FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROYCE C. GOUVEIA, *Petitioner-Appellee*, v. NOLAN P. ESPINDA, Warden, Director of the Department of Public Safety for the State of Hawaii; CLARE CONNORS, Attorney General of the State of Hawaii, *Respondents-Appellants*.	No. 17-16892 D.C. No. 1:17-cv-00021-SOM-KJM OPINION

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, District Judge, Presiding

Argued and Submitted October 12, 2018
Honolulu, Hawaii

Filed June 12, 2019

Opinion by Judge Berzon

SUMMARY*

Habeas Corpus

The panel affirmed the district court's judgment granting Royce Gouveia's 28 U.S.C. § 2241 habeas corpus

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

petition challenging the trial court's grant of a mistrial in his Hawaii manslaughter case in which, after the jury reached a verdict but before the verdict was announced, jurors expressed concern for their safety because of a scary-looking man in the courtroom.

The panel held that the *Rooker-Feldman* doctrine does not preclude a federal district court from exercising jurisdiction under § 2241. The panel did not need to determine precisely what level of deference is owed to the trial court's determination that there was manifest necessity for a mistrial. The panel held that even under a more deferential standard, the trial court's manifest-necessity determination was erroneous because the trial court failed to provide any meaningful consideration of alternatives to mistrial. The panel concluded that the district court therefore did not err in concluding that retrying Gouveia would violate the Double Jeopardy Clause.

COUNSEL

Donn R. Fudo (argued), Deputy Prosecuting Attorney, Honolulu, Hawaii, for Respondents-Appellants.

Peter C. Wolff, Jr. (argued), Federal Public Defender, Honolulu, Hawaii, for Petitioner-Appellee.

OPINION

BERZON, Circuit Judge.

Jurors in Royce Gouveia's trial saw a menacing-looking man on the prosecution side of the courtroom

before they retired to deliberate. The jury proceeded to deliberate and reached a verdict. Before the verdict was announced, however, jurors expressed concern for their safety because of the scary-looking man. All the jurors stated that their verdict was unaffected by the man's presence. Nonetheless, the trial court, at the prosecution's request and against Gouveia's opposition, granted a mistrial. On federal habeas review, the district court held that there was no manifest necessity for the mistrial, so retrying Gouveia would violate his right not to be subjected to double jeopardy. We agree.

I

Gouveia was tried for manslaughter in Hawaii state court for the death of Albert Meyer. *See* Haw. Rev. Stat. § 707-702(1)(a). The testimony was that Gouveia struck Meyer during an altercation, and Meyer died after hitting his head on the pavement. The presentation of evidence concluded, both sides gave closing arguments, and the jury was sent off to deliberate.

This case turns on two notes the jury sent to the trial court in close succession. The first informed the court that the jury had "reached a verdict." A second, drafted a few minutes after the verdict message, stated: "Concern. This morning on prosecutor's side of courtroom there was a man, shaved head, glaring and whistling at defendant. We have concern for our safety as jurors."

After receiving the messages, the trial court gathered the attorneys and informed them about the notes.

Explaining that it was inclined "to take no action on this," the trial court asked the parties what approach they suggested. The prosecution requested that the jurors be questioned, and Gouveia's attorney agreed.

The court then conducted individual voir dire of each juror. Before beginning, the court asked the attorneys whether they "ha[d] any idea what this is based on." The prosecution noted that Meyer's brother had been in the courtroom that morning "with [a] shaved head" and appeared "pretty upset."

The trial court proceeded to question each juror. Although a few testified that the man seemed angry and that they were afraid for their safety, all twelve jurors stated that the menacing-looking man's presence had not affected their votes. The jurors gave conflicting testimony as to when the safety concern about the shaved-headed man first came up in deliberations, some saying at the outset, others toward the end, and others only after the verdict was reached. One juror stated, "Yes," when asked whether the fear of the man "impact[ed] other people's decision," but did not elaborate as to how she knew that or what the impact was. But she, like all the others, said her own decision was unaffected.

After questioning the jury, the trial court asked Gouveia's attorney whether he wanted the court to take any additional steps; the attorney declined. The prosecution, however, moved for a mistrial, arguing that there was manifest necessity for a mistrial because

some jurors had expressed safety concerns.[1] According to the prosecution, the fact that Meyer's brother was "associate[d] with the prosecution and the decedent side" might have "lended more credibility to Mr. Gouveia's testimony as he testified." Gouveia's attorney opposed the motion, stressing that all the jurors had stated that their own votes had been unaffected by the incident, and that no jurors had expressed to the court any concern about the individual until it was announced that a verdict had been reached.

After a bit more discussion, the trial court granted the mistrial motion:

> I find it difficult to really believe when I . . . apply my reason and common sense to this that at least some of these jurors have . . . what strikes me as a really serious concern for their personal safety and it came up according to, at least as I count, four or five of them, it . . . was . . . one of the first topics of discussion when they got back in the room and started deliberating the case. Somebody brought it up and they started talking about it. It frankly beggars my reason and common sense that it would have no bearing on the deliberations in this case and therefore the verdict.
>
> I'm going to grant the State's motion for mistrial. I'm going to find there's manifest

[1] Initially, the prosecution requested a mistrial "in an abundance of caution." The trial court then noted, "If you're going to move for mistrial, you better ask me to find manifest necessity," after which the prosecution rephrased its motion to include a request for a manifest-necessity determination.

> necessity for such based on what I said . . . and everything else that's been put on the record, including my questions to counsel.
>
> The verdict's going to be sealed for future purposes, if any, but obviously we're not going to take the verdict. I'm declaring a mistrial and I'm finding manifest necessity for that, because I don't think there's anything short of a mistrial . . . that can cure it. The verdict's tainted, in my view, based on my findings.

A few weeks later, the trial court issued findings of facts and conclusions of law to further explain its decision. The court reasoned that "[a]lthough there [was] no specific juror misconduct" in this case, it would adopt "the well-established 'harmless beyond a reasonable doubt' standard" for juror-misconduct claims. Relying on that standard, the trial court found that "the jurors' statements that the incident did not affect their decision-making process and/or deliberations [were] not credible," and reiterated its prior conclusion that "the jury was not impartial" and that "there [was] manifest necessity for a mistrial."

Gouveia moved to dismiss the prosecution, contending that there was no manifest necessity for the mistrial. The constitutional double jeopardy protection, Gouveia maintained, would be violated were he retried. The trial court denied the motion.

When Gouveia appealed the trial court's manifest-necessity finding, the appellate court unsealed the verdict form for purposes of the appeal. The form revealed that the jury had unanimously found Gouveia not

guilty. *State v. Gouveia* (*Gouveia I*), No. CAAP-14-0000358, 2015 WL 2066780, at *7 (Haw. Ct. App. Apr. 30, 2015). The state appellate court affirmed, with one judge dissenting. *Id.* at *11; *see also id.* at *11–13 (Nakamura, C.J., dissenting). The Hawaii Supreme Court granted discretionary review, but then affirmed over one justice's dissent. *State v. Gouveia* (*Gouveia II*), 384 P.3d 846, 852–53 (Haw. 2016); *see also id.* at 857 (Nakayama, J., dissenting). The state high court held that the trial court "did not abuse its discretion in deciding that manifest necessity existed for a mistrial because the presumption of prejudice could not be overcome beyond a reasonable doubt and no reasonable alternatives to a mistrial were available." *Id.* at 853 (majority opinion).

Gouveia then filed a federal habeas petition. He argued that there was no manifest necessity for a mistrial and that the jury's verdict form, now unsealed, precluded Hawaii from retrying him. The district court granted the petition. *Gouveia v. Espinda* (*Gouveia III*), No. 17-00021 SOM/KJM, 2017 WL 3687309, at *1 (D. Haw. Aug. 25, 2017). It concluded, first, that jurisdiction under 28 U.S.C. § 2254 was not appropriate, as "Gouveia is not currently 'in custody pursuant to the judgment of a State court,' " but that it did have jurisdiction under § 2241. *Id.* at *5 (quoting 28 U.S.C. § 2254(d)). The district court then rejected the state's contentions that the *Rooker-Feldman* doctrine or *Younger* abstention precluded the court from exercising jurisdiction over Gouveia's habeas petition. *Id.* at *6–7.

On the merits, the district court determined that the now-unsealed verdict form was not an acquittal for purposes of double jeopardy. *Id.* at *10–12. The court first recited several reasons why the trial court's conclusion that the jurors were affected was questionable. *Id.* at *14. Ultimately, the district court held that, accepting the trial court's jury taint conclusion, Gouveia was entitled to habeas relief. *Id.* at *15. Alternative remedies for any valid concerns as existed were available, the district court reasoned, so there was no manifest necessity for a mistrial and retrying Gouveia would violate the Double Jeopardy Clause. *Id.* at *15–17.

Hawaii timely appealed, challenging the district court's exercise of jurisdiction as well as its decision on the merits.

II

We begin with the jurisdictional point: The state argues that, under the *Rooker-Feldman* doctrine, the district court was barred from exercising jurisdiction under 28 U.S.C. § 2241 over Gouveia's habeas petition. We have not directly addressed the precise question whether *Rooker-Feldman* applies to habeas petitions filed under § 2241, although two other circuits have held that it does not. *See Reitnauer v. Tex. Exotic Feline Found., Inc.* (*In re Reitnauer*), 152 F.3d 341, 343 n.8 (5th Cir. 1998); *Garry v. Geils*, 82 F.3d 1362, 1365 n.4 (7th Cir. 1996). Our gap on this point is understandable,

as it is rare that we are asked to address an argument so transparently without merit.

The *Rooker-Feldman* doctrine takes its name from a pair of cases—*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)—both "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The doctrine holds that "a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). "Direct federal appellate review of state court decisions must occur, if at all, in the Supreme Court." *Gruntz v. County of Los Angeles* (*In re Gruntz*), 202 F.3d 1074, 1078 (9th Cir. 2000) (en banc).

Rooker-Feldman is not a constitutional directive but rather "a statute-based doctrine, based on the structure and negative inferences of the relevant statutes rather than on any direct command of those statutes." *Noel*, 341 F.3d at 1154–55. In particular, the doctrine is an interpretation of two statutes: 28 U.S.C. § 1331, which establishes district courts' original jurisdiction, and 28 U.S.C. § 1257, which vests jurisdiction to review most state court decisions solely in the U.S. Supreme Court. *See Gruntz*, 202 F.3d at 1078. "The *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and

does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme] Court." *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002).

Because the *Rooker-Feldman* principle is purely statutory, "Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments." *Exxon Mobil*, 544 U.S. at 292 n.8. Put differently, Congress may, via statute, provide federal district courts with jurisdiction to review state court decisions as long as that jurisdiction is conferred *in addition to* the original jurisdiction established under § 1331. And Congress "has done so, most notably, in authorizing federal habeas review of state prisoners' petitions." *Id.* We have accordingly recognized that "[i]t is well-settled that the *Rooker-Feldman* doctrine does not touch the writ of habeas corpus," as the writ is "a procedure with roots in statutory jurisdiction parallel to—and in no way precluded by—the [*Rooker-Feldman*] doctrine." *Gruntz*, 202 F.3d at 1079.

Gruntz considered whether habeas review under 28 U.S.C. § 2254, covering "writ[s] of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a), is limited by *Rooker-Feldman*. Gouveia is not currently in custody under a state court judgment, *see Gouveia III*, 2017 WL 3687309, at *5–6, so the district court considered the habeas petition under 28 U.S.C. § 2241, not under § 2254. But the principles underlying *Gruntz* still apply. Applying those principles, *Rooker-Feldman* does

not preclude a federal district court from exercising jurisdiction under 28 U.S.C. § 2241, if that statute, like § 2254, confers jurisdiction in addition to the original jurisdiction already conferred by 28 U.S.C. § 1331. It does.

Section 2241 provides that "[w]rits of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions" for prisoners "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3). Relying on this grant of jurisdiction, this court has consistently held that § 2241 confers jurisdiction for "habeas petition[s] raising a double jeopardy challenge to a petitioner's pending retrial in state court." *Wilson v. Belleque*, 554 F.3d 816, 821 (9th Cir. 2009).

The first case so to hold was *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004). Like the case at hand, *Stow* concerned a petitioner whose double jeopardy claim had been rejected by the state supreme court. *Id.* at 885. The petitioner then filed a federal habeas petition under § 2254, arguing that the state supreme court's conclusion was incorrect. *Id.* The district court granted the petition. *Id. Stow* affirmed the district court's grant of habeas corpus but, before doing so, explained that the petitioner's petition, "which raised a double jeopardy challenge to his pending retrial," was "properly treated under § 2241," not § 2254. *Id.* at 885–87.

We have repeatedly reaffirmed *Stow*'s holding.[2] *Stow* and its progeny make clear that, as in the § 2254 habeas context considered in *Gruntz*, jurisdiction in the § 2241 habeas context derives from the federal habeas statutes, not from § 1331. The upshot is that § 2241, like § 2254, provides "a procedure with roots in statutory jurisdiction parallel to—and in no way precluded by—the [*Rooker-Feldman*] doctrine." *Gruntz*, 202 F.3d at 1079.

In light of *Gruntz*, Hawaii acknowledges, as it must, that *Rooker-Feldman* is inapplicable to federal habeas claims filed under § 2254. But the state argues that unlike § 2254, § 2241 does not confer jurisdiction to review state court decisions. Why? Because § 2241 lacks the word "judgment." *Cf.* 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the *judgment* of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

---

[2] *See, e.g.*, *Dominguez v. Kernan*, 906 F.3d 1127, 1135 n.10 (9th Cir. 2018) ("A pretrial double jeopardy challenge . . . 'is properly brought under § 2241.' " (quoting *Stow*, 389 F.3d at 886)); *Harrison v. Gillespie*, 640 F.3d 888, 896 (9th Cir. 2011) (en banc) ("Our precedent makes clear that 28 U.S.C. § 2241 is the proper vehicle for asserting a double jeopardy claim prior to (or during the pendency of) a successive trial."); *Wilson*, 554 F.3d at 821 ("[A] habeas petition raising a double jeopardy challenge to a petitioner's pending retrial in state court is properly treated as a petition filed pursuant to 28 U.S.C. § 2241."); *Hoyle v. Ada County*, 501 F.3d 1053, 1058 (9th Cir. 2007) ("28 U.S.C. § 2241 . . . empowers district courts to provide habeas relief on pretrial double jeopardy challenges. . . .").

(emphasis added)). This argument has no merit, for two reasons.

