

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.

PETITIONER'S REPLY

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REPLY ARGUMENT

This trial did not need to be difficult. Surveillance video captured the altercation leading to Petitioner’s murder charge and jurors only had to decide whether he was justified in using his firearm when the decedent advanced on him with a long kitchen knife.¹

Instead, it dragged on for weeks due to prosecutorial inexperience.² The court even pulled the parties aside to demand whether the State was competent to continue.³ But although Petitioner declined to request a mistrial, the court declared one anyway.⁴

One day after Petitioner declined a mistrial, several trial participants tested positive for COVID, and the court later dismissed the jury without considering the parties’ plan—that of the defense *and* the State—to recess and retest.⁵ Because even the State below acknowledged a short recess was appropriate, the mistrial was uncalled for.⁶

The Response concedes the State may not retry Petitioner unless it was manifestly necessary to dismiss the jury, but contradicts the State’s position below to argue the court had no reasonable choice but to declare a mistrial.⁷ Even ignoring the U-turn, it is mistaken. It can only argue that, in the abstract, illness can cause mistrials because the actual facts show that here, a mistrial was not only unnecessary, it was unnecessarily risky. And the court’s decision—which it reached before the hearing and without considering the parties’ alternative—is a prototypical abuse of discretion.⁸

This trial occurred in 2023, not 2020. Both parties, consistent with public health guidance, believed the court should revisit the issue after a short recess. But instead of wait-and-see, the court made the irrevocable choice to dismiss the jury. And now that has irrevocable consequences. Petitioner requests that the Court reverse his conviction.

¹ See A.R. 2612.

² See *Law. Disciplinary Bd. v. Taylor*, No. 23-133, 2024 WL 4767010, at *7 (W. Va. Nov. 13, 2024) (memorandum).

³ A.R. 136–39.

⁴ A.R. 139–41; A.R. 150–52.

⁵ A.R. 150–52; A.R. 156.

⁶ See *Jourdan v. State*, 341 A.2d 388, 398 (Md. 1975) (no manifest necessity where State believed a recess was a sufficient alternative to mistrial).

⁷ Resp.’s Br. 5.

⁸ A.R. 150–52; A.R. 156–57.

I. Per the State, an alternative existed and thus the mistrial was unnecessary.

Below the State did not believe a mistrial was necessary, but now argues otherwise.⁹ The formal propriety of its contradictory positions aside,¹⁰ the State's original position is substantively determinative. Mistrials are rarely—if ever—necessary when the State agrees to an alternative.¹¹ Thus, the Double Jeopardy Clause barred Petitioner's retrial.¹²

The Response emphasizes that illness is outside the State's control, but Petitioner has never suggested otherwise.¹³ For federal manifest necessity analysis, the State's blameworthiness is largely irrelevant.¹⁴ If a mistrial was not manifestly necessary and the defendant objected, it does not matter why the court declared it.¹⁵

But the State did not merely fail to move for the mistrial. *It agreed with Petitioner that one was not necessary.*¹⁶ In 2023, public health guidance was clear: rest for five days, then retest.¹⁷ The parties agreed to wait and see.¹⁸ Importantly, due to a holiday weekend four days had already elapsed after the positive tests.¹⁹ To discard two weeks of trial when it could have continued in as little as a day or two is preposterous.

It is impossible to reconcile the Response's insistence that a mistrial was necessary with the State's position below that it was not.²⁰ And here, the contradictory stances are not merely procedurally dubious. Because the State agreed to an alternative, the mistrial was not manifestly necessary.

⁹ A.R. 153; Resp.'s Br. 5.

¹⁰ See *State v. Ward*, 249 W. Va. 347, 359, n. 22, 895 S.E.2d 202, 214, n. 22 (2023); *State ex rel. Gabrielle M. v. Janes*, No. 16-0167, 2016 WL 5846619, at *3 (W. Va. Oct. 6, 2016) (memorandum).

¹¹ See *Jourdan*, 341 A.2d at 398 (no necessity where State offered a continuance as an alternative); *Thomason v. State*, 620 So. 2d 1234, 1239 (Fla. 1993) (mistrial not necessary where State requested two-week continuance); *U.S. v. Evers*, 569 F.2d 876, 878–79 (5th Cir. 1978) (mistrial not necessary where defense and prosecution agreed curative instruction would suffice).

