

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-330  
Case No. 22-F-28  
Circuit Court of Boone County

KEVIN SCOTT DICKENS,

Defendant below, Petitioner.

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PETITIONER'S BRIEF

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## ASSIGNMENT OF ERROR

Petitioner shot another bar patron who had brandished a six-inch blade. Two weeks into his murder trial, several participants tested positive for COVID-19. The court declared a mistrial over Petitioner's objection.

In 2023, was a mistrial "manifestly necessary" where neither party requested one, both believed a one-week recess would be appropriate, and the court expressly refused to consider the parties' position because it had decided before the hearing?

## STATEMENT OF THE CASE

This should not have been a difficult case. Security footage showed that Petitioner drew his gun after the decedent armed himself with a knife.<sup>1</sup> The State's own witness—an officer who formerly taught use of force at the State Police Academy—admitted that Petitioner was justified if, at the time, he saw the decedent's knife.<sup>2</sup> Jurors only had to decide why Petitioner had no recollection of the weapon afterwards: whether he never saw the knife, or whether alcohol and trauma from the stressful event clouded his memory.<sup>3</sup>

But due to prosecutorial inexperience and mismanagement,<sup>4</sup> the trial dragged on for weeks.<sup>5</sup> Petitioner had an opportunity to request a mistrial, but declined to give the State a mulligan.<sup>6</sup> The court declared one anyway.<sup>7</sup> A day after Petitioner declined a mistrial due to prosecutorial undermatch, several trial participants tested positive for COVID and the court refused the parties' plan to pause the trial one week and reassess.<sup>8</sup> Because this occurred in 2023, there was no emergency, and the ends of justice favored seeing the case through, Petitioner appeals.

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<sup>1</sup> A.R. 2612 (surveillance video). All audio/visual exhibits are compatible with VLC Media Player, available at <https://www.videolan.org/vlc/>.

<sup>2</sup> A.R. 1472–73; *see also* A.R. 1355.

<sup>3</sup> *Compare* A.R. 2469 *with* A.R. 2477–78; *see also* A.R. 1318.

<sup>4</sup> *See Lawyer Disciplinary Board v. Taylor*, Supreme Court of Appeals of West Virginia No. 23-133, Petr.' Br. 5–6 (Perfected May 30, 2024).

<sup>5</sup> *See* A.R. 155.

<sup>6</sup> A.R. 139–41.

<sup>7</sup> A.R. 150–52.

<sup>8</sup> *Id.*; A.R. 156.

**A. Petitioner and a bar patron brawled. After the patron brandished a knife, Petitioner drew his gun and fired.**

On December 30, 2021, Petitioner, who was 53 years old and had no prior record,<sup>9</sup> had been drinking for several hours at Midtown Market, a tavern in Whitesville, after work.<sup>10</sup> He transported mining supplies to remote areas in and around Boone County, and still had a concealed pocket pistol that, like many of his coworkers, he routinely carried to protect himself on the job.<sup>11</sup> He and a friend then traveled to Terry's Café, a nearby gambling parlor and the site of the altercation at issue.<sup>12</sup>

The bar's surveillance system recorded the shooting and most events leading up to it.<sup>13</sup> Petitioner and his friend enter the establishment and sit at the short bar, the friend at the opposite end from the decedent and Petitioner between them. The decedent was 41 years old and visibly fit, but uncoordinated due to a TBI he received as a teenager.<sup>14</sup> Petitioner is acquainted with him<sup>15</sup> and taps the decedent on the shoulder in recognition. The two chat intermittently but otherwise mind their own business.

The video cuts out for several seconds and misses the inciting incident. But the bartender testified that she heard the decedent say, "Just don't start. I don't want to hear this shit tonight," while Petitioner apologized and urged him to calm down.<sup>16</sup>

When the video picks back up, Petitioner and the decedent are standing and yelling at one another. Per the bar staff, the two squabbled over who hit whom during the video gap.<sup>17</sup> Petitioner begins hitting the decedent and the bar staff separate them. The staff push the decedent into a kitchen area, where he is unsupervised, while restraining Petitioner at the door.

