

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOUSE LATOUR ALLBROOKS
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Blueford v. Arizona*, 566 U.S. 599, 132 S.Ct. 2044, 182 L.Ed. 2d 937 (2012), Justice Sotomayor wrote the following; “A jury’s genuine inability to reach a verdict constitutes manifest necessity.” *Id* at 619.

With the utmost respect, Petitioner contends that such a statement is tautological. Petitioner requests review to address the critical issues of when “first jeopardy” attaches, and whether the failure of a jury to reach a verdict automatically relieves the State of its burden to prove the existence of a manifest necessity to discharge the jury before retrying the Petitioner following a hung jury.

Petitioner believes that his second trial is inconsistent with the fundamental distinctions between the European Inquisitorial system of criminal jurisprudence and the American Adversary system.

Petitioner’s case provides an excellent vehicle to address the issue.

The Question Presented is;

Whether the State can retry the Petitioner, following a mistrial due to a hung jury, when:

- A) There was no finding of a manifest necessity made by the trial Judge,
- B) The Petitioner did not make the motion to declare a mistrial, and
- C) “First Jeopardy “was not self-imposed by the Petitioner?

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PETITION FOR WRIT OF CERTIORARI

NOW COMES the Petitioner, Carlouse Latour Allbrooks, and requests that this Court issue a Writ of Certiorari to the North Carolina Court of Appeals to review the opinion filed on 21 November 2017, affirming the denial of the Petitioner’s Motion to Dismiss Pursuant to Double Jeopardy. In support of this Petition, the Petitioner shows as follows:

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL AUTHORITY INVOLVED

The Fifth Amendment provides in pertinent part, “...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...”

The Fourteenth Amendment provides in pertinent part, "...nor shall any state deprive any person of life, liberty or property, without due process of law..."

PROCEDURAL AND FACTUAL BACKGROUND

On 16 March 2015, the Petitioner was tried for First Degree Murder in Moore County, North Carolina Superior Court.

During jury deliberations, the foreman sent a note to the trial judge stating, "We still are unable to make a unanimous decision and we are not making any further progress". App. 15.

Neither the State or the Petitioner made a Motion for Mistrial due to a hung jury.

Without making a finding of "manifest necessity" to declare a mistrial, Judge Sasser stated, "...any further deliberation will be futile in this matter. The Court will remove one juror and declare a mistrial in this matter." App. 15.

The State recalendared the matter for trial, and on September 23, 2015, Petitioner filed a Motion to Dismiss Pursuant to Double Jeopardy, which was denied by the Honorable Richard S. Gottlieb. App. 13.

Petitioner sought pretrial review in the North Carolina Court of Appeals, by way of a Petition for Writ of Certiorari, which was denied on January 4, 2016, without an opinion. App. 14.

The Petitioner was retried and convicted of First Degree Murder at the 8 January 2016 Criminal Session of Moore County Superior Court.

Petitioner appealed to the North Carolina Court of Appeals, which affirmed the Petitioner's conviction and sentence by opinion filed 21 November 2017. App. 1.

The North Carolina Supreme Court denied Petitioner's Petition for Discretionary Review on 1 March 2018, without an opinion. The Order of denial is attached at App. 9.

OPINIONS BELOW

The North Carolina Court of Appeals filed an Opinion addressing the federal issue presented on 21 November 2017. App. 1. The North Carolina Supreme Court denied review without an opinion.

REASONS FOR REVIEW

REASON ONE

REVIEW IS REQUESTED TO ADDRESS THE APPARENT INCONSISTENCY BETWEEN THIS COURT'S DECISIONS IN *U.S. v PEREZ*, 22 U.S. (9 Wheat) (1824), and *CRIST v BRETZ*, 437 U.S. 28, 98 S. Ct. 2156 (1978), WITH RESPECT TO WHEN "FIRST JEOPARDY" ATTACHES.

a. Attachment of "first jeopardy"

Petitioner respectfully submits that in order to determine whether the Fifth Amendment Double Jeopardy Clause has been violated, it is critical to pinpoint exactly when “first jeopardy” attached.

