IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOUNDARY

STATE OF IDAHO, Plaintiff, vs. JOSEPH ALLEN MANLEY, Defendant.	**CASE NO: CR-01-17363** **CORRECTED ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

On March 28, 2002, I declared a mistrial in this matter pursuant to I.C.R. 29.1(c) because I determined Defendant Joseph Manley was being deprived of his right to a fair trial on the charge of second-degree murder. I concluded there was serious question about the adequacy of preparation for trial and it appeared to be due to the lack of mental and/or emotional fitness of Defendant's counsel, Roger Williams, to provide Defendant with effective counsel. When the mistrial was declared, I stated it was due to my concerns about the mental or emotional condition

of Mr. Williams and because of the court's observations in the trial and prior proceedings. Tr., p. 590-592.

Mr. Williams engaged in conduct which was either negligent or which was intentionally dilatory and designed to frustrate the criminal trial process once he became frustrated with the course of the trial. Such conduct made it impossible to proceed with the trial in conformity with law. Having observed an accumulation of circumstances demonstrating ineffective counsel prior to and during the trial, I ultimately came to the conclusion that the cumulative effect of this conduct obstructed a full and fair adjudication of the case. Defendant did not have the benefit of effective assistance of counsel and was denied due process of law as set forth in the findings below. I concluded the situation was serious enough to outweigh Defendant's interest in obtaining a final resolution of the charges against him.

FINDINGS OF FACT

1. After observing Defendant's counsel in the conduct of the defense of his client during the presentation of the evidence by the State, it became abundantly clear that Roger Williams had engaged in no meaningful investigation or preparation prior to trial. The representation by Mr. Williams of Defendant during trial showed that he proceeded

to trial without requiring the prosecution to timely furnish important information regarding the evidence against Defendant.

2. Defendant's counsel filed no pre-trial motions to obtain the services of a qualified expert to examine any objects of evidence for forensic purposes. Specifically, defense counsel filed no motion to secure an expert on blood-spatter evidence or DNA evidence at issue in this case to evaluate the evidence.

3. Defendant's counsel failed to file any motion to suppress the incriminating statements made by Defendant during his first interview by police, made as soon as Mr. Manley was arrested. There appears to be a colorable issue of whether Defendant made an intelligent and knowing waiver of his *Miranda* rights under the circumstances. *See, e.g.,* ***State v. Varie***, 135 Idaho 848, 26 P.3d 31 (2001).

4. Defendant's counsel compounded this failure by stipulating to the admission of the tape recording of incriminating statements into evidence.

5. At the beginning of the trial, Defendant's counsel was obviously unprepared or unable to concentrate as demonstrated by his recross examination of prosecution witness Rhonda Russell. The inept questioning by Mr. Williams unnecessarily emphasized, to the prejudice of his

client, that not only did she observe Joe Manley upset but that Chris Manley had never seen Joe Manley so mad. Tr., p. 95.

6. Defendant's counsel failed to make a timely objection, or seek a continuance, when evidence of blow back blood spatter on the Defendant's pant leg was introduced. This evidence was not timely disclosed by the State. Chester Park's examination of the pants was not done until March 22, the Friday before the trial began. See Tr., p. 455, ll. 22-25; Tr., p. 473. No report was generated by Chester Park, so none was revealed. Tr., p. 457, ll. 8 and pp. 472-473. Mr. Williams stated that he received no report. Tr., ll. 8-9, p. 456; Tr., p. 457, ll. 3-7. Although Mr. Williams acknowledged he was "at a loss" because he had no report or disclosure, he did absolutely nothing which would effectively remedy this unfair prejudice to his client. Instead, without adequate preparation, Mr. Williams elicited testimony from Chester Park damaging to his client. Tr., p. 460.

7. The tardy disclosure of this evidence should have been objected to, but it was not. A motion should have been made to prevent the jury from hearing the undisclosed evidence. Most lawyers would have moved for a mistrial or at least for exclusion of the evidence or a continuance.

Mr. Williams did nothing that would effectively protect his client's right to a fair trial. His failure to seek proper remedies could not justify a court-sanctioned designation of evidence of blood-stained objects for which defense counsel had not disclosed any qualified witness to explain.

8. These accumulating failures observed throughout the proceedings finally convinced me that Defendant's counsel was failing to provide competent representation and demonstrated that he was unprepared for this trial. I also was concerned about the fact that this young defendant, only 17, was unable to effectively evaluate the performance of his counsel.

9. As set forth in the Court's Order Declaring Mistrial, I observed Defendant's counsel, who had reserved his opening statement for the opening of his case, emotionally breaking down at points during his comments to the jury. I noticed the jury reaction to this behavior, and members of the jury appeared confused or concerned as to why Mr. Williams was unable to maintain his composure.

10. Mr. Williams' professionalism was obviously compromised in this case. He admitted "he was really into this case" after excusing his emotion (Tr., p. 556, ll. 3-5) and apologized for his emotional condition. He broke down again later. Tr., p. 556, ll. 10-11.

11. I have observed Mr. Williams in several trials and because of his emotional behavior during his opening statement, I became very concerned and wondered what strain Mr. Williams might be under to cause this emotion. For a moment, I entertained the thought that it was nothing more than a show. Because Mr. Williams' voice was cracking as he spoke, however, I concluded his emotion was not feigned. I decided to be cautious and to avoid interference with the case presentation and instead observe for further indications of ineffective performance of counsel.

12. During the defense evidence presentation out of the hearing of the jury, Defendant's counsel was clearly dissatisfied with my ruling on certain tardily-disclosed evidence that he sought to introduce. He appeared frustrated and angry. Discovery issues had been addressed at length prior to trial so Mr. Williams was aware of the concern of the state that defense evidence be timely disclosed or that it be refused admission. During the hearing prior to trial I ruled in Defendant's favor, but stressed to Mr. Williams the importance of timely evidence disclosure.

13. At the hearing during trial concerning the tardily-disclosed evidence, I ruled that Defendant would be allowed to use the doorknob as evidence and the table as

evidence because I concluded the State was not surprised or prejudiced by the admission of these objects. I excluded the blood-stained book and paper evidence, however, because it did prejudice the State and because of the lack of any disclosed defense expert or other witness to demonstrate a foundation for admission or to testify about the significance of the evidence.

14. Without any basis, and without even attempting to state any basis, Defendant's counsel blurted out in open court that I was biased against him personally as a result of his support for an announced district judge candidate, John "Jack" Douglas. I was astonished by this remark because I did not harbor bias against Mr. Williams which would preclude fair treatment of him or any of his clients, including the Defendant. Mr. Williams has never stated any factual basis for his accusation. There never has been any basis for it. I had announced my retirement. Whether Mr. Douglas or any other lawyer was running to fill my position was not something that would cause bias.

15. I concluded that the more obvious reason for the outburst was that Mr. Williams had become frustrated with his own lack of preparation in the case and his earlier failure to timely object to very incriminating evidence.

16. In hindsight this allegation of bias was either intentional and therefore showed disrespect for me and my office as district court judge, or in the alternative demonstrated that counsel was unable to control his emotions.

17. At this point, Defendant's counsel expressed concerns that he might have a heart attack as a result of this case. I am aware of similar concerns during a prior trial I presided over in February 2000 in the consolidated Bonner County Cases of State v. Swader, CR-99-02673 and State v. Horvath, CR 99-02659. At that time, Defendant's counsel had to be hospitalized overnight for heart monitoring.

18. I called a recess. After I declared the mistrial, I learned later that same day that during the recess Mr. Williams was laughing and joking with Defendant and family members of the Defendant. This behavior strongly suggests that Mr. Williams was not handling the stress he was experiencing or that his conduct was an intentional effort to invite error into the proceedings by the declaration of a mistrial without just cause.

19. After much concern during the trial that Defendant's due process rights had been severely compromised by the conduct of his counsel, I reviewed

I.C.R. 29.1 during the recess. I had earlier reviewed the law concerning double jeopardy when I became increasingly concerned about the performance of Mr. Williams. I had earlier considered discussing with both attorneys the option of declaring a mistrial, but refrained because I did not want to interfere with the wide latitude afforded counsel in making tactical decisions. In addition, I have presided over cases with Mr. Williams for over five years and any discussion of incompetence would only meet with defensiveness on his part and no productive result would occur.

20. During the recess, I determined to announce the mistrial without discussing it with counsel or inviting arguments because of the volatile nature of the situation. Defendant's counsel was obviously either unable to maintain professional bearing and composure or was intentionally engaging in tactics designed to incite the court and/or invite error to frustrate the criminal trial process.

21. I concluded that any further discussion of the matter with Mr. Williams would only make matters worse. In the interest of maintaining civility and decorum I determined that a mistrial was to be declared *sua sponte*. This was due in part to the speech by Mr. Williams found at Tr., p. 583, l. 18 and p. 584, l. 18. I determined that

any discussion of my concerns about Mr. Williams' performance on behalf of his client would only generate more self-serving excuses attempting to justify what the record already showed--incompetent counsel for the Defendant.

22. When the bailiff told me that Mr. Williams was ready to continue, I reconvened court and announced the mistrial twice, once out of hearing of the jury and once after the jury had been brought back into the courtroom. At no time did Defendant's counsel object to the mistrial before the jury was released.

CONCLUSIONS OF LAW

1. A mistrial may be declared by the court *sua sponte* where it is impossible to proceed with the trial in conformity with the law. I.C.R. 29.1(c); ***State v. Stevens,*** 126 Idaho 822, 892 P.2d 889 (1995).

2. An ALR annotation by John E. Theuman, entitled Former Jeopardy as Bar to Retrial of Criminal Defendant After Original Court's Sua Sponte Declaration of a Mistrial--State Cases, 40 A.L.R.4th 741 (1985), is helpful in determining whether retrial is prevented under constitutional prohibitions against double jeopardy. In material part it is stated therein:

> It is a basic principle of American constitutional law, as it was of the English common law, that no person may be twice placed in jeopardy--that is, put on trial with the possibility of conviction and punishment--for the same criminal offense. Under the early common law, this meant that a criminal trial could not be terminated prior to the verdict for any reason without in effect acquitting and discharging the defendant, since any attempt to recommence the prosecution would be barred as double jeopardy. However, modern rules, recognizing that circumstances may arise in the course of a trial which make it impossible to continue the proceedings without serious prejudice to either or both parties, allow the judge to declare a mistrial in a proper case, at the request of the defense or prosecution or on his or her own motion, without prejudice to the right of the prosecution to seek a new trial.

Annotation, 40 ALR4th § 2(a), at 745-746.

3. Criminal actions may not be terminated by a mistrial without double jeopardy consequences unless there is "manifest necessity" or a sufficiently compelling reason for doing so which obstructs Defendant's right to a full and fair adjudication of the case. *Id.,* 126 Idaho at 826, 892 P.2d at 893; *see also,* ***State v. Lewis***, 123 Idaho 336, 848 P.2d 394 (1993).

4. In determining whether manifest necessity exists, the court may consider the record as a whole. ***Arizona v. Washington***, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); ***United States v. Bauman***, 887 F.2d 546, 550 (5th Cir. 1989).

5. The decision whether to declare or deny a mistrial is a matter within the discretion of the trial judge if the court determines that an occurrence at trial has prevented a fair trial. ***State v. Kuzmichev***, 132 Idaho 536, 976 P.2d 462 (1999); ***State v. Araiza***, 124 Idaho 82, 94, 856 P.2d 872, 884 (1993).

6. Deference is given to the trial court's decision because he or she is "far more 'conversant with the factors relevant to that determination' than any reviewing court can possibly be." ***Arizona v. Washington***, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), quoting ***Wade v. Hunter***, 336 U.S. 684, 687, 69 S.Ct. 834, 836, 93 L.Ed. 974 (1949). The reason for such deference is that the trial judge has listened not only to the words, but observed the tone of voice, the body language, and the facial expressions of all the participants, including the apparent reactions of the jurors. *See, e.g.,* ***Washington***, *supra,* 434 U.S. at 513-14, 98 S.Ct. at 834; ***Unites States v. Bauman***, 887 F.2d 546 (5th Cir. 1989)(appellate court must give mistrial order the "highest degree of respect" because trial judge is most familiar with events that compromised the trial).

7. One consideration is whether the trial court carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner. ***Bauman***, 887 F.2d at

550. "The availability of alternatives less draconian than a mistrial does not necessarily preclude reprosecution, as reasonable judges may differ concerning proper curative measures." ***Id.***

8. In this case, I concluded that there were no alternative measures to explore because the prejudice that Defendant already had suffered due to his attorney's incompetence prior to the declaration of the mistrial could not be cured by a continuance of the trial or any other measure. The State had rested its case and much of the damage had been done as a result of incompetent performance by counsel for the Defendant. The prejudice could not be cured.

9. In addition, Mr. Williams' mental and emotional state, where he appeared to me to be having a break-down, would not allow a rational discussion nor any information which would explain the obvious, unfair prejudice to his client that the record clearly shows.

10. Article I, § 13 of the Idaho Constitution assures criminal defendants of "reasonably competent assistance of counsel." ***Gibson v. State***, 110 Idaho 631, 635, 718 P.2d 283, 287 (1986). In this case, the assistance of counsel was not "reasonably competent" which became all too clear when counsel entirely lost his composure. The rights of

the Defendant must be safeguarded, and it became the duty of this court to abort the trial. *See, e.g.,* ***United States v. Williams***, 411 F.Supp. 854 (S.D. N.Y. 1976)(court must intervene when quality of representation falls below the level necessary to achieve some semblance of the adversary process).

11. In ***Williams*** it was explained:

> The court's declaration of a mistrial does not bar retrial of the defendant. Substantial harm could result if, because of the double jeopardy clause, a court felt compelled to allow a trial to continue although the accused was not adequately represented. It would be inconceivable to require a trial judge to rely on the chance that a cold record will shock the conscience of an appellate court when an incipient miscarriage of justice is growing before his eyes.

Williams, 411 F.Supp. at 857-858.

12. It is obvious that inadequate representation by the Defendant's counsel constitutes manifest necessity to halt the trial. It is just as obvious that if the Defendant's counsel is too ill, whether physically or emotionally, to continue a mistrial is proper. ***See, e.g., United States v. Dinitz***, 424 U.S. 600, 98 S.Ct. 1075, 47 L.Ed.2d 267 (1976)(where banishment of defense counsel from proceeding was not in bad faith and defendant moved and obtained mistrial to obtain another counsel, defendant's double jeopardy right not violated); ***United States v.***

Godwin, 272 F.3d 659 (2001)(if defense counsel's performance is deficient, judge may take such steps as admonishing counsel, ensure facts favorable to defendant are presented, or may declare mistrial); ***United States v. Wayman***, 510 F.2d 1020 (5th. Cir. 1975)(when defense counsel cannot continue due to illness or injury, jeopardy does not attach); ***United States v. Spears***, 89 F.Supp.2d 891 (W.D. Mich. 2000)(manifest necessity where defense counsel engaged in misconduct throughout trial).

13. Another consideration is whether Defendant has an opportunity to oppose the mistrial, or whether he waived his right when he failed to object. ***Stevens,*** 126 Idaho at 827, 892 P.2d at 894-895. In this case, although I did not invite objections or comments from Mr. Williams, he made no objection. Further, he offered no comment or explanation that he was fit to proceed--either out of hearing of the jury or when the jury was re-convened. It has been held that when defense counsel remains silent after a mistrial is declared, he impliedly consents to the mistrial unless there is some misconduct on the part of the prosecution causing the mistrial. ***United States v. DiPietro***, 936 F.2d 6 (5th. Cir. 1991); ***Camden v. Circuit Court of the Second Judicial Circuit***, 892 F.2d 610 (7th Cir. 1990). In general, however, it is immaterial whether the defendant has

objected or consented to the mistrial if manifest necessity for the mistrial exists. *See,* Annotation, 77 A.L.R.3d 1143 (1970) and cases cited therein.

CONCLUSION

In this case, there was manifest necessity for declaration of the mistrial as outlined above in that Defendant's due process rights were violated. As such, a new trial is not barred by double jeopardy considerations. Defendant's motion to dismiss must be denied.

The Court shall issue separate orders appointing Galen Warren as an expert for the defense, as requested by Defendant, and setting the matter for trial and pre-trial proceedings. An order setting a deadline for additional scientific testing of evidence shall also issue.

DATED this 7 day of May, 2002.

/s/
James R. Michaud
District Judge

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, or faxed, this _____ day of May, 2002, to:

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