No. 22-

In the United States Supreme Court

JOSEPH STANLEY,

Petitioner,

v.

MARTIN BITER,

Respondent.

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

PETITIOER'S APPENDIX

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APPENDIX

APPENDIX A

FILED

MAR 17 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CARL STANLEY,

Petitioner-Appellant,

v.

MARTIN BITER, Warden,

Respondent-Appellee.

No. 21-55371

D.C. No.
2:12-cv-09569-JAK-GJS
Central District of California,
Los Angeles

ORDER

Before: BERZON, CHRISTEN, and BENNETT, Circuit Judges.

Petitioner-Appellant's petition for rehearing is DENIED.

APPENDIX B

Case: 21-55371, 03/02/2023, ID: 12665589, DktEntry: 40-1, Page 1 of 13

NOT FOR PUBLICATION

FILED

MAR 2 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CARL STANLEY, Petitioner-Appellant, v. MARTIN BITER, Warden, Respondent-Appellee.	No. 21-55371 D.C. No. 2:12-cv-09569-JAK-GJS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Argued and Submitted January 9, 2023
Pasadena, California

Before: BERZON, CHRISTEN, and BENNETT, Circuit Judges.
Dissent by Judge BERZON.

California state prisoner Joseph Stanley appeals the district court's denial of his petition for writ of habeas corpus. Stanley's petition challenged his convictions on multiple state charges, contending that the State's prosecution of him violated his constitutional right to be free from double jeopardy. We assume the parties' familiarity with the facts and do not recite them here. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

pursuant to 28 U.S.C. §§ 1291, 2253, and we affirm.

Because Stanley is "a person in custody pursuant to the judgment of a State court," his petition would ordinarily be reviewed under 28 U.S.C. § 2254. *See Dominguez v. Kernan*, 906 F.3d 1127, 1134–35 (9th Cir. 2018). But Stanley argues that his petition should be reviewed under 28 U.S.C. § 2241 because he originally filed it as a pre-trial detainee and he lost his right to be free from double jeopardy only as a result of the federal courts' erroneous application of *Younger v. Harris*, 401 U.S. 37 (1971). Because Stanley's claim fails even under § 2241, we need not decide which standard applies.

Under the Double Jeopardy Clause of the Fifth Amendment, "upon declaration of a mistrial, retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by 'manifest necessity.'" *Weston v. Kernan*, 50 F.3d 633, 636 (9th Cir. 1995) (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). Consent to a mistrial may be express or implied. *United States v. You*, 382 F.3d 958, 964 (9th Cir. 2004). The trial court's declaration of mistrial in Stanley's case was not caused by manifest necessity or express consent. Thus, Stanley's appeal turns on whether his counsel impliedly consented to a mistrial.

We will not find implied consent where the trial court "precipitously" declares a mistrial without providing the defendant an opportunity to object.

United States v. Gaytan, 115 F.3d 737, 743 (9th Cir. 1997). As the Supreme Court has explained, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976); *see also Gaytan*, 115 F.3d at 743 (quoting *Dinitz*, 424 U.S. at 609)). By contrast, where the trial court makes clear its intent to declare a mistrial and provides "ample opportunity to object to the mistrial," but defense counsel raises no objection, our court has found implied consent. *You*, 382 F.3d at 965; *see also United States v. Smith*, 621 F.2d 350, 352 (9th Cir. 1980) ("Defense counsel did not object to the order of mistrial, despite adequate opportunity to do so. Indeed, we find that he impliedly consented to the mistrial.").

Here, defense counsel requested that four alternates be seated because trial was to begin shortly before the holidays. The jury was sworn in on a Friday afternoon and, after it was sworn in, one juror informed the court that he would not be able to serve after all. On Monday morning, another two jurors informed the court that they would be unable to serve. A fourth juror informed the court that, because of a communicable disease, he would need a continuance of at least two days. Stanley's trial counsel engaged in a sidebar conversation with the judge and prosecutor in which the judge made clear his understanding that the jury was down to a single alternate who could only participate if the trial were delayed by two

days. The judge stated:

> The bottom line is, when this case goes, if this case goes, you let me know what you want to do. This person, I haven't heard a decision on him yet, and we are down three people at this point. Also what I want to say is, if we are down to no alternates, when I call them in the room before we go any farther, I'm going to say look, I don't know exactly when this will end at this point. You could be here until the last week in November. I don't know. I cannot do that. Let me know right now. If somebody raises their hand, we are done.

Stanley's counsel raised a concern regarding scheduling his expert, and the prosecutor agreed to allow the expert to testify out of order. When the jury returned, the judge explained to them that the jury had lost three members and that the only remaining alternate would require that the trial be continued for two days. He explained to the jury that the trial might extend through the Thanksgiving holiday and asked any jurors unable to commit to serving during that time to raise their hands. The court made clear that if any jurors did so, the trial would not move forward.

Juror Number 2 raised his hand and stated that he could not participate because he had had a heart attack. Back at sidebar, the judge told the attorneys, "I believe they win." Defense counsel did not object. The judge then expressed at length his frustration to the jury, before directing them to leave the courtroom. About fifteen minutes later, proceedings resumed without the jury. The judge declared a mistrial, and Stanley's attorney discussed with the court the scheduling of a new trial.

Stanley argues that the judge initially expressed an intention to allow jurors to opt out only "if we are down to no alternates," but deviated from that plan when he proceeded to allow the jurors to opt out even though one potential alternate remained. Even if Stanley is correct, however, the first extended sidebar conversation put defense counsel on notice that the judge was considering declaring a mistrial. Subsequently, when the judge clearly explained to the jury his intention to declare a mistrial if another juror opted out, counsel did not object. Similarly, after Juror Number 2 claimed to have had a heart attack, the judge stated in another side bar conversation, "I think they win," but again Stanley's lawyer did not object. Finally, the judge explained to the jury his frustration about being unable to go forward, and defense counsel still did not object. Even after the jury had departed, Stanley's attorney did not object to declaration of a mistrial, instead engaging in a discussion about the timing of a new trial. Stanley's attorney states that he was confused by these events, but he never sought clarification.

Stanley's brief argues that his counsel's actions must be viewed through the lens of what he understood to be California's standard, which required more than silence from defense counsel to find implied consent. But in the declarations filed in connection with Stanley's double jeopardy challenge, Stanley's counsel did not claim to be operating under that impression of California law. Further, the California Court of Appeal clarified in *Stanley v. Superior Court*, 206 Cal. App.

4th 265 (2012), that defense counsel's actions in this case did satisfy the state's implied consent standard. *Id.* at 291–92.

The trial court's declaration of mistrial was not precipitous. And given these circumstances—particularly counsel's participation in multiple sidebar conversations regarding the possibility of a mistrial and the multiple opportunities to object—defense counsel's actions were sufficient to manifest implied consent to the mistrial.

AFFIRMED.

FILED

MAR 2 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Stanley v. Biter, No. 21-55371

BERZON, Circuit Judge, dissenting:

Whether we review this habeas petition under 28 U.S.C. § 2241 or under 28 U.S.C. § 2254(d)(2), the record here does not, reasonably or otherwise, establish that Joseph Carl Stanley's defense attorney consented to a mistrial. I therefore respectfully dissent.

1. The Double Jeopardy Clause "protect[s] the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35 (1978). Even when a problem with a juror arises that might justify dismissal, the defendant may "desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.'" *United States v. Dinitz*, 424 U.S. 600, 608 (1976) (citation omitted).

The Double Jeopardy Clause is not, however, implicated when the defendant has consented to a mistrial, because consent, like "[a] defendant's motion for a mistrial[,] constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'" *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (quoting *United States v. Scott*, 437 U.S. 82, 93 (1978)); *see also Scott*, 437 U.S. at 99–100. Thus, "the defendant, by deliberately choosing to seek termination of the proceedings against him . . . , suffers no injury cognizable under the Double Jeopardy Clause." *Scott*, 437 U.S. at 98–99. The Clause "does not relieve a defendant from the consequences of [a] voluntary

choice." *Currier v. Virginia*, 138 S. Ct. 2144, 2151 (2018) (quoting *Scott*, 437 U.S. at 99). Ultimately, then, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *Dinitz*, 424 U.S. at 609.

The majority here does not conclude that Stanley "deliberately cho[]s[e] to seek termination of the proceedings against him." *Scott*, 437 U.S. at 98–99. Instead, its decision to imply consent in the circumstances here emphasizes the failure of defendant's counsel to raise an unsolicited objection to a potential mistrial, effectively applying waiver or forfeiture principles to the Double Jeopardy Clause. But "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error." *Dinitz*, 424 U.S. at 609. Absent manifest necessity for a mistrial, Supreme Court case law demands "*consent*" – not waiver or forfeiture – before a defendant may be retried. *See id.* at 606–07 (emphasis added).

2. Consistent with these Supreme Court precepts, we have held that "consent to mistrial may be inferred 'only where the circumstances *positively* indicate a defendant's willingness to acquiesce in the mistrial order.'" *Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995) (emphasis added) (citation omitted); *see also United States v. You*, 382 F.3d 958, 964–65 (9th Cir. 2004); *United States v. Gaytan*, 115 F.3d 737, 742 (9th Cir. 1997). Where there "[a]re *no* 'affirmative' expressions by

counsel consenting to the dismissal, . . . we cannot find implied consent." *Gaytan*, 115 F.3d at 744 (citing *United States v. Smith*, 621 F.2d 350, 352 (9th Cir. 1980)). The majority relies on *Smith* and *You*, two cases in which this court found implied consent to a mistrial, but both cases involved positive – that is, affirmative – indications of consent wholly absent here.

