

1           **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** \_\_\_\_\_

3 **Filing Date: May 15, 2017**

4 **NO. S-1-SC-35881**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **CLIVE PHILLIPS,**

9           Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 David Williams, District Judge

12 The Hastings Law Firm

13 Mark A. Earnest

14 Albuquerque, NM

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18 for Appellant

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21 Santa Fe, NM

22 for Appellee

1 **OPINION**

2 **CHÁVEZ, Justice.**

3 {1} This case addresses the procedure for determining whether a jury is  
4 deadlocked. A jury is deadlocked or “hung” on a crime when the jurors cannot  
5 unanimously agree on a verdict of guilty or not guilty for that crime. If the jury is  
6 deadlocked on a crime, the defendant may be retried for that crime without violating  
7 constitutional protections against double jeopardy. Conversely, double jeopardy  
8 protections prevent a retrial when the jury has rendered a verdict. It follows from  
9 these basic precepts that when a jury is unable to reach unanimous agreement on an  
10 open count with lesser included offenses, the judge must poll the jury and clearly  
11 establish on the record on which offense in the count the jury was deadlocked. The  
12 defendant may be retried on the offense on which the jury was deadlocked and any  
13 lesser included offenses. Importantly, the judge must confirm that the jury did not  
14 unanimously agree that the defendant was not guilty of one or more of the included  
15 offenses because the constitutional protection against double jeopardy precludes the  
16 State from prosecuting the defendant for such offense(s) since the jury’s unanimous  
17 agreement on a verdict of not guilty constitutes an acquittal. If the judge fails to  
18 clearly establish on the record the offense(s) on which the jury was deadlocked, all  
19 but the lowest offense must be dismissed and the dismissed offense(s) cannot be

1 retried.

2 {2} In this case, the jury announced that it was hung on Count 1, which required  
3 it to consider whether Defendant Clive Phillips was guilty of first-degree  
4 premeditated murder, second-degree murder, or voluntary manslaughter. The district  
5 court then polled the jurors. During the poll, seven jurors stated that the jury had  
6 unanimously agreed Phillips was not guilty of first-degree murder, but five jurors  
7 indicated the jury was unable to reach a verdict on that crime. The only verdict form  
8 given to the jury that exclusively referred to first-degree murder was the guilty verdict  
9 form, so there is no written record of whether the jury had acquitted Phillips of that  
10 crime or deadlocked during deliberations. The district court determined that the jury  
11 was hung on first-degree murder. We hold that the judge failed to clearly establish  
12 on the record whether the jury deadlocked on first-degree murder, and therefore  
13 Phillips can only be retried on the lowest offense in Count 1, which is voluntary  
14 manslaughter. We reverse the district court and remand to dismiss the first- and  
15 second-degree murder charges with prejudice.

16 **BACKGROUND**

17 {3} Phillips shot his former girlfriend and shot and killed his friend after  
18 discovering them in bed together at the home they all shared. The State prosecuted

1 Phillips for a number of crimes, and seven counts were submitted to the jury after  
2 trial, including Count 1, which contained the crimes of first-degree murder, second-  
3 degree murder, and manslaughter. The jurors did not enter a verdict on Count 1.

4 {4} To resolve Count 1, the jury had the option of entering a verdict finding  
5 Phillips guilty of first-degree murder, second-degree murder, or voluntary  
6 manslaughter, or a verdict finding him not guilty of all three crimes. Because second-  
7 degree murder is a lesser included offense of first-degree murder, and voluntary  
8 manslaughter is a lesser included offense of both first- and second-degree murder, the  
9 model jury instruction used in this case requires jurors to individually consider each  
10 greater offense before considering a lesser offense. *See* UJI 14-6012 NMRA; UJI 14-  
11 250 NMRA. Under the model jury instruction, the jurors first must determine  
12 whether they unanimously agree that the defendant is guilty of first-degree murder.  
13 UJI 14-250. If they agree that the defendant is guilty, the jury enters a guilty verdict  
14 for first-degree murder and does not need to consider second-degree murder or  
15 voluntary manslaughter. *Id.* If not, after reasonable deliberation, the jurors must then  
16 consider second-degree murder. *Id.* The jurors follow the same procedure with  
17 respect to second-degree murder and only consider voluntary manslaughter if they  
18 cannot unanimously agree that the defendant was guilty of second-degree murder.

1 *Id.*

2 {5} If the jurors unanimously determine that there is reasonable doubt that the  
3 defendant committed any one of the aforementioned crimes, their verdict must be that  
4 the defendant is not guilty of that crime. *Id.* The jury in this case was not provided  
5 with a “not guilty” verdict form for each crime. Thus, if the jurors unanimously  
6 agreed that Phillips was not guilty of first-degree murder, they had no verdict form  
7 on which to indicate an acquittal on that specific crime because the only “not guilty”  
8 verdict form available to the jury on Count 1 required the jury to unanimously find  
9 Phillips not guilty of all three crimes.