¹² U.S. Const. Amend. V.

¹³ Resp.'s Br. 7–8; discussing Syl. Pt. 2, *Porter v. Ferguson*, 174 W. Va. 253, 324 S.E.2d 397 (1984).

¹⁴ See *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (explaining usual rule and bad faith exception).

¹⁵ See *Kennedy*, 456 U.S. at 672–73; see also U.S. Const. Amend. V.

¹⁶ A.R. 153; A.R. 259–60; see also Resp.'s Br. 14.

¹⁷ 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=To-day,%20CDC%20is%20streamlining%20its%20COVID-19%20guidance%20to%20help%20people>) (last accessed Nov. 21, 2024).

¹⁸ A.R. 153; A.R. 259–60; see also Resp.'s Br. 14.

¹⁹ See A.R. 152.

²⁰ Compare A.R. 153 with Resp.'s Br. 5.

II. The actual facts of this case, not hypothetical abstractions, show that a mistrial was not manifestly necessary.

The Fifth Amendment and surrounding law explain the parameters for when retrial may follow a mistrial declared over the defendant's objection.²¹ Without manifest necessity, such a dismissal acts like an acquittal and the State cannot retry the defendant.²² The court must hear from the parties before ruling,²³ and consider their alternatives.²⁴ And if the State's own position was that alternatives existed, it will be hard-pressed to argue a mistrial was manifestly necessary after the fact.²⁵ But in applying these principles, every case is unique.²⁶ Whether a circumstance hypothetically could justify a mistrial, or has in past cases, has little to do with whether manifest necessity exists in this case.²⁷

Yet the Response argues that, in theory, illness can justify a mistrial.²⁸ Petitioner does not disagree.²⁹ A COVID outbreak in 2020 likely would have constituted manifest necessity to discharge the jury. For that matter, the common cold could justify a mistrial *if* the particular circumstances make it impossible for the trial to move forward.³⁰ But that is the key: the mistrial must have been manifestly necessary based on the facts of *this* case.³¹ And here, the Response must resort to abstractions.³²

²¹ See, e.g., *Lovinger v. Cir. Ct. of the 19th Jud. Cir., Lake Cnty., Ill.*, 845 F.2d 739, 743 (7th Cir. 1988) (The Double Jeopardy Clause protects against "the unfairness of a mistrial declaration designed to give the government a second chance to convict when the first is going badly.").

²² See *U.S. v. Dinitz*, 424 U.S. 600, 606–07 (1976); see also U.S. Const. Amend. V.

²³ W. Va. R. Crim. P. 26.3.

²⁴ *Id.*; see also *U.S. v. Jorn*, 400 U.S. 470, 487 (1971).

²⁵ See *supra*. at n. 11; see also *U.S. v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004) (Finding no manifest necessity, noting that "Rather than demonstrate manifest necessity, the Government presented the Court with a reasonable alternative to a mistrial[.]"); *Lewis v. Bickham*, 91 F.4th 1216, 1226 (5th Cir. 2024) (mistrial not manifestly necessary where the State requested a continuance).

²⁶ See *Jorn*, 400 U.S. at 480 (The Supreme Court has declined "to formulate rules based on categories of circumstances which will permit or preclude retrial."); *Lovinger*, 845 F.2d at 745 (Whether manifest necessity exists "can only be determined on a case by case basis.").

²⁷ *Id.*; see, e.g., *Grandberry v. Bonner*, 653 F.2d 1010, 1015 (5th Cir. 1981) (no manifest necessity where court failed to inquire into illness prognosis or consider alternatives).

²⁸ Resp.'s Br. 8–9.

²⁹ Petr.'s Br. 12.

³⁰ Compare *Com. v. Robson*, 337 A.2d 573, 577 (Pa. 1975) (judge's serious illness justified mistrial where it would be impossible for the trial to continue for several weeks) with *Com. v. Dull*, 390 A.2d 777, 780 (Pa. Super. 1978) (no manifest necessary where judge declared mistrial due to witness's illness without first waiting for more information about his availability).

³¹ See *State v. Oldaker*, 172 W. Va. 258, 265, 304 S.E.2d 843, 849 (1983) (for illness to justify a mistrial, it must "*mak[e] the completion of the trial impossible[.]*") (*emphasis in the original*).

