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# Criminal Law

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## Court Decisions In Brief


### Double Jeopardy

#### Double Jeopardy--Mistrial--Judge's Mid-Trial Departure for Military Duty

A criminal trial judge's departure to fulfill a military obligation in Iraq after trial had commenced did not give rise to manifest necessity for a mistrial that would permit the state to subject the defendant to another trial, the New Hampshire Supreme Court decided March 20. (*State v. Solomon*, N.H., No. 2007-290, 3/20/08)

The defendant's trial began in August 2006 with the testimony of the complainant. Cross-examination was deferred pending the witness's consultation with a lawyer. Trial was scheduled to resume in January 2007, but in December 2006 the judge volunteered for military service in Iraq and waived a customary 30-day notice. He was deployed to Iraq in January. Trial resumed shortly thereafter with a new judge presiding.

The defendant moved to dismiss the charges, arguing that the absence of the original trial judge violated his right to have his trial completed by a particular tribunal pursuant to the state and federal constitutional guarantees against double jeopardy. The judge denied the motion, finding that the prior judge "was called to duty" and that manifest necessity for declaring a mistrial existed. The defendant appealed, arguing that a retrial before a new factfinder would subject him to double jeopardy.

The state high court, in an opinion by Justice Richard E. Galway, decided that there was no manifest necessity for a mistrial that would trump the defendant's right under the state and federal double jeopardy clauses to have his trial completed by a particular tribunal. Whether the judge's absence was voluntary was not determinative, the court said. More important was the state's failure to show that consideration was given to the impact of the change in judges on the defendant's rights or that any steps were taken to make sure those rights were protected, it said. The court pointed out that although the original judge knew by December that he had volunteered for military duty, there is no indication that the state made an effort to expedite the resumption of the trial or even to let the defense know of the judge's impending departure. It concluded that, "[h]owever laudable the underlying cause, when a judge becomes unavailable after jeopardy has attached and maintains the ability to reasonably allow for the conclusion of that case, but fails to do so, the State cannot meet its burden of showing manifest necessity." 

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