QUESTION PRESENTED

Did the presiding judge's decision to volunteer for service in Iraq, causing the termination of trial prior to its conclusion, constitute manifest necessity such that Solomon could be retried by a different tribunal?

Issue preserved by motion to dismiss, App. A1,* the State's objection, App. A4, hearing on the motion, the trial court's conditional ruling at the conclusion of the hearing, T 35-36, Solomon's second motion entitled "motion to dismiss," App. A5, the State's objection, App. A10, Solomon's first motion to reconsider entitled "motion to reconsider motion to dismiss," App. A11, the trial court's written order denying the motion to dismiss and denying the motion to reconsider, App. A16, Solomon's motion to reconsider the written order, App. A21, and the court's denial of the motion to reconsider. App. A31.

*References to the record are as follows:
"T" refers to the transcript of the February 13, 2007 hearing on Solomon's motion to dismiss;
"App." refers to the Appendix to this brief.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

In the Derry District Court, the State charged Ernest Solomon with three counts of class A misdemeanor simple assault. App. A16. The State alleged that on November 19, 2005, Solomon assaulted his son Justin by hitting him with a leather belt. Id. The case was originally set for trial on May 22, 2006. Id. The trial was continued twice, each time on Solomon's request, before trial commenced on August 14, 2006. Id.

During cross-examination of the first witness, Justin, the trial court (Coughlin, J.) became concerned that Justin had a Fifth Amendment privilege. Id.; T 3. The court, *sua sponte,* suspended the trial so that counsel could be appointed for Justin. T 3.

The trial recommenced on October 23, 2006, with court-appointed counsel representing Justin. App. A17; T 3. After defense counsel conducted additional cross-examination, Justin's attorney moved to continue so that she could obtain a transcript of Justin's earlier testimony. App. A17; T 3-4. The court (Coughlin, J.) continued the trial until January 22, 2007. App. A17; T 4.

On December 12, 2006, Judge Coughlin, a member of the New Hampshire Army National Guard, volunteered for duty in Iraq. App. A8-A9. He provided a memorandum to his military superiors indicating: "1. In support of our nation's current war efforts, I hereby volunteer to be mobilized for service at Baghdad, Iraq or other such place plus any additional temporary duty locations as

needed by the Army. 2. As part of this voluntary assignment, I specifically waive any and all formal advanced notice to mobilization, such as the customary 30-day notification period." App. A8. In an additional, similar memorandum, Judge Coughlin represented: "Neither my employer, my family nor I will be adversely harmed by not having 30 days to prepare for this mobilization." App. A9. At some point in January, 2007, prior to the date that the trial was scheduled to resume, Judge Coughlin deployed to Iraq, with an anticipated return date of January, 2008. App. A1, A5, A17; T 4, 21, 28.

On January 22, 2007, defense counsel filed a motion to continue on the basis that he was sick at home and unable to attend court. App. A17; T 6. Because Justice Coughlin was in Iraq, Special Justice Stephen presided over the hearing. T 6-7. Solomon appeared, and orally moved to terminate his counsel's representation so that he could represent himself. App. A17. The court granted that motion. Id. After Solomon's *pro se* motion to dismiss for lack of speedy trial was denied, however, Solomon requested that counsel be reinstated, and the court granted that request. Id.; T 7. A subsequent court date of February 5, 2007, was continued on defense counsel's motion because of a scheduling conflict. App. A17.

On January 31, 2007, Solomon filed a motion to dismiss. App. A1. Defense counsel represented on information and belief that Justice Coughlin "volunteered to go to Iraq and serve in the military

and left Derry District Court in early January, 2007 to go to Iraq." T 8; see App. A32-33. Solomon argued that "further prosecution of the accused at his currently scheduled March 12, 2007 trial constitutes a violation of his rights against double jeopardy...." App. A2 (citing N.H. Const., pt. I, art. 16; U.S. Const., 5th and 14th Amendments). Solomon also made clear he did not consent to the granting of a mistrial. App. A2. The State objected. App. A3.

