IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-285

ERNEST DALE COLLINS, JR., PETITIONER

v.

J. KEVIN KOCH, RESPONDENT

PETITIONER'S REPLY BRIEF

Circuit Court of Wood County West Virginia
Civil Action No. CC-54-2022-C-222

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Treatises

Constitutional Provisions

INTRODUCTION

In wielding its sanction powers, a circuit court must ensure that the sanction is fashioned narrowly to address the identified harm; this restraint is a fundamental principle of the court's inherent sanction power, which requires that the punishment must go no further than necessary to remedy the crime. Syl. pt. 1, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). This restraint applies not just to the degree of sanctions, but to the kind. Dismissal is the most drastic of these sanctions and is therefore only appropriate "after other sanctions have failed to bring about compliance." *Doulamis v. Alpine Lake Prop. Owners Ass'n, Inc.*, 184 W. Va. 107, 112, 399 S.E.2d 689, 694 (1990). The use of dismissal as a sanction goes against "the fundamental policy of law favoring the disposition of cases on their merits[,]" meaning its use must be only when necessary. *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 172, 332 S.E.2d 127, 134 (1985). Dismissal with prejudice is, in turn, the harshest version of the sanction of dismissal, meaning additional scrutiny must be applied where such a sanction is levied.

The scope and type of the sanctions imposed on Petitioner extend far beyond the alleged harm identified by the circuit court, striking at the heart of Petitioner's fundamental rights. The rights to a jury trial and to litigate his claim on the merits are seriously threatened. This failure to exercise the court's inherent sanction authority with restraint and discretion has transformed a good-faith dispute over evidence rules into a death sentence for Petitioner's claim, without any adequate warning or consideration of less severe sanctions. Imposing a dismissal with

prejudice for such a minor issue is like using a shotgun to kill an ant – it exceeds what is necessary. It causes undue collateral damage to core rights, making it unacceptable under the *Bartles* framework.

Furthermore, the circuit court failed to establish the necessary grounds to impose dismissal with prejudice, the strictest sanction available to the court. When considering the use of the "harshest sanction," a court must properly warn the party about the impending extreme penalty and evaluate less severe sanctions first. *See Woolwine v. Raleigh General Hospital*, 194 W. Va. 322, 328, 460 S.E.2d 457, 463 (1995). The circuit court did not fulfill this obligation. None of the trial orders resulting in sanctions against Petitioner's trial counsel for violations were documented in writing, and the court did not indicate it was escalating to the harshest sanction. By failing to adequately warn Petitioner's trial counsel of the potential dismissal, neglecting to consider less severe sanctions that could achieve the same goal of discouraging such conduct, and not narrowly tailoring the sanction to the specific conduct, the circuit court abused its discretion in imposing these sanctions.

ARGUMENT

I. The circuit court failed to follow the *Bartles* framework and subsequently abused its discretion in dismissing the case with prejudice.

The Supreme Court of Appeals of West Virginia has established guardrails for the judicial administration of sanctions in situations like this. When issuing a sanction upon a party, a circuit court "must explain its reasons clearly on the

record[,]" considering: (1) the seriousness of the conduct, (2) the impact the conduct had in the case and in the administration of justice, (3) any mitigating circumstances, and (4) whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case. Syl. pt. 2, *Bartles*, 196 W. Va. at 381, 472 S.E.2d at 827. In formulating the type and kind of sanction, a circuit court must be guided by equitable principles. *Id.* at syl. pt. 2. In addition, the Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist "a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case." *Id.* at 391. Appellate Courts review an order granting sanctions for an abuse of discretion. *Bartles*, 196 W. Va. at 389–399, 472 S.E.2d at 835–836.