First, the state's argument confuses the relationship between the two habeas corpus statutes. Section 2254 "is not itself a grant of habeas authority, let alone a discrete and independent source of post-conviction relief." *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (quoting *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003)).[3] "Instead, it is § 2241 that provides generally for the granting of writs of habeas corpus by federal courts, implementing 'the general grant of habeas authority provided by the Constitution.'" *Id.* (quoting *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2004)). Overlaying that general grant of jurisdiction, § 2254 "implements and limits the authority granted in § 2241 for 'a person in custody pursuant to the judgment of a State court." *Id.* (quoting 28 U.S.C. § 2254(a)). Thus, just as habeas review under § 2254 is "a procedure with roots in statutory jurisdiction parallel to—and in no way precluded by—the [*Rooker-Feldman*]

---

[3] This conception of § 2254 accords with the history of the habeas corpus statutes. Section 2241 codified the general grant of habeas corpus jurisdiction conferred by Congress in 1867. *See* Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1197 (7th ed. 2015); *see also Medberry*, 351 F.3d at 1055. Section 2254 was added in its original form in 1948 to add requirements "dealing specifically with challenges to custody resulting from conviction in state court." Fallon et al., *supra*, at 1197. The present § 2254, placing further constraints on federal habeas review of state court convictions, was added as part of the Antiterrorism and Effective Death Penalty Act of 1996. *Id.* at 1197–98; *see also Williams v. Taylor*, 529 U.S. 362, 402 (2000).

doctrine," *Gruntz*, 202 F.3d at 1079, so review under § 2241 too is necessarily unaffected by *Rooker-Feldman.*

Second, and relatedly, the state's argument badly misunderstands the relationship between the writ of habeas corpus and state court judgments. A habeas court does not review a state court *judgment.*[4] Rather, "[h]abeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner." *Fay v. Noia*, 372 U.S. 391, 430–31 (1963), *overruled in part on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977). " '[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody,' not necessarily a challenge to a judgment." *Dominguez*, 906 F.3d at 1137 (alteration in original) (citation omitted) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). For that reason, the writ does not empower a habeas court to modify a state court judgment. *See Lujan v. Garcia*, 734 F.3d 917, 935 (9th Cir. 2013); *Douglas v. Jacquez*, 626 F.3d 501, 504 (9th Cir. 2010).

To be sure, under § 2254, a habeas court does "*oversee* certain state-court judgments," *Exxon Mobil*, 544 U.S. at 292 n.8 (emphasis added), by assessing, in

---

[4] Some of our cases have been less than precise about this point, describing § 2254 as "provid[ing] expressly for federal collateral review of final state court judgments." *Gruntz*, 202 F.3d at 1079; *see also*, *e.g.*, *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006); *Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004).

the context of custody pursuant to a judgment, whether those judgments "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d). For that reason, "§ 2254 requires a nexus between 'the judgment of a State court' and the 'custody' the petitioner contends is 'in violation of the Constitution or laws or treaties of the United States.'" *Dominguez*, 906 F.3d at 1136 (quoting 28 U.S.C. § 2254(a)). But even with that requirement, § 2254 petitions need not "present a challenge to the underlying state court judgment," as long as "the custody complained of is attributable in some way to the underlying state court judgment." *Id.* at 1137. A § 2254 petition may challenge, for example, the loss of good-time credits, *see Preiser*, 411 U.S. at 487, or the revocation of parole, *see Spencer v. Kemna*, 523 U.S. 1, 7 (1998), even though those claims do not challenge the underlying state court judgment.

In sum, the additional jurisdictional grant provided by § 2241—separate and apart from the jurisdiction conferred under § 1331—means that *Rooker-Feldman* is not pertinent. Accordingly, the district court correctly held the *Rooker-Feldman* doctrine inapplicable here.

III

We turn to the merits of the double jeopardy question.

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Clause embodies the principle 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." *Green v. United States*, 355 U.S. 184, 187 (1957). And "[b]ecause jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

But that principle "does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade*, 336 U.S. at 688. "[A] mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent," the Supreme Court has explained, "would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." *Washington*, 434 U.S. at 505 n.16 (quoting *United States v. Jorn*, 400 U.S. 470, 479–80 (1971) (plurality opinion)). Rather, "a defendant's valued right to have his trial

completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade*, 336 U.S. at 689.

Recognizing these competing interests, Justice Story wrote in a seminal double jeopardy case in 1824 that retrial may be permitted after a mistrial only where a trial court determines that, "taking all the circumstances into consideration, there is a manifest necessity for [a mistrial], or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). *Perez* concerned the circumstances in which a deadlocked jury could support a trial court's determination that there was such "manifest necessity." *Id.* at 579–80. Since then, the same term—"manifest necessity"—has been used in "a wide variety of cases," beyond the deadlocked jury situation, to encapsulate the circumstances in which "any mistrial declared over the objection of the defendant" is permissible without triggering the double jeopardy protection. *Washington*, 434 U.S. at 505–06.

Under the manifest-necessity standard, "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Wade*, 336 U.S. at 690. For purposes of assessing whether that standard is met, "the key word 'necessity' cannot be interpreted literally; instead, . . . there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington*, 434 U.S. at 506. To establish a manifest necessity, "the

prosecutor must shoulder the burden of justifying the mistrial," and "[h]is burden is a heavy one." *Id.* at 505. That heavy burden has not been met here, as we shall explain.

A

Because our review proceeds under § 2241, the deference owed to a state court under § 2254(d) is not applicable. *See Harrison*, 640 F.3d at 897. Instead, we apply the same standard of review as applied on direct appeal. *See id.*

"A judicial determination of manifest necessity is reviewed for abuse of discretion, but the level of deference varies according to the circumstances in each case." *United States v. Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008); *see also Washington*, 434 U.S. at 507–09. "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence," for which "the strictest scrutiny is appropriate." *Washington*, 434 U.S. at 507–08. "At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict." *Id.* at 509. Similarly, "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." *Illinois v. Somerville*, 410 U.S. 458, 464 (1973). In those situations, "[t]he trial judge's decision to declare a mistrial . . . is . . . accorded great deference by a reviewing

court." *Washington*, 434 U.S. at 510. "Nevertheless, because the mistrial decision affects a constitutionally protected right, 'reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised "sound discretion" in declaring a mistrial.'" *United States v. Sanders*, 591 F.2d 1293, 1297 (9th Cir. 1979) (quoting *Washington*, 434 U.S. at 514).

Here, it is highly debatable how much deference is owed to the trial court's determination that there was manifest necessity for a mistrial. To begin, there was no deadlocked jury—the jury said it had reached a unanimous verdict. *Cf. Perez*, 22 U.S. (9 Wheat.) at 580.

Nor does this appear to be a case in which, had the jury verdict favored the prosecution and a judgment in accord with the verdict been entered, the verdict would have been reversible on appeal on account of potential juror bias. *Cf. Somerville*, 410 U.S. at 464. Although one juror suggested that other jurors may have been affected by the presence of Meyer's brother, each individual juror testified that that [sic] his presence did not affect his or her own decision. There is no indication that Meyer's brother spoke with, or threatened, any juror in or out of the courtroom. The jury's note pointed only to his "shaved head" and the fact that he was "glaring and whistling at [Gouveia]" as the basis for their concern. And nothing in the record indicates that the jurors knew his connection to the trial—that is, that he was Meyer's brother. Nor did the presence of Meyer's brother provide any extrinsic information to the jury. In short, the circumstances here appear to fall

short of the cases in which we have reversed a conviction for alleged juror bias or taint.[5]

So we have here none of the paradigmatic situations in which we accord great deference to the trial judge as to the manifest necessity for a mistrial. Still, the Supreme Court has also indicated that a case involving *potential* juror bias "falls in an area where the trial judge's determination is entitled to special respect." *Washington*, 434 U.S. at 510. But the potential for juror bias here—as opposed to the safety concern communicated to the court postverdict—is relatively weak, for the reasons already discussed.[6]

Additionally, the Supreme Court has recognized that the Double Jeopardy Clause "prevents a prosecutor or

---

[5] *Compare, e.g.*, *United States v. Vartanian*, 476 F.3d 1095, 1098–99 (9th Cir. 2007) (holding that a district court did not err in dismissing a juror who had spoken to members of the defendant's family, defense counsel, and the defendant), *and United States v. Gonzalez*, 214 F.3d 1109, 1113 (9th Cir. 2000) (concluding that juror bias could be assumed where a juror "disclosed the fact that her ex-husband, the father of her daughter, dealt and used cocaine—the same drug and conduct at issue" in the case), *with United States v. Gonzalez*, 906 F.3d 784, 797 (9th Cir. 2018) (rejecting a juror-bias claim where the juror in question "unequivocally stated that she could evaluate all of the evidence impartially"), *and United States v. Hayat*, 710 F.3d 875, 885–89 (9th Cir. 2013) (affirming a district court's finding that a juror was not impermissibly biased despite "several inappropriate racial and religious comments" made by the juror during deliberations).

[6] It is noteworthy as well that, as *Washington* stressed repeatedly, the potential bias in that case was caused by defense counsel's misconduct. *See, e.g.*, 434 U.S. at 501, 512–13, 516. Here, neither attorney has any responsibility for the behavior that led to the mistrial.

judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict," *Green*, 355 U.S. at 188, and so protects "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate," *Washington*, 434 U.S. at 835 (quoting *Jorn*, 400 U.S. at 486). Closer scrutiny is therefore especially appropriate if the parties believed an acquittal was likely forthcoming. They did.

According to the Hawaii Supreme Court, when the mistrial was declared, it was "apparent from the record that the parties believed the sealed verdict was 'not guilty.'" *Gouveia II*, 384 P.3d at 851 n.2. Immediately before declaring the mistrial, the trial court recognized as much, stating, "Well, it's pretty clear to the court what everybody thinks the verdict is based on your arguments and your motions and lack of such." Gouveia therefore had a significant interest seeing his case proceed to verdict—and the prosecution likewise had reason for pressing for a mistrial even if it had no actual concern about jury bias.

How these interests should be balanced is not entirely clear. Overall, the pertinent factors tend to support considerably less deference to the trial court than in the paradigmatic high-deference situation. But we need not finally determine precisely what level of deference is appropriate. Even under a more deferential standard, the trial court erred in concluding that there was manifest necessity for a mistrial.

B

Under a more deferential standard, for the most part "we focus on the procedures employed by the judge in reaching his determination" and assess whether the trial court "(1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chose[] the alternative least harmful to a defendant's rights, [and/or] (3) acted deliberately instead of abruptly." *Chapman*, 524 F.3d at 1082 (alterations in original) (quoting *United States v. Bates*, 917 F.2d 388, 396 (9th Cir. 1990)).

Here, the trial court's determination that manifest necessity justified a mistrial fails at the second step.[7] "A trial court should consider and correctly evaluate the alternatives to a mistrial" and, "once the court considers the alternatives, it should adopt one if less drastic and less harmful to the defendant's rights than a mistrial." *Bates*, 917 F.2d at 396; *see also* 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.2(d) (4th ed. 2015).[8]

---

[7] We reject Hawaii's contention that Gouveia waived this argument when his attorney agreed with the trial court's assertion that "[t]here's no other remedy short of a mistrial that's going to cure this or allow us to take the verdict." *Cf. Ricketts v. Adamson*, 483 U.S. 1, 8–9 (1987) (holding that a defendant may waive double jeopardy protections). As the district court correctly noted, the Hawaii Supreme Court fully addressed the availability of reasonable alternatives and so necessarily considered the issue not waived under state law. *See Gouveia II*, 384 P.3d at 856–57; *see also Gouveia III*, 2017 WL 3687309, at *14 n.2.

[8] The Supreme Court has suggested that a trial court need not consider alternatives when a jury is deadlocked. *See Blueford*

Consideration of potential alternatives was especially important in this case, as the trial court's substantive conclusion that manifest necessity existed for a mistrial was weak. This is not a case in which the indicia of juror bias were so compelling as to cast significant doubt on the fairness of the verdict. Instead, the trial court concluded that a mistrial was needed because it could not "find beyond a reasonable doubt that there was no impact on the deliberations or verdict . . . such that the verdict was not tainted"; the Hawaii appellate courts likewise endorsed the application of this reasonable doubt standard. *See Gouveia II*, 384 P.3d at 854; *Gouveia I*, 2015 WL 2066780, at *6, 10–11. The use of the reasonable doubt standard in this context is questionable.[9] But even if use of the standard

---

v. Arkansas, 566 U.S. 599, 609 (2012) ("We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse. . . ."); *see also Renico v. Lett*, 559 U.S. 766, 775 (2010). But these statements apply only to deadlocked juries, and "in cases where the mistrial is based upon something other than jury deadlock, lower courts have continued to examine alternatives to mistrial as part of the manifest necessity analysis." 6 LaFave, *supra*, § 25.2(d).

[9] Gouveia does not challenge the Hawaii courts' use of the reasonable doubt standard, so we do not determine its propriety. We note, however, that the application of that standard appears inconsistent with the Supreme Court's admonition that "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar." *Washington*, 434 U.S. at 505. The Hawaii Supreme Court appears to have imported the reasonable doubt standard from the harmless error standard applicable where a defendant claims a denial of due process or jury trial rights because of juror or prosecutorial misconduct. *See Gouveia II*, 384 P.3d at 854. But that standard is applied to protect a defendant's constitutional rights: "[B]efore a federal constitutional

were permissible, the trial court's strong reliance on the standard suggests that its belief that "the verdict was . . . tainted" was not particularly strong. Indeed, immediately before declaring a mistrial, the trial court itself recognized that it was "a really, really close ruling" on whether a mistrial was necessary.

Further, the record does not indicate that the jurors knew of the scary man's connection to the trial. At most, some jurors surmised from the man's location on the prosecution side of the courtroom and his actions that he was angry at Gouveia. But the leap from any such surmise to *antiprosecution* bias because of those actions is farfetched. If anything, one would think that if the jurors thought the unknown man was dangerous and might hurt them if they sided with Gouveia, they would be biased against Gouveia, so as to avoid the danger an acquittal might create. That obviously did not occur, as we know both from the jurors' attestations that they were not affected and from the unanimous vote to acquit.

Similarly, the trial court's agreement with the prosecution that the jurors' deliberations were likely affected by the scary man's presence was wholly unsupported by any objective fact in the record. All twelve jurors testified that that [sic] the presence of Meyer's brother did *not* affect their own decisions. The trial court based its determination on a finding that all

---

error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Here, it was the prosecution, not the defendant, that sought a mistrial.

twelve jurors' testimony was not "credible." But as the district court noted, "nothing in the record identifies facts supporting [the] finding that the jurors were not believable." *Gouveia III*, 2017 WL 3687309, at *14. In particular, the trial court "ma[de] no reference to any juror's demeanor." *Id.* "The jurors' ability to serve impartially for the remainder of the trial is at the heart of the [trial] judge's determination of manifest necessity." *United States v. Bonas*, 344 F.3d 945, 949 (9th Cir. 2003). If the reasons for that determination are not reflected in the record, "we have no way of reviewing whether the district judge's decision to declare a mistrial was a sound exercise of discretion." *Id.*

Given all these circumstances, particularly careful consideration of potential alternatives to a mistrial was appropriate. We must ensure that the trial court "exercise[d] a sound discretion . . . with the greatest caution, under urgent circumstances, and for very plain and obvious causes," as Justice Story admonished long ago. *Perez*, 22 U.S. (9 Wheat.) at 580.

