CAUSE NO. 7886004

STATE OF TEXAS	**§**	**IN THE MUNICIPAL COURT**
	§	
VS.	**§**	**CITY OF AUSTIN**
	§	
ANTONIO BUEHLER	**§**	**TRAVIS COUNTY, TEXAS**

DEFENDANT'S MEMORANDUM OF LAW
OPPOSING THE STATE'S MOTION FOR MISTRIAL

TO THE HONORABLE MITCHELL SOLOMON, JUDGE PRESIDING:

Now comes ANTONIO BUEHLER, Defendant in the above numbered cause, and Opposes the State's Motion for Mistrial, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, and Article 36.29(a) of the Texas Code of Criminal Procedure, and in support thereof would show as follows:

Issues:

1. Whether the State may move for mistrial – or is estopped from doing so – when the State agreed to release the disabled juror.

2. Whether the State must agree to waive the presence of a sixth juror when the Defendant has expressly waived the disabled juror's presence so that the case may proceed to jury deliberations.

Short Answer:

First, the State invited the error by agreeing to release this juror. The State may not benefit from error it created.

Second, the State should not be permitted to use Antonio Buehler's Sixth Amendment right to a six-member jury trial as a sword that cuts into his Fifth Amendment right to be free from subsequent prosecutions, while simultaneously slicing at his right to a Speedy Trial.

Background:

A juror has been excused from service on the jury. The State did not object to the court releasing the juror. The defense objected to a mistrial before he was released. The jury has not yet been charged. The excused juror indicated that he was experiencing severe mental distress related to his service on the jury and would not under any circumstances be able to render a verdict, even if the Court took certain precautions to protect him. The State has moved for mistrial without explaining why there is a manifest necessity to declare a mistrial. Antonio Buehler opposes a mistrial and asserts his Federal Constitutional rights to 1) a Speedy trial, 2) have *this* jury decide this case, and 3) not be subject to Double Jeopardy for this 3-day, 9-witness, 4-video, Class C misdemeanor.

The Law:

Invited Error:

The law of invited error provides that a party cannot take advantage of an error that is invited or caused, even if such error is fundamental. *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011). The State is estopped from seeking relief from an error that it introduced. *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999) (en banc). When a defendant has agreed to release a disabled juror, that defendant is estopped from complaining about the error later: "Given these facts, Appellant is estopped from asserting a claim that [the juror] should not have been discharged by the trial court under Article 36.29." *Stoker v. State*, 02-10-00491 (Tex. App.—Fort Worth, September 22, 2011) (mem. op.). If a defendant – with certain constitutional rights – is estopped from complaining when he agreed to release the juror, why should the State be treated differently?

Neither *Ballew*, *Ex parte Garza*, Nor the Sixth Amendment Provide that the State Must Agree to a Five-Member Jury if the Defendant Waives the Presence of a Sixth Juror:

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed […]." U.S. Const. amend. VI. It does not mention a State's right to anything.

The Supreme Court held in *Ballew* that a defendant is entitled to at least six jurors to decide a criminal case. *Ballew v. Georgia*, 435 U.S. 223 (1978). The Supreme Court explained the purpose of our jury system is to act as a check against an overzealous prosecutor: "[T]he Court reaffirmed that the 'purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'" *Ballew*, 435 U.S. at 229 (citing *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968). This safeguarding function of a jury trial can be fulfilled by six members. *Id*.

The Court indicated that there was no bright-line, identifiable difference between five-person or six-person juries, but because of the importance of the jury system and because Georgia failed to give a persuasive argument why five-member juries do not offend the Sixth Amendment, the Court held that the Sixth Amendment requires a jury of at least six members. *Id*. at 240.

Nowhere in *Ballew*, does the Court reason, articulate, or urge that the State's interest in prosecuting a defendant is also protected in the Sixth Amendment. Instead "the purpose of the jury trial […] is to prevent oppression by the Government." *Ballew*, 435 U.S. at 229. A defendant may waive any rights secured by law, and will preclude him from raising the issue on appeal. *Monreal v. State*,

99 S.W.3d 615, 622 (Tex. Crim. App. 2002).

The Double Jeopardy Clause Would Bar Retrial of this Cause Should the Court Grant the State's Motion:

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb […]." U.S. Const. amend. V. The State bears a heavy burden to show 'manifest necessity,' or a 'high degree' of necessity, to justify a mistrial. *Ex parte Garza*, 337 S.W.3d 903, 909 (Tex. Crim. App. 2011) (citations omitted). The Court of Criminal Appeals has held that a defendant may not be retried after a mistrial when 1) there was a missing juror, 2) the defense objected to a mistrial, and 3) there was no manifest necessity for a mistrial because the court failed to employ less drastic alternatives. *Ex parte Little*, 887 S.W.2d 62, 64-65 (Tex. Crim. App. 1994).

