IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Appellate Case No.:2015-002171

Troy Stevenson...Appellant

v.

State of South Carolina...Respondent

INITIAL BRIEF OF APPELLANT

Aimee J. Zmroczek, Esq.
A.J.Z. Law Firm, LLC
2003 Lincoln Street (29201)
P.O. Box 11961
Columbia, South Carolina 29211
(803) 400-1918 (telephone)
(803) 403-8005 (fax)
aimee@ajzlawfirm@gmail.com
Attorney for Appellant

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of Issues on Appeal 1

Standard of Review 1

Statement of the Case 2

Argument

I. THE PENDING RETRIAL CREATES AN ONGOING VIOLATION OF THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE AND THE APPELLANT'S MOTION FOR DISMISSAL OF THE INDICTMENTS WITH PREJUDICE SHOULD WAS IMPROPERLY DENIED BECAUSE JEPORDY ATTACHED.......... 7

II. APPELLANT'S MURDER TRIAL RESULTED IN MISTRIAL WHICH WAS OPPOSED BY DEFENDANT AND SHOULD NOT BE RETRIED BECAUSE DOUBLE JEOPARDY CLAUSE BARS THE SECOND TRIAL AS NO MANIFEST NECESSITY EXISTED TO GRANT MISTRIAL OVER DEFENDANT'S OBJECTIONS.......... 8

III. THE CONDUCT OR ALLEGED MISCONDUCT OF THE ALTERNATE JUROR DID NOT AFFECT THE DELIBERATING JURORS.......... 13

IV. THE RECORD REFLECTS THAT THE TRIAL COURT DID NOT CONSIDER ALL ALTERNATIVES AND EXERCISED SOUND DISCRETION IN DECIDING THE MISTRIAL WAS REQUIRED UNDER THE MANIFEST NECESSITY STANDARD... 16

Conclusion 17

Certificate of Service

TABLE OF AUTHORITIES

CASES:

Arizona v. Washington, 434 U.S. 497, 54 L.Ed. 2d 717, 98 S. Ct. 824, 831, 832 - 33 (1978) .... passim

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) 8

Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1972)..................... 11

Ex Parte Prince, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937)...................................... 7

Gilliam v. Foster, No. 95 - 2334, 1995 WL 444596 (4th Cir. July 28, 1995) 10

Gilliam v. Foster, 75 F.3d 881 (4th Cir. 1996), cert denied, 517 U.S. 1220, 116 S.Ct. 1849, 134 L.Ed.2d 950 (1996) .... passim

Gori v. United States, 367 U.S. 364, 6 L.Ed. 2d 901, 81 S. Ct. 1523 (1961) reh'g denied, 368 U.S. 870, 7 L.Ed. 2d 70, 82 S. Ct. 25 (1961) 9, 15, 16

Logan v. United States, 144 U.S. 263, 36 L.Ed. 429, 12 S. Ct. 617 (1892) 8, 9

State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (2010) 13, 14, 15

State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) 1, 12

State v. Bilton, 156 S.C. 324, 342, 153 S.E. 269, 276 (1930) .... 7, 10 - 11

State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999) 1, 11, 14

State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) 1, 17

State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) 1, 12

State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) 1, 12

State v. Ravencroft, 222 S.C. 139, 71 S.E.2d 798 (1952) 11

State v. Rowlands, 343 S.C. 454, 457 - 58, 539 S.E.2d 717, 719 (Ct. App. 2000) 1, 13

State v. Stephenson, 54 S.C. 234, 32 S.E. 305 (1898) 7

State v. Wasson, 299 S.C. 508, 509-10, 511, 386 S.E.2d 255, (1989) 14, 15

State v. Zeigler, 364 S.C. 94, 108, 109, 610 S.E.2d 859, 866, 867 (Ct.App. 2005) 11, 14

Simmons v. United States, 142 U.S. 148, 35 L.Ed. 968, 12 S. Ct. 171 (1891) 8

Thompson v. United States, 155 U.S. 271, 39 L.Ed. 145, 15 S. Ct. 73 (1894) 9

United States v. Jorn, 400 U.S. 470 (1971) 10

United States v. Perez, 22 U.S. 579, 9 Wheat. 579, 6 L.Ed. 165 (1824) 8

Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489 (2009) 14

UNITED STATES CONSTITUTION

Fifth Amendment .... passim

OTHER

Comment, "Double Jeopardy and Government Appeals of Criminal Dismissals," 52 Texas Law Review 303, 324 (1974) 16

Comment, "Mistrial and Double Jeopardy," 49 New York University Law Review 937, 942 (1974) 16

STATEMENT OF ISSUE ON APPEAL

I. Whether the Circuit Court erred in its decision to deny Appellant's motion to dismiss the indictments after its previous ruling to grant the state's motion for mistrial, over the objection of the defendants when it was not supported by manifest necessity.