The trial court here did not meet this standard. Instead, with regard to consideration of an alternative to subjecting Gouveia to an entire second trial even though the jury had reached a verdict (and one probably in his favor), the trial court simply asserted, "There's no other remedy short of a mistrial that's going to cure this or allow us to take the verdict, correct? It's not like we can continue the trial . . . or I can give them a further instruction." The trial court's conclusion that it could not ask the jury to deliberate further after cautionary instructions appeared to be based on

its belief that the jury "reached a verdict already," which could not be changed or reconsidered. The Hawaii appellate courts agreed with this assumption, concluding that there were no reasonable alternatives to a mistrial. *See Gouveia II*, 384 P.3d at 856–57; *Gouveia I*, 2015 WL 2066780, at *10.

If, in fact, the verdict *were* final, as the Hawaii courts suggested, it would constitute an acquittal for purposes of the double jeopardy protection, and a new trial would violate the Double Jeopardy Clause for that reason. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (alterations in original) (quoting *Ball v. United States*, 163 U.S. 662, 671 (1896)). Unlike a mistrial, after which retrial may be permitted with "manifest necessity," an acquittal categorically precludes retrial. *See Brazzel v. Washington*, 491 F.3d 976, 981–82 (9th Cir. 2007).

But here, as the district court correctly recognized, the undisclosed verdict form did *not* constitute a final verdict for purposes of the Double Jeopardy Clause. *Gouveia III*, 2017 WL 3687309, at *16. Contrary to Gouveia's contentions, with regard to the double jeopardy protection, "in a jury trial, an 'acquittal' . . . occurs only when the jury renders a verdict as to all or some of the charges against a defendant." *Harrison*, 640 F.3d

at 898.[10] A "verdict," in turn, "must be rendered by the jury in open court and accepted by the court in order to become final." *Id.* at 899.[11] This reasoning is in accord with the Supreme Court's holding that a preliminary report on the jurors' votes "lack[s] the finality necessary to amount to an acquittal" if it is "possible for [the] jury to revisit . . . its earlier votes." *Blueford*, 566 U.S. at 608.

It is precisely because the undisclosed verdict form in Gouveia's case was *not* a final verdict of acquittal that the Double Jeopardy Clause's most stringent protections against retrial after an acquittal do not apply. It cannot both be true that the verdict was final and could not be altered *and* that there was nothing that could be done to avoid a mistrial by allowing the jury to revisit the nonfinal verdict.

As the verdict was not final, a variety of alternatives were available to the trial court. The district

---

[10] An acquittal may also take the form of a "ruling that the prosecution's proof is insufficient to establish criminal liability for an offense," including " 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.' " *Evans v. Michigan*, 568 U.S. 313, 318 (2013) (alterations in original) (quoting *United States v. Scott*, 437 U.S. 82, 91, 98 & n.11 (1978)).

[11] Applying these principles, *Harrison* held that the Double Jeopardy Clause did not provide a habeas petitioner with the right "to poll the deadlocked jury on the status of its deliberations in his . . . capital-sentencing proceeding," as there was no "procedural mechanism in which the jury's preliminary determinations [could] be embodied in a valid final verdict." 640 F.3d at 900–01.

court recognized one possible route the trial court could have taken:

> [T]he trial judge could have done a brief investigation into the glaring man and could then have called the jury back into court and assured the jury that his inquiries caused him to conclude that the jurors' security was being properly addressed or that there was no safety threat. . . . The trial judge could then have sent the jurors back into the deliberation room to continue their deliberations armed with these assurances. He could have told the jurors that they could reach the same result and even use the same verdict form if, upon further deliberation, they came to the same conclusion, while also providing a blank verdict form for them to use in case they changed their decision.

Gouveia III, 2017 WL 3687309, at *16. Apart from an unexplained, conclusory statement—"It's not like we can continue the trial . . . or I can give them a further instruction"—the trial court provided no discussion of this or any other potential alternative to a mistrial. As the district court put it: "The admonition that all reasonable alternatives be considered requires more than an assertion. Finding a manifest necessity is a hugely consequential matter that requires a more searching process." *Id.* at *15.

Moreover, the trial court's error was compounded by its failure to consider the especially prejudicial effect a mistrial would have on Gouveia. "[I]n the final analysis, the judge must always temper the decision

whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 486. Thus, "once the court considers the alternatives, it should adopt one if less drastic and less harmful to the defendant's rights than a mistrial." *Bates*, 917 F.2d at 396.

Retrying Gouveia would expose him to the exact evils against which the Double Jeopardy Clause protects—that is, "the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney v. United States*, 431 U.S. 651, 661 (1977). But the circumstances of Gouveia's mistrial were particularly prejudicial. Here, both sides had already presented their evidence completely. So, in a retrial, the prosecution would be fully aware the weaknesses in its own case as well as the strength of Gouveia's defenses. The mistrial effectively "operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Somerville*, 410 U.S. at 469. The trial court gave no apparent weight to Gouveia's interests in this regard.

C

We are, as the district court was, "sympathetic to the dilemma facing Gouveia's trial judge at the time the mistrial was declared." *Gouveia III*, 2017 WL 3687309, at *16. "[A] criminal trial is, even in the best of circumstances, a complicated affair to manage."

Washington, 434 U.S. at 505 n.16 (quoting *Jorn*, 400 U.S. at 479). Faced with jurors who expressed "a really serious concern for their personal safety," the trial court suspected that the presence of the menacing-looking man could have affected the jury's deliberations and the ultimate verdict reached.

But the Double Jeopardy Clause demands more than mere suspicion. "[T]he . . . doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Dinitz*, 424 U.S. 600, 607 (1976) (quoting *Jorn*, 400 U.S. at 485). By failing to provide any meaningful consideration to alternatives to a mistrial, the trial court disobeyed that command.

We conclude there was no manifest necessity for a mistrial. The district court therefore did not err in concluding that retrying Gouveia would violate his double jeopardy rights and granting the writ.

IV

The *Rooker-Feldman* doctrine is inapplicable to § 2241 petitions. And retrying Gouveia would violate the Double Jeopardy Clause. We affirm the district court's grant of Gouveia's § 2241 petition.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROYCE C. GOUVEIA, Petitioner, vs. NOLAN ESPINDA, Director of the Department of Public Safety for the State of Hawaii; and DOUG CHIN, Attorney General of the State of Hawaii, Respondents.	Civ. No. 17-00021 SOM/KJM ORDER GRANTING HABEAS PETITION (Filed Aug. 25, 2017)

ORDER GRANTING HABEAS PETITION

I. INTRODUCTION.

Petitioner Royce C. Gouveia is scheduled to be retried in state court for manslaughter. The Hawaii state courts have determined that his double jeopardy rights will not be violated by a retrial. Gouveia now seeks relief from this court, arguing that the Double Jeopardy Clause of the federal Constitution forbids the upcoming trial.

Gouveia was tried in state circuit court for manslaughter in violation of section 707-702(1)(a) of Hawaii Revised Statutes. After the jury had reached a verdict, but without reading the verdict, the state trial judge declared a mistrial. The judge ruled that the jury deliberations and verdict were tainted by the jurors'

concern about their personal safety, given their comments about a glaring man in the audience during trial. The trial judge sealed the verdict without opening it and concluded that a mistrial was supported by manifest necessity. In the trial judge's opinion, nothing short of a mistrial could cure the effect of the menacing man, and Gouveia's double jeopardy rights would not be violated by a retrial on the manslaughter charge.

On appeal, the Intermediate Court of Appeals of the State of Hawaii ("ICA") opened the sealed verdict and learned that the jury had voted to acquit Gouveia of the charges. The ICA then affirmed the trial court. The Hawaii Supreme Court granted certiorari and also affirmed. This habeas petition followed.

Gouveia asserts that, given the acquittal, any retrial would violate his Fifth Amendment right not to be placed in double jeopardy. Gouveia also argues that the mistrial declaration was not supported by manifest necessity. This court determines that the verdict of acquittal was not final at the time a mistrial was declared, but concludes that a mistrial was not manifestly necessary. This court therefore grants Gouveia's habeas petition, ruling that a retrial would violate his federal double jeopardy rights.

II. BACKGROUND FACTS.

Gouveia was indicted in October 2012 for allegedly having committed manslaughter in violation of section 707-702(1)(a) of Hawaii Revised Statutes. Trial commenced in state court on Tuesday, September 3, 2013,

with jury selection, preliminary instructions, and opening statements. By Friday, September 6, 2013, the jury was instructed, closing arguments were presented, and the jury began deliberations. *See* Docket Sheet, available through eCourt KōKua on the Hawaii State Judiciary website, www.courts.state.hi.us (input CaseID 1PC121001474 under "Case Search" after entering eCourt KōKua) (last visited August 15, 2017).

In the afternoon of September 6, 2013, the jury sent simultaneous notes to the court. In Communication No. 3 From the Jury, which indicates that it was signed at 2:20 p.m., the jury indicated, "We reached a verdict." ECF No. 3, PageID # 56. Communication No. 2 From the Jury indicates that, notwithstanding being numbered "2," it was actually signed at 2:24 p.m., after the later-numbered Communication No. 3 had been signed. Communication No. 2 stated, "Concern. This morning on prosecutor's side of courtroom there was a man, shaved head, glaring and whistling at defendant. We have concern for our safety as jurors." ECF No. 3, PageID # 58.

The parties convened in open court to discuss the notes. The trial judge stated:

> My intention, unless counsel, you know, can persuade me otherwise, is just to take no action on this, take the verdict, and then I'm going to do what I normally do, which is ask them if I can come in and talk to them right afterwards and then address this with them basically one-on-one, meeting with them in

> private after we take the verdict and formally stand adjourned.

ECF No. 13-3, PageID # 349.

At that point, the parties asked that the jurors be individually voir dired about Communication No. 2. *See id.* The following table is a summary of the individual juror voir dire.

Juror	**Saw Man Glaring and Whistling at Gouveia?**	**Was Incident Talked About During Deliberations**	**Any Concern For Safety?**	**Any Bearing on Decision?**
Mr. Valencia	No (PageID # 353)	Yes. For a few minutes at the end. (PageID # 354)	Not concerned for own safety. (PageID # 355); discussion related to jurors' concern for their safety. (PageID # 356)	No. (PageID # 355)
Ms. Wilcox	No (PageID # 358)	Yes. In the beginning for about 5 minutes. (PageID # 358-59) Also, brought up after verdict was reached. (PageID # 361)	A few jurors said they were a little bit scared. (PageID # 360)	No. (PageID # 360)
Ms. Boehm	Yes. Heard whistling from prosecutor's side. (PageID # 369)	No. Only after the verdict was reached. (PageID # 365)	A few of the jurors expressed concern for their safety. (PageID #s 366 and 370)	No. (PageID # 367)
Ms. Foster	Yes. (PageID #s 373 and 376)	No. After the verdict was reached. (PageID #s 373 and 375)	Yes. Had concern for own safety. (PageID #s 374 and 377)	No. (PageID # 373-74)
Ms. Hanashiro	No. (PageID # 381)	Yes. As soon as deliberations started for about 10 minutes. (PageID #s 382-84); Also brought up towards the end. (PageID # 387)	Yes. Jurors were slightly intimidated and concerned. (PageID # 386)	No. (PageID # 383)
Ms. Li	Yes. (PageID # 388)	Yes, in the "middle-early" of deliberations and again at the end. (PageID # 389)	Was not concerned when she saw it. But there was concern after the verdict. (PageID # 392)	No. (PageID # 390-91)
Juror #7 (unidentified but referred to as Ms. Li when excused, although apparently not the same person as the preceding juror)	Yes. (PageID # 393)	Yes. Toward end of deliberations for a few minutes. (PageID # 394)	Was not concerned for herself. (PageID # 393)	No. (PageID # 394-95)

Mr. Chandler	No (PageID # 406)	Yes. For a minute or so when jurors went to deliberate, and then again after verdict had been reached. (PageID # 407)	Jurors did not seem scared. (PageID # 408)	No. (PageID # 407)
Mr. Masuno	No. (PageID # 410)	No, only after verdict reached. (PageID #s 411-12)	There was concern for the safety of some of the female jurors. (PageID # 414-15)	No. (PageID # 413)
Ms. Mau	No. (PageID # 417)	No. (PageID # 417)	No. (PageID # 417)	No. (PageID # 417)
Ms. Kama	No. (PageID # 422)	Yes. At the end and after verdict reached. (PageID # 422, 425)	Yes. Jurors were concerned. (PageID # 426)	Yes. Jurors were concerned about their safety such that it impacted their decision. (PageID # 426)
Ms. Chun	No. (PageID # 428)	Yes, as soon as jurors went into the deliberation room or the "early-middle." (PageID #s 430-31)		No. (PageID # 429-30)

At the conclusion of the individual juror voir dire, the trial judge noted that the verdict was unknown and asked defense counsel if Gouveia was moving for a mistrial. ECF No. 13-3, PageID # 435. Gouveia did not make such a motion, but the prosecution did. *Id.*

After hearing argument, the trial judge repeated that there was no way of knowing what the verdict was, but indicated that it was "pretty clear . . . what everybody thinks the verdict is." *Id.*, PageID # 451. He stated that, whatever the verdict was, it was "immaterial" to his ruling on the mistrial motion. *Id.*

Based on the individual juror voir dire, the trial judge determined that at least some of the jurors had a "really serious concern for their personal safety." He reasoned that four or five of the jurors had stated that the subject came up as one of the first things in the deliberation room. Other testimony supported that impression, including Ms. Kama's statement that the situation affected deliberations. *Id.*, PageID # 452. The judge stated, "It frankly beggars my reason and common sense that it would have no bearing on the deliberations in this case and therefore the verdict." *Id.* He then declared a mistrial based on "manifest necessity," sealing the verdict for future purposes without ever determining what the verdict actually was. *Id.* He did not find credible the eleven jurors (other than Ms. Kama) who said that the glaring man had not affected the verdict, given the statements by at least three or four of them that they had concerns for their safety. *Id.*, PageID #s 452-53.

On October 22, 2013, the trial judge followed up his oral ruling with written Findings of Fact, Conclusions of Law and Order Granting State's Oral Motion for Mistrial Based on Manifest Necessity. ECF No. 13-3, PageID #s 172-77. He made the following findings of fact:

> 7. The Court questioned the jurors individually and both counsel for the State and for Defendant were given adequate opportunity to question each juror regarding Communication No. 2.
>
> 8. Four jurors witnessed an individual seated on the prosecutor's side of the courtroom whistling and/or glaring at Defendant ("incident") prior to commencing deliberation.
>
> 9. Seven of the jurors indicated discussion of the incident occurred before the verdict, ranging from within ten minutes of commencing deliberation to the end of deliberation. At least four of these seven jurors indicated discussion of the incident occurred at the beginning of deliberations, specifically that it was one of the first topics discussed.
>
> 10. During the discussion of the incident prior to verdict, the jurors who actually observed the incident communicated to the other jurors fear for their own safety.
>
> 11. Some of the juror answers regarding Communication No. 2 and the incident included the following:

a. Some jurors were worried about retaliation;

b. The unidentified male's look appeared hostile during the incident;

c. Some jurors were concerned;

d. Some jurors felt intimidated; and

e. The incident impacted other jurors' decisions.