The court heard argument on the motion on February 13, 2007. During the hearing, Solomon pointed out that the February 9, 2007 edition of the New Hampshire Bar News had reported that "Derry District Court Judge John Coughlin, a JAG Major, volunteered for a second tour of duty in Iraq," and submitted the article as an exhibit. T4; App. A32. At the hearing's conclusion, the court denied the motion to dismiss, and indicated it would declare a mistrial unless Judge Coughlin could hear the remainder of the trial by some type of teleconference from Iraq. App. 18; T 36.

Solomon filed a motion to reconsider the court's oral order, and a second motion to dismiss. App. A5, A11. Solomon attached the December 12, 2006 documents quoted above to each of these pleadings. App. A8-A9, A11. Meanwhile, the trial court received a memorandum from the Multi-National Security Transition Command-Iraq indicating that "Maj. Coughlin's military duties neither permit him to return to the United States nor to engage in any additional responsibilities outside of his military duties and

responsibilities." App. A18-A19. Subsequently, the court ordered a mistrial, and denied the motion to reconsider. App. A20. Solomon moved to reconsider this written order, App. A21, and the court denied the motion without hearing. App. A31. Solomon then appealed to this Court.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Solomon's motion to dismiss, because Solomon objected to a mistrial following Justice Coughlin's mid-trial departure to Iraq, and the circumstances underlying his departure did not rise to the level of manifest necessity. Solomon's double jeopardy right attached, and that right in the context of a bench trial is violated by a mid-trial substitution of a different presiding judge or a recommencement of trial before a different judge.

Courts have generally found manifest necessity for a mistrial where there is a breakdown of the judicial machinery that is not caused by a voluntary act of a critical trial participant. For example, if the presiding judge in a bench trial becomes unavailable due to illness, there is manifest necessity to declare a mistrial. Justice Coughlin's unilateral decision to volunteer for duty in Iraq, while admirable, did not establish manifest necessity because it amounted to a voluntary departure from the proceedings, rather than an unavoidable breakdown of the judicial machinery.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING SOLOMON'S MOTION TO DISMISS, BECAUSE RESUMING OR RECOMMENCING TRIAL BEFORE A DIFFERENT FACT-FINDER WOULD VIOLATE DOUBLE JEOPARDY.

The trial court erred in denying Solomon's motion to dismiss, because resuming or recommencing trial before a different factfinder would violate his right to double jeopardy under the state and federal constitutions. N.H. Const., pt. I, art. 16; U.S. Const., fifth and fourteenth amendments. Because the state constitution provides at least as much protection of this right as does the federal constitution, this brief discusses the state constitutional issue, referring to cases decided under the federal constitution for guidance. State v. Gould, 144 N.H. 415, 416 (1999); State v. Hogg, 118 N.H. 262, 267 (1978)(where dual sovereigns involved, state constitutional right against double jeopardy provides greater protection than federal constitution).

"The Double Jeopardy Clause of the New Hampshire Constitution prohibits the State from placing a criminal defendant in jeopardy more than once for the same offense, thereby preserving the defendant's '"valued right" to have his trial completed by a particular tribunal.'" Petition of Mello, 145 N.H. 358, 360 (2000)(quoting Gould, 144 N.H. at 416). Jeopardy attached when the first witness was sworn and the court began to hear evidence. State v. Courtemarche, 142 N.H. 772, 774 (1998).

In the context of a bench trial, the right to have a trial completed by a "particular tribunal" means having the trial completed

by the same judge who began the trial. Solomon has the fundamental right "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." United States v. Jorn, 400 U.S. 470, 486 (1971)(plurality opinion). Just as "[e]very jury has its own character and the initial jury may be more favorably disposed to the defendant than the next jury," W. LaFave, J. Israel & N. King, 5 Criminal Procedure §25.1(b) at 632 (2d Ed. 1999), so does every trial judge have his or her own character and particular disposition towards the defendant and type of case.