Among the sanctions available to a circuit court, dismissal—particularly dismissal with prejudice—is the harshest and is only appropriate "after other sanctions have failed to bring about compliance." *Doulamis*, 184 W. Va. at 112, 399 S.E.2d at 694. In administering the sanction of dismissal, the circuit court's failure to "(1) warn of an impending ultimate sanction, or (2) consider less onerous sanctions before dismissing the case amounts to [a] reversible error[.]" *Woolwine*, 194 W. Va. at 328, 460 S.E.2d at 463. The exception to this rule is when there is an egregious pattern of neglect. *Id.* Generally, there is a strong policy interest in allowing a properly filed case to be tried on its merits, and misusing the dismissal sanction directly conflicts with that policy. *See Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 172, 332 S.E.2d 127, 134 (1985).

A. The circuit court's order overstates the seriousness of the conduct relative to existing caselaw.

In its order imposing sanctions, the circuit court, during its *Bartles* analysis, emphasized the severity of the conduct, noting that Petitioner's counsel clicked his pen during witness testimony, interrupted witnesses, and repeatedly tried to introduce Dr. Naum's testimony—both as an exhibit and as impeachment material—after the court had already ruled it inadmissible.[1] While the Petitioner's trial counsel's behavior in this context might be seen as overzealous or somewhat impolite, the analysis downplays the behavior described in West Virginia Supreme Court cases that uphold dismissals as sanctions. Respondent similarly relies on these cases in his brief, citing *Bartles*, 196 W. Va. 381, 472 S.E.2d 827, and *Smith v. Gebhardt*, 240 W. Va. 426, 429-30, 813 S.E.2d 79, 82-83 (2018), to support his argument. However, framing Petitioner's trial counsel's behavior around these cases is misleading because the allegations in those cases involve much more serious misconduct.

For example, in *Bartles*, the defendants were found to have repeatedly, intentionally, and knowingly violated a trial order requiring them to turn over thousands of documents.[2] Additionally, the defendants improperly redacted these documents when they were submitted, despite the judge's direct order not to do so.[3] The trial court also determined that the defendants were "stonewalling" and "not delivering ... material quickly enough so that counsel for the Plaintiffs had adequate

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[1] JA0002

[2] *Bartles* at 391.

[3] *Id.*

time to absorb it and to make use of it in the case," and that this pattern was so evident in the record it was "established in concrete."[4] Furthermore, the court noted the defendants took "very little interest in trying to explain [its] inaction," and it failed to meet its burden of proof."[5] This conduct was significantly more serious than the behavior in the case at hand.

Even if the conduct of Petitioner's trial counsel was the same as in *Bartles*, it's important to note that the sanction in *Bartles* was a $10,000 fine.[6] The *Bartles* court denied the plaintiff's request for a new trial.[7] *Bartles* involved a pattern of a party knowingly and willingly violating a clear written order multiple times during litigation; therefore, mistrial and dismissal were considered too severe a sanctions.[8]

Petitioner next cites *Smith*, *supra,* which at least addresses dismissal as a sanction. *Smith,* however, does not support dismissal as a sanction in this case. In *Smith*, the sanctioned counsel's conduct was nearly criminal, as he committed numerous serious offenses including intentionally causing water damage to the defendants' home, removing bricks from the defendants' home, blocking a drain in the defendants' home, performing mold tests on a banister in the defendants' home without notice or consent from the defendants, knowingly submitting inaccurate

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[4] *Id*. at 391.

[5] *Id*.

[6] *Id*. at 385.

[7] *Id*.

[8] *Id*.

expert disclosures, inappropriately recording a conversation with the opposing party, communicating improperly with the *Smith* respondent's Rule 26(b)(4)(3) non-testifying consultant, and improperly serving a subpoena duces tecum directly on the opposing party without notice to his counsel.[9] Despite these facts, the dismissal in *Smith* was overturned on appeal.[10] This case involved a scenario where the sanctioned counsel was acting in a manner that could reasonably be described as criminal, misrepresented evidence, improperly communicated with the opposing client and their witness without counsel present, and secretly recorded a conversation. Nevertheless, the court did not believe that the administration of justice was so compromised that dismissal was an appropriate remedy.[11]