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Cooper,* 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *State v. Beckham,* 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris,* 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." *State v. Patterson,* 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.' " *State v. Rowlands,* 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting *Gilliam v. Foster,* 75 F.3d 881, 895 (4th Cir.1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. *State v. Council,* 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

STATEMENT OF THE CASE

Troy Stevenson was set for retrial November 2, 2015, on matters that were tried in June 2015, which trial ended in a mistrial. A motion for a mistrial is, by its very nature, both an allegation of error and allegation of prejudice sufficient to warrant a mistrial. The pending retrial creates an ongoing violation of the Fifth Amendment's Double Jeopardy Clause and the indictments should be dismissed with prejudice.

INTRODUCTION

On July 1, 2013, in the early morning hours Kelly Hunnewell was shot and killed by two perpetrators at her work on Tommy Circle in Richland County. Police responded within minutes of the shooting they secured and processed the scene and collected several videos and swabs for DNA analysis. Law enforcement has not linked any of this forensic evidence to Troy Stevenson. A swab from the front of a large metal spoon held by the victim and used as a defensive weapon against her attackers yielded a mixture of at least three individuals from which the convicted co-defendants, Lorenzo Young and Trenton Barnes cannot be excluded. Additionally, video from the incident location were obtained, reviewed, and released to the media. Troy Stevenson appears on that video for less than one second as he has maintained from the time of his arrest he was going to retrieve his little brother, convicted co-defendant Trenton Barnes. On July 2, 2013, an informant told law enforcement that someone named "Troy" was bragging about the crime. The informant later identified as Donald Moore provided the police with what they believed at the time to be credible information to generate a search warrant for the homes of Troy Stevenson (and Trenton Barnes) and Lorenzo Young.[1]

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[1] DonaldMoore's credibility and competence have been called into question and will be Discussed later in the Motion.

On July 5, 2013, law enforcement executed the search warrants and Trenton Barnes, who was sixteen at the time, "voluntarily" went to Columbia Police Department and gave several statements where he implicated his brother Troy Stevenson as the shooter and identified himself as the "lookout."[2] Law enforcement obtained an arrest warrant for Troy Stevenson for Murder, Kidnapping, Attempted Armed Robbery, Burglary 2nd degree, Criminal Conspiracy, and Possession of a Weapon During the Commission of a violent crime. All six warrants were served on Troy Stevenson on July 5, 2013.[3]

On July 28, 2013, even though all three defendants waived their bond hearings[4], a hearing waiving the same was heard in front of Judge Clifton Newman who stated that any defendant could request a bond hearing at a later date with proper notice and filing.[5] The media was present and the victim's family was present. Troy Stevenson was brought to the courthouse but returned to the detention center without appearing in front of the Judge at the request of counsel.[6] Counsel filed a detailed discovery motion on July 15, 2013, and served the same on the solicitor's office. For the next two months counsel continuously requested discovery and finally on September 10, 2013, counsel filed a motion to compel production of discovery which was heard on September 18, 2013. Judge Lee ordered that if discovery was not received by September 27, 2013, than Troy Stevenson would receive a personal recognizance bond. Discovery was received on September 27, 2013, at 4:00 p.m. Counsel continued to request items

[2] This term has been consistently used by law enforcement since releasing the video to the media this is not the term or a term ever created or generated by Trenton Barnes.
[3] The State decided to proceed only on the Indictments of Murder, Attempted Armed Robbery, Kidnapping, and Burglary-Second degree-violent.
[4] Stevenson signed and filed his on July 25, but had verbally advised undersigned counsel that he was waiving his right to have bond set at that time.
[5] This case, as discussed in two different pending motions filed on the same date, has generated much publicity due to the fact that the victim was a single white woman and mother of four and that a co-defendant (Lorenzo Young) had requested a bond reduction for a previous pending case which was granted by Judge Lee earlier in 2013.
[6] Counsel believes that this was simply a way to parade the defendant in front of the media and further political agendas dealing with alleged gang violence in the Columbia area.