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<sup>9</sup> See A.R. 24; A.R. 1616–17; A.R. 70–71.

<sup>10</sup> A.R. 2178; A.R. 2180–82; A.R. 1240.

<sup>11</sup> A.R. 2173–74; A.R. 2176–78.

<sup>12</sup> See A.R. 2204–06.

<sup>13</sup> See A.R. 2612 (surveillance video). Unless otherwise noted, all assertions concerning the altercation come from channels 9, 10, and 16.

<sup>14</sup> A.R. 2067–69.

<sup>15</sup> A.R. 2186.

<sup>16</sup> A.R. 1729.

<sup>17</sup> A.R. 1762.

The kitchen had a back door that exited to another part of the building,<sup>18</sup> but the video shows the decedent instead arming himself with a six-inch bladed kitchen knife. He conceals it behind his back and the two continue to yell — Petitioner, from the doorway and restrained by bar staff, and the decedent, unrestrained in the kitchen.

In the course of restraining and pulling at Petitioner, the bar staff spin him around. For this moment, Petitioner cannot see into the kitchen. His back is exposed. And the decedent advances with the knife.

Petitioner turns back and, from his perspective, the scene has changed in two significant respects. The decedent is several paces closer. And for the first time the knife is in view. Petitioner struggles at his front pocket and retrieves his handgun. The decedent begins to turn away, but Petitioner is already firing and advancing. Petitioner fires five shots while advancing and eventually standing over the decedent. The entire shooting lasts three seconds.

At his eventual trial, an investigating officer testified as an expert based on his experience teaching use of force at the Police Academy.<sup>19</sup> Under cross-examination he admitted that the knife was a deadly weapon, and the decedent was well within lethal striking range.<sup>20</sup> Advancing on an assailant is not always the best decision, but a reasonable one if doing so improves accuracy and reduces the risk to bystanders.<sup>21</sup> And it makes sense to empty one's clip to ensure the target is no longer a threat.<sup>22</sup> In his opinion, law enforcement is held to a higher standard for use of force, but even an officer would be justified under these circumstances — “if the knife is viewable.”<sup>23</sup>

The State charged Petitioner with first degree murder on the theory that he was not reacting to the knife, and instead killed the decedent because he threatened to sue him.<sup>24</sup>

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<sup>18</sup> A.R. 1755; A.R. 1860–61; A.R. 2831.

<sup>19</sup> A.R. 1355; A.R. 1444; A.R. 1449–50; A.R. 1471.

<sup>20</sup> A.R. 1363; A.R. 1437–38; A.R. 1466.

<sup>21</sup> A.R. 1458; A.R. 1466–67.

<sup>22</sup> A.R. 1364–67; A.R. 1413–14.

<sup>23</sup> A.R. 1472–73; *see also* A.R. 1328–29; A.R. 1421; A.R. 1447–48.

<sup>24</sup> A.R. 2613–15; *see* A.R. 2207. The State also charged three counts of wanton endangerment.

**B. After two weeks of trial, Petitioner had an opportunity to request a mistrial but declined to give the State a do-over.**

Petitioner drove home, wrecked, and passed out.<sup>25</sup> He testified that when he awoke, he realized he had killed a man but had little recollection of what happened after his interaction with the decedent became physical.<sup>26</sup> He ideated suicide-by-cop, but his boss helped negotiate a peaceful surrender to authorities.<sup>27</sup>