Not all retrials, however, violate the right against double jeopardy. For example, when structural trial error infects a proceeding to the extent that reversal on appeal becomes inevitable, the trial court can terminate the proceeding and retry the defendant. State v. Ayer, 150 N.H. 14, 24 (2003). More generally, when the defendant consents to a mistrial, retrial will not violate his right against double jeopardy. United States v. Dinitz, 424 U.S. 600, 607 (1976).

Absent the defendant's consent, however, a defendant may not be retried following the declaration of a mistrial unless the prosecution can demonstrate that the mistrial was justified by "manifest necessity." Gould, 144 N.H. at 416. "Absent such proof, a retrial is barred." Id. A mistrial should be declared only "'with the greatest caution, under urgent circumstances, and for very plain and obvious causes.'" State v. Bertrand, 133 N.H. 843, 854

(1991)(quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)).

In claiming that the trial court erred in denying his motion to dismiss, Solomon does not contend that the trial court acted precipitously, or that it failed to consider the available alternatives to a mistrial. Cf. Gould, 144 N.H. 417-18 (trial court acted precipitously, and record did not demonstrate that it considered available alternatives in declaring mistrial). During the hearing, the court considered the alternatives of listening to the tape of the proceeding and then picking up where Justice Coughlin left off, or starting the evidence all over again. T 21-28. Solomon pointed out that these alternatives violated his right to have his case decided by the same tribunal that started the trial, T 21, and the State appeared to agree. T 28.

Further, the court considered the alternative of waiting for Justice Coughlin to return from Iraq. T 21. Solomon declined to waive his right to speedy trial in order to effectuate this alternative, arguing that he should not have to waive one constitutional right in order to exercise another. T 22. The trial court "agree[d] [that was] not the best option." T 22. Finally, the court considered the alternative of Justice Coughlin hearing the case by some kind of teleconference or video-conference from Iraq, T 34-36, but the military command rejected that alternative. App. A18-A19.

Based on its consideration of these alternatives, the trial court determined that the circumstances met the standard of manifest necessity. App. A18-A20. Solomon contends, however, that the relevant circumstances were not his refusal to waive his speedy trial, or the decision of the military command not to allow a trial by video-conference. Rather, the circumstance that terminated this trial was Coughlin's departure for Iraq. His ensuing unavailability did not constitute manifest necessity, because it resulted from a voluntary decision rather than a military command.

In this regard, Solomon and the trial court differed, not with respect to the underlying facts, but with respect to the framing of the issue. Solomon contended that the circumstance that resulted in a mistrial was Justice Coughlin's unilateral decision to volunteer for duty in Iraq. T 4-5, 16, 23-24. After the hearing, Solomon obtained the memoranda provided to the military on December 12, 2006 confirming that Coughlin volunteered for duty, and provided those to the Court as part of his second motion to dismiss and his motion to reconsider. App. A8-A9, A11.

The trial court, however, defined the trial-terminating circumstance differently, as being the decision of military commanders to deploy Coughlin to Iraq. App. A20; T 4-6, 16. As the trial court explained in its order:

> [W]hether he volunteered or not is not critical. The fact remains that Judge Coughlin was 'called to duty.' It was clearly up to the military to decide whether to deploy Judge Coughlin to Iraq regardless of whether he volunteered or not.

> Considering that the military has made that decision to deploy Judge Coughlin and now that the military has indicated that he is not available in any manner, a mistrial is appropriate considering that defense counsel has rejected all other available alternatives....

App. A20.

The trial court erred in determining that the voluntary nature of Justice Coughlin's request for duty was "not critical," because this fact made the difference between a trial terminated by an external influence, the decision of military commanders, and a trial terminated by a unilateral and voluntary decision of a trial participant. As such, this case is distinguishable from the only decision counsel could find involving the intersection of judicial responsibility and the exigencies of war as relating to double jeopardy. Wade v. Hunter, 336 U.S. 684 (1949).