When *U.S. v. Perez*, 22 U.S. (9 Wheat) 579 (1824), was decided, jeopardy attached at the time of verdict, under English Common Law. See Janet E. Findlater, “Retrial After a Hung Jury: The Double Jeopardy Problem”, 129 U. P. L. Rev. 701, 703 (1981) Therefore, for first jeopardy to attach it was *necessary* for the jury to reach a verdict convicting or acquitting the defendant.

In *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24, (1978), the time of jeopardy attachment was determined to be when the jury was empaneled. “Today we explicitly hold what *Somerville* assumed: The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.” Therefore, for jeopardy to attach, it *was not necessary* for the jury to convict or acquit, and first jeopardy has been accomplished even if the jury was unable to reach a unanimous decision. In *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), the Court stated, “Consequently, *as a general rule*, the prosecutor is entitled to *one, and only one*, opportunity to require an accused to stand trial”.

b. Adversarial system vs. Inquisitorial system

The Petitioner submits that the notion that jeopardy attaches *before* the conclusion of a trial by either acquittal or conviction is consistent with two foundational principles of American criminal jurisprudence. First, unlike the European “inquisitorial” system of justice, the United States has adopted the “adversarial” model of justice. Second, although not specifically stated in the Constitution, all persons charged are “presumed to be innocent”.

In other words, the goal of a criminal trial under the inquisitorial system is to determine factually whether the defendant is actually guilty or actually innocent of the crime charged. On the other hand, the goal of the adversarial model is to put the burden on the State to prove beyond a reasonable doubt that the defendant is actually guilty, and if that is not accomplished following one attempt, the defendant is released. No verdict sheet in the entire United States of America has on it an option that says, “We the jury unanimously finds that the Defendant is innocent”.

All defendants are *presumed innocent*, and the burden is on the State to overcome, or rebut, that presumption. If, *as a general rule*, the State has had their one full and fair opportunity to rebut the presumption of innocence, no second trial is allowed.

c. Burden of Proof on State

However, “retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused”. *Arizona v. Washington* at 505.

“Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.” *Arizona v. Washington*, at 505. “The prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one.”

d. Manifest necessity

The double jeopardy bar is overcome if there is a “manifest necessity” to stop the trial shown by the State. Petitioner submits that some examples of manifest necessity would be when an event of nature makes it impossible to go forward with the trial, such as a blizzard when it shuts down the courthouse, or, when a prosecutor or defense attorney suffers a fatal heart attack or stroke during the trial.

If the burden of a retrial does not present unfairness to the Defendant, the burden of proving necessity by the State is low. For example, if a Defendant

requests that the trial be terminated before verdict, he cannot complain about a second trial since the first one ended at his request. *See U.S. v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

The transcript page at App. 15 reveals that Petitioner did not ask that Judge Sasser discharge the jury. Nor did the prosecutor make a motion for mistrial, which was not objected to by the Petitioner.

Petitioner contends that in cases where the Judge, rather than the prosecutor, initiated the termination of the trial, it is not necessary for a defense attorney to make a formal objection on the record. The termination of the trial was a *fait accompli* upon the announcement by Judge Sasser that he was ending the trial. It is indeed a futile act for a litigant to object to a decision when the person to whom the objection is made is also the person who made the decision.

e. Self-imposed first jeopardy

Another scenario which lessens the burden on the State to show manifest necessity is when first jeopardy is "self-imposed" by a guilty plea to a lesser offense than the one the State wants to prosecute.

Suppose a defendant is charged with DWI in a traffic accident, and it is unknown whether the victim will die or not. Defense counsel may advise the defendant to plead guilty and pay a fine for the DWI, in order to avoid prosecution for the much more serious charge of Felonious Death by Motor Vehicle. If after the

fine is paid for DWI, the victim dies, a defendant could claim double jeopardy because Felonious Death by Motor Vehicle includes the element of driving while impaired.