10 {6} If the jurors cannot unanimously agree on any verdict for a count with lesser  
11 included offenses such as Count 1 in this case, the trial court must poll the jurors,  
12 beginning with the greatest offense, to determine whether they unanimously found  
13 the defendant not guilty of any individual offense within the count. Rule 5-611(D)  
14 NMRA. If the jury has unanimously found a defendant not guilty of any offense  
15 within the count, the trial court is required to enter a verdict of not guilty for the  
16 offense and for any greater degree of the offense. *Id.*

17 {7} The jurors in this case deliberated for three days. On the second day of  
18 deliberations, the jurors sent a note to the court indicating that some jurors believed

1 that Phillips was guilty of second-degree murder because the State had proved that  
2 there was no sufficient provocation, and therefore those jurors were forced to vote  
3 against manslaughter. The note also indicated that the jurors agreed on all other  
4 elements of both offenses and asked the court for guidance on how to proceed. The  
5 note did not mention whether the jurors had voted to acquit Phillips or were  
6 deadlocked on first-degree murder. The court replied that the jurors had been “given  
7 all the procedural instructions.” The jury continued to deliberate.

8 {8} On the third day, after approximately six additional hours of deliberations, the  
9 jury sent a note to the court reading: “What does it mean if we don’t sign any of the  
10 papers on Count 1? We are hung.” Concerning Count 1, the jury only received four  
11 papers for signature. The first was a verdict, which read “We find the defendant  
12 guilty of first degree murder by a deliberate killing as charged in Count 1.” The  
13 second was a verdict, which read “We find the defendant guilty of second degree  
14 murder an included offense of Count 1.” The third was a verdict, which read “We  
15 find the defendant guilty of voluntary manslaughter an included offense of Count 1.”  
16 The fourth and last was a verdict, which read “We find the defendant not guilty of  
17 Count 1.”

18 {9} Later that afternoon, the court called in the jury, and a juror informed the court

1 that the jurors had not reached a verdict on Count 1 and that they would not reach a  
2 verdict, even with more time to deliberate. With respect to the charges in Count 1,  
3 the court asked “so as to none of them, you could not reach an agreement?” to which  
4 the juror responded “No,” which the court—despite the form of the  
5 question—interpreted to mean that the jurors could not reach an agreement. A jury  
6 poll was therefore required by Rule 5-611(D) to determine whether the jury had  
7 unanimously voted not guilty as to any offense included within Count 1.

8 {10} The district court polled the jurors to “inquire whether the jury ha[d] truly  
9 deadlocked on the greater offense of first-degree murder.” As the court began its  
10 polling, the following colloquy ensued:

11 THE COURT: I need to ask each and every one of you the  
12 question as to whether you have truly deadlocked on the greater offense  
13 of first-degree murder. I will start with you, Mr. Ashe.

14 THE JUROR: So I don't understand how the—

15 THE COURT: Yes or no, whether you were deadlocked with  
16 regards to the greater offense of first-degree murder. You cannot reach  
17 a decision as to that charge?

18 THE JUROR: And the word “deadlock” meaning?

19 THE COURT: That you unanimously could not reach a decision  
20 with your fellow jurors as to that charge.

21 THE JUROR: I hate to say the wrong thing, but I believe we did

1 reach a decision, and we went down to the next charge; is that correct?

2 THE COURT: So with regards to first-degree, you were not  
3 deadlocked with first-degree?

4 THE JUROR: No.

5 THE COURT: I'm asking you, Mr. Ashe.

6 THE JUROR: No.

7 The second juror also indicated that the jury was not deadlocked. The third juror  
8 initially responded to the question of whether the jury was deadlocked on first-degree  
9 murder with "I thought we were," but eventually said no. The next three jurors also  
10 answered no.

11 {11} The seventh juror sought further clarification:

12 THE JUROR: Can I ask a question? I mean, deadlocked meaning  
13 we couldn't agree?

14 THE COURT: Correct. You could not arrive at a verdict.

15 THE JUROR: Then, yes, we were deadlocked.

16 The next four jurors also answered yes to indicate that the jury was deadlocked on  
17 first-degree murder. The twelfth juror responded no to the same question. Thus,  
18 seven jurors indicated that the jury agreed on first-degree murder, which could only  
19 mean that the jury had agreed that Phillips was not guilty of that crime, but five jurors



1 indicated that the jury was deadlocked. However, those five jurors indicated that they  
2 were deadlocked immediately after being told that “deadlocked” meant they could not  
3 agree on a *verdict*. Because the only verdict form offered to the jury for first-degree  
4 murder was a guilty verdict form, these five jurors could have answered “yes” to  
5 reflect that the jury could not agree to enter *that* verdict—finding Phillips guilty of  
6 first-degree murder. If this is what the five jurors meant by their answers, these  
7 answers could be consistent with the other seven jurors seemingly saying that the jury  
8 agreed that Phillips was not guilty of first-degree murder, for which there was no  
9 verdict form. Yet another reasonable interpretation of the answers from those five  
10 jurors is that the jury could not agree that Phillips was either guilty or not guilty of  
11 first-degree murder and was therefore hung on that crime.

