No. 19-___

IN THE

Supreme Court of the United States

CHARLES GARSKE, RICHARD GOTTCENT, AND MICHAEL SEDLAK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court has established two standards for determining whether the Double Jeopardy Clause bars retrial of a defendant after a mistrial. A defendant who requests a mistrial can presumptively be retried unless there is proof that the government intentionally goaded the defendant into moving for the mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). In contrast, a defendant who objects to the entry of a mistrial can be subjected to a second trial only where the government has made a showing of "manifest necessity" for the trial judge's declaration of the mistrial. *United States v. Perez*, 22 U.S. 579, 580 (1824).

The question presented is:

For purposes of determining whether the Double Jeopardy Clause bars a second prosecution, does the test enunciated in *Oregon v. Kennedy*, 456 U.S. 667 (1982), apply when the government caused the mistrial, and the mistrial was entered over the defendant's objection?

RELATED PROCEEDINGS

United States Court of Appeals for the First Circuit:

United States of America v. Charles v. Charles W. Garske, Richard J. Gottcent, and Michael Sedlak, No. 18-1873 (September 20, 2019)

United States District Court, District of Massachusetts:

United States of America v. Donna Ackerly, Charles W. Garske, Richard J. Gottcent, and Michael Sedlak, Criminal Action No. 16-10233-RGS (August 16, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles Garske, Richard Gottcent, and Michael Sedlak respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is published at 939 F.3d 321. The district court opinion (Pet. App. 23a-50a) is published at 323 F. Supp. 3d 187.

JURISDICTION

The court of appeals issued its decision on September 20, 2019. Pet. App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part that no person "be subject for the same offence to be twice put in jeopardy of life or limb."

Federal Rule of Criminal Procedure 23 provides in relevant part:

> (b) JURY SIZE.
>
> > (1) *In General.* A jury consists of 12 persons unless this rule provides otherwise.
> >
> > (2) *Stipulation for a Smaller Jury*. At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:
> >
> > > (A) the jury may consist of fewer than 12 persons; or
> > >
> > > (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary

to excuse a juror for good cause after the trial begins.

(3) *Court Order for a Jury of 11*. After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

INTRODUCTION

This case raises an important and as-of-yet unanswered question in Double Jeopardy jurisprudence: when should the government get a second opportunity to prosecute a defendant after the government's own conduct caused a mistrial to be declared over the defendant's objection?

Here, the government charged four individuals with fraud and conspiracy counts. After three weeks of trial and on the eve of closings, one of the twelve jurors was dismissed for cause. Pursuant to Federal Rule of Criminal Procedure 23(b)(2)(B), three out of the four defendants – Petitioners Charles Garske, Richard Gottcent, and Michael Sedlak (hereinafter "Petitioners") – agreed to proceed to a verdict with the existing eleven-person panel. Initially, the government agreed, stating unequivocally that it consented "to proceed with 11." Pet. App. 27a. But the government withdrew its consent as to all four defendants when the fourth defendant, Donna Ackerly, refused to agree. Over the objection of the three Petitioners, the district court declared a mistrial. *See* Pet. App. 29a.

When the government announced its intention to retry all four defendants, Petitioners objected that a second trial would violate their rights under the Double Jeopardy Clause. *See* Pet. App. 5a-6a. The district court agreed and dismissed the indictment as to Petitioners, holding that the government's interest in avoiding severance – its stated

reason for withholding consent – was not sufficiently weighty to justify subordinating the Petitioners' "valued right to have [their] trial completed by the first impaneled tribunal." Pet. App. 24a. The First Circuit reversed, applying the standard enunciated in *Oregon v. Kennedy*, 456 U.S. 667 (1982), a case in which the defense had requested a mistrial. The First Circuit found that even though Petitioners agreed to proceed with a jury of eleven and even where the government is the "but-for" cause of a mistrial, the government's "conduct – including that which 'might be viewed as … overreaching' – does 'not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.'" Pet. App. 19a (quoting *Kennedy*, 456 U.S. at 675-76).

The Court has yet to address the Double Jeopardy implications of the prosecution forcing a mistrial over a defendant's objection. As a result, lower courts have taken conflicting approaches to analyzing that problem. Some, like the First Circuit below, have required a showing that the government acted in bad faith to deliberately instigate a mistrial in order to bar a second prosecution. Other courts have precluded retrial where the prosecution's conduct caused the mistrial, even if its conduct did not rise to the level of bad faith required by the Court in *Kennedy*.

How the government's conduct should be evaluated for purposes of the Double Jeopardy Clause is a question of immense significance, as it implicates a right "'fundamental to the American scheme of justice.'" *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). Indeed, the First Circuit's holding is at odds with this Court's Double Jeopardy jurisprudence. Defendants have a "valued right" to complete their trial with the empaneled jury, which may be subordinated only in extraordinary circumstances and when compelled by the public interest. *Downum v. United States*, 372 U.S. 734,

736 (1963). Requiring defendants who *object* to a mistrial to make a showing that the government acted in bad faith under *Kennedy*, which the Court requires of defendants who *request* a mistrial, runs afoul of the fundamental precept that the Double Jeopardy Clause protects a defendant against prosecutorial "overreaching," *United States v. Jorn*, 400 U.S. 470, 484 (1971), and from the State seeking to "achieve a tactical advantage over the accused," *Arizona v. Washington*, 434 U.S. 497, 508 (1978).

For these reasons, the writ should be granted.

STATEMENT OF THE CASE

I. Legal Background

The Double Jeopardy Clause provides that a criminal defendant shall not be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. Amend. V. "[J]eopardy attaches when the jury is empaneled and sworn." *Crist v. Bretz*, 437 U.S. 28, 35 (1978). The reason for such early attachment "lies in the need to protect the interest of an accused in retaining a chosen jury." *Id*. In other words, a defendant has a "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

"[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require the accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). This is because a second trial may be "grossly unfair" to a defendant. *Id.* at 503. A second trial "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Id.* at 503-04.

Of course, no constitutional guarantee is without limits. There are circumstances in which a defendant's "valued right" to have his trial completed by a particular

tribunal "may be subordinated to the public interest." *Downum v. United States*, 372 U.S. 734, 736 (1963). A defendant may be retried where, "taking all the circumstances into consideration, there is a manifest necessity for the [mistrial], or the ends of justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579, 580 (1824). This Court has emphasized that a mistrial should be declared "only in very extraordinary and striking circumstances," *Downum*, 372 U.S. at 736 (quoting *United States v. Coolidge*, 25 F. Cas. 622, 622 (C.C.D. Mass. 1815)), such as when "unforeseeable circumstances" arise during trial, "making its completion impossible." *Wade*, 336 U.S. at 689.

Prior to 1970, based on the Court's ruling in *Patton v. United States*, 281 U.S. 276, 292 (1930), it was believed that a jury of twelve was required by the Constitution. But in *Williams v. Florida*, 399 U.S. 78 (1970), this Court repudiated *Patton* and held that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" *Id.* at 102 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). Thus, with respect to jury size, the important consideration is that it is "large enough to promote group deliberation, free from outside attempts at intimidation, and [provides] a fair possibility for obtaining a representative cross-section of the community." *Id.* at 100. As few as six jurors could suffice. *Id.*

Notwithstanding this Court's ruling in *Williams*, Federal Rule of Criminal Procedure 23 requires a jury in a criminal case to have twelve members, unless the requirements of Rule 23(b)(2) or Rule 23(b)(3) are satisfied. Rule 23(b)(2) provides that "[a]t any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if

the court finds it necessary to excuse a juror for good cause after the trial begins." Rule 23(b)(3) authorizes the court to permit a jury of eleven to return a verdict over the objection of the parties where deliberations have already begun and there is good cause to excuse the twelfth juror.

II. Factual and Procedural Background

1. On August 10, 2016, Petitioners Charles Garske, Richard Gottcent, and Michael Sedlak, along with co-defendant Donna Ackerly, were charged by indictment with multiple counts of wire fraud, honest services fraud, and conspiracy, in violation of 18 U.S.C. §§ 1343, 1346, and 1349. *See* Pet. App. 2a. The defendants were employees of Georgeson, Inc., a proxy solicitation firm. *See id.* 2a-3a. The indictment alleged that the defendants participated in a conspiracy to provide tickets to concerts and sporting events to an employee of a proxy advisory firm, Institutional Shareholder Services ("ISS"), in order to obtain information about whether and how its clients had voted on shareholder proposals. *See id.* 3a. The total value of the tickets provided to the ISS employee during the alleged four-and-a-half-year conspiracy was $12,000. *See id.* 25a, n.4. The indictment also charged the defendants with billing a portion of the cost of some of the tickets to clients and falsely describing the tickets on invoices. *See id.* 3a. Prior to trial, Ackerly filed two motions requesting severance from her three co-defendants; they were both denied. *See id.*

2. Trial began on February 26, 2018. *See* Pet. App. 3a. At the start of trial, the district court empaneled twelve jurors and two alternates. *See id.* Two of the jurors were excused for cause during the first week, leaving no additional alternates. *See id.*

Trial lasted three weeks, until Friday, March 16, 2018, with closing arguments scheduled for the following Monday. *See* Pet. App. 3a. Over the weekend, however, one of

the jurors informed the court clerk that his wife had a medical emergency and that he was concerned about fulfilling his duties as a juror. *See id.* He later updated the clerk that his wife had been diagnosed with a brain tumor and would require surgery. *See id.* At the direction of the judge, the clerk informed the parties by email about the situation and requested the parties' consent to proceed with a jury of eleven. *See id.* 4a. Counsel for the government, Garske, Gottcent, and Sedlak all responded in the affirmative. *See id.*

Two hours after consenting, however, the government sent a second email stating that its consent was conditioned on all four defendants consenting. *See* Pet. App. 4a. Counsel for Ackerly responded that she would not consent to proceed with eleven jurors, invoking her unsuccessful pretrial attempts to gain severance from her co-defendants. *See id.* The government replied to all, asserting that it was "puzzled by [Ackerly's counsel's] reference to severance" because "it would be terribly inappropriate to use this circumstance in an attempt to achieve that result." *Id.*

Later that afternoon, the clerk emailed the parties that she had communicated their positions to the court. *See* Pet. App. 4a. The email explained that the court would enter findings of good cause to excuse the juror and that the court "accept[ed] the emails of the consenting defendants[']' attorneys as made in good faith and believe[d] that the double jeopardy clause g[ave] . . . those defendants the right to proceed to a verdict with [the empaneled] jury." *Id.* Soon after, the clerk sent another email, stating that the district court had just seen the government's second email – making its consent conditional – and reporting that the court "fe[lt] it ha[d] no other choice than to declare a mistrial on Monday morning." *Id.* 4a-5a.

3. On Monday, March 19, 2018, the district court announced its intention to declare a mistrial in light of Rule

23(b)(2) and the government's unwillingness to consent to a jury of eleven. *See* Pet. App. 5a. From the bench, the court said that there was "no power that I see, or discretion that I have, under the rule to force any different result." *Id.* 29a. Counsel for Petitioners objected to the mistrial and expressed their desire to finish the trial with eleven jurors. *See id.* 5a. The district court then entered a finding of good cause to dismiss the twelfth juror and declared a mistrial. *See id.* The next day, the government informed defendants' counsel that it intended to bring all four defendants to trial a second time. *See id.*

4. Petitioners moved under the Double Jeopardy Clause to bar a second trial. *See* Pet. App. 5a-6a. In opposing the motion, the government conceded that it had refused to consent to finish the trial because it wanted all four defendants to be tried together. *See id.* 48a.

5. The district court granted Petitioners' motion and dismissed the indictment as to them. *See* Pet. App. 50a. The court viewed the issue as "one involving a fundamental principle of constitutional supremacy: '[W]here a constitutional right comes into conflict with a statutory right, the former prevails.'" Pet. App. 33a (quoting *Gray v. Mississippi*, 481 U.S. 648, 663 (1987)). After reviewing the historical context of the Double Jeopardy Clause and relevant Supreme Court cases, the district court extrapolated "several principles that compel the conclusion that retrial of the three consenting defendants would violate their Fifth Amendment right." Pet. App. 43a.

First among those is the principle that a defendant should be protected "against the ordeal of multiple trials." Pet. App. 43a-44a. Second, a defendant has a "'prized right to have his trial, once underway, completed by a particular trier.'" *Id.* 45a (quoting *United States v. Toribio-Lugo*, 376 F.3d 33, 37 (1st Cir. 2004)). The district court opined that this prized right is "weightiest after a defendant has

undergone the full gauntlet of a criminal trial and after he has likely shown his hand to the prosecution," *id.* 48a, which applied to the circumstances here. The court found that the government's objective was "to submit all four defendants to the jury for a verdict, most probably in the belief that a conviction of all four would be made more likely by the jury's collective consideration." *Id.* The court added, "[A]s defendants speculate and the government more or less concedes . . . [the government] was determined to prevent Ackerly from succeeding in her quest for a severance." *Id.* The district court concluded that the mistrial would unfairly benefit the government because "the three defendants stood to gain nothing from a mistrial, while the government accomplished at least one, and possibly two, of its objectives." *Id.*

The court acknowledged that a defendant's valued right may be "'subordinated to the public's interest in fair trials designed to end in just judgments,'" Pet. App. 48a-49a (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)), but concluded that the government had "fail[ed] to demonstrate how the public's interest in just punishment would have been threatened had the government agreed to proceed to a verdict against Garske, Gottcent, and Sedlak, and then retried a shorter and simpler case against Ackerly, rather than undertaking another month-long trial against all four defendants." *Id.* 49a.