When police arrived at the café, they watched the surveillance video and recovered the knife.<sup>28</sup> However, none of the witness statements mentioned that the decedent armed himself.<sup>29</sup> Police did not include the knife in their reports or the criminal complaint.<sup>30</sup> They instructed Petitioner's boss not to mention the knife,<sup>31</sup> and they withheld its existence when interrogating him.<sup>32</sup> The State even withheld the knife from the preliminary hearing magistrate.<sup>33</sup> It delayed disclosing the knife, and Petitioner's colorable self-defense claim, for five months.<sup>34</sup>

The State further delayed by moving to continue a week before trial.<sup>35</sup> It had not discussed the trial date with the medical examiner and learned late that he would be out of the country.<sup>36</sup> Petitioner objected that the autopsy was immaterial; jurors only had to watch the video and decide whether Petitioner was justified.<sup>37</sup> He likely would stipulate to a substitute ME—the State's intended witness already was not the one who performed the autopsy—and Petitioner wanted a trial that term.<sup>38</sup> Per Petitioner, using another ME, or foregoing the autopsy, should not impact the trial.<sup>39</sup> The court sided with the State.<sup>40</sup>

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<sup>25</sup> A.R. 2226–28.

<sup>26</sup> *E.g. id.*

<sup>27</sup> A.R. 2047; A.R. 2058–62; A.R. 2064–67.

<sup>28</sup> *See* A.R. 1389; A.R. 1254; A.R. 1979.

<sup>29</sup> A.R. 1450.

<sup>30</sup> A.R. 1331–32; 1978–79.

<sup>31</sup> A.R. 2063–64.

<sup>32</sup> A.R. 1254.

<sup>33</sup> A.R. 1334–37.

<sup>34</sup> A.R. 2617; *see also* A.R. 2145.

<sup>35</sup> *See* A.R. 22.

<sup>36</sup> *See* A.R. 2619.

<sup>37</sup> A.R. 25–26; A.R. 2621–22; *see also* A.R. 69–70.

<sup>38</sup> *Id.*; A.R. 23–24; A.R. 28–29; *see also* A.R. 244–45.

<sup>39</sup> *Id.*

<sup>40</sup> A.R. 2623; A.R. 29.

The trial began four months later, on January 3, 2023,<sup>41</sup> but the State was unprepared and unfamiliar with courtroom procedure.<sup>42</sup> A full week into trial, the State mentioned as an aside that one of its upcoming witnesses would testify remotely.<sup>43</sup> This was news to the court.<sup>44</sup> The court stated in no uncertain terms that was not a decision a party could make.<sup>45</sup> The constitutional preference for live testimony aside, the logistics alone required the court's involvement.<sup>46</sup> It was inappropriate for the State to arrange remote testimony without leave of court.<sup>47</sup>

Two days later, on January 12, the State's mismanagement of the case reached a breaking point.<sup>48</sup> The judge pulled the parties into chambers to place on the record that she was "extraordinarily concerned."<sup>49</sup> The State had missed deadlines and filed discovery late.<sup>50</sup> It had amended its witness list at least twice mid-trial<sup>51</sup> and its exhibit list four times,<sup>52</sup> calling into question the point of notice at all if it need not precede trial.<sup>53</sup> "I can't help but come to the conclusion in my mind that the State is either woefully unprepared or is not competent to try this matter."<sup>54</sup>

The prosecutor was unfamiliar with the "extraordinarily elementary" procedure for laying foundations and marking exhibits.<sup>55</sup> "I had to remind you of what questions to ask on more than one occasion and [the second chair prosecutor], sitting at counsel table next to you ... had to spoon feed the Prosecutor the questions to ask."<sup>56</sup>

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<sup>41</sup> A.R. 2665.

<sup>42</sup> *E.g.* A.R. 124–25.

<sup>43</sup> A.R. 124.

<sup>44</sup> *Id.*

<sup>45</sup> A.R. 124–27.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> A.R. 136.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; A.R. 2633–36; 2640–43.

<sup>52</sup> A.R. 2624–25; A.R. 2627–28; 2630–31; 2637–38.