12. Although all twelve jurors indicated that neither the incident itself nor the discussion regarding the incident during the deliberations affected their own decision, at least one juror indicated that the incident appeared to have impacted the deliberation process and decision.

13. The incident was not part of the evidence in the case at hand.

14. The verdict was never taken for this case. At no point during the proceedings did the Court take, read or otherwise get any indication of the jury's verdict.

15. The Court finds that the jurors' statements that the incident did not affect their decisionmaking process and/or deliberations are not credible as evidenced by the plain language of Communication No. 2 and answers of the voir dire of each individual juror.

16. The Court further finds that the concern for personal safety as expressed by the jurors had an impact on the jurors' decisions based

> on the totality of the circumstances present and thus its effect on the subsequent verdict was not harmless beyond a reasonable doubt.

ECF No. 13-3, PageID #s 173-75.

The trial judge concluded that, although no juror said that the glaring man had affected his or her own decisionmaking process, "reason and common sense dictates that the incident did have an effect on the deliberations hence the impartiality of the jurors, which [wa]s not harmless beyond a reasonable doubt." *Id.*, PageID # 176. Accordingly, the trial judge ruled that the jury had not impartially deliberated on a verdict. *Id.* The trial judge stated that there was no remedy short of declaring a mistrial "as neither a continuance nor a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict." *Id.* He said that the bar on double jeopardy did not preclude Gouveia's retrial because, based on the totality of the circumstances, there was a "manifest necessity" for the mistrial, which he defined as a sudden and overwhelming emergency beyond the control of the court that was unforeseeable and made it no longer possible to conduct the trial or to reach a fair result. *Id.*, PageID # 177.

On December 19, 2013, following the mistrial declaration, the trial court denied Gouviea's [sic] motion to dismiss the charges based on double jeopardy. *See* Appeal From the Order Denying Motion to Dismiss for Violation of Double Jeopardy on December 19, 2013. ECF No. 13-3, PageID # 148. Gouveia appealed, arguing in

his Opening Brief to the ICA that (1) the trial court had erred in declaring a mistrial (PageID #s 160-66); and (2) the trial court had erred in denying the motion to dismiss based on the violation of Gouveia's double jeopardy rights under the United States and Hawaii constitutions (PageID #s 166-67).

On April 30, 2015, the ICA, in a 2-1 decision, affirmed the trial court's rulings, holding that, because the trial judge had not abused his discretion in finding a manifest necessity to declare a mistrial, Gouveia's constitutional right to be free of double jeopardy would not be implicated in any retrial. *See Hawaii v. Gouveia*, 135 Haw. 219, 348 P.3d 496, 2015 WL 2066780 (Ct. App. Apr. 30, 2015). The ICA unsealed the verdict, in which the jury had found Gouveia not guilty. 2015 WL 2066780, *7; ECF No. 8, PageID # 104 (copy of verdict).

On July 2, 2015, Gouveia sought a writ of certiorari from the Hawaii Supreme Court. *See* ECF No. 13-3, PageID # 228. Gouveia again argued that the trial court had erroneously granted the motion for mistrial. PageID #s 232-235. He contended, "As previously argued, the trial court's finding of manifest necessity was erroneous. Therefore the denial of Gouveia's Motion to Dismiss for Violation of Double Jeopardy and the ICA's ruling affirming the denial were erroneous." PageID # 235.

The Hawaii Supreme Court granted certiorari. *See* 2015 WL 4756475 (Haw. Aug. 10, 2015). On October 26, 2016, the Hawaii Supreme Court affirmed in a 4-1 decision. *See* 139 Haw. 70, 384 P.3d 846 (2016).

On January 18, 2017, Gouveia filed the present petition. *See* ECF No. 1.

III. STANDARD OF REVIEW.

Gouveia originally requested relief under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Respondents correctly argue (and Gouveia concedes) that § 2254(d) is inapplicable because Gouveia is not currently "in custody pursuant to the judgment of a State court." There is no judgment against him at all. Instead, his case is set to be retried.

But while the absence of a state judgment renders § 2254 inapplicable, it does not leave Gouveia without

a federal avenue for challenging his retrial. This court reviews Gouveia's petition under 28 U.S.C. § 2241, which provides federal courts with a general grant of habeas authority. *See Frantz v. Hazey, 533 F.3d 724, 735* (9th Cir. 2008) (en banc).

An example of precisely this approach is found in *Stow v. Murashige*, 389 F.3d 880, 885 (9th Cir. 2004), a case that involved the present judge and the same attorney for a petitioner. In *Stow*, a double jeopardy claim had similarly been asserted under § 2254. Noting that the petitioner was not "in custody pursuant to the judgment of a State court" at the time he filed his petition, the Ninth Circuit stated that the threshold requirement for § 2254 had not been satisfied. *Id.* Instead of denying the § 2254 petition on that basis, the Ninth Circuit recognized that the petitioner had raised a double jeopardy challenge to his retrial that could be "properly treated under § 2241," which allows for pretrial habeas challenges. *Id.* at 885 and 888; *accord Harrison v. Gillespie*, 640 F.3d 888, 896 (9th Cir. 2011) ("Our precedent makes clear that 28 U.S.C. § 2241 is the proper vehicle for asserting a double jeopardy claim prior to (or during the pendency of) a successive trial."). This court construes Gouveia's § 2254 petition as a § 2241 petition. This court has allowed supplemental briefing to alleviate any possible prejudice to Respondents relating to consideration of Gouveia's habeas petition as one under § 2241.

Section 2241 does not require a petitioner to be in custody pursuant to a state judgment, but it does require a petitioner to be in custody. Citing *Wilson v.*

Belleque, 554 F.3d 816, 821 (9th Cir. 2009), which noted that "'custody' is a jurisdictional prerequisite to habeas review under § 2241(c)(3)," Respondents argue that Gouveia is not "in custody" such that § 2241 applies. *See* ECF No. 18, PageID # 573-74. This court is not persuaded.

Gouveia is on "supervised release" in the state system, which, unlike "supervised release" in the federal system, occurs pretrial. Gouveia is, in essence, equivalent to a federal defendant who is subject to pretrial release conditions monitored by a United States Pretrial Services Officer.

As *Belleque* recognizes, "custody" is defined broadly and "has not been restricted to situations in which the applicant is in actual, physical custody." *Id.* at 822 (quotation marks and citation omitted). Instead, the "custody" requirement is satisfied when there is a "significant restraint" on a person's liberty that is not shared by the public generally. *Id.* The Ninth Circuit has noted that the custodial requirement has been met in cases involving prisoners released on parole, on their own recognizance, and free on bail. *Id.*

It is undisputed that Gouveia must comply with restrictive conditions. *See* ECF No. 16-1, PageID #s 495-96. These conditions govern where he may reside, with whom he may have contact, his consumption of alcohol, his attendance at substance abuse treatment at his expense, employment, an extradition waiver, and his possession of dangerous weapons, firearms, or ammunition. *Id.*, PageID #s 497, 500-01. These are

substantial conditions that are not imposed on the public generally. The totality of the conditions renders Gouveia in "custody" for purposes of § 2241.

A petition under § 2241, unlike one under § 2254, is not subject to the heightened standards set forth in 28 U.S.C. § 2254(d). *Stow*, 389 F.3d at 886. Habeas relief is proper under § 2241 when the petitioner shows that a retrial would violate his or her Fifth Amendment right against double jeopardy. The § 2241 petitioner need not show that the state court decision was contrary to or an unreasonable application of clearly established federal law, as required by § 2254(d). *Id.* at 888. In examining Gouveia's petition under § 2241, this court therefore focuses on whether his double jeopardy right would be violated by the scheduled retrial.

IV. THERE IS NO JURISDICTIONAL, PROCEDURAL, OR OTHER HURDLE TO THIS COURT'S CONSIDERATION OF THE DOUBLE JEOPARDY ISSUE.

A. The *Rooker-Feldman* Doctrine is Inapplicable.

In its Supplemental Memorandum of July 31, 2017, Respondents argue that this court lacks jurisdiction pursuant to the *Rooker-Feldman* doctrine. *See* ECF No. 18. That argument lacks merit.

As a general principle, this court may not exercise appellate jurisdiction over state court decisions. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983); *Rooker v. Fidelity Trust Co.*, 263

U.S. 413, 415-16 (1923). This rule, commonly known as the *Rooker-Feldman* doctrine, bars a losing party in state court from seeking what amounts to appellate review of the state-court judgment in federal court based on the losing party's claim that the state judgment itself violates the loser's federal rights. *See Bennett v. Yoshina*, 140 F.3d 1218, 1223 (9th Cir. 1998).

However, it is well settled that the *Rooker-Feldman* doctrine is inapplicable to cases seeking habeas corpus relief. *See In re Gruntz*, 202 F.3d 1074, 1079 (9th Cir. 2000) ("It is well-settled that the Rooker-Feldman doctrine does not touch the writ of habeas corpus."); *Martin v. Virga*, 2012 WL 1622663, *2 (N.D. Cal. May 9, 2012) ("regardless of the *Rooker-Feldman* doctrine, a federal court has jurisdiction to consider a habeas corpus petition which, in effect, is a challenge to the final judgment of a state court in a criminal action").

B. *Younger* Abstention is Inapplicable.

Respondents' Supplemental Memorandum also argues that this court should abstain from this matter pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), which "forbids federal courts from unduly interfering with pending state court proceedings that implicate important state interests." *Potrero Hills Landfill, Inc. v. City of Solano*, 657 F.3d 876, 881 (9th Cir. 2011) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (quotation marks omitted)). This argument is also unpersuasive.

In *Younger*, the Supreme Court held that a federal court may not interfere with a pending criminal prosecution absent extraordinary circumstances. *Logan v. United States Natl. Ass'n*, 722 F.3d 1163, 1167 (9th Cir. 2013). This principle has been extended to interference with some civil cases. *Id. Younger* abstention applies when there is a state proceeding that is (1) ongoing; (2) implicates important state interests; and (3) provides an adequate opportunity to raise federal questions; and (4) when the federal action would enjoin the state proceeding or have the practical effect of doing so. *Id.* But a double jeopardy claim is an exception to the *Younger* abstention doctrine. *Wilson v. Czerniak*, 355 F.3d 1151, 1157 (9th Cir. 2004) ("double jeopardy claims present an exception to the general rule requiring federal courts to abstain from interfering with pending state proceedings"); *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992) (same); *Schillaci v. Peyton*, 328 F. Supp. 2d 1103, 1105 (D. Haw. 2004) (same). Accordingly, *Younger* abstention is inapplicable.

C. Gouveia Exhausted His Double Jeopardy Claim.

"As a prudential matter, courts require that habeas petitioners exhaust all available judicial and administrative remedies before seeking relief under § 2241." *Ward v. Chavez*, 678 F.3d 1042, 1045 (9th Cir. 2012). Citing *Cooper v. Neven*, 641 F.3d 322, 326-27 (9th Cir. 2011), Respondents argue that Gouveia failed to exhaust his double jeopardy claim by presenting it

to the highest court of Hawaii. *See* ECF No. 18, PageID # 574. This court disagrees.

Gouveia filed a motion to dismiss on Hawaii and federal double jeopardy grounds with the trial court. When the trial court denied that motion, he appealed that denial to the ICA, contending that his Hawaii and federal rights to be free of double jeopardy had been violated and that the trial court had abused its discretion in determining the mistrial was supported by manifest necessity. *See Gouveia*, 2015 WL 2066780, at *11. After the ICA affirmed, Gouveia sought a writ of certiorari from the Hawaii Supreme court, arguing that the ICA ruling was erroneous. ECF No. 13-3, PageID # 235 ("As previously argued, the trial court's finding of manifest necessity was erroneous. Therefore, the denial of Gouveia's Motion to Dismiss for Violation of Double Jeopardy and the ICA's affirming the denial were erroneous."). Gouveia properly exhausted his Fifth Amendment double jeopardy claim.

This court does not agree with Respondents that Gouveia failed to properly exhaust his remedies because he did not present the "operative facts" to the Hawaii Supreme Court. *See* ECF No. 18, PageID # 575-77. Respondents make no suggestion that Gouveia failed to present the "operative facts" to the ICA. *Id.* In fact, Gouveia expressly argued to the ICA with references to relevant facts that the mistrial declaration was not supported by manifest necessity and that the trial court had erroneously denied Gouveia's motion to dismiss on state and federal double jeopardy grounds. *See* ECF No. 13-3, PageID # 165-67 (arguing that the

verdict was untainted, that the trial court let the jury reach a verdict but refused to take it, and that retrial was barred because the mistrial declaration was not supported by manifest necessity).

In his application for a writ of certiorari from the Hawaii Supreme Court, Gouveia argued that each juror had been impartial in his or her decisionmaking process and that the jurors' individual verdict determinations had not been improperly influenced. *See* ECF No. 13-3, PageID #s 228, 234. Gouveia then relied on Chief Judge Craig Nakamura's dissent in the ICA decision. *See id.*, PageID # 235. That dissent stated, "In my view, the Circuit Court of the First Circuit (Circuit Court) abused its discretion in concluding that manifest necessity existed for a mistrial." *Hawaii v. Gouveia*, 2015 WL 2066780, *11 (Ct. App. Haw. Apr. 30, 2015). Chief Judge Nakamura noted that the "jurors' expression of concern for their personal safety due to the incident did not automatically or necessarily mean that the jurors would be incapable of rendering a fair and impartial decision." 2015 WL 2066780 at *13. Chief Judge Nakamura disagreed with the trial judge's determination of manifest necessity, which was based on the jurors' expressed concerns for their personal safety. *Id.* at *12 to *13. The certiorari application also argued that, because manifest necessity was lacking, reprosecution was barred by double jeopardy and that the trial court had erroneously denied Gouveia's motion to dismiss based on double jeopardy grounds. ECF No. 13-3, PageID # 235. Under these circumstances, it cannot be said that Gouveia failed to adequately raise

to the Hawaii Supreme Court the very double jeopardy claim he raises here.

V. DOUBLE JEOPARDY ISSUE.

A. Legal Background.

1. The Double Jeopardy Clause Prohibits a Retrial After an Acquittal.

In relevant part, the Fifth Amendment to our nation's Constitution, known as the Double Jeopardy Clause, declares "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This Double Jeopardy Clause provides three related protections: (1) it prohibits a second prosecution for the same offense after acquittal; (2) it prohibits a second prosecution for the same offense after conviction; and (3) it prohibits multiple punishments for the same offense. *See United States v. Wilson*, 420 U.S. 332, 343 (1975). At issue here is the first of these protections, which the Supreme Court in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), characterized as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence."

The policy behind the Double Jeopardy Clause "is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."