6. The First Circuit reversed. *See* Pet. App. 22a. Writing for the First Circuit, Judge Seyla framed the issue as involving "two competing rights: the right of all parties to have a criminal case decided by a jury of twelve and a criminal defendant's right not to be twice put in jeopardy." *Id*. 6a. The court stated that the right to have a criminal case decided by a jury of twelve was a constitutional right, citing *Patton v. United States*, 281 U.S. 276 (1930). *See* Pet. App. 6a. As a result, the First Circuit concluded that "[o]nce

Juror 12 was excused, the remaining eleven jurors no longer comprised a constitutional jury and the trial was stopped in tracks." Pet. App. 14a. The court held it was "nose-on-the-face plain that there was manifest necessity for the district court's declaration of a mistrial" because "the court was left with a constitutionally deficient jury of eleven." *Id.* 17a.

The First Circuit further held that the mistrial was justified by the "three interstitial factors," *id.* 17a, laid out in *United States v. Simonetti*, 998 F.2d 39, 41-42 (1st Cir. 1993), because the district court consulted with counsel, there were no feasible alternatives, and the court did not act rashly. The First Circuit criticized the district court for not limiting its analysis to these factors, which only inquire as to the court's own actions, and held that it erred by applying the manifest necessity standard to actions taken by the government. *See* Pet. App. 17a. The First Circuit proclaimed that "[t]here is nothing in . . . the Supreme Court's double jeopardy jurisprudence that affords any basis for applying the manifest necessity doctrine to the decisionmaking of the government (as opposed to that of the trial court)." *Id.* 12a.

The court concluded that, absent purposeful instigation of a mistrial, the government's actions are irrelevant to the double jeopardy analysis, even though the defendants had objected. *See id.* 12a-13a. Addressing what qualifies as "purposeful instigation," the First Circuit applied the standard enunciated in *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982), a case in which the defendant had *requested* a mistrial, holding that there must be a showing that the prosecutor intended "to subvert the protections afforded by the Double Jeopardy Clause." Pet. App. 19a. Conversely, "the government's knowledge that withholding consent to move forward with a jury of twelve would cause a mistrial" did not evince intent to abridge the defendants'

double jeopardy rights. *Id*. Finally, the First Circuit dismissed the defendants' argument that the first trial gave the government an unfair dress rehearsal that would allow it to retool its case in a second trial, claiming that "the purported advantage works both ways." *Id.* 21a.

REASONS FOR GRANTING THE WRIT

I. Lower Courts Are Divided About When the Double Jeopardy Clause Bars a Retrial After the Government's Conduct Causes a Mistrial Over the Defendant's Objection.

This case presents an important question that has confounded lower courts: what standard applies to determining when a second prosecution is permitted after a mistrial that was declared over the defendant's objection and was caused by the government's conduct?

1. While the Court has never directly addressed what the Double Jeopardy standard should be when the defense objects to a mistrial caused by the government, it has forecast that the factual scenario at issue here would require a different approach to evaluating manifest necessity. In *Illinois v. Somerville*, 410 U.S. 458, 464 (1973), the Court held that a procedural defect in the indictment warranted a mistrial and permitted re-prosecution under the Double Jeopardy Clause, but the presentation of evidence had not yet begun and there was no suggestion of government gamesmanship. The Court stated that under *Perez*, it would be an "*entirely different question*" if the "declaration of a mistrial [was] on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation[.]" *Id.* (emphasis added); *see also Washington*, 434 U.S. at 508 (the "strictest of scrutiny is appropriate . . . 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") (emphasis added).

This case presents the "entirely different question" reserved in *Somerville*, 410 U.S. at 464. The government exercised its option under Rule 23(b) to withhold consent to a jury of eleven in order to gain a tactical advantage over the Petitioners – namely, to prevent severance of the defendants. Because the Court has not ruled on how that "entirely different question" should be answered, lower courts have taken conflicting approaches to considering the government's role in causing a mistrial that is declared over a defendant's objection.

2. Some courts, including the court below, have held that a second trial is barred only when the government has in bad faith deliberately forced the mistrial (as in *Kennedy*). The First Circuit held that even though the defendants had objected to the mistrial, the only mechanism to "unlatch" the double jeopardy bar was proof of government "intent to abridge the defendants' double jeopardy rights." Pet. App. 19a (prosecutorial "overreaching," "error," or "even harassment" insufficient to preclude second trial). Accordingly, the *Kennedy* standard was not satisfied because the trial judge "made no finding that the number of jurors was irrelevant to the government's decision." *Id.* Put another way, in the First Circuit's analysis, the government's withholding of consent under Rule 23(b)(2) was presumptively valid.

Similarly, in *United States v. Simonetti*, 998 F.2d 39 (1st Cir. 1993), the First Circuit cited *Kennedy* and found that because the government's failure to disclose exculpatory evidence was only "inadvertent" and "careless," the mistrial declared over defendant's objection was manifestly necessary and retrial was permitted. *Id.* at 42.

Several state courts have also held that the government has no obligation to explain its reasons for refusing to consent to proceeding with eleven jurors, and that absent bad faith, a mistrial on such grounds will not bar re-

prosecution. In *State v. Gorwell*, 661 A.2d 718 (Md. 1995), the Maryland high court allowed a second prosecution when a mistrial had been declared over the defendant's objection because the State had refused to consent to proceeding with eleven jurors. Citing *Kennedy*, 456 U.S. 667, the court noted that this was not a case where the government had engaged in misconduct "with the specific intent to cause a mistrial." 661 A.2d at 724. Like the First Circuit, the court refused to read into Maryland law a requirement that either party "explain or justify a decision to insist upon the number of jurors provided by law," *id.*, and concluded that there is "no requirement that the trial judge agree with the State's decision to decline to continue with [eleven] jurors, or, where reasons are given by the State, that the trial judge agree with those reasons." *Id.* at 725-26. *See also King v. Commonwealth*, 579 S.E.2d 634, 640 (Va. Ct. App. 2003) (though government provided no reason for its refusal to proceed with eleven jurors, the court held that manifest necessity for a mistrial exists when the government "asserts its right to a trial by a jury of twelve").[1]

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[1] While not necessarily citing *Kennedy*, several lower courts have held that there is no manifest necessity when it is clear that the prosecution is seeking a "do-over" in its request for a mistrial. *See, e.g.*, *Routh v. United States*, 483 A.2d 638, 645 (D.C. Cir. 1984) (finding no manifest necessity when trial court granted prosecution's request for mistrial due to its witness suddenly falling ill in part because "there is reason for concern that the prosecutor's decision to ask for a mistrial may have been influenced, even if only unconsciously, by the apparent setbacks to the government's case"); *State v. Bates*, 597 P.2d 646, 650-52 (Kan. 1979) (finding no manifest necessity where court declared a mistrial to allow government to obtain mental examination of defendant because the apparent reason State requested a mistrial was that it did not realize until trial how strong defendant's insanity defense was and it wanted the opportunity to repair its prosecution of defendant); *see also United States v. Banks*, 383 F. Supp. 389, 396-97 (D.S.D. 1974) (concluding that reasons given by prosecution for withholding consent

4. By contrast, other courts have not required a showing of bad faith in order to trigger the protections of the Double Jeopardy Clause. On facts almost identical to those at issue here, Oklahoma's high court ruled that there is no presumption of validity to the prosecution's refusal to consent to an eleven-member jury, and that the burden is on the prosecution, not the defense, to offer a "compelling" reason for withholding its consent. *See Hutchens v. District Court of Pottawatomie*, 423 P.2d 474, 475 (Okla. 1967). In *Hutchens*, the defendant had agreed to proceed with eleven jurors, but the prosecution had refused. *Id.* at 476. Considering whether a mistrial in such circumstances was an "overruling" or "manifest" necessity, the Oklahoma Court of Criminal Appeals found that the State's refusal to consent was not "cogent or compelling" and "instead ha[d] the appearance of being an arbitrary or adamant position, not based on any necessity whatsoever." *Id.* at 477-78. Accordingly, under the Double Jeopardy Clause, the prosecution's refusal to consent to a jury of eleven, without good reason, was insufficient to permit a second prosecution.

Consistent with the holding of the Oklahoma Court of Criminal Appeals, other lower courts consider the prosecutor's role in causing the mistrial, even if it falls short of "bad faith," to weigh in favor of precluding re-prosecution. *See, e.g.*, *United States v. Shafer*, 987 F.2d 1054, 1059 (4th Cir. 1993) (finding no manifest necessity for retrial when mistrial was declared in part because after six years of preparation, prosecutors discovered mid-trial "substantial exculpatory evidence," and the court did not want the government's "self-inflicted injury" to be "used to afford the

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under Rule 23(b) – namely, that its chance of obtaining conviction from the eleven jurors was "'slim'" – "constitute a violation of the spirit in which a prosecutor should function"). These cases do not shed light on whether double jeopardy would bar a second trial if the government conduct did not suggest an explicit desire for a "do-over."

government a second chance to prosecute"); *United States v. Glover*, 506 F.2d 291, 298 (2d Cir. 1974) (finding no manifest necessity when trial court granted prosecution's request for mistrial because government failed to provide court with defendant's statements that implicated co-defendants prior to trial); *McNeal v. Hollowell*, 481 F.2d 1145, 1152 (5th Cir. 1973) (no manifest necessity because prosecution had contributed to the need for declaring a mistrial by proceeding with jury empanelment knowing that there was a risk that the co-indictee would not testify); *Hylton v. Eighth Judicial Dist.*, 743 P.2d 622, 626-27 (Nev. 1987) (explaining that retrial is barred where governmental misconduct that rises to the level of "'inexcusable' negligence" causes a mistrial).

While in many of these decisions the appellate courts found that the trial court had alternatives to a mistrial, implicit in their holdings is a consideration that balances the government's role in causing the mistrial against the defendant's Double Jeopardy rights. *See, e.g.*, *Shafer*, 987 F.2d at 1059 ("The government's actions in this case were inexcusable . . . . Clearly, the mid-trial 'discovery' of substantial exculpatory evidence contradicting the government's theory of the case did not constitute manifest necessity justifying a mistrial over the defendant's objection."). *See also Glover*, 506 F.2d at 299 (noting that barring re-prosecution "will be worth the possible sacrifice of public justice in the case of [Defendant] if this decision alerts prosecutors to enlist the willing aid of trial courts fully to explore Bruton problems" before trial).

In short, the caselaw is fractured and muddled and the Court's guidance is required. The decision below turned on the court's application of the *Kennedy* standard to evaluate the government's refusal to consent to an eleven-member jury. It placed the burden on the defense to establish that the government deliberately instigated the mistrial in bad

faith, rather than require the government to proffer reasons of sufficient weight that would justify subordinating the defendants' valued right to be free from successive prosecutions. Accordingly, this case presents the perfect vehicle for the Court to provide guidance to conflicted lower courts about how the prosecution's role in bringing about the mistrial should be evaluated for purposes of Double Jeopardy when the mistrial is declared over the defendant's objection.

II. The Question Presented Is Important and Recurring.

1. At stake in this case is a fundamental constitutional question of when a defendant should be free from "being twice put in jeopardy of life or limb" for the same offense. U.S. Const. Amend. V. The protection against double jeopardy is a foundational right in our country's history, "fundamental to the American scheme of justice." *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (quoting *Duncan v. Louisiana*, 391 U.S. 145 (1968)); *see also Green v. United States*, 355 U.S. 184, 198 (1957) ("The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society."). "While the precise origin of the protection against double jeopardy is unclear, it is certain that the notion is very old." *United States v. Jenkins*, 490 F.2d 868, 870 (2d Cir. 1973). As Justice Black explained, "Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers." *Bartkus v. People of State of Illinois*, 359 U.S. 121, 152 (1959) (Black, J., dissenting).

This case presents the Court with a unique opportunity to define the scope of this foundational constitutional right as it applies to situations in which government

conduct forced a mistrial over the objections of the defendant.

2. Clarifying how, and the extent to which, government conduct should be considered when determining whether a second trial is permitted will necessarily require the Court to address a structural tension between Federal Rule of Criminal Procedure 23(b) and the Double Jeopardy Clause. "Faced with a number of unique situations left in doubt by the Federal Rules of Criminal Procedure, the Court has always sought to interpret the rules in a manner which protects the defendants' constitutional rights . . . ." *United States v. Meinster*, 484 F. Supp. 442, 444 (S.D. Fla. 1980), *aff'd sub nom. United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136 (1982). This approach recognizes that "[t]he [Federal Rules of Criminal Procedure] are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v. United States*, 378 U.S. 139, 142 (1964).