<sup>53</sup> *See* W. Va. R. Crim. P. 16 (under the heading, "IV. Arraignment and Preparation for Trial"); *see also* A.R. 237–38.

<sup>54</sup> A.R. 136.

<sup>55</sup> *Id.*

<sup>56</sup> A.R. 136–37. This dysfunction and more were apparent even to laypeople in the gallery. *See* A.R. 2647–48.

All of this—the State’s unfamiliarity with courtroom procedure, pretrial disclosures mid-trial, late subpoenas, etc.—gave the court “grave concerns” and prompted the court to ask “if the State is prepared and competent to try this case?”<sup>57</sup>

The prosecutor said she was prepared, but the court was unconvinced.<sup>58</sup> “I have major concerns, major concerns. I have due process concerns. I have constitutional concerns. ... I have major concerns in regard to preparedness and competency.”<sup>59</sup>

Defense counsel was concerned that jurors may feel undue sympathy for the State’s position but would decline a mistrial.<sup>60</sup> Jeopardy had attached, and any mistrial due to prosecutorial mismanagement was not Petitioner’s fault.<sup>61</sup>

The court acknowledged that jeopardy had attached,<sup>62</sup> but still had concerns. “All of this, cumulatively, is extraordinarily concerning. This -- we’re literally talking about people’s lives here. And I have a very real concern that the State is unprepared or is not competent to try this.”<sup>63</sup>

The court concluded the in-chambers hearing: “Something needs to change ... I don’t know what you have to do ... but something’s got to change.”<sup>64</sup>

**C. Over a defense objection and after refusing to entertain the parties’ proposed alternative, the court sua sponte declared a mistrial when several court participants tested positive for COVID-19.**

A few days later, something changed. Tuesday, January 17, the court conducted a Zoom hearing to place on the record the status of a COVID outbreak amongst the trial participants and the court’s unilateral decision to declare a mistrial.<sup>65</sup>

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<sup>57</sup> A.R. 137.

<sup>58</sup> *Id.*

<sup>59</sup> A.R. 138–39.

<sup>60</sup> A.R. 139–41.

<sup>61</sup> A.R. 140.

<sup>62</sup> A.R. 140.

<sup>63</sup> A.R. 142.

<sup>64</sup> A.R. 142.

<sup>65</sup> A.R. 150–52.

The court had dressed down the prosecution the prior Thursday.<sup>66</sup> Between then and Friday evening, seven trial participants had tested positive for COVID.<sup>67</sup> Due to a long holiday weekend, four days had already passed without testimony and it would be “several more days” before they could resume.<sup>68</sup> The court had decided to declare a mistrial but would let the parties make a record if they deemed one necessary.<sup>69</sup>

Petitioner objected.<sup>70</sup> The parties had not contemplated a mistrial.<sup>71</sup> Petitioner and the State had agreed off the record to a one-week recess.<sup>72</sup> By 2023, COVID was “something that is now just a part of our lives in trying cases[.]”<sup>73</sup> They were two weeks into the trial and starting over would be highly prejudicial to Petitioner.<sup>74</sup>

The court interrupted defense counsel to remind him it had already ruled.<sup>75</sup> This was only an opportunity to lodge an objection, not make an argument.<sup>76</sup>

Petitioner moved to dismiss.<sup>77</sup> Jeopardy had attached, Petitioner did not cause the mistrial, and he had objected to it.<sup>78</sup> “There have been other grounds for mistrial, that have already come up. Again, not caused by the defense.”<sup>79</sup>

The court denied the motion.<sup>80</sup> Per its research, Double Jeopardy only required dismissal if the State caused the mistrial.<sup>81</sup>

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<sup>66</sup> A.R. 136.

<sup>67</sup> The court sealed their personal health information, but their identities are available at A.R. 150–52.

<sup>68</sup> A.R. 152.