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), makes it clear that a greater offense and a lesser offense are the same offense for Fifth Amendment purposes. Therefore, a lawyer could tell a client to get to court as quickly as possible and enter a guilty plea to a lesser offense of a potentially much greater offense. Petitioner acknowledges that such tactics should not thwart the State's interest in having one full and fair opportunity to attempt to convict the person of the greater offense.

REASON TWO

REVIEW IS REQUESTED TO ADDRESS THE APPARENT INCONSISTENCY BETWEEN *ARIZONA V. WASHINGTON* AND THE NOTION THAT THE INABILITY OF THE JURY TO REACH A VERDICT AUTOMATICALLY PROVES A “MANIFEST NECESSITY” ENABLING THE STATE TO RETRY THE DEFENDANT.

The difficult question is whether the inability of a jury to reach a verdict is, in and of itself, a manifest necessity sufficient to warrant a second trial. With the utmost respect to Justice Sotomayor, Petitioner contends that her statement in *Blueford v. Arkansas*, 566 U.S. 599, 132 S.Ct. 2044, 182 L.Ed.2d 937 (2012) about what constitutes a manifest necessity is tautological.

Justice Sotomayor wrote in her *Blueford* dissent, “A jury’s genuine inability to reach a verdict constitutes manifest necessity”. *Blueford* at 619. If a failure to reach a verdict is, by definition, a manifest necessity to end the trial, then the State’s “high burden” is reduced to nothing more than proving the obvious, that the jury didn’t reach a verdict.

The statement simply cannot be reconciled with this statement in *Washington*, “Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” and the prosecutor’s burden of proving manifest necessity “is a heavy one”. In essence, Justice Sotomayor’s statement shifts the burden to the defendant to show why the State cannot retry him, rather than keeping the burden on the State to show why they can.

The position that “No verdict, *ergo*, manifest necessity for retrial” is a principle without limits, and is contradictory to established policies underlying the Double Jeopardy Clause of the Fifth Amendment.

In *Green v. U.S.*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199(1957) the Court stated, “The underlying idea, *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”.

The sole fact upon which the State relies to justify the retrial of Petitioner is that the jury couldn’t reach a verdict. Petitioner requests review to argue that such a self-fulfilling proof of the existence of a “manifest necessity” to stop the trial violates the Fifth Amendment.

The fundamental flaw of the statement that the inability of a jury to reach a verdict, standing alone, constitutes a “manifest necessity” to end a trial and allow a second trial, is that there is no “limiting principle”. If the State can try a defendant twice simply because the jury could not reach a verdict, can the State retry someone four times without showing more than a hung jury, and not offend the defendant’s right to be free from double jeopardy? Eight times? Twelve times? As many times as the prosecutor wants?

Petitioner’s jury was unable to reach a decision. Without a finding of a manifest decision to discharge the jury, or that the Petitioner requested a mistrial, Judge Sasser removed a juror and declared a mistrial. Petitioner did not “self-impose” first jeopardy and his lawyer did nothing improper to warrant a mistrial because the State had been prejudiced. Review is requested to allow briefing and argument to resolve the inconsistency in the Court’s decisions as to when jeopardy attaches for the first time, and whether a hung jury shifts the burden from the State

to show why a second trial *should occur*, to the defendant to show why it *should not*.

CONCLUSION

WHEREFORE, upon the foregoing arguments and authorities, the Petitioner respectfully requests that this Court issue its Writ of Certiorari to the North Carolina Court of Appeals to review the decision upholding the denial of Petitioner's Motion to Dismiss Pursuant to Double Jeopardy.

Respectfully submitted this the 30th day of May, 2018.

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**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE NORTH CAROLINA COURT OF APPEALS**

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached document on all parties to this cause by:

___ Hand delivered a copy hereof to the attorney for each said party addressed as follows:

X Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

___ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

___ Telecopying a copy hereof to the attorney for each said party as follows:

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This the 30th day of May, 2018.

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