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|----------------------------|---|------------------------------|
| THE STATE OF TEXAS, |) | IN THE 13th DISTRICT |
| |) | COURT |
| Plaintiff, |) | |
| |) | NAVARRO COUNTY, TEXAS |
| v. |) | |
| |) | |
| GWENDOLYN XXX, |) | |
| |) | |
| Defendant . |) | |
| _____ |) | |

DEFENDANT’S MOTION FOR WRIT OF HABEAS CORPUS¹

Defendant, Gwendolyn XXX, hereby moves this Court to grant her a writ of habeas corpus barring further prosecution in this case based upon the Double Jeopardy Clause of the United States Constitution and the Texas Constitution. In support of this motion, Ms. XXX sets forth the following facts and argument.

I. BACKGROUND

As the Court is well aware, the Court previously declared a mistrial in this prosecution based upon the violation of a motion *in limine* by the state’s case agent, Bertha Zaidle. In declaring the mistrial, the Court acknowledged that it was doing so “on a *sua sponte* basis.” *See* Transcript of June 2, 2005 hearing (“Tr.”) (attached hereto as Attachment A) at 20. (“[T]he Court will grant a mistrial based on what the Court believes is a knowing or at any rate a reckless disregard for this Court’s orders with respect to particular testimony.”). Significantly, in granting

¹A pretrial motion for writ of habeas corpus is the mechanism to be utilized in seeking relief from the exposure to double jeopardy. *See Ex Parte Robinson*, 641 S.W.2d 552 (Tex. Crim. App. 1982)

the *sua sponte* mistrial, the Court acknowledged that it was *not* doing so out of a manifest necessity:

I am not sure whether the testimony of the witness was so injurious that it could not be cured by an instructions. *I think certainly it might be*, at the same time I do believe that the testimony of the witness in direct violation of the Court's order is serious enough that a mistrial should be granted in this case.

Id. (emphasis added).

Indeed, in arguing against the declaration of a mistrial, the defense noted that the violation of the Court's order by Zaidle "could be solved in a different way." *Id.* at 18. One suggestion urged by the defense was that the prosecution proceed but that the jury be instructed that Zaidle had disregarded the Court's pretrial order and that the Court was considering contempt proceedings against Zaidle. *Id.* at 11.

II. DISCUSSION

The case law in Texas is very clear regarding a court's *sua sponte* declaration of a mistrial. "As a general rule, after a jury has been impaneled and sworn, thus placing the defendant in jeopardy, double jeopardy bars a re-trial if the jury is discharged without reaching a verdict." *Ex Parte Fierro*, 79 S.W.3d 54, 56 (Tex. Crim. App. 2002). Nevertheless, this rule does not apply "where manifest necessity exists to declare a mistrial." *Brown v. State*, 907 S.W.2d 835, 839 (Tex. Crim. App. 839).

As noted recently by the Texas Court of Criminal Appeals:

Although the Supreme Court has not set forth precise circumstances in which manifest necessity exists, a trial judge's discretion to declare a mistrial based on manifest necessity is limited to "very extraordinary and striking circumstances." Manifest necessity exists when the circumstances render it impossible to arrive at a fair verdict, *when it is impossible to continue with*

trial, or when the verdict would be automatically reversed on appeal because of trial error.

The judge is required to consider and rule out "less drastic alternatives" before granting a mistrial. The judge must review the alternatives and choose the one which best preserves the defendant's "right to have his trial completed before a particular tribunal." The judge need not expressly state his reasons in the record as long as the basis for his ruling is adequately disclosed by the record. When a trial judge grants a mistrial despite the availability of a less drastic alternative, there is no manifest necessity and he abuses his discretion.

Hill v. State, 90 S.W.3d 308, 313 (Tex. Crim. App. 2002) (emphasis added) (citations omitted).

See also, Fierro, 79 S.W.2d at 56 ("There must be a 'high degree' of necessity that the trial come to an end." (citation omitted)).

Here, the Court itself acknowledged that "manifest necessity" did *not* exist when it stated that Zaidle's disregard of the pretrial order could "certainly" be solved by "an instruction." *See* Tr. at 20. Moreover, as noted above, defense counsel suggested alternatives to declaring a mistrial that clearly could have allowed the trial to go forward. In short, it was *not* "impossible to continue with trial."²

²It is true that the defense originally requested a mistrial. Nevertheless, this request was only made after Zaidle testified that she had not been shown the Court's order on the Motion *In Limine*. *See* Tr. at 12-13. (Counsel requests mistrial because, based upon Zaidle's testimony, "jeopardy would have attached..."); *Bauder v. State*, 921 S.W.2d 696 (Tex. Crim. App. 1996) (Texas Constitution precludes retrial if the prosecutor should have known that his/her conduct might provoke a mistrial.); *State v. Cabrera*, 24 S.W.3d 528 (Tex. App.--Corpus Christi 2000, pet. ref'd) (Retrial was precluded when state knowingly or recklessly caused violation of motion *in limine*).

Despite an obligation to correct perjurious testimony on Zaidle's part, then Assistant District Attorney Amanda Doan did not immediately correct Zaidle's testimony to claim that Zaidle had been told of the Court's order, but, instead, allowed defense counsel to proceed to request the mistrial. *See Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) ("The prosecutor's constitutional duty to correct known false evidence is well established both in law

III. CONCLUSION

Precedent indicates that, given the fact that the previous trial ended when the Court declared a mistrial *sua sponte* and that this mistrial was not the result of “manifest necessity,” any further prosecution of Ms. XXX would be barred by double jeopardy protections. Consequently, the writ of habeas corpus should issue and the indictment against Ms. XXX should be dismissed with prejudice.³

Respectfully submitted,

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and in the professional regulations which govern prosecutorial conduct.”) Nevertheless, when the state finally did correct Zaidle’s perjurious testimony so as to eliminate jeopardy having attached due to prosecutorial misconduct, the defense immediately withdrew its mistrial motion. *See* Tr. at 14-15, 17-18. In any event, the Court acknowledged that it allowed the defense to withdraw its mistrial request and was declaring a mistrial *sua sponte*. *Id.* at 18-20.

³For purposes of this pleading, Ms. XXX assumes that Zaidle was informed as to the Court’s order and that the prosecution did not “cause” the mistrial. Nevertheless, in the event the Court was to rule that the mistrial resulted from a “manifest necessity,” Ms. XXX reserves the right to argue that the mistrial *was* caused by the state.

CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on February 27, 2006, I caused a copy of the foregoing document to be delivered by facsimile on the Navarro County District Attorney's Office at 300 West Third Avenue, Corsicana, Texas 75110.

F. Clinton Broden

No. 29, 433

| | | |
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| GWENDOLYN XXX, |) | |
| |) | |
| Defendant . |) | |
| _____ |) | |

ORDER

Upon consideration of Defendant’s Motion for Writ of Habeas Corpus, said motion is this ____ day of March, 2006 GRANTED.

The Court FINDS that it previously granted a mistrial in this case *sua sponte*. The Court further FINDS that the mistrial was not supported by “manifest necessity.” The Court further finds that further prosecution in this case would be barred by the Double Jeopardy Clause of the United States Constitution and the Texas Constitution. Based upon these findings, it is

ORDERED the State of Texas is prohibited from further prosecuting Gwendolyn XXX based upon the instant indictment.

FURTHER ORDERED that the indictment against Gwendolyn XXX is hereby dismissed with prejudice.

JOHN H. JACKSON
JUDGE, 13TH JUDICIAL DISTRICT

ORDER