<sup>69</sup> *Id.*

<sup>70</sup> A.R. 153.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; see also A.R. 220–21. In January 2023, the CDC advised individuals who contracted COVID to quarantine for five days. See CDC Press Release, *CDC streamlines COVID-19 guidance to help the public better protect themselves and understand their risk* (Aug. 11, 2022) (available at <https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html#:~:text=Today,%20CDC%20is%20streamlining%20its%20COVID-19%20guidance%20to%20help%20people>).

<sup>73</sup> A.R. 153.

<sup>74</sup> A.R. 155.

<sup>75</sup> A.R. 156.

<sup>76</sup> *Id.*; see also A.R. 258–59.

<sup>77</sup> A.R. 156–57.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> A.R. 157.

<sup>81</sup> *Id.*

In follow-up hearings Petitioner renewed his motion to dismiss and vouched the record with the myriad ways the mistrial prejudiced Petitioner.<sup>82</sup>

Petitioner had retained counsel.<sup>83</sup> But unable to work for a year while incarcerated, the State had exhausted his funds.<sup>84</sup> Counsel therefore required an appointment order to conduct a second trial, afford transcripts, and consult with experts.<sup>85</sup>

The mistrial acted as a do-over for the State.<sup>86</sup> The State could hire a new assistant to act as lead counsel in place of the prosecutor.<sup>87</sup> It could now call witnesses it could not in the first trial due to discovery violations.<sup>88</sup> It also cleaned up the police investigation.<sup>89</sup>

The original police report was not thorough, and Petitioner's strategy had been to cross-examine officers on the incompleteness of their work.<sup>90</sup> But now—a year after the incident, weeks after the mistrial, and days before the second—the police produced a brand new report that filled in those gaps.<sup>91</sup> It attributed investigatory steps to police officers that they themselves had not included in their original narratives.<sup>92</sup> It contained previously-undisclosed crime scene diagrams and measurements.<sup>93</sup> And it was signed and delivered a month after the State got a preview of the defense strategy.<sup>94</sup>

The mistrial also allowed the State to jettison its first degree murder theory. The charge worked to deprive Petitioner of bail since it carried a life sentence, but juror interviews showed it had cost the State credibility.<sup>95</sup> In the do-over trial, after Petitioner sat in jail for 15 months, the State opted only to argue for second degree murder.<sup>96</sup>

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<sup>82</sup> See A.R. 178; A.R. 196; A.R. 210; A.R. 279.

<sup>83</sup> A.R. 186.

<sup>84</sup> A.R. 186–88.

<sup>85</sup> *Id.*

<sup>86</sup> See A.R. 221–22; A.R. 225; A.R. 230; A.R. 240–41; A.R. 252.

<sup>87</sup> Compare A.R. 287 with A.R. 335; see also A.R. 1281.

<sup>88</sup> A.R. 221–23; see also A.R. 2656–59.

<sup>89</sup> A.R. 223.

<sup>90</sup> A.R. 231; A.R. 292–94.

<sup>91</sup> A.R. 223–24; A.R. 231.

<sup>92</sup> A.R. 227–28.

<sup>93</sup> A.R. 225–28; see also A.R. 284–85.

<sup>94</sup> A.R. 228.

<sup>95</sup> See A.R. 229–30; A.R. 241–43; A.R. 247; A.R. 250–52; see also W. Va. Code § 62-1C-1.

<sup>96</sup> A.R. 1058; A.R. 1134–35.

The circuit court again denied the motion to dismiss.<sup>97</sup> It reasoned that so long as the State was not responsible for the mistrial, Double Jeopardy would not bar retrial and it had declared one due to the COVID outbreak.<sup>98</sup> “I made it clear on that date that that was the reason that the Court was taking that action.”<sup>99</sup>

At the conclusion of the do-over trial, the jury convicted Petitioner of voluntary manslaughter.<sup>100</sup>

### SUMMARY OF ARGUMENT

The onset of the Pandemic required extraordinary action. This Court instituted a series of protocols tailored to the best available public health data so courthouses could remain open while protecting the professionals, litigants, and witnesses who depend upon a functioning judiciary. Certainly in 2020 and extending into 2021, a COVID outbreak would justify a prudent court, considering all the circumstances and alternatives, to find manifest necessity for a mistrial.