> The Clause, therefore, guarantees that the State shall not be permitted to make repeated

> attempts to convict the accused, "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."

Martin Linen, 430 U.S. at 569 (quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)); *see United States v. Bates*, 917 F.2d 388, 392 (9th Cir. 1990) ("Criminal defendants have a right to have the jury first impaneled to try them [sic] reach a verdict."). The Supreme Court has noted that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984).

The Double Jeopardy Clause's protection against retrial for the same offense was at issue in *Ball v. United States*, 163 U.S. 662, 671 (1896), which involved a murder charge brought against three men. A jury found two of the defendants guilty but acquitted the third, Millard F. Ball. The trial court discharged Ball and judged the other two defendants guilty, sentencing them to death. *Id.* at 664. The convictions of the two defendants were reversed on appeal because the indictment was insufficient. *Id.* at 664-65. Despite Ball's acquittal in the first trial, all three defendants were reindicted. Over objections by all of the defendants based on double jeopardy, all three were then retried and convicted of murder. *Id.* at 665-66. The Supreme Court held that, because Ball had already been

acquitted, his retrial violated the Double Jeopardy Clause. Id. at 669-71. The retrial of the other two defendants, by contrast, did not violate the Double Jeopardy Clause. *Id.* at 672.

Martin Linen also involved the first double jeopardy protection. After the jury was deadlocked and discharged, the trial court entertained motions for judgment of acquittal, then entered judgments of acquittal. 430 U.S. at 565-67. The issue before the Supreme Court was whether the government could appeal the judgments of acquittal. The Court began its examination of the issue by noting that the Double Jeopardy Clause was implicated "only when the accused has actually been placed in jeopardy." *Id.* at 569. Jeopardy attaches when the jury is empaneled and sworn, or, in the case of a bench trial, when the judge begins to receive evidence. *Id.* The Supreme Court noted that the Double Jeopardy Clause was not implicated when a government appeal would not lead to successive prosecutions. The government could, for example, appeal a post-conviction dismissal of an indictment, as a reversal would merely reinstate the conviction. *Id.* at 570. However, when a judgment of acquittal has issued, a reversal on appeal would require a new trial, or at least some other proceeding devoted to the resolution of factual issues going to the elements of the offense charged. Such a retrial would violate the Double Jeopardy Clause. *Id.*

The Supreme Court further explained in *Fong Foo v. United States*, 369 U.S. 141 (1962), that even an erroneous acquittal prevents a retrial. In *Fong Foo*, the

trial court directed the jury to return a verdict of acquittal because of prosecutorial misconduct and/or a lack of credible testimony. After a formal judgment of acquittal was entered, the government appealed, arguing that the judgment of acquittal should be vacated and the case retried. The First Circuit, concluding that the trial judge had not had the authority to direct a judgment of acquittal, set aside the acquittal and ordered a retrial. The Supreme Court reversed. Because the defendants had been tried under a valid indictment in a court with subject matter jurisdiction, and because the trial did not terminate before the entry of the judgment of acquittal, the Supreme Court held that, regardless of any trial court error in directing a judgment of acquittal for the defendants, they could not be retried without violating the Double Jeopardy Clause. *Id.* at 143.

2. The Double Jeopardy Clause Prohibits a Retrial When A Mistrial Has Been Declared After Jeopardy Attaches Unless the Defendant Consents or the Mistrial Determination is Supported by Manifest Necessity.

"Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's valued right to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quotation marks and citation omitted). The Supreme Court has recognized that there are multiple "circumstances that may make

it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Id.* at 505. "If a case is dismissed after jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for the same crime only in two circumstances: (1) if he consents to the dismissal; or (2) if the district court determines that the dismissal was required by " 'manifest necessity.' " *United States v. Bonas*, 344 F.3d 945, 948 (9th Cir. 2003).

Given the importance of a person's right to be free of double jeopardy, a prosecutor must shoulder the "heavy burden" of demonstrating a "manifest necessity" justifying a mistrial over the objection of a defendant in order to retry that defendant without violating the Double Jeopardy Clause. *Id.*; *United States v. Dinitz*, 424 U.S. 600, 606-07 (1976). The words "manifest necessity" "do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Arizona*, 434 U.S. at 506.

The Supreme Court has long recognized the trial court's discretion in making the manifest necessity determination:

> We think, that in all cases of this nature, the law has invested Courts of justice with the

> authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

United States v. Perez, 22 U.S. 579, 580, 1824 WL 2694, at *1 (1824).

The degree of deference a trial judge has to declare a mistrial varies:

> The judge's decision should be strictly scrutinized when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused. At the other extreme, great deference should be accorded a trial judge's decision to discharge a jury which appears to be deadlocked.

United States v. Sanders, 591 F.2d 1293, 1296 (9th Cir. 1979) (quotation marks and citations omitted). "A trial judge's decision to declare a mistrial because of possible juror bias is also deserving of great deference." *Id.* at 1297. "Nevertheless, because the mistrial decision affects a constitutionally protected right, reviewing courts have an obligation to satisfy themselves that the trial judge exercised sound discretion in declaring a mistrial." *Id.* (quotation marks, alterations, and citations omitted); *accord* Arizona, 434 U.S. at 514 ("reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial").

It is with the legal backdrop of all the authorities cited earlier in this order that this court turns to Gouveia's specific arguments.

B. Gouveia Does Not Establish That This Court Should Treat His Sealed Verdict As a Final Acquittal.

The main focus of Gouveia's habeas petition is his argument that, because the jury reached a unanimous determination that he was not guilty of the offense charged, he was acquitted for double jeopardy purposes. Respondents point to the failure of the trial court to receive the verdict as critical to this analysis. This court rules that when a verdict is not received by a trial court, that verdict, even when it is an acquittal, does not necessarily trigger the protection of the Double Jeopardy Clause.

The court recognizes that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *Martin Linen*, 430 U.S. at 571. Instead, whether a ruling is an acquittal turns on "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571; *accord Sanabria v. United States*, 437 U.S. 54, 71 (1978) (defining "acquittal" as "a resolution, correct or not, of some or all of the factual elements of the offense charged"). In other words, an acquittal encompasses "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318 (2013). Under the circumstances presented here, Gouveia does not show that the verdict in his case was a final determination that he was innocent or that the prosecution failed to satisfy all of the elements of the manslaughter charge.

Blueford v. Arkansas, 566 U.S. 599, 132 S.Ct. 2044 (2012), is instructive. In *Blueford*, a one-year-old boy suffered fatal head trauma while at home with his mother's boyfriend, Blueford. 132 S. Ct. at 2048. Blueford was charged with capital murder and the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide. *Id.* A few hours into the deliberations, the jury sent a note that asked what would happen if it could not agree on a charge. The court called the jury back into the courtroom, instructed the jury to deliberate further pursuant to *Allen v. United States*, 164 U.S. 492 (1896), and sent the jury back to deliberate. About 30 minutes later, the jury sent out another note, this one stating that it

could not agree "on any one charge in this case." 132 S. Ct. at 2049. The court then summoned the jury back into court and asked the foreperson to disclose the votes on each offense. The foreperson indicated that the jury had unanimously agreed that Blueford was not guilty with respect to the capital murder and first-degree murder charges, but was divided nine to three on the manslaughter charge. The foreperson told the court that the jury had not voted on the negligent homicide charge. 132 S. Ct. at 2049. The court then gave another *Allen* charge and sent the jury back to deliberate. When the jury could not reach a verdict, the court declared a mistrial. *Id.*

Citing the foreperson's statement in open court that the jury had unanimously agreed to acquit Blueford of the capital murder and first-degree murder charges, Blueford sought dismissal of those charges on double jeopardy grounds. *Id.* The Supreme Court determined that the "foreperson's report was not a final resolution of anything." 132 S. Ct. at 2050. The continuation of deliberations demonstrated that the report could not have been final. *Id.* The Supreme Court gave an example:

> A jury enters the jury room, having just been given these instructions. The foreperson decides that it would make sense to determine the extent of the jurors' agreement before discussions begin. Accordingly, she conducts a vote on capital murder, and everyone votes against guilt. She does the same for first-degree murder, and again, everyone votes against guilt. She then calls for a vote on

> manslaughter, and there is disagreement. Only then do the jurors engage in a discussion about the circumstances of the crime. While considering the arguments of the other jurors on how the death was caused, one of the jurors starts rethinking his own stance on a greater offense. After reflecting on the evidence, he comes to believe that the defendant did knowingly cause the death -- satisfying the definition of first-degree murder. At that point, nothing in the instructions prohibits the jury from doing what juries often do: revisit a prior vote.

132 S. Ct. at 2051.

Had this case been in federal court, the verdict clearly would not have been final for double jeopardy purposes before its contents were known to the trial judge and parties. The Ninth Circuit has held:

> Rule 31(d) [of the Federal Rules of Criminal Procedure] grants the judge or any party the absolute right to have the jury polled after it has returned its verdicts. Although their jury room votes form the basis of the announced verdict, the jurors remain free to dissent from the announced verdict when polled. In short, a jury has not reached a valid verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered.

United States v. Nelson, 692 F.2d 83, 84-85 (9th Cir. 1982) (internal citations and quotation marks omitted); *accord Harrison v. Gillespie*, 640 F.3d 888, 899

(9th Cir. 2011) (en banc) ("the verdict must be rendered by the jury in open court and accepted by the court in order to become final"); *United States v. Boone*, 951 F.2d 1526, 1532 (9th Cir. 1991) ("A verdict is returned when it is given by the jury to the judge in open court."); 3 C. Wright and S Welling, *Fed. Practice and Procedure*, § 517 at 52 (2011) ("A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent.").

In federal court proceedings, when a poll "reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury." Fed. R. Crim. P. 31(d).

Even if a jury is not polled, a juror could presumably announce in open court his or her disagreement with other jurors, thereby preventing a verdict from being final. The jury could then be sent back to continue deliberations.

Hawaii law is similar. Rule 31(c) of the Hawaii Rules of Penal Procedure provides:

> When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, or there is not concurrence by the number of jurors stipulated to as being necessary for returning a verdict, the jury may be directed to retire for further deliberations or may be discharged.

The purpose of Hawaii's Rule 31(c) is to assure the court and the parties that a unanimous verdict has been reached and to give each juror the opportunity to indicate assent to the verdict in open court. *See Hawaii v. Uyesugi*, 100 Haw. 442, 457, 60 P.3d 843, 858 (2002); *see also Hawaii v. Yamada*, 99 Haw. 542, 562, 57 P.3d 467, 487 (2002) ("Criminal defendants are entitled to a unanimous verdict under the Hawai'i Constitution and pursuant to court rule."). As illustrated by *Hawaii v. Keaulana*, 71 Haw. 81, 83, 784 P.2d 328, 329 (1989), jurors in Hawaii courts have actually indicated during polling that verdicts reached were not unanimous, resulting in continued deliberations. This demonstrates that even though the jury in the present case had unanimously agreed to acquit Gouveia and had informed the court that it had reached a verdict, that decision was not yet a final acquittal for double jeopardy purposes under Hawaii law, as jurors could still have changed their minds.

Although not a case involving Hawaii law, *Durall v. Quinn*, 2007 WL 1574121 (W.D. Wa. May 29, 2007), is helpful to the present discussion. *Durall* is a federal case flowing from a case in Washington's state court in which a jury deliberated and informed the court that it had reached a decision. Before the verdict was disclosed to the court, the defense alleged juror misconduct. The court then held a hearing and decided to replace one of the jurors with an alternate because the juror had been told by a courthouse security officer the officer's views of Durall's credibility. The verdict form was then sealed and later destroyed. The jury, with an

alternate, deliberated anew and reached a guilty verdict. *Id.* at *10. Durall sought habeas relief under 28 U.S.C. § 2254, arguing that the second verdict violated the Double Jeopardy Clause. The federal district court noted that the last reasoned decision by Washington's state courts had determined that the jury's initial, sealed verdict was not a "final verdict" that terminated Durall's jeopardy. *Id.* at *6. The federal district court determined that that decision was reasonable and that § 2254 relief was unavailable because Durall had not shown an unreasonable application of Supreme Court precedent. *Id.*

Similarly, the jury in Gouveia's case could have changed its mind at the time it announced that it had reached a verdict (and at the time the mistrial was declared). Its verdict form indicating an acquittal therefore does not trigger double jeopardy protections.[1]

C. The Mistrial Was Not Supported By Manifest Necessity.

This court's analysis does not end with its determination that the verdict was not final. Gouveia additionally argues that the mistrial was not supported by "manifest necessity." This court agrees.

Hawaii state law provides that, "[w]hen circumstances arise that could influence the impartiality of

---

[1] This court need not address here the hypothetical situation in which a judge refuses to receive a verdict for an improper motive. There is no suggestion that the judge presiding over Gouveia's trial had any improper motive.

the jury and thus affect the ability to reach a fair result based on the evidence, a rebuttable presumption of prejudice is raised" that supports a determination of "manifest necessity." *Gouveia*, 139 Haw. at 78 384 P.3d at 854. "To overcome such a presumption, the trial court, after investigating the totality of the circumstances, must find that the outside influence on the jury was harmless beyond a reasonable doubt." *Id.*

The Hawaii Supreme Court viewed the issue in Gouveia's case as being "whether the circuit court abused its discretion in finding that the presumption was not proven harmless beyond a reasonable doubt and no reasonable alternative to declaring a mistrial existed." *Id.* at 78-79, 384 P.3d at 854-55. That is, the Hawaii Supreme Court, determining that the jurors' concerns about the glaring man raised a rebuttable presumption of prejudice, applied a two-pronged test. First, it examined whether the trial court had found that the outside influence on the jury was harmless beyond a reasonable doubt. Second, if the influence was not proven harmless beyond a reasonable doubt, it required the trial court to look at all reasonable alternatives to cure the harm before declaring a mistrial. *Id.* at 78, 384 P.3d at 854.

Although this court discusses the first prong of the above issue (going to the presumption), its focus in the discussion below is primarily on the second prong (reasonable alternatives to a mistrial).

As the Hawaii Supreme Court noted, upon receipt of the jury note concerning the menacing man, both

counsel and the trial judge recognized the possibility of an improper influence and agreed that the jurors should be individually questioned. The Hawaii Supreme Court said:

> the jury communication in the instant case was a statement that the jurors were actually concerned for their safety, not merely inquiring into the possibility of danger. Additionally, at least four jurors stated that the discussions of the incident and potential danger happened at the beginning of deliberations, which indicates those discussions could have had an effect on the subsequent jury deliberations. Under these circumstances, the circuit court was well within its discretion to conclude that under the totality of the circumstances, the outside influence was not harmless beyond a reasonable doubt.

Id., 139 Haw. at 80, 384 P.3d at 856.