The trial court's "discretion to declare a mistrial based on manifest necessity is limited to 'very extraordinary and striking circumstances.'" *Id*. at 65 (*citing Downum v. United States*, 372 U.S. 734, 736 (1963)). If a mistrial is granted without a defendant's consent, double jeopardy bars retrial absent manifest necessity. *Id*. (citations omitted). In Footnote Number 5 of *Little*, the Court noted that a trial may properly proceed with eleven jurors when a juror has become mentally impaired. *Id*. at 67 (*citing* Tex. Code Crim. Proc. Art. 36.29(a)).

***Ex parte Garza* Supports a Conclusion that a Defendant's Waiver Determines this Issue, and the State Need Not Agree:**

Mistrial is only appropriate "when particular circumstances giving rise to the declaration render it impossible to arrive at a fair verdict before the initial tribunal, when it is simply impossible to continue with trial, or when any verdict that the original tribunal might return would automatically be subject to reversal on appeal because of trial error." *Ex parte Garza*, 337 S.W.3d 810, 909 (Tex. Crim. App. 2011). In the case at bar, the State has failed to show why it is now impossible to arrive at a fair verdict, given the fact that the State did not object to the five remaining jurors during *voir dire*, or move to strike them for cause. Nor is it impossible to continue with the trial. Nor would any verdict be automatically reversed on appeal, given Mr. Buehler's express waiver of the presence of the sixth juror.

In *Ballew*, cited in *Garza*, the concern was whether a smaller jury would harm a defendant, including the fact that smaller juries under-represented minorities. *Id*. at 910. Here, the disabled juror was a white male. And, the defense is waiving his presence. "So long as the appellant may waive his constitutional right to a six-member jury, it cannot be said that it was impossible to arrive at a fair verdict, impossible as a practical matter to continue with the trial, or that reversal on appeal would automatically ensue." *Garza*, 337 S.W.3d at 911.

Headnotes are not law. There is some dicta in *Garza* that may be misconstrued to mean that the Court of Criminal Appeals intended that the State agree to a five person jury after the sixth juror becomes disabled. However, that is dicta. The *Garza* Court ruled in favor of the defendant because the trial court failed to consider a five-person jury. The issue in the case at bar has not been squarely addressed by the Court of Criminal Appeals because these particular facts – where a defendant expressly waives the sixth juror, the State agrees to release the juror, but then wants a mistrial – have not been presented to the high court.

The State Wants a Do-Over:

The State called two rebuttal witnesses on the last day of evidence. The first rebuttal witness did not answer a single question because the State was attempting to elicit hearsay from him. The second rebuttal witness bolstered the defense's case by supporting the conclusion that Officer Patrick Oborski illegally detained and assaulted Mr. Buehler. The underlying rationale for the Double Jeopardy Clause supports a conclusion that the State should not get a do-over:

> 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 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.

Green v. United States, 355 U.S. 184, 187 (1957).

Furthermore:

> [The Supreme Court] has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. […] This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.

Id. at 188. Here, the State's star rebuttal witness bolstered the defense's case. This trial is not a mulligan for the State – Mr. Buehler has a valued right for **this jury** to decide this case.

There is a system in place in Texas to deal with the problem of releasing a disabled juror: Proceed with the remaining five jurors if the sixth juror is released for disability. There is no constitutional reason to do otherwise if the court has Mr. Buehler's waiver.

Article 36.29(a) Provides that the Remainder of a Felony Jury Has the Power to Render a Verdict:

The Code states:

> Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman. Except as provided in Subsection (b), however, after the trial of any felony case begins and a juror dies or, as determined by the judge, **becomes disabled from sitting at any time before the charge of the court is read to the jury**, **the remainder of the jury shall have the power to render the verdict**; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

Tex. Code Crim. Proc. art. 36.29(a) (emphases added). A juror is deemed

'disabled' for Article 36.29(a) purposes if he/she has a "physical illness, mental condition, or emotional state" that interferes with his/her ability to perform the duties of a juror. *Hill v. State*, 90 S.W.3d 308, 315 (Tex. Crim. App. 2002). Further, a 'disability' includes "any condition that inhibits a juror from fully and fairly performing the functions of a juror." *Routier v. State*, 112 S.W.3d 554, 588 (Tex. Crim. App. 2003).

Feeling emotional distress is sufficient grounds for disability. *Stephens v. State*, 276 S.W.3d 148 (Tex. App.—Amarillo 2008, *pet. ref'd*) (involving a juror that was "freaking out"). Moreover, fear of retaliation is also sufficient grounds for disability if that fear means that the juror cannot perform his/her duties. *Reyes v. State*, 30 S.W.3d 409 (Tex. Crim. App. 2000) (involving a juror who thought the defendant may retaliate against him for a guilty verdict).

Whether a juror is disabled is within the sound discretion of the trial court. *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999). Here, the court has already deemed the excused juror disabled. There was ample basis for the court's decision, as the juror indicated that he could not come to a verdict because of his emotional distress. The question, then, is whether the logic behind 36.29(a) should also apply to a misdemeanor jury with five remaining members. This question was not squarely before the Court of Criminal Appeals in *Ex parte Garza*.

Article 36.29(a) Should Apply to Misdemeanors if the Defendant Waives the Sixth Juror's Presence:

The First Court of Appeals in *Hegar v. State*, held that the disabled-juror procedure for felony cases also applies in misdemeanor cases. *Hegar v. State*, 11 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 1999, *no pet.*). The disabled juror in the misdemeanor theft trial in *Hegar* informed the court and parties after being sworn that she was not feeling well and could not sit still due to injuries sustained in a recent car accident. *Id*. at 292. The defendant was asked if he would prefer to proceed by adding a juror who had already been dismissed, or if he would move for mistrial; he elected to move for mistrial. *Id*. at 293. The *Hegar* court reasoned:

> Although the Code of Criminal Procedure does not address the situation in which a juror becomes disabled after being sworn in a *misdemeanor* trial, it does address the situation where a juror becomes disabled after being sworn during a *felony* trial. […] The State does not provide us with any reason why the procedure applied under article 36.29(a) should not also apply to a misdemeanor case.

Id. at 294. Deciding that 36.29(a) should apply to misdemeanors, the court concluded that Hegar should have been given the option to proceed with less than the full compliment of jurors: "The trial court did not give appellant the option of proceeding with 11 jurors […]. The trial court did not give adequate consideration to appellant's right to have his guilt or innocence decided by the first jury sworn in as the trier of fact." *Id*. While this *Hegar* case does not address the five-or-six juror problem, it does indicate that there is no real reason not to apply the felony

rule to misdemeanors. *Ballew v. Georgia* is not at issue here, as a defendant's waiver removes the case at bar from *Ballew*'s purview.

***Ex parte Garza* Does Not Hold that the State Must Agree:**

"The trial court is obliged to consider every less drastic alternative [before declaring a mistrial]." *Ex parte Garza*, 337 S.W.3d 903, 917 (Tex. Crim. App. 2011). If – in a felony case – waiving one juror's presence is a less drastic alternative **even if the State does not agree to it**, why would it not be an option in a misdemeanor case? It certainly seems to be a less drastic alternative than repeating an expensive 3-day Class C trial, where the parties have spent many-times the amount of resources in trying the case compared to the ticket value of $500, let alone retrying it. Nowhere does the law provide that the State must agree to proceed with five jurors in this situation, and because the State need not agree in a felony case – where the stakes are ever-so-much higher – we should not require agreement here.

The right to a jury trial is the defendant's Constitutional right – not the State's. Any right the State may have may be grounded in state law. Here, there is a countervailing defense interest in not being prosecuted twice for the same alleged offense. U.S. Const. amend. V.

In the case at bar, the State did not object to any of the five jurors who remain in the jury box, nor did the State attempt to strike any of them for cause

during *voir dire*. There is no question of impartiality. And, the State has waived its right to complain by agreeing to release the juror without objection. *See Stoker, supra*.