But this trial happened in 2023. The Court rescinded its last COVID protocol in 2021.<sup>101</sup> The CDC’s timeline of its response to the crisis—relegated to the agency’s museum—ends in 2022.<sup>102</sup> By the time of this trial, rapid at-home testing and vaccinations made COVID at least as predictable as other diseases. And the parties recognized that the proper response was to recess, wait, and see.

Therefore, there was no manifest necessity for a mistrial. The court erred by refusing to consider alternatives and by reaching a decision before ever conducting a hearing. The mistrial was counterproductive to the ends of justice and public health. Its only effect was to grant the State a mulligan.

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<sup>97</sup> A.R. 261–62.

<sup>98</sup> A.R. Amend. Order 2665–67.

<sup>99</sup> A.R. 261.

<sup>100</sup> A.R. 2600–03.

<sup>101</sup> *Administrative Order, Re: Suspension of COVID-19 Health and Safety Protocols*, Supreme Court of Appeals Of West Virginia, June 25, 2021.

<sup>102</sup> Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html> (last accessed Sept. 9, 2024).

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In 1824, the Supreme Court recognized a defendant's right to be tried by a particularly selected tribunal, absent manifest necessity for a mistrial.<sup>103</sup> The principle underlying this right could not be more weighty: "the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged 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.'"<sup>104</sup>

Petitioner therefore requests a Rule 19 argument and signed opinion reminding courts to weigh available alternatives before declaring a mistrial over the defendant's objection. A court's power to end a trial before verdict "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes[.]"<sup>105</sup>

## ARGUMENT

**The circuit court erred by finding manifest necessity for a mistrial without considering the parties' alternate plan to follow public health guidance and recess a few days.**

The court denied Petitioner's motion to dismiss believing that so long as the State did not cause the mistrial, it could retry Petitioner.<sup>106</sup> However, that is not the standard.<sup>107</sup> The court was mistaken that manifest necessity existed, barring retrial regardless of fault.

Even the State below knew that the mistrial was unnecessary.<sup>108</sup> Indeed, it would strain credibility to suggest that a short recess, consistent with then-existing guidelines, was not a reasonable alternative.<sup>109</sup> If everyone recovered, the trial could continue. And if

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<sup>103</sup> *U.S. v. Perez*, 22 U.S. 579, 580 (1824).

<sup>104</sup> *U.S. v. Dinitz*, 424 U.S. 600, 606 (1976) (quoting *Green v. U.S.*, 355 U.S. 184, 187–88 (1957)).

<sup>105</sup> *Perez*, 22 U.S. at 580.

<sup>106</sup> A.R. 157.

<sup>107</sup> See *Perez*, 22 U.S. at 580.

<sup>108</sup> A.R. 153; A.R. 259–60.

<sup>109</sup> See *supra*. at n. 72.

not, or if others became ill, the court could have declared a mistrial at that point. There was no harm in waiting, but the court refused to entertain that alternative.<sup>110</sup>

“No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb[.]”<sup>111</sup> This includes a prohibition on multiple trials for the same offense whether the previous trial resulted in conviction or acquittal.<sup>112</sup> Where the circuit court ends the trial before verdict, it may still implicate the defendant’s “valued right to have his trial completed by a particular tribunal[.]”<sup>113</sup> If the defendant consented to the mistrial, then Double Jeopardy bars retrial if the State or court engaged in misconduct intended to provoke the motion.<sup>114</sup> If the defendant opposed ending the trial, then Double Jeopardy bars retrial unless the State can prove “manifest necessity” compelled the mistrial.<sup>115</sup>