³² See Resp's Br. 8–9.

The Response also leans on foreign authority concerning pandemic-era outbreaks to argue that COVID can cause mistrials.³³ But its cases are too factually distinct to substitute for actual analysis of this case.³⁴ *State v. Rush* is not even on point.³⁵ There, the defendant argued his lawyer was ineffective for *consenting* to a mistrial.³⁶ The court found that regardless of whether circumstances justified a mistrial, stipulating to one is not *per se* ineffective; the singular and fleeting reference to manifest necessity was dicta.³⁷

Rush also concerned a pandemic-era trial,³⁸ like *State v. Green*, which occurred in 2020.³⁹ Likewise in *U.S. v. Dennison*, the federal court still had active emergency protocols in place, unlike here.⁴⁰ Those courts could not know how long of a delay would be appropriate—too little was known about COVID at the time. But here, in 2023, the parties had concrete public health guidance.⁴¹ For all the uncertainty between 2020 and 2022, the situation is vastly different now. Petitioner is aware of no other illness for which the guidance is so precise and for which individuals can so easily test themselves to know with certainty whether they are contagious.

And the Response’s cases analyzed their own facts. The appellate courts did not reason based upon abstractions or what happened in unrelated cases.⁴² “[The Supreme Court] has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial.”⁴³

³³ Resp.’s Br. 10–11.

³⁴ See *Downum v. U.S.*, 372 U.S. 734, 737 (1963) (“Each case must turn on its facts.”).

³⁵ *State v. Rush*, 11 N.W.3d 394 (Neb. 2024).

³⁶ See *Rush*, 11 N.W. 3d at 442–43.

³⁷ See *id.* at 442–43.

³⁸ See *id.* at 413. Summer of 2022. The Response points out this trial was five months later, Resp.’s Br. 13, but given the rapid public response to the pandemic, five months was significant. See Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html> (last accessed Nov. 14, 2024).

³⁹ See *State v. Green*, 992 N.W.2d 56, 59 (Wis. 2023).

⁴⁰ See *U.S. v. Dennison*, 73 F.4th 70, 72 (1st Cir. 2023); *Administrative Order, Re: Suspension of COVID-19 Health and Safety Protocols*, Supreme Court of Appeals Of West Virginia, June 25, 2021.

⁴¹ See *supra* n. 17 (CDC guidance).

⁴² See *Green*, 992 N.W.2d 56 at 62 (Whether manifest necessity exists “varies depending on the particular facts of the case.”); accord. *Dennison*, 73 F.4th at 78.

⁴³ *Jorn*, 400 U.S. at 480.

Turning to the actual case, the Response's analysis is scant. It quibbles over which court personnel were indispensable,⁴⁴ but misses the point. Yes, the lawyers and judge all recovered quickly,⁴⁵ and the record is silent as to the juror, for whom there was an alternate,⁴⁶ and the court reporter, who likewise could have sought a substitute.⁴⁷ But the point isn't that, in hindsight, the trial could have continued. The point is that the court needn't have ruled upon incomplete knowledge at all. It could have waited to rule after everyone had retested. Instead, it committed to the rash and irrevocable decision to dismiss the jurors without knowing whether the trial could continue.

The Response also overestimates the possible delay by assuming that had it recessed, the court mechanistically would wait seven days from the hearing, rather than five days from when everyone had tested positive.⁴⁸ This defies logic. The parties sought a recess consistent with public health guidance.⁴⁹ The parties never had occasion to hash out the retesting schedule because the court refused to hear it.⁵⁰ But the date of infection is what matters, not when the court scheduled its pro forma hearing.⁵¹

The Response further worries that long breaks can, again in theory, be detrimental to jurors.⁵² This hypothetical concern applies as much to breaks for holidays as it does COVID, yet the court still allowed the jurors to observe Martin Luther King Jr. Day. It gave no rationale why four days was an acceptable break in a multiweek trial, but that five or six would cross a line. In fact—and perhaps this is why the Response can only discuss this in the abstract—the court below gave no indication it considered any of this.⁵³ It was adamant that its sole concern was public health.⁵⁴

⁴⁴ Resp.'s Br. 11–12.

⁴⁵ See A.R. 259–60.

⁴⁶ A.R. 129.

⁴⁷ See W. Va. Code § 47-27-1 (making provision for official court reporters or their substitutes).