and discovery and provide information to assist the State in the proper arrests and convictions of the perpetrators of this crime. A preliminary hearing was held on November 25, 2014, and it was learned that there was much discovery missing. The indictments were true billed on February 20, 2104, 442 days after Troy Stevenson's arrest. Counsel sent a detailed letter requesting specific items of discovery and requesting to meet with the lead investigator on March 5, 2014. Troy Stevenson provided another interview March 24, 2014. On October 10, 2014, counsel received notice for trial of Stevenson and his two co-defendants to begin on October 27, 2014. After several pre-trial hearings which Stevenson counsel was not notified nor had an opportunity to question any witnesses, the trial was continued. On November 4, 2014, counsel received a filed reciprocal Rule 5 which was filed on November 3, 2014. Counsel complied by producing over 100 pages and her experts video on November 5, 2014. Stevenson met with Investigator Cambo Streeter of the Fifth Circuit Solicitor's office to reiterate his testimony at which time his counsel inquired about an offer similar to a federal proffer prior to his testifying which was not extended and Stevenson did not testify at the trial which proceeded against the two co-defendants on four of the indictments on November 10, 2014, ending on November 19, 2014, 494 days after the arrests of the defendants. Stevenson did not testify which caused several procedural problems for the State but felt that he could not do so without some protection since he was still facing the six indictments and life in prison. On April 29, 2015, after no communication regarding an offer or a trial date, Stevenson filed a Motion for Bond. This hearing was held in front of Judge Gee on May 5, 2015, 169 days after the completion of the trial of the co-defendants and 671 days after Stevenson's arrest. Judge Gee denied bond but stated that if the case were not tried or disposed of within 90 days that Stevenson could refile his request for bond. On June 10, 2015, there was an additional status conference wherein Judge Hood set the June 15, 2015, date as the trial date.

Counsel immediately went back to her office and requested additional funding for her private investigator to re-serve and locate the witnesses for trial.[7]

On June 11, 2015, at 4:28 p.m. counsel received the first plea offer in this case which was relayed on June 12, 2015. Counsel has not had adequate time to prepare her case for trial even though it is a two year old case, as this Court knows it is high profile and there is voluminous discovery and new discovery being provided as late as June 11, 2015.

Several pre-trial motions were filed and argued some specifically addressing concerns with seating a fair and impartial jury. (Trial Tr. 30-50) The request for change of venue and request for attorney conducted voir dire was denied as well as several other motions and the trial began June 15, 2015. (Trial Tr. 50) After a lengthy jury selection and several motions trial was set to begin on June 16, 2015. The court conducted an extended voir dire of the panel because of the nature and publicity of the case. (Trial Tr. 50-161) There were additional pretrial motions argued after the jury was released and cautioned about keeping an open mind. (Trial Tr. 161)

The Appellant had initially decided to plead guilty under *North Carolina v. Alford* when court resumed July 16, 2015. (Trial Tr. 209) The Appellant changed his mind during the plea colloquy and the jury was sworn in on June 16, 2015. (Trial Tr. 220) The Trial Judge routinely questioned the jurors upon their return from breaks about any influences even stating, "Part of the foundation of our system is us believing and trusting in jurors that they will follow the judge's instructions and do what they are supposed to do." (Trial Tr. 573) On June 18, 2015, there was a note from a juror regarding potential contact with a possible family member. (Trial Tr. 657) The issue was addressed and resolved and the trial continued.

[7] This is an additional basis for the continuance request as counsel has no more funding for these services and OID refuses to pay for services that have not been pre-approved. It should be noted that this and additional request for funding for the investigator have continuously been denied.

The case was given to the jury on June 22, 2015, at 4:19 p.m. (Trial Tr. 1245) The jury deliberated for just over an hour and sent a request for some specific evidence (a video compiled by the defense as well as the audio taped interviews between Troy Stevenson and Columbia Police Department agents. It was at that time that the Solicitor's office indicated that they had an issue with the alternate juror and there were discussions in chambers. At 5:24 p.m. the jurors were summoned to the court room and advised to stop deliberations. (Trial Tr. 1245)

The deliberating jurors were then questioned on the record individually in the presence of the Court, all trial counsel, the appellant, and the court reporter. (Trial Tr. 1245-1271) Each juror was questioned extensively and each stated that they could all be fair and impartial regardless of what the conduct and any statements of the alternate were. (Trial Tr. 1245-1271).

