No. 18-8123

IN THE SUPREME COURT OF THE UNITED STATES

In re RONNIE LEE FAGAN

On Petition for Writ of Mandamus
to the Alabama Supreme Court
(No. 1171115, Ala.S.Ct.)

PETITION FOR WRIT OF MANDAMUS

by

Ronnie Lee Fagan

(Pro Se)

Ronnie Lee Fagan
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QUESTIONS PRESENTED

QUESTION ONE

Whether the trial court's exclusion of defense counsel when the grounds for mistrial were being considered: (a) denied the defendant an opportunity to be heard or to object to the discharge of the jury; (b) prejudiced the defendant's prospects for an acquittal; and, (c) deprived the court of jurisdiction to proceed to a judgment of mistrial.

QUESTION TWO

Whether the trial court's exclusion of defense counsel from the trial & declaration of mistrial, in the face of a case going badly for the state, barred any second trial.

RELIEF SOUGHT

The petitioner seeks a mandamus from the U.S. Supreme Court directing the Alabama Supreme Court to enter an order of acquittal where the trial judge violated the defendant's Sixth amendment rights by excluding defense counsel from the critical stage of a criminal trial when the entry of a mistrial was being considered and, given the circumstances described herein, any re-prosecution was barred under the double jeopardy clause of the Fifth amdendment to the U.S. Constitution.

PARTIES TO THE PROCEEDING

1. Ronnie Lee Fagan, Defendant
2. Errek Paul Jett, District Attorney
3. Mark Braxton Craig, Circuit Court Judge

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

Petitioner respectfully prays that a writ of mandamus issue to review the judgment(s) below:

(a). The opinion of the Alabama Supreme Court at Appendix [A], which is unpublished;

(b). the opinion of the Alabama Court of Criminal Appeals at Appendix [B].

Jurisdiction

The date on which the Alabama Supreme Court decided my case was October 3, 2018. A copy of that decision appears at Appendix [A]. The jurisdiction of this Court is invoked under 28 USC §1651 and 28 USC §1257(a). Adequate relief cannot be obtained in any other form or in any other court as a pre-trial double jeopardy claim must be presented by mandamus and the lower federal courts have no appellate jurisdiction over the Alabama Supreme Court.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Fifth Amendment: "[N]or shall any person be twice put in jeopardy of life or limb... "

Sixth Amemdment: "In all criminal prosecutions the accused shall have the Assistance of Counsel for his defense."

Fourteenth Amendment: No State shall "deprive [a United States citizen] of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

(1). After a complicated 4 (four) day trial with over 15 (fifteen) state witnesses & approximately 24 (twenty four) hours of testimony, the state's case went badly as their own witnesses provided substantive exculpatory testimony indicating the defendant, who lived across the street from the complaintant, could not have been the assailant she claimed had raped her on the morning of March 18, 1981, as there was no evidence of, inter alia, any of the wounds or injuries she stated she inflicted upon the assailant during the alleged assault, no evidence that an ejaculatory rape had occurred upon her bed as she claimed, and the defendant did not have key physical characteristics she attributed to her attacker. [FN 1]

[FN 1] The testimony herein comes from the transcripts of the first trial. The alleged victim, Mrs. Anita Appleton, testified that she was home alone on 03/18/1981 when she was raped at approximatley 8:00 AM by an assailant who had a "hairy chest", that she fought during the attack, gouging the assailant with her fingernails and biting him on the "palm' of the left hand when he covered her mouth. An in court demonstration, however, showed the jury that the defendant did not have a hairy chest. The state's lead investigator, Mr. R.E. Hancock, along with the county jailer, Mr. Cecil Cooper, examined the defendant 1 to 2 hours after the purported attack and noticed a bandaid on the defendant's left little finger covering a cut the defendant stated he had sustained from a piece of sharp metal while he was working on a roof the previous day, the 17th. Hancock testified the wound awas "possibly half an inch long... on the inside of the first joint of the little finger on the left hand" (First Trial Transcripts, R.154, line 12-14) and when asked "was it within the last hour or so?" replied "Oh no, I couldn't say that. I would say it was probably -- it could have been that day or maybe possibly the day before" (Id., line 26-29); and when asked if there were any corresponding "impressions of teeth or any cuts on the opposite side from the cut" consistent with a bite wound, Hancock indicated there were none at all (R.154-R.155). The jailer, Mr. Cooper, testified that the bandaid covering the cut had a "scab" on it that came off of the wound when the bandaid