Here, a rigid interpretation of Rule 23 would grant the prosecution the right to withhold consent under Rule 23(b)(2) and thereby terminate a defendant's trial for any reason. Such a *carte blanche* would render the Double Jeopardy Clause meaningless whenever the jury size fell below twelve. In order to preserve a defendant's Double Jeopardy rights in such a situation, at least one commentator has urged a construction of Rule 23 that would require the government to articulate its reasons for objecting to an eleven-member jury, or at least require that government consent not be withheld unreasonably. *See* Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 475-77 (1977); *see also* George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. Cal. L. Rev. 1551, 1556 (1996) (arguing that if state or federal law permits the parties to agree to a jury of less than twelve, there is no

necessity for a mistrial and the party requesting a mistrial "is the one who is stuck with the double jeopardy consequences").

The waiver provisions in Rule 23(b)(2) were intended to implement the holding of *Patton v. United States*, 281 U.S. 276, 312 (1930). Assuming that the Constitution required a jury of twelve, *Patton* gave the following rationale for requiring the consent of both the court and prosecution in order to proceed with fewer than twelve jurors:

> [T]he maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had . . . .

Id. (emphasis added).

A similar reasoning was adopted in *Singer v. United States*, 380 U.S. 24 (1965). There, the Court addressed the constitutionality of Rule 23(a), which requires all "parties" to consent to proceed with a bench trial. While there are important differences between consenting to an eleven-member jury and consenting to a bench-trial, the Court underscored that prosecutors were expected to exercise their right to withhold consent under Rule 23 consistent with their special role – "not an ordinary party to a controversy, but a 'servant of the law.'" *Id.* at 37 ("It was in light of this concept of the role of the prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by the government attorneys."). Even so, the Court in *Singer* left open the possibility that the government's withholding of consent under Rule 23 could in certain circumstances violate a defendant's rights. *Id.* (recognizing that "there might be some circumstances where a defendant's reasons for wanting to be tried by a

judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial"). This case presents such a circumstance and requires the Court's intervention.

3. Finally, the specific circumstances of this case are likely to be repeated. Double Jeopardy questions continue to surface where jurors are lost mid-way through trial in a variety of circumstances. *See* Part I, *supra* at 12-14 (citing cases)*; see also People of the State of New York v. Smith*, 111 N.Y.S.3d 46, 48-49 (N.Y. App. Div. 2019) (mistrial not manifestly necessary after loss of juror because curative instruction could have been given); *Johnson v. United States*, 619 A.2d 1183, 1187 (D.C. 1993) (government within its rights to object to a jury where "one of its members has had his mental capacity and capabilities openly challenged by his peers" and finding manifest necessity to declare mistrial); *State v. McFerron*, 628 P.2d 440, 444 (Or. 1981) (where state law allowed non-unanimous convictions if at least ten jurors voted guilty, dropping below twelve jurors constituted manifest necessity because the government "need not relinquish that advantage and thereby create an added advantage for defendant merely because defendant insists on it"). Indeed, given the increasing length and complexity of criminal trials, the loss of jurors is common. *See, e.g.*, *United States v. Davis*, 708 F.3d 1216, 1218-20 (11th Cir. 2013) (juror dismissed due to financial reasons and another juror dismissed because she did not speak English well enough to serve); *United States v. Simmons*, 560 F.3d 98, 109-10 (2d Cir. 2009) (during jury deliberations, juror excused because child fell ill); *United States v. Paulino*, 445 F.3d 211, 225-26 (2d Cir. 2006) (ill juror dismissed after he was absent for two days); *United States v. Doerr*, 886 F.2d 944, 970 (7th Cir. 1989) (dismissal of two jurors because of illnesses); *United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985) (district court dismissed juror after he found

that he would be unavailable for four-and-one-half days to observe a religious holiday).

The frequency has only been exacerbated in recent years due to the prohibited use of the Internet and social media by jurors during trials. *See, e.g.*, *United States v. Feng Ling Liu*, 69 F. Supp.3d 374, 377-78 (S.D.N.Y. 2014) (dismissing juror for tweeting about trial); *United States v. Juror Number One*, 866 F. Supp. 2d 442, 451-52 (E.D.P.A. 2011) (in a juror contempt case, discussing background where juror was dismissed for emailing during deliberations and explaining that "the widespread availability of the Internet and the extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors"); *New York v. Cosme*, 102 N.Y.S.3d 187, 187 (N.Y. App. Div.), *appeal denied*, 130 N.E.3d 1283 (2019) (dismissing alternate juror for posting on social media during trial); *Shaw v. State*, 139 So. 3d 79, 88-89 (Miss. Ct. App. 2013) (removing juror for contacting witness through Facebook); *Commonwealth v. Rodriguez*, 828 N.E.2d 556, 564-66 (Mass. App. Ct. 2005) (dismissing juror for conducting Internet research).

III. The Decision Below Is Wrong.

The First Circuit made two fundamental and disturbing errors. First, it applied the *Kennedy* standard to evaluate the government's conduct in bringing about the mistrial, even though here, unlike in *Kennedy*, the defendant objected to, rather than requested, the mistrial. Second, it erroneously held that the United States Constitution requires a jury of twelve, giving undue weight and significance to the government's rule-based right to withhold its consent.

1. In considering how the government's actions in this case factored into the double jeopardy analysis, the

First Circuit applied the test laid out in *Kennedy*, 456 U.S. at 668. *See* Pet. App. 13a, n.2. But that standard puts the onus on the defense to establish a specific intent on the part of the government "to subvert the protections afforded by the Double Jeopardy Clause," Pet. App. 19a (citing *Kennedy*), and is too stringent to apply when a mistrial is declared over the objections of the defendant. As the Court has repeated, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *United States v. Dinitz*, 424 U.S. 600, 609 (1976); *see also United States v. Glover*, 506 F.2d 291, 297 (2d Cir. 1974) (where a mistrial is "not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to his double jeopardy protection"). A defendant who asks for a mistrial has, at least by appearances, retained control and the mistrial is presumptively in his benefit: the defendant's request for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Kennedy*, 456 U.S. at 676 (quoting *United States v. Scott*, 437 U.S. 82, 83 (1978)). In these circumstances, it makes sense that the *Kennedy* Court found only a "narrow exception" to the rule that the "Double Jeopardy Clause is no bar to retrial," 456 U.S. at 673, 675-76, and held that retrial should be precluded only if the defendant could establish that the government deliberately attempted to secure a mistrial.

But that rule does not make sense when, as in this case, a defendant objects to the mistrial. Unlike the defendant in *Kennedy*, Petitioners had no control "over the course to be followed" and did not stand to benefit from the mistrial. To subject them to a second prosecution unless they establish the "narrow exception" carved out in *Kennedy* is therefore unfair and at odds with the Court's Double Jeopardy jurisprudence.

Certainly, there may well be times when the government's refusal to consent to a jury of fewer than twelve is not only proper but wise. The reasons for the diminished jury size could raise concerns about the integrity or fairness of the deliberations – when, for example, there is evidence of tampering, *see, e.g.*, *United States v. Ruggiero*, 846 F.2d 117, 123-24 (2d Cir. 1988) (given loss of jurors based on jury tampering, government could have withheld consent under Rule 23(b)), or juror bias, *see, e.g.*, *State v. Romeo*, 203 A.2d 23, 25-29 (N.J. 1964) (given loss of a juror after it was established he had developed a bias against the State, government should not be compelled to proceed with remaining jurors).

But here, the government's withholding of consent had nothing to do with the size of the jury, or its integrity; the government had unequivocally consented to a jury of eleven. As the district court found, and indeed the government had conceded, the government was motivated by a desire to "submit all four defendants to the jury for a verdict, *most probably in the belief that a conviction of all four would be made more likely by the jury's collective consideration.*" Pet. App. 48a (emphasis added). Such motives, while perhaps not indicative of "bad faith," have nothing to do with the "maintenance of the jury as a fact-finding body in criminal cases." *Patton*, 281 U.S. at 312. Nor do the reasons offered by the government satisfy the ends of public justice such that the defendants' double jeopardy rights should be subordinate. Thus, this case squarely raises the "entirely different question" the Court in *Illinois v. Somerville*, 410 U.S. 458, 464 (1973), reserved, namely, whether the "declaration of a mistrial [was] on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation[.]" *Id.* The First Circuit's resolution of that question was wrong, and the decision should be reviewed and reversed.

2. Moreover, undergirding the question of whether the government has an unfettered right to withhold consent to a jury of less than twelve under Rule 23(b)(2) is the question of whether a twelve-member jury is mandated by the Sixth Amendment of the United States Constitution. In *Patton*, the Court, in upholding the constitutionality of a defendant's ability to waive a twelve-person jury, assumed that the Sixth Amendment required a jury of not less than twelve persons. 281 U.S. at 289. But in *Williams*, the Court retracted that suggestion, holding that the state's "refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the State through the Fourteenth." 399 U.S. at 86; *see also id.* at 102 ("[T]he fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purpose of the jury system and wholly without significance 'except to mystics.'") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)).[2]

In considering the government's role in bringing about the mistrial, the court below ignored *Williams*, cited *Patton,* and improperly held that in withholding its consent to an eleven-member jury, the government was insisting on a "constitutional jury." Pet. App. 14a; *see also id.* 17a ("It is nose-on-the-face plain that there was manifest necessity for the district court's declaration of a mistrial" because

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[2] Other circuits have suggested in dicta that because *Williams* addressed requirements in state criminal proceedings, its holding may not be applicable to federal criminal trials. *See United States v. Curbelo*, 343 F.3d 273, 279 n.5 (4th Cir. 2003) ("[T]he Supreme Court has never *held* that the Sixth Amendment does *not* require a twelve-person jury in federal prosecutions."); *United States v. Stewart*, 700 F.2d 702, 704 (11th Cir. 1983) (same); *United States v. Spiegel*, 604 F.2d 961, 966 n.9 (5th Cir. 1979) (same).

"the court was left with a constitutionally deficient jury of eleven.").

But stripped of any constitutional significance, the government's right to withhold consent under Rule 23(b) is nothing more than a procedural rule that must cede when in conflict with a defendant's "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Certainly, where a constitutional right comes into conflict with a procedural or statutory rule, the constitutional right prevails. *Gray v. Mississippi*, 481 U.S. 648, 663 (1987).

Especially in light of the Court's recent consideration of *Williams* as applied to a defendant's constitutional right to a unanimous verdict, *Ramos v. Louisiana*, 203 L.Ed.2d 563 (2019), the Court should rectify the First Circuit's errors and clarify that *Williams* applies in both federal and state criminal trials.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to vacate the First Circuit's decision.

Respectfully submitted,

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December 19, 2019

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 18-1873

UNITED STATES OF AMERICA,
Appellant,

v.

CHARLES W. GARSKE, A/K/A CHUCK GARSKE; RICHARD J. GOTTCENT; MICHAEL SEDLAK,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Richard G. Stearns, U.S. District Judge)

Before
Thompson, Selya, and Barron,
Circuit Judges.

Cynthia A. Young, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellant.

David Spears, with whom Josiah Pertz, Spears & Imes LLP, Justine Harris, Michael Gibaldi, Sher Tremonte LLP, William J. Cintolo, Meredith Fierro, and Cosgrove, Eisenberg & Kiley, PC were on joint brief, for appellees.

September 20, 2019

SELYA, Circuit Judge. This appeal requires us to address a novel question implicating the Double Jeopardy Clause. *See* U.S. Const. amend. V. Concluding, as we do, that the district court erred in holding that the defendants were insulated from a retrial by double jeopardy principles, we reverse the district court's order of dismissal and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

We briefly rehearse the relevant facts and travel of the case. The reader who thirsts for more exegetic detail may wish to consult the district court's comprehensive account. *See United States v. Ackerly*, 323 F. Supp. 3d 187, 190-92 (D. Mass. 2018).

On August 10, 2016, a federal grand jury sitting in the District of Massachusetts returned an indictment charging four defendants – Donna Ackerly, Charles Garske, Richard Gottcent, and Michael Sedlak – with multiple counts of wire fraud, honest-services wire fraud, and conspiracy to commit both species of wire fraud. *See* 18 U.S.C. §§ 1343, 1346, 1349. The indictment recounted that between September

of 2007 and March of 2012, the four defendants conducted a fraudulent scheme while employed at Georgeson, Inc., a firm that specializes in advising public companies on positions that institutional investors are likely to take in voting their proxies with respect to corporate governance proposals. The alleged scheme consisted of bribing an employee of Institutional Shareholder Services, Inc. (ISS), a firm that advises institutional shareholder clients on how to vote on particular proxy issues, in exchange for confidential information about ISS's proxy-voting advice and then falsifying invoices to Georgeson's clients to cover the cost of the bribes.

Ackerly moved to sever, *see* Fed. R. Crim. P. 14(a), arguing that she was "peripheral at most" to the conduct alleged in the indictment and that severance would shield her from potentially prejudicial spillover attributable to the evidence against her codefendants. The government opposed Ackerly's motion, and the district court sustained the government's objection. Ackerly renewed her severance motion approximately one year later, but to no avail.

