second jury for purposes of determining the defendant's sentence is not barred by principles of double jeopardy. *See State v. Storey*, 40 S.W.3d 898, 914-15 (Mo. 2001) (impanelment of a new capital sentencing jury after remand, which finds aggravating circumstances in addition to those found to exist by prior sentencing juries, did not offend double jeopardy guarantees).

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[1] The jurors rendered their verdicts in this case on September 26, 2001.

In *State ex rel. Neely v*. *Sherrill [Segelson]*, 168 Ariz. 469, 815 P.2d 396 (1991), the Arizona Supreme Court discussed the exceptions to a defendant's right, as guaranteed by his right to be free from double jeopardy, to have his trial completed before a single tribunal. In that case, the defendant had absconded during trial. *Id*. at 470, 815 P.2d at 397. During deliberations, the State requested that the court dismiss the jury after its verdict and to impanel a second jury to determine the defendant's prior convictions after he was apprehended. *Id.* at 470-71, 815 P.2d at 397-98. The State argued that the defendant's absence prevented it from proving the priors because the State needed the defendant's fingerprints to prove those priors. *Id*. at 471, 815 P.2d at 398. The trial court granted the State's motion, over defense counsel's objection, and discharged the jury after it rendered its verdict on the charged offense. *Id*. After the defendant was apprehended, the court reversed its prior ruling, and refused to allow the State to prove the priors before a second jury. *Id.* The State petitioned for special action.

The *Segelson* Court held that impaneling a second jury to decide the defendant's prior convictions would not violate his right to be free from double jeopardy. Citing *Wade*, 336 U.S. at 689, and *Washington*, 434 U.S. at 503, n. 11, the Court reasoned that defendant's right to have his trial completed before a single tribunal was limited. *Segelson*, 168 Ariz. at 473, 815 P.2d at 400. The Court stated that impaneling a second jury to determine the enhancements in that case would not violate double jeopardy guarantees because, under the circumstances presented, "[t]he State is not attempting to take two bites of the

apple by trying twice to prove defendants' prior convictions. … [I]t simply requests the proceeding to which it is entitled – *a* trial in which it would have *one* chance to prove the prior convictions." *Id*. at 474, 815 P.2d at 401. The court held that allowing the State one chance to conduct proceedings to which it was entitled did not implicate principles of double jeopardy.

Similarly, impaneling a jury to decide the defendant's sentence would not constitute giving the State another bite at the sentencing apple. The law did not provide the State an opportunity to present that issue to the defendant's first jury, despite the fact that the defendant requested that the court do so. Impanelment of a second jury simply would not violate the defendant's right to be free from double jeopardy. Therefore, the State asks this Court to deny the defendant's motion to dismiss.

See recent case law — *State v. Anderson*, 210 Ariz. 327, 347-348, 111 P.3d 369, 389-390 (2005) (defendant is not constitutionally entitled to have aggravation and penalty issues decided by same jury that decided guilt).