(2). The state presented its entire case and all of it's witnesses yet, after the jury had been deliberating for 2 hours as to the sufficiency of the evidence to sustain a conviction, rather than return a verdict the jury requested further instructions from the court and in open court the following exchange occurred:

COURT: Okay, what other phase is it that your interested in? Is it reasonable doubt or anything like that?

(Whereupon several jurors conferred among themselves, after which the following occurred)

FOREMAN: The part we are supposed to determine.

COURT: In other words, what your duty in the case is?

FOREMAN: Yes sir.

(R.348-R.349)

This colloquy made quite an impression upon the defendant because after the foreman asked what the jury was supposed to

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[FN 1](cont.) was forcefully removed. Hancock also testified that Fagan had "some scratches on both hands and the wrist area" (R.148, line 11-12) that "didn't appear to be deep enough to actually -- for blood to be dripping from them" (R.153, line 18-19). The jailer described the same wounds as being "pitch marks" from Fagan's employment as a roofer working with splattering hot tar. This lack any wounds described on Fagan capable of leaving blood at the scene of the attack (only 2 hours earlier) is significant as the state claimed the blood stains found on Mrs. Appleton's sheets came from Fagan during the purported "rape". The state also claimed the assailant ejaculated during the rape since there was semen found upon Mrs. Appleton's vaginal/anal region, yet the state forensic expert, Mr. Roger Morrison, issued a report which indicated "no seminal stains were detected on the... fitted sheet, the flat sheet, nighty, suspect's shirt and underwear" (Dept. of Forensic Sciences "Report" dated 03/26/1981, pg. 2, line 18-19). It is simply implausible, given this testimony/evidence by the state witnesses, that a violent, bloody, ejaculatory rape could have occurred on the sheets and not a single stain of semen could be found upon the sheets of the bed or upon the clothing worn during the purported rape nor any fresh, blood dripping, wounds found on the defendant mere hours after the attack. The defendant felt this exculpatory testimony gave him his best chance for aquittal.

"determine", there was an extremely long pause during which the judge stared very hard at the prosecutor! It is reasonable to infer that, based upon this interaction, both the prosecutor and the judge realized that the state's case and evidence against the defendant was not overwhelming thus raising the specter of an "acquittal" in the case.

(3). While the jury continued their deliberations, defense counsel, Mr. Don White, advised the court that he had a 6:30 PM appointment that evening and could not be present to take any verdict & obtained permission of both the court as well as the defendant to have stand-in counsel, Mr. Cecil Caine, to be present during the proceedings in order to preserve the defendant's rights during the criminal trial. (See **Appendix [C]**, 1Hearing Transcripts, R.357-R.358).

(4). At some point the trial judge engaged in an off-the-record conversation with the jury foreman, without any apparent permission or knowledge of the parties, because 2 hours later the jury was called back into the courtroom, along with the defendant, for further proceedings. The defendant was brought before the jury and forced to remain standing with his hands shackled at the side of the room next to the jailer while a colloquy with the jury took place. Conspicuously, there was a complete absence of defense counsel or stand-in counsel present in the courtroom -- despite the elaborate arrangements previously made (supra) to have a legal representative present to preserve

the defendant's rights.