Trial began on February 26, 2018, with twelve jurors and two alternates empaneled. On the second day of trial, the district court excused a juror who failed to report for duty. On the fourth day of trial, the court excused a second juror for medical reasons. During the eleventh day of trial (Friday, March 16), the court told the jurors that the presentation of evidence would conclude on Monday, March 19, with final arguments and jury instructions to follow. Later that evening, a "distraught" Juror 12 contacted a district court clerk, explaining that his wife had gone to the hospital and he was concerned about continuing his jury service. He subsequently told the clerk that his wife had been diagnosed with a brain tumor and would require surgery in the next few days.

At 10:32 a.m. on Saturday morning, at the direction of the district court, the clerk notified counsel by email about Juror 12's situation. The clerk wrote that Federal Rule of Criminal Procedure 23(b)(2)(B) "allows a reduction to 11 jurors with the written consent of the parties and the judge" and added that the court was "prepared to make the necessary finding of good cause and look[ed] to the parties to agree." Attorneys for Garske, Gottcent, and Sedlak all responded, indicating their clients' assent to proceeding with a jury of eleven. The government replied by email at 12:18 p.m. that it "consent[ed] to proceed with 11." At 2:53 p.m., the government clarified "that [its] consent is conditioned on all four defendant consenting." Ackerly's counsel weighed in at 4:15 p.m., reminding the court that Ackerly had sought severance from the inception of the case and stating that she would not consent. This email went on to assert that the government witnesses set to testify that Monday would "not offer any evidence against [Ackerly]," and that Ackerly was prepared to move for a judgment of acquittal. The government replied that the evidentiary record as to Ackerly was "not complete." Moreover, the government noted that it was "puzzled by [Ackerly's] reference to severance," expressing the view that it would be "terribly inappropriate to use this circumstance in an attempt to achieve that result."

Later that afternoon, the clerk emailed the parties that she had communicated their positions to the district court. The email explained, inter alia, that the court would not entertain Ackerly's motion for judgment of acquittal and that it intended to enter a finding of good cause for Juror 12's excusal on Monday, March 19. Finally, the email stated that the court "accept[ed] the emails of the consenting defendants[']attorneys as made in good faith and believe[d] that the double jeopardy clause g[ave] . . . those defendants the right to proceed to a verdict with [the empaneled] jury." This email, however, proved to be premature. Shortly after

it was sent, the clerk reported to the parties that the district court had just seen the government's second email – clarifying that its consent was conditional – and the court "fe[lt] it ha[d] no other choice than to declare a mistrial on Monday morning."

On Monday, the district court convened a non-evidentiary hearing. The court began by reiterating that the circumstances "constitute[d] good cause for the juror's excusal." Turning to Rule 23(b)(2), the court noted that the rule was "as clear as a rule could be" in stating that the parties, "which would necessarily include the government," must agree to proceed with a jury of fewer than twelve. Given the government's unwillingness to consent to a reduced jury, the court acknowledged that "[t]here's no power that I see, or discretion that I have, under the rule to force any different result." The court then related that it had considered alternatives to the declaration of a mistrial but could think of only one: indefinitely postponing the trial pending the return of Juror 12. In the court's judgment, though, such an alternative was not feasible due to the uncertainty of the juror's wife's medical condition and the difficulty of supervising the other jurors in the interim. The parties suggested no other alternatives to a mistrial, but Garske, Gottcent, and Sedlak objected to a mistrial on the ground that the government's "conditional" consent did not demonstrate the requisite "manifest necessity."

At that point, the district court summoned the jury and explained what had transpired. The court declared a mistrial and discharged the jurors. The following day, the government announced that it intended to retry the defendants.

On April 27, 2018, Garske, Gottcent, and Sedlak filed a joint motion to preclude retrial and to dismiss the indictment under the Double Jeopardy Clause on the ground that the government could not establish "'manifest necessity'

for its decision to force the mistrial." After hearing argument, the district court took the matter under advisement. In due course, the court handed down a rescript and granted the motion to dismiss the indictment. This timely appeal followed.

II. THE LEGAL LANDSCAPE

This case presents a question of first impression arising at the intersection of the Federal Rule of Criminal Procedure 23 and the Double Jeopardy Clause. It implicates two competing rights: the right of all parties to have a criminal case decided by a jury of twelve and a criminal defendant's right not to be twice put in jeopardy. We lay the groundwork for our analysis by limning the applicable legal principles.

A. Rule 23.

In *Patton v. United States*, 281 U.S. 276 (1930), the Supreme Court held that a criminal defendant has a constitutional right to a jury of twelve unless he waives that right. *See id.* at 312. The Court cautioned that "[i]n affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons . . . , we do not mean to hold that the waiver must be put into effect at all events." *Id.* In amplification, the Court stated that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Id.* Relatedly, "the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion." *Id.*

The *Patton* Court's holding was later codified in Federal Rule of Criminal Procedure 23. *See* Fed. R. Crim. P. 23 advisory committee notes to 1944 adoption. Rule 23 declares that, except as otherwise provided in the rule, "[a

criminal] jury consists of 12 persons." Fed. R. Crim. P. 23(b)(1). The rule contains a proviso, which states that "[a]t any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins." Fed. R. Crim. P. 23(b)(2). It follows that, by virtue of the plain language of Rule 23, the consent of all parties and the court is generally required to try a case to verdict with a jury of eleven.[1]

B. Double Jeopardy.

The Double Jeopardy Clause ensures that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It provides "a triumvirate of safeguards: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *United States v. Ortiz-Alarcon*, 917 F.2d 651, 653 (1st Cir. 1990) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). These safeguards attach once a criminal jury is sworn. *See United States v. Toribio-Lugo*, 376 F.3d 33, 37 (1st Cir. 2004). "That jeopardy attaches at this early stage, rather than at final judgment, is a recognition of the defendant's prized right to have his trial, once under way, completed by a particular trier." *Id.*

Even so, the prophylaxis of the Double Jeopardy Clause is not absolute. *See Wade v. Hunter*, 336 U.S. 684,

[1] There is an exception for situations in which jury deliberations already have begun. *See* Fed. R. Crim. P. 23(b)(3) (authorizing district court to "permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a [deliberating] juror"). This excpetion is not implicated in the case at hand.

688 (1949) (explaining that double jeopardy protection "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"). When a mistrial occurs, the point at which double jeopardy principles bar a retrial is not always easy to plot. The general rule is that a judge's decision to discharge an empaneled jury and declare a mistrial prior to verdict does not bar retrial when, "taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Although the determination of whether to discharge the jury and declare a mistrial lies in the "sound discretion" of the trial court, *id.*, "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar," *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Specifically, "[t]he prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Id.*

The Supreme Court has cautioned that the manifest necessity standard cannot "be applied mechanically or without attention to the particular problem confronting the trial judge." *Id.* at 506. So, too, the Court has warned "that the key word 'necessity' cannot be interpreted literally." *Id.* After all, "there are degrees of necessity," and the Court's jurisprudence "require[s] a 'high degree' [of necessity] before concluding that a mistrial is appropriate." *Id.* Thus, "[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).

III. ANALYSIS

Against this backdrop, we turn to the case at hand. We review the district court's allowance of a motion to dismiss on double jeopardy grounds, following the declaration of a mistrial, for abuse of discretion. *See Toribio-Lugo*, 376 F.3d at 38. Within this rubric, we accept the district court's factual findings unless those findings are clearly erroneous. *See id.* (citing *United States v. Bradshaw*, 281 F.3d 278, 291 (1st Cir. 2002)). "Articulations of law engender de novo review." *Id.* (citing *United States v. Keene*, 287 F.3d 229, 233 (1st Cir. 2002)). And we remain mindful that "an error of law is always tantamount to an abuse of discretion." *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 336 (1st Cir. 2008).

Re-examining its earlier decision to declare a mistrial, the court below concluded that

> [w]ere the issue to turn solely on the operation of Rule 23, it would be difficult to imagine a necessity more manifest: the Rule plainly dictates that in circumstances like these, a trial cannot proceed with less than twelve jurors without the consent of *all* parties, and that includes the government.

Ackerly, 323 F. Supp. 3d at 201 (emphasis in original). But, the court explained, "the issue is more complex than a strictly rule-based analysis would suggest. While [Rule 23] may excuse the trial judge for declaring a mistrial (at least where there is no practical or feasible alternative), the [manifest necessity] doctrine also implicates the decision-making of the government." *Id.* Analogizing to the Supreme Court's pronouncement that "the prosecutor must shoulder the burden of . . . demonstrat[ing] 'manifest necessity' for any mistrial declared over the objection of the defendant," *id.* at 202 (quoting *Washington*, 434 U.S. at 505), the district court ruled that when "the prosecutor plays a prominent role in bringing about the necessity of a

mistrial, the 'manifest necessity' standard applies to the government's decision-making with the same force as it does to the actions taken by the trial judge," *id.*

On this understanding, the district court framed the dispositive question as: "Can the government, in the circumstances of this case, point to a 'manifest necessity' for the withholding of its consent to a verdict by a jury of eleven one day before a month-long trial was coming to an end?" *Id.* Answering its own question in the negative, the court granted the joint motion of Garske, Gottcent, and Sedlak for dismissal of the charges against them. *See id.* at 203.

The district court's focus on the manifest necessity of the government's decisionmaking is novel and, in our view, rests on a misreading of *Washington*. We do not gainsay that in order to retry a defendant after a mistrial, the government must carry the burden of showing "'manifest necessity' for [the] mistrial." *Washington*, 434 U.S. at 505. But this burden is not – as the district court suggests – a burden to show manifest necessity for the government's decisionmaking. Instead, it is a burden to show manifest necessity for the district court's decision to declare a mistrial. *See id.* at 514 (explaining that "reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial" (quoting *Perez*, 22 U.S. at 580)); *Toribio-Lugo*, 376 F.3d at 39 (suggesting that the manifest necessity "inquiry inevitably reduces to whether the district judge's declaration of a mistrial was reasonably necessary under all the circumstances" (quoting *Keene*, 287 F.3d at 234)); *see also Perez*, 22 U.S. at 580 (stating that there must be "manifest necessity for *the act*" of declaring a mistrial (emphasis supplied)).

Washington illustrates this point. There, the trial judge granted the government's motion for a mistrial due to prejudicial comments in defense counsel's opening

statement. *See* 434 U.S. at 498, 501. The Supreme Court trained the lens of its inquiry on whether the judge "act[ed] precipitately in response to the prosecutor's request for a mistrial," not on the prosecutor's decision to make such a request. *Id.* at 515. The Court concluded that, because the judge "exercised 'sound discretion' in handling the sensitive problem of possible juror bias created by the improper comment of defense counsel, the mistrial order [was] supported by the 'high degree' of necessity which is required in a case of this kind." *Id.* at 516.

The Supreme Court's decision in *Somerville* is similarly instructive. There, the prosecutor moved for a mistrial after spotting a fatal defect in the indictment. *See* 410 U.S. at 459-60. Concluding that further proceedings under the defective indictment would be futile, the trial judge granted the prosecutor's motion. *See id.* at 460. The Court determined that there was manifest necessity for the judge's decision to declare a mistrial, explaining that "where the declaration of a mistrial . . . aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." *Id.* at 471. The Court did not, however, inquire into the reasons for the government's faulty indictment.

Although the *Somerville* Court kept the focus of the manifest necessity inquiry squarely on the trial judge's actions, it did not categorically dismiss the relevance of the government's role in causing a mistrial. The Court explained that "[a] trial judge properly exercises his discretion to declare a mistrial" if "a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error." *Id.* at 464. The Court hastened to add that "[i]f an error would make reversal on appeal a certainty, it would not serve 'the ends of public

justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." *Id.* (quoting *Perez*, 22 U.S. at 580). Importantly, the Court qualified these statements by noting that "the declaration of a mistrial on the basis of a rule or a defective procedure *that would lend itself to prosecutorial manipulation* would involve an entirely different question." *Id.* (emphasis supplied). Nothing in the Court's discussion, however, suggests that the manifest necessity test used to determine the propriety of the trial judge's decision to declare a mistrial is the relevant metric for assessing prosecutorial exploitation of a rule or procedure.

Washington and *Somerville* light the path that we must tread. There is nothing either in those opinions or elsewhere in the Supreme Court's double jeopardy jurisprudence that affords any basis for applying the manifest necessity doctrine to the decisionmaking of the government (as opposed to that of the trial court). Such an application would represent a substantial – and ungrounded – expansion of the manifest necessity doctrine.