Smith involved several affirmative statements by defense counsel indicating counsel's acquiescence in a retrial:

> *[B]efore the court dismissed the jury*, the court and the attorneys discussed the defense's desire that the mistrial ruling be explained to the jury in a way that did not cast blame on the defendant or his counsel; the defense's desire that the dismissed jurors be instructed not to discuss the case; and the possibility that the schedules of the attorneys and of the out-of-town witnesses could accommodate a retrial of Smith before the 90-day period of the Speedy Trial Act expired.

621 F.2d at 352 (emphasis added). When the court asked "(D)o you mind if we bring the jury in . . . and excuse them?," counsel responded, "That is fine." *Id*. We affirmed the district court's conclusion that the defendant had consented to the mistrial because the defense attorney "not only did not object to the order of mistrial, but *affirmatively indicated his understanding that there could and would be a retrial*." *Id.* (emphasis added). As we later explained, "*Smith* . . . found implied consent as the result of specific and unambiguous conduct on the part of defense counsel that demonstrated consent." *Gaytan*, 115 F.3d at 742.

You involved a co-defendant's express motion for a mistrial where the co-defendant's counsel stated: "I'll state categorically on the record that I wouldn't interpose any double jeopardy problem." 382 F.3d at 962. When the trial court "stated that it was going to declare a mistrial and schedule a new trial," the court expressly "asked the attorneys if [they] wished 'to make any record?'" *Id.* You's counsel responded that he did not. *Id.* We held that "You's counsel's . . . repeated failure to take advantage of the trial judge's offer to make a record . . . constituted an implied consent to the mistrial." *Id*. at 965.

3. Unlike in *Smith*, defense counsel here did not affirmatively accede to dismissal of the jury before it occurred. And unlike in *You*, Stanley's counsel did not affirmatively decline an opportunity to object. Indeed, the majority has not identified any case in our court or the Supreme Court finding implicit consent in circumstances remotely like those in this case — that is, where there were simply no "positive[] indicat[ions]," *Weston*, 50 F.3d at 637, that the defendant consented to the mistrial.

Here, Stanley's counsel remained silent in a rapidly evolving situation in which both the facts concerning the jurors' ability to serve as well as the trial court's stated intentions were shifting. Before the court's dismissal of the jury, there was no motion for a mistrial, no discussion of a retrial, and no opportunity for

defense counsel to confer with Stanley, nor any invitation to object to or comment on the possibility of a mistrial.

In particular, the trial court's statements to counsel outside the presence of the jury did not put defense counsel on notice that the court was contemplating declaring a mistrial if there were twelve jurors qualified to serve. The court indicated that *if* there were no alternates, it would question the jury and if another juror "raises their hand, we are done." But when the trial court dismissed the jury, there were still twelve jurors remaining, as both the prosecution and the defense were willing to continue the trial to accommodate one juror with a temporary medical problem.

The trial court's statements to the jury provided the first suggestion that the court was considering dismissing the jury even if twelve jurors remained. *See* Mem. Disp. at 4. At that point, there was not "ample opportunity," *You*, 382 F.3d at 965, for Stanley to object. The court was speaking in the jury's presence, except for a one-sentence sidebar in which only the court spoke, saying, "I believe they win." The court stated a conclusion at the sidebar; it did not ask whether counsel agreed or objected. After the abbreviated sidebar, the court proceeded to expound on its frustration to the jury; during that lecture, counsel could not reasonably be expected to interrupt. "[T]o have objected in front of the jury might have prejudiced [the defendant] for trying to 'show up' the trial judge, especially if

some members of the jury actually wanted to go home despite their civic obligation." *Love v. Morton*, 112 F.3d 131, 138 (3d Cir. 1997) (citation omitted); *cf. Webb v. Texas*, 409 U.S. 95, 97 (1972). At that point, the court immediately and unilaterally ended the matter by dismissing the jury, even though there remained 12 jurors as long as the trial was briefly continued.

Further, where, as here, there was no manifest necessity and no prejudicial error, it would have been important for defense counsel to discuss with Stanley the benefits and risks of proceeding to trial under the circumstances. Defense counsel must have "an adequate opportunity . . . to discuss the various possible choices with their clients." *Gaytan*, 115 F.3d at 743. "[C]onscientious defense counsel are obligated to consult with their clients and with one another before selecting [a] course of action." *Id.* at 744. "[W]e cannot agree that . . . [defense counsel] should have been prepared to determine on the spot their position on an issue of such vital importance to their clients." *Id.*

Stanley's attorney had no opportunity to confer with his client as to whether to consent to a mistrial. From the moment the court told the jury that it could not go forward if someone "tells me you can't do it," until the time the court dismissed the jury, there was no recess. And the only person other than the judge who had a recognized opportunity to speak was the juror who did not "think" he could serve. Neither defense counsel nor the prosecutor got a word in, and there was no time for

defense counsel to confer with Stanley. In contrast, in *You*, there was a 24-minute recess after co-defendant's counsel renewed the motion for mistrial and before the court declared a mistrial and dismissed the jury. 382 F.3d at 962.

Defense counsel's statements *after* the jury was dismissed provide no basis for implying consent, particularly given that the parties do not dispute that the court could not have recalled the jury once it was dismissed. "[C]ounsel's statements and silences after the order of mistrial are relevant to the issue of implied consent, *if they come before the actual dismissal of the jury*." *Smith*, 621 F.2d at 352 n.2 (emphasis added); *see also United States v. Bates*, 917 F.2d 388, 393 n.8 (9th Cir. 1990). Once the jury was dismissed, anything Stanley's counsel said "would have made no difference whatsoever." *Gaytan*, 115 F.3d at 743 n.8; *see Bates*, 917 F.2d at 393 n.8.

In short, the court never asked Stanley's counsel if he objected to a mistrial. He had no practical opportunity to do so, especially given his obligation to confer with the defendant first. Any conclusion that Stanley consented under the circumstances here, when he had no opportunity to make a "deliberate election," *Oregon*, 456 U.S. at 676 (citation omitted), is a fiction.

I respectfully dissent.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH CARL STANLEY,
Petitioner

v.

LEROY D. BACA,
Respondent.

Case No. 2:12-cv-09569-JAK (GJS)

JUDGMENT

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED THAT this action is dismissed with prejudice.

DATE: April 14, 2021

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH CARL STANLEY,
Petitioner

v.

LEROY D. BACA,
Respondent.

Case No. 2:12-cv-09569-JAK (GJS)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative 28 U.S.C. § 2254 petition (Dkt. 98, "Petition") and all relevant pleadings, motions, and other documents filed in this action, the Report and Recommendation of United States Magistrate Judge (Dkt. 149, "Report"), and Petitioner's Objections to the Report (Dkt. 156). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated.

The Petition raises two habeas claims: the first asserts that Petitioner's rights under the Double Jeopardy Clause were violated by his trial and conviction following an earlier mistrial declaration. The second asserts that the evidence was insufficient to support Petitioner's convictions. The Report concluded that federal habeas relief was not warranted based on either claim.

Petitioner's Objections are not directed to these findings or analysis in the Report. Rather, Petitioner objects to the earlier portion of the Report in which the United States Magistrate Judge concluded that an argument set forth in Petitioner's Reply to the Answer to the Petition constituted an attempt belatedly to raise a new claim. The Report found that the argument in question – that Petitioner was entitled to habeas relief because the state court impermissibly created and retroactively applied to him "a new interpretation of constitutional law" in violation of "clearly established federal law barring retroactive application of new constitutional rules or procedure" – constituted a new claim based on federal due process and criminal procedure retroactivity principles that had not been raised in the Petition and was unexhausted. The Magistrate Judge declined to consider the new claim, noting, *inter alia*, this case was stayed for a year and a half to allow Petitioner to exhaust his sufficiency of the evidence claim and that his counsel could have exhausted this additional retroactivity claim during that period as well, had he wished to do so. (*See* Report at 23-28.)

In his Objections, Petitioner does not dispute that his retroactivity argument was asserted for the first time in his Reply, and that it is unexhausted. He asserts that, nonetheless, there is "no reason" not to consider this belatedly-asserted claim, which he characterizes as a mere "argument" rather than a claim. Petitioner reasons that 28 U.S.C. § 2254(d)(1) "requires no nexus between the constitutional provision that grounds the claim" and the means by which the state court is alleged to have unreasonably adjudicated it. This argument ignores the clearly established federal law requirement of Section 2254(d)(1), as well as both the exhaustion requirement for granting federal habeas relief and the long established case law precluding the assertion of a new claim based on a new federal constitutional provision in a Reply. The Court does not find this first Objection to be appropriate procedurally and concludes that the Magistrate Judge did not err in declining to consider the unexhausted retroactivity "argument" first asserted in the Reply.

Petitioner next asserts that his belatedly-asserted retroactivity "argument" should have received independent consideration under 28 U.S.C. § 2254(d)(2). He argues that, because the state court's allegedly improper retroactive application of new law to assess his trial counsel's conduct constituted a defective factfinding process, it was an unreasonable determination of fact within the meaning of Section 2254(d)(2). He faults the Magistrate Judge for failing to consider this argument. The Court is not persuaded that the legal error asserted – that federal due process and retroactivity principles were violated by the state court's finding that trial counsel impliedly consented to mistrial – properly can be assessed within the framework of whether an erroneous *factual* determination occurred within the meaning of Section 2254(d)(2). But even if it could be, any such claim remains unexhausted and improperly raised for the first time in Petitioner's Reply, a defect that Petitioner seeks to ignore. Petitioner's second Objection does not establish any error.

Petitioner's assertions and arguments have been reviewed carefully. The Court concludes that nothing set forth in the Objections or otherwise in the record in this case affects or alters, or calls into question, the findings and analysis set forth in the Report. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

Accordingly, **IT IS ORDERED** that: (1) the Petition is **DENIED**; and (2) Judgment shall be entered dismissing this action with prejudice.