Wade involved the court-martial of two American soldiers for the rape of two German women in Krov. Id. at 685-86. The illness of several state's witnesses caused delay in the proceedings. Id. at 686-87. In the interim, Wade's unit continued to advance across the battlefield, but the witnesses, German civilians, remained in Krov. Id. at 686. Subsequently, "[t]he Commanding General of the Third Army concluded that the 'tactical situation' of his command and its 'considerable distance' from Krov made it impracticable for the Third Army to conduct the court-martial." Id. at 687.

Under these circumstances, the United States Supreme Court held that a new court-martial did not violate Wade's right against double

jeopardy. Id. at 687-88. Instead, the Court reasoned, "this record is sufficient to show that the tactical situation brought about by a rapidly advancing army was responsible for withdrawal of the charges from the first court-martial." Id. at 691. Thus, the exigencies of war resulted in the termination of the first proceeding, and constituted manifest necessity for a mistrial and retrial. Id. at 690.

As Wade v. Hunter illustrates, courts tend to find manifest necessity when the circumstances terminating the proceeding are beyond the control of the trial participants. Thus, the incapacitation of the presiding judge in a bench trial due to illness or death would constitute manifest necessity. E.g., United States v. Whitlow, 110 F. Supp. 871, 876 (D.D.C. 1953) (mistrial may be "declared in the discretion of the court if the continuation of the trial is impossible or impracticable due to such a cause as the illness of the defendant, the illness of the judge, or the illness of a juror"); Commonwealth v. Robson, 337 A.2d 573, 577 (Pa. 1975), cert. denied, 423 U.S. 934 (1975). Similarly, an impasse due to a "genuinely deadlocked jury" constitutes manifest necessity. State v. Crate, 141 N.H. 489, 492 (1996).

On the other hand, where an essential trial participant abruptly terminates the proceeding for a good-faith purpose that does not rise to the level of "necessity," retrial will be barred. State v. Pond, 133 N.H. 738 (1990). In Pond, after jeopardy attached, the State discovered an infirmity in the indictment, and entered nolle

prosequi. Id. at 739-40. Ironically, as the Court noted, had the State simply stood by and allowed the trial court to grant the defendant's motion to dismiss, the case could have been retried on a substitute indictment. Id. at 741. Because the State unilaterally and voluntarily terminated the prosecution, however, double jeopardy barred retrial. Id.; see also Love v. Morton, 112 F.3d 131, 134 (3d Cir. 1997)(double jeopardy violation where trial judge terminated the proceeding after the first day of trial following the sudden death of judge's mother-in-law, and trial began anew the next day before different judge); Ferlito v. Judges of County Court, Suffolk County, 39 A.D.2d 17, 331 N.Y.S.2d 229, 232-33 (N.Y.A.D. 1972)(double jeopardy barred retrial where trial court recused itself mid-trial due to a perceived appearance of impropriety but trial judge did not harbor actual bias); State v. Kasprzyk, 763 A.2d 655, 661-62 (Conn. 2001)(double jeopardy violation where trial court over defense objection began hearing trial and motions to suppress together, but then transferred the trial to another judge because defendant chose to testify in the suppression portion of the proceeding only); Ahern v. Ahern, 15 S.W.3d 73, 80-82 (Tenn. 2000)(where trial judge heard part of criminal contempt bench trial that involved interpretation of marital dissolution agreement, then transferred matter to the judge who originally approved the agreement as having greater competency to interpret that document, defendant's double jeopardy right violated); State v. Johnson, 932 P.2d 380, 381, 387 (Kan. 1997)(fact that completion of bench trial would have

had to occur in inconvenient forum of magistrate judge's home district, which was five hours away, did not create manifest necessity for mistrial).