This is not to say that the actions of the government never factor into the double jeopardy inquiry. As *Somerville* intimates, those actions may have relevance to that inquiry. Indeed, they may sometimes be of critical import because "the Double Jeopardy Clause provides a defendant with a shield against prosecutorial maneuvering designed to provoke a mistrial." *United States v. McIntosh*, 380 F.3d 548, 557 (1st Cir. 2004) (citing *Oregon v. Kennedy*, 456 U.S. 667, 674 (1982)); *see United States v. Dinitz*, 424 U.S. 600, 611 (1976). Thus, even if manifest necessity exists for the trial judge's decision to declare a mistrial, a retrial may be foreclosed "if the prosecutor purposefully instigated a

mistrial or if he committed misconduct designed to bring one about." *McIntosh*, 380 F.3d at 557.[2]

When all is said and done, a defendant whose trial was terminated prior to verdict can invoke the double jeopardy bar in one of two situations. First, if the defendant objected and the trial judge's decision to declare a mistrial was unsupported by some manifest necessity, double jeopardy will foreclose a second trial. *See id.* at 553; *United States v. Simonetti*, 998 F.2d 39, 41 (1st Cir. 1993). Second, if the prosecution either deliberately instigated the mistrial or engaged in other misconduct causing the mistrial, double jeopardy will foreclose a second trial. *See McIntosh*, 380 F.3d at 557; *Simonetti*, 998 F.2d at 42.

The defendants have a more expansive view of double jeopardy. They argue that their constitutional right to proceed with an already-empaneled jury "takes precedence" over the government's right to withhold consent to a jury of eleven. According to the defendants, "neither *Patton* nor Rule 23(b)(2)(B) was intended to give the government an automatic right to retry a defendant before a new jury simply by refusing to consent to fewer than 12 jurors and thereby compelling a mistrial over a defendant's

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[2] The defendants strive to persuade us that this standard "has no relevance to this case" because they did not request the mistrial. We are not convinced. Although *Kennedy* and *Dinitz* both involved defendants who had sought mistrials, *see Kennedy*, 456 U.S. at 668; *Dinitz*, 424 U.S. at 601, we see no reason why prosecutorial misconduct would not similarly activate the double jeopardy bar when the defendant objected to the mistrial, *cf. McIntosh*, 380 F.3d at 552, 557 (analyzing claim that retrial was barred by prosecutor's actions that "were both improper and designed to provoke a mistrial" when defendants had objected to mistrial on the basis of such actions); *United States v. Simonetti*, 998 F.2d 39, 41-42 (1st Cir. 1993) (considering defendant's argument that retrial was barred because mistrial declared over his objection was "caused by governmental misconduct").

objection." Since "the government was the exclusive agent of the mistrial," their thesis runs, its reason for withholding consent to an eleven-member jury must satisfy the manifest necessity standard. Referencing several cases in which courts have found no manifest necessity when a district court chose to declare a mistrial rather than sever a defendant's case,[3] *see, e.g., United States v. Chica*, 14 F.3d 1527, 1532-33 (11th Cir. 1994); *United States v. Allen*, 984 F.2d 940, 942 (8th Cir. 1993); *United States v. Crotwell*, 896 F.2d 437, 440 (10th Cir. 1990); *United States v. Ramirez*, 884 F.2d 1524, 1530 (1st Cir. 1989); *United States v. Bridewell*, 664 F.2d 1050, 1051 (6th Cir. 1981) (per curiam), the defendants insist that concerns about judicial economy cannot satisfy the manifest necessity standard.

As an initial matter, we disagree with the defendants' attempt to brand the government as the architect of the mistrial. Although the government's decision to withhold consent to a jury of eleven technically precipitated the mistrial, the root cause of the mistrial was Juror 12's sudden unavailability due to his wife's medical emergency. Once Juror 12 was excused, the remaining eleven jurors no longer comprised a constitutional jury, *see Patton*, 281 U.S. at 312, and the trial was stopped in its tracks. It could proceed only if the strictures of Rule 23(b)(2)(B) were satisfied.

Of course, the right to a constitutional jury may be waived. Such a waiver is permitted, though, only with "the consent of government counsel and the sanction of the court." *Id.* The government is under no obligation to consent to a jury of eleven, and the defendants' entitlement to waive trial by a jury of twelve does not carry with it an

[3] For the sake of completeness, we note that none of the three defendants who are appellees here moved for a severance at or after the time when Ackerly refused to consent to proceeding with a jury of eleven.

entitlement to override the government's unwillingness to consent. *Cf. Singer v. United States*, 380 U.S. 24, 34-35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."). Seen in this light, keeping the focus of the manifest necessity inquiry on the trial judge's decision to declare a mistrial, rather than switching the focus to the government's decision to withhold consent to a jury of eleven, does not impermissibly elevate the government's right to withhold consent under Rule 23 above the defendants' double jeopardy rights.

Nor would such a focus impair the defendants' double jeopardy protections. Although these protections attach when a jury is sworn, *see Toribio-Lugo*, 376 F.3d at 37, "unforeseeable circumstances that arise during a trial [may make] its completion impossible," *Somerville*, 410 U.S. at 470 (quoting *Wade*, 336 U.S. at 689). In such an event, "a defendant's valued right to have his trial completed by a particular tribunal must . . . be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* (emphasis omitted) (quoting *Wade*, 336 U.S. at 689); *see Dinitz*, 424 U.S. at 609 n.11 (explaining that "the defendant's interest in going forward before the first jury [is not] a constitutional right comparable to the right to counsel"). So it is here: a circumstance beyond the control of the parties and the district court rendered the empaneled jury unconstitutional. Although the defendants were entitled to waive their right to a constitutional jury, they had "no absolute right to proceed with a jury of less than twelve." *Parker v. United States*, 507 F.2d 587, 589 (8th Cir. 1974); *see United States v. Ruggiero*, 846 F.2d 117, 124 (2d Cir. 1988) (concluding that "a court can grant a mistrial even where the defendant files a motion to proceed with a jury of eleven"). They needed the consent of both the government and the district court, and that consent was not forthcoming.

We have been unable to find a case directly on point. But we think that a fair analogy can be drawn to cases in which courts of appeals have found no double jeopardy bar when a trial judge refused to allow a case to continue to verdict with a jury that had shrunk to eleven members. *See Parker*, 507 F.2d at 589- 90 (finding that trial judge had discretion to declare mistrial when one of three defendants refused to consent to jury of eleven); *United States v. Potash*, 118 F.2d 54, 56 (2d Cir. 1941) (explaining that when one juror became incapacitated, "the court had discretion to discharge the jury, even if both parties had consented . . . to proceed with the reduced number"); *Gardes v. United States*, 87 F. 172, 177 (5th Cir. 1898) (finding manifest necessity for mistrial due to juror's death when trial court declined to allow parties to proceed with jury of eleven).

The severance cases on which the defendants rely are inapposite. When a mistrial is unavoidable with respect to one defendant in a partially completed two-defendant trial, considerations of judicial economy, without more, cannot justify the trial judge's refusal to sever the other defendant and allow him to continue separately to a verdict with an already-empaneled jury. *See, e.g., Chica*, 14 F.3d at 1532-33. Those cases rest solidly on the proposition that "judicial economy, standing alone, does not support a finding of manifest necessity." *Id.* (collecting cases). In the last analysis, the court's interest in judicial economy cannot outweigh a defendant's valued right to continue to a verdict with an already-empaneled jury.

Here, however, the finding of manifest necessity does not rest to any degree on considerations of judicial economy. The district court had no viable option to allow Garske, Gottcent, and Sedlak to proceed with the already-empaneled jury. Accordingly, this is not a case in which the district court may be said to have put its interest in judicial

economy above the defendants' valued right to double jeopardy protections.

Instead, the district court's rationale for the declaration of a mistrial was the unavailability of the twelfth juror (due to circumstances beyond the parties' control). This rationale strongly supports a finding of manifest necessity, and the severance cases do not diminish the strength of that support.

The short of it is that it was an error of law for the district court to apply the manifest necessity standard to the government's decision to withhold consent to a jury of eleven. The correct approach would have been for the court to have inquired whether there was manifest necessity for the declaration of a mistrial and, if so, to inquire whether the government helped to bring about that manifest necessity through some misconduct or purposeful instigation. The record makes the answers to these inquiries pellucid.

We start with manifest necessity itself. In determining whether there was manifest necessity for a mistrial, it is useful to consider three interstitial factors: "(1) whether the district court consulted with counsel; (2) whether the court considered alternatives to a mistrial; and (3) whether the court adequately reflected on the circumstances before making a decision." *McIntosh*, 380 F.3d at 554 (citing *Simonetti*, 998 F.2d at 41). These factors, though, "serve only as a starting point." *Id.* "Each case is sui generis and must be assessed on its idiosyncratic facts." *Id.*

In this instance, it is nose-on-the-face plain that there was manifest necessity for the district court's declaration of a mistrial: the court was left with a constitutionally deficient jury of eleven. The court tried to avoid a mistrial by requesting that the parties consent to a jury of eleven. *Cf. Toribio-Lugo*, 376 F.3d at 39 (finding no manifest necessity when "[t]he court never offered the appellant a choice

between proceeding with eleven jurors or accepting a mistrial"). Once it became apparent that universal consent would not be forthcoming, the court explored the possibility of delaying the trial indefinitely. But such an alternative was not feasible, the court reasonably concluded, given the unpredictability of how long Juror 12 would be unavailable and the difficulties inherent in attempting to supervise the remaining eleven jurors in the interim. Seeking additional ideas, the court solicited the parties – but none of them offered any helpful suggestions.

Nor did the court act rashly. It mulled the mistrial decision over the course of several days and decided upon a course of action only after requesting consent from all parties and seeking their input on potential alternatives. The court recognized that it had no power to force either side to proceed to verdict with eleven jurors. As the court aptly observed, its "[h]ands [were] tied." *Ackerly*, 323 F. Supp. 3d at 192.

"Where, as here, the district court fully considers, but reasonably rejects, lesser alternatives to a mistrial, we will not second-guess its determination." *McIntosh*, 380 F.3d at 556. We thus hold that there was manifest necessity for the district court's carefully reasoned decision to declare a mistrial.

This brings us to the matter of whether the government's decision to withhold its consent to proceeding with a jury of eleven constituted either misconduct or purposeful instigation of a mistrial. On its face, that decision was not misconduct: it was the government's prerogative under Rule 23 to decline to consent to a jury of less than twelve. *See* Fed. R. Crim. P. 23(b)(2). The slightly closer question is whether the government's decision to withhold its consent, knowing that a mistrial would ensue, was the functional equivalent of purposeful instigation of a mistrial. We think not.

In conducting this inquiry, intent is a central element. Even when a prosecutor's conduct is the but-for cause of a mistrial, such conduct – including that which "might be viewed as . . . overreaching" – does "not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Kennedy*, 456 U.S. at 675-76; *see McIntosh*, 380 F.3d at 557 (explaining that "prosecutorial error or even prosecutorial harassment that results in a mistrial will not unlatch the double jeopardy bar in the absence of the intent to cause a mistrial" (citing *Creighton v. Hall*, 310 F.3d 221, 227 (1st Cir. 2002))). It follows that the government's knowledge that withholding consent to move forward with a jury of eleven would cause a mistrial is not enough to bar a retrial absent an intent to abridge the defendants' double jeopardy rights. Here, we discern no indication of any such intent.

To begin, the removal of Juror 12 was brought about by his wife's sudden illness, not by any act attributable to the government or within its control. As the district court acknowledged, "it is unfair to say that [the government] caused the mistrial any more than [it is to say] that Defendant Ackerly forced the mistrial, as both were exercising a right granted to them by Rule 23." *Ackerly*, 323 F. Supp. 3d at 194 (citation and internal quotation marks omitted). Moreover, the district court made explicit findings that "the government's conduct [was] not infected with any hint of improper motive," *id.*, and that the government had done "nothing reproachable or in bad faith," *id.* at 203. To cinch the matter, the court found that this was not a case in which the government "refused consent to go forward with eleven jurors because it was not sanguine about its chances of winning a conviction." *Id.* at 194.

We think it important that, in evaluating the government's preference to try all four defendants together, the district court found only that "the government's decision to

withhold consent was influenced by a desire to submit all four defendants to the jury for a verdict." *Id.* at 202. Merely being "influenced" by such a legitimate desire does not evince an intent to instigate a mistrial, particularly where, as here, the district court has made no finding that the number of jurors was irrelevant to the government's decision. In short, this is not a case in which the record indicates either that the government's exclusive motivation in withholding consent was to evade severance (a goal Rule 23(b)(2)(B) does not serve) or that the government had no bona fide interest in asserting its right to a jury of twelve (the interest underlying Rule 23(b)(2)(B)).

The district court's findings are supported by the record and, thus, are not clearly erroneous. *Cf. United States v. Flete-Garcia*, 925 F.3d 17, 26 (1st Cir. 2019) (stating that "[i]f two plausible but competing inferences may be drawn from particular facts, a [district] court's choice between those two competing inferences cannot be clearly erroneous"). Consequently, we are bound to accept them. *See Simonetti*, 998 F.2d at 42.

The defendants have a fallback position: they contend that the government took "unfair advantage of a mistrial" by withholding consent to proceed with eleven jurors after having "enjoyed a full view of [the defendants'] defenses." Such an advantage was evidenced at Ackerly's retrial, the defendants say, since "the government demonstrated that it had learned from its lapses in the first trial" by not calling several witnesses whose credibility had been undercut on cross-examination.