The court then allowed the State to place on the record their concerns with conduct "someone" in their office witnessed immediately after being released in regards to an alternate juror.[8] It is unclear, unaddressed, and unexplained as to why the State chose to wait an hour before drawing this to the attention to the court. Trial Counsel for the Appellant was allowed to make arguments and Appellant's position clear (vehemently denying the Court grant the State's request for a mistrial) on the record including submitting case law. (Trial Tr. 1274-1275)

The assistant solicitors were advised in chambers that if the Judge granted the mistrial that jeopardy had attached. Senior assistance solicitor Campbell asked for a moment to consult some unknown party and then advised the Judge that a mistrial is how they wanted to proceed. Defense counsel vehemently objected stating that all jurors testified under oath they could be fair and impartial and that this was not a manifest necessity requiring a mistrial under the law. (Trial Tr. 1278) Trial counsel for Appellant requested a curative instruction be given which was not

[8]As of the date of this submission the names of the people who witnessed behavior, which is still unclear as to what the behavior was, have not been released nor have they allowed to have been questioned regarding what they saw.

even entertained by the court. (Trial Tr. 1289) The mistrial was granted on June 22, 2015. The case was placed on the docket for October 19, 2015, and counsel requested a different date since she is in federal trial that week. The date was set for November 2, 2015, and Mr. Stevenson consented even though he was told he had to waive any right to bond. On October 12, 2015, Trial counsel for Appellant filed and argued a motion to dismiss the indictments. Trial Counsel and the State argued their positions and submitted case law. The court denied the motion, an order of the same was filed October 15, 2015. This appeal follows.

ARGUMENT

Defendant's murder trial resulted in mistrial which was opposed by defendant and should not be retried because double jeopardy clause bars the second trial as no manifest necessity existed to grant mistrial over defendant's objections.

I. THE PENDING RETRIAL CREATES AN ONGOING VIOLATION OF THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE AND THE APPELLANT'S MOTION FOR DISMISSAL OF THE INDICTMENTS WITH PREJUDICE WAS IMPROPERLY DENIED BECAUSE JEOPARDY ATTACHED.

It is unconstitutional to try the case of these indictments. "It is a rule of general recognition that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent Court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity or the verdict, if rendered, be set aside according to law." *Ex Parte Prince*, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937). Also see *State v. Bilton*, 156 S.C. 324, 153 S.E. 269 (1930) and *State v. Stephenson*, 54 S.C. 234, 32 S.E. 305 (1898). After jeopardy has attached, the termination of the trial without a verdict is equivalent to an acquittal and is a bar to a subsequent prosecution for the same offense. The termination has no such effect if it was consented to by the defendant, or was justified by

"manifest necessity." The theory of former jeopardy presupposes the imposition of the adjudicatory gauntlet only once when one is accused of a crime. This guarantee consists of three separate constitutional safeguards: (1) protection from prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection from multiple prosecutions for the same offense after an improvidently granted mistrial. Trial court even goes as far as to rely on the denial of the motion as some sort of preemptive post-conviction relief protect, a basis which trial counsel rejects. (Hrg. Tr. 12) The safeguards derive their constitutional proportion through Article 1, Section 12 of the South Carolina Constitution and the Fifth Amendment of the United States Constitution made applicable to the states through the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

II. APPELLANT'S MURDER TRIAL RESULTED IN MISTRIAL WHICH WAS OPPOSED BY DEFENDANT AND SHOULD NOT BE RETRIED BECAUSE DOUBLE JEOPARDY CLAUSE BARS THE SECOND TRIAL AS NO MANIFEST NECESSITY EXISTED TO GRANT MISTRIAL OVER DEFENDANT'S OBJECTIONS.

In 1824, in *United States v. Perez*, the Supreme Court recognized that "the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579, 9 Wheat. 579, 6 L. Ed. 165 (1824). The key term of art in this statement was "manifest necessity." If no "manifest necessity" existed at the time the jury was discharged, reprosecution of the accused would violate the protection against double jeopardy. *Id.* ; *see also Simmons v. United States*, 142 U.S. 148, 35 L. Ed. 968, 12 S. Ct. 171 (1891); *Logan v. United*

States, 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617 (1892); *Thompson v. United States*, 155 U.S. 271, 39 L. Ed. 146, 15 S. Ct. 73 (1894).