The cases Respondent cites demonstrate that he has greatly underestimated the threshold for the seriousness of conduct required for dismissal under a *Bartles* analysis. Compare these instances of blatant, nearly criminal misconduct and knowing, strategic, and willful disobedience to the simple act of clicking a pen, a good-faith disagreement about the rules of evidence, and some conversational faux pas when addressing witnesses.[12] Even considering these extreme facts, neither case resulted in dismissal. Furthermore, labeling a good-faith and reasonable dispute over the rules of evidence and the clicking of a pen as a pattern of misconduct is an

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[9] *Id.* at 429

[10] *Id.* at 434

[11] *Id.*

[12] JA0002

overreach of the holding in Bartles.[13] Each time Petitioner's trial counsel "violated the order," he did so in good faith, with a different and reasonable legal rationale for why such testimony would be admissible.[14] The other alleged instances of misconduct, such as interrupting witnesses or clicking a pen, are too minor to warrant attention.

Respondent (at p. 9) describes the circuit court's dismissal with prejudice as a "deliberate and disciplined exercise of judicial discretion." It is anything but. Even a basic reading of the caselaw following *Bartles* makes it clear that the standard for serious misconduct is extremely high, and the conduct here does not nearly reach that level. The circuit court made a mountain out of a molehill. It applied the harshest sanctions against the Petitioner for what was clearly a good-faith dispute over evidence rules and the act of clicking a pen. In doing so, it severely prejudiced Petitioner's fundamental rights as collateral damage. The circuit court, therefore, abused its discretion by imposing such a disproportionate sanction for the conduct involved.

B. The circuit court failed to tailor the sanction to the harm identified and was unable to consider equitable principles or meaningfully examine mitigating circumstances.

As the last resort option within the framework of sanctions, dismissal with prejudice is only allowed when other sanctions have failed to achieve compliance or

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[13] *Id.*

[14] *Id.*

cannot adequately address the harm.[15] As part of this analysis, circuit courts must consider equitable principles when determining their sanctions.[16] This framework requires a circuit court to evaluate lesser sanctions and to craft the final sanction based on the harm identified, while avoiding unnecessary measures and balancing the equities of the case.[17]

The circuit court failed to consider any lesser sanctions, immediately granting a *sua sponte* mistrial over the objection of the *Respondent's* trial counsel and then escalating the matter further by dismissing the case with prejudice.[18] In the circuit court's order granting sanctions, lesser sanctions are neither considered nor analyzed; they were dismissed as being "futile."[19] Any consideration of the *Respondent's* trial counsel's suggestion of a curative jury instruction was dismissed, with the court only asking, "how does that unring the bell?" with no further analysis or discussion.[20] While the circuit court provided its reasoning for not allowing the trial to continue, it did so in a vague and conclusory manner. It did not meaningfully address why certain lesser sanctions were "futile."[21]

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[15] *Bartles* at syl. pt. 1

[16] *Id.* at syl. pt. 2

[17] *Id.*

[18] JA1244-JA1245

[19] JA0630-JA0638

[20] *Id.*

[21] *Id.*

Notably, the circuit court did not explain why a monetary sanction on trial counsel (such as the one affirmed in *Bartles*) was insufficient. Respondent requested broad monetary relief which the circuit court denied "so far as it relates to his request for the recovery of attorney's fees, costs, and expenses through the trial of the matter."[22] The circuit court, however, did award Respondent attorney fees and costs related to the motion for sanctions itself which it ordered be personally paid by Petitioner's trial counsel.[23] A monetary sanction on trial counsel satisfies the requirement that a sanction be tailored to the violation because it addresses trial counsel's allegedly improper conduct without punishing the Plaintiff whom no party alleges was at fault. The circuit court offered no explanation why this or some other monetary sanction would not have been a sufficient sanction.