This Court reviews the decision to declare a mistrial for abuse of discretion.<sup>116</sup> However, abuse of discretion is not a one-size-fits-all standard.<sup>117</sup> Only forceful reasons will justify a court in prematurely ending a criminal trial.<sup>118</sup> The power to declare a mistrial “is a delicate and highly important trust[.]”<sup>119</sup> And here, the court abused its discretion by weighing the wrong standard and expressly stating it would not entertain the alternatives or arguments of the parties because it had already ruled.<sup>120</sup>

First, the court below placed undue weight on the fact it declared a mistrial for reasons unrelated to the prosecution.<sup>121</sup> That is a necessary, but never alone sufficient, condition more applicable to cases where the defense consented to the mistrial.<sup>122</sup> It is virtually

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<sup>110</sup> A.R. 156; A.R. 258–59.

<sup>111</sup> U.S. Const. Amend. V; *accord.* W. Va. Const. Art. III, § 5.

<sup>112</sup> *See Currier v. Virginia*, 585 U.S. 493, 501 (2018) (citing *Brown v. Ohio*, 432 U.S. 161 (1977)).

<sup>113</sup> *U.S. v. Dinitz*, 424 U.S. 600, 606 (1976) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

<sup>114</sup> *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982); *see Dinitz*, 424 U.S. at 611–12.

<sup>115</sup> *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

<sup>116</sup> *See* Syl. Pt. 2, *State ex rel. Brooks v. Worrell*, 156 W. Va. 8, 190 S.E.2d 474 (1972) (quoting Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938)).

<sup>117</sup> *See State v. Head*, 198 W. Va. 298, 305, 480 S.E.2d 507, 514 (1996) (Cleckley, J., concurring).

<sup>118</sup> *See SER Brooks*, 156 W. Va. 8 at Syl. Pt. 2.

<sup>119</sup> *Little*, 120 W. Va. 213 at Syl. Pt. 3; *accord. Perez*, 22 U.S. at 580.

<sup>120</sup> A.R. 156; A.R. 258–59; *see also Porter v. Ferguson*, 174 W. Va. 253, 258, 324 S.E.2d 397, 401 (1984) (judge must not declare a mistrial “precipitately[.]”).

<sup>121</sup> *See* A.R. 157; A.R. 261–62; 2665–67. Though the exact origins are hotly debated, Petitioner assumes, for the sake of argument, that the State of West Virginia did not cause COVID.

<sup>122</sup> *See Kennedy*, 456 U.S. at 676.

irrelevant here since Petitioner objected. If manifest necessity did not exist, then the State cannot retry him no matter the State’s blameworthiness.<sup>123</sup>

Second, the court abused its discretion by refusing to hear out Petitioner and consider the parties’ plan to recess. “[B]efore a midtrial break on manifest necessity grounds will be upheld, it must be shown that the trial court explored reasonable alternatives to a mistrial[.]”<sup>124</sup> Per Petitioner’s uncontested proffer, the parties had discussed the situation and agreed a short recess would be appropriate.<sup>125</sup> The court interrupted him to say he could lodge an objection but not make an argument.<sup>126</sup> It had already ruled, and that was that.<sup>127</sup> But to properly exercise its discretion, the court had to at least consider the alternatives.<sup>128</sup> To prejudge the matter and hold a hearing only to place the predetermined outcome on the record is the very definition of acting “precipitately.”<sup>129</sup>

Third, the parties’ plan to recess a few days was more than reasonable, making a mistrial anything but manifestly necessary. Manifest necessity is a matter of degree depending on the individual case.<sup>130</sup> At one extreme is the prototypical mistrial for a deadlocked jury.<sup>131</sup> At the other end, a desire to bolster the State’s case will never justify a mistrial over a defendant’s objection.<sup>132</sup> That “abhorrent” practice is precisely what the Double Jeopardy Clause prohibits.<sup>133</sup>

Of course, illness in the abstract could constitute manifest necessity, but only under circumstances that make it impossible for the trial to continue.<sup>134</sup> That is not this case. In 2023 the judicial system had dealt with COVID for three years. Detection, prognosis, and

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<sup>123</sup> See *Washington*, 434 U.S. at 505.