A "manifest necessity" may be found however, notwithstanding the fact that the trial court did not invoke this phrase in granting the mistrial. In *Gori v. United States*, the Court manifested a strong predilection to sustain the decision of the trial judge in declaring a mistrial when done "in the sole interest of the defendant," even when such was not the only or even the wisest alternative available to the court. *Gori v. United States*, 367 U.S. 364, 6 L. Ed. 2d 901, 81 S. Ct. 1523 (1961), reh'g denied, 368 U.S. 870, 7 L. Ed. 2d 70, 82 S. Ct. 25 (1961). The trial judge's decision to grant the state's motion for mistrial, over the objection of the defendants was not exercised in sound discretion, and reprosecution of the case is a violation of double jeopardy. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed2d 717, 98 S.Ct. 824 (1978), one of the leading cases on double jeopardy, requires that the record reflect that the trial judge exercised "sound discretion" in declaring a mistrial. 434 U.S. at 514. In *Arizona* both the prosecutor and the trial judge expressed their concern about the potential double jeopardy problem. *Id.* at 501, n.5. Among the various reasons propounded by the state to justify a finding of manifest necessity for declaration of the mistrial are the jury was tainted by the actions of this alternate juror. This is clearly not supported by the record. The record must reflect that the trial court considered all alternatives and exercised sound discretion in deciding the mistrial was required under the manifest necessity standard. Counsel asserts that once this record is reviewed, any Court will find that the trial judge did not exercise sound discretion in granting the mistrial. As the District Court found in *Gilliam v. Foster*, 75 F.3d at 881, 904 (4th Cir.1996), counsel is concerned that the trial judge may have acted "precipitately in response to the prosecutor's request for a mistrial." *Arizona v. Washington*, 434 U.S. at 515. Unlike the trial judge's procedure approved

by the Supreme Court in *Arizona v. Washington*, the trial judge in this case did not "evinc[e] a concern for the possible double jeopardy consequences of an erroneous ruling." *Id.* Indeed, there were several candid and informed discussions off the record in the Trial Judge's chambers about Defendant's constitutional rights, the record contains no indication that the trial judge was aware that the Defendant's constitutional rights against double jeopardy might be implicated by his ruling. Counsel asserts that the state trial judge acted without any rational justification in granting a mistrial. *Gilliam v. Foster,* No. 95-2334, 1995 WL 444596 (4th Cir. July 28, 1995) (en banc).

A mistrial granted over the defendant's objection prevents reprosecution of the defendants unless there was "manifest necessity" for the mistrial and protects the defendants from having to endure the process of more than one trial. *Arizona v. Washington*, 434 U.S. 497 (1978). The prosecution bears the burden of proving manifest necessity for the mistrial, and that burden is a "heavy one." *Id.* at 505. While the trial judge's determination in such circumstances "is entitled to special respect," that deference is not absolute. *Id.* at 513-14. The record must reflect that the trial court's decision to grant the mistrial "reflects the exercise of sound discretion." *Arizona v. Washington*, 434 U.S. at 514. "A judge cannot find that manifest necessity requires declaration of a mistrial 'until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.' " *United States v. Jorn*, 400 U.S. 470 at 485 (1971).

In *State v. Bilton*, supra, this Court cited and approved the following general authority: "The American cases hold generally that there must be a manifest necessity for the discharge of the jury and leave the Courts to determine in their discretion whether under all the circumstances of each case such necessity exists. When such necessity exists, a plea of former jeopardy will not

prevail on a subsequent trial. But if the jury are discharged without defendant's consent for a reason legally insufficient and without an absolute necessity for it, the discharge is equivalent to an acquittal and may be pleaded as a bar to a subsequent indictment." 156 S.C. at 342, 153 S.E. at 276. *See also State v. Ravencraft*, 222 S.C. 139, 71 S.E.2d 798 (1952).[9]

The relevant record to be reviewed here are the questioning of the jurors in camera and the arguments in which the mistrial motion was made by the state.

Inadvertent mistakes happen in trials. There are no perfect trials. *See, Brown v. United States*, 411 U.S. 223, 232, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1972). In order to establish manifest necessity for a mistrial, the burden is on the state to show that the error was improper and prejudicial and that it created juror bias or impartiality. *Arizona v. Washington*, at 505, 510, 511. There is no reasonable basis to conclude that the jurors in this case were improperly biased or that the trial was rendered fundamentally unfair by the alleged conduct of an alternate who had been dismissed and was in no way a part of the deliberations.

