No. 22-1177 ORIGINAL

In the Supreme Court of the United States

LINDSAY LEE,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Appellate Division, Second Department

PETITION FOR A WRIT OF CERTIORARI

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MAY 30, 2023
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QUESTIONS PRESENTED

The unwarranted declaration of a mistrial deprived the petitioner of her constitutional rights to a fair trial. The lower courts must assure that a mistrial is truly necessary when the petitioner is ill and all alternatives have been exhausted before declaring a mistrial.

Abuse of process was used in declaring the mistrial. Immediately, while ill, the petitioner said she would testify. The judge said "too late." The jury was not dismissed. The judge ordered the petitioner to jail for $250,000 / $200,000 bail and solitary confinement for five days. Upon returning to court, the judge asked the petitioner to plead guilty eight times. The petitioner said "I can't plead guilty to something I didn't do." The judge said, "There are times when you can and you heard all the testimony that was given at the hearing and the jury may not believe you." The petitioner pled not guilty and was sent back to jail.

This issue is of great legal and national importance for the United States Supreme Court to determine.

The Questions Presented Are:

1. Once the unwarranted mistrial was declared by the judge, did this prohibit the petitioner's right to a fair trial?

2. Did abuse of process in declaring a mistrial bar the petitioner from retrial?

LIST OF PROCEEDINGS

New York Court of Appeals

The People of the State of New York, *Respondent*, v. Lindsay L. Lee, *Appellant*.

Denial of Application for Leave to Appeal:
December 28, 2022

New York Appellate Division, Second Department, 9th and 10th Judicial Districts

Appellate Term Docket No. 2019-956 N CR

The People of the State of New York, *Respondent*, v. Lindsay L. Lee, *Appellant*.

Date of Final Judgment: October 20, 2022

Supreme Court of the State of New York
County of Nassau

The People of the State of New York v.
Lindsay L. Lee

CR-018330-16NA

Trial Verdict Date: January 25, 2019

Sentencing Date: April 29, 2019

Supreme Court of the State of New York County of Nassau—IAS/Trial Part 22

Index No. 477/18

In the Matter of the Application of Lindsay L. Lee *Petitioner*, v. Hon. Madeline Singas and The Judges of the District Court, County of Nassau, *Respondents*.

Date of Order Denying Writ of Prohibition for Double Jeopardy Prosecution: September 25, 2018

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Petitioner sought a Writ of Prohibition in the Supreme Court of Nassau County, to prevent a double-jeopardy prosecution, which was denied by order of September 25, 2018, and is included at App.6a. That Court, in a second trial, entered a judgment of conviction on January 29, 2019. The appellate court for the New York, Second Department, 9th & 10th Judicial Districts, dated October 20, 2022, is included at App.3a. The New York Court of Appeals denied review on December 28, 2022.

JURISDICTION

The Order of the United States Court of Appeals for the State of New York was entered on December 28, 2022. (App.1a). The Court granted an extension to file through May 27, 2023. Sup. Ct. No. 22A832. This date, falling on a Saturday, rolls forward to he next business day, which is May 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-ment 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.

U.S. Const., amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. 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. Statement of Facts

On July 16, 2016, we departed The Mansion at Glen Cove in the afternoon and headed to Sagamore Hill, Long Island to tour the historic Roosevelt Home and Museum and learn about the history of Teddy Roosevelt, the 26th President of the United States of America, and his family's heritage. I bought my grandfather's books and souvenirs from the gift store. Afterwards, we decided to have dinner at a seafood restaurant on the beach. The restaurant had tables and chairs on the beach where you can dine in the summertime. That was ideal for having my service dog with me. During dinner, I stepped away from the restaurant to use my phone and check on my car as I had received a parking ticket earlier. There were police officers gathered around talking. They were hitting on me and asking me questions. I answered some questions such as where I was from and I said the city. They asked me for my number and I didn't give it to them. They were insistent and persistent. I politely tried not to interact as I wasn't interested. I went back to finish dinner.

We stayed on the beach for about an hour and a half after dinner. There was no drinking. Walking back we were approached by two officers. They pointed to my car and asked if it was my vehicle. I said yes. They told me I had to move my car. I moved my car to another parking spot. Officer Lamariana then came. Then Officer Volpe arrived. He was in a rage. The police officers proceeded to brutally hurt me and injure

me. The officers forcefully slammed me into my car door. I was grabbed by the back of the head and my head was violently slammed into the door. My face was smashed into the glass and I had force on my neck. My friend is yelling please don't hurt her. Please don't hurt her. She has a hurt hand. I'm saying please don't hurt my left hand. I've had many surgeries.

Officer Volpi then forcefully squeezes my hand very tight and twists my wrist. He proceeds to rip my arms back. I was scared. When the officer's pulled and dragged me by the chain of the cuffs and picked up my feet and started carrying me away, I thought they were taking me away to take advantage of me. I was violently thrown down behind my vehicle by the officers. My ankles were cut open and bleeding from

Officer Lamariana crushing them into the pavement with the force of his body weight on top of me. I incurred huge bruises on my arms from being forcefully grabbed and giant bruises on the backs of my arms. I had bruises of the cuff markings imprinted on my wrists from being carried and dragged by the chain of the handcuffs from the officers. I also sustained a twisted ankle. I wasn't told why I was detained or kept in handcuffs.

Another officer, Officer Auspaker, arrived and saw me on the ground hurt, crying, and in pain. He didn't tell me why I was being detained. Officer Lamariana and Officer Volpe were ransacking my car, moving, and tossing around all of its contents. The bill of sale was in the glove compartment and I hear them say she owns the vehicle.

Almost forty minutes later another officer, Officer Nappi, arrived and handed to the first two officers a

camera. I asked why am I detained, why am I in handcuffs? She didn't tell me. I said I am hurt and I was crying in pain. I told her that I had an injured left hand and the handcuffs were cutting off my circulation and hurting me. She said the other officers didn't lock the cuffs, that's why they were so tight on my wrists. An ambulance was there. Officer Nappi told me that if I asked for medical attention that she would make sure that they kept me all week. I was never released from the handcuffs. She asked me to follow a light with my eyes and I did. I did not do any walking tests because my ankles were cut and bloody and I had a twisted ankle. A lieutenant was there, LT Haggerty. He looked at the wounds that Officer Lamariana and Officer Volpe inflicted on me and saw that I was hurt by them.

The entire time I was respectful, calm, compliant, and composed. I was taken to the police station around an hour and a half to two hours later because I they wanted to do more testing. I was cuffed to a bench with my hands between my legs. I was never read any Miranda rights. While sitting there, the bench began to fill up with many other females. Another technician, Officer Obert-thorn, walks in the precinct in jeans and a t-shirt with a backpack. He is the head technician. He eventually comes out in a lab coat and tells me he is there for me. He asks me right off bat if the vehicle was mine. I said yes, that my grandparents helped me buy it for work. All the other girls were receiving both blood and breath tests. They went before me. I called my father and told him what happened to me and he says he is going to call for an attorney because this wasn't right.

At 3:36 am, I am on the phone with my father. He tells me that he got in touch with an attorney. He tells me that the attorney is going to call the station to find out what's going on. He tells me the attorney will then call to speak with me. Between four and five am, I speak with my father and the attorney. I take the test between five and six am. When I blow, my breath reads zeros. The head technician assigned to me, Officer Obert-thorn, makes me blow multiple times and the results continue to be zero. I ask him if I'm free to go now. He says he has other tests to perform. I ask him if it's a blood test and he says no. He makes me do a walking test. I have a twisted ankle but I do it so I can go. He tells me that I failed the walking test and I can't go. It is daylight when I leave the testing room. I am processed to go into a jail cell between seven and eight am. The next day at arraignment I find out that I am charged with a DWI of .17 which was absolutely impossible. Plus other charges. I also found out later that they said I took the test at 3:33 am. I did not take the breath test at 3:33 am.

B. Findings of Fact

All camera footage was requested to prove my innocence. The cops didn't wear body cameras. The police officers turned off their dash cameras in their vehicles that night. I asked for the camera footage in the testing room. I was told that it is their policy to turn off the cameras in the testing room during testing when a person consents to testing. The police technicians can put anyone's name into the breathalyzer and have anyone blow and there is no proof that it's the same person. I found out that the walking test Officer Obert-thorn gave me is not a real test. He made

me do his made up version of the test. Had camera footage been obtained, there would be no trial at all. NCPD has a history of cops making false arrests, using excessive force, police brutality, corruption, and cops testifying falsely and inaccurately. Officer Volpe had a huge excessive force on a female lawsuit against him. Officer Nappi also had an excessive force lawsuit against her. When Nassau police technicians effectuate a breathalyzer reading of double over the limit, the police automatically seize and possess the vehicle. The vehicle is then auctioned and the money goes directly to the Nassau County Police Department.

C. Procedural History

I was mandated to come to court almost every week to every other week for the trial to begin. Each time I went to court I was expecting there to be a trial. It was a tremendous amount of uncertainty, pressure, stress, and anxiety to bear and carry for so long. The people weren't ready for trial for over a year and a half. Throughout the process, I was required to be in court over 100 days. I was present for every court date except one time when I had surgery.

1. First Trial
February 26, 2018 to March 16, 2018

Judge Hohauser allotted around five days time to conduct this trial. The trial was held in a different courtroom every day. The courthouse is three floors with many courtrooms not including the jail underneath. Before the trial would start, I would go through security and go directly to the bathroom. I would wait in the bathroom for my attorney to arrive and text me which courtroom to go to. I did not feel safe or comfortable waiting by myself and alone around

the police that hurt me and falsely accused me there to testify.

The officer's testified falsely about what happened that night. Officer Lamariana testified that my injuries occurred by him ripping me out of the car. That is not the truth. Him and Officer Volpi purposely and intentionally hurt me that night. Officer Volpi was in a rage and Officer Lamariana joined in. I was completely calm, compliant, and respectful and they attacked me and hurt me. Officer Lamariana testified that I threw myself to the ground. Him and Officer Volpe violently and forcefully threw me to the ground. Officer Lamariana testifies that it was 5-6 minutes before Officer Nappi arrives. Certified police GPS records verify Officer Nappi arrived 38 minutes later. Three police officers, Officer Lamariana, Officer Volpi, and Officer Auspaker were there prior to Officer Nappi arriving. Officer Nappi's testimony about the walking test is the same as Officer Obert-thorn's testimony. On the police document for field sobriety test, there is an X on the box marked for "Not Given." She did not administer nor attempt to administer the test. She made it up in her testimony. There were many discrepancies in cop's testimonies. Their testimonies are not credible or factual.

Had it not been for the indisputable intentional violence of Officer Lamariana and Officer Volpi and the injuries they inflicted on me there of, there would be no trial or false charges against me. I had many pictures of evidence of the injuries, bruises, cuts, cuff marks imprinted on my wrists, and the swollen twisted ankle that I sustained by Officer Lamariana and Officer Volpi. The judge would only allow some of them

in. The judge allowed the prosecution to get everything in.

It was not fair. I commuted from Manhattan to Hempstead, Long Island every day. It is approximately two hours each way without traffic. The record reflects two incidences that I was late. One, was when the person driving me was rear ended on the way to court. Pictures of the accident and vehicle were shown to the judge. Second, was the day after I testified. I was on the way and the highway was completely backed up and stopped. I was communicating with people in the courtroom about my location so that the court knew my whereabouts at all times. They were on google maps tracking my eta. They could see that everything was red and I couldn't get there any faster. The judge was furious with me. Judge Hohauser then ordered me to be in the courtroom at 9:30 am the next day, an hour before the trial was to begin.

2. Day of Mistrial – *March 16, 2018*

Friday, of the third week of trial, I was present in the courtroom at 9:30 am. The judge had finished his morning cases and left. I was sitting in the courtroom alone. The longer I sat there reliving the trauma, I began not to feel well. I have multiple pinched nerves in the left side of my neck from a previous accident that radiate down through my body. When I'm stressed they flare up and cause much pain. I also had over twenty pieces of metal titanium in my left hand (3 plates and 20 screws) and a metal collarbone (a plate and screws) that were excruciating. I was in a lot of pain. I started panicking. I was crying. My mascara had ran down my face and my eyes were smudged. I went to the bathroom that I

would wait in located on a different floor to compose myself and look presentable before testifying. My stomach was in knots in the bathroom. I was feeling nauseous and I got sick. I was hovering over the toilet vomiting my breakfast. I was feeling worse in the courtroom. I was shaking and threw up in a trash can. My heart was beating so fast I thought it was going to burst. My vision was blurry. I was sweating bullets but freezing cold. I was dizzy and disoriented. My mouth was so dry. I asked if I could have some water and the judge denied me. I could hear my heart pounding and all the sounds in the courtroom were so loud and jumbled running together. It was difficult to breathe.

They told me I could take the trash can to the witness stand and testify with the trash can next to me and vomit in it while testifying. I wanted to testify. However, at that time, my body was having a complete panic attack. In my mind, I thought I was going to die. My heart was racing uncontrollably and I was scared. I thought I might pass out. My nerves were radiating through my body with pain. I was trembling and terrified on the inside. I felt terrible. I was doing the best I could do to sit there calmly and endure it. I agreed with my attorney to give up my right to testify and have my testimony stricken to continue the trial. The court room was full of cops. I had cops lined up behind me snapping their blue gloves. It was obvious that I was ill with the trash can next to me.

My attorney and I said that I was ill and the judge neglected to address my illness. Judge Hohauser asked me if I was prepared to testify. I said, "I am not feeling well, Your Honor." He asked again if I was prepared to testify beginning now, yes or no. I said,

"no" because at that moment my body was in a state of shock. I did not know how I could testify right then as I was shaking, dry heaving, and I could barely speak at that time. Those aren't conditions a human being is prepared to testify under. Judge Hohauser then declared a mistrial and ordered me to jail with a bail of $250,000 over $200,000. I told the judge that I would testify and he said to me "too late." My attorney also told the judge that I would testify. The jury was still present in another room.

The trial judge acted irresponsibly, erratically, and emotionally when declaring the mistrial. The mistrial was not out of manifest necessity. Judge Hohauser declared a mistrial and ordered me to jail to punish me for not testifying right then in the midst of having a legitimate medical illness. The court did not effectively examine my current physical condition before declaring a mistrial. They could see that I was shaking. I was sweating. I was pale. I was dry heaving. I was having difficulty breathing. There was a trash can next to me I vomited in. I was dehumanized. Seconds after the judge declared a mistrial I told the judge I would testify under my current condition because I did not want to go through another trial and he said "too late." I agreed to do exactly what the trial court and the People wanted.

The judge could have reversed his decision of the mistrial and let the trial continue with me testifying. The jury had not been dismissed. I didn't want a mistrial. My attorney didn't want a mistrial. My attorney saying that I said I would testify to the judge is an objection to the mistrial.

Judge Hohauser proceeded to put me in jail for $250,000/$200,000 bail. I was also placed in solitary confinement. Shortly after, the same day, a letter from my doctor at Mount Sinai Hospital was provided to the court legitimizing my illness. Five days later I was brought out of jail to court. Judge Hohauser told me to plead guilty or it was going to be worse for me. I said, "I can't plead guilty to something I didn't do." The judge then responds, "There are times when you can, and you've heard the testimony that was given and the jury may not believe you." I was repeatedly told to plead guilty. For my conscience, I could not plead guilty to something that I did not do. I pled not guilty and I was ordered back to jail.

3. Article 78 Trial
August 7, 2018 to August 11, 2018

The article 78 trial ruled in favor of the mistrial with a reasoning of the jury being dismissed. However, the jury was not dismissed at the time of declaring a mistrial. Judge Hohauser had the ability to reverse the mistrial and let me testify to continue the trial and he said it was "too late." There were also other suitable remedies for continuing the trial

4. Second Trial
January 7, 2019 to January 25, 2019

I was doomed from the beginning of this trial. The ADA, Lauren Nickerson, blew up a giant size poster board picture of my mugshot from the night that the cops hurt me and she faced it toward the jury for the majority of the first day of trial for the jury to stare at. This is a demonstration of the unfair and unjust tactics that were used against me and continued throughout the trial. My finances were depleted from

the first trial. I was appointed an attorney with known cerebral problems. My attorney didn't object to damaging and prejudicial evidence that the prosecutors were introducing or make the record clear on certain things that the prosecution said that were incorrect. Suppression council did not dispute the admissibility of inculpatory evidence. Had council gained suppression, there would be no trial at all.

The prosecution made their case stronger by all the information they gained from the first trial. The court improperly permitted the People to introduce prejudicial evidence and a parking ticket. Officer Lamariana, Officer Nappi, and LT Haggerty testified differently in this trial than they did in the first trial. In fact, Officer Lamariana told three different stories, one in the pre-trial hearing, and another in the first trial, and another in the second trial. Lieutenant Haggerty tells an opposite testimony in this trial than in the previous trial. The officer's cultivated new testimonies from information they learned in the first trial. Based on my testimony in the first trial, the officers generated new fictional testimonies. The officers concocted a story to cover up what Officer Lamariana and Officer Volpi did to me. The police officer's testimonies were not accurate of what happened that night. The officer's testimonies are not credible. I was not allowed to play the radio transmissions to the jury that contradicted the cop's testimonies. However, similar things were allowed for the prosecution.

From the first trial, Ms. Nickerson was able to gain information about my friend that was there. She learned about my friend's immigration status and Ms. Nickerson used that to threaten, intimidate, manipulate, and coerce her. During the trial she had

police show up at my friend's door telling her if she wasn't at the courthouse by a certain time that she would be taken to jail. Ms. Nickerson called and had cops call my friend's landlord and call her job as well. My friend got another job at a church because she was terrified of being taken away. Ms. Nickerson was telling my friend to testify and say things that weren't factual. I agreed with my friend not to have her testify in the first trial or ask her any questions in the second because we knew what they would do to her if she told the truth about what the cops did to me and it wouldn't be good. They had already destroyed my life. I didn't want them to destroy her life too. It was a scary and serious situation for her. Her mother had died and she had no one where she was from. She came from a very dangerous place. She wouldn't be able to come back from it and she wouldn't be safe there.

This trial also went on longer than expected, three weeks, and the jury was frustrated and didn't want to be there. The jury only reviewed the People's one and two of evidence before determining a verdict. It was extremely quick. The jury did not review any of my evidence or listen to the recordings of the police officers which weren't allowed to be played in the trial that verified discrepancies and fabrications in the cop's testimonies. The jury just wanted to leave. This was not a fair trial.

Upon appeal, the Nassau County DA's office made over 130 edits to the original trial transcripts.

Appellate Term of the Supreme Court of the State of New York For the 9th & 10th Judicial Districts Ordered that the judgment of conviction is confirmed. Dated: October 20, 2022

State of New York Court of Appeals Ordered that the application is denied. Dated: December 28th, 2022.

REASONS FOR GRANTING THE PETITION

This court should vacate the DWI misdemeanor convictions against Lindsay Lee. The petitioner was convicted of failure to signal (VTL 1163[d]), driving while intoxicated per se (VTL 1192[2]), and common law driving while intoxicated (VTL 1192[3]).

The petitioner's constitutional rights to a fair trial was violated by the unwarranted declaration of a mistrial. The lower courts must assure that a mistrial is truly necessary when the petitioner is ill and all alternatives have been exhausted before declaring mistrial. The court had a legal obligation to confirm its suspicions of the petitioner's illness before declaring a mistrial which was in conflict with the law. A mistrial cannot be declared if all possibilities are not exhausted and the courts did not ascertain that the petitioner's illness was legitimate.

The United States Supreme Court should review this writ of certiorari for the following reasons:

I. THE LOWER COURTS HAVE ERRED IN THIS CASE AND THIS IS WHERE THE UNITED STATES SUPREME COURT CAN RESOLVE THESE CONFLICTS.

The law is clear, it is never too late to testify after a mistrial as long as the jury has not been discharged. The Judge did not take this into account. The courts'

mistaken belief that a mistrial declaration, once issued, could not be recalled substantiates the law of "abuse of discretion." *People v. Dawkins*, 82 NY2d 226, 230 (1993).

On the day of the mistrial, the law is clear, it is not whether the trial court considered some options for a mistrial, but whether the court exhausted all reasonable remedies for continuing the trial. The trial court knew the testifying petitioner was ill. The trial court never assessed the petitioner's illness to determine if her illness was sufficiently severe to render the petitioner incapable of resuming her testimony that day.

II. THIS ISSUE IS OF LEGAL AND NATIONAL SIGNIFICANCE: THE UNITED STATES SUPREME COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE IF THE PETITIONER'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE UNWARRANTED DECLARATION OF A MISTRIAL FROM ABUSE OF PROCESS BARRING RETRIAL.

The unwarranted declaration of a mistrial deprived petitioner's constitutional rights to a fair trial. The petitioner did not immediately resume her testimony because she was medically unable to do so. One of this country's most prominent hospitals explicitly confirmed that fact. The People make no mention of this in their legal analysis.

As both the People's affirmation and the existing record confirm, none of the parties: the petitioner, the defense counsel, nor the prosecution desired a mistrial in the period immediately surrounding the trial court's mistrial declaration.

The lower courts have erred in two distinct and independent duties in evaluating the prospect of a mistrial: it must conduct an antecedent inquiry in which it weighs suitable alternatives and it must assure itself that a mistrial is truly necessary under the circumstances. A court's failure to complete either task mandates a dismissal. (*Matter of Pronti v. Allen*, 13 A.D.3d 1034, 1036 (3d Dep't 2004)). The relevant question is not whether the trial court considered some options; it is whether the court exhausted: "all reasonable choices." *Seay v. Cannon*, 927 F.3d 776, 784 (4th Cir. 2019); *Matter of Taylor v. Dowling*, 108 A.D.3d 566, 568 (2d Dep't 2013).

The trial court received a claim that the testifying witness, the petitioner, was ill. The trial court never assessed the authenticity of that claim, and consequently made no finding that the claim was prevaricated. Instead, it immediately began mistrial discussions. Even more troublingly, the trial court never sought to determine the legitimacy of the petitioner's claim at any subsequent time. The subsequent medical evaluation performed by Mount Sinai Hospital confirmed that the petitioner's illness was legitimate (Letter of Andrew Petelin, M. D.). *People v. Chavis*, 91 N.Y.2d 500, 506 (1998). There should be no mistake: even if a court suspects that a complaint of illness is prevaricated, it is legally obligated to confirm its suspicions before declaring a mistrial. *Matter of Capellan v. Stone*, 49 A.D.3d 121, 127 (1st Dep't 2008).

The trial court did not obtain more definite information "before declaring a mistrial. Nor did it consider the obvious alternative of an adjournment. *Dickson v. Morgenthau*, 102 A.D.2d 168, 171-72 (1st

Dep't 1984). "The fact is that an adjournment of an additional day or two might have obviated the reason for the mistrial." The trial court's nonfeasance is dispositive. To consider and reject an option is entirely distinct from never considering that option at all. *Lamondie v. Main*, 152 A.D.3d 902, 903 (3d Dep't 1989) finding double jeopardy, where the court "properly explored the alternatives proposed by defense counsel, but failed to consider other available alternatives, such as an adjournment. [.]"); *cf. Varkonyi v. S.A. Empresa*, 22 N.Y.2d 333, 337 (1968) ("Where . . . [a] court, in exercising its discretion, fails to take into account all the various factors entitled to consideration, it commits an error of law[.]").

In short, the trial court never performed any inquiry to support that conclusion short of asking the petitioner whether she would "testify [] beginning now, yes or no". It never ascertained whether the petition's illness was legitimate. Nor did it seek to determine whether, if so, the petitioner's illness was sufficiently severe to render the petitioner incapable of resuming her testimony that day. *Matter of Capellan v. Stone*, 40 A.D.2d 121, 127 (1st Dep't 2008).

Given this record, the court's belief that it was "too late: to proceed could only have derived from one of three sources: (1) the court's mistaken belief that a mistrial declaration, once issued, could not be recalled, (2) the court's fear of inconveniencing the jurors, or (3) the courts personal pique. The law does not recognize any of these rationales. Mistrial declarations that reflect misunderstanding of law receive no appellate deference. *United States v. Toribio-Lugo*, 376 F.3d 33, 38 (1st Cir. 2004) ("A mistake of law is, *a fortiori*, an abuse of discretion."). Nor do fears of

jury inconvenience. *People v. Michael*, 48 N.Y.2d 1, 9, 11 (1979) ([A] mistrial founded solely upon the convenience of the court and the jury is certainly not manifestly necessary."). Nor does judicial pique. *Cf. U.S. v. Gaytan*, 115 F.3d 737, 743 (9th Cir. 1997), *People v. Dawkins*, 82 N.Y.2d 226, 230 (1993), *Hall v. Potoker*, 49 N.Y.2d 356 (1988), *Hall v. Potoker*, 49 N.Y.2d 501, 506-507 (1980).

The defense counsel did not "consent" to the mistrial nor could he lawfully have done so on his client's behalf: "Consent" is not the equivalent of the mere absence of an objection. *Delcol v. Dillon*, 173 A.D.2d 704, 704 (2d Dep't 1991). ("Although [counsel] did not specifically object to the mistrial, neither did he consent to it.). *Weston v. Kernan*, 50 F3d 633, 637 (9th Cir. 1995), *Malinovsky v. Court of Common Pleas*, 7 F3d 1263, 1272 (6th Cir. 1993), *Lovinger v. Circuit Court of the 19th Judicial Circuit*, 845 F2d 739, 744 (7th Cir. 1988).

The mistrial hinged solely on the petitioner's ability to testify, only the petitioner could waive that right. And doing so would not, as the People now argue, have given the petitioner "unfettered control over the criminal proceedings" It would merely have afforded her the opportunity that the federal and state constitutions afford to every criminal defendant. U.S. Const. Amend. V; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; N.Y. Const. Art. 1, *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961) Even assuming that defense counsel somehow retained the authority to override his client's wishes, the defense counsel never furnished his consent. The defense and the trial court explicitly testified that the counsel wished to proceed. Having calculated the odds, the counsel determined that

continuing with the existing trial was a less hazardous proposition than obtaining a new one. *Cf. United States v. Crotwell*, 896 F.2d 437, 439 (10th Cir. 1990) (noting that retrial may provide the prosecution with an "unfair opportunity to reformulate its case in light of what it learned during the first trial about the strengths of the defense and the weaknesses of its own case"). It would drain the petitioner's financial resources and unavailability for employment. *People v. Ferguson*, 67 N.Y.2d 383, 387, 388 (1986). *United States v. Razmilovic*, 509 F3d 130, 141-42 (2d Cir. 2007).

After the bench conferences occurred, but before the trial court declared the mistrial the defense counsel approached the court and explicitly informed it that the petitioner's statements regarding her illness were "not sufficient" for a mistrial. And when the trial court declared a mistrial anyway, the counsel immediately urged the court that the petitioner wished to testify. *People v. Baptiste*, 72 N.Y.2d 356 (1988).

The jurors were still present. Sequestered in another room, they had neither been informed of the parties' discussions nor discharged from their duties. The law is clear; consent, once furnished, can subsequently be limited or withdrawn. Even assuming that counsel consented during the initial bench conferences, he ultimately revokes that consent on two separate occasions. *Davis v. Brown*, 87 N.Y.2d 626, 631-32 (1996), *United State ex rel. Russo v. Superior Court of New Jersey*, 483 F.3d 7, 12 (3d Cir. 1973).

There is no such thing as an "interest of justice affirmance." The trial court failed to grasp the legal significance of its ruling. *United States v. Rivera*, 384 F3d 49, 54 (2d Cir. 2004). Apparently believing that

this act would have no effect other than substituting one trial date with another is granted a mistrial. Now recognizing what the trial court did not—namely, the grave consequences of the instant mistrial declaration—the People ask this Court to affirm on that basis alone. In their view, this court may uphold a mistrial declaration that reflects neither manifest necessity nor defense consent on the basis of equitable considerations. This court has no such power. The People's argument to the contrary reflects a legal misunderstanding.

The People have identified no case—from any jurisdiction—in which an appellate court has found that neither manifest necessity nor consent were present and has nonetheless upheld the underlying conviction. Whenever the applicable legal standard is met a dismissal must result:

Nor would granting this mandatory dismissal set a dangerous precedent. This scenario can hardly be expected to recur. To be reversed, a trial court would have to declare a mistrial over the stated desires of all of the interested parties. It would have to commence mistrial discussions with no consideration (even in passing) of an obvious alternative such as an adjournment. The petitioner would actually have to be ill (or, alternatively, the trial court would have to reject the petitioner's offer to testify within moments of affirmatively soliciting that testimony. The jury would have to be available at the time of the court's decision. Finally, the petitioner would have to raise a Fifth Amendment claim and be denied on the basis of a patently erroneous finding of fact. Double jeopardy arises here because the existing law compels that

result. This outcome may not be convenient, but it is unquestionably correct.

Petitioner's constitutional rights to a fair trial was violated by the unwarranted declaration of a mistrial. The declaration of a mistrial and the refusal to alter that decision seconds later—that amounted to abuse of discretion. *United States v. Razmilovic*, 507 F.3d 130, 141-42 (2d Cir. 2007).

The legal arguments from the first trial state that "the law was not upheld, therefore, the legal system was violated."

Leave is further sought for a national rule that even assuming defense counsel initially, impliedly consented to a mistrial, his subsequent on-the-record request for his witness to continue her testimony must legally negate his initial consent, so long as it was made before the jury was discharged.

This Court is asked to revisit *Baptiste*, *supra*, to render national rule that, even assuming a trial court's initial rationale for a mistrial was proper, where the court's reason becomes a non-issue prior to dismissal of the jury, it can no longer be said that a mistrial was a "manifest necessity."

The national rule needs a new implied consent rule that does not allow consent to be implied from circumstances, such as those provided above where defense counsel does not positively indicate his consent to a mistrial.

Accordingly, this Court's national guidance is sought to establish the aforementioned legal caveats to Ferguson's general rule that "findings of consent must be upheld if there is any support in the record

conclusion." *Id.* at 389. Where defense counsel advocates for the continuation of trial, and the trial court acknowledges counsel's representation, analysis of whether counsel impliedly consented to a mistrial must stop there. Just as federal courts have found an "implication of implied consent is not to be lightly indulged" (*Lara-Ramirez*, 516 F3d.).

The national rule needs a new implied consent rule that does not allow consent to be implied where circumstances do not demonstrate actual consent.

A national rule expressly authorizing defense counsel's negation of his prior consent to a mistrial declaration is supported by recent federal caselaw. (*See United States v. Razmilovic*, 509 F3d 130, 142 (2d Cir. 2007)).

A national rule that a defense counsel's revocation of his initial consent to a mistrial must be found if, prior to dismissal of the jury, he ultimately represents his client's desire to continue testimony. Accordingly leave to appeal should be accepted.

This Court's guidance is further sought to revisit in ruling in *Hall v. Potoker*, 49 NY2d 501 (1980) for a national legal rule that when a witness's stated illness may delay her ability to testify, the trial court must conduct an inquiry ex ante as to the extent of the illness prior to determine where the *sua sponte* declaration of a mistrial is a "manifest necessity."

Without a national medical inquiry requirement in the event of a witness's purported illness, those defendants affected by illness may immediately run the risk of an unnecessary mistrial and all attendant double jeopardy consequences which flow therefrom.

National rule clarity is required. The instant matter illustrates the importance of a national requirement for a medical inquiry whenever a witness's illness may evoke mistrial consideration. Both the lower courts and the Appellate Term ignored entirely the need for one. A brief accounting of the facts is critical.

Without a national rule which would have required the trial court to conduct a medical inquiry both the Article 78 and the Appellate Term failed to address the trial court's failure to do so.

A national rule is necessary to require an inquiry into a witness's stated illness, and whether it is of sufficient severity so to render a mistrial manifest necessary.

Leave also sought for this Court to revisit *Baptiste*, 72 NY2d at 361, to render a national rule that even if a trial court's initial rationale for a mistrial was proper, where the court's reason becomes a non-issue prior to dismissal of the jury it can no longer be said that a mistrial was a "manifest necessity."

The significance of this proposed national rule is evident: it does not permit the trial court to ignore direct solutions which would negate its reasons for a mistrial. The rule would hold the trial court more firmly to *Baptiste*'s "manifest necessity" standard. Again, the instant matter reflects the necessity.

Where defense counsel advocates for the continuation of trial, and the trial court acknowledges counsel's representation, analysis of whether counsel impliedly consented to a mistrial must stop there. Just as federal courts have found an "implication of implied consent is not to be lightly indulged" (*Lara-Ramirez*, 516 F3d.)

The trial court also ignored the most "obvious and adequate" (*Schafter*, 987 F2d at 1057) solution of them all: to simply permit Appellant to testify when both she and her attorney said that she would. But rather than negate the need for a mistrial, the trial court responded that it was "too late.". The Article 78 court found that Appellant's effort to directly address the trial court's reason for a mistrial was "belated," pointing instead only to the other alternatives rejected by the trial court during the bench conferences. Again, the Appellate Term did not address Appellant's willingness to testify, instead finding "there was a manifest necessity for a mistrial, as there was no acceptable alternative under the circumstances."

But there was an "acceptable alternative," and one which abated all concerns about proceeding to trial: Appellant stated she would testify. It was not "too late" for her to negate the court's reason for a mistrial declaration, because the court had yet to discharge the jury. *Dawkins*, 82 NY2d at 230; *Rice*, 24 NY3d at 1036. Accordingly, this Court should grant the writ of certiorari to determine that where, as here, a defendant directly addresses the court's stated reason for a mistrial at any time prior to dismissal of the jury, and so it cannot legally determine that a mistrial is a "manifest necessity" (*Baptiste*, 72 NY2d at 361).

The unwarranted declaration of a mistrial at the petitioner's initial trial barred the petitioner's convictions upon her subsequent trial for the same offenses.

The lower courts have erred in these cases and this is where the United States Supreme Court can resolve these conflicts. These issues are of great legal and national significance.

CONCLUSION

For the foregoing reasons, petitioner Lindsay Lee respectfully request this Court grant a writ of certiorari to review the judgements of the lower courts.

Respectfully submitted,

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