STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2016AP000142 - CRLV

CIRCUIT COURT CASE NO. 2013CF1742

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ANTHONY ALVARADO,
Defendant-Petitioner.

DEFENDANT-PETITIONER'S BRIEF

JOHN A. CABRANES
Attorney at Law
State Bar No. 1023311

CABRANES LAW OFFICES, LLC
840 Lake Avenue, Suite 100
Racine, Wisconsin 53403
262-638-0529
Email: cabraneslawoffices@yahoo.com

Attorney for Defendant-Petitioner
Anthony Alvarado

On Appeal from Racine Circuit Court Branch 2
Hon. Eugene Gasiorkewicz
Presiding

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Alvarado requests oral argument that oral to clarify the issues and respond to any of the Court's concerns.

STATEMENT REGARDING PUBLICATION

Mr. Alvarado requests that the decision be published as this is a case of first impression in Wisconsin and would provide guidance where there is presently none.

STATEMENT OF CASE

On December 23, 2013 the State filed a single count complaint against the defendant alleging a 2nd Degree Sexual Assault in violation of §940.225(2)(a) Wis. Stats. A one-count information was filed alleging the same charge on January 9, 2014.

On February 24, 2015 the trial in this matter began and the charges, the original charge of Second Degree Sexual Assault and a lesser-included offense of Third Degree Sexual Assault, were submitted to the jury on February 26, 2015 at 11:10am. At 2:00pm in response to a note from the jury that they were unable to reach a decision in this matter, the Court gave Wisconsin Jury

Instruction Criminal 520. At 3:00pm the jury sent another note indicating that they were unable to reach a decision. The Court directs them to deliberate for an additional 30 minutes. At 3:35 the jury send a note to the Court indicating in part "…we still cannot come to a unanimous decision. We all agree on not guilty for the second degree, but we are hung on the third degree," whereupon the Court declared a mistrial. On April 13, 2015 the State indicated its intent to retry the case. On July 29, 2015 the defendant filed a Motion to Dismiss on the Grounds of Double Jeopardy under the Federal and State Constitutions. A hearing was held on January 4, 2016 wherein the Court denied the defendant's Motion and scheduled a trial date. A Petition for Leave to Appeal a Non-Final Order was filed on January 20, 2016.

QUESTIONS PRESENTED

QUESTION #1: IS A NOTE FROM THE JURY DURING DELIBERATIONS SIGNED BY THE FOREPERSON INDICATING THAT THEY HAVE AGREED ON A VERDICT OF NOT GUILTY AS TO THE DEFENDANT ON THE CRIME CHARGED BUT THAT THEY WERE UNABLE TO REACH A DECISION ON THE LESSER INCLUDED OFFENSE, A VERDICT WHICH WOULD TRIGGER THE PROTECTIONS OF THE 5TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 8 OF THE

CONSTITUTION OF THE STATE OF WISCONSIN AGAINST DOUBLE JEOPARDY?

QUESTION #2: DOES DEFENSE COUNSEL'S FAILURE TO OBJECT TO MISTRIAL ACT AS A WAIVER OF THE DOUBLE JEOPARDY ISSUE?

ANSWERS

QUESTION #1: YES. The note signed by the foreperson of the jury is a valid verdict, which would trigger the protection of the 5th Amendment of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of Wisconsin.

QUESTION #2: NO. The waiver of a Constitutional Right requires a waiver by the defendant and no such waiver was asked for or given.

STANDARD OF REVIEW

As these are issues of law the Court's standard of review is DeNovo. *State v. Anderson*, 219 Wis.2d 739, 746 (1998).

ARGUMENT

A. THE NOTE FROM THE FOREPERSON IS A VERDICT, WHICH WOULD TRIGGER 5TH AMENDMENT PROTECTION AS DOUBLE JEOPARDY.

It is well settled law that "a man who has been acquitted cannot be made to run the gauntlet a second time." *Green v. United States,* 355 U.S. 184, 190 (1957); *Abney v. United States,* 431 U.S. 651, 662 (1977). Yet that is precisely

what the State of Wisconsin intends to do to Mr. Alvarado in attempting to re-try him after a jury unanimously acquitted him on the charge of Second Degree Sexual Assault, 940.225(2)(a) Wis. Stats.

That the jury resolved the Second Degree Sexual Assault charge against Mr. Alvarado could not have been clearer. After hours of deliberation and after having received Wisconsin Jury Instruction Criminal 520, commonly known as an *Allen* instruction[1] the jury submitted a note, signed by the jury foreperson, indicating "we still cannot come to a unanimous decision. We all agree on a not guilty for the second degree, but we are hung on the third degree." *Partial Trans. of Proceedings 2/26/15* p. 10, the Court determined that no verdict had been reached and declared a mistrial. *Id.* at p. 12. That jury's statements represented a resolution of "some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). The Alvarado jury did not express any uncertainty as to its decision in on the Second Degree Sexual Assault charge and the jury was discharged. With that with that clear expression of the jury's decision and the discharge of the jury the State's opportunity to

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[1] *Allen v. United States*, 164 U.S. 492, 501-502, 17 S.Ct. 154, 41 L.Ed 528 (1896)

re-try Mr. Alvarado on that Second Degree Sexual Assault was extinguished.

The trial Court has taken the position that Mr. Alvarado may be retried on the Second Degree Sexual Assault charges because no verdict had been reached, *Partial Trans. of Proceedings 2/26/15* p. 12. The United States Supreme Court has rejected that position and has consistently help that the Double Jeopardy Clause may bar retrial regardless of whether a formal Judgment of Acquittal has been entered. In *United States v. Ball,* 163 U.S. 662, 671 (1896) the Supreme Court of the United States stated "in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Ball* stands for the proposition that a procedural defect in the return of a jury's verdict and any corresponding defect in the judgment, does not affect the finality of the jury's verdict under the Double Jeopardy clause. In other words the Court looks to the substance of the jury decision rather than the form of the decision. That was made clear in *United States v. Martin Linen*, 430 U.S. 540, 571 when the Court stated that what constitutes an acquittal is not controlled by the form of the fact-finders action, rather if the ruling of the fact finder

actually represents a resolution of some or all of the elements of the crime charged.

In a recent decision with similar facts, *Blueford v. Arkansas*, 132 S.Ct. 2044 (2012) the United States Supreme Court determined that the jury had not returned a verdict against the defendant and for that reason double jeopardy did not attach. The *Blueford* decision is an anomaly in United States Supreme Court decisions on the issue of what constitutes a verdict and can be distinguished on the critical fact of the timing of the mistrial. In *Blueford*, the foreperson of the jury sent a note to the Court telling the judge that they had acquitted the defendant on the main charge but were hung on the lesser included offenses. The Court asked the jury to continue deliberations, giving them the *Allen* instruction for a second time. Approximately a half hour later the foreperson again sent a note to the Court that the jury was not able to arrive at a verdict the Court declared a mistrial. In deciding *Blueford* the Court determined that the jury's deliberations had not concluded and that since the jury had returned to their deliberations following the last *Allen* instruction there was no way of knowing what the state of the deliberations was at the time of the mistrial. The Court emphasized that:

> When they emerged a half hour later, the

> foreperson stated only that they were unable to reach a verdict. She gave no indication whether it was still the case that all 12 jurors believed Blueford was not guilty of capital or first-degree murder, that 9 of them believed that he was guilty of manslaughter, or that a vote had not been taken on negligent homicide. The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses. *Blueford* at p.2050

That is not the case in this instance. There was a mistrial declared in the Alvarado case upon receiving the message from the jury foreperson indicating that they had agreed on a not guilty on the Second Degree Sexual Assault and were unable to reach a decision on the Third Degree Sexual Assault. The jury had no additional time to deliberate after the verdict was submitted to the Court, unlike *Blueford.* Here, the jury made an unambiguous finding of Not Guilty.

B. WISCONSIN JURISPRUDENCE ON DOUBLE JEOPARDY IS IDENTICAL IN SCOPE AND PURPOSE AS FEDERAL DECISIONS.

There is no statute in the State of Wisconsin that

governs the form of a verdict. There is also no case law in the State of Wisconsin governing the form of a verdict making this issue a case of first impression in this State.

The Wisconsin Supreme Court has repeatedly stated that it views prohibitions against Double Jeopardy contained in the Federal and State Constitutions as identical in scope and purpose, and therefore accepts the decisions of the United States Supreme Court as controlling authority of the double jeopardy provisions of both Constitutions. *State v. Kelty*, 294 Wis.2d 62, 72 (2006) (citing *State v. Davison*, 2003 WI 89 ¶18, 263 Wis.2d 145 (2003).

Wisconsin Courts and Statutes are silent on the issue presented. The Federal cases on this issue confirm that the basic philosophy of the double jeopardy clause in the Federal Constitution is one of substance over form. Under that philosophy and under *Kelty* and its predecessors the decision rendered by the Alvarado jury, though not in the form of the verdict submitted to them, is a verdict for the purposes of a double jeopardy analysis.

C. DEFENSE COUNSEL'S FAILURE TO OBJECT TO MISTRIAL IS NOT A WAIVER TO DOUBLE JEOPARDY ARGUMENT

The 5th Amendment of the Constitution of the United States and the Wisconsin Constitution, Article I, Section 8 each recognized a defendant's fundamental right against

double jeopardy. It is clear that defense counsel, the undersigned, failed to object to the Court's declaration of a mistrial. It is Mr. Alvarado's position that counsel's failure to object to the mistrial is not a waiver to the issue.

The Wisconsin Supreme Court in *State v. Albright*, 96 Wis.2d 122, 129-30 (1980) identified certain rights guaranteed by the State and Federal Constitutions that are personal rights which must be waived personally by the defendant. Among those rights were the decision to plead guilty, the decision to request a trial by jury, the decision to appeal, the decision to forego the assistance of counsel, the decision to obtain the assistance of counsel and to refrain from self-incrimination. These fundamental rights are found in the Bill of Rights, specifically 5th and 6th Amendments to the Constitution of the United States, as is the defendant's protection against double jeopardy. It is Mr. Alvarado's position that his fundamental right against double jeopardy is a right that only he, not his attorney, can waive. This is a position that the United States Supreme Court looked favorably upon in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) when it stated that:

> It has been pointed out that 'courts indulge

> every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

The resolution in this issue as in the previous issue depends on the facts and timing. If this Court determines that there was no verdict submitted to the Court by the jury, there is no fundamental constitutional right that is being affected and, as a result, the waiver issue is moot. If the Court determines that the note from the jury foreperson is a verdict, then that would immediately, before any mistrial was ordered by the trial court, trigger Mr. Alvarado's fundamental constitutional right to protect himself against double jeopardy. As the *Zerbst* and *Albright* decisions both indicate, any waiver of that right must be made by the defendant himself and not by his counsel. *Zerbst* and *Albright* both place the onus of ascertaining the knowing relinquishment of that right on the trial court itself. *Johnson v. Zerbst*, 304 U.S. at 465; *State v. Albright*, 96 Wis.2d at 131. The record is

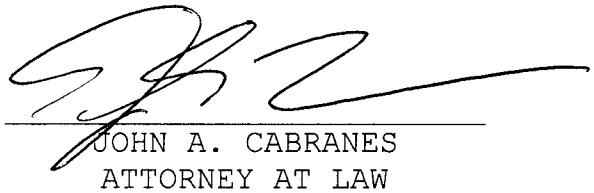
clear that the trial Court had no such colloquy with the defendant in this instance.

CONCLUSION

For all the reasons stated above, Mr. Alvarado prays that this Court find that the jury entered a verdict of acquittal in the Second Degree Sexual Assault charge and remand the case to the Circuit Court for the entry of a judgment of acquittal consistent with this Court's decision.

Dated this 18th day of April, 2016.

CABRANES LAW OFFICES LLC



JOHN A. CABRANES
ATTORNEY AT LAW
STATE BAR NO. 1023311

Please Direct Inquiries to:
840 Lake Avenue, Suite 100
Racine, Wisconsin 53403
Tel. No. 262-638-0529
Fax. No. 262-638-0533

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is produced with a monospaced font, 10 characters per inch, double spaced, left margin is set at 1.5 inches and other margins have been set at 1.0 inches.

Dated this 18th day of April, 2016.

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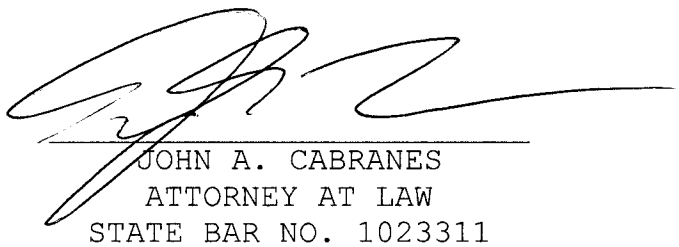

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Racine, Wisconsin 53403
Tel. No. 262-638-0529
Fax. No. 262-638-0533

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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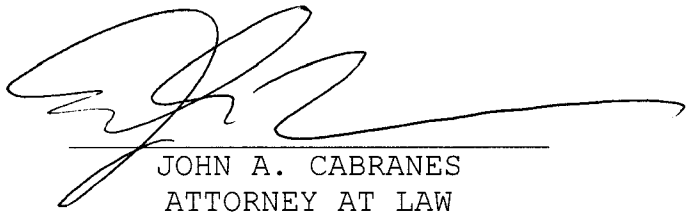
Dated this 18th day of April, 2016.

CABRANES LAW OFFICES LLC



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DEFENDANT-PETITIONER'S APPENDIX

JOHN A. CABRANES
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