"In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). However, "[u]nless the misconduct affects the jury's impartiality; it is not such misconduct as will affect the verdict." *Id.* "The general test for evaluating alleged juror misconduct is whether or not there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence." *State v. Zeigler,* 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct.App.2005).

Whether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial court. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.

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[9] *State v. Kirby,* 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977)

Arizona v. Washington, 434 U.S. at 506, 98 S.Ct. at 831. And, while manifest necessity for a mistrial does not require that a mistrial be "necessary" in the strictest sense of the word, it does require a high degree of necessity. *Arizona v. Washington,* 434 U.S. at 506, 98 S.Ct. at 831. Perhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict. *Id.* at 509, 98 S.Ct. at 832. At the other extreme are situations in which a prosecuting attorney seeks a mistrial in order to have additional time to marshal evidence to strengthen the case against the defendant. *Id.* at 508, 98 S.Ct. at 831–32. Between these two extremes exists a spectrum of trial errors and other difficulties, some creating manifest necessity for a mistrial and others falling far short of justifying a mistrial. *See id.* at 510, 98 S.Ct. at 832–33.

The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *State v. Beckham,* 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris,* 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." *State v. Patterson,* 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.' " *State v. Rowlands,* 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting *Gilliam v. Foster,* 75 F.3d 881, 895 (4th Cir.1996)).

III. THE CONDUCT OR ALLEGED MISCONDUCT OF THE ALTERNATE JUROR DID NOT AFFECT THE DELIBERATING JURORS.

The South Carolina Supreme Court in *State v. Bantan* had the opportunity to specifically address juror conduct. *State v. Bantan,* 387 S.C. 412, 692 S.E.2d 201 (2010). The facts in that case included after the jury began deliberations, the trial court received a note from the jury's foreperson with the following information:

> It has been brought to the jury's attention that one of the jurors has heard, quote unquote, something about these two guys being targeted by the police for an alleged bank robbery in Cameron, South Carolina. It is my concern that by hearing this comment, this juror may not be capable of providing an unbiased opinion based solely on the evidence. *Id.* at 421.

The trial court requested the jury stop its deliberations and conducted an on-the-record interview in chambers with the jury foreperson, Rosella Jones, and the juror involved, Mr. Gladden. Gladden apparently overheard a conversation at a gas station between two men he did not know. The men referenced generally a case going on at the courthouse. As the State argued at trial, this reference placed the State in a negative light. However, embedded in Gladden's statement is that Bantan was somehow linked to another crime: a fact prejudicial to him. After concluding the interviews in chambers, the trial court proceeded to question each juror and asked if he or she would be able to disavow Gladden's remark and render a verdict based solely on the evidence presented. *Id.* at 422. Each juror indicated he or she could do so. *Id.* Within the individual interviews, the trial court instructed each juror the comment had nothing to do with the trial whatsoever and suggested the juror write a note or tell the jury foreperson of any concerns with respect to his or her ability to disregard Gladden's remark. ***(emphasis added)***. Bantan moved for a mistrial, and the trial court denied the motion based on the interviews and its belief the jurors had credibly testified to their impartiality. The trial court then reminded the jury of its obligation to deliberate based solely on the evidence presented and deliberations resumed.

Id. While Bantan presented this issue as the erroneous admission of prior bad acts, it is really an issue of juror misconduct wherein a juror overheard and shared inappropriate information with his fellow jurors. *Id.* at 423. "In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." *State v. Cooper,* 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). However, "[u]nless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." *Id.* "The general test for evaluating alleged juror misconduct is whether or not there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence." *State v. Zeigler,* 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct.App.2005), see also *State v. Bantan,* 387 S.C. 412, 692 S.E.2d 201 (2010).

A defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct ... does not *ipso facto* justify the grant of a new trial; but in order that a new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors. *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.,* 384 S.C. 441, 447, 682 S.E.2d 489, 493 (2009) (quoting C.J.S. New Trial § 54 (1998)).