Furthermore, the circuit court failed to consider equitable principles when imposing sanctions. In its brief analysis of the order granting sanctions, the court focused on the unfairness of requiring Respondent to retry the case, without addressing or weighing the rights of Petitioner.[24] And, any unfairness to Respondent could have been mitigated by a monetary sanction. The court's sanctions order ignored both the fundamental goal of the judicial system – resolving cases on their merits and the clear injustice to Petitioner in dismissing his claim with prejudice because of his attorney's independent actions. Even if Petitioner's trial counsel's

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[22] JA0008

[23] *Id.*

[24] *Id.*

conduct was properly punishable, a dismissal with prejudice is excessively severe and effectively nullifies his claim due to his attorney's actions. While the circuit court sees it as unfair that Petitioner's trial counsel might get another chance at a retrial, this perceived unfairness is minor compared to Petitioner's interest in having his case evaluated on its merits.

Considering all this, the harm of retrying the case is relatively minor. The discovery is complete, and the parties have a clear understanding of each other's presentations and arguments. The case proved to require less than a week to try. In trying to prevent Petitioner's trial counsel from gaining an advantage via a mistrial, the circuit court went beyond what was necessary and removed the chance for Petitioner to have his case heard on the merits. While retrial would cost both sides time and resources, when weighed against the fundamental unfairness of Petitioner not having his day in court and the court system's strong policy of resolving cases on their merits, the equities favor retrying the case.

Next, the circuit court failed to meaningfully examine the circumstances for mitigating factors, dismissing them by plainly stating they did not exist.[25] The Court's pretrial rulings were unclear and not reduced to writing, which the counsel for either party or the court could later easily refer to. The circuit court also failed to consider that opposing counsel before trial gave a vague evidentiary stipulation to "let all of the medical records be admitted as exhibits," to which Petitioner's trial

[25] JA0007

counsel reasonably believed he was complying.[26] The Respondent later withdrew from that stipulation without explanation.[27]

When imposing the harshest sanctions available, proper groundwork must be established, and thorough consideration and analysis must be given to lesser sanctions. The circuit court's dismissive attitude does not constitute adequate consideration.

Finally, the circuit court failed to apply the law correctly by ruling that the defense did not open the door, or at least could not reasonably be seen to have opened the door, to inquire about Dr. Thacker's review of Dr. Naum's deposition.[28] The fact that Petitioner's trial counsel was correct about Dr. Thacker opening the door should be viewed as a mitigating factor. Overall, the circuit court failed to consider factors that could reasonably be seen as mitigating, instead dismissing the idea that any existed without proper examination. This failure to thoroughly review the facts related to the sanctioned conduct represents another flawed application of the *Bartles* factors in the circuit court's analysis.

C. The circuit court failed to adequately warn the petitioner of the impending ultimate sanction.

The circuit court did not provide Petitioner's trial counsel with any reasonable warning that his conduct could lead to the most severe sanction available. When considering the use of the "harshest sanction," a court must properly alert the party

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[26] JA0983-JA0984

[27] *Id.*

[28] JA1244-JA1245

about the impending ultimate penalty and evaluate less severe sanctions first. See *Woolwine*, 194 W. Va. at 328, 460 S.E.2d at 463. To justify imposing the sanction of dismissal "for serious litigation misconduct," the "trial court findings [must] adequately demonstrate and establish willfulness, bad faith, or fault of the offending party." Syl. pt. 7, *State ex rel Richmond Am. Homes of W. Va. v. Sanders*, 226 W. Va. 103, 113, 697 S.E.2d 139, 149 (2010).

Throughout the trial, the circuit court never reduced to writing the order that the Petitioner's trial counsel was accused of violating. While the circuit court did rule Dr. Naum's report inadmissible as evidence, Petitioner's trial counsel was making a good-faith attempt at complying with the court's orders by using an alternative method to get the report into the record. This was not a malicious attempt to cause a mistrial; it was a genuine disagreement about the rules of evidence. He was not intentionally disobeying the court order; in fact, he was doing his best to follow the order while advocating for his client's rights.

Furthermore, it cannot be said that Petitioner's trial counsel was properly warned about the possibility of sanctions. In fact, before attempting to admit Dr. Naum's report during questioning of Dr. Thacker, sanctions had not been mentioned in the trial record.[29] It is hard to imagine that imposing the harshest sanctions available on a party for violating a verbal order without any reasonable prior warning about sanctions constitutes adequate warning to that party.