Counsel found only one case where an appellate court approved the substitution of a different judge as a means to avoid a double jeopardy violation where the trial judge voluntarily terminated the proceedings during a bench trial. Huss v. Graves, 252 F.3d 952, 954 (8th Cir. 2001). In Huss, the State and defense presented a stipulated record to the judge, "[n]early all" of which favored the defense, and jointly argued for a verdict of not guilty by reason of insanity. Id. at 954, 957. That judge terminated the proceeding, however, stating he was "unable to find Mr. Huss not guilty by reason of insanity due to concerns that he had about the evidence," and transferred the case for a jury trial without obtaining the defendant's assent. Id. at 954. In the jury trial, the prosecution "aggressively sought a conviction" and the jury found Huss guilty. Id. The Court granted habeas relief, determining that the jury verdict violated Huss's right against double jeopardy. Id. at 957-58. Instead of releasing the prisoner, however, the Court afforded the State an opportunity to present the same stipulated record to a different trial judge. Id. at 958.

In Huss, the Eighth Circuit Court of Appeals did not explain how the mid-trial substitution of trial judges could be reconciled with the defendant's double jeopardy right to "conclud[e] his confrontation with society through the verdict of a tribunal he might

believe to be favorably disposed to his fate...." Jorn, 400 U.S. at 486. Under different circumstances, a mid-trial substitution of judges would implicate the very core of the double jeopardy right. For example, absent double jeopardy protection, one could envision a scenario where a judge in a bench trial begins to demonstrate an inclination to acquit a controversial defendant, inflaming public opinion, only to be removed from the case for a mid-trial substitution of a judge known for his "law and order" tendencies. Indeed, counsel could find no other case involving a bench trial where the appellate court held or even suggested that mid-trial substitution of the factfinder could obviate a double jeopardy problem arising out of the first judge's unavailability. Cf. Johnson, 932 P.2d at 384 (in the case previously cited where the trial judge believed a five-hour commute rendered the completion of trial impractical, the Court did not even consider the possibility of a mid-trial substitution of a judge that presided in the home forum).

Accordingly, the remedy portion of the Huss opinion appears either to be wrongly decided, or to reflect a narrow exception to the general rule based on the fact that the case involved a stipulated record. That record consisted of "depositions from a psychiatrist and a psychologist who opined that Mr. Huss was not responsible for his acts, in addition to tapes and depositions describing Mr. Huss's bizarre behavior." Id. at 954. Thus, the assessment of credibility, usually the most important part the role of the factfinder, was not implicated.

Here, Judge Coughlin had heard testimony from the State's primary witness, so witness credibility was implicated. Accordingly, the State was correct in its apparent agreement with Solomon during the motion hearing that Justice Stephen could not avoid a double jeopardy problem simply by listening to the tape of the first part of the trial and then picking up where it left off. T 28.

In conclusion, the termination of Solomon's trial was not occasioned by an unavoidable circumstance such as a military draft or call up of reserves, the demands of a "rapidly advancing army," or the incapacitation of the trial judge due to illness. Rather, Solomon's trial terminated because of the trial judge's voluntary decision to leave his judicial post and serve his country in Iraq. "There are degrees of necessity, and a 'high degree' of necessity is required to justify a mistrial without the consent of the defendant." Bertrand, 133 N.H. at 853 (quotations omitted). Here, the presiding judge's voluntary departure from the proceedings, while admirable and noble in its purpose, did not represent a 'high degree' of necessity. Accordingly, this Court must rule that retrial is barred by the double jeopardy provisions of the state and federal constitutions.

CONCLUSION

WHEREFORE, Mr. Solomon requests that this Court reverse.

Undersigned counsel for Solomon requests fifteen minutes oral argument.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I, Theodore Lothstein, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 20th day of November, 2007.

_____

Theodore Lothstein

DATED: November 20, 2007