"Initially, the trial [court] must make a factual determination as to whether juror misconduct has occurred." *Zeigler,* 364 S.C. at 109, 610 S.E.2d at 867. If it has, the trial court must then determine whether the misconduct has improperly influenced the jury. *Id.*

In *State v. Wasson,* 299 S.C. 508, 509-10, 386 S.E.2d 255, 256 (1989), two jurors read a newspaper article about the case that referenced other similar criminal charges pending against the defendant. The two jurors mentioned the article to the other jurors after the jury had voted to convict. *Id.* at 510, 386 S.E.2d at 256. When this misconduct came to the trial court's attention, the court questioned the two jurors, who stated reading the article had not influenced their

deliberations. *Id.* The trial court polled the remainder of the jury who affirmed the verdict. *Id.* On appeal, the South Carolina Supreme Court concluded "[t]he trial [court] clearly satisfied any duty [it] had to insure the impartiality of the jury.... Only after the trial [court] was satisfied that the jury's verdict had been reached free from any outside influences, did it deny Wasson's motion for a mistrial." *Id.* at 511, 386 S.E.2d at 257.

Likewise, the trial court in *Bantan* interviewed the jurors and was satisfied each one could reach a fair and impartial verdict. *Id.* at 424. Although Gladden's comment was heard by more jurors and prior to the verdict, the comment itself was less prejudicial than the newspaper article because the comment was from a less reliable source and generally had negative overtones as to law enforcement's role in that case. "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so-called for the safeguard of the Fifth Amendment cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." *Gori v. United States*, 367 U.S. 364, 369, 6 L. Ed. 2d 901, 81 S. Ct. 1523 (1961), reh'g denied, 368 U.S. 870, 7 L. Ed. 2d 70, 82 S. Ct. 25 (1961).

"By placing primary emphasis on the fact that the mistrial had been declared for the sole benefit of the defendant, the Court in *Gori* greatly expanded the circumstances under which a trial judge would be permitted to declare a mistrial and be sure that the defendant could be reprosecuted." *Comment, "Mistrial and Double Jeopardy,"* 49 New York University Law Review 937, 942 (1974).

"*Gori* complicates efforts to devise a rational balancing test that recognizes and weighs all entrants. Proximity to the events at trial, upon which the majority based its assumption that the trial judge is better equipped to determine the necessity for a mistrial, may not facilitate an accurate evaluation of either the prosecutor's good faith in precipitating a mistrial or the prejudice of the defendant from losing his right to a determination by the first jury. Placing primary reliance on the trial judge's appraisal tips the scale against the defendant." *Comment, "Double Jeopardy and Government Appeals of Criminal Dismissals,"* 52 Texas Law Review 303, 324 (1974), *see also Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996), cert. denied, 517 U.S. 1220, 116 S. Ct. 1849, 134 L. Ed. 2d 950 (1996).

IV. THE RECORD REFLECTS THAT THE TRIAL COURT DID NOT CONSIDER ALL ALTERNATIVES AND EXERCISED SOUND DISCRETION IN DECIDING THE MISTRIAL WAS REQUIRED UNDER THE MANIFEST NECESSITY STANDARD.

Contrary to the state's argument, the trial judge did not consider the alternatives offered by the defense. While deference is to be given to the trial court that declared the mistrial, that discretion must still be exercised, and a reviewing court must satisfy itself that the trial judge exercised "sound discretion" in declaring the mistrial. The only way an appellate court can determine if discretion has been exercised is by a close examination of the record. The fact is that the record does reflect that the judge did not give true consideration to any alternatives offered by the defense (none was offered by the State) and precipitously declared a mistrial. True consideration of the alternatives included the judge to reflecting on, contemplating, thinking about carefully, deliberating conscientiously before making a decision. If there are reasonable alternatives available to cure the error, the court must exercise those alternatives to protect the defendants' valuable right to have the case decided by that jury. *Arizona v. Washington*, supra. The trial court should exhaust other methods to cure possible prejudice before aborting a trial.

State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). The trial judge did not acknowledge the defense's request for a curative instruction and gave no curative instruction.

CONCLUSION

The retrial of this defendant irretrievably and permanently deprives him of his constitutional right not to be forced to stand trial twice for the same offense. Because the double jeopardy clause is designed to protect a defendant not only from double conviction but also from being subjected twice to the trial process itself. The pending retrial creates an ongoing violation of the Fifth Amendment's Double Jeopardy Clause and the indictments should be dismissed with prejudice.

Respectfully Submitted,

Aimee L. Zmroczek, Esquire
A.J.Z. Law Firm, LLC
2003 Lincoln Street (29201)
Post Office Box 11961
Columbia, South Carolina 29211
(803) 400-1918 (telephone)
(803) 403-8005 (fax)
Attorney for the Appellant

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Columbia, South Carolina