This contention is composed of more cry than wool. As the government accurately explained, the district court had allotted twenty hours of trial time per side in the original trial but reduced that amount to eleven hours per side for Ackerly's retrial. As a result, the government had "to cut almost half of its previous trial presentation." It is pure

speculation to suggest that the government's use of this reduced time was unfairly advantaged by the earlier trial proceedings. We say "unfairly" because any time that a mistrial occurs near the end of a case, each side will have had a preview of the other's case. In other words, the purported advantage works both ways. Here, for instance, the defendants have previewed the government's case and are now better positioned to defend against it.

To sum up, the right to trial by a jury of twelve is a right that is shared by the government and the defense. The government was entitled under Rule 23 to withhold its consent to an eleven-person jury and made a fully permissible election. As the district court acknowledged, "Rule 23 permits the government to exercise its right to withhold consent without requiring any explanation or justification of its reasons for doing so." *Ackerly*, 323 F. Supp. 3d at 194. Here, though, the government was not shy about its reasons: the government's exercise of its right to withhold consent under Rule 23(b)(2)(B) was entirely consistent with its long-held and staunchly asserted position that the interests of justice would best be served by trying all the defendants together.[4] The government had no role in causing the unavailability of the twelfth juror, and we do not think that it should be given the Hobson's choice of trying three of the indicted coconspirators apart from the fourth with a jury

[4] Even while this appeal was pending, the government persisted in trying to keep the four defendants together. To that end, it moved under 18 U.S.C. § 3161(h)(7)(A) to exclude from Ackerly's speedy trial calculations the time that would elapse until the appeal was resolved. Ackerly opposed the motion and the district court denied it, scheduling Ackerly's trial to begin on January 7, 2019. The government twice moved for reconsideration, repeatedly imploring the district court to delay Ackerly's trial and preserve the possibility of trying all four defendants together. The court denied both motions and went ahead with Ackerly's case. Ackerly was convicted on January 15, 2019, following a week-long jury trial.

of eleven or not at all. When – as in this case – the government's reasons for withholding its consent under Rule 23(b)(2)(B) are completely above-board, double jeopardy principles should not prevent the government from retrying the defendants. Elsewise, "the ends of public justice would . . . be defeated." *Perez*, 22 U.S. at 580.

To say more would be to paint the lily. Because the district court's decision to declare a mistrial rested on manifest necessity and because that mistrial was not the product of any purposeful instigation or other government misconduct, double jeopardy principles do not prohibit the government from retrying Garske, Gottcent, and Sedlak.

IV. CONCLUSION

We need go no further. For the reasons elucidated above, we reverse the order dismissing the indictment as to Garske, Gottcent, and Sedlak and remand for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 16-10233-RGS

UNITED STATES

v.

DONNA ACKERLY, CHARLES W. GARSKE,
RICHARD J. GOTTCENT, AND MICHAEL SEDLAK

ORDER ON MOTION OF DEFENDANT CHARLES W. GARSKE, RICHARD J. GOTTCENT, AND MICHAEL SEDLAK TO DISMISS THE INDICTMENT UNDER THE DOUBLE JEOPARDY CLAUSE

August 16, 2018

STEARNS, D.J.

When viewed from a higher orbit, the matter presently before the court involves a tension between rights conferred by the Federal Rules of Criminal Procedure and the United States Constitution. From a more earthly vantage, it involves the clash between a criminal defendant's interest in being free on the one hand from undue oppression

by the State, and on the other, the Sovereign's interest in pursuing just punishment.

To begin: Federal Rule of Criminal Procedure 23(b)(2) permits a criminal jury trial to continue to a verdict with fewer than twelve jurors only with consent of all parties (and the court's approval), while the Fifth Amendment to the United States Constitution, among its other limitations on the power of the State, provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life of limb."[1] As will be explained, despite the simplicity of its wording, the Double Jeopardy Clause of the Fifth Amendment has many facets. It protects a defendant not only from being subjected to multiple trials and multiple punishments for the same offense; it also preserves a defendant's "valued right to have the trial concluded by a particular tribunal," *Arizona v. Washington*, 434 U.S. 497, 505 (1978), including the right to "hav[e] his case finally decided by the jury first selected" to hear his case. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982).

The factual underpinning of this case can be summarized as follows. Over the weekend preceding what was expected to be the last day of evidence in a multi-week trial involving four alleged co-conspirators in a scheme to deprive a stock proxy tabulation firm of the honest services of one of its employees, the twelfth remaining juror was excused after his wife was stricken with a grave medical emergency.[2] The government initially agreed to go

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[1] The prohibition against double jeopardy is recognized as a "universal maxim of the common law." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *355 (Claitor's ed., Baton Rouge, LA 1976).

[2] The trial had begun with fourteen jurors. One failed to report for jury duty on the second day of trial. A week later, the remaining alternate was excused after learning that he had been diagnosed with a recurrence of leukemia.

forward with eleven jurors, but then added the condition that it would only agree if all four co-defendants also agreed. Three of the co-defendants did so, but one declined. After much back-and-forth over the weekend, the government and the fourth co-defendant refused to relent (positions iterated on Monday morning), leaving the court with no practicable option under the plain text of Rule 23 but to declare a mistrial.[3]

And so the question under the peculiar facts of this case is this: Does the Double Jeopardy Clause bar the government from retrying the three defendants – Charles Garske, Richard Gottcent, and Michael Sedlak – who sought to proceed to a verdict validated by eleven jurors? While the answer is a difficult one, the court concludes that it does, for reasons that will be explained, necessarily at some length.

FACTS AND OVERVIEW

This case arose out of an investigation involving an alleged bribery scheme affecting the proxy solicitation industry. Defendants were employees of Georgeson, Inc., a firm that specializes in advising clients on positions that institutional investors are likely to take in voting their proxies on the governance proposals offered by corporate management and shareholders. To enhance the quality of their predictions to their clients, defendants are alleged to have corrupted an insider at Institutional Shareholder Services, Inc. (ISS), a proxy advisory firm, by plying him with meals and tickets to sporting events and concerts.[4] The object was to gain access to the proxy voting advice that ISS was giving to its institutional clients. The indictment was

[3] The three consenting defendants preserved their right to object to any retrial as a violation of their rights under the Double Jeopardy Clause. *See* Tr. Mar. 19, 2018, at 6:16-7:17.

[4] Over the four and one-half years of the duration of the alleged conspiracy, the gratuities amounted to some $12,000 total in face value.

handed up on July 11, 2016. The court ruled on various pretrial motions, including, most notably for present purposes, two unsuccessful attempts by defendant Donna Ackerly to sever her trial from that of her three co-defendants. *See* Dkt # 235 (Nov. 14, 2017), Dkt # 331 (Feb. 21, 2018).

The trial began on February 26, 2018, with fourteen jurors impaneled. As previously noted, on March 1, 2018, the remaining alternate juror was excused for cause. In granting the excusal, the court, in an exercise of misplaced optimism, observed that "under the . . . rules, 11 is sufficient for a jury, 10 if everyone consents to it. So I think we'll be okay." Tr. Mar. 1, 2018, 163:8-10. Despite four interruptions caused by snow emergencies, the trial progressed to what proved to be its penultimate day on Friday, March 16, 2018. At a conference held after the jury had been excused for the weekend, defendants' counsel informed the court that they did not intend to call any witnesses, meaning that the case would go to the jury the coming Monday or Tuesday.

The precipitating event leading to the mistrial came on the evening of Friday, March 16, 2018. Juror No. 12[5] contacted the Chief Law Clerk to report that his wife had just been diagnosed with a brain tumor and required immediate surgery. The juror, who was in a state of shock and understandable anguish, stated that he had an urgent need to attend to his wife and children and was unable to continue his jury service.

The next morning, Saturday, March 17, I instructed the Chief Clerk to email the parties and inform them of the turn of events. I also asked her to relay my observation that Federal Rule of Criminal Procedure 23(b)(2)(B) "allows a reduction to 11 jurors with the written consent of the

[5] A pseudonym to protect the juror's privacy.

parties and the judge," and to advise the parties that I was "prepared to make the necessary finding of good cause and [that I] look[ed] to the parties to agree." *See* Dkt # 416-2. At 10:32 a.m. she did so. Counsel for defendant Gottcent replied at 10:38 a.m. stating that his client was prepared to go forward with eleven jurors. Dkt # 416-3. The government replied at 12:18 p.m. stating that it consented to "proceed with 11" jurors. *See* Dkt # 416-5. At 2:44 p.m., counsel for defendant Sedlak agreed to proceed with eleven jurors. *See* Dkt # 416-6. The government then sent an email at 2:52 p.m. to all parties "clarifying" its original assent and announcing that "the government's consent is conditioned on all four defendants consenting." *See* Dkt # 416-7. Counsel for Garske forwarded her client's consent at 3:06 p.m.

The bump in the road was felt at 4:15 p.m., when counsel for Ackerly wrote to all parties stating that his client was "not comfortable consenting to go with only 11 jurors." *See* Dkt # 416-9. The email referenced Ackerly's previous attempts to have her case severed from her three co-defendants, arguing that the government's remaining witnesses would "not offer any evidence against her," *id.*, and that the evidentiary record was complete with respect to her planned motions for a directed verdict, or alternatively, to exclude certain of the out-of-court statements of her alleged co-conspirators pursuant to *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977). She requested a hearing on these motions the following Monday morning. The government responded thirteen minutes later, objecting to the assertion that the record as it pertained to Ackerly was complete and stating that it was "puzzled by [Ackerly's] reference to severance. Certainly it would be terribly inappropriate to use this circumstance in an attempt to achieve that result." *See* Dkt # 416-10.

The court denied Ackerly's request to be heard on the directed verdict and *Petrozziello* motions, *see* Dkt # 416-11,

and then explained to the parties that, in light of "the government's second email [from 2:52 p.m., *see* Dkt # 416-7] that they only consent if all four defendants consent . . . the court feels it has no other choice than to declare a mistrial on Monday morning." *See* Dkt # 416-12. The following day, Sunday, March 18, 2018 at 12:36 p.m., counsel for Ackerly wrote in an email (purportedly on behalf of all four defendants) that "the Government's change in position that it will refuse to proceed with the trial against the three defendants if Ackerly exercises her right to a jury of 12, will create a double jeopardy problem that would prevent the retrial of the other three defendants." *See* Dkt # 416-13. In that email, Ackerly again requested a severance and proposed that the "three other defendants and the government should be ready to proceed with trial at 9 am tomorrow [Monday]." *Id.* Counsel for Garske replied to the email, stating that Ackerly "does not speak for defendants Garske, Gottcent and Sedlak," and emphasizing that these three defendants "have consented to a jury of eleven . . . and their decisions were made without regard to [Ackerly's] possible course of action." *See* Dkt # 416-14. The court responded that it understood the parties' respective positions. *See* Dkt # 416-15.

Court convened Monday morning, March 19, 2018, without the jury present. The Chief Law Clerk summarized her conversations with Juror No. 12. I then explained to the parties that "consistent with [Fed. R. Crim. P.] Rule 26.3," I had considered other possibilities than a mistrial, but the "only alternative I can think of is to just indefinitely postpone the trial and try to resume at some point in the future." Tr. Mar. 19, 2018, at 6:1-3. However, I further explained that because there was no way of knowing when Juror 12's wife's "operation will take place, or even what its outcome will be, and the likelihood, it being brain surgery, of extended convalescence," I did not believe that the court was in a position to "keep tabs on the remaining jurors and

everyone else in a fashion that would actually allow the trial to be concluded in an orderly fashion." *Id.* at 6:6-12. As I deemed Rule 23 to be "as clear as a rule could be" in requiring the consent of all parties to go forward with less than twelve jurors, and since the government and Ackerly remained at loggerheads, there was "no power that I see, or discretion that I have, under the rule to force a different result." *Id.* at 5:15, 19-21. I invited the parties to suggest other ideas, but none were forthcoming. Counsel for the three defendants who were willing to proceed – Gottcent, Garske and Sedlak – iterated their desire to proceed with eleven jurors, while stating on the record that they would be raising a double jeopardy bar in the event of a retrial. Hands tied, I declared a mistrial and discharged the jury.

Defendants Gottcent, Garske and Sedlak now formally move to dismiss the indictment under the Double Jeopardy Clause. *See* Dkt # 416. The court welcomed supplemental briefing on this issue, and heard argument on the Motion on July 17, 2018.

DISCUSSION

The court offers a few words first about the origins of the traditional principle that a jury is to consist of twelve individuals – a principle embedded in federal criminal trial practice, but one that has no independent, constitutional significance.

A. Jury Size

The jury of twelve is a vestige of English common law that carried over into the colonial and later the American legal system more as a matter of tradition and habit than of *opinio juris sive necessitatis*. The Sixth Amendment, while guaranteeing the common-law jury trial right, is silent on the question of how many persons need be present to constitute a constitutionally acceptable jury. The Supreme Court in the late nineteenth and early twentieth centuries

articulated the view that the jury of twelve, perhaps by adverse possession, had found its way into the United States Constitution. *See, e.g.*, *Patton v. United States*, 281 U.S. 276, 292 (1930) ("A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person.").