This court does not agree with Gouveia that the state courts' presumption analysis is constitutionally flawed. The jurors agreed that the menacing man was discussed after the verdict was reached. But the jurors also generally agreed that the matter was discussed before the verdict was reached. At least three of the jurors indicated that the jury discussed the menacing man (the outside influence) as soon as they started deliberations. Ms. Wilcox, for example, stated that the man was discussed in the beginning for about five minutes. ECF No. 13-3, PageID #s 358-59. Ms. Hanashiro stated that the man was discussed as soon as

deliberations started for about ten minutes. *Id.*, PageID #s382-84. Mr. Chandler told the court that the man was discussed early on for a minute or so. *Id.*, PageID #s 382-84. Ms. Chun similarly indicated that the man was discussed as soon as the jury went into the deliberation room, or possibly in the "early middle" of deliberations. *Id.*, PageID #s 430-31. Ms. Li also said the man was discussed in the "middle-early" of deliberations." *Id.*, PageID # 389. Mr. Valencia, unidentified Juror #7, and Ms. Kama each indicated that the man was discussed toward the end of deliberations. *Id.*, PageID #s 354, 394, 422, and 425. This means that eight of the twelve jurors remembered discussing the menacing man before the verdict was reached, with five of them indicating that it was so important that he was discussed in the beginning or in the early-middle of deliberations. Only four jurors (Ms. Boehm, Ms. Foster, Mr. Masuno, and Ms. Mau) indicated that the menacing man was not discussed until after the verdict was reached. *Id.*, PageID #s 365, 373, 375, 411-12, and 417.

When combined with the jury's sending of a note indicating that the jurors were actually concerned about their safety, the jurors' indications that they discussed the menacing man during deliberation supports the finding that they may have been afraid for their safety while deliberating. Ms. Wilcox, for example, said a few jurors were scared. ECF No. 13-3, PageID 360. Ms. Hanashiro said a few jurors were intimidated and concerned. *Id.*, PageID # 386. Mr. Valencia, Ms. Boehm, Ms. Foster, Ms. Li, Mr. Masuno, and

Ms. Kama each said the jurors were concerned for their safety. *Id.*, PageID #s 356, 366, 370, 374, 377, 392, 414-15, and 426. Additionally, Ms. Kama testified that she thought the safety concern affected the jury's decision. *Id.*, PageID # 426. The trial judge "was well within [his] discretion to conclude that under the totality of the circumstances, the outside influence was not harmless beyond a reasonable doubt." *Gouveia*, 139 Haw. at 80, 384 P.3d at 856; *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966) (stating that defendant has right to be tried by twelve impartial jurors).

This court recognizes that there are problems inherent in accepting the trial judge's determination that the verdict was tainted by the jurors' fear. After all, a safety concern does not automatically taint a verdict. And here, there are specific circumstances raising questions about whether the verdict was tainted.

First (and most notable), the jurors voted to acquit! To the extent they thought the glaring man was associated with the prosecution, any fear they had would only have arisen with an acquittal. As it turns out, the glaring man was the decedent's brother who would have only been upset with an acquittal. *See* Memorandum in Support of Section 2254 Petition at 3, ECF No. 2, PageID # 12; Transcript of Proceedings (Sept. 6, 2013) at 59-60, ECF No. 13-3, PageID #s 352-53 (indicating that decedent's brother had shaved head and was upset while in courtroom). That the jurors voted to acquit is extraordinary evidence that they were not affected by fear, as very clearly laid out by the

dissenting jurists in the ICA and Hawaii Supreme Court in Gouveia's state court proceedings.

Second, while not all the jurors said that they associated the glaring man with a particular party, those jurors that did draw such an association thought he was favorable to the prosecution and hostile to Gouveia. Ms. Foster associated the man with the prosecution and said she had a concern for her safety. *See Id.*, PageID #s 374-75. Ms. Foster added that the concern "was once the verdict was read, that maybe there would be some retaliation against, you know, of us for whatever reason just being a juror." *See Id.*, PageID # 377. Ms. Li associated the man with the prosecution and indicated that there was "maybe a little" concern after the jury had reached a decision. *See Id.*, PageID # 392. Juror # 7 indicated that the man had directed his anger toward the defendant, not the jury, and was not concerned about safety. *See Id.*, PageID # 393. Juror # 7 indicated that one of the jurors wondered whether the man's anger might be directed to the jury "after everything's done." *See Id.*, PageID # 394.

Third, notwithstanding their expressions of fear, eleven of twelve jurors indicated that any such fear had no effect on their decision. Although the trial judge couched his determination as to the impact of the glaring man on what he called "credibility" findings, nothing in the record identifies facts supporting his finding that the jurors were not believable when they said that the man did not affect their decision. The trial judge makes no reference to any juror's demeanor. He just says, "It frankly beggars my reason and common sense

that it would have no bearing on the deliberations in this case and therefore the verdict." ECF No. 13-3, PageID # 452. Whether this is a true "credibility" finding is unclear; it may instead be an assumption.

But this court sees no need to rely on these acknowledged problems with the conclusion that the jurors were affected.[2] To this court, the more conspicuous problem is that there was a readily available alternative to a mistrial. *See Arizona*, 434 U.S. at 514; *Sanders*, 591 F.2d at 1296; ECF No. 13-3, PageID # 176.

State law on reasonable alternatives in the double jeopardy context does not diverge from federal law in requiring an examination of reasonable alternatives to a mistrial. Indeed, the Hawaii Supreme Court expressly recognized the need for the trial judge to have considered alternatives in Gouveia's case. The Hawaii Supreme Court, noting that the jury had reached a verdict and notified the court that there was a concern about juror safety, held, "Under these circumstances,

---

[2] The majority in the ICA's *Gouveia* opinion notes in a footnote that, because Gouveia did not argue in either the trial court or the ICA that the trial judge had "erred in failing to consider options less severe that [sic] mistrial," the ICA had "no basis for concluding" that the trial judge had erred in that regard. 2015 WL 2066780, at *10 n.5. This court nevertheless examines whether the trial judge had options short of a mistrial. While cognizant that the ICA statement might raise a possible procedural default issue, this court is relying on the Hawaii Supreme Court opinion that makes clear its understanding that the issue of alternatives to a mistrial was indeed before it. The Hawaii Supreme Court's majority opinion in *Gouveia* includes a section headed "No reasonable alternative to a mistrial would have eliminated the potential of prejudice." 139 Haw. at 80-81, 384 P.3d at 856-57.

the circuit court determined that the verdict was already tainted and that neither a continuance nor additional jury instructions to ignore the outside influence would have been effective. This determination was reasonable." 139 Haw. at 80, 384 P.3d at 856.

The problem this court identifies with the Hawaii Supreme Court's conclusion in this regard is that it is based entirely on the trial judge's statement that "there is no other remedy short of a mistrial to cure the issue at hand as neither a continuance not [sic] a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict." *See id.* at 79, 384 P.3d at 855. Nothing in the record suggests that either the trial judge or the state appellate courts considered any possible instruction at all. The trial judge made an assertion unaccompanied by explication of any sort, and the state appellate courts accepted the assertion without really examining it.

The admonition that all reasonable alternatives be considered requires more than an assertion. Finding a manifest necessity is a hugely consequential matter that requires a more searching process. Otherwise, the "reasonable alternatives" prong becomes meaningless. It becomes a foregone conclusion that there is no reasonable alternative once the prejudice is not rebutted. In fact, at one point the Hawaii Supreme Court suggested as much, saying that "the circuit court was well within its discretion to conclude that manifest necessity existed for a mistrial because the presumption of prejudice was not overcome beyond a reasonable

doubt." *Id.* Although the Hawaii Supreme Court then went on to note the need to examine reasonable alternatives separately, that discussion was cursory and nearly pro forma, consisting primarily of accepting the trial judge's statement that no reasonable alternative existed. While there are undeniably situations in which there is no reasonable alternative to a mistrial (and this court confesses to having determined that itself in a trial), something more than the existence of prejudice is required for a mistrial.

Citing *Hogan v. Dunkerley*, 579 F.2d 141 (2d Cir. 1978), the Ninth Circuit in *Sanders* said that a mistrial cannot be said to have been manifestly necessary when a trial judge has failed to adequately consider alternatives to the mistrial. *Id.* at 1299. In the Second Circuit's *Dunkerley* case that the Ninth Circuit relied on, the trial court had *sua sponte* declared a mistrial over a defendant's objections after learning that the defendant had to be hospitalized for seven to ten days because of a collapsed lung. 579 F.2d at 143-44. The Second Circuit, noting that such continuances were "commonplace in many jurisdictions," held that, because the trial court had not explained why a continuance was not feasible, there was no manifest necessity to declare a mistrial. *Id.* at 147-48 (stating that "the apparent availability of at least one alternative to a mistrial," specifically, "adjourning the trial for 7 to 10 days[,] leads us to conclude that a mistrial was not a 'manifest necessity' "). Under both federal and Hawaii law, if a reasonable alternative to a mistrial existed that

adequately addressed the potential of prejudice, double jeopardy protections now prevent Gouveia's retrial.

This trial judge is hugely sympathetic to the dilemma facing Gouveia's trial judge at the time the mistrial was declared. The trial judge acted deliberately, taking care to consult with counsel and to hear from each juror. He then concluded that nothing short of a mistrial could cure the effect of the menacing man, and the Hawaii Supreme Court agreed. But there was at least one "commonplace" thing the trial court could have tried before reaching that conclusion. This "commonplace" measure, if successful, would have preserved Gouveia's right to have the charges decided by the first jury empaneled.

Critical to the availability of this remedy is the status of the "sealed verdict" as not "received" or final. That status meant that the trial judge could have done a brief investigation into the glaring man and could then have called the jury back into court and assured the jury that his inquiries caused him to conclude that the jurors' security was being properly addressed or that there was no safety threat. For example, the trial judge could have told the jury that the court had identified the man with the shaved head who was whistling and glaring. Even if this required a short continuance, the trial judge could have told the jury that he or security officers had admonished the man and concluded that he posed no safety risk to the jurors now or in the future. The trial judge could then have sent the jurors back into the deliberation room to continue their deliberations armed with these assurances. He could have

told the jurors that they could reach the same result and even use the same verdict form if, upon further deliberation, they came to the same conclusion, while also providing a blank verdict form for them to use in case they changed their decision. This would have been similar to the trial judge's initial plan to talk to the jurors about the incident after receiving the verdict. *See* ECF No. 13-3, PageID # 349.

Trial judges often, upon receipt of jury questions, address jury concerns and questions in open court before sending the jury back to deliberate. In *United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003), jurors had communicated while evidence was being presented that they were concerned about the lack of security in the courtroom, given the large number of scary-looking people in the audience. The jury was told in open court that many of those people were actually United States Marshals in plainclothes and that the jurors should not be concerned for their safety. The jurors ultimately found the defendant guilty, and the judgment was affirmed.

As noted earlier in the present order, the verdict in Gouveia's trial was not final. This means that the trial judge still had an opportunity to remedy the situation. In declaring a mistrial without even considering the lesser, "commonplace" action of alleviating the jurors' safety concern through information and/or instructions, the trial judge committed a constitutional error. The record does not show why the preceding "commonplace" cure could not have entirely addressed any harm.

There were, of course, other possible alternatives. Had the trial judge been concerned that the outside influence might have caused the jurors to return a guilty verdict, as it appeared that the man was threatening Gouveia, the trial judge could have adopted a bifurcated procedure. Before looking at the verdict, he could have said that, if the verdict was guilty, he would declare a mistrial because he could not say beyond a reasonable doubt that the influence of the man was not harmless, but, if the verdict was not guilty, then he would receive the verdict because the influence would have been harmless beyond a reasonable doubt.

This court is at pains to avoid simply disagreeing with the trial judge's determination that there was nothing short of a mistrial that could have remedied the menacing man's influence on the jury. Well aware that actions contemplated after the fact may not fall within what is reasonably considered at the time, this court has focused its attention on what is "commonplace." Given the importance of Gouveia's federal double jeopardy rights, the court is simply unable to ignore an obvious, "commonplace" cure that was clearly available to the trial judge in light of the nonfinal nature of the verdict. At the very least, reasonable alternatives had to be considered, not declared unavailable out of hand. Under these circumstances, this court rules that the trial judge violated Gouviea's double jeopardy right in declaring that a mistrial was supported by manifest necessity. Gouveia may not be retried for manslaughter in violation of section 707-702(1)(a) of Hawaii Revised Statutes. *See United States v. Jorn*, 400 U.S. 470,

487 (1971) (stating that double jeopardy prevents retrial when trial court abuses discretion in declaring mistrial).

VI. CONCLUSION.

The court grants Gouveia's habeas petition under § 2241, ruling that his federal right to be free of double jeopardy will be violated by a retrial under the circumstances presented here. The Clerk of Court is directed to enter judgment in favor of Gouveia and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 25, 2017

[SEAL]

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROYCE C. GOUVEIA, Petitioner-Appellee, v. NOLAN P. ESPINDA, Warden, Director of the Department of Public Safety for the State of Hawaii; DOUG CHIN, Attorney General of the State of Hawaii, Respondents-Appellants.	No. 17-16892 D.C. No. 1:17-cv-00021-SOM-KJM District of Hawaii, Honolulu ORDER (Filed Jul. 23, 2019)

Before: WARDLAW, BERZON, and RAWLINSON, Circuit Judges.

The panel has unanimously voted to deny appellant's [sic] petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

KEITH M. KANESHIRO 2027
Prosecuting Attorney
KRISTINE YOO 7845
Deputy Prosecuting Attorney
City and County of Honolulu
1060 Richards Street, 10th Floor
Honolulu, Hawai'i 96813
Ph: (808) 768-6408
FAX: (808) 768-7513
Attorneys for State of Newell

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I v. ROYCE C. GOUVEIA, Defendant.	CR NO. 12-1-1474 MANSLAUGHTER (§707-702(1)(a), H.R.S.) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING STATE'S ORAL MOTION FOR MISTRIAL BASED ON MANIFEST NECESSITY

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING STATE'S ORAL MOTION FOR MISTRIAL BASED ON MANIFEST NECESSITY

(Filed Oct. 22, 2013)

State of Hawaii's (hereinafter "State") oral motion for mistrial, having come on for hearing on September

9, 2013, before the Honorable Glenn J. Kim, the State being represented by Deputy Prosecuting Attorney Kristine Yoo, and Defendant Royce C. Gouveia ("Defendant") being present and represented by Keith Shigetomi, Esq., and the Court having received evidence, heard argument of counsel, and being fully advised in the premises, makes the following findings. of fact and conclusions of law:

FINDINGS OF FACT

1. On October 4, 2012, Defendant was indicted for Manslaughter under CR 12-1.1474.

2. A jury trial commenced on September 3, 2013, and ended on September 6, 2013. The jury was given the case for deliberation at about 10:35 AM on September 6, 2013.