12 {12} Despite the jurors’ apparent inability to agree on whether they had disagreed,  
13 the district court declared that the jury was “split” and “in complete disagreement”  
14 on first-degree murder. Defense counsel astutely argued that the jurors’ conflicting  
15 answers indicated that they were confused about the question, and therefore she urged  
16 the court to clarify the jury’s resolution of the first-degree murder charge. The court  
17 responded that it had asked a yes-or-no question and could not clarify the jurors’  
18 responses any further, then declared a mistrial and reserved the State’s right to retry

1 Phillips on every crime in Count 1: first-degree murder, second-degree murder, and  
2 voluntary manslaughter.

3 {13} Phillips brought a motion to dismiss the first- and second-degree murder  
4 charges on double jeopardy grounds, arguing that the district court had not  
5 established a clear record of whether the jury had deadlocked on first- and second-  
6 degree murder due to the jurors' ambiguous responses during the jury poll. The  
7 district court denied his motion and held that the jury poll demonstrated that the jurors  
8 were hung on first-degree murder, and accordingly there was manifest necessity for  
9 the court's declaration of a mistrial as to every crime within Count 1. Phillips  
10 appealed to this Court to challenge the district court's denial of his motion to dismiss.

### 11 **DISCUSSION**

12 {14} The sole legal issue in this case is whether the district court abused its  
13 discretion by determining that the jurors were hung on first-degree murder based on  
14 the jury poll. *See State v. Wardlow*, 1981-NMSC-029, ¶ 13, 95 N.M. 585, 624 P.2d  
15 527 (applying an abuse of discretion standard to the trial court's determination that  
16 there was no reasonable possibility that the jury could agree on a verdict). When  
17 jurors are polled regarding their verdict, the trial court is under a nondiscretionary  
18 duty to clarify any ambiguity in the jurors' responses and obtain a clear and

1 unambiguous response from the jury, beginning with the highest offense included in  
2 the count. *See State v. Holloway*, 1987-NMCA-090, ¶¶ 13, 16, 106 N.M. 161, 740  
3 P.2d 711 (“The responsibility for preserving the right to a voluntary and unanimous  
4 verdict rests primarily on the trial court. . . . Where a juror’s response indicates  
5 uncertainty concerning unanimity, a jury poll requires exploration of the uncertainty  
6 or dissent.” (citations omitted)). The responses from the jurors in this case were  
7 ambiguous because some jurors indicated that the jury had reached a unanimous  
8 agreement on the charge of first-degree murder, while others stated that the jury could  
9 not unanimously agree to enter a verdict for the same charge. The jurors should have  
10 given uniform answers as to whether they unanimously agreed on the charge or could  
11 not agree. Their conflicting answers indubitably demonstrated confusion with the  
12 district court’s question.

13 {15} In the face of juror confusion, the district court possessed significant discretion  
14 to undertake “proper remedial measures” to clarify the jurors’ ambiguous responses.  
15 *Id.* ¶ 17. For example, the district court could have explained that the term  
16 “deadlocked” means that the jury could not unanimously agree that Phillips either was  
17 or was not guilty of first-degree murder, and then it could have re-pollled the jury. In  
18 the alternative, the court could have requested not guilty verdict forms for each crime,

1 submitted all verdict forms to the jury, and could then have directed the jurors to  
2 retire for further deliberations to determine whether they unanimously agreed on a  
3 verdict for any of the crimes. Rule 5-611(E). We do not intend to imply that these  
4 were the only methods available to the district court for clarifying the jurors’  
5 ambiguous responses during its polling of the jurors.

6 {16} However, the district court did not have the option of taking the action it did  
7 in this case. Without establishing a clear record indicating the crimes on which the  
8 jurors had failed to reach a unanimous verdict, it was an abuse of discretion for the  
9 court to conclude that the jury was hung and that there was manifest necessity  
10 justifying a mistrial on all of the crimes in Count 1. *See Holloway*, 1987-NMCA-090,  
11 ¶ 17 (“This discretion, and the action taken by the [trial] court, . . . must resolve any  
12 doubt concerning the unanimity of a verdict. . . . [T]he verdict should be definite in  
13 nature and devoid of any ambiguity.”).