JUDGMENT SHALL BE ENTERED.

DATED: April 14, 2021

John A. Kronstadt
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH CARL STANLEY,
Petitioner

v.

LEROY D. BACA,
Respondent.

Case No. CV 12-9569-JAK (GJS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. Based on the facts and reasoning set forth below, the undersigned recommends that the First Amended Petition be denied.

PROCEDURAL BACKGROUND

The Mistrial:

On November 4, 2011, a jury was selected in Petitioner's criminal trial in Los Angeles County Superior Court Case No. BA348056, but by the morning of the next court day, a mistrial had been declared. [Dkt. No. 115, lodgments of state record by

Respondent ("Lodg."), Lodg. No. 5, Ex. 4; Lodg. No. 19, Reporter's Transcript ("RT") A-13.] The Court will discuss the specific circumstances of that mistrial later, but for initial overview purposes, the California Court of Appeal's original description of what happened is set forth below:

> Very shortly after the jury and four alternates were sworn in a double-murder case, a number of jurors asserted reasons why they needed to be excused from service. One juror revealed a previously undisclosed bias, and was dismissed. An alternate juror revealed a previously undisclosed child care obligation, and was dismissed at the request of the defendant. Another juror's fiancée had broken her ankle and required the juror's constant attention. The record does not reflect whether this juror was actually dismissed, but it appears that the trial court and counsel assumed that he had been excused. A fourth juror asserted that he had contracted contagious conjunctivitis (pinkeye) and was under doctor's orders to stay home for two days. The trial court posited the question as to whether it should wait for this juror to get well, and a discussion was held with counsel. Both the prosecutor and the trial court believed that the result of the conversation was an agreement that the trial would not proceed unless there was *at least* one alternate. As a single alternate would be preserved if the trial were continued in order to retain the juror with pinkeye, the trial court proposed to counsel that it would ask the remaining jurors if they all would still be able to serve if the commencement of the trial were delayed for two days. The trial court expressed the view that if any other jurors asserted an inability to serve if the trial were continued, the court would grant a mistrial and dismiss the jury. Hearing no objection, the trial court proceeded with that course of action. A fifth juror then expressed concern, stating that he had "had a heart attack." The trial court held another conference with counsel and, relying on what it believed to be the agreement it had previously reached with counsel, and hearing no objection, dismissed the jury and declared a mistrial. A new trial date was set.

Stanley v. Superior Court, 206 Cal. App. 4th 265, 269 (2012).

Before the new trial commenced, Petitioner moved to dismiss the case based upon a double jeopardy objection. The trial court denied the motion after finding that defense counsel had impliedly consented to the November 7, 2011 dismissal of the

jury and mistrial. *Stanley*, 206 Cal. App. 4th at 270. Petitioner filed a petition for a writ of prohibition in the California Court of Appeal, which was denied on May 22, 2012, in a reasoned decision concluding that the trial court's finding of implied consent was factually and legally justified. *Id.* at 278-294. The California Supreme Court denied review on September 12, 2012, without comment. [Lodg. Nos. 15-16.]

The Federal Action Commences:

Approximately two months later, on November 8, 2012, Petitioner filed his original habeas petition in this action pursuant to 28 U.S.C. § 2241 [Dkt. No. 1, "Petition"]. The sole named Respondent was Lee Baca, the former Sheriff for Los Angeles County. The Petition alleged a single claim, *to wit*, that "Petitioner is being prosecuted in violation of his right against double jeopardy." [*Id.* at 5.] As supporting facts, the Petition alleged that: the above-described mistrial "was declared without legal necessity and without consent"; and "[f]urther proceedings on the charges are barred by the Fifth Amendment to the United States Constitution." [*Id.*]

On January 8, 2013, Petitioner asked the Court to direct the Los Angeles Superior Court to stay his criminal trial until the Petition was resolved. [Dkt. No. 10.] Respondent opposed the request, invoking the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). [Dkt. No. 14.] Respondent subsequently moved to dismiss the Petition based upon Petitioner's asserted failure to exhaust his claim and the *Younger* abstention doctrine. [Dkt. No. 17.] Following briefing, on March 21, 2013, the first United States Magistrate Judge to whom this case was referred issued a Report and Recommendation in which he concluded that abstention was not required but habeas relief was not warranted based on Petitioner's double jeopardy claim, because he had impliedly consented to the mistrial and retrial. [Dkt. No. 24.] On April 5, 2013, District Judge Kronstadt denied Petitioner's stay request. [Dkt. No. 27.]

In the interim, the case had been reassigned to another United States Magistrate

Judge. [Dkt. No. 26.] On April 10, 2013, the second Magistrate Judge vacated the pending Report and Recommendation and directed further briefing on the motion to dismiss and certain designated issues. [Dkt. No. 28.] On June 7, 2013, the second Magistrate Judge issued a Report and Recommendation in which he concluded that: *Younger* abstention was warranted; no exception to the doctrine applied, because the Petition did not present a "colorable" double jeopardy claim; and the motion to dismiss should be granted. [Dkt. No. 36.] On June 25, 2013, District Judge Kronstadt accepted the Report and Recommendation and denied and dismissed the Petition. Thereafter, Judgment was entered dismissing this case. [Dkt. Nos. 38-39.]

Petitioner appealed. On July 8, 2013, the United States Court of Appeals for the Ninth Circuit granted a certificate of appealability on the following single issue: "whether the district court properly dismissed appellant's 28 U.S.C. § 2241 petition pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), on the basis that the double jeopardy claim is not colorable." [Dkt. No. 43.] The Ninth Circuit also denied Petitioner's request to stay his trial, indicating that the denial was without prejudice to Petitioner renewing his request before the state trial court. [*Id.*]

Petitioner's Trial and Conviction:

The next day, jurors were called for Petitioner's second trial. [*See* RT, *passim*, and Lodg. No. 17, Clerk's Transcript ("CT") 488.] On July 30, 2013, Petitioner was convicted of two counts of first degree murder and one count of possession of a firearm by a felon, and the jury found true a multiple murder special circumstances allegation and various use of firearm allegations. [CT 729-30, 732, 741-43.] At a bench trial on November 19, 2013, the trial court found the prior conviction allegations to be true. [CT 821-22.] On that same day, the trial court sentenced Petitioner to two consecutive terms of life without the possibility of parole based on the two murder convictions, plus two consecutive terms of 25 years to life for the firearm enhancements. [CT 822-27.] (Hereafter, the 'State Conviction.")

The Ninth Circuit Remand Order:

Petitioner appealed the State Conviction. [CT 828.] While Petitioner's appeal of his State Conviction was pending in the state courts, his above-noted Ninth Circuit appeal proceeded with briefing and oral argument. On February 19, 2014, the Ninth Circuit issued an Order in which it concluded that: for purposes of the *Younger* abstention issue before it, Petitioner's double jeopardy claim "has some possible validity"; thus, it was error to dismiss the claim pursuant to the *Younger* abstention doctrine; and on the record before it, the Ninth Circuit was "unable to determine whether mistrial was supported by implied consent." In particular, the Ninth Circuit identified three factual issues that it believed needed to be resolved in order to answer the question of whether there had been implied consent: (1) "how much time passed between the dismissal of the jury and the declaration of mistrial"; (2) "whether the jury could have been recalled had an objection been lodged immediately upon declaration of mistrial"; and (3) "whether defense counsel heard the state trial court refer to an agreement that trial would not go forward without at least one alternate juror." The Ninth Circuit vacated the dismissal of the Petition and remanded the case for "consideration of the petition on the merits" and "for the district court to determine, after a hearing, whether mistrial was supported by implied consent." *Stanley v. Baca*, 555 Fed. Appx. 707, 708-09 (9th Cir. Feb. 19, 2014) ("Remand Order"). The mandate issued on May 22, 2014. [Dkt. No. 51.]

Subsequent Federal and State Proceedings:

On June 16, 2014, the second assigned Magistrate Judge scheduled an evidentiary hearing for September 11, 2014. [Dkt. No. 52.] On August 8, 2014, Respondent filed a motion asking the Court to depart from the Ninth Circuit's mandate. Respondent argued, *inter alia*, that: Section 2241 no longer governed Petitioner's double jeopardy claim due to his change in status from pretrial detainee to a convicted defendant in custody pursuant to the State Conviction; his habeas

claim now was governed by 28 U.S.C. § 2254; the Court should not hold an evidentiary hearing until the issue of whether Section 2241 or Section 2254 governed the double jeopardy claim was resolved and briefing occurred pursuant to the appropriate standard; and the Petition should be dismissed without prejudice or be deemed to constitute a Section 2254 petition. Following an Order vacating the evidentiary hearing and briefing, on February 19, 2015, the former Magistrate Judge denied Respondent's motion in reliance on *Stow v. Murashige*, 389 F.3d 880, 885-86 (9th Cir. 2004), concluding that Section 2241 was the proper vehicle for Petitioner's double jeopardy challenge, because he was a pretrial detainee when he filed the Petition [Dkt. No. 76, "February 19 Order"].