(5). The judge then asked the foreman if the jury had reached a verdict, to which the foreman replied "No, sir" (Id., R.358, line 11), and then proceeded to engage in questioning the jury foreman, and the foreman only, to make a determination as to whether the current "division among your numbers" (Id., line 14-15) represented a disagreement over the evidence in the case, or over some other aspect of the trial, and if that disagreement could be characterized as permanent or temporary (Id., R.358-R.359). The court did not ask any questions or poll the other members of the jury to determine if they had the same opinion as the foreman in regards to whether there were additional steps that could be taken to help them reach an agreement as to a verdict.

(6). Before the trial judge even completed the examination of the jury foreman to determine if the jury could, or could not, ultimately resolve their differences, the trial judge indicated it was his intention to "enter a mistrial and put the case back on the docket & submit it to another jury at a later time" (Id., R.359, line 9-10) and then, without any defense counsel or stand-in counsel present to represent the defendant, the trial judge turned to the prosecutor and asked "Mr. Littrell, do you have any motions you want to make?" (Id., line 26-27), to which Mr. Littrell replied "No Sir, if they can't reach a verdict, why they can't reach a verdict" (Id., R.360, line 1-2). The judge did not

ask the shackled defendant what motions he would like to make, or to state his position on the reported disagreement of the jurors, and the defendant did not have anyone present in the courtroom to help him preserve his right to a verdict from this first empanelled jury that had heard all of the exculpatory testimony from the state witnesses which indicated he could not have been lthe attacker (See [FN 1] supra) and which, accordingly, gave him his best chance for an acquittal.

(7). The trial judge then made the critical admission that, even before he had called the jury back into the courtroom to engage in a colloquy to determine if & why they could not reach a verdict, the trial judge had already called stand-in counsel and told counsel his services would not be be needed stating "Mr. White had an appointment & he had to leave, & the other lawyer was going to stand in for him, but under the circumstances I told the other lawyer that it wouldn't be necessary for him to come o ver" (Id., 360, line 3-6)(emphasis added). The trial judge's exclusion of defense counsel from the stage of trial in which the defendant's guilt of innocence is being decided by a jury that has heard all of the state's evidence, substantially altered the trial structure established by the framers of the U.S. Constitution who mandated that Fagan have a skilled legal advocate present to protect his rights during a criminal trial. The transcript does not give any indication that stand-in counsel was told by the trial judge why the judge felt counsel's presence was not needed, that the jury had initially reported that it was

not able to reach an agreement as to a verdict, that there was going to be an on-the-record colloquy with the jury foreman to determine if the inability to agree was permanent or temporary, that the prosecutor was going to be given an opportunity to comment on the state's position (See para. (3) supra) in regards to that inability to agree, and that the judge intended to enter a mistrial and discharge the jury. There is also no indication that stand-in counsel was allowed to offer any objections to his exclusion from the trial proceedings or to consult with the defendant in regards to the rights to be preserved at that stage of the trial & not having counsel there to preserve them. There is also no indication that stand-in counsel was offered any opportunity to object to a declaration of mistrial, and the discharge of the jury, in the case.

(8). The court then entered a judgment of "mistrial", ordered the case to be put back on the docket for a second trial, and then discharged the jury (Id., R.360, line 8-12). The record does not indicate that the court considered: (a) offering the jury some dispute resolution techniques designed to allow the jury to overcome any obduracy and to reach a reasoned decision as to their position on guilt or innocence; (b) giving the jury a modified Allen charge; (c) giving the jury a night of rest, after they had just been through a grueling 4 day trial with conflicting testimony from over 15 witnesses and had been deliberating for only 7 hours, whereby the jury might resume a period of deliberation in the morning with a refreshed

perspective to see if they could resolve their differences -- and any subsequent colloquy could be conducted in open court with defense counsel present; and (d) any other reasonable alternatives to the declaration of a mistrial, in order to preserve the defendant's right to a verdict from the jury which had heard the substantive exculpatory testimony from the state's witnesses.