Why the State's Agreement Should Not Be Required:

Within Article 36.29, the Legislature demonstrated its intent that the parties must agree to proceed with less than the full compliment of jurors if, and only if, a juror becomes disabled **after** the jury is charged. Compare 36.29(a) with 36.29(c). In subsection (a), there is no indication that the parties must agree in order to proceed one-juror-short. In contrast, subsection (c) provides:

> After the charge of the court is read to the jury, if a juror becomes so sick as to prevent the continuance of the juror's duty and an alternate juror is not available, or if any accident of circumstances occurs to prevent the jury from being kept together under circumstances under which the law or the instructions of the court requires that the jury be kept together, the jury shall be discharged, except that on agreement on the record by the defendant, the defendant's counsel, and the attorney representing the state, 11 members of a jury may render a verdict and, if punishment is to be assessed by the jury, assess punishment. […]

The principle *Expresio Un Est Exclusio Alteris* "is a product of logic and common sense, expressing the learning of common experience that when people say one thing they do not mean something else." *Williams v. State*, 965 S.W.2d 506, 507 (Tex. Crim. App. 1998). The maxim aids in statutory construction.

For felonies, the Legislature specifically excluded a requirement that the State agree to proceed with the full compliment of jurors if a juror becomes

disabled *before* the jury is charged. Then, the Legislature specifically included the agreement-requirement in subsection (c) to apply to circumstances *after* the jury has been charged.

In this case, the jury has not been charged. In a felony case – where the stakes are ever-so-much higher – the Legislature decided that the parties need not agree to waive a juror's presence if the jury has not yet retired. Why would we require a higher standard in a Class C misdemeanor trial? Moreover, why would we require more in a Class C misdemeanor trial that has been pending for almost three years? Further, why would we require more in an almost three-year-old Class C misdemeanor trial when the Double Jeopardy Clause is implicated? Texas law should not infringe Mr. Buehler's Federal Constitutional rights. Any Texas law that may seem to indicate that the State's agreement is required would conflict with the Double Jeopardy Clause in the case at bar.

When a Federal Constitutional Right Conflicts with a State's Law, the Supremacy Clause Requires that the Federal Right Will-Out:

The only requirement is that Antonio Buehler be given the opportunity to either waive the disabled juror's presence or ask for a mistrial: "The trial court erred in failing to give the appellant an opportunity to choose between continuing with eleven jurors or seeking a mistrial." *See Carrillo v. State*, 597 S.W.2d 769, 771 (Tex. Crim. App. 1980) ("The court should then, depending on the appellant's

election, have granted a mistrial or continued with eleven jurors."). While there is a state-level constitutional right to six jurors, Mr. Buehler has a Fifth Amendment right not to be tried twice for the same offense under the United States Constitution. Because of the Supremacy Clause, this conflict should be resolved in favor of allowing the defense to waive the disabled juror's presence and present this case to **this** jury. Mr. Buehler has waived the presence of the sixth juror in open court, and you will find his written waiver attached.

Note, also, that the State can waive known rights. *See e.g. Ned v. State*, 654 S.W.2d 732 (Tex. App.—Houston [14th Dist.] 1983, *no pet*.) (involving the State's waiver of its right to examine a coroner). The State did not object to this court's dismissal of the disabled juror. In fact, the State expressly advocated that he be excused in chambers. The State may not now complain that the juror's release has resulted in an impartial jury. By releasing the juror without objection, the State has waived its right to complain.

The Right to a Speedy Trial is Also Implicated:

Antonio Buehler was arrested on January 1, 2012. The case will just now be presented to a jury (hopefully) on October 29, 2014 – almost three years later. For a Class C ticket. Mr. Buehler has urged his right to a Speedy Trial under the United States Constitution Sixth Amendment. Because the State is urging for further delay in the resolution of this case, Mr. Buehler will move to dismiss the

case for want of speedy trial if the State's Motion is granted. Should that Motion to Dismiss for Lack of Speedy Trial be denied, he will file a Writ of Habeas Corpus with the Travis County Clerk's office on Double Jeopardy grounds.

Finally, there is a societal interest in finality. *See Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) (holding that the interest in finality was more important than the notion of fundamental fairness). And, our jurisprudence acknowledges that justice delayed is justice denied. *See Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

WHEREFORE, PREMISES CONSIDERED, Antonio Buehler prays that the Court deny the State's Motion for Mistrial, and for all other relief to which he may be entitled.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

This is to certify that on October 28, 2014, a true and correct copy of the above and foregoing document was served on the City of Austin by fax, and by email.

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MILLIE L. THOMPSON