14 {17} We have long held that in cases such as this where the record is “silent upon  
15 which, if any, of the specific included offenses the jury had agreed and upon which  
16 the jury had reached an impasse,” we must “resolve any doubt in favor of the liberty  
17 of the citizen” and “dismiss[] upon double jeopardy grounds . . . such offenses on  
18 which the record is unclear.” *State v. Castrillo*, 1977-NMSC-059, ¶ 14, 90 N.M. 608,

1 566 P.2d 1146.<sup>1</sup> In *Castrillo*, the defendant was tried by a jury on first-degree murder  
2 with second-degree murder and voluntary manslaughter as the lesser included  
3 offenses. *Id.* ¶ 1. The foreman announced that the jury was deadlocked and that there  
4 was no purpose in continuing to deliberate. *Id.* ¶ 14. The judge declared a mistrial  
5 and then asked the foreman for a numerical split. *Id.* The foreman indicated that the  
6 split was nine for acquittal, and responded “Yes” when the judge asked, “Nine for  
7 acquittal and three for *some degree of conviction*?” *Id.* (emphasis added). The phrase  
8 “some degree of conviction” did not clearly establish upon which of the three  
9 crimes—first-degree murder, second-degree murder, or voluntary manslaughter—the  
10 jury was deadlocked. *Id.* ¶¶ 1, 14. The *Castrillo* Court noted that the lack of a clear  
11 record as to whether the jurors disagreed on first- or second-degree murder  
12 demonstrated no manifest necessity to declare a mistrial, and therefore jeopardy  
13 attached to those crimes and precluded the State from seeking a retrial. *Id.* ¶ 14.  
14 However, the defendant in *Castrillo* could be retried on the least included offense,  
15 voluntary manslaughter, because the jury would not have been hung had it reached  
16 a unanimous decision on manslaughter—it would have instead entered an acquittal

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17 <sup>1</sup>Although in *Wardlow* this Court stated that *Castrillo* was overruled to the  
18 extent that it was inconsistent with *Wardlow*, we now clarify that we perceive no  
19 inconsistency between those cases. *Wardlow*, 1981-NMSC-029, ¶ 15.

1 on the entire count. *Id.*; see also *State v. Garcia*, 2005-NMCA-042, ¶ 22, 137 N.M.  
2 315, 110 P.3d 531 (noting that “it would appear to be logically inconsistent, if not a  
3 logical impossibility” for a jury to simultaneously deadlock on a greater offense and  
4 acquit on a lesser included offense).

5 {18} The same principle applies here because the district court in this case failed to  
6 create a clear record “as to which of the included offenses the jury was considering  
7 at the time of its discharge.” *Castrillo*, 1977-NMSC-059, ¶ 14. This case presents  
8 an interesting wrinkle because the jury’s note during the second day of deliberations  
9 demonstrates that at that point in the deliberations it was hung on second-degree  
10 murder. However, the note merely provides a snapshot of the jury’s thinking partway  
11 through deliberations and does not give a definitive answer as to its final disposition  
12 of each crime within Count 1. See *Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir.  
13 2011) (“Because of the significance of the entire deliberative process, the jurors’  
14 preliminary votes in the jury room do not constitute a final verdict, even if they are  
15 unanimous. Instead, the verdict must be rendered by the jury in open court and  
16 accepted by the court in order to become final.” (citations omitted)). Indeed, the  
17 jury’s note would not be sufficient even if it had been sent to the court on the same  
18 afternoon as the jury poll because once the court conducted the jury poll, the results

1 of that poll were the ultimate expression of the jury's verdict at the time of its  
2 discharge. *See Holloway*, 1987-NMCA-090, ¶ 23 (holding that the results of a jury  
3 poll superceded any contrary verdict determined in the jury room because jurors are  
4 free to change their votes and register dissent to a previously announced verdict  
5 during the jury poll). Here there was no clear record of the jury's decision at the time  
6 of its discharge. Thus, constitutional double jeopardy protections bar retrial on the  
7 first- and second-degree murder charges, but jeopardy has not attached to voluntary  
8 manslaughter, and the State may retry Phillips for that lesser included offense.

#### 9 **CONCLUSION**

10 {19} Because the district court failed to clarify the ambiguous and conflicting jurors'  
11 responses during the jury poll, we vacate the district court's order denying Phillips'  
12 motion to dismiss the charges of first- and second-degree murder and remand the case  
13 to the district court with instructions to dismiss those charges with prejudice.

14 {20} **IT IS SO ORDERED.**

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**EDWARD L. CHÁVEZ, Justice**

1 **WE CONCUR:**

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3 **CHARLES W. DANIELS, Chief Justice**

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5 **PETRA JIMENEZ MAES, Justice**

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7 \_\_\_\_\_  
7 **BARBARA J. VIGIL, Justice**

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9 **JUDITH K. NAKAMURA, Justice**