(9). As defense counsel was not present at the proceeding where the trial court frittered away the defendant's jeopardy rights, there was no opportunity for any objections or the filing of a pre-trial mandamus to preserve the defendant's interest against being subject to a second prosecution where it is apparent from the transcripts (cited supra) that the trial judge had overstepped his constitutional boundries by excluding defense counsel from the proceedings in order to terminate the trial without any objections and allow the state a more favorable opportunity to convict the defendant now that they knew the weaknesses of their case and the exculpatory nature of the testimony of their witnesses.

(10). The defendant was forced to undergo a second trial and the state assured, of course, that their lead investigator, Mr. R.E. Hancock, was unavailable to provide his exculpatory testimony about the age and description of the cut they found on the defendant's little finger which did not appear to be from an recent attacks or have the characteristics of a bite wound, and

that the wounds he found on Fagan did not appear to be capable of leaving blood stains on the sheets of the bed where the rape had reportedly occurred 1-2 hours earlier. The alleged victim, Mrs. Appleton, materially altered her testimony, now stating the assailant did not have a hairy chest, and that she had bitten the assailant on the "fingers" rather than on the "palm" of the hand as she had first reported. Without the exculpatory testimony from the state winesses, the second jury convicted the defendant and he was sentenced to 50 years of imprisonment.

(11). When the defendant went to prison it took him 8 years to get his GED and improve his reading & writing ability to the point where he could read the lawbooks and start to get some help from other inmates in filing his claims. He tried to get the transcripts from his trial/apppellate attorneys but they refused to send him any of his trial records. In 1985 he requested his trial transcripts from the court and the clerk sent the transcripts from the first trial by mistake. When the prosecutor, Mr. Littrell, found out that the clerk had released the first trial transcripts he came personally to the prison and demanded that the defendant return them. The Warden had to stand up for the defendant's right to have his transcripts and had Mr. Littrell escorted from the prison. None of the prisoner's the defendant had assist him recognized the errors that had occurred at the close of the first trial. Multiple post-conviction petitions were submitted raising other issues but none were successful.

(12). In 2018 the defendant finally found a fellow inmate who recognized the substantive problems with the judgment of "mistrial" in the first trial and a "Nunc Pro Tunc Mandamus" was submitted on 06/29/2018 to the Alabama Court of Criminal Appeals (ACCA) raising, inter alia, claims that: (a) counsel was denied by the court at a critical stage of the proceeding when the grounds for a judgment of mistrial were being considered; (b) that the court failed to exercise the scrupulous discretion required to determine whether there was a manifest necessity to declare a mistrial under Perez (1824) and it's progeny; and (c) that the trial court had taken steps to terminate the trial because it appeared the state's evidence was insufficient to sustain a conviction, i.e. engaged in an off-the-record exchange with the the jury foreman without permission or knowledge of the parties, excluded defense counsel from the proceedings in order to prevent any hearing or objections by the defense, or to otherwise allow the defendant's jeopardy rights to be preserved.

(13). The ACCA issued an ORDER (d. 08/29/2018)(See **Appendix [B]**, herein) that mischaracterized the defendant's claims by falsely representing that "Fagan alleges in his petition that his first trial resulted in a mistrial due to a hung jury" (**Appx [B]**, line 11-12) despite the fact that the petitioner's fundamental claim has always been that the exclusion of defense counsel from the 'consideration of mistrial' stage of the proceeding, and only allowing the state prosecutor to hear and comment on whether the

jury could not "reach a verdict" (See Appx. [C], R.360, line 1-2), did not allow for the scrupulous exercise of discretion required to determine if the jury could not ultimately reach a verdict.