⁴⁸ Resp.'s Br. 12.

⁴⁹ A.R. 156; A.R. 258–59; see *supra*. n. 17 (CDC's ongoing guidance).

⁵⁰ A.R. 156; A.R. 258–59.

⁵¹ See *supra*. n. 17 (CDC's ongoing guidance).

⁵² Resp.'s Br. 12.

⁵³ A.R. 150–53; A.R. 156.

⁵⁴ A.R. 261.

The full record shows that the mistrial was not manifestly necessary. By 2023, free vaccines and rapid at-home testing kits eased COVID's detection, moderated the symptoms, and limited its spread.⁵⁵ Two years had passed since this Court rescinded its protocols.⁵⁶ And the public health guidance was specific.⁵⁷ By 2023, courts had better guidance for COVID than other illnesses.

Against this background, the parties' plan to recess was more than reasonable. It appears everyone was exposed at the same event and those that fell ill developed symptoms within the same timeframe.⁵⁸ Those individuals could rest five days and retest.⁵⁹ Everyone had already rested four days⁶⁰ and retesting thus could begin in a day or two. But the court chose to rule upon incomplete information.

After the State's agreement to recess and retest, the Response's next biggest, unanswerable problem is that nothing required the court to rule that instant. It could have waited a day and decided after knowing the test results. Instead, the court committed itself to the irrevocable option to dismiss the jury despite the parties' agreement to wait.⁶¹

Worse, the court's decision to ignore public health guidance was riskier than finishing the first trial. The exposure had passed, and those affected would have been resilient against reinfection for the short term.⁶² But by declaring a mistrial and waiting over a month for the second trial, all those previously affected were at a greater risk of reinfection.⁶³ Its decision also meant empaneling a second venire, congregating dozens more citizens in the same circumstances that caused the first exposure.⁶⁴

⁵⁵ *See supra.* at n. 38 (CDC Museum's COVID response timeline).

⁵⁶ *See supra.* at n. 40 (Court's last rescission order).

⁵⁷ *See Supra.* at 17 (CDC ongoing guidance).

⁵⁸ A.R. 150–52.

⁵⁹ *See Supra.* at 17 (CDC ongoing guidance).

⁶⁰ A.R. 152.

⁶¹ A.R. 153.

⁶² Centers for Disease Control, *About Reinfection*, <https://www.cdc.gov/covid/about/reinfection.html> (last accessed Nov. 14, 2024).

⁶³ *See id.*

⁶⁴ A.R. 155.

The simple fact is that on this record, there is no good argument for ending a trial that the parties had already invested two weeks in. This is why, below, the State wanted a recess instead of a mistrial.⁶⁵ And it is why now the Response must resort to abstraction.⁶⁶

III. The court abused its discretion because it relied upon a mistake of law, prejudged the issue, and refused to consider the parties' joint alternative.

Here, the court's judgment amounted to an abuse of discretion warranting reversal. "The power [to declare a mistrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes[.]"⁶⁷ It skuttled two weeks of trial rather than retest in as little as one day. And though its goal may have been to protect the public,⁶⁸ going against public health guidance posed more problems than it solved.⁶⁹ Therefore, the court not only reached the wrong decision, its on the record explanation shows that the court abused its discretion.

First, it predicated its decision upon a mistake of law—that if it declared a mistrial because of illness and not a reason attributable to the State, the Double Jeopardy Clause would not bar retrial.⁷⁰ Its emphasis on blameworthiness suggests that the court mistakenly relied upon the principle that the State cannot skirt the Fifth Amendment by goading defendants into requesting mistrials.⁷¹ But this only matters if the defendant consented.⁷² If the defendant objected and there was no manifest necessity, then Double Jeopardy bars re-prosecution regardless of who the court blames.⁷³ Even if the court had declared a mistrial due to Petitioner's conduct, the State could not retry him if an alternative existed.⁷⁴

⁶⁵ A.R. 153; A.R. 259–60; *see also* Resp.'s Br. 14.

⁶⁶ *E.g.* Resp.'s Br. 8–9.

⁶⁷ *U.S. v. Perez*, 22 U.S. 579, 580 (1824).

⁶⁸ A.R. 157; A.R. 261.

⁶⁹ *See* A.R. 342 (beginning of day 1); A.R. 551 (day 2); A.R. 761 (day 3); *see also* A.R. 155.

⁷⁰ A.R. 157; *cf. Lewis v. Bickham*, 91 F.4th 1216, 1224 (5th Cir. 2024) (diminished deference where, due to a mistake of law, court declares a mistrial mistaken as to the legal consequences).

⁷¹ *See Kennedy*, 456 U.S. at 672–73.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See Johnson v. Karnes*, 198 F.3d 589, 591–92, 595 (6th Cir. 1999) (Where alternatives to mistrial existed, there was no manifest necessity and the Double Jeopardy Clause precluded retrial, despite defense counsel's improper cross-examination); *Harris v. Young*, 607 F.2d 1081, 1085–86

Second, the court said on the record it had prejudged the matter.⁷⁵ Per Criminal Procedure Rule 26.3, “*Before* ordering a mistrial, the court shall provide an opportunity for the state and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.”⁷⁶ “The dialogue fostered by Rule 26.3 ensures that only those mistrials that are truly necessary are ultimately granted.”⁷⁷ But as the court explained, it had already ruled.⁷⁸ The hearing was a formality to place its pre-made ruling on the record.⁷⁹ Allowing the parties to lodge objections after-the-fact is not the same as hearing them out.⁸⁰

Third, and flowing from its prejudgment, the court indicated it would not entertain the parties’ alternative.⁸¹ When Petitioner attempted to do what Rule 26.3 entitled him to—to be heard in court—the court cut him off.⁸² The hearing was only an opportunity to vouch the record with an objection.⁸³ The court had already ruled that since it blamed illness rather than the State, it could declare a mistrial consequence-free.⁸⁴

Finally, the court abused its discretion because it chose an irrevocable action when the parties’ alternative was to wait a reasonable period for more information. It appeared that everyone was exposed at the same time, and waiting a day and retesting would have shown whether they recovered on the same timeline as well. If so, the trial could continue. And if not, the court could have considered a mistrial at that time. But the court chose to act upon incomplete information.

(4th Cir. 1979) (though defense counsel was at fault, no manifest necessity for mistrial where less drastic alternatives existed to punish counsel).

⁷⁵ A.R. 156; *see also* A.R. 258–59.

⁷⁶ W. Va. R. Crim. P. 26.3 (*emphasis added*).

⁷⁷ *Cf. U.S. v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004) (discussing analogous federal rule).

⁷⁸ A.R. 156.

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

The Response's problem is the record. It must confess that absent manifest necessity, a hastily declared mistrial bars re-prosecution.⁸⁵ But the court itself said it had already ruled, believing that the State's blamelessness was all that mattered.⁸⁶

It has to confess that courts must consider alternatives, because if a reasonable one exists, a mistrial cannot be manifestly necessary.⁸⁷ But the court itself said it would not hear Petitioner's position, because it had already ruled.⁸⁸

And it must confess that below, the State's position was that a short recess made far more sense than aborting two weeks of trial.⁸⁹ But if even the State agreed a mistrial was unnecessary, it is difficult to imagine what could justify the court's ruling.⁹⁰

So instead of analyzing the facts below and the court's own statements about its ruling, the Response can only resort to abstraction.

CONCLUSION

The Founders did not create the Double Jeopardy Clause as an arbitrary loophole. They had felt the sting of overbearing State power. And now, so has Petitioner.

The first trial ruined him.⁹¹ The second condemned him. And every moment the State prosecuted him, suspicion grew and public sentiment inexorably turned more hostile.

Petitioner had a bona fide defense—a fair jury could have acquitted him. But that doesn't matter if the State can pursue you until it gets the jury and the verdict it wants.

Respectfully submitted,
Kevin Scott Dickens,
By Counsel

⁸⁵ Resp.'s Br. 6.

⁸⁶ A.R. 156; *see also* A.R. 258–59; *but see* W. Va. R. Crim. P. 26.3.

⁸⁷ Resp.'s Br. 9–10.

⁸⁸ A.R. 156; *see also* A.R. 258–59; *but see* W. Va. R. Crim. P. 26.3.

⁸⁹ Resp.'s Br. 14 (acknowledging the court rejected the joint position of Petitioner and the State).

⁹⁰ *See supra*. at n. 11.

⁹¹ A.R. 186–88.

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