On March 5, 2015, Respondent filed a motion seeking review of the February 19 Order [Dkt. No. 78, "Review Motion"]. On March 10, 2015, District Judge Kronstadt referred the Review Motion to the second Magistrate Judge for issuance of a report and recommendation. [Dkt. No. 79.] On April 13, 2015, this case was reassigned and referred to the undersigned United States Magistrate Judge. [Dkt. No. 83.] Briefing ensued on the Review Motion and, on July 24, 2015, the Court issued its Report and Recommendation [Dkt. No. 88, "Prior Report"]. In the Prior Report, the Court concluded that: review of the February 19 Order was warranted; the change in Petitioner's status – from pretrial detainee to convicted defendant – affected the jurisdictional basis for relief; the Petition should be recharacterized as one now seeking relief under 28 U.S.C. § 2254 rather than under 28 U.S.C. § 2241; and doing so did not violate the Remand Order and/or the rule of mandate. [*Id.*] After considering Petitioner's Objections to the Prior Report, on September 15, 2015, District Judge Kronstadt accepted the Prior Report, granted the Review Motion and vacated the February 19 Order, ordered that the Petition be recharacterized as one brought under Section 2254, and directed Petitioner to file a response advising how he wished to proceed. [Dkt. No. 90.]

While these events ensued in this federal habeas action, Petitioner's direct

appeal of his State Conviction continued, and as of January 8, 2015, his appeal was fully briefed in the California Court of Appeal (Case No. B252979). On May 13, 2015, however, after letter briefs had been filed, the California Court of Appeal issued an Order in which it deferred consideration of Petitioner's appeal of the State Conviction pending the entry of judgment in this case.[1]

On October 15, 2015, Petitioner requested that this case be stayed while his direct appeal was pending. [Dkt. No. 91.] The Court granted the request and stayed this action pursuant to *Rhines v. Weber*, 544 U.S. 265 (2005). [Dkt. No. 92.]

The California Court of Appeal thereafter resumed its consideration of Petitioner's appeal. On December 8, 2016, the state appellate court affirmed Petitioner's conviction. The California Court of Appeal concluded that its prior 2012 decision with respect to the double jeopardy claim [Dkt. No. 12] was the law of the case, and thus, retrial had been proper. [Lodg. No. 31 at 2, 15-26.] The state appellate court also rejected Petitioner's claim that his convictions were not supported by sufficient evidence. [*Id.* at 2, 26-33.] On March 1, 2017, the California Supreme Court denied his petition for review. [Dkt. Nos. 32-33.]

Subsequently, the Court lifted the stay of this action. [Dkt. No. 97.] On April 21, 2017, Petitioner filed a First Amended Petition, which is the operative habeas petition in this case [Dkt. No. 98, "FAP"]. Respondent filed an Answer to the FAP and lodged the remaining relevant portions of the record. [Dkt. Nos. 114-117.] Thereafter, Petitioner filed his Reply. [Dkt. No. 124.]

On May 20, 2020, Petitioner initiated a pro se proceeding in the Ninth Circuit (No. 20-71628), in which he complained, among other things, that he had not received an evidentiary hearing. On July 2, 2020, the Ninth Circuit issued a brief Order ("July 2 Order"). The July 2 Order construed Petitioner's initial letter as a petition for a writ of mandamus and denied it "without prejudice to the filing of a new

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[1] Pursuant to Rule 201 of the Federal Rules of Civil Procedure, the Court has taken judicial notice of the electronic dockets for the California Court of Appeal.

petition if the district court has not conducted an evidentiary hearing related to the pending 28 U.S.C. § 2254 petition within 90 days after the date of this order."

On July 9, 2020, the Court issued an Order in which it acknowledged the July 2 Order. [Dkt. 125, "July 9 Order."] The Court explained why it believed that, under the standards governing its Section 2254(d) review, it lacked the authority to hold an evidentiary hearing until there has been a determination that Petitioner had satisfied either Section 2254(d)(1) or Section 2254(d)(2).[2] The Court nonetheless conceded

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[2] As the Court explained:

> [W]hen, as in this case, a petitioner's habeas claims were resolved on their merits by the state courts, the AEDPA standards of review embodied statutorily in 28 U.S.C. § 2254(d) apply. The Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), substantially curtailed the availability of evidentiary hearings in federal habeas actions subject to such AEDPA review. *See, e.g., Thomas v. Santoro*, No. 16-cv-05646-BLF, 2017 WL 2351251, at *3 (N.D. Cal. May 31, 2017) ("A district court's ability to conduct an evidentiary hearing was severely cabined by the Supreme Court's decision in" *Pinholster*). The *Pinholster* decision made clear that federal habeas review under Section 2254(d) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180-81. "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id. at* 185 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."). Thus, unless and until the threshold requirements of Section 2254(d) are found satisfied, an evidentiary hearing is not permitted. *See Gulbrandson v. Ryan*, 738 F.3d 976, 993-94 (9th Cir. 2013) (when a state court has denied claims on their merits, *Pinholster* precludes "further factual development of these claims" through an evidentiary hearing to determine whether Section 2254(d) is satisfied); *Stokley v. Ryan*, 659 F.3d 802, 809 (9th Cir. 2011) ("*Pinholster*'s limitation on the consideration of [a petitioner's] new evidence . . . in federal habeas proceedings also forecloses the possibility of a federal evidentiary hearing"). This limitation on the Court's review to the record before the state courts applies whether a claim is evaluated under Section 2254(d)(1) or Section 2254(d)(1). *See Pinholster*, 563 U.S. at 189 n.7; *Gulbrandson*, 738 F.3d at 993 n.6.

[July 9 Order at 6.]

that, as a lower court, it was constrained to follow the July 2 Order and, accordingly, advised the parties that an evidentiary hearing would be scheduled to address the three factual issues identified in the Ninth Circuit's Remand Order. Respondent filed a motion seeking review of the July 9 Order, which District Judge Kronstadt denied on July 29, 2020. [Dkts. 129-133.]

On September 18, 2020, an evidentiary hearing took place, which was addressed to the second question identified in the Remand Order. [*See* Dkt. 140 (hearing transcript) and 142 (Exhibit 1 from hearing).] As discussed *infra*, in the July 9 Order, the Court had concluded that the existing record was adequate to resolve the first and third questions posed by the Remand Order, and the parties agreed. [Dkts. 135 and 143 at 4-5.] Thus, there was no need to conduct an evidentiary hearing regarding those two issues. The Court Operations Manager for the Juror Services Division of the Los Angeles County Superior Court (Maisha Elie) appeared as a witness at the hearing and testified, in brief, that the jurors at Petitioner's trial likely had been discharged by her department by the time the trial court formally declared a mistrial. Pursuant to a briefing schedule agreed to by the Court and the parties, Petitioner filed a Supplemental Brief on October 22, 2020, Respondent filed a Supplemental Brief on November 12, 2020, and Petitioner filed a Reply on December 13, 2020. [Dkts. 143-144, 147.]

FACTUAL BACKGROUND

The Court has reviewed the trial record carefully and will discuss the salient portions thereof in connection with its analysis of both of Petitioner's habeas claims. In the meantime, to provide an initial factual background summary, the Court quotes in full the California Court of Appeal's description of the evidence presented at trial:

> In May 2008, [Petitioner] was living in Las Vegas with his wife, Tracey. He owned a barbershop, and wore his hair in dreadlocks, with the sides of his head shaved—a style described at trial as a dreadlock mohawk.

Although he lived in Las Vegas, [Petitioner] grew up in Los Angeles—on West 74th Street between Figueroa and Flower—and still had family in the area. [Petitioner's] customers called him by his childhood nickname, JoJo.

[Petitioner's] mobile phone number was (702) 352-5550. The phone was used on May 3, 2008, in North Las Vegas, Nevada. Late that night, [Petitioner] traveled from North Las Vegas to Los Angeles. By 3:17 a.m. on May 4, 2008, [Petitioner] had reached South Los Angeles. On May 4, 2008, [Petitioner] spent the day in the city.

Manuel Romero lived in a van, which he parked in front of his family's house at 528 West 74th Street, between Hoover and Figueroa in Los Angeles. Manuel and his brother Roberto had a nephew named Jorge Duke. Manuel raised Duke, and Duke thought of Manuel as his father. Kathi Preston also lived on West 74th Street, west of Figueroa. Her mother, Jean Preston,[3] and her son, Devondre Haynes, lived with her.

1. May 4, 2008.

Around 5:00 p.m. on May 4, 2008, [Petitioner] arrived at Kathi's house in an SUV. He wore his hair in blonde and black dreadlocks with the sides of his head shaved and was accompanied by an African-American woman. [Petitioner] was looking for Tymore Haynes—[Petitioner] knew him as T-Mo—a childhood friend who used to live there. T-Mo was Devondre Haynes's father; he died in 1991. [Petitioner] had grown up down the street from T-Mo—and from Kathi. Haynes, however, had never met him. Kathi and Haynes visited with [Petitioner] for about an hour.

Around 6:00 p.m., [Petitioner] and Haynes left Kathi's house together, crossed the street, and walked toward the nearby Romero home. Haynes was in his early 30's and wearing a blue sweater. [Petitioner] was wearing a white t-shirt and a big, gold chain. A group of people, including Duke and Manuel, was hanging out next to Manuel's van; [Petitioner] and Haynes joined them. Roberto arrived sometime after dark, and by 8:30 p.m., Roberto Carlos Bustos (Bustos) had parked his car behind the van. Bustos reclined his front seat and remained in the

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[3] Footnote 6 in original: "Because Kathi and Jean Preston share a last name, we refer to them by their first names."

car, resting. Everyone was smoking marijuana and drinking malt liquor and beer. [Petitioner] and Haynes ultimately stayed for three or four hours. [fn. om.]

[Petitioner] told Manuel and Duke that he used to live on the block but had moved to Las Vegas. To Duke, it sounded like [Petitioner] was speaking with a Jamaican or Belizean accent, using phrases like "me likie" and "I love Cali people." According to Haynes, [Petitioner] asked Manuel about "buying some dope." Though Duke recalled Haynes speaking to Manuel, he did not know who asked Manuel about drugs. Manuel started making phone calls. Duke also heard [Petitioner] tell Manuel's friend Paisan that "he triples it out there[,]" and "gets a good profit." Someone else in the group mentioned weapons. Duke looked around and saw a bulky shape on [Petitioner's] waistband. Earlier in the day, Haynes had noticed a black handgun tucked in [Petitioner's] waistband.[4]

[Petitioner's] female companion returned in the SUV and parked across the street. [Petitioner] left the party with the woman; they walked down West 74th Street together to look at [Petitioner's] old house, which was four or five houses away. At 8:02 p.m., [Petitioner's] mobile phone was used to call Manuel's phone. The call was made within a mile of Manuel's van.