(14). The ACCA also improperly states in it's order (supra) that "[T]he trial judge stated in open court that he had told the stand-in attorney for Fagan's counsel that it was not necessary to be in the court when the jury reported it's impasse" (Appx. [B], line 13-14). This false conclusion by the ACCA is belied by the fact that there is nothing in the trial trancripts, provided herein, which indicates the trial judge explained any of the circumstances of the case to stand-in counsel or explained to stand-in counsel that there was going to be a colloquy with the jury to determine whether their reported inability to agree upon a verdict represented an insurmountable impasse and that the prosecutor was going to be given the opportunity to present the state's position on the jury's inability to agree upon a verdict at that time. There is also no evidence in the transcripts that stand-in counsel was aware of the fact that the state witnesses had given exculpatory testimony indicating the defendant could not have been the assailant thus preventing the jury from reaching a guilty verdict. Additionally, the ACCA's conclusion that the jury was merely "report[ing] it's impasse" is not based upon the record as the transcript indicates there was an open court colloquy to determine if the jury was actually at an impasse. While the jury clearly reported a disagreement as to

the verdict, whether that disagreement can be characterized as a permanent impasse necessary to warrant a declaration of a mistrial is to be determined after the questioning of the jury, input of both parties as to the conclusions to be drawn from the jury's response to the questions, and then an adjudication by the court as to whether the inability to reach a verdict is insurmountable and the jury considered to be "hung". It appears that this statement by the ACCA is a disingenuous attempt to minimize the critical nature of the stage of the trial where the defendant's right to a verdict from the jury that had heard the exculpatory testimony from the state's witnesses, thus giving him his best chance for an acquittal, were at stake.

(15). The ACCA order (supra) properly stated "Fagan alleges that under the principals of double jeopardy he should not have been retried since his attorney was not present at a critical stage of his first trial" (Appx. [B], line 15-17), but then directly follows this with an improper conclusion that "In essence this appears to be a post conviction petition [and t]he Court of Criminal Appeals does not have original jurisdiction to dispose of an action attacking a conviction & sentence" (Id., line 18-20) despite the fact that the cause of action before the court is clearly styled, and substantively presents, a "Petition for Writ of Mandamus" (See Appx. [B] @ styling of Order, line 4-7) and the claims therein directed towards the improprieties in the first trial that did not result in a sentence or conviction but, rather, barred any second trial. The "Nunc Pro Tunc" nature of

the "pre-trial" mandamus as the proper vehical for the double jeopardy claims therein was extensively presented and argued at Issues (3) & (4) of the mandamus (at pg.'s 26-29), and included a specific citation of the Alabama Supreme Court in Ex parte Head, 958 So.2d 860, 865 (Ala. 2006) that "A defendant's double jeopardy claim is properly reviewed by a petition for writ of mandamus. See Ex parte Beneford, 935 So.2d 421, 425 (Ala. 2006). This Court has held that an accused rights against being twice placed in jeopardy cannot be adequately protected by appellate review & that a writ of mandamus is appropriate in a case in which the petitioner argues that former jeopardy bars retrial on the charges against him" (Nunc Pro Tunc Mandamus, f. 06/29/2018, @ pg. 26). The ACCA ultimately ignored the styling of the case and the Alabama Supreme Court precedent cited in the mandamus to conclude they had no jurisdiction to entertain the petition and "Dismissed" the petition without an adjudication upon the merits of the jeopardy claims therein (See Appx. [B], @ line 21).

(16). The petitioner then submitted a "Notice of Appeal by Submission of Mandamus (No. CR-17-0957) before the Alabama Supreme Court" (f. 09/04/2018) and included the previously filed "Nunc Pro Tunc Mandamus" dismissed by the ACCA. The Alabama Supreme Court (Ala.S.Ct.) docketed the appeal as a "Petition for Writ of Mandamus: Criminal" and did not convert or construe it as a post-conviction proceeding. The state court of last resort adjudicated the merits of the mandamus by issuing an Order that summarily "DENIED" the petition without any findings of fact or

law in regards to, inter alia, the denial of counsel or Perez (1824) issues raised therein (See Appx. [A], ORDER of Ala.S.Ct. (d. 10/03/2018)).

(17). The Ala.S.Ct. "GRANTED" the petitioner Informa Pauperis Status for purposes of the Mandamus proceedings (See Appx. [D], herein).