Forty years later, however, so much of *Patton* that purported to constitutionalize the jury of twelve was repudiated in *Williams v. Florida*, in which the Supreme Court concluded that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" 399 U.S. 78, 102 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). The Court found that while the jury should be "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community," there was "little reason to think" that the grand purpose of committing decisions of life, liberty, and property to the verdict of the community, was "in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 – particularly if the requirement of unanimity is retained." *Williams*, 399 U.S. at 100. "To read the Sixth Amendment as forever codifying a feature [12 jurors] so incidental to the real purpose of the Amendment," the Court concluded, "is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions." *Id.* at 102-103.

B. Federal Rule of Criminal Procedure 23

Notwithstanding the lack of any mooring in the Constitution, the jury of twelve is enshrined in the Federal Rules of Criminal Procedure as the presumptive minimum. *See* Fed. R. Crim. P. 23(b)(1) ("A jury consists of 12 persons unless this rule provides otherwise."). The Rule further provides that "[a]t any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins." Fed. R. Crim. P. 23(b)(2). The plain text of the Rule establishes that all parties must consent to a jury of less than twelve in federal criminal trials. There is one exception: where a case has been submitted to the jury for a verdict, the "court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b)(3). However, the Rules do not permit a trial judge to force a non-consenting party to proceed with a jury of less than twelve prior to the commencement of deliberations.

The government, in other words, under the plain text of the Rule, was within its rights to refuse consent to proceed to a verdict with only eleven jurors. The moving defendants argue, however, that by conditioning its consent on the reciprocal consent of all four co-defendants, and then by refusing to proceed to verdict with a jury of eleven against the three consenting defendants, the government in effect "caused the mistrial." Defs.' Mem., Dkt # 417 at 12. In support of that argument, defendants rely on *United States v. The Larouche Campaign*, a First Circuit case written by then-Judge Breyer, in which the court held that the defendants' refusal to go forward with a jury of ten "differ[ed] in no significant way from a case in which a

defendant says the words 'I want a mistrial,' and we must treat it similarly." 866 F.2d 512, 514 (1st Cir. 1989). There is, however, a significant factual dissimilarity between that case and this one: in *Larouche*, the defendants had affirmatively requested the excusal of five jurors on hardship grounds and then, once the request was granted by the trial judge, reneged by refusing to proceed with the ten jurors that remained.

Here, by contrast, the juror's excusal was caused by a *force majeure* beyond the control of the parties and the court. Thus, I agree with the government that it is unfair to say that it caused the mistrial "any more than [to say] that Defendant Ackerly forced the mistrial," Gov't's Opp'n, Dkt # 426 at 14, as both were exercising a right granted to them by Rule 23. There are instances in which the government has been found to have engaged in conduct intended to goad a defendant into moving for a mistrial, *see Oregon v. Kennedy*, 456 U.S. 667, 676 (1982), or where the government was found to have refused consent to go forward with eleven jurors because it was not sanguine about its chances of winning a conviction, *see United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974), *aff'd sub nom. United States v. Means*, 513 F.2d 1329 (8th Cir. 1975). Here, however, the government's conduct is not infected with any hint of improper motive, whatever one might think of the strategic wisdom of the choice it made.

In the attempt to identify an improper motive, defendants contend that the government's decision to withhold consent was animated by a desire to deny Ackerly the severance that she had sought on several occasions. This may well be true, but the law has long countenanced the sentiment that those "indicted together [should be] tried together to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources." *United States v. Soto-Beniquez*, 356 F.3d 1, 29 (1st Cir. 2003). Moreover, Rule 23

permits the government to exercise its right to withhold consent without requiring any explanation or justification of its reasons for doing so.

The government understandably would have the discussion begin and end with Rule 23, arguing in its opposition that it "cannot be punished for exercising a statutory right given to it by the rules promulgated by the Supreme Court of the United States." Opp'n, Dkt # 426 at 15. There is, however, a countervailing argument. The issue is not one of punishing the government, or anyone else for that matter; rather, the issue is one involving a fundamental principle of constitutional supremacy: "[W]here a constitutional right comes into conflict with a statutory right, the former prevails." *Gray v. Mississippi*, 481 U.S. 648, 663 (1987). It is entirely possible to follow the letter of the Federal Rules and still run afoul of the Constitution's prohibition against double jeopardy. And it is to that subject that I will now turn.

C. Double Jeopardy

Judge Henry Friendly aptly noted that "[w]hile the precise origin of the protection against double jeopardy is unclear, it is certain that the notion is very old," *United States v. Jenkins*, 490 F.2d 868, 870 (2d Cir. 1973) (Friendly, J.). The history of the double jeopardy bar is of more than academic significance, as it is the key that unlocks an informed understanding of its modern-day constitutional content. *See, e.g., Green v. United States*, 355 U.S. 184, 201-202 (1957) (Frankfurter, J., dissenting) ("Since the prohibition in the Constitution against double jeopardy is derived from history, its significance and scope must be determined, 'not simply by taking the words and a dictionary, but by considering [its] origin and the line of [its] growth.'") (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)); *Bartkus v. Illinois*, 359 U.S. 121, 152 (1959) (Black, J., dissenting) ("Fear and abhorrence of

governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.").

1. Historical Overview

Early western legal systems considered the concept of double jeopardy as a form of *res judicata* that applied in both civil and criminal contexts. *See Jenkins*, 490 F.2d at 870 (quoting 1 Demosthenes 589 (Vance trans. 1962)) ("[T]he laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort."). Cicero vaunted the universality of the prohibition among the civilized nations: "Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same." Charles E. Batchelder, Former Jeopardy, 17 AM. L. REV. 735, 749 (1883).

Even in the grip of the Dark Ages, "when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers," *Bartkus*, 359 U.S. at 152 (Black, J., dissenting), for "not even God judges twice for the same act." *Id.* at 152 n.4 (collecting sources). During the thirteenth century, as Judge Friendly noted, "[s]ince many criminal offenses were tried by battle between the wronged party and the alleged offender, it was evident that a series of prosecutions would ultimately produce a 'conviction' against all but the hardiest combatants, if enough 'appealors' were willing to try their hands at the case." *Jenkins*, 490 F.2d at 871 (citing 2 Bracton, On the Laws and Customs of England 391 (Thorne trans. 1968)).

By the time of Chief Justice Coke, the double jeopardy principle had been distilled as common-law pleas limiting the power of the Crown. The first such plea was *autrefois acquit*, under which a defendant could defeat a second trial by showing that he had been previously acquitted of the

same offense. 3 Coke, Institutes of the Laws of England 213-214 (1797 ed.). The second plea, *autrefois convict*, gave similar effect to a former conviction. *Id.*[6] Against these pleas the Crown had but two affirmative defenses: a defect in the indictment on which the defendant was first tried; or a prior conviction (or acquittal) rendered by a court of incompetent jurisdiction.[7] *See Vaux's Case*, 76 Eng. Rep. 992 (Q.B. 1591).

As double jeopardy evolved in the common law, it began to be applied more broadly as a bar not only to a second prosecution, but also in some circumstances to any retrial of an offense. As the Supreme Court observed in an 1873 double jeopardy case, albeit with some historical imprecision: "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex Parte Lange*, 85 U.S. at 169.

Despite the universal acceptance of the double jeopardy prohibition – or perhaps because of it – ratification-

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[6] These common-law pleas were largely adopted by the American colonial courts. For example, The Body of Liberties of Massachusetts (1641), clause 42, provided that "No man shall be twise sentenced by Civil Justice for one and the same Crime, offence, or Trespasse." *See also* The Laws and Liberties of Massachusetts (1648) (Farrand ed. 1929) ("everie Action * * * in criminal Causes shall be * * * entred in the rolls of everie Court * * * that such Actions be not afterwards brought again to the vexation of any man.").

[7] In the ancient common law, double jeopardy protection attached only to capital offenses (although most felonies were theoretically at least punishable by death). *See* 4 W. BLACKSTONE, COMMENTARIES *335-336. While the Fifth Amendment speaks of "life or limb," it is well settled that in its modern form double jeopardy protects against repeated prosecutions for *all* criminal offenses. *See Ex Parte Lange*, 85 U.S. 163, 170 (1873).

era evidence as to the precise meaning the Framers assigned to the Double Jeopardy Clause is scant, although what is available "suggests that the draftsmen of the Bill of Rights intended to import into the Constitution the common law protections much as they were described by Blackstone." *Jenkins*, 490 F.3d at 873; *see also Currier v. Virginia*, 138 S. Ct. 2144, 2152-2153 (2018) (plurality opinion) ("The Double Jeopardy Clause took its cue from English common law pleas that prevented courts from retrying a criminal defendant previously acquitted or convicted of the crime in question.").[8]

In 1824, the Supreme Court decided *United States v. Perez*, 22 U.S. 579 (1824). In that case, which the Court would later describe as the "fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objection," *Illinois v. Somerville*, 410 U.S. 458, 461 (1973), the Court held that a hung jury did not prevent a retrial of a defendant. Justice Story, writing for a unanimous court, limned the rule as we know it today:

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

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[8] The original draft of the Double Jeopardy Clause introduced by Madison in the House of Representatives on June 8, 1789, provided that: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." *See* 1 Annals of Congress 343 (1789). This language was considered insufficiently protective of the rights of criminal defendants because it could have been read to preclude a defendant from suing on a writ of error on his own behalf or from receiving a second trial in case his first conviction was reversed on appeal, *see Jenkins*, 490 F.2d at 873 (Friendly, J.); *see also Green*, 355 U.S. at 202 (Frankfurter, J., dissenting) ("There was fear that as proposed by Madison, it might be taken to prohibit a second trial even when sought by a defendant who had been convicted.").

> 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.

22 U.S. at 580 (emphasis added). The *Perez* "manifest necessity"[9] standard has since been consistently applied by the Supreme Court and lower federal courts when addressing a re-prosecution after a mistrial, although the standard has been refined over time. *See Renico v. Lett*, 559 U.S. 766, 774 (2010) ("Since *Perez*, we have clarified that the 'manifest necessity' standard 'cannot be interpreted literally,' and that a mistrial is appropriate when there is a 'high degree' of necessity.") (quoting *Washington*, 434 U.S. at 506).

2. The Modern Approach to Jeopardy and Mistrials

The modern relationship between mistrials and double jeopardy is anchored in a triptych of Supreme Court decisions: *Downum v. United States*, 372 U.S. 734 (1963), *United States v. Jorn*, 400 U.S. 470 (1971) (plurality), and *Illinois v. Somerville*, 410 U.S. 458 (1973). In *Downum*, the defendant was charged with mail theft and check fraud. On the first day of trial, a jury was selected and sworn and instructed to reconvene at 2 p.m. When the jury returned, the prosecution asked that the jurors be discharged because a key witness (the payee on the stolen and altered checks) was not present to testify – he had not been served with a summons as a result of a miscommunication between the marshal and the witness's wife. Because the

[9] This language tracks that of Blackstone, who wrote that a jury could not be discharged before verdict "unless in cases of evident necessity." 4 W. BLACKSTONE, COMMENTARIES * 360.

witness's testimony was relevant to only two of the six counts of the indictment, Downum moved to have these counts dismissed for want of prosecution and to continue with the trial on the remaining four counts. The judge refused and, over Downum's objection, discharged the jury. Two days later, the court called the case again and sought to impanel a second jury. Downum interposed a plea of double jeopardy, which was denied. The second jury was sworn, and Downum was tried and convicted. The Fifth Circuit affirmed the conviction, and the Supreme Court granted certiorari.

In its decision, the Supreme Court observed that "[a]t times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest – when there is an imperious necessity to do so." *Downum*, 372 U.S. at 736. As a limitation on this principle, the Court noted that "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" are clear examples of situations where "jeopardy attaches" and a defendant can raise the previous judicial proceeding as a bar to a second trial. *Id.* Viewing jeopardy as having "attached" the moment the jury is sworn results from the Court's conclusion that "the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" *Id.* (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)).

After surveying the case law, the Court, quoting language from a Ninth Circuit case, *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931)[10], ruled that double jeopardy

[10] For reasons best known to itself, a Supreme Court majority had previously declined to follow the "Cornero rule" in *Wade v. Hunter*, decided fourteen years before *Downum*. *See* 336 U.S. 684, 691 (1949)

barred a second trial in Downum's case because the prosecutor, when "impanel[ing] the jury without first ascertaining whether or not his witnesses were present . . . took a chance." *Downum*, 372 U.S. at 737. Although recognizing that the rule would bar the retrial of a criminal defendant who benefitted from a prosecutor's carelessness or a witness's unavailability, the Court nonetheless held that "[w]e resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.'" *Id.* at 738 (quoting *United States v. Watson*, 28 F. Cas. 499, 501 (S.D.N.Y. 1868)).