3. On September 6, 2013, while deliberating, the jury made the following three communications with the court:

   a. Communication No. 1 – the jury requested a "layman's explanation of 'reckless' ";

   b. Communication No. 2 – the jury expressed concern for their safety;

      "Concern: This morning on the prosecutor's side of courtroom there was a man, shaved head, glaring and whistling at defendant. We have concern for our safety as jurors."

   c. Communication No. 3 – the jury informed the court and counsel that a unanimous decision had been reached;

4. On September 6, 2013, Communication No. 2 and No. 3 were given to the Court at the same time. Communication No. 2 was dated and timed at 1424 hours and Communication No. 3 was dated and timed 1420 hours (out of order).

5. Based on Communication No. 2, both parties requested the court to individually voir dire the jurors regarding the communication.

6. All twelve jurors were individually questioned on September 6, 2013, and September 9, 2013, by both the Court and parties specifically about Communication No. 2. Special precautions were taken to ensure no juror revealed the verdict during the individual voir dire.

7. The Court questioned the jurors individually and both counsel for the State and for Defendant were given adequate opportunity to question each juror regarding Communication No. 2.

8. Four jurors witnessed an individual seated on the prosecutor's side of the courtroom whistling and/or glaring at Defendant ("incident") prior to commencing deliberation.

9. Seven of the jurors indicated discussion of the incident occurred before the verdict, ranging from within ten minutes of commencing deliberation to the end of deliberation. At least four of these seven jurors indicated discussion of the incident occurred at the beginning of deliberations, specifically that it was one of the first topics discussed.

10. During the discussion of the incident prior to verdict, the jurors who actually observed the incident

communicated to the other jurors fear for their own safety.

11. Some of the juror answers regarding Communication No. 2 and the incident included the following:

    a. Some jurors were worried about retaliation;

    b. The unidentified male's look appeared hostile during the incident;

    c. Some jurors were concerned;

    d. Some jurors felt intimidated; and

    e. The incident impacted other jurors' decisions.

12. Although all twelve jurors indicated that neither the incident itself nor the discussion regarding the incident during the deliberations affected their own decision, at least one juror indicated that the incident appeared to have impacted the deliberation process and decision.

13. The incident was not part of the evidence in the case at hand.

14. The verdict was never taken for this case. At no point during the proceedings did the Court take, read or otherwise get any indication of the jury's verdict.

15. The Court finds that the jurors' statements that the incident did not affect their decision-making process and/or deliberations are not credible as evidenced by the plain language of Communication No. 2 and answers of the voir dire of each individual juror.

16. The Court further finds that the concern for personal safety as expressed by the jurors had an impact on the jurors' decisions based on the totality of the circumstances present and thus its effect on the subsequent verdict was not harmless beyond a reasonable doubt.

CONCLUSIONS OF LAW

1. This issue is of first-impression. Although there is no specific juror misconduct, based on the facts and circumstances of the situation, the well-established "harmless beyond a reasonable doubt" standard is adopted.

2. "As a general matter, the granting or denial of a motion for new trial is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. The same principle is applied in the context of a motion for new trial premised on juror misconduct. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." State v. Furutani, 76 Hawai'i 172, 178-79, 873 P.2d 51, 57-58 (1994).

3. "The sixth amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution guarantee the criminally accused a fair trial by an impartial jury. If any juror was not impartial, a new trial must be granted. However, not all juror misconduct necessarily dictates the granting of a new trial. A new trial will not be granted if it can be shown that the jury *could not* have been influenced by the alleged misconduct."

(*Emphasis added*) State v. Kim, 103 Hawai'i 285, 290-91, 81 P.3d 1200, 1205-06 (2003); *see* State v. Gabalis, 83 Hawai'i 40, 45, 924 P.2d 534, 539 (1996).

4. "Where the trial court does determine that such alleged deprivation is of a nature which could substantially prejudice the . . . right to a fair trial, a rebuttable presumption of prejudice is raised. The trial judge is then duty bound to further investigate the totality of circumstances surrounding the alleged deprivation to determine its impact on jury impartiality. The standard to be applied in overcoming such a presumption is that the alleged deprivation must be proved harmless beyond a reasonable doubt." State v. Bailey, 126 Hawai'i 383, 400, 271 P.3d 1142, 1159 (2012); *see* Furutani, 76 Hawai'i at 177, 873 P.2d at 56.

5. Communication No. 2 raised the concern of the Court and both counsel that the incident may have substantially prejudiced the right to a fair trial. After further investigating the totality of circumstances surrounding Communication No. 2, the Court concluded at least some of the jurors were not credible, although explicitly indicated they were not lying. The Court's concern is that although all twelve jurors unanimously agreed to release Communication No. 2, no juror admitted that the incident affected their own decision making process. Furthermore, reason and common sense dictates that the incident did have an effect on the deliberations hence the impartiality of the jurors, which is not harmless beyond a reasonable doubt

6. Communication No. 2 and the underlying incident could not be proven harmless beyond a reasonable doubt.

7. "[T]he trial court must grant a motion for new trial if any member (or members) of the jury was not impartial; failure to do so necessarily constitutes an abuse of discretion." State v. Sugiyama, 71 Hawai'i 389, 391, 791 P.24 1266, 1267 (1990).

8. Under the totality of the circumstances in light of the plain language of Communication No. 2 and the voir dire of the individual jurors, the Court finds that the jury was not impartial in their deliberation and decision-making process. Based on the foregoing, there is no other remedy short of a mistrial to cure the issue at hand as neither a continuance nor a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict.

9. "Even in the absence of a defendant's express or implied consent to a mistrial, principles of double jeopardy pose no bar to reprosecution after discharge of a jury if there was a manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated. Manifest. necessity is defined as a sudden and overwhelming emergency beyond [the] control of [the] court and unforeseeable[, under circumstances in which] it becomes no longer possible to conduct [the] trial or to reach a fair result based upon the evidence." State v. Ouitog, 85 Hawai'i 128, 143, 938 P.24 559, 574 (1997); State v. Minn., 79 Hawaii [sic] 461, 903 P.2d 1282 (1995).

10. The incident underlying Communication No. 2 was both beyond the court's control and unforeseeable. Accordingly, based on Communication No. 2, and the totality of the circumstances, there is manifest necessity for a mistrial.

ORDER

ACCORDINGLY IT IS HEREBY ORDERED that the State's oral motion for mistrial based on manifest necessity be and the same is hereby granted.

Dated at Honolulu, Hawai'i: OCT 22 2013.

THE HONORABLE GLENN J. KIM Judge of the above entitled court

/s/ Glenn J. Kim
THE HONORABLE GLENN J. KIM
Judge of the above entitled court

APPROVED AS TO FORM:

/s/ Keith Shigetomi
KEITH SHIGETOMI, ESQ.
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROYCE C. GOUVEIA, Petitioner, vs. NOLAN ESPINDA, Director of the Department of Public Safety for the State of Hawaii; and DOUG CHIN, Attorney General of the State of Hawaii, Respondents.	Civ. No. 17-00021 SOM/KJM ORDER ENJOINING REPROSECUTION OR RETRIAL OF GOUVEIA; ORDER DIRECTING STATE COURT TO DISMISS PENDING CRIMINAL CASE WITH PREJUDICE AND TO RELEASE GOUVEIA FROM ALL CONDITIONS OF SUPERVISED RELEASE; ORDER STAYING ORDER DIRECTING STATE COURT TO DISMISS PENDING CRIMINAL CASE WITH PREJUDICE; ORDER GRANTING CERTIFICATES OF APPEALABILITY

ORDER ENJOINING REPROSECUTION OR RETRIAL OF GOUVEIA;

ORDER DIRECTING STATE COURT TO DISMISS PENDING CRIMINAL CASE WITH PREJUDICE AND TO RELEASE

GOUVEIA FROM ALL CONDITIONS OF SUPERVISED RELEASE;

ORDER STAYING ORDER DIRECTING STATE COURT TO DISMISS PENDING CRIMINAL CASE WITH PREJUDICE;

ORDER GRANTING CERTIFICATES OF APPEALABILITY

I. INTRODUCTION.

On August 25, 2017, this court issued an Order Granting Habeas Petition pursuant to 28 U.S.C. § 2241. *See* ECF No. 22. Judgment in favor of Petitioner Royce C. Gouveia was entered the same day. *See* ECF No. 23.

On August 29, 2017, Gouveia sought to amend the order and judgment pursuant to Rule 60(a) of the Federal Rules of Civil Procedure. *See* ECF No. 24. That motion is granted in part. The court clarifies here its earlier ruling.

First, the State of Hawaii is enjoined from reprosecuting or retrying Gouveia for the manslaughter charge at issue in the state court criminal case numbered 1PC121001474. Second, the court orders the State of Hawaii to dismiss with prejudice the state court criminal case against Gouveia numbered 1PC121001474 and orders that he be relieved of all conditions of supervised pretrial release. Third, the court stays the order requiring dismissal of the criminal case until such time as this case becomes final, meaning that all appeals of this court's orders and

judgment have been adjudicated. The court also grants the parties a certificate of appealability to allow them to appeal this court's determination that the mistrial was not supported by manifest necessity and that the sealed jury verdict was not a final verdict for double jeopardy purposes.

II. RULE 60(a) STANDARD.

Rule 60(a) provides:

> The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

Fed. R. Civ. P. 60(a). Rule 60(a) may not be the only vehicle for the clarification Gouveia seeks; Gouveia possibly could have sought relief under Rule 59 or Rule 60(b) of the Federal Rules of Civil Procedure. Still, Rule 60(a) does allow this "court to clarify a judgment in order to correct a failure to memorialize part of its decision, to reflect the necessary implications of the original order, to ensure that the court's purpose is fully implemented, or to permit enforcement." *Tattersalls, Ltd. v. DeHaven*, 745 F.3d 1294, 1298 (9th Cir. 2014) (quotation marks and citation omitted).

III. ANALYSIS.

Gouveia's § 2241 motion asked this court to "order that the State of Hawaii give effect to the jury's acquittal, enter judgment in accordance with that verdict, and dismiss Cr. No. 12-1-1474 with prejudice, and grant any other relief to which the petitioner is entitled." ECF No. 1, PageID # 8.

In its order of August 25, 2017, this court granted Gouveia's § 2241 motion, stating that "Gouveia may not be retried fo [sic] manslaughter in violation of section 707-702(1)(a) of Hawaii Revised Statutes." ECF No. 22, PageID # 644.

On August 29, 2017, Gouveia moved under Rule 60(a) for clarification of the court's order, arguing that this court had not explicitly barred any retrial of Gouveia for manslaughter, had not ordered the dismissal of the state-court proceedings with prejudice, and had not ordered the state to immediately release Gouveia from all pretrial release conditions imposed on him. *See*, *e.g.*, ECF No. 24, PageID # 647. This court grants the motion in part, ruling that the following clarification reflects the necessary implications of the court's order of August 25, 2017, and ensures that the purpose of granting relief to Gouveia is fully implemented, while preserving the rights of the parties to appeal. *See Tattersalls*, 745 F.3d at 1298.

This court believes that its original order was sufficiently clear that the State of Hawaii cannot retry Gouveia on the same manslaughter charge. This court has no reason to believe that the State of Hawaii will

flout this court's order. Nevertheless, an examination of the state court docket sheet indicates that Gouveia's retrial is still set to begin on September 25, 2017, with "trial call" set for September 19, 2017. *See* Docket Sheet, available through eCourt KōKua on the Hawaii State Judiciary website, www.courts.state.hi.us (input CaseID 1PC121001474 under "Case Search" after entering eCourt KōKua) (last visited September 12, 2017). This court therefore explicitly clarifies its earlier order and enjoins the State of Hawaii from reindicting or retrying Gouveia on the manslaughter charge at issue in case number 1PC121001474. Absent a stay or reversal of this court's order by an appellate court, the manslaughter charge at issue in case number 1PC121001474 may not proceed.

Gouveia also asks this court to clarify that the State of Hawaii must dismiss the pending criminal case with prejudice. While dismissal is an automatic consequence of this court's double jeopardy ruling, the immediate dismissal of the state court criminal case with prejudice could make a nullity of the appeal Respondents indicate they will take from this court's order and judgment. *See* ECF No. 26, PageID # 658. If this court were to order the immediate dismissal of the criminal case with prejudice, the passage of time during the pendency of the appeal could create a statute of limitations issue if Respondents prevail on appeal and the State of Hawaii seeks to reindict or retry Gouveia on the manslaughter charge. Accordingly, while the court orders the State of Hawaii to dismiss the manslaughter case against Gouveia in case

number 1PC121001474 with prejudice, this court stays that order to allow the appellate court(s) to rule on the correctness of this court's order and judgment. If this court's order and judgment become final by being affirmed, this stay shall automatically be lifted, and the State of Hawaii must immediately dismiss with prejudice the manslaughter charge asserted in case number 1PC121001474.

Gouveia also asks this court to clarify that the State of Hawaii must release him from the conditions of his supervised pretrial release. This court agrees that, unless the State of Hawaii obtains a stay of this part of the court's order from the Ninth Circuit Court of Appeals, the State of Hawaii must relieve Gouveia of the terms of his supervised pretrial release. This court declines to stay this part of the order.

The Clerk of Court is directed to send a certified copy of this order with a notation that it pertains to *Hawaii v Gouveia*, 1PC121001474, to counsel of record and to: 1) Circuit Court Judge Glenn J. Kim, First Circuit Judge, 777 Punchbowl Street, Honolulu, Hawaii 96813; 2) Kristine Yoon Yoo, Esq., Dept. of the Prosecuting Attorney, 1060 Richards Street, Honolulu, HI 96813; and 3) Keith S. Shigetomi, Esq., Pacific Park Plaza, 711 Kapiolani Boulevard, Ste. 1440, Honolulu, HI 96813.

IV. THE COURT GRANTS CERTIFICATES OF APPEALABILITY.

Under 28 U.S.C. § 2253(c)

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2253(c).

It is not clear whether only Gouveia needs a certificate of appealability to appeal this court's determination or whether Respondents also need such a certificate. To ensure that each party's rights are safeguarded, this court grants, to the extent required, Respondents a certificate of appealability to appeal this court's orders and judgment based on this court's determination that the mistrial was not supported by manifest necessity. In so doing, this court recognizes

that reasonable jurists could find this court's determination debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Although Gouveia prevailed on the merits of his double jeopardy claim, he did not prevail on each of the grounds he raised in his § 2241 motion. In case Gouveia needs a certificate of appealability to challenge rulings on grounds rejected by this court, *see Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015), this court grants him a certificate of appealability with respect to arguments rejected by this court (e.g., that the sealed state-court verdict was a final verdict for purposes of the Double Jeopardy Clause). This court recognizes that reasonable jurists might find this court's rejection of Gouveia's arguments debatable or wrong. *See id.*

For example, in footnote 1 of the present motion, Gouveia argues that "this [c]ourt's concern about the lack of polling is misplaced." ECF No. 24 n.1, PageID # 649. Although this court did not say that polling was a prerequisite to rendering any verdict final for double jeopardy purposes, it did reason that the unpolled jurors could have changed their minds such that the sealed verdict in Gouveia's manslaughter trial was not final for double jeopardy purposes. Reasonable jurists could disagree on this point.

