No. _____

In The

Supreme Court of the United States

Demario Carman,
Petitioner,

v.

State of Georgia,
Respondent,

On Petition For A Writ of Certiorari
To The Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the protection against Double Jeopardy contained in the Fifth Amendment is an empty promise where determinations as to what is "manifest necessity" are based on the reasonableness of the trial court's actions rather than a true consideration of whether a mistrial was necessary?

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PETITION FOR WRIT OF CERTIORARI

Demario Carman respectfully petitions for a writ of certiorari to review the judgement of the Supreme Court of Georgia.

OPINIONS BELOW

The Georgia Supreme Court's opinion is reported at 815 S.E.2d 860.

JURISDICTION

The Georgia Supreme Court entered judgement on June 18, 2018. This Court has jurisdiction under 28 U.S.C.A. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in relevant part: "No person shall be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

The protection against Double Jeopardy contained within the Fifth Amendment is meaningless if not enforced by the courts. When this Court created the "manifest necessity" exception to the double jeopardy clause, it made clear that:

> *the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.*

United States v. Perez, 22 U.S. 579, 580, 6 L. Ed. 165 (1824). In 1963 this Court warned caution in exercising the manifest necessity exception lest it become abused through "unlimited, uncertain, and arbitrary judicial discretion." Downum v. United States, 372 U.S. 734, 738, 83 S. Ct. 1033, 1035–36, 10 L. Ed. 2d 100 (1963). The promise of caution and limitation in the application of this doctrine has been abandoned by the lower courts resulting in the exercise of "unlimited, uncertain, and arbitrary judicial discretion" and the uneven enforcement of the Constitution amongst jurisdictions. *Id.*

What constitutes "manifest necessity" in one jurisdiction often does not in another. This patchwork of interpretations creates unreliability in the enforcement of the double jeopardy clause. In the present case, the trial court's concerns regarding "the emotional health and ability to proceed of one of the two attorneys" and judicial economy became the paramount concern over the defendant's Fifth Amendment right against double jeopardy when the trial court, *sua sponte*, declared

a mistrial over the objections of the defense, the defendant himself and the prosecution. Carman v. State, 815 S.E.2d 860, 867 (Ga. 2018). Absent intervention by this Court, the Fifth Amendment will become an empty promise, and the plain meaning of "manifest necessity" will be lost.

STATEMENT OF THE CASE

1. The indictment in this action was returned on November 13, 2012, charging Demario Carman, Christopher Penson, Gerald Peterson and Otis Ricks with Participation in a Criminal Street Gang, Murder, Felony Murder, Armed Robbery, Aggravated Assault, Possession of a Firearm During Commission of a Felony, Possession of a Firearm During the Commission of a Felony, and Possession of a Firearm by a Convicted Felon.[1] On December 17, 2012, the State filed its *Notice of Intent to Seek the Death Penalty Against Demario Carman.*

2. After several weeks of jury selection, a Jury was sworn on October 24, 2014 and impaneled on November 17, 2014. Trial Tr. at 41:23-24. On November 19, 2018, one of the defendant's three attorneys had a family emergency. The trial court then declared a mistrial over objections of the defense, the

[1] All other codefendants have plead guilty and been sentenced, including the shooter, Otis Ricks.

defendant himself, and the prosecution, and the trial was terminated before a verdict was reached on November 19, 2014. Id. at 435:22-25.

3. Mr. Carman filed his *Plea of Former Jeopardy and Cruel and Unusual Punishment* on November 24, 2014. R. at 3485-3487. On January 13, 2015, the trial court denied Mr. Carman's *Plea of Former Jeopardy and Cruel and Unusual Punishment*. R. at 3639. A timely appeal to the Georgia Supreme Court followed on January 22, 2015. R. at 1.

4. The case was docketed, briefed and argued at the Georgia Supreme Court. On August 4, 2016, the case was remanded to the trial court because the record on appeal was incomplete as a result of omissions by the Fulton County Clerk of Superior Court and the court reporter. The case was re-docketed at the Georgia Supreme Court on December 7, 2017.

5. Mr. Carman argued that the trial court erred in denying Mr. Carman's plea in bar of former jeopardy in a capital case after declaring a mistrial *sua sponte* over the objection of both the defense and the State without manifest necessity.

6. The Georgia Supreme Court issued an opinion which affirmed the court below on June 18, 2018.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE CURRENT ITERATION OF THE "MANIFEST NECESSITY" EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE RUNS CONTRARY TO THE TEXT AND HISTORY OF THE RIGHTS GUARANTEED AGAINST DOUBLE JEOPARDY BY THE FIFTH AMENDMENT.

This Court explained in 1896:

> The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

Ball v. United States, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300 (1896). The federal guarantee against double jeopardy, along with the right to counsel, "represents a fundamental ideal in our constitutional heritage" and is enforceable in state proceedings through the Fourteenth Amendment to the United States Constitution. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707 (1969).

The fundamental basis of the constitutional guarantee against double jeopardy is :

> 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 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 v. U.S., 355 U.S. 184, 187-88, 78 S. Ct. 221, 61 (1957). The "continuing state of anxiety and insecurity" previously described is exacerbated, as here when the defendant is facing the possibility of a death sentence. Id. See, e.g., Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll").

A criminal defendant holds a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974 (1949). In light "of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar." Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L. Ed. 2d 717 (1978). Manifest necessity "stands as a command to trial judges not to foreclose the defendant's option 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" and requires the trial court to "take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." United States v.

Jorn, 400 U.S. 470, 485-86, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971). Where a court is to determine whether manifest necessity exists "any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." Downum v. United States, 372 U.S. 734, 738, 83 S. Ct. 1033, 1035–36, 10 L. Ed. 2d 100 (1963).

In applying the standard of manifest necessity, the Georgia Supreme Court upheld the trial court's ruling, holding that the trial court's determination that a mistrial was proper was "not unreasonable" even though the Georgia Supreme Court "might have chosen a different course in Carman's case as trial judges." Carman v. State, 815 S.E.2d 860, 869 (Ga. 2018). The Georgia Supreme Court sanctioned the trial court's placement of judicial economy and concerns about possible appeals as a legitimate basis for determining that "the ends of public justice would not be served" over the Constitutional rights of the defendant to have his case concluded. Any interpretation of "manifest necessity" that values judicial economy and theoretical concerns about possible future appeals over the valued right of the accused to have his trial completed by a particular tribunal is contrary to this Court's precedent and antithetical to plain meaning of the Double Jeopardy clause. Should this Court allow this case to stand, the protection against Double Jeopardy will stand meaningless. Because the Georgia Supreme Court decided this important question of federal law in a way that conflicts with the relevant decisions of this court, the writ of certiorari should be granted. U.S. Sup. Ct. R. 10(c).

II. THE PLAIN MEANING OF "MANIFEST NECESSITY" HAS DEVOLVED INTO CONFUSING TANGLE OF INTERPRETATIONS BY LOWER COURTS.

The warnings issued by this Court in Downum of confusion and unreliability if discretion is not limited have proven prophetic. The current state of manifest necessity jurisprudence is unclear, confusing and arbitrary. Some courts have limited the discretion of trial judges to declare mistrials over defense objection to only those cases where necessity is plain and obvious. See, e.g. Thomason v. State, 620 So. 2d 1234, 1239 (Fla. 1993). Others, like Georgia, defer to the lower courts determination that a mistrial was appropriate unless the trial court acts patently unreasonably. See e.g. State v. Melton, 97 Wash. App. 327, 333, 983 P.2d 699, 702 (1999). This created a situation where the application of the important right against double jeopardy is not consistently upheld from jurisdiction to jurisdiction.

Georgia is not alone in defining manifest necessity in terms of the reasonableness of the trial court granting wide latitude to the trial courts to declare a mistrial. For example, in State v. Melton, 97 Wash. App. 327, 333, 983 P.2d 699, 702 (1999), the Washington Court of Appeals questioned whether or not the trial court acted in a "precipitate or unreasoning fashion" in making its determination, rather than looking to whether the *sua sponte* grant of mistrial was necessary. See also Ex parte Garza, 337 S.W.3d 903, 911 (Tex. Crim. App. 2011) ("Certainly there was no manifest necessity in this case for the trial court to declare a mistrial

without at least exploring the option to wait a week, possibly then to conduct the trial with only five jurors. So long as the appellant may waive his constitutional right to a six-member jury, it cannot be said that it was impossible to arrive at a fair verdict, impossible as a practical matter to continue with the trial, or that reversal on appeal would automatically ensue."); Carrillo v. Superior Court, 145 Cal. App. 4th 1511, 52 Cal. Rptr. 3d 614 (2006) (The trial court declaration of a mistrial based on alleged ineffective assistance of defense counsel did not constitute a necessity and court should have allowed case to proceed to judgment, because defense counsel's decision was valid and, if later determined not be the trial court could have granted defendant a new trial were he convicted.); State v. Manley, 142 Idaho 338, 346, 127 P.3d 954, 962 (2005)("The district court's finding of manifest necessity for a mistrial was grounded on alleged physical and emotional deficiencies of Manley's attorney, together with a determination Manley's attorney was ineffective. Because the district court did not adequately consider alternatives or offer Manley an opportunity to be heard, and erroneously determined that Manley's attorney was ineffective, we find the district court abused its discretion in declaring a mistrial."); Jones v. Kiger, 194 Ariz. 523, 527, 984 P.2d 1161, 1165 (Ct. App. 1999) ("Moreover, the trial judge apparently failed to give sufficient deference to defense counsel's assessment of another facet of the case...Defense counsel wanted to continue with the trial, not only because he did not find the hearsay testimony prejudicial, but also because the State would then have a second opportunity to present potentially damaging testimony that it had been precluded from

introducing in the first trial. This is just what cases like *Downum v. United States* forbid."); State v. Harrison, 578 N.W.2d 234, 239 (Iowa 1998) ("For a judge, *sua sponte*, to declare a mistrial because of perceived inadequacy of defense counsel is-and certainly should be-an extremely rare event. Even where an inadequacy exists, a far safer practice would be for the court to intervene only in ruling on posttrial motions following a conviction-if indeed a conviction occurs."); State v. Stevens, 126 Idaho 822, 827, 892 P.2d 889, 894 (1995)(" These considerations, emphasized the court, are peculiarly within the knowledge of the accused, not the judge, and the latter must avoid depriving the accused of his constitutionally protected freedom of choice in the name of a paternalistic concern for his welfare."); United States v. Quiala, 19 F.3d 569, 572 (11th Cir. 1994) (Late arrival by defense counsel to closing arguments did not constitute manifest necessity.); United States v. Allen, 984 F.2d 940, 943 (8th Cir. 1993)(" Because the record in this case does not reveal the manifest necessity for a retrial, we find that the district court's *sua sponte* declaration of a mistrial as to Allen was not the result of a *scrupulous* exercise of judicial discretion."); Cross v. State, 813 P.2d 691, 696 (Alaska Ct. App. 1991) ("Cross had important constitutional rights to complete his trial with the jury which had been impaneled, and with the counsel who had been appointed to represent him. We believe that before the trial court could interfere with these rights, the court was required to show that competing considerations of similar magnitude justified declaring a mistrial."); United States v. Dixon, 913 F.2d 1305, 1315 (8th Cir. 1990)(Judicial economy was not sufficient grounds to "outweigh

the defendants' " 'valued right' to have [their] trial completed by the first jury that was empaneled and sworn."); State v. Torres, 524 A.2d 1120, 1125–26 (R.I. 1987)(The length of the continuance was insufficient to warrant a mistrial.); People v. Garofalo, 71 A.D.2d 782, 783, 419 N.Y.S.2d 784, 786 (1979), on reargument, 75 A.D.2d 980, 453 N.Y.S.2d 382 (1980) ("The reasons for a mistrial stated by the District Attorney do not constitute "necessitous ones, actual and substantial". No condition existed which rendered it physically impossible to proceed with the trial.")

This stands in stark contrast to the number of other states and circuits that limit court's discretion to declare a mistrial to situations of true and obvious necessity. In Thomason v. State, 620 So. 2d 1234, 1239 (Fla. 1993) the trial court declared a mistrial near the end of evidence on the grounds that defense counsel was incapacitated due to illness, despite counsel's assertion of her ability to proceed and the defendant's indication he was happy with her performance. The Florida Supreme Court determined that it is permissible to declare a mistrial based on an incapacitation only when the "incapacity is objectively verifiable." Id. at 1240. The decision to terminate a trial before verdict on the grounds of counsel's incapacitation cannot be "based solely, or even substantially, on the subjective impressions of the trial judge, and it must be such that it cannot be cured or avoided by another alternative." Id.

Likewise, in People v. Michael, 48 N.Y.2d 1, 420 N.Y.S.2d 371, 394 N.E.2d 1134 (1979). There the defense counsel's father died and counsel was unable to appear in

court that day. The trial court *sua sponte* declared a mistrial, despite the suggestion that a continuance would be preferable, in part, due to its concerns regarding vacation plans of the court and the jurors. The New York Court of Appeals declared that "a mistrial founded solely upon the convenience of the court and the jury is certainly not manifestly necessary" and held that the indictment should be dismissed. Id. at 9, 394 N.E.2d 1134. The Michael Court explained:

> While the court could not have continued defendant's trial in the absence of defense counsel, a delay of several days would certainly appear to have been reasonable, despite any inconveniences it might have imposed upon the court and some jurors. Rather than considering this alternative seriously, the court *sua sponte* and unfortunately declared a mistrial. That decision constituted an abuse of discretion. A defendant's right to have his fate determined as expeditiously as possible and by the first jury to which the case is presented is a basic one, and may not be set aside without strong reason.

Id. at 9-10, 394 N.E.2d 1134. See also, State v. Marshall, 2014-Ohio-4677, ¶ 35, 22 N.E.3d 207, 221 ("A review of the record demonstrates that the trial court acted reasonably and responsibly in determining a manifest necessity existed for the declaration of a mistrial in this case."); State v. Anderson, 295 Conn. 1, 12–13, 988 A.2d 276, 283–84 (2010) ("The trial court reasonably concluded that manifest necessity existed on the basis of the totality of the circumstances because (1) Malone unexpectedly became ill during the trial, (2) no other prosecutor would have been able to assume the prosecution within a reasonable time in light of the complexity of

the case, and (3) there were jurors who were already "chomping at the bit" because of the time constraints that the court originally had estimated and because the jurors had prior plans that they wished to keep."); People v. Edwards, 388 Ill. App. 3d 615, 627, 902 N.E.2d 1230, 1241 (2009) (No manifest necessity found where the trial court declared a mistrial based upon defense counsel's discovery violation.); State v. Loyal, 164 N.J. 418, 440, 753 A.2d 1073, 1086 (2000) (Manifest necessity found where trial court declared mistrial due to appearance of impropriety relating to trial counsel's prior representation of a witness.); Rodriguez v. State, 719 So. 2d 1215, 1216 (Fla. Dist. Ct. App. 1998) (The trial court entertained the possibility of a continuance, but rejected it as unfair to the jurors. The juror's inconvenience did not outweigh the defendant's right to be tried by that particular jury, particularly in light of the trial court's failure to question the jurors); Clukey v. Clute, 246 A.D.2d 906, 907, 667 N.Y.S.2d 825, 826 (1998) (Where court reporter was injured in an automobile accident and arrested for murder, and his notes were confiscated by the police, manifest necessity found over defense objection.); Com. v. Thomas, 346 Pa. Super. 11, 17, 498 A.2d 1345, 1348 (1985) (Manifest necessity found where trial judge was sick and nature of illness was unknown. "The decision to declare a mistrial was within the sound discretion of the trial court and, absent a flagrant abuse of that discretion, the decision will not be reversed."); Com. v. Robson, 461 Pa. 615, 623, 337 A.2d 573, 577 (1975) (The president judge's determination that original judge was too sick to proceed with trial over defense counsel's objection and without a hearing on defense counsel's motion was found to constitute manifest

necessity.); Baker v. State, 15 Md. App. 73, 93, 289 A.2d 348, 360 (1972) ("While Baker may not have expressly moved for the mistrial, it was evidence that what he desired was a mistrial."); Adkins v. Smith, 205 So. 2d 530, 534 (Fla. 1967) (Where juror's wife was ill, "in entering the mistrial for cause the trial judge acted within the orbit of his reasonable discretion, the plea of double jeopardy is not good."); State v. Farmer, 48 N.J. 145, 224 A.2d 481 (1966) (Manifest necessity found where trial court declared mistrial due to prosecutions inadvertent failure to comply with the discovery order.)

The various positions outlined above cannot be reconciled. Because the Georgia Supreme Court has decided this important federal question in a way that conflicts with the decisions of other state courts of last resort and United States courts of appeals, this court should grant defendant's writ of certiorari. U.S. Sup. Ct. R. 10 (a).

III. THIS CASE IS AN APPROPRIATE VEHICLE TO ADDRESS THE DEGRADATION OF THE RIGHT AGAINST DOUBLE JEOPARDY BY THE OVERBROAD INTERPRETATION OF THE "MANIFEST NECESSITY" EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE BY THE LOWER COURTS.

This case is a clean vehicle for this Court to address the issue. Carman appeals directly from the Georgia Supreme Court. The only issue on appeal was whether or not Double Jeopardy barred a retrial of his case. The issue was properly preserved on appeal. There is no procedural impediment whatsoever to this Court determining this issue on its merits.

Moreover, unlike most cases, Mr. Carman has not yet gone on to a second trial. Should this court intervene, the purpose of the Double Jeopardy clause will be effectuated in that he will not be forced to stand trial a second time.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I, Christina P. Rudy, do certify that on this date, September 14, 2018, pursuant to Supreme Court Rule 29.3, I have served the attached Petition for Writ of Certiorari on each party to the above proceeding, or that party's counsel and on every other person required to be served. I have served the Supreme Court of the United States via United States Mail, properly addressed and with first-class postage prepaid. The State of Georgia has been served by depositing an envelope containing the above documents in the United States mail, properly addressed and with first-class postage prepaid.

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