No. ___-_____

In the Supreme Court of the United States

JERMAIN V. RICHARDS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

On Petition For Writ of Certiorari to the Connecticut Supreme Court

PETITION FOR WRIT OF CERTIORARI

Norman A. Pattis
Counsel of Record
Kevin M. Smith
Cameron L. Atkinson
Earl A. Voss
383 Orange Street, 1st Floor
New Haven, Connecticut 06511
Phone: (203) 393-3017
Fax: 203-393-9745
Email: npattis@pattisandsmith.com

Counsel for Petitioner

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QUESTIONS PRESENTED

After *Ramos v. Louisiana* required unanimous juries to convict criminal defendants, only Oregon preserved nonunanimous jury verdicts in criminal cases, allowing nonunanimous acquittals. Every other state and the United States require unanimous acquittals. If juries cannot agree on verdicts, *Perez v. United States* authorizes trial judges to declare mistrials if *Allen* charges fail to persuade juries to reach unanimous verdicts. *Perez*, however, did not invoke the Double Jeopardy Clause. Its manifest necessity doctrine flowed from common law jury practice. 150 years later, *Richardson v. United States* transformed *Perez* into a double jeopardy decision to permit retrials after juries cannot unanimously reach verdicts.

In this case, the trial court declared mistrials after two juries hung on whether to convict Jermain Richards of murder. Connecticut prosecuted Richards a third time, and a third jury convicted him.

The questions presented are:

1. Whether the Fifth Amendment's Double Jeopardy Clause bars a criminal defendant's retrial after the government has had a fair opportunity to prove its case and a mistrial is declared due to a hung jury, thus abrogating *Richardson v. United States*, 468 U.S. 317 (1984) and *United States v. Perez*, 9 Wheat. 579 (1824).

2. Whether the retrial of a criminal defendant after the government has had a fair opportunity to prove its case and a mistrial is declared due to a hung jury violates the Due Process Clause of the Fourteenth Amendment by placing a burden on him to prove his innocence.

PARTIES TO THE PROCEEDING

The Petitioner is Jermain Richards. He was the defendant in the Connecticut Superior Court and the defendant-appellant before the Connecticut Appellate and Supreme Courts.

The Respondent is the State of Connecticut. The State of Connecticut was the prosecuting authority in the Connecticut Superior Court and the appellee before the Connecticut Appellate and Supreme Courts.

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An encounter with the Connecticut criminal justice system destines a criminal defendant to endure months and sometimes years of pretrial wrangling as the state and defense counsel assemble their cases and negotiate plea bargains. When a case finally makes its way to trial, a criminal defendant has already endured months, and often years, of strict bail conditions, inflexible court dates, and the stigma of being charged with a crime. A jury trial represents his last hope to crush once and for all the accusations leveled against him and moved on with his life.

In this case, the unthinkable then happened. A jury failed to reach a unanimous verdict, and the trial court declared a mistrial and rescheduled the case for a second trial. Thus, instead of the nightmare ending, it only got worse. Perhaps finding solace in the fact that the first jury found reasonable doubt, the defendant turned to trial again, but fate had another cruel twist for him. The second jury failed to reach a unanimous verdict, and the scene repeated itself.

Between the second and third trials, the prosecution struck a deal with a felon, essentially letting him walk free in exchange for his testimony against the defendant. The defendant returns to trial, and a third jury convicts him in less than 24 hours. Thus, Connecticut courts permitted the prosecution to make infinite, successive attempts to obtain a conviction despite repeated failures to meets it burden of proof. The Petitioner, Jermain Richards, lived this nightmare and now sits behind bars for the rest of his life after being convicted of murder on the state of Connecticut's third attempt at prosecuting him.

Richards' plight is no outlier. According to a 2003 unpublished report funded by the United States Department of Justice, an average of 6.2% of jury trials in the United States end in hung juries. *See* P. Hannaford-Agor, et al., *Are Hung Juries A Problem? Executive Summary*, U.S. Department of Justice, at p. 2 (2003).[1] Larger jurisdictions such as Los Angeles County reported a hung jury rate of 14.8%. *Id.* The averages skyrocketed when researchers defined a hung jury as one that deadlocks on any single charge. Under this definition, the national average doubled to 12.8%, and Washington, D.C. and Los Angeles County reported hung jury percentages of 22.3% and 19.5% respectively. *Id.* at p. 3.

The Court's precedents currently permit prosecutors to retry defendants after a jury hangs without violating the Fifth Amendment's Double Jeopardy Clause or the Fourteenth Amendment's Due Process Clause. Those precedents rely only on the common law procedural rules and exceptions that originally had no relevance in double jeopardy or due process doctrine. Their ancient history, however, has largely insulated them from independent scrutiny, and the Court has dismissed criticism as being of "academic interest only" even though it has acknowledged that the criticism is more constitutionally accurate than its precedents are. *Crist v. Bretz*, 437 U.S. 28, 34 n.10 (1978).

The high rates of hung jury mistrials and Richards' current plight signify that the Court's precedents have very real and devastating consequences to criminal defendants who stand to lose their lives and their liberty to a blind adherence to

[1] https://www.ojp.gov/pdffiles1/nij/grants/199372.pdf

historical precedents that did not even purport to interpret the constitutional provision at issue. In other words, Richards presents for review questions that recur in almost 12% of jury trials in the United States and that have devastating consequences on people supposedly presumed innocent of crimes. The importance of these questions cannot be overstated, and he respectfully urges the Court to grant certiorari to review and resolve them on an independent constitutional basis instead of merely relying on its past precedents.

OPINIONS BELOW

The decision of the Connecticut Supreme Court has not officially been reported yet, but it is reproduced at App.1-5. The underlying decision of the Connecticut Appellate Court is reported at 196 Conn.App. 387 and 229 A.3d 1157, and it is reproduced at App.6-26. The Superior Court's judgment file contains its formal verdict, it is reproduced at App.27-29.

JURISDICTION

The trial court entered a judgment of conviction against the Petitioner on March 2, 2018. The Connecticut Appellate Court affirmed the Petitioner's conviction on March 10, 2020. The Connecticut Supreme Court issued its opinion on July 16, 2021, affirming the Petitioner's conviction. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

> cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
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> United States Constitution, Amendment XIV, § 1:
>
> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

On April 20, 2013, this tragic case's victim, Alyssa Maria Wiley, disappeared. App.10, 12. At the time, she attended Eastern Connecticut State University (ECSU) and had dated the Petitioner, Jermain Richards, since high school. App.10. When Wiley failed to respond to various attempts to contact her and missed classes, ECSU's Department of Public Safety began a missing person investigation in coordination with the Connecticut State Police. App.10.

After 45 investigators conducted 400 interviews, executed 19 search warrants, and searched more than 25 different locations, they designated Richards as a person of interest on April 26, 2013. App.10. Law enforcement interest in Richards piqued when officers deduced that he was the last person seen alive with Wiley – at Richards' mother's residence on April 20, 2013. App.10, 12. That interest became extremely

focused when officers learned of allegations that Richards had stalked, controlled, and engaged in violence toward her. App.10-12.

On May 17, 2013, Connecticut state troopers working with specially trained K-9s located Wiley's partial remains in a wooded area about a mile and a half from Richards' home. App.12-13 The next day, they arrested and charged Richards with murder. App.13.

Connecticut's prosecution of Richards for murder faced serious difficulties. Law enforcement officers only recovered a decomposed leg from the knee down and two portions of Wiley's arm in separate locations at the same site. App.12-13. Dr. Wayne Carver, Connecticut's chief medical examiner at the time of Wiley's death, reported in his autopsy findings that he could not determine Wiley's cause or manner of death. His successor, Dr. James Gill, concluded that Wiley's death was a homicide at Richards' third trial despite not performing Wiley's autopsy. Dr. Gill, however, acknowledged that he could not testify as to the mechanism of Wiley's death, saying that there was "no way to tell how [Wiley's death] happened, where it happened, or when it happened." App.48-49. Adding to Connecticut's difficulties was its lead investigator's testimony that the Connecticut State Police's investigation yielded "no information whatsoever about any connection about the body parts that were found and someone that may have dropped them off."

To connect Richards to Wiley's disappearance, Connecticut relied entirely on inferences. On April 20, 2013, Wiley informed friends and colleagues that she would miss a school luncheon because she needed to go home to her grandmother. App.12.

School video surveillance footage then showed her exit her campus residence hall at about 12:25 P.M. on April 20, 2013, enter Richards' car, and leave campus. App.12. Richards' mother who he shared a residence with then testified that she encountered Wiley with Richards at their shared residence at about 2:15 PM on April 20, 2013 while she prepared for work – the last time that any of Connecticut's witnesses saw Wiley alive. App.12.

Further investigation revealed seven additional facts that Connecticut based its argument that Richards murdered Wiley. App.12-13. First, Richards did not report for his regularly scheduled work shift as a licensed practical nurse on April 21, 2013 from 3 to 11 P.M, but he did report to his second shift on April 21, 2013, which began at 11 P.M. App.12. Second, police K-9 dogs discovered Wiley's partial remains about 1.5 miles from Richards' home. App.12-13 Third, Connecticut's medical examiners determined that someone dismembered Wiley's body with a sharp instrument after her death. App.13. Fourth, when law enforcement seized and searched Richards' car on April 26, 2013, they concluded that the interior had been recently detailed. App.13. Fifth, Wiley's cell phone's last connection occurred at about 4:02 P.M. on April 20, 2013 at the cell tower closest to Richards' residence. App.13. Sixth, when police searched Richards' home and an additional residence, they discovered that the bathroom was being remodeled and no sink or bathtub was present. App.13. Finally, in Richards' Bridgeport home, law enforcement officers found Wiley's birth control prescription and a gold necklace belonging to her in a garbage bag in Richards' basement next to the washer and dryer. App.13.

To supplement this evidence, Connecticut turned to the romantic relationship between Wiley and Richards prior to her disappearance. It offered testimony from Wiley's sister that described Richards as "possessive, obsessive, controlling, and manipulative" and always insistent that he had to know "where [Wiley] was, with whom, and what she was doing." App.10-11. Connecticut also offered evidence that Richards had allegedly assaulted Wiley at his house by trying to suffocate her and putting her in a headlock. App.11-12. Wiley's sister claimed that Wiley snuck out of Richards' house with her belongings and told her that she did not want to be in a relationship with Richards any more, but did not know how to break up with him. App.11-12. Wiley's sister, however, conceded that Wiley did not report the incident to the police and that, days later, she rekindled her relationship with Richards, who purchased Wiley new clothes and groceries for school. App.11-12. Richards' acquaintances also testified that he acknowledged choking Wiley while upset. App.12.

In a last-ditch effort to connect Richards to Wiley's disappearance and death, Connecticut turned to one of Richards' former high school acquaintances, Jeven Wright, who testified that Richards had allegedly confided in him that Wiley had cheated on him and then broken up with him over Facebook during a transaction in which Wright sold Richards a used car. App.12. Wright also testified that Richards told him that Wiley "doesn't know who she's messing with, you know, I'm a nurse and I'll get rid of her." App.12

Connecticut tried Richards for the first time in February 2015. App.28. After 11 days of evidence and 1 day of argument, the jury could not reach a verdict after

deliberating for 6 days, and the trial court declared a mistrial. During Richards' first trial, the trial court delivered a *Chip Smith* charge[2] instructing the jury on the importance of reaching a unanimous verdict. The jury deliberated for 3 days after receiving this charge.

Connecticut then retried Richards in March 2016. After 10 days of evidence and argument, the jury could not reach a verdict after deliberating for 8 days, and the trial court declared a mistrial. App.33-36. During Richards' second trial, the trial court delivered two *Chip Smith* charges to the jury, and the jury deliberated for 4 days after receiving the first charge. App.37-38.

Undaunted, Connecticut tried Richards for a third time in September 2017 and, after 7 days of evidence and argument, the jury convicted Richards of murdering Wiley after less than 24 hours of deliberation. App.39-40.

B. Procedural History

Richards appealed his conviction to the Connecticut Appellate Court on three grounds: (1) insufficient evidence existed to convict him of murder because Connecticut failed to prove the manner, mechanism, time, and place of Wiley's death, (2) the trial court erred in declining to give a special credibility instruction on the testimony of a cooperating witness when Connecticut gave that witness a cooperation agreement between Richards' second and third trials, and (3) the retrials of Richards

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[2] "A Chip Smith instruction reminds the jurors that they must act unanimously, while also encouraging a deadlocked jury to reach unanimity." *State v. O'Neil*, 261 Conn. 49, 51 n.2 (2002) (quoting *State v. Smith*, 49 Conn. 376 (1881)). It serves the same purpose as the instruction that this Court approved in *Allen v. United States*, 164 U.S. 492 (1896).

violated his Fifth Amendment right against being put in jeopardy more than once for the same offense and impermissibly diluted the Connecticut's burden of proof in violation of the Fourteenth Amendment. App.10, 25 n.2.

The Connecticut Appellate Court rejected all three of Richards' arguments, and it only addressed his double jeopardy and due process argument in a single footnote, relying on this Court's decision in *Richardson v. United States*, 468 U.S. 317 (1984) and a similar Connecticut Supreme Court case – *State v. James*, 247 Conn. 662 (1999). App.25 n.2. Richards then petitioned the Connecticut Supreme Court for review of all three of his arguments. App.43-72. The Connecticut Supreme Court, however, chose to address only his sufficiency of the evidence argument and ultimately concluded that sufficient evidence existed to convict him. App.4-5.

REASONS FOR GRANTING THE PETITION

The Court's decisions holding that prosecutors may retry defendants after juries fail to reach unanimous verdicts leans on a broken reed of common law reasoning rather than the sounder foundation of constitutional analysis. In the double jeopardy context, the Court simply transplanted a common law rule designed to treat jurors humanely into a substantive constitutional rule without finding a constitutional basis to do so. Thus, at no point in our nation's history has the Court conducted an independent constitutional inquiry into whether the state or federal government may retry a defendant after a jury fails to reach a unanimous verdict without violating the Fifth Amendment's Double Jeopardy Clause.

The Court's reliance on common law rules also has completely neglected any analysis of the presumption of innocence principles guaranteed by the Fourteenth Amendment. While the Court has clearly established that the presumption of innocence and the prosecution's concurrent duty to rebut it by proof of guilt beyond a reasonable doubt dictate outcomes, it has never considered their application in the context of a jury failing to reach a unanimous verdict.

While reliance on stare decisis is well-established in the Court's traditions, the stakes overwhelmingly favor the Court's reconsideration of its past precedents, and our most fundamental constitutional principles require their abrogation. A criminal defendant stands to lose years of liberty – something that can never be regained or compensated – based on precedents almost 200 years old that do not even address the constitutional issues that he may raise. The Petitioner, Jermain Richards, faces a life sentence based on those faulty precedents, and justice requires that the Court conduct the independent constitutional analysis that its precedents have not before he spends the rest of his life in prison.

I. The Fifth Amendment's Double Jeopardy Clause Bars The Retrial Of A Criminal Defendant After A Court Declares Mistrial Due To A Hung Jury.

A. The Court's precedents in *Richardson* and *Perez* are irreconcilable with its modern double jeopardy precedents.

In *Richardson v. United States*, 468 U.S. 317 (1984), this Court declined to reexamine its decision in *Perez v. United States*, 9 Wheat. 579 (1824), which held that mistrial declarations because of hung juries did not preclude retrials. Instead, even though *Perez* resolve a double jeopardy question, *Richardson* extrapolated its

holding into a controlling rule for the double jeopardy context without reexamining its context or its relationship to the Court's subsequent double jeopardy precedents.[3] Thus, *Perez* – a criminal procedure decision that never discussed the Fifth Amendment's Double Jeopardy Clause – currently controls mistrials when juries fail to reach a unanimous verdict, creating an irreconcilable anomaly in the Court's double jeopardy jurisprudence.

1. *Perez* never considered a constitutional question, and it only resolved a long-running common law dispute over a rule of criminal procedure.

Perez does not mention the Fifth Amendment's Double Jeopardy Clause at all, and the trial court record shows that the defendant's counsel never raised a double jeopardy claim. *See A Correct Report of the Trial of Josef Perez, for Piracy, Committed on Board the Schooner Bee, in Charleston, S.C. Before the Circuit Court of the United States for the Southern District of New York*. New York: J.W. Bell (1823).[4] The defendant – Josef Perez – moved the trial court enter a verdict of acquittal when the jury informed it that it could not reach a verdict and that it was equally divided. *Id.* at 33. Instead, the trial court charged the jury on the importance of reaching a unanimous verdict, but it was to no avail as the jury reported a deadlock again. *Id.* at 33. Perez preserved his objection to the discharge of the jury, and he argued the day after the jury had been discharged that (1) the trial court lacked the legal

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[3] *Richardson* does not stand alone among the Court's precedents. The Court has summarily relied on *Perez* in three other cases presenting the double jeopardy question. *Keerl v. Montana*, 213 U.S. 135 (1909); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Logan v. United States*, 144 U.S. 263 (1891).

[4] The Library of Congress provides the full report at the following URL: https://www.loc.gov/item/2006573374/.

authority to discharge a jury in a capital case and (2) if it did possess the power, it could only be exercised where the jury had reached the limits of human endurance or a health problem had befallen one of the jurors. *Id.* at 33. At no point during argument did Perez's counsel assert a Fifth Amendment Double Jeopardy argument to challenge his retrial. *Id.* at 34-36. Thus, this record clearly establishes that the issues presented to this Court in *Perez* were solely whether the trial court had the authority to discharge a jury before it reached a verdict in a capital case and, if so, under what circumstances.

Perez addressed only the questions presented to it, and it did not pretend to reach the Fifth Amendment Double Jeopardy question. Its holding clearly stated that "the facts constitute[ed] no legal bar to a future trial…" because "[t]he prisoner ha[d] not been convicted or acquitted, and may again be put upon his defence." *Perez*, 22 U.S. at 579. Justice Joseph Story explained the holding within the context of the questions presented:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.

Id. at 580.

Justice Story then established the nature of the decision as a procedural one rather than a constitutional one:

> We are aware that there is some diversity of opinion and practice on this subject, in the American Courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial.

Id. at 580. In other words, *Perez* itself explains that it settled an issue of criminal procedure and practice, not a constitutional issue.

Justice Story himself confirmed this interpretation a decade later while sitting as a circuit justice. In *United States v. Gilbert*, the Circuit Court rejected convicted pirates' new trial petitions claiming newly discovered evidence and legal error at their first trial. 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204). Justice Story reasoned that granting them a new trial would place them in jeopardy twice in violation of the Fifth Amendment's Double Jeopardy Clause even though they would be executed without one. *Id.* at 1301-02. After a long discussion establishing that jeopardy only attaches after a jury delivered a verdict,[5] Justice Story then stated that *Perez* never

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[5] Justice Story expressed the same view a year earlier in his influential *Commentaries on the Constitution*, relying on *Perez* and explaining that the meaning of the Double Jeopardy Clause is

> that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged…. But it does not mean, that he shall not be tried for the offence a second time, if the jury have been discharged without giving any verdict… for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1781 (Boston 1833) (footnote omitted).

considered the Fifth Amendment's Double Jeopardy Clause because initial jeopardy had not attached:

> Upon the question of discharging a jury in capital cases, the supreme court of the United States have in the case of *U. S. v. Perez*, 9 Wheat. [22 U. S.] 579, adopted the doctrine of the supreme court of New York. Upon that occasion the court did not go into any exposition of the clause in the constitution now under consideration; but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted, and therefore might again be put upon his defence. But I think I may say, that it was never for a moment at that time understood by the court, that if there had been a verdict of conviction or acquittal, the prisoner could be again tried for the same offence. The point was not before the court, and was not at all examined.

Id. at 1300.

Gilbert is not an outlier in its era. While also sitting as a circuit justice, Justice Bushrod Washington reached the same conclusion on when jeopardy attaches for Fifth Amendment purposes eleven years before Justice Story did. *See United States v. Haskell*, 26 F. Cas. 207 (C.C.E.D. Pa. 1823) (No. 15,321). After a trial court discharged a jury because of a juror's insanity and held that the discharge did not bar a retrial, Justice Washington held that "the jeopardy spoken of in [the Fifth Amendment] can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon." *Id.* at 212.

Thus, when the Court decided *Perez*, it did not address whether the Fifth Amendment's Double Jeopardy Clause barred a retrial after a jury failed to reach a unanimous verdict because jeopardy did not attach for constitutional purposes until

after a verdict entered. Instead, *Perez* settled an ancient common law dispute over a judge's authority to discharge a jury prior to verdict.[6]

2. *Richardson* and its predecessors create untenable legal fictions of continuing jeopardy and manifest necessity that has no support in the Fifth Amendment or its history.

"Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528 (1975). "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *Price v. Georgia*, 398 U.S. 323, 327 (1970). Relying on these principles in 1978, this Court settled the question of when jeopardy attaches in a criminal jury trial for Fifth Amendment purposes by holding that it attaches when a jury is sworn. *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").

The Court, however, has sought to distinguish between when jeopardy attaches and when it terminates, thus fashioning a doctrine of "continuing jeopardy" out of thin air. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984). The Court's early "continuing jeopardy" doctrine did not strain logic. In trying to cure the injustice of *Gilbert* and to afford convicted defendants appellate review of their convictions, the Court held that retrials after an appellate court has reversed a conviction did not bar a retrial on double jeopardy grounds. *Ball v. United States*, 163

[6] For a brief history of the common-law dispute, see Janet E. Findlater, *Retrial After A Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 705-710 (1981).

U.S. 662, 672 (1896). Instead of offering a detailed analysis, *Ball* cited various cases to support its holding. *Id.* The only explanation among those cited cases came from *Commonwealth v. Gould*, 12 Gray. 171, 173 (Mass. 1858), which explained that a defendant has not been placed in jeopardy when an indictment or conviction is vacated for being defective. In other words, jeopardy never attached in the proceedings.

In 1970 though, the Court took a far different view of *Ball*. Instead of tracing its sources to establish the rationale of its holding, the Court found a "concept of continuing jeopardy implicit in the *Ball* case." *Price v. Georgia*, 398 U.S. 323, 329 (1970). *Price* then extrapolated *Ball* into establishing a rule that jeopardy continues until criminal proceedings against an accused have "run their full course." *Id.* at 326. Thus, *Price* makes two assumptions that have no basis in both this Court's precedents and stand at fundamental odds with the Fifth Amendment: (1) *Ball* held that jeopardy attaches even when an indictment or conviction is defective, and (2) it does not terminate until a verdict enters free of any prejudice to a defendant no matter how many times it takes to get one. Even more shockingly, *Price* acknowledges that continuing jeopardy rests on no historical legal foundation, but opaque public policy interests: "After *Kepner* and *Green*, the continuing jeopardy principle appears to rest on an amalgam of interests—e.g., fairness to society, lack of finality, and limited waiver, among others." *Id.* at 329 n.4.

Despite *Price*'s leap in logic, the Court never employed the "continuing jeopardy" doctrine for more than holding that a defendant "who has secured the

reversal of a conviction on appeal may be retried the same offense." *Breed v. Jones*, 421 U.S. 519, 534 (1975); *see also Burks v. United States*, 437 U.S. 1, 15 (1978); *Price v. Georgia*, 398 U.S. 323, 329 n.4 (1970). Its restraint ended in *Richardson v. United States*, 468 U.S. 317 (1984).

In *Richardson*, a jury acquitted an alleged drug dealer on one of his three charges and failed to reach verdicts on the other two. *Id.* at 318. The district court declared a mistrial, and the defendant objected to his retrial on double jeopardy and sufficiency of the evidence grounds – both arguments ultimately being rejected by the district court. *Id.* at 319. Like its predecessors,[7] *Richardson* offered no original or independent Fifth Amendment analysis, and it confessed as much: "Justice Holmes' aphorism that 'a page of history is worth a volume of logic' sensibly applies here, and we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected." *Id.* at 325-26.

The page of history that the Court relied on was *Perez*:

> It has been established for 160 years, since the opinion of Justice Story in *United States v. Perez*, 9 Wheat 579 (1824), that the failure of the jury to agree on a verdict was an instance of "manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant, because "the ends of justice would otherwise be defeated."

Id. at 323-24.

[7] *Arizona v. Washington*, 434 U.S. 497 (1978); *Wade v. Hunter*, 336 U.S. 684 (1949); *Logan v. United States*, 144 U.S. 263 (1892).

The *Richardson* Court could point to nothing in the Fifth Amendment or its history to support its reliance on *Perez* as a constitutional decision. Instead, it offered two public policy reasons. First, it cited *Arizona v. Washington*: "[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Id.* at 324 (quoting *Washington*, 434 U.S. at 509). Second, it dismissed out of hand the oppression that can result from repeated retrials:

> The double-jeopardy provision of the Fifth Amendment, however, 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. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.... 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 judgments.

Id. at 324-25 (quoting *Wade v. Hunter*, 336 U.S. 684, 688-689 (1949)).

History has not found a way to erase the two fatal problems with these two ad-hoc rationales. First, the rationales have rendered the Fifth Amendment's double jeopardy clause a nullity by systemizing the very injustice that the Fifth Amendment sought to curb. During the reign of the Stuarts in England, judges routinely discharged juries that either appeared disposed to acquit or otherwise unable to reach

a verdict to allow the crown an opportunity to strengthen its case and try the defendant.[8] *See State v. Garrigues*, 2 N.C. (1 Hayw.) 241, 241 (1795) (discussing trial practice during the Stuarts' reign); *see also The Queen v. Charlesworth*, 121 Eng. Rep. 786, 801 (Q.B. 1861) (likewise). A particular poignant example came in the cases of two Jesuit priests who were tried with three others for high treason. *Trial of Whitebread (Whitebread's Case)*, 7 How. St. Tr. 311 (1679); *Trial of Ireland (Ireland's Case)*, 7 How. St. Tr. 79 (1678). Their first trials ended when the court dismissed the jury "until more proof may come in." *Trial of Ireland (Ireland's Case)*, 7 How. St. Tr. 79, 120 (1678). Six months later, the crown assembled more evidence, the court dismissed their double jeopardy claims, a jury convicted them, and the hangman hung them. *Whitebread (Whitebread's Case)*, 7 How. St. Tr. 311 (1679); *Trial of Ireland (Ireland's Case)*, 7 How. St. Tr. 79 (1678).

English courts ultimately applied strong medicine to curb the abuse. After a nationwide judicial conference, English judges formally announced a rule that juries could not be discharged until they rendered a verdict. *See United States v. Bigelow*, 14 D.C. (3 Mackey) 393, 415-16 (1884) (discussing adoption of the rule). The strong medicine led to another extreme as English courts went to great lengths to ensure that juries reached unanimous verdicts, depriving jurors of food and drink, forcing them to follow the court from town to town until they reached a verdict, and even

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[8] An English legal commentator of the period openly advocated for this practice in cases where the crown could have, but simply did not, muster enough evidence of guilt to convict. 2 M. Hale, *The History Of The Pleas of The Crown* 294-95 (London 1736).

imprisoning them. 1 W. Holdsworth, *A History of English Law* 318-19 (7th ed. Rev. 1956); Thayer, *The Jury and Its Development II*, 5 Harv. L. Rev. 295, 297 (1892); *see also King v. Ledgingham*, 86 Eng. Rep. 67 (K.B. 1682).

While early American courts quickly adopted the manifest necessity rule as a matter of jury practice for considerations of humanity, they did not reopen the door to the Stuarts' abuses, but *Richardson* and its predecessors did. The manifest necessity doctrine, as established in *Perez* and its progeny, never functioned as a constitutional exception to the Fifth Amendment's Double Jeopardy Clause. Instead, it acted as a common law procedural exception that had no bearing on a defendant's constitutional rights. When *Richardson* and its predecessors transformed the manifest necessity doctrine into a constitutional exception, they constitutionally authorized the Stuarts' abuses in discharging juries struggling to reach verdicts to allow governments to muster more proof.

Thus, *Richardson* and its predecessors completely frustrate the purpose of the Fifth Amendment – to protect a criminal defendant from being repeatedly subjected to criminal trials until the government finally presents a case that succeeds in convicting him. *Green v. United States*, 355 U.S. 184, 187-88 (1957). *Crist* acknowledged this possibility in speaking of *Perez*: "In fact, a close reading of the short opinion in that case could support the view that the Court was not purporting to decide a constitutional question, but simply settling a problem arising in the administration of federal criminal justice." *Crist v. Bretz*, 437 U.S. 28, 34 n.10 (1978). It, however, dismissed the concern as being "of academic interest only." *Id.*

No statement could be further from the truth. The Court's acknowledged blind reliance on *Perez* has gutted the Fifth Amendment's Double Jeopardy protections and rendered it a nullity. As a constitutional matter, the rationales fail because they perpetuate the precise evil that the Fifth Amendment prohibits.

The rationales' second fatal flaw lies in their self-contradictions and their contradictions of the Court's due process precedents. While it is true that society has an interest in ensuring that the prosecution has a "complete opportunity to convict those who have violated its law," *Richardson*, 468 U.S. at 324 (quoting *Washington*, 434 U.S. at 509), this Court has made it clear that the prosecution only gets one such opportunity. *Arizona v. Washington*, 434 U.S. 497, 509 (1978). That the Fifth Amendment limits the prosecution to only one opportunity is no arbitrary accident:

> The underlying idea… 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 possibly even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

The burdens of repeated retrials are no mere abstraction either. New juries may not view the defendant as favorably as the previous jury, creating a situation in which the prosecution needs only to keep trying until it finds a favorable jury to convict. Prosecution witnesses come to the retrials with recollections more in line with prosecutorial goals. *See Carsey v. United States*, 392 F.2d 810, 813-14 (D.C. Cir. 1967) (Leventhal, J., concurring) (footnotes omitted) (describing how testimony changed seismically from trial to retrial). Defendants who are denied bail or lack the

means to post it languish in prison while the prosecution musters more evidence and courts manage their busy dockets. Defendants may incur additional legal fees that they will never recover even if a jury ultimately acquits, and their dwindling financial resources may affect their ability to present an adequate defense. *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978). Thus, the Fifth Amendment limits the prosecution to one complete opportunity to present its case to a jury to protect defendants from infinite trials.

When a trial court and parties submit a case to a jury, the prosecution has received its complete and fair opportunity to present its case to the jury. If a properly sworn, instructed, and empaneled jury cannot reach a unanimous verdict, the fault lies not with the jury or the defendant, but the prosecution for failing to meet its constitutional duty to present sufficient evidence to convict him.

In 1982, the Court clearly reaffirmed that "the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt." *Tibbs v. Florida*, 457 U.S. 31, 45 (1982). When a deliberating jury – a rational factfinder as a whole rather than as individual jurors – cannot reach a unanimous verdict, the prosecution has failed to persuade it of the defendant's guilt beyond a reasonable doubt. In such a circumstance, the logical conclusion of both the Court's Double Jeopardy precedents and its due process precedents is that the prosecution has received a full and fair opportunity to present

its case for conviction to the jury and that the jury has concluded that the evidence is insufficient as a constitutional matter.[9]

To declare a mistrial because of a jury's inability to reach a unanimous verdict and to invoke the legal fiction of continuing jeopardy to retry a defendant is to relieve the prosecution of its constitutional burden to prove the defendant guilty beyond a reasonable doubt. When a court discharges a jury because of a mistrial, the defendant's jeopardy at their hands and on that set of evidence ends. When he is subjected to a new trial for the same offense based on a different iteration of the same evidence and testimony and any additional evidence that the prosecution musters, he faces a different jeopardy based on far different facts than he initially faced, which is exactly what the Double Jeopardy Clause prohibits.

Manifest necessity and continuing jeopardy are misinterpretations of the Court's constitutional precedents and are entirely inconsistent with the Court's other precedents in the areas of double jeopardy and due process. They render the Fifth Amendment's Double Jeopardy Clause a nullity and relieve the prosecution of its burden to present sufficient evidence to convict. Such a gross error caused by a complete lack of constitutional analysis requires the Court's intervention to reverse and correct.

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[9] Courts ask juries to make a constitutional determination: Is the defendant guilty beyond a reasonable doubt of the crime he was accused of based on the evidence against him?

B. This case is the ideal vehicle for the Court to conduct the first constitutional analysis of this important question in the nation's history.

Crist v. Bretz, 437 U.S. 28, 34 n.10 (1978) dismissed the question raised by this petition as being of "academic interest only." *Richardson* lulled the Court into a false sense of security because it presented this question before a retrial was conducted and the Court did not have the benefit of a record detailing the ills to fully inform its decision. This case is far different and represents the ideal vehicle for the Court to conduct the first independent constitutional analysis of this question in the nation's history.

First, the Petitioner, Jermain Richards, has preserved his double jeopardy argument by presenting it to the Connecticut Appellate Court and the Connecticut Supreme Court. App.25 n.2, App.44. Even though the Appellate Court did not discuss it in detail and the Connecticut Supreme Court declined to hear it, his appeals and the Appellate Court's ruling on its merits have plainly preserved the issue for the Court's review.

Second, Richards' case presents all the ills that the Court lacked for a fully informed consideration of the issue in *Richardson*. Instead of mere abstractions better suited for academic debate, no speculation about what might happen is present here. Richards faced three trials, and two separate juries could not find enough evidence to unanimously agree to convict or acquit him after lengthy deliberations and careful instructions from the trial court. The third jury did convict Richards after the state of Connecticut presented the testimony of a used car salesman (literally), Jeven Wright, under the cloak of a new cooperation agreement. Tellingly, the state had two

prior trials to reflect on what did and did not work – trials that ran their course, from presentation of witnesses through argument to jury deliberation. Nothing interfered with the state's ability to put on its case in the first two trials, yet, in both instances, it failed to meet its constitutionally mandated burden of proof. In neither case was trial interrupted or frustrated by an external cause. Richards had rested on his constitutional rights and witnessed not one, but two failures of the state to meet its burden of proof.

Third, the state of Connecticut can invoke no sympathy as to the unreasonableness of the first two juries. The case presented to the first two juries raised a credible suspicion that Richards might have had some involvement with the death of his girlfriend, but it lacked any evidence that he murdered her. In fact, Richards' main theory of defense throughout his prosecution has been that the state of Connecticut has been completely unable to show how his girlfriend died. There was only tenuous evidence from Wright that Richards bore any ill will toward his girlfriend.

Without Wright's complete testimony of Richards' alleged threats to "get rid" of his girlfriend, the first two juries could not conclude beyond a reasonable doubt from the state of Connecticut's presentation of its case that Richards had gotten rid of his girlfriend as the state suggested. The third jury had no difficulty making the connection that the state asked for after hearing Wright's complete testimony as elicited by his cooperation agreement. Thus, this case clearly presents a situation in

which a defendant, Richards, has suffered incalculable harm from successive retrials – something that the Court's previous cases have lacked.

Richards does not imply that the Connecticut trial court judge intentionally committed the Stuarts' outrages as discussed above. Instead, he presents for the Court's consideration that an unexaggerated system that automatically permits successive retrials when the prosecution has failed to persuade a jury to reach a unanimous conclusion gives the prosecution repeated chances to bolster its case – the exact evil that the Fifth Amendment prohibits.

He submits that the record is ideal for review, that the issue has been properly preserved, and that the question is of transcendental national importance. Thus, Richards asks the Court to grant him a writ of certiorari to consider this important issue.

II. The Retrial Of A Criminal Defendant After The Government Has Had A Fair Opportunity To Prove Its Case And A Mistrial Is Declared Due To A Hung Jury Violates The Due Process Clause Of The Fourteenth Amendment By Impermissibly Shifting The Burden On Him To Prove His Innocence.

A criminal defendant's presumption of innocence is the most basic and fundamental component of due process and fairness in the United States. *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"). Almost synonymous with the presumption is the prosecution's burden to rebut it with proof of guilt beyond a reasonable doubt. *Id.* at 458-61.

The presumption of innocence vests an accused with strong rights, including the right to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion." *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978). Thus, a defendant has the right to do absolutely nothing at his criminal trial. He can decline to present his own evidence, testify on his own behalf, or participate in any other way during his trial. The prosecution, however, still bears the heavy burden of rebutting his presumption of innocence by proof of guilt beyond a reasonable doubt.

These two axioms do not merely serve as pretrial ideals. The Constitution mandates that they control outcomes as well. Every jury must start by presuming that a criminal defendant is innocent, and the prosecution bears the burden of proving beyond a reasonable doubt that he is guilty of every fact of the crime that he has been accused of. When a criminal jury fails to reach a unanimous verdict, it has told the world in unequivocable terms that the prosecution has failed to meet its burden of proof.

To declare a mistrial due to a hung jury after the government has had a fair and complete opportunity to prove its case violates the Fourteenth Amendment's Due Process Clause by forcing the defendant to prove his innocence to the jury's satisfaction or, at best, that sufficient reasonable doubt exists. A criminal defendant bears no such burden under the Court's due process precedents except in this particular area. Given the axiomatic and fundamental nature of the right at stake, the Court's intervention is necessary in this case to ensure that a state's interest in

prosecution does not outweigh the presumption of innocence and the constitutional rules regarding the burden of proof in a criminal case.

A. Hung jury mistrials and subsequent retrials force a defendant to prove his innocence.

Human history offers few examples of times when the law has forced defendants to prove their innocence. The Sugar Act of 1764 is a rare example. The act statutorily required shipping owners accused of customs violations to prove their innocence:

> [I]f any ship or goods shall be seized… and any dispute shall arise whether the customs and duties for such goods have been paid… then, and in such cases, the proof thereof shall lie upon the owner or claimer of such ship or goods, and not upon the officer who shall seize or stop the same; any law, custom, or usage, to the contrary notwithstanding.

The Sugar Act (Apr. 5, 1764) in *Prologue To The Revolution: Sources And Documents on the Stamp Act Crisis 1764-1766*, at 8 (Edmund S. Morgan ed., 2012).

The reason for the presumption and the burden of proof resting with the prosecution flows from reasons of practicality as well. As one commentator aptly noted, "[d]efinitive proof of factual innocence was too much of a burden for mortals to bear." William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 331-32 (1995). Thus, English civilization abolished trial by ordeal and replaced it with the presumption of innocence: "Proof of factual innocence was replaced by proof of legal guilt or its absence, legal innocence." *Id.*

When a court requires a defendant to persuade a jury to unanimously reach a verdict of acquittal or be dismissed so another jury can retry the defendant, it has improperly relieved the state of a portion of its burden to rebut the presumption of

evidence with proof of guilt beyond a reasonable doubt. The relief returns a defendant to the times of trial by ordeal where he shoulders a burden to prove his innocence – albeit not by coals, but by repeatedly facing a jury until they deliver a unanimous verdict.

This modern ordeal of coals ignores the fact that a jury starts by presuming a defendant innocence and must progress to a finding of guilt beyond a reasonable doubt. Deliberation do not start in a neutral posture. The defendant starts with the proceedings titled in his favor, and the proceedings remain weighted in his favor until the prosecution carries its burden. A jury's failure to reach a verdict means that it has not progressed from its presumption of innocence to a finding of guilt beyond a reasonable doubt. In other words, the prosecution received a fair and complete opportunity to prove its accusations against the defendant and failed.

In such a circumstance, the presumption of innocence should operate to mandate that the jury acquits the defendant because the prosecution has not met its burden of proof. *Richardson* and its predecessors, however, rely on manifest necessity to circumvent the presumption of innocence and create a paradoxical result with no basis in Fifth or Fourteenth Amendments.

The manifest necessity doctrine never indemnified the prosecution for intrinsic failures to meet its constitutionally required burden of proof. Instead, it provided a safe haven to cover extrinsic factors that interfere with parties' ability to completely present their cases. *See, e.g.*, *State v. Anderson*, 295 Conn. 1, 12-13 (2010) (holding

that a prosecutor's mid-trial illness and the state's lack of any other prosecutor to complete presentation of evidence constituted manifest necessity).

Due process requires parties to participate in good faith and to be held to the terms of their waivers and the consequences of their strategic decisions. Under this principle, the prosecution cannot claim manifest necessity when it does not like that its strategic elections did not yield a verdict in the case. In other words, manifest necessity never existed to save the prosecution from its failure to meet its burden of proof.

Richardson upended this principle with no analysis that it might be doing so, and it relegated the precise situation that the Petitioner finds himself in to a mere hypothetical worst case scenario. *Richardson*, however, proves ill-suited to support such a weighty holding. It presented the Court with an interlocutory appeal before retrial when all the harms that it sought to prevent constituted mere abstract speculations. Thus, the Court lacked the benefit of a full record that revealed in concrete and certain terms the nature of the harm caused by the rule *Richardson* created.

Justice Brennan recognized this fact in *Richardson*. In his dissent, he criticized the majority for a blind and misplaced reliance on "a formalistic concept of continuing jeopardy." 468 U.S. at 327 (Brennan, J., dissenting). He also warned that *Richardson*'s rule would undoubtedly lead to situations in which convictions came only after infinite retrials subjecting a defendant to a Herculean burden of defense. *Id.* at 327. Justice Brennan then argued that the Court's precedents clearly

established the rule that retrial is precluded "where the state has failed as a matter of law to prove its case despite a fair opportunity to do so." *Id.*

Despite his strong argument, Justice Brennan did not argue for a formalistic rule though. Instead, he advocated for a two-part test: "first, whether an initial proceeding at which jeopardy attached has now objectively ended, and second, whether a new proceeding would violate the Constitution." *Id.*

The first aspect of this test requires an equitable inquiry based on the policies underlying the Double Jeopardy Clause: concerns that "repeated trials may subject a defendant 'to embarrassment, expense and ordeal and compel 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." *Green v. United States*, 355 U.S. 184, 187-88 (1957). The more these policy concerns are implicated, the more likely it is that the previous proceeding had terminated for purposes of this analysis.

The second aspect of the inquiry is to determine whether "retrial may be permitted despite a mistrial." *Richardson*, 469 U.S. at 329 (Brennan, J., dissenting). The salient point though is not that the initial trial "ended with a hung jury," but rather that the jury could not reach a unanimous verdict because "the prosecution failed to present constitutionally sufficient evidence." *Id.* at 330 (Brennan, J., dissenting).

Justice Brennan's test does not require the Court to adopt a per-se rule that every case that ends in a mistrial cannot be retried. Instead, each case must rest on its facts. The Fifth Amendment's Double Jeopardy Clause and Fourteenth

Amendment's Due Process Clause give the prosecution one opportunity, and only one opportunity, to convict the accused. When the prosecution fails to present constitutionally sufficient evidence, it fails to meet its burden of proving guilt beyond a reasonable doubt. At that point, the presumption of innocence should operate, and the trial court should instruct the jury to deliberate one more time. If it still fails to reach a unanimous verdict, the trial court should instruct it to enter a verdict of acquittal based on constitutionally insufficient evidence.

B. This case represents the ideal vehicle for the Court to include the presumption of innocence in the hung jury retrial question for the first time in the nation's history.

The Petitioner, Jermain Richards, presents the Court with a clean factual record. He endured three criminal trials, and his first two juries failed to reach unanimous verdicts. At no point in those two trials did the state of Connecticut complain that misconduct or unfairness prevented it from fully and completely presenting its case to the jury.

Thus, it is indisputable as a matter of fact that the state of Connecticut received everything that it was entitled to in Richards' first trial. It had the right to "one full and fair opportunity to present [its[case to an impartial jury." That jury was unable to return a verdict in favor of the state. In other words, the state failed to dislodge the presumption of innocence from the minds of each juror, which was its obligation, if it was to obtain a conviction. There were no complaints that the intrinsic trial process was flawed. The parties prepared their motions, argued their points of law, presented their witnesses, and then argued their respective points of view. There

was a "full and fair" opportunity to present the case to the jury. At that trial, the defendant had the right to do nothing, to sit in repose, and demand simply that the state meet its burden of proof.

Despite the state's efforts, the jury could not reach a unanimous verdict despite six days of deliberation, including three days of deliberation after receiving an instruction from the judge on the importance of reaching one. When the trial court concluded that the jury could not reach a unanimous verdict, it declared a mistrial and rescheduled Richards for a second trial on the grounds that manifest necessity existed.

The second trial proved to be a replay of the first trial. The state received the same full and fair opportunity to presents its case to an impartial jury. It prepared its motions, argued its points of law, presented its witnesses, and argued its theory of the case to the jury. The second jury could not reach a verdict after eight days of deliberation and two instructions from the trial court on the importance of reaching a unanimous verdict. Once again, the trial court declared a mistrial and leaned on manifest necessity to reschedule Richards for another trial.

This factual record places the legal question squarely before the Court without the distraction of an intervening issue, and Richards submits that the answer to that question required his acquittal after his first trial and, by extension, after his second trial as well. It simply defies logic to suggest that, once the State presents its full case and submits the case to a jury without asking for a finding of manifest necessity, it can then claim manifest necessity to cover for its failure to meet its burden of proof.

Courts inform jurors about the need for unanimity. They understand the stakes if they are unable to reach an agreement. Permitting the state to try a case again after it fails to meet its burden in a full and fair trial impermissibly transfers to the defendant a silent burden of the proof – either persuade a jury that he is not guilty or run the risk of infinite trials if the state fails initially. There is no hidden requirement that the defendant persuade the jury of his innocence or face the prospect of infinite prosecutions. Indeed, such a hidden requirement is anathema to the presumption of innocence. *Coffin v. United States*, 156 U.C. 432, 453 (1895); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Taylor v. Kentucky*, 436 U.S. 478, 484-485 (1978). It simply cannot be squared with a robust and honest commitment to the presumption of innocence.

That all of the previously discussed policy concerns are implicated in Richards' case is indisputable. Having failed to satisfy its burden of proof and dislodge the presumption of innocence in the minds of two separate juries, Richards remained in a kind of limbo, waiting for the state to drop the hammer and once again bind him over for yet another trial. The embarrassment, expense, and anxiety spoken of in *Green* and cited by Justice Brennan would be the natural reaction for any accused in the crosshairs of an overzealous prosecutor.

The presumption of innocence spares defendants such angst, and it dictates the conclusion that, if a jury cannot reach a unanimous verdict, the state has failed to rebut the presumption of legal innocence. The state's failure to rebut that

presumption of legal innocence should operate as an acquittal, and Richards asks the Court to grant him a writ of certiorari on this issue to resolve this important question.

CONCLUSION

For all these reasons, this Court should grant the petition for certiorari.

Respectfully submitted

NORMAN A. PATTIS
Counsel of Record
KEVIN M. SMITH
CAMERON L. ATKINSON
EARL A. VOSS
PATTIS & SMITH, LLC
383 Orange Street, 1st Fl.
New Haven, CT 06511
(203) 393-3017
npattis@pattisandsmith.com

Counsel for Petitioner

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APPENDIX