While [Petitioner] showed the woman his old neighborhood, Haynes waited by the van with Manuel, smoking marijuana and drinking beer. At some point, Haynes's brother Rodney Kirk joined them. The conversation made Duke uncomfortable, and he left.

As Duke was leaving, the couple returned. The woman got back inside the SUV, and [Petitioner] returned to the group next to the van. Manuel and Roberto walked down a nearby alley. They returned 15 minutes later. Manuel went to the van; Roberto stood in the street. Manuel emerged from the van's rear passenger door, followed a few minutes later by [Petitioner]. [Petitioner] looked directly at Bustos, who was still reclining in his car. Haynes was standing on the grass adjacent to the

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4 Footnote 8 in original: "Haynes's preliminary hearing testimony was inconsistent on this point. At the preliminary hearing, Haynes testified he did not see a gun but was told [Petitioner] had one."

curb; Manuel and [Petitioner] stood between Haynes and the van.

2. The shooting and aftermath.

Around 8:45 p.m., Haynes saw a muzzle flash and heard a shot. Bustos saw [Petitioner] raise his arm, saw muzzle flashes, and saw Manuel fall. Meanwhile, Roberto was still standing in the nearby street. Bustos saw [Petitioner] walk to the front of the van, then heard more gunshots. As [Petitioner] walked past Bustos, he fired one more time. Haynes and Kirk ran away. Bustos saw [Petitioner] enter a nearby SUV; the SUV drove off "really fast[.]"

Police responded to the Romero home moments later. A Chevrolet Suburban or Tahoe was pulling away as they approached. Police found Manuel lying on the grass near his van. He was dead—killed by a gunshot wound to the head. Roberto was lying on the ground between two parked cars. He was alive, but died en route to the hospital from multiple gunshot wounds. An hour later, [Petitioner] was still in the neighborhood; he began the drive back to Las Vegas around 10:00 p.m. and arrived home by the next morning.

At the scene, police found five used nine-millimeter shell casings and one live nine-millimeter round. A search of Manuel's pockets revealed $219 cash, a mobile phone, and a slip of paper with the phone number (702) 352-5550 and the name JoJo. A search of the van revealed a small bag of white powder; the powder was not a controlled substance. The police collected fingerprints from the van and surrounding items; none of the fingerprints matched [Petitioner's]. Though the shell casings and live round were not tested for fingerprints, police did swab them for DNA. However, the lab was unable to extract a DNA profile. The record does not reveal whether police collected or analyzed additional DNA or other physical evidence.

3. The investigation.

On October 17, 2008, Haynes was taken into custody for the unrelated murder of Kevin Baldwin. Haynes thought—and at trial, appeared to still think—he was a suspect not only in the Baldwin murder, but also in the murders of Manuel and Roberto. During his interrogation, Haynes was shown a six-pack photographic lineup; he identified someone other than [Petitioner] as

looking like the shooter. When the interview was over, police arrested him for the murder of Kevin Baldwin.

The police interrogated Haynes again four days later, and this time, Haynes identified [Petitioner] as the shooter.[5] Haynes believed the police wanted him to identify someone in the Romero killings, and thought that if he failed to do so, he might be prosecuted for those murders too. As they began questioning him, the police told Haynes, "So whether this guy represented himself one way or whatever it might be, we just need to know everything—because it comes out later and then you don't come up front with it and you're telling me that's all the truth then later it looks bad for you because then it looks like you were hiding something." Haynes then described the events of May 4, 2008. He explained that the reason he did not identify [Petitioner] during their earlier interview was that he feared for his own safety and his family's safety.[6] Police released Haynes from custody that day. He was not prosecuted in either case.

A week later, on October 28, 2008, [Petitioner] was arrested in Las Vegas. At the time of his arrest, defendant wore his hair in dreadlocks, with the sides of his head shaved. He did not speak with an accent, and did not have any tattoos. A search of his house did not uncover any evidence of drug sales.

4. Defense evidence.

The defense acknowledged [Petitioner] was in Los Angeles on the day of the murders, but argued it was for an innocent purpose—[Petitioner] came to the city to see his family and his old neighborhood, spent some time

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5 Footnote 9 in original: "As discussed in the body of the opinion, though police showed Haynes the same six-pack array the court ruled unduly influenced two other witness identifications, the court denied the defense motion to exclude Haynes's identification. Although there were lengthy proceedings on this issue before the first trial, the record on appeal did not contain any motions or transcripts of proceedings that occurred before November 7, 2011, and appellate counsel did not move to correct or augment the record to include them. In light of the seriousness of this case and the importance of this portion of the record, we augmented the record on our own motion."

6 Footnote 10 in original: "On direct examination, Haynes testified that he was still afraid for the safety of his grandmother, Jean, who continued to live in the house. Then, on cross-examination, he explained, as he did at the preliminary hearing, that he had identified [Petitioner] as the shooter because he feared retaliation from the real culprit, not [Petitioner]. But on redirect, Haynes testified again that [Petitioner] was the shooter."

there, then went home. The phone records and most of the testimony were consistent with that theory. As for the eyewitness testimony, the defense argued Bustos's identification was more consistent with testimony by Carlos Ramos Montoya, who also witnessed the shooting, than it was with the contradictory and confusing version presented by Haynes. Since Haynes was a liar trying to save his own skin, the jury should disregard Haynes's identification.

Montoya testified that on the evening of May 4, 2008, he drove to his sister's house on West 74th Street. Before Montoya got out of his car, his friend Manuel called out to him. As Montoya walked toward his sister's house, he saw Manuel speaking with two African-American men in a parked SUV. The driver had long braids covering his head and the passenger was nearly bald. Manuel turned away from the men and began walking back to his van.

The men got out of the SUV and followed Manuel. They were angry and aggressive, used vulgar language, and carried at least one gun. The men walked past Montoya. He noted their size, shoes, clothing, and hair. The man with braids was wearing a white and blue sleeveless shirt and denim shorts; he was not wearing a necklace or a chain. He had a tattoo on his left shoulder, which Montoya attempted to describe to detectives. The defense emphasized that Montoya's testimony was consistent with the description Bustos gave the police: the shooter had long braids covering his head and was wearing a sleeveless shirt.

The defense expert, Dr. Kathy Pezdek, testified about factors that reduce the accuracy of eyewitness identifications. These include lighting and distance; length of exposure to a suspect; weapon focus; cross-racial identification; disguise; memory details; the passage of time between the event and the identification; lineup procedures—including biased lineups, double-blind procedures, and admonition comprehension; and bias of in-court identifications. Finally, Dr. Pezdek pointed to the "large number of studies" concluding the certainty of an eyewitness identification does not correlate with its accuracy.

Finally, the defense called Devondre Haynes. Haynes admitted drugs were sold out of his house. In

> 2003, he was convicted of felony drug sales. In contrast to Haynes, the defense argued, the police had uncovered no evidence connecting [Petitioner] to the drug business.

[Lodg. No. 31 at 7-14.]

PETITIONER'S HABEAS CLAIMS

Ground One: Mistrial was declared on November 7, 2011, without legal necessity or consent, after jeopardy had attached. Therefore, the Double Jeopardy Clause barred Petitioner's subsequent retrial in 2013. [FAP at 5.]

Ground Two: The evidence was insufficient to sustain Petitioner's convictions. There was no physical evidence connecting Petitioner to the shootings and the only evidence of guilt was unreliable eyewitness testimony. [FAP at 5 and Addendum.]

STANDARD OF REVIEW

A. The Nature Of The Court's Review

As noted above, District Judge Kronstadt already has determined that, going forward, this case is governed by Section 2254 – the statute that governs federal habeas review when a petitioner has been convicted – and that this conclusion does not violate the Remand Order or the rule of mandate. Nonetheless, in his merits Reply, Petitioner continues to argue that this Court's review of the merits of the FAP must be conducted under Section 2241 – the general habeas provision that applies to pretrial habeas challenges. To the extent that Petitioner seeks reconsideration of District Judge Kronstadt's prior Order, Petitioner does not satisfy the requirements of Local Rule 7-18, nor does he state any tenable basis for reconsideration. Moreover, the Ninth Circuit's July 2 Order expressly described the FAP as one pending under Section 2254.

While the Court considers the Section 2241 or Section 2254 issue to have been resolved conclusively, it feels compelled at this juncture, nonetheless, to address a

position taken by Petitioner regarding the purported dispositive effect of the Remand Order on both the standard of review and the merits of Ground One. Petitioner contends that, through the Remand Order, the Ninth Circuit not only purportedly conclusively determined that Section 2241 governs this case but also rendered a merits ruling on Ground One in his favor. Petitioner asserts that, by the Remand Order, the Ninth Circuit found that the evidence before the state courts was insufficient to support the state court merits ruling with respect to Ground One on the issue of implied consent. Petitioner contends that because the Remand Order constituted a merits ruling in Petitioner's favor on the Ground One implied consent issue, this effected a burden of proof shift that obligated Respondent to produce additional new evidence to retroactively support the state appellate court's finding of implied consent. Petitioner reasons that unless such new evidence has been produced, then under the Remand Order, the Ninth Circuit has ruled that a grant of federal habeas relief is required. [Reply at 6, 9; Dkt. 147 at 2-3, 5.]

Petitioner's assertions regarding what the Ninth Circuit supposedly did in the Remand Order are perplexing, as the Court's review of the Remand Order does not reveal any such case-dispositive determinations. At the time the Ninth Circuit ruled on the pre-trial abstention issue, the Circuit Court did not have before it the entirety of the state record, unlike this Court. Moreover, as discussed in the Court's Prior Report, the Ninth Circuit was tasked with ruling on, and actually did rule on, only the correctness of the 2013 *Younger* abstention decision finding that the pretrial double jeopardy claim asserted in the original Petition was not "colorable." This was the *sole* issue on which a certificate of appealability had been granted. The Ninth Circuit did not rule that the underlying state court decision on the double jeopardy question was not supported by sufficient evidence for purposes of habeas relief, nor did the Circuit Court actually determine that no implied consent existed, as Petitioner contends. As the Remand Order clearly stated, the Ninth Circuit noted that "we are unable to determine whether mistrial was supported by implied consent" based on the

incomplete record before it. In short, the Ninth Circuit explicitly did *not* decide the implied consent issue, sending the case back to the district court for a full consideration. Petitioner's attempt to twist a statement expressly noting that something has *not* been decided into an affirmative resolution of the merits of the thing stated not to have been decided is unpersuasive, to say the least. The Remand Order plainly left the implied consent issue to be resolved at the district court level when a full merits review could take place under the relevant standard of review, including once the three factual issues identified by the Ninth Circuit were resolved (two of which were not actually open at all, as it turned out, under the fuller record available to this Court).

The Ninth Circuit's Remand Order also did not render any decision on the standard of review that would govern Petitioner's claims once they were resolved on their merits. As the Ninth Circuit noted expressly and repeatedly in the Remand Order, all that was before it was a "pretrial habeas petition" and the question of whether abstention had been properly ordered in response to this "pretrial" request for habeas relief. Moreover, Petitioner's second federal habeas claim – challenging the sufficiency of the evidence – was not even raised in the state courts or here until after he had been convicted and certainly was not before the Ninth Circuit when it issued the Remand Order. Construing the Remand Order to require the sufficiency of the evidence claim to be reviewed under Section 2241 would be nonsensical.[7]

Petitioner's insistence that a rote adherence to his status at the time this action commenced controls no matter what has happened subsequently is wrong not only for the reasons discussed in the Prior Report but because his argument has been expressly rejected by the Ninth Circuit's reasoning in *Dominguez v. Kernan*, 906 F.3d 1127 (9th Cir. 2018). In that case, the petitioner's first trial ended in a hung jury and after he was convicted at his second trial, he filed a Section 2254 petition raising a double

[7] Indeed, as the Ninth Circuit recognized in the July 2 Order, this case involves a "pending 28 U.S.C. § 2254 petition."

jeopardy challenge. While the federal petition was pending, however, the state trial court vacated the conviction on another ground. After the state elected to retry petitioner, he was placed in pretrial custody awaiting retrial and the district court dismissed his federal habeas petition as moot. The Ninth Circuit reversed the mootness finding, concluding that petitioner remained in custody and continued to present the same legal claim as before, namely, that double jeopardy barred a further trial. *Id.* at 1129, 1132-33.

Critically for this case, in *Dominguez*, the Ninth Circuit found that even though the federal habeas petition properly had been brought under Section 2254 when it was filed due to the petitioner's then-pending conviction, the petitioner no longer could proceed under Section 2254 due to the intervening vacatur of the state judgment. The Ninth Circuit found that, once the conviction was vacated, the district court should have converted the petition to one to be considered under Section 2241 in light of the petitioner's return to pretrial custody status awaiting retrial. "*Just as a court may convert a § 2241 petition to a § 2254 petition when a pretrial detainee is convicted while a petition is pending*, we hold that a court has the authority to convert a § 2254 petition into a § 2241 petition when a petitioner's convictions are vacated during the pendency of the petition and the petitioner has become a pretrial detainee." *Dominguez*, 906 F.3d at 1129 (emphasis added); *see also id.* at 1137-38 (noting that "[c]ourts and commentators have recognized that, '[i]f the petition is filed by a pre-trial detainee under § 2241 who is subsequently convicted, the federal court may convert the § 2241 petition to a § 2254 petition'" and "[w]e now hold that the same rationale applies where, as here, the opposite situation arises") (citations omitted). *See also Saulsberry v. Lee*, 937 F.3d 644, 647-48 (6th Cir. 2019) (in the very same situation involved here – federal petition filed prior to retrial but resolved after retrial – rejecting the arguments made by Petitioner and holding that: (1) "Any other approach would not make sense. Saulsberry's requested relief targets his state judgment in just the same way as if it preceded his petition. Every circuit that has

considered the question agrees that it follows from the text of § 2254 and this practical reality of prisoners' challenges that § 2254 governs a pending § 2241 petition in the event of a conviction."; and (2) the deferential Section 2254(d) standard of review therefore governed the converted petition) (citing decisions from the First, Fifth, and Tenth Circuits, as well as *Dominguez*).

These decisions make clear that, in this Circuit and many others, if a petitioner is convicted while his Section 2241 petition is pending, his case then properly is converted to one brought and reviewable under Section 2254. Petitioner's insistence that Section 2241 governs this case is simply wrong under the law. His insistence that the Remand Order actually resolved the merits of Ground One also is wrong. Petitioner's attempt to attribute to the Ninth Circuit case dispositive rulings it did not make through the Remand Order is unfounded and unpersuasive.[8]

The Court now will turn to its Section 2254(d) merits consideration of both of Petitioner's claims.

B. The Section 2254(d) Standard Of Review

Petitioner raised his Ground One double jeopardy claim in a petition for a writ of prohibition filed in the California Court of Appeal, which denied the claim on its merits in a written, reasoned decision. [Lodg. No. 12, hereafter *Stanley I*.] The California Supreme Court denied review without comment. [Lodg. No. 16.] After Petitioner was convicted in 2013, he appealed, again raising Ground One and adding his Ground Two sufficiency of the evidence challenge. Appellate briefing ensued, as

[8] The Court also rejects Petitioner's assertion that the Ninth Circuit necessarily factored into its Remand Order the fact that he already had been convicted pursuant to his second trial and that the Circuit Court, therefore, intended for the Remand Order to be dispositive of, and to govern the standard of review of, claims raised on a post-conviction basis. The Remand Order plainly does not say so and, instead, states repeatedly that the Ninth Circuit was addressing only a "pretrial" challenge based on double jeopardy and only the question of whether abstention was warranted at the time it was ordered *prior to trial*. Had the Ninth Circuit intended for its Remand Order to have the broad-ranging and merits-dispositive scope that Petitioner urges – one well outside of the particular abstention issue before it – the Court believes that the Ninth Circuit would have said so.

did the filing of letter briefs ordered by the California Court of Appeal. [Lodg. Nos. 20-30.] On December 8, 2016, the California Court of Appeal: concluded that *Stanley I* was the law of the case with respect to Ground One; adhered to its *Stanley I* decision rejecting Ground One on its merits and found that Petitioner's retrial had not been barred by the Double Jeopardy Clause; and considered and rejected Ground Two on its merits. [Lodg. No. 31, hereafter, *Stanley II*.] The California Supreme Court denied review without comment. [Lodg. No. 33.] Thus, both Grounds One and Two of the FAP were resolved on their merits in the state courts.

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), Petitioner is entitled to habeas relief only if the state court's decisions on the merits of his claims "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)."). The above AEDPA standard "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

To undertake its Section 2254(d) analysis, the Court must look to the last reasoned decision on the merits. Here, there are two, namely, the California Court of Appeal's decision on the prohibition petition regarding Ground One and its subsequent decision on direct appeal as to both Grounds One and Two. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (when claims were denied by state court of appeal on their merits on direct appeal in a reasoned decision, and the state supreme court denied discretionary review, the "relevant state-court decision" under Section 2254(d) was the state court of appeal decision); *see also Wilson v. Sellers*, 138 S. Ct.

1188, 1193-96 (2018) (when a state high court issues a summary denial of relief following a reasoned decision by a lower state court denying relief, the federal habeas court looks through the summary denial to the lower court's reasoned decision for purposes of AEDPA review, because it is presumed the state high court's decision rests on the grounds articulated by the lower state court).

Under Section 2254(d)(1) review, the relevant "clearly established Federal law" consists of Supreme Court holdings (not dicta) applied in the same context that a petitioner seeks to apply it and existing at the time of the relevant state court decision. *See Lopez v. Smith*, 574 U.S. 1, 2, 6-7 (2014); *Premo v. Moore*, 562 U.S. 115, 127 (2011); *see also Greene v. Fisher*, 565 U.S. 34, 37 (2011) (holding that "the 'clearly established Federal law' referred to in § 2254(d)(1) is the law at the time of the state-court adjudication on the merits."). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably applies" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand. *White v. Woodall*, 572 U.S. 415, 425-27 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; 'even clear' error will not suffice." *Id.* at 419 (citation and some internal quotation marks omitted). "The question ... is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable -- a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

In his Reply, Petitioner contends that the state court's decisions not only are unreasonable under Section 2254(d)(1) but also are based on an unreasonable determination of the facts, thus implicating Section 2254(d)(2) as well. A state court has made an "unreasonable determination of the facts" within the meaning of Section 2254(d)(2) when either its findings were not supported by substantial evidence in the

state court record or its fact-finding process was unreasonably deficient. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). However, the federal courts "must be particularly deferential to our state-court colleagues" in conducting Section 2254(d)(2) review. *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004). A state court's "factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 130 S. Ct. 841, 849 (2010). The petitioner must show that the state court's factual findings were not merely incorrect but "'objectively unreasonable.'" *Hibbler*, 693 F.3d at 1146 (citations omitted). To succeed, the petitioner must convince the federal court not only that it would reverse in similar circumstances on direct review, but also "that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor*, 366 F.3d at 1000.

For claims, such as here, that are governed by the Section 2254(d) standard of review, federal habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 562 U.S. at 102. To obtain habeas relief, a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (*per curiam*). This standard is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id*. at 101 (citation omitted). "AEDPA thus imposes a 'highly

deferential standard for evaluating state-court rulings,' … and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

DISCUSSION

I. Ground One: The Double Jeopardy Issue

A. The Nature Of The Claim That May Be Considered

By his first habeas claim, Petitioner contends that the November 7, 2011 mistrial described briefly above was declared without legal necessity or consent, and thus, the Double Jeopardy Clause precluded his subsequent 2013 trial and conviction. [FAP at 5.] Specifically, as alleged in the FAP, the Ground One double jeopardy claim stated only the following:

> Violation of petitioner's right against double jeopardy. On November 4, 2011, a jury trial was empaneled and sworn, causing jeopardy to attach on the stated charges. On November 7, 2011, a mistrial was declared, without legal necessity and without consent. Further proceedings on the charges are barred by the Fifth Amendment to the United States Constitution.

[FAP at 5.] Notwithstanding its cursory nature, it is clear that Ground One is the same claim that was raised in the state courts and resolved on the merits by *Stanley I* and to which the state courts subsequently adhered in *Stanley II*. [*See* Lodg. Nos. 1, 6, 10, 13, 15, 20, 22, 24, 27, 29, and 32.] The above-quoted claim, therefore, is exhausted. The above claim also is the only double jeopardy claim that Respondent addressed in his Answer [at 4-17], and Petitioner addresses this same claim in his Reply [at 14-24]. Accordingly, the Ground One claim set forth above, as resolved in the state courts, is *the* exhausted claim actually properly before the Court and which it will analyze below. Before turning to the merits of this double jeopardy claim, however, the Court must address Petitioner's assertion of a new and unexhausted claim in his Reply.

Rule 2(c) of the Habeas Rules requires Section 2254 petitioners to specify the ground(s) for relief asserted and "state the facts supporting each ground" in their Section 2254 habeas petitions. Section 7 of the habeas petition form prescribed for use in this District requires a petitioner to separately state every ground for relief and, for each ground alleged, "[s]ummarize briefly the facts supporting each ground." In Section 2254 actions, "'notice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error.'" Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases (citation omitted); *see also Mayle v. Felix*, 545 U.S. 644, 655 (2005) (opining that this language means that the rules governing pleading for Section 2254 habeas petitions is "more demanding" than the notice pleading allowed under Fed. R. Civ. P. 8); *Wacht v. Cardwell*, 604 F.2d 1245, 1247 (9th Cir. 1979) (this language means that there is a "specificity requirement" for pleading Section 2254 habeas claims).

Thus, a Section 2254 petitioner is required to set forth in his habeas petition all of his claims in a manner that provides the Court and the respondent with the ability to ascertain just what specific habeas claims are being alleged in an action. This, in turn, affords the respondent an adequate opportunity to respond to the actual claims that have been asserted. As a corollary to this, it is well-established that a petitioner may not assert a new or additional habeas claim in his traverse or reply to the respondent's return or answer. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (finding that district court properly declined to address a claim raised in the traverse and holding that: "A Traverse is not the proper pleading to raise additional grounds for relief. In order for the State to be properly advised of additional claims, they should be presented in an amended petition or, as ordered in this case, in a statement of additional grounds. Then the State can answer and the action can proceed."); *see also Lopez v. Dexter*, 375 Fed. Appx. 724, at *1 (9th Cir. April 13, 2010) (district court "appropriately rejected" claim that was not alleged in the petition on the basis that it "improperly surfaced for the first time" in the

petitioner's traverse); *Moore v. Chrones*, 687 F. Supp. 2d 1005, 1032 n.17 (C.D. Cal. 2010) ("it is improper to attempt to change the substance of a claim through a Traverse and to assert . . . a new claim distinct from that alleged in the original petition").

The FAP pleads only the two claims identified earlier, namely, the above-quoted Ground One claim that double jeopardy precluded retrial following the mistrial declaration and the Ground Two sufficiency of the evidence challenge. In his Reply, however, Petitioner proffers a third and distinct basis for federal habeas relief for the first time in this action. Petitioner argues therein that he is entitled to federal habeas relief based on a theory that the state courts – through *Stanley I* – impermissibly created and retroactively applied to him "a new interpretation of constitutional law" in violation of "clearly established federal law barring retroactive application of new constitutional rules or procedure." [Reply at 9, 13, 14.] Petitioner identified the following decisions as the "clearly established federal law" that is violated by *Stanley I*: *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016); *Davis v. United States*, 564 U.S. 229, 240-41 (2011); *American Trucking Associations Inc. v. Smith*, 496 U.S. 167, 169 (1990); *Teague v. Lane*, 489 U.S. 288, 290 (1989; *United States v. Johnson*, 457 U.S. 537, 552 (1982); *Solem v. Stunes*, 465 U.S. 638, 643 (1984); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 98 (1971); *Bouie v. City of Columbia*, 378 U.S. 347, 349-50 (1964); *Ybarra v. Filson*, 869 F.3d 1016, 1032 (9th Cir. 2017); *Ruiz v. Schriro*, 289 Fed. Appx. 195, 197 (9th Cir. Aug. 8, 2008); *Harris v. Carter*, 515 F.3d 1051, 1054 (9th Cir. 2008); *United States v. Goodheim*, 651 F. 2d 1294, 1297 (9th Cir. 1981).[9] (Hereafter, the "Federal Law Retroactivity Claim.")

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[9] The theory of *Bouie* and similar cases cited by Petitioner is a "basic due process concept," namely, that a criminal defendant must receive notice before he can be punished based on a state court's unforeseeable interpretation or construction of criminal law. *See, e.g., Bouie*, 378 U.S. at 354-55; *Goodheim*, 651 F.2d at 1297. The theory of *Teague* and similar cases cited by Petitioner is that new constitutional rules of criminal procedure generally are not applicable to cases which have become final before the new rules are announced, with the exception of new "watershed rules" of criminal procedure. *Teague*, 489 U.S. at 307, 310-13.

Petitioner did not raise the Federal Law Retroactivity Claim in his state court proceedings. After *Stanley I* issued, Petitioner sought rehearing. He argued that the California Court of Appeal had misinterpreted the facts, had failed to follow existing California law on the question of implied consent to a mistrial and fashioned a new state law rule of "waiver," and that under California law, the state appellate court could not apply this new state law waiver rule to Petitioner, because the new rule was unforeseeable. Petitioner did not raise or argue any federal issue or cite any federal decision or constitutional provision (other than the Double Jeopardy Clause). He did not argue that applying the assertedly new state law waiver rule to him violated federal due process or any other federal constitutional provision or rule, nor did he cite any federal decision implicating such an argument. [Lodg. No. 13.] After rehearing was denied, Petitioner sought review in the California Supreme Court. The petition for review essentially argued the same matters as the rehearing petition and again failed to allude to, mention, or raise any federal issue other than the double jeopardy question, with the sole federal case cited bearing only on that issue. Petitioner again did not argue that applying the assertedly new state law waiver rule to him violated any federal statute, regulation, or constitutional provision. [Lodg. No. 15.]

After Petitioner was convicted in 2013, he appealed. He raised the two claims alleged here, namely, that his retrial had been barred by the Double Jeopardy Clause and that the evidence was insufficient to support his convictions. He also asked the California Court of Appeal to reconsider *Stanley I*, arguing that the earlier finding of implied consent was incorrect under California law and, further, that the Ninth Circuit, through the Remand Order, allegedly had rejected the reasoning underlying *Stanley I*. In his appellate briefing, Petitioner did not make any sort of argument or claim predicated on retroactivity,[10] much less one based on federal law as is now

[10] During the appeal, the California Court of Appeal directed the parties to file a series of letter briefs addressed to questions posed by the state appellate court, in one instance, asking the parties to

asserted in the Reply. The only federal decisions Petitioner cited bore directly on the double jeopardy and sufficiency of the evidence claims that he has alleged in the FAP; they had nothing to do with retroactivity. [Lodg. Nos. 20, 22.] When Petitioner sought review in the California Supreme Court, he again argued that *Stanley I* created a new rule, but his argument was predicated on the theory that state law "[p]rinciples of notice, equity and reliance" applied to prevent retroactive application of the new rule and that, under state law principles, application of the law of the case doctrine would "result in a substantial injustice." [Lodg. No. 32 at 37-40.] Petitioner did not argue that retroactivity was barred or precluded by any federal constitutional provision, rule, decision, or other federal matter; indeed, he did not make any federal argument of any type with respect to retroactivity. And as before, the only federal decisions he cited bore solely on the double jeopardy and sufficiency of the evidence questions and had nothing to do with federal law regarding retroactivity [*Id.*, *passim*.]

The Federal Law Retroactivity Claim that Petitioner has alleged in his Reply plainly is unexhausted. Moreover, the claim has been raised, improperly, for the first time in his Reply rather than in the FAP. Petitioner has been represented at all times by counsel. At Petitioner's request, this case was stayed under *Rhines* for a year and

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address whether retroactive application of *Stanley I* would be "fair and equitable" given trial counsel's obligation to abide by preexisting California law regarding an attorney's duty to speak in the mistrial context. In his letter brief in response, Petitioner observed, in passing, that "[f]ederal appellate courts have addressed the question of whether retroactive application of a new rule would be fair and equitable in various contexts" and then cited several cases not applicable to his situation. [Lodg. No. 27 at 6.] Petitioner, however, did not argue that any federal right on his part was violated by a retroactive application of the "new" rule articulated in *Stanley I*. Rather, he argued that "defense counsel, relying on the state of the law at the time of [Petitioner's] trial, could not both protect his client's federal constitutional right to the effective assistance of counsel by preserving a meritorious defense by remaining silent, and at the same time disabuse the trial court of the assumption that he was consenting to a mistrial. Applying the new rule in *Stanley I* retroactively to [Petitioner] would therefore lead to a substantially inequitable result." [*Id.* at 6-7.] This brief discussion in response to a question from the state appellate court did not come close to making, much less fairly presenting for exhaustion purposes, the Federal Law Retroactivity Claim raised for the first time in the Reply.

a half to afford Petitioner the chance to exhaust any additional claims he wished to raise here. Had Petitioner wished to exhaust his Federal Law Retroactivity Claim, his counsel could have done so at any time during that stay. Having failed to avail himself of that opportunity, it was even more improper for Petitioner to attempt thereafter to interject into this long pending case a new and unexhausted claim through his Reply. Accordingly, as ample precedent provides, the Court declines to consider the new claim alleged in the Reply at pp. 9-14, *to wit*, Plaintiff's belatedly-made contention that the application of the "new rule" announced in *Stanley I* in itself serves as an independent basis for federal habeas relief, because doing so was contrary to and violated clearly established federal law regarding retroactivity and his right to due process. The Court's consideration of Ground One will proceed solely based on the double jeopardy claim actually exhausted in the state courts and alleged in the FAP.

B. Background

In Petitioner's original trial, jury selection commenced on November 3, 2011. [Lodg. No. 5, Ex. 3 at 1, 16-197.] Before then, Petitioner's counsel had advised that a defense expert would be unavailable from November 16 through mid-December and had secured the agreement of the trial court and the prosecutor that, if the prosecution was not through with its case as of November 15, defense counsel would be allowed to present the defense expert out of order on that date. (*Id.* at 15-16.] Jury selection continued on November 4, 2011, and was completed in the afternoon. [Lodg. No. 5, Ex. 4 at 1-157.] After both sides accepted the jury as impaneled, the trial court asked the parties about the number of alternates needed and Petitioner's counsel stated, "four," "because we are butting up against the holidays." The prosecutor and the trial court agreed, and then Petitioner's counsel agreed upon the particular four persons to serve as alternates and the procedure to select them should an alternate be needed (*i.e.*, to pull their numbers out of a jar). The jury then was

sworn, given preliminary instructions, and excused until November 7, 2011. [*Id.* at 158-67.]

Shortly thereafter, Juror No. 3 spoke with the trial court's judicial assistant and then advised the trial court and the parties about the information he had disclosed to the assistant. Juror No. 3 stated that: he had worked for the City Attorney's Office for the three prior summers as an advocate for victims of violent crimes; and it would be "highly unlikely that [he would be] fair and impartial as a juror." The trial court ordered Juror No. 3 to return in a week for a contempt hearing. [Lodg. No. 5, Ex. 4 at 168-72.]

The trial re-convened on the morning of November 7, 2011, without Juror No. 3. Juror No. 4 advised that, on the prior evening, his fiancée had broken her ankle and he needed to stay at home to act as her caretaker. Petitioner's counsel stated that he had no questions for Juror No. 4. The trial court expressed concern that it would be inappropriate to inquire any further about why the fiancée could not stay home alone and said "I see no choice unless you have something better." Petitioner's counsel responded, "Well, the only thing that is starting to worry me is we haven't begun the trial," and asked the trial court to inquire whether there was any alternative to Juror No. 4 acting as caretaker. After Juror No. 4 responded in the negative and further explained his situation, the trial court directed Juror No. 4 to wait in the hallway. [Lodg. No. 4, Reporter's Transcript ("RT") A2-A4.]

Juror No. 32 then advised that she had an issue she wished to bring to the trial court's attention, namely, that she had to take care of her three-year-old daughter from 9:00 a.m. through 2:00 p.m. When asked why she had not raised this issue during jury selection, Juror No. 32 said that she did not think she would be picked, because she had a young child. The trial court noted that Juror No. 32 had made a "conscious decision" to sit through jury selection on the hope she would not be selected and would "have to stay." [RT A4-A6.]

Juror No. 6 then presented a form from his health care provider, which

indicated that he should be placed on temporary jury duty release from November 6-8 and was to be "home bound or bed bound." Juror No. 6 explained that his eye had been bothering him so he went to the doctor on Sunday, he was diagnosed with pink eye and told it was highly contagious and he should stay home, and he understood that he would be over it by November 8. [RT A7.]

At a sidebar conference to discuss the Juror No. 6 situation, Petitioner's counsel said, "I don't want to touch it." The trial court noted that, if the case was put over to November 9, at least they could be assured that Juror No. 6 would come back. The trial court said, "If that's not what you want to do, we'll move on that too," and then asked Petitioner's counsel about Juror No. 32. Counsel responded, "I don't say this lightly because I'm watching what is happening to our jury," but then expressed his concern that Juror No. 32 had not kept her oath and had lied by omission, hoping that she would get credited for having performed her jury service but kicked out without actually serving. The trial court asked, "Long story short, You don't want her?," Petitioner's counsel responded, "No," and the trial court responded, "She's gone." [RT A7-A8.]

The trial court then turned back to Juror No. 6, stating, "If you don't want to wait for this, this person is gone also, and then I think you maybe have one left over." The prosecutor replied, "I don't think we have any," to which Petitioner's counsel did not respond.[11] The trial court then stated:

> The bottom line is, when this case goes, if this case goes, you let me know what you want to do. This person, I haven't heard a decision on him yet, and *we are down three people at this point*.
>
> Also what I want to say is, if we are down to no alternates, when I call them in the room before we go any further, I'm going to say look, I don't know exactly when

[11] This statement appeared to reflect the belief that Juror No. 4 had been or would be excused. Jurors No. 3 and 32 had been excused already and Juror No. 4 made it three, leaving only one alternate if Juror No. 6 was retained and no alternates if he was excused.

> this will end at this point. You could be here until the last week in November. I don't know. I cannot do that. Let me know right now. *If someone raises their hand, we are done*.

[RT A8-A9; emphasis added.]

In response to the trial court's stated concern – namely, if they dismissed Juror No. 6, they would not have any alternates and if a juror then expressed an inability to serve all the way until the last week of November, they would be "done" as a result – Petitioner' counsel responded that his "only problem" at that point was making sure that his expert could testify.[12] The prosecutor responded that taking the expert's testimony out of order was fine and that: "I think we should wait for [Juror No. 6]. I would rather have at least one alternate. That makes me uncomfortable without an alternate." The trial court responded to her concern by stating tersely, "The bottom line is we are done." The prosecutor reiterated that she would prefer to keep Juror No. 6 rather than not have any alternate, and if that meant waiting to start until November 9, that was okay with her, noting that she had agreed to have the defense expert testify out of order. Petitioner's counsel said nothing. The trial court responded, "All right. All right. Thank you." [RT A9.]

The trial court then spoke with the jurors to discuss the situation and determine whether delaying the trial until November 9 (to wait for Juror No. 6) would create any problem. The trial court explained briefly what had happened with Jurors Nos. 3, 4, 6, and 32, including noting that the situation with Juror No. 4's fiancée "will now require his constant attention." [RT A10.] After noting that one of the jurors had a condition that required the trial to be postposed until Wednesday (November 9), the trial court stated:

> We would resume Wednesday.
>
> But here's where we are, and I'm going to leave it totally up to you because it is very critical. Sometimes I

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[12] As noted earlier, Petitioner already had obtained an agreement that his expert could be taken out of order on November 15, if necessary, due to her unavailability after that date.

> think I'm talking and I'm making sense and people look at me like they understand me and it turns out it was not true.
>
> Again, I want you to clearly understand if we go forward, this matter won't even start again until Wednesday. But secondly, I'm making no assurances, assurances about anything at this point. And all I can tell you is you have my individual pledge as a bench officer to use your time as efficiently as possible.
>
> Now here's where we are. Come back on the 9th. It will be a full day on the 9th. The 10th would be a half day. You come in the morning on the 10th. You will not come in the afternoon.
>
> The 11th is a court holiday. The following week would be all the way through. The 21st to the 23rd would be all the way through. I'm not sure where we will end up so I'm letting you know that flat out front.
>
> Here's the issue in a nutshell. *Because we are so short of jurors, I'm not even going to start this if somebody tells me you can't do it.* I don't want to invest the time and bring in all witnesses and do what we have to do if somebody believes they can't do this. *All you need to do is raise your hand, and I will tell them that it's done at this point because I cannot risk doing this.*
>
> I see your hand. I will talk to you. . . .

[RT A10-A11; emphasis added.] Petitioner's counsel did not interject any objection to, make any comment about, or request clarification of the trial court's statement that, if even a single juror raised his or her hand, the trial would not go forward.

Juror No. 2 had his hand raised. The trial court asked, "Number 2, you cannot do it?" Juror No. 2 responded: "I don't think so because I had a heart attack. I called up the doctor, seen a doctor." [RT A12.] The trial court did not question Juror No. 2 further and the proceedings moved to sidebar, at which time the trial court stated simply, "I believe they win." [*Id.*] Neither the prosecutor nor the Petitioner's counsel said anything in response, and the proceedings then returned to open court. [*Id.*]

The trial judge addressed the jurors and expressed his frustration with the

situation, including expressing his dismay that jurors had waited until after they were selected to advise of problems. The trial court then thanked the jurors, stated "[a]t this point, I cannot go forward," and instructed them to return to the jury assembly room. Petitioner's counsel did not say anything in response