In the next of the three cases, *United States v. Jorn*, 400 U.S. 470 (1971), the defendant was charged with the preparation of fraudulent income tax returns. On the first day of trial, the jury was selected and sworn and the government introduced the suspect income tax returns through the testimony of an IRS agent. The government's remaining five witnesses were the taxpayers whom the defendant had allegedly aided in preparing the false returns. *Id.* at 473. The trial judge, concerned that the taxpayers had not been adequately warned of their right not to incriminate themselves, discharged the jury, advised the witnesses of their constitutional rights, and declared a mistrial for the stated purpose of allowing the witnesses to consult with attorneys. The case was then set for a retrial before another jury but, upon the motion of the defendant, the judge dismissed the indictment on double jeopardy grounds. The government appealed, ultimately to the Supreme Court.

The Court, in a plurality opinion authored by Justice Harlan, agreed that the Double Jeopardy Clause barred a

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("We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere.").

retrial. Citing *Gori v. United States*,[11] the plurality noted that a relevant consideration is "which party to the case was the beneficiary of the mistrial ruling." *Jorn*, 400 U.S. at 482. The government argued that "even if [the Court concludes] the trial judge here abused his discretion, reprosecution should be permitted because the judge's ruling 'benefitted' the defendant and also clearly was not compelled by bad-faith prosecutorial conduct aimed at triggering a mistrial in order to get another day in court." *Id.* The Supreme Court disagreed that the mistrial ruling necessarily "benefitted the defendant." That determination, the Court stated, turned on what the taxpayer witnesses would in fact have said if, after consulting counsel, they had agreed to take the stand. Because the content of their testimony was as-yet unknown, the Court was unable to conclude that "this is a case of a mistrial made 'in the sole interest of the defendant.'" *Id.* at 483 (quoting *Gori*, 367 U.S. at 369).

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[11] In *Gori v. United States*, 367 U.S. 364 (1961), decided two years before *Downum*, the Supreme Court held that the retrial of a criminal defendant was not barred by the Double Jeopardy Clause where the trial judge, on the first day of his first trial, had *sua sponte* dismissed a juror and declared a mistrial. It was not entirely clear what motivated the trial judge's decision – which the Second Circuit had described as "overassiduous" and premature – although the Supreme Court surmised that the judge may have intuited that the prosecution's line of questioning of a witness was leading to the introduction of prejudicial evidence, specifically other crimes committed by the accused, "and took action to forestall it." *Id.* at 365-366. Counsel for the defendant never had the opportunity to weigh in on the judge's decision, apparently because it was taken so hastily. In any event, the Supreme Court, citing *Perez* and *Hunter* and deferring to the district judge's determination that the declaration of a mistrial in Gori's case fit the "manifest necessity" standard, concluded that "[s]uffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest in the defendant, to hold that its necessary consequence is to bar all retrial." *Id.* at 369.

The Supreme Court determined, however, that the trial judge abused his discretion by declaring a mistrial.

> Despite assurances by both the first witness and the prosecuting attorney that the five taxpayers involved in the litigation had all been warned of their constitutional rights, the judge refused to permit them to testify, first expressing his disbelief that they were warned at all, and then expressing his views that any warnings that might have been given would be inadequate.

Jorn, 400 U.S. at 486-487. It was apparent that "no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so." *Id.* at 487. As the trial judge had not adequately explored his discretion to determine whether, in light of all the alternatives, there was a "manifest necessity" for a mistrial, the plurality found that a second attempted prosecution would violate the Double Jeopardy Clause. Chief Justice Burger concurred, bemoaning the fact that "the case represents a plain frustration of the right to have this case tried, attributable solely to the conduct of the trial judge," and that "[i]f the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense." *Id.* at 487-488 (Burger, C.J., concurring).

The last of the three cases, *Illinois v. Somerville*, 410 U.S. 458 (1973), arose from the prosecution of an Illinois man for theft. The day after the jury was impaneled and sworn, the prosecutor realized that the indictment was facially deficient under Illinois law because it lacked the allegation that the defendant had intended to permanently

deprive the owner of the stolen property.[12] The trial court determined that continuing the trial would be pointless and granted the government's motion for a mistrial. The government secured a second indictment and proceeded to trial before a second jury over the defendant's objection. A post-conviction petition for habeas relief was denied by the district court and the Seventh Circuit. The *Jorn* decision then intervened, and after granting certiorari, the Supreme Court vacated and remanded to the Seventh Circuit for further proceedings in light of *Jorn* and *Downum*. The Seventh Circuit reversed its prior ruling, holding that a reprosecution was barred because jeopardy had attached when the jury was impaneled and sworn. Consequently, the declaration of a mistrial over the defendant's objection precluded a retrial under a valid indictment. *See United States ex rel. Somerville v. State of Illinois*, 447 F.2d 733, 734 (7th Cir. 1971). The State of Illinois then appealed to the Supreme Court.

The Supreme Court, invoking the "manifest necessity" language from *Perez*, noted that the standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations during the course of a criminal trial." *Somerville*, 410 U.S. at 462. The Court's principal concern appears to have been a pragmatic one: "[i]f a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned." *Id.* at 469. "Here, the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this

[12] Under then Illinois law, an indictment defect was jurisdictional and could not be waived by a defendant's failure to object.

manner could be manipulated so as to prejudice the defendant." *Id.*

Despite the defendant's reliance on *Jorn* and *Downum*, the Supreme Court noted that the cases did not stand for the proposition that in *all* instances a defendant has the right to have his trial completed by the first jury impaneled. Rather, those cases, particularly *Jorn*, had been careful to emphasize the *Hunter* court's admonition that a bright-line rule "would create an insuperable obstacle to the administration of justice," and "what has been said is enough to show that 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 punishments." *Id.* at 470 (quoting *Hunter*, 336 U.S. at 688-689). Because the delay in proceeding with Somerville's case was "minimal," and because a mistrial was "the only way in which a defect in the indictment could be corrected," the Court could not "say that the declaration of a mistrial was not required by 'manifest necessity' or the 'ends of public justice.'" *Somerville*, 410 U.S. at 469. The Court concluded with the observation that, "[w]here the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." *Id.* at 471.

3. Application to the Motion by Garske, Gottcent, and Sedlak

Distilled from these cases and the historical context of the double jeopardy prohibition are several principles that compel the conclusion that a retrial of the three consenting defendants would violate their Fifth Amendment right. At its most basic level, the Double Jeopardy Clause has come to provide protection as much against the ordeal of

multiple criminal trials as against the possibility of multiple verdicts. In his opinion for the Court in *Green*, Justice Black, after a learned discussion of Blackstone and common-law antecedents, laid out the first principle in the following passage:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
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> Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.

Green, 355 U.S. at 187-188 (citations omitted); *see also Bartkus*, 359 U.S. at 155 (Black, J., dissenting) ("[T]he basic and recurring theme has always simply been that it is wrong for a man to 'be brought into Danger for the same Offence more than once.' Few principles have been more deeply 'rooted in the traditions and conscience of our people.'") (citations omitted).

A second basic principle can be extracted from the maxim that "jeopardy attaches when the jury is sworn." *United States v. Toribio-Lugo*, 376 F.3d 33, 37 (1st Cir.

2004). This principle reflects the "recognition of the defendant's prized right to have his trial, once under way, completed by a particular trier." *Id.* (citing *Washington*, 434 U.S. at 503); *see also Crist v. Bretz*, 437 U.S. 28, 38 (1978) ("The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.").

Embedded in the rule is the further recognition that "[e]ven if the first trial is not completed, a second prosecution may be grossly unfair" because, among other things, a second trial "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Washington*, 434 U.S. at 503-504; *see also Jorn*, 400 U.S. at 479 ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in the enforcement of criminal laws . . . . These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge."); *Currier*, 138 S. Ct. at 2149 ("This guarantee [of the Double Jeopardy Clause] recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek.").

Of course, the right of a defendant to see his trial to completion before a single jury is not absolute. *See Jorn*, 400 U.S. at 480 (noting that "[t]he question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without

the defendant's consent," and further observing that the Court "has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial"). It is only after a determination that "jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by 'manifest necessity' or the 'ends of public justice.'" *Somerville*, 410 U.S. at 468.

In applying the *Perez* doctrine of "manifest necessity," a reviewing court will closely examine the trial judge's decision to declare a mistrial, whether alternatives were adequately explored, and the weight of the burden a retrial would impose on the accused. *See Hunter*, 336 U.S. at 691 ("The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances, without injury to defendants or to the public interest."). And it is here that the rule comes up against the right. Were the issue to turn solely on the operation of Rule 23, it would be difficult to imagine a necessity more manifest: the Rule plainly dictates that in circumstances like these, a trial cannot proceed with less than twelve jurors without the consent of *all* parties, and that includes the government.

But the issue is more complex than a strictly rule-based analysis would suggest. While the Rule may excuse the trial judge for declaring a mistrial (at least where there is no practical or feasible alternative), the doctrine also implicates the decision-making of the government. *Arizona v. Washington*, 434 U.S. 497 (1978), is instructive. In *Washington*, the trial judge granted the government's motion for a mistrial based on an improper and prejudicial opening statement by defense counsel. The Supreme Court found no abuse of discretion on the trial judge's part, as his was the superior position from which to determine "the likelihood that the impartiality of one or more jurors may have

been affected by the improper comment." *Id.* at 511. The Court did not, however, stop there. "In view of the importance" of the double jeopardy rights of the accused, the Court continued, "and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Id.* at 505. In other words, because the double jeopardy right belongs to a criminal defendant, where the prosecutor plays a prominent role in bringing about the necessity of a mistrial, the "manifest necessity" standard applies to the government's decision-making with the same force as it does to the actions taken by the trial judge.

So the issue boils down to this. Can the government, in the circumstances of this case, point to a "manifest necessity" for the withholding of its consent to a verdict by a jury of eleven one day before a month-long trial was coming to an end? Phrased differently, is it the case that "the ends of public justice would otherwise [have been] defeated," *Perez*, 22 U.S. at 588, had the government proceeded to a verdict with eleven jurors as the three consenting defendants (and the court) desired?

In balancing the interests at stake, two factors seem to me to have particular importance. The first is a temporal consideration: a mistrial declared on the first day of a jury trial is a far less onerous imposition on the rights of a defendant than a mistrial declared after a defendant has endured the ordeal of a multi-week trial. In *Gori* and *Somerville*, for example, in contrast to this case, the mistrial decision came on the very first day of trial. To the extent that "the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a

declaration of mistrial," *Jorn*, 400 U.S. at 485, this interest would seem weightiest after a defendant has undergone the full gauntlet of a criminal trial, and after he has likely shown his hand to the prosecution.

A second consideration, although not dispositive, is whether the government stands to gain (or extract) some "benefit" from the declaration of a mistrial. *See United States v. Glover*, 506 F.2d 291, 297 (2d Cir. 1974) ("[W]here the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to his double jeopardy protection."). *Compare Gori*, 367 U.S. at 366 ("Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial."); *cf. Jorn*, 400 U.S. at 483 (extending *Gori* and concluding that "a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision.").

From all appearances, the government's decision to withhold consent was influenced by a desire to submit all four defendants to the jury for a verdict, most probably in the belief that a conviction of all four would be made more likely by the jury's collective consideration. It appears also to be the case, as defendants speculate and the government more or less concedes, that it was determined to prevent Ackerly from succeeding in her quest for a severance of her case from the others. Whatever the explanation, it is clear that the three consenting defendants stood to gain nothing from a mistrial, while the government accomplished at least one, and possibly two, of its objectives.

It is true, as the government insists, that a defendant's "valued right" to have his trial completed by the first impaneled tribunal, "must in some instances be subordinated

to the public's interest in fair trials designed to end in just judgments." *Hunter*, 336 U.S. at 689; *see also Washington*, 434 U.S. at 506 (A defendant's double jeopardy rights are "sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury."). But while the principle is sound, the government fails to demonstrate how the public's interest in just punishment would have been threatened had the government agreed to proceed to a verdict against Garske, Gottcent, and Sedlak, and then retried a shorter and simpler case against Ackerly, rather than undertaking another month-long trial against all four defendants.[13]

Here, in withholding consent, the government assumed the risk that the consenting defendants' double jeopardy claim would have merit, as I find it does. In making this determination, let me make explicit what I have implicitly said in the discussion of Rule 23: the government here did nothing reproachable or in bad faith. Fully aware of the possible consequences, it simply made a bad gamble, and in the eyes of this court at least, lost.

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[13] I add that the government, had it consented to proceed against the three consenting defendants, would also have been spared the extra (and unnecessary) burden of defending against a double jeopardy argument that the moving defendants gave fair warning they would make were a mistrial granted. *See United States v. Ramirez*, 884 F.2d 1524, 1530 (1st Cir. 1989) ("It is important to point out that the court had been advised by counsel of a possible double jeopardy problem prior to its mistrial declaration.").

CONCLUSION

Garske, Gottcent, and Sedlak's Motion to Bar Retrial under the Fifth Amendment is ALLOWED. The court further orders that the indictment be DISMISSED WITH PREJUDICE as to these three defendants. The Clerk will schedule the retrial of defendant Ackerly at the first available opportunity consistent with the court's calendar and agreeable to the parties.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE