

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES BLAND,  
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK, AND THE HONORABLE  
JACKIE GLASS, DISTRICT JUDGE,  
Respondents,  
and  
THE STATE OF NEVADA,  
Real Party in Interest.

No. 56128

**FILED**

JUN 03 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or prohibition requests this court to bar petitioner's retrial on double jeopardy grounds. Petitioner was charged with several offenses, including battery with the intent to commit sexual assault. The district court and the parties proceeded to trial under the mistaken belief that none of the offenses were punishable by a life sentence, and, consequently, the defense and prosecution were each allowed four peremptory challenges under NRS 175.051(2). On the third day of trial, counsel discovered that battery with the intent to commit sexual assault carried a potential life sentence, see NRS 200.400(4), and, therefore, each side was entitled to eight peremptory challenges, see NRS 175.051(1). Petitioner advised the district court of the peremptory-challenge defect, and the district court declared a mistrial based on manifest necessity.

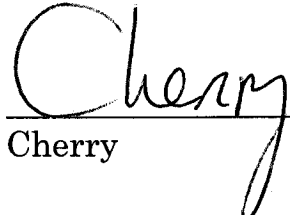
Petitioner argues that double jeopardy precludes retrial because he did not consent to the mistrial and no manifest necessity existed as less drastic alternatives were available. We disagree.

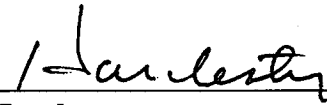
Although petitioner did not request a mistrial, he remained silent when the district court informed the parties that it had “no choice but to declare a mistrial.” “The failure of defense counsel to object or express an opinion to the district court regarding the propriety of the mistrial implied consent and indicated tacit approval.” Gaitor v. State, 106 Nev. 785, 788, 801 P.2d 1372, 1374 (1990), overruled on other grounds by Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993). Petitioner’s silence here signaled tacit approval of the mistrial.

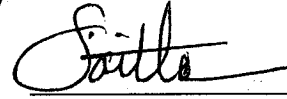
As to petitioner’s claim that less drastic alternatives were available, we do not view the State’s dismissal of the problematic charge as a necessary alternative to avoid a mistrial. We also reject petitioner’s contention that the district court failed to conduct a hearing to determine whether the parties were willing to waive the peremptory-challenge defect. The district court addressed the matter in a hearing outside the jury’s presence, during which petitioner remained mute and never indicated a willingness to waive the peremptory-challenge defect. Under the circumstances, the district court did not manifestly abuse its discretion by declaring a mistrial based on manifest necessity. See Morales v. State, 116 Nev. 19, 21-22, 992 P.2d 252, 253 (2000) (concluding that “[t]he improper limitation of peremptory challenges is not subject to harmless error”). Accordingly, we conclude that double jeopardy does not preclude petitioner’s retrial, see Glover v. Dist. Ct., 125 Nev. \_\_\_, \_\_\_, 220 P.3d 684, 696-97 (2009) (describing “manifest necessity”) and that

petitioner is not entitled to extraordinary relief, see NRS 34.160; Ryan v. Dist. Ct., 123 Nev. 419, 425, 168 P.3d 703, 707 (2007). We therefore,

ORDER the petition DENIED.<sup>1</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Jackie Glass, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>1</sup>We deny petitioner's emergency motion for stay of the district court proceedings.