(18). This Mandamus to the U.S. Supreme Court follows under the Court's appellate jurisdiction to review the decisions of the state court of last resort in regards to the jeopardy claims raised in the state court proceedings.

REASONS FOR GRANTING THE WRIT

(1). The trial judge's exclusion of defense counsel from the "consideration of mistrial" stage of the proceedings denied the defendant any opportunity to be heard as to his substantive jeopardy rights.

"Of all the rights an accused has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Penson v. Ohio, 488 US 75, 84 (1988). When the trial judge in the instant case predetermined that he would exclude defense counsel from the proceedings where a colloquy was to be had with the jury as to whether their inability to agree upon a verdict represented a true impasse, and thus the grounds for declaration of a mistrial, prevented the assertion of Fagan's jeopardy rights and interests at the trial in which the jury had heard substantive exculpatory testimony from the state witnesses indicating he could not have been the assailant and, accordingly, gave him his best chance for an aquittal.

See also U.S. v. Cronic, 466 US 648, 659 (1984)("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial" and "the court has uniformly found constitutional error without any showing of prejudice when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"); Argersinger v. Hamlin, 407 US 25 (1972)("The assistance of counsel is often a requisite to the very existence of a fair trial); Powell v. Alabama, 287 US 45, 68-69 (1932)("The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel"); Hawk v. Olson, 326 US 271 (1945)("We hold that denial of an opportunity to consult with counsel on any material step after indictment... violates the 14th amendment. Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he has not had the kind of trial in a state court which

the due process clause of the 14th amendment requires"); and Johnson v. Zerbst, 304 US 458 (1932)(A court's jurisdiction... may be lost "in the course of the proceeding" due to failure to complete the court -- as the Sixth Amendment requires -- by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty and whose life & liberty is at stake. If this requirement of the Sixth amendment is not complied with, the court no longer has jurisdiction to proceed).

The trial judge's exclusion of defense counsel from the proceedings which is done in bad faith, in order to prejudice the defendant's prospects for an aquittal, bars any retrial, Oregon v. Kennedy, 456 US 667, n13 (1982)(by implication), and "render[s] unmeaningful the defendant's choice to continue or to abort the proceeding" (Id., @ 689); See also U.S. v. Dinitz, 424 US 600 (1971)(Double Jeopardy Clause bars retrials where "bad-faith conduct by judge or prosecutor," U.S. v. Jorn, [400 US 470 (1971)] at 485, [] threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. Downum v. US, 372 US 734, 736 (1963)(emphasis added). Under the circumstances of the instant case, the trial judge provided no 'good faith' reason for his exclusion of defense counsel from the proceeding, where the state's case had gone badly and an aquittal appeared immanent due to the exculpatory testimony from it's own witnesses, in order to give the state a more favorable opportunity to convict the defendant.

(2). The colloquy with the jury to determine whether grounds exist for judgment of mistrial, is a critical stage of the trial proceedings.

Whether a particular stage of the trial is considered critical depends upon the nature of the stage and the substantial rights that may be affected. The rights affected at the stage of trial where the court engages in a on-the-record colloquy with the jury to determine if the inability to agree upon a verdict represented a permanent impasse and grounds for entry of a judgment of mistrial are:

(a). The defendant's "protected interest in having his guilt or innocence decided in one proceeding," Arizona v. Washington, 434 US 497, 503 (1978), "by a particular tribunal," Wade v. Hunter, 336 US 684, 689 (1949), "he might believe to be favorably disposed to his fate," U.S. v. Jorn, 400 US 470, 487 (1971);

(b). His right to "comment on the foreperson's remarks," Reninco v. Lett, 559 US 766 (2010), to have a determination whether there is a "mere disagreement" (Id.) amiable to a "continuance" of deliberations after a night of rest, or to modified supplemental instructions, Allen v. US, 164 US 492 (1896) where "deliberating jurors should be offered assistance when an apparent impasse is reported," Reninco, n15;

(c). An objective determination of whether the jury has had a reasonable time to deliberate "considering the number of days of evidence it heard," Reninco (supra);

(d). To have a "full opportunity to explain their positions," Washington (supra) at 515-516, and to consideration and exploration of "alternatives to mistrial," U.S. v. Jorn, at 487;

(e). His right to "retain primary control of the course to be followed in the event of an error at trial," Dinitz, 424 US 600, 609 (1976);

(f). To have an "opportunity to object to the discharge of the jury," Jorn, in order to have the "protection to the defendant's interests" provided by the "manifest necessity" standard of the Perez doctrine, Jorn at 485, Oregon v. Kennedy, 456 US 667, 672 (1982).

All of which establish that counsel is required in order to preserve the defendant's substantive rights, even at the end of Fagan's trial, where his jeopardy interests were at stake. The trial judge's exclusion of defense counsel denied any preservation of the rights identified above.

(3). Reprosecution is barred under Perez (1824) and it's progeny where trial judge excluded defense counsel from proceeding thereby failing to exercise "scrupulous discretion" required to determine if "manifest necessity" existed for judgment of mistrial.

The trial court's denial of counsel after the possibility of an acquittal became apparent, and with a pre-determined goal of declaring a mistrial, resulted in the intentional manipulation of the defendant's jeopardy rights in order to allow the state a second opportunity to convict the defendant. Such a gross abuse of judicial discretion fails to meet the "manifest necessity" standard required for the entry of a judgment of mistrial. See U.S. v. Jorn, 400 US 470, 487 (1971)(When "it is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to discharge of the jury, there would have been no opportunity to do so... it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistirial, U.S. v. Perez, 9 Wheat @ 580, 6 L.Ed, @ 166. Therefore, we must conclude that in the circumstances of this case, [defendant's] reprosecution would violate the double jeopardy provisions of the 5th Amendment." Circumstances exist to bar a future prosecution where a "judge exercises his authority to help the prosecution at a trial in which the case is going badly, by offering it another, more

favorable opportunity to convict the accused." Gori v. US, 367 US 364, 369 (1961)... whether misconduct occurs at the instance of the prosecutor or on the trial judge's sole initiative, there is no question but that the guarantee against double jeopardy would make another trial impossible. Jorn, at 489 (emphasis added).

"The Perez doctrine of manifest necessity stands as a command to trial judge's not to foreclose the defendant's option [to decide whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of 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. See Perez @ 166". Jorn @ 485. The ends of public justice are not served, in the instant case, where the trial judge has gone against society's "interest against the historical and abhorrent practice of terminating trials whenever it appears that the government's evidence was insufficient to convict." Arizona v. Washington, 434 US 497, 505-508 (1978); Oregon v. Kennedy, 456 US 667, @ n30 (1982).

See also Reninco v. Lett, 559 US 766 (2010)(If a trial judge acts irrationally or irresponsibility, his actions [declaring a mistrial] cannot be condoned. Judge had improperly conflated "mere disagreement" with "deadlock" and "gave the parties no opportunity to comment on the foreperson's remarks, much less on the question of mistial." Exhibited remarkable "haste" and "inexplicable abruptness" evidence of a lack of "sound discretion"). Clearly the instant trial judge's pre-

determination to exclude defense counsel and not allowing the defense to present it's position on the jury's inability to agree, while giving the prosecution an opportunity to comment, is far from the "scrupulous exercise of judicial discretion" required by the precedent cited herein.

CONCLUSION

The petition for writ of mandamus should be granted.

Respectfully submitted,

Date: 10-30-18 Ronnie Lee Fagan

Ronnie Lee Fagan, Petitioner, Pro Se

VERIFICATION

I, Ronnie Lee Fagan, do solemnly swear under the penalty of perjury, 28 USC §1746, that all of the factual averments herein are, to the best of my knowledge, information, and belief, true and correct.

Date: 10-30-18 Ronnie Lee Fagan

Ronnie Lee Fagan, Petitioner, Pro Se

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