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[29] JA1244-JA1245

In the Respondent's Opening Brief, he attempts to counter this by claiming that Petitioner was warned multiple times and providing a list of these warnings. However, these supposed warnings do not serve the purpose of the warning requirement. In the first cited warning, the circuit court noted that he had been clicking his pen, and the Petitioner agreed to stop; there was no mention of possible sanctions.[30] The next alleged warning involved the circuit court instructing Petitioner's trial counsel to stop interrupting witnesses, to which he agreed, without any indication that sanctions were being considered.[31] Subsequently, Petitioner's trial counsel tried to introduce an alternative treatment method in front of the jury. The circuit court warned him not to do so and expressed displeasure but did not mention sanctions or any escalating penalties.[32] Petitioner's trial counsel complied.[33] The next alleged warning occurred when Petitioner's trial counsel attempted to enter Dr. Naum's report into evidence, reasonably believing it complied with the vague evidentiary stipulation by Respondent to "let all of the medical records be admitted as exhibits."[34]

In good faith, Petitioner's trial counsel attempted to admit an exhibit into evidence in accordance with an evidentiary stipulation with opposing counsel.[35] The

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[30] JA0896-JA0897

[31] JA0929-JA0930

[32] JA0951-JA0953

[33] *Id.*

[34] JA0983-JA0984

[35] *Id.*

circuit court instructed Petitioner's trial counsel to stop, and he complied, without mentioning sanctions.[36] In the final purported warning provided by the Respondent, Petitioner's trial counsel again sought to admit Dr. Naum's report into the record under a different and reasonable legal theory. The circuit court denied the request but did not mention sanctions.[37] Motions and objections are routine in a trial, and even if they are incorrect or poorly timed, they do not constitute misconduct. Petitioner's trial counsel made good faith efforts to place a report into the record with rational arguments each time. All of the warnings that Respondent claims were given to Petitioner's trial counsel were merely the circuit court's vague expressions of dissatisfaction, with no clear indication that the court was escalating to the harshest sanction available.

Even if Petitioner's trial counsel had been warned of the possibility of lesser sanctions, the sanction of dismissal with prejudice remains the harshest of all. Before imposing such a sanction, a circuit court must establish a proper foundation, considering and attempting less severe sanctions that could address the harm. That did not occur here. Even when Respondent's trial counsel mentioned he would be satisfied with a curative jury instruction, the circuit court failed to give it proper consideration, dismissing it casually.[38] It is clear that the circuit court did not establish a proper basis for imposing the most severe sanction, as it did not provide

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[36] *Id.*

[37] JA0991-JA0994

[38] JA1245

anything that a reasonable person would interpret as a warning that dismissal was imminent. Therefore, the circuit court abused its discretion by imposing such sanctions without providing adequate warning on the record.

II. The circuit court erred when it found Petitioner's trial counsel violated the court's evidentiary ruling concerning Dr. Naum's expert testimony.

The circuit court incorrectly applied the West Virginia Rules of Evidence by denying Petitioner's trial counsel the chance to cross-examine defense experts about the materials they used for their opinions and then mistakenly granted a mistrial. During the trial, defense expert Dr. Thacker testified that she relied on Dr. Naum's report and deposition to form her professional opinion.[39] By opening the door in this manner, the Respondent allowed for cross-examination regarding Dr. Naum's report.

"Opening the door is also referred to as the doctrine of curative admissibility." *Miller v. Allman*, 240 W. Va 438, 450, 813 S.E.2d 91, 103 (2018) (quoting *United States v. Rucker*, 188 Fed. Appx. 772, 778 (10th Cir. 2006)). This rule "allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has 'opened the door' by introducing similarly inadmissible evidence on the same point." *Id.* If the door is opened, "to present rebutting evidence on an evidentiary fact: (a) [t]he original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary facts as the original inadmissible evidence." *Id.* (citing syl. pt. 10, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)).

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[39] JA1232-JA1233

Although the original report had been ruled inadmissible as evidence, both Respondent and Dr. Thacker testified that they relied on Dr. Naum's report and deposition when forming their conclusions. This use was prejudicial to Petitioner because it was cited to support Respondent's expert's opinion that Petitioner's injuries are unrelated to the right colectomy performed by Respondent. Petitioner's trial counsel had the right to cross-examine her regarding whether, and how, such records affected her professional opinion. The rebuttal evidence, Dr. Naum's materials, had previously been established as inadmissible.

Respondent argues in his Opening Brief that no inadmissible evidence was introduced, stating the testimony of Respondent's experts was limited solely to their professional opinions. However, by referencing her reliance on such records in forming her professional opinion, Dr. Thacker properly opened the door for the use of these materials as impeachment evidence. That legal error constitutes an abuse of discretion, as a trial court abuses its discretion if it rules based on an erroneous assessment of the evidence or the law. *See Cox v. State*, 194 W. Va. 210, 218 n.3, 460 S.E.2d 25, 33 n.3 (1995).

Even if it were assumed that the circuit court was correct in its ruling regarding inadmissibility, it still abused its discretion in granting a mistrial, as a curative jury instruction would have addressed the issue without significant prejudice to either party. Mistrials in civil cases are generally regarded as the "most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed." *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 308, 418

S.E.2d 738, 754 (1992) (quoting *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 208 (Mo. 1991)). A mistrial should only be granted where there is a manifest necessity for discharging the jury before it has rendered its verdict. *State v. Meadows*, 231 W.Va. 10, 13, 743 S.E.2d 318, 321 (2013). Mistrials are reserved solely for the most egregious errors that a curative jury instruction cannot correct. *Reed v. Wimmer*, 195 W.Va. 199, 205, 465 S.E.2d 199, 205 (W. Va. 1995).

Under West Virginia law, a curative jury instruction is generally assumed to be enough to fix improper remarks or evidence made during a trial. *See Preserving a Claim for Error*, 1 Handbook on Evidence for West Virginia Lawyers, § 103.03 (citing Syl. pt. 2, *Rice v. Henderson*, 140 W. Va. 284, 285, 83 S.E.2d 762, 764 (1954) ("Error in the admission of improper testimony, [is] subject to cure by action of the court … , since the jury is presumed to follow the instructions of the court.")). When improper evidence is introduced during trial, and the court gives a prompt and correct curative instruction, that instruction is assumed to be enough to eliminate the error. *Id.* It is only if the court believes there is an "overwhelming probability" that the jury cannot follow the court's curative instructions that this assumption is overturned. *Greer v. Miller*, 483 U.S. 756, 766, n. 8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).

Curative instructions are presumed effective under West Virginia law, and mistrials are considered a last resort only for the most serious errors. This presumption can only be overturned when there is an overwhelming likelihood that the jury cannot follow such instruction, making a mistrial justified. That is not the situation here. A clear curative jury instruction would have resolved the issue without

causing significant prejudice to either side. Neither the circuit court nor the Respondent has shown why the limited comments by Petitioner's trial counsel regarding Dr. Naum's report meet that high standard. They have not explained why they believe that these limited comments would so prejudice the jury that it could not follow the curative instruction. Even the Respondent's trial counsel did not think so, as he specifically requested a curative jury instruction and declined to move for a mistrial when the alleged violation occurred.[40] Since the standard to override the presumption of effectiveness is "overwhelming" and the remedy is a last resort, the Circuit Court's conclusory explanation was insufficient. By granting the mistrial, the circuit court abused its discretion. This Court should reverse.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court vacate the order below and remand for a new trial.

Respectfully Submitted,

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[40] JA0630-JA0638

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CERTIFICATE OF SERVICE

I certify that on November 13, 2025, I served a true copy of Petitioner's Reply Brief upon counsel of record through the Court's Electronic Filing System.

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