<sup>124</sup> *State ex rel. Betts v. Scott*, 165 W. Va. 73, 79, 267 S.E.2d 173, 177 (1980).

<sup>125</sup> A.R. 153; A.R. 259–60.

<sup>126</sup> A.R. 156.

<sup>127</sup> *Id.*

<sup>128</sup> See *Betts*, 165 W. Va. at 79.

<sup>129</sup> See *Porter*, 174 W. Va. at 258.

<sup>130</sup> See *Washington*, 434 U.S. at 506.

<sup>131</sup> See *id.* at 509.

<sup>132</sup> See *Id.* at 507–08.

<sup>133</sup> *Id.*

<sup>134</sup> See *State v. Oldaker*, 172 W. Va. 258, 265, 304 S.E.2d 843, 849 (1983).

treatment were sufficiently definite for public health officials to give concrete guidance: quarantine for five days and re-test.<sup>135</sup> The parties' joint plan followed this guidance.<sup>136</sup>

As it turned out, had the court followed the parties' plan the trial would have continued. All necessary court personnel had recovered within the week.<sup>137</sup> In fact, the week recess requested by the parties erred on the side of caution. The best available health guidance was to wait five days and reassess.<sup>138</sup> Per the court's timeline and the happenstance of a long holiday weekend, four days had already passed.<sup>139</sup> The trial may have continued even sooner than the parties had budgeted for.

The parties' plan was also more protective of public health. The court staff and original jury had already been exposed, presumably during the lengthy, close quarters of voir dire.<sup>140</sup> After negative tests, they could reconvene and finish the trial safely. At the earliest, reinfection can occur several weeks after recovery, but even that is a rarity.<sup>141</sup> By declaring a mistrial and summoning a new panel over a month later, the court increased, rather than decreased, the risk of reinfection. And the court unnecessarily exposed a whole new panel of potential jurors. The court's intent may have been to protect public health, but the mistrial was riskier than the alternative. The mistrial accomplished nothing but to give the State a do-over after previewing the defense case.

Finally, accepting the parties' alternative and pausing the trial a few days would not have irrevocably committed the court. If the situation had played out differently—if more people fell ill rather than the apparent full recovery<sup>142</sup>—then the court could always declare a mistrial at that point. Nothing would have been lost by the parties' plan to simply

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<sup>135</sup> *See supra.* at n. 72.

<sup>136</sup> A.R. 153; A.R. 259–60.

<sup>137</sup> A.R. 259–60. The record, of course, is silent as to the jury since the court did not poll them after dismissing them from service.

<sup>138</sup> *See supra.* at n. 72.

<sup>139</sup> A.R. 152.

<sup>140</sup> A.R. 155.

<sup>141</sup> Centers for Disease Control, *About Reinfection*, <https://www.cdc.gov/covid/about/reinfection.html> (last accessed Sept. 17, 2024).

<sup>142</sup> A.R. 259–60.

follow the prevailing public health guidance. The only irreversible decision was the one the court precipitately took: to dismiss the jurors without even entertaining alternatives.

### CONCLUSION

No matter the strength of the government's case, sooner or later it will get a conviction if given enough tries. With its might, the government can bankrupt defendants, exhaust them with endless anxiety, and turn them into pariahs as the suspicion of guilt remains unresolved until the government gets the answer it wants. This is unacceptable.

Which is why the framers of the Constitution put an end to it. If the government thinks you are guilty of a crime, it gets one chance to prove it. Petitioner therefore asks that the Court reverse his conviction.

Respectfully submitted,  
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