In his Rule 60(a) motion, Gouveia posits for the first time that, because the state trial court individually voir dired jurors regarding whether the menacing man affected the verdict, that was tantamount to polling the jury. *See id.* Asking whether the menacing man affected the verdict is not the same as asking whether

the verdict reflected each juror's decision. This court also recognizes that reasonable jurists could disagree with respect to this argument and with respect to whether the sealed verdict was a final verdict for purposes of the Double Jeopardy Clause.

V. CONCLUSION.

The court grants Gouveia's Rule 60(a) motion in part. The court enjoins the retrial of Gouveia, orders dismissal of the pending charges with prejudice but stays the dismissal requirement, orders Gouveia's immediate release from supervised pretrial release conditions, and grants both parties certificates of appealability.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 12, 2017.

[SEAL] /s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

Gouveia v. Espinda, et al., Civ. No. 17-00021 SOM/KJM; ORDER ENJOINING REPROSECUTION OR RETRIAL OF GOUVEIA; ORDER DIRECTING STATE COURT TO DISMISS PENDING CRIMINAL CASE WITH PREJUDICE AND TO RELEASE GOUVEIA FROM ALL CONDITIONS OF SUPERVISED RELEASE; ORDER STAYING ORDER DIRECTING STATE COURT TO DISMISS PENDING CRIMINAL CASE WITH PREJUDICE; ORDER GRANTING CERTIFICATES OF APPEALABILITY

2004 WL 1816637 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

Steven Donald STOW, Petitioner-Appellee,
v.
Albert MURASHIGE, Warden, Maui Community Correctional Center, Respondent-Appellant.

No. 03-17036.
July 1, 2004.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
The Honorable Susan Oki Mollway
United States District Judge
D.C. CIV. NO. 02-00766 SOM/KSC
(District of Hawaii)

Petitioner-Appellee Steven Donald Stow's Supplemental Brief

Peter C. Wolff, Jr., Federal Public Defender, District of Hawaii, 300 Ala Moana Boulevard, Suite 7104, Honolulu, Hawaii 96850-5269, Telephone: (808) 541-2521, Facsimile: (808) 541-3545, Attorney for Petitioner-Appellee, Steven Donald Stow

***i TABLE OF CONTENTS**

*ii *TABLE OF AUTHORITIES*

CASES

STATUTES

CONSTITUTIONAL PROVISION

OTHER AUTHORITY

Pursuant to this Honorable Court's request, petitioner-appellee, STEVEN DONALD STOW, submits the following brief discussing whether Stow's federal habeas petition should be treated as one arising under 28 United States Code (U.S.C.) § 2241 or 28 U.S.C. § 2254.

ARGUMENT

This Court's order directs the parties to consider McNeely v. Blanas, 336 F.3d 822, 824 n. 1 (9th Cir. 2003), and Jacobs v.McCaughtry, 251 F.3d 596 (7th Cir. 2001). In McNeely, the petitioner – as well as the respondent and, it appears, the district court – characterized his federal habeas petition as "falling under" § 2254. McNeely's federal claim was that the state's holding of him in pretrial detention violated his constitutional right to a speedy trial, because no preliminary hearing had been conducted, and he had not been brought to trial, within a reasonable period of time. See McNeely, 336 F.3d at 824. This Court noted that, given McNeely's status as a pretrial detainee, he was not "being held 'pursuant to the judgment of a State court.'" McNeely, 336 F.3d at 824 n.1 (quoting § 2254). As such, this Court noted that his claim properly fell under § 2241 and treated his petition, and its review of the district court proceedings, as if they had occurred pursuant to § 2241 rather than § 2254. See McNeely, 336 F.3d at 824 n. 1.

The Seventh Circuit's Jacobs decision is similar in this respect. The state charged Jacobs with and tried him upon five counts of first-degree murder; the ***2** jury acquitted him, however, on all five counts. See Jacobs, 251 F.3d at 597. Some four years later, the state – believing it had "new evidence" warranting a different result – charged Jacobs a second time for the same predicate incident, under the rubric that it was doing so for the crimes of kidnaping and false imprisonment. See Jacobs. 251 F.3d at 597. Exhausting his state

remedies prior to being tried a second time, Jacobs filed a federal habeas petition seeking to bar the second trial on double jeopardy grounds. See Jacobs. 251 F.3d at 597. The Seventh Circuit deemed this petition as being "properly classified as a § 2241 petition because it was filed pretrial and not while he was 'in custody pursuant to the judgment of a state court.'" Jacobs, 251 F.3d at 597 (quoting § 2254).

Stow agrees that, in the ordinary case raising a pretrial double jeopardy right not to be tried, the claim should fall under § 2241. This is because, in such ordinary cases, the accused is in pretrial custody pursuant to a state trial court's pretrial detention order or the like. In such cases, no "judgment" – trial not yet having been had – exists upon which to predicate a § 2254 habeas petition. This is usually so even where, as was the situation in Jacobs, a first trial has occurred and resulted in a judgment; because, in the ordinary double jeopardy scenario, that judgment is one of acquittal, and the State, thereafter, instigates a new proceeding ***3** upon a second indictment or complaint, which, in turn, generates a new state trial court pretrial detention order of some kind.

Stow's case, however, is not the usual case. The State of Hawaii ("the State") has already tried Stow, as a result of which it secured a judgment of conviction on first-degree murder, but the jury acquitted Stow on the two counts of second-degree murder. On appeal, the Hawaii Supreme Court reversed the first-degree murder conviction, due to evidentiary insufficiency, but held that retrial could be had on the two counts of

second-degree murder. The Hawaii Supreme Court, accordingly, remanded the matter for retrial on these two counts.

A new, second indictment was never obtained and, as such, there is no "pretrial" – or, if you will, "pre-retrial" – state trial court detention order.[1] Stow, ***4** rather, remained in the State's custody pursuant to the judgment on appeal of the Hawaii Supreme Court. Since Stow's petition contested the propriety of the State's continued custody of him pursuant to the Hawaii Supreme Court's judgment on appeal, he invoked § 2254 as the basis for his petition, which provides for federal habeas relief from the "judgment of a state court" without, moreover, drawing a distinction between judgments on appeal issued by a state appellate

[1] Prior to his first trial, Stow was in pretrial custody because he could not post bail. After conviction, the trial court's issuance of the mittimus in conjunction with its judgment of conviction and sentence obviated any pretrial bail orders. The Hawaii Supreme Court's decision to reverse the judgment of conviction, however, might be said to have implicitly abrogated the issuance of mittimus and, in essence, revived the previous conditions of bail. Indeed, on remand, Stow unsuccessfully sought a reduction of bail. In a hyper-technical fashion, Stow's custody prior to the pending retrial of the second degree murder counts might be attributed to the state trial court's order denying a reduction in bail or, that court's previous, now implicitly revived, order setting bail in the first instance. Be that as it may, Stow's habeas petition did not seek to set aside these orders nor contend that the bail-related orders violated the constitution, laws, or treaties of the United States. And, relatedly, Stow's custody pending retrial on the two second-degree murder counts, as discussed above, was not "pursuant" to these bail orders, but, rather, was wholly caused by the Hawaii Supreme Court's unconstitutional decision and judgment on appeal to remand the acquitted counts for retrial.

court and judgments of conviction issued by a state trial court.

In any event, Stow does not believe that – given the present posture of this case – it makes much difference whether his petition is styled as one arising under § 2241 or § 2254. Given that relief is warranted under § 2254's more difficult standards, any failing to proceed under § 2241 would appear to be harmless, at best. Indeed, under both sections, this Court's review of the district court's ruling is *de novo.* See Arredondo v. Ortiz, 365 F.3d 778, 781 (9th Cir. 2004) ("[w]e review a district court's decision to grant . . . a 28 U.S.C. § 2254 habeas petition *de novo*"); Hunter v. Avers. 336 F.3d 1007, 1011 (9th Cir. 2002) ("[w]e review *de novo* the district court's decision to grant a 28 U.S.C. § 2241 habeas petition"). What differs, then, is not the standard of review that this Court applies to the State's appeal in the present matter. Rather, the salient difference between a § 2241 habeas petition and ***5** one brought under § 2254 is the standard that the district court applies to grant the writ.

Under § 2254, the district court may only grant the writ, as is relevant here, if the state court decision complained of was either contrary to or constituted an unreasonable application of clearly established federal law as decided by the United States Supreme Court. In granting Stow the writ, the district court ruled that this standard was met here. Under § 2241, on the other hand, the petitioner is entitled to the writ upon simply showing that he is in custody in violation of the federal constitution, laws, or treaties. See 28

U.S.C. § 2241(c)(3); Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) ("[t]o prevail on his claim for habeas relief [under § 2241], Mannhalt must show that his detention violates the Constitution, a federal statute, or a treaty" (citing § 2241 and Rose v. Hodges. 423 U.S. 19, 21 (1975) (*per curiam*))). It seems intuitive, if not axiomatic, that if § 2254's more stringent standards are met, so, too will habeas relief be warranted under § 2241.

The present matter is before this Court on an appeal brought by the State. If this Court is inclined to hold, as it did in McNeely, that the petition falls under § 2241 rather than § 2254, the State's burden on appeal would seem to become more onerous. Rather than the questions briefed, which center around whether the district court was wrong in granting the writ because the Hawaii Supreme Court's decision ***6** was contrary to or an unreasonable application of clearly established federal law as decided by the United States Supreme Court, the question under § 2241 would simply be whether the district court was wrong to issue the writ because retrying Stow on the two second-degree murder counts violated the federal constitution's double jeopardy clause (as applicable to the states through incorporation in the fourteenth amendment's due process clause). The latter question, Stow submits, would be the more difficult one for the State to persuasively answer in its favor.

This Court's recent decision in White v. Lambert. ___ F.3d ___ 2004 WL 1276822 (9th Cir. June 10, 2004), confirms that, at least on the facts of this case.

characterizing Stow's petition as one arising under § 2241, rather than under § 2254, only assists Stow in vindicating his constitutional protection against double jeopardy. In White, this Court held that § 2254 "is properly seen as a limitation on the general grant of habeas authority in § 2241," such that it is "the exclusive vehicle" by which a prisoner in custody pursuant to the judgment of a state court may obtain habeas relief from a federal court, even if the prisoner's habeas claims do not challenge the underlying state court judgment; in White, a judgment of conviction. White, 2004 WL 1276822 at *6. Hence, a habeas petitioner in custody pursuant to a state court judgment must meet the additional, AEDPA-amended requirements that attach to a § 2254 petition. See White, 2004 WL 1276822. at *2-*7. A habeas petitioner in state ***7** custody for some other reason that is not attributable to a state court judgment, such as pre-trial custody or detention pending extradition, may avail himself of § 2241, thereby alleviating himself of the AEDPA's stringent requirements. See White. 2004 WL 1276822, at *2-*7.

Nor, as both McNeely and White evince, is this Court's jurisdiction – or that of the district court – affected by whether the petition is styled one way or the other. In both McNeely and White, this Court simply recharacterized the petition's statutory basis and thereafter proceeded under the appropriate substantive standards; in neither case did this Court perceive that it lacked jurisdiction.

CONCLUSION

In sum, petitioner-appellee STEVEN M. STOW submits that it does not make a material difference in the present matter whether his petition is perceived as arising under 28 U.S.C. § 2254, as the parties and the district court have characterized it, or under 28 U.S.C. § 2241. In either event, he is entitled to the writ.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Electronically Filed
Intermediate Court of Appeals
CAAP-14-0000358
31-JAN-2014 11:39 AM

STATE OF HAWAII	)	
	)	
vs.	)	Criminal No. 12-1-1474
	)	
ROYCE C. GOUVEIA,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

before the Honorable Glenn J. Kim, Judge, Fourth Division, presiding, on September 9, 2013.

JURY TRIAL.
Verdict.

APPEARANCES:

KRISTINE YOO, ESQ. For the State of Hawaii
ROBERT RAWSON, ESQ.
Deputies Prosecuting Attorney

KEITH S. SHIGETOMI, ESQ. For the Defendant
Court-appointed Attorney

REPORTED BY
Sharon Hulihee, RPR, CSR 306
Official Court Reporter
State of Hawaii

Official Court Reporters
First Circuit Court
State of Hawaii

* * *

[282] THE COURT: Do you recall that or not, Ms. Yoo?

MS. YOO: Yes, I do recall that. There's – I note about three.

THE COURT: Some of them said it came up both at that point and that it also came up later in the deliberations.

MS. YOO: Right.

THE COURT: I think two or three people said that.

MS. YOO: I have three people saying that it came up towards the beginning of the conversation.

THE COURT: Okay. You think that's important?

MS. YOO: Your honor, I do believe that that's important, especially given what Ms. Hanashiro said was that it was one of immediately – one of the first things that had come up as soon as they got back there, that it was sort of like, hey –

THE COURT: Yeah, I mean, it would seem to imply that it was pretty much – pretty important to at least some of them, right? I mean, that's what it implies to me, if it's one of the earliest topics of discussion when they get into the room.

MS. YOO: And the fact that it again came up [283] later and the fact that after the verdict that they felt the need or the need to indicate to the court what they had discussed from the beginning part. So based on all of that, your honor, unless the court has any other questions?

THE COURT: You have any response, Mr. Shigetomi? I have what I am construing now to be a motion for mistrial by the State based on manifest necessity to declare that mistrial.

MR. SHIGETOMI: And we object to it.

THE COURT: Yeah. So I'm giving you a chance to make a record if you want to.

MR. SHIGETOMI: Well, your honor, the court addresses or instructs the jury that you are to make your decision based solely on the evidence in this case. You listen to the evidence; you follow the court's instructions; you make a decision. Every one of the jurors have said it had – there was discussion, but it had no impact on my decision, all 12.

THE COURT: That's clearly the strongest argument for me to deny the State's motion in my view is that all 12 of them, when I asked them specifically, said it had no impact on their deliberations. Go on.

MR. SHIGETOMI: And that's the crux of our argument, that they are presumed to follow instructions. [284] They all said that they did and therefore the court should take the verdict at this point in time. It's not manifest necessity.

THE COURT: Well, if I declare a mistrial based on the reasons that Ms. Yoo has given me, it's a no-brainer it's manifest necessity, right? There's no – put it this way. There's no other remedy short of a mistrial that's going to cure this or allow us to take the verdict, correct? It's not like we can continue the trial –

MR. SHIGETOMI: I understand.

THE COURT: – or I can give them a further instruction.

MR. SHIGETOMI: Correct, correct.

THE COURT: You know, they reached a verdict already and then they tell me that there was this other thing. So, you know, if I think it rises to the level of a mistrial, I'm pretty much going to find that there's manifest necessity 'cause there's nothing short of a mistrial that I can do. It's a tainted verdict, if that's going to be my ruling. I mean, you agree with that, right?

MR. SHIGETOMI: I would agree with that, your honor.

THE COURT: Let me ask you this, Mr. Shigetomi, at the risk of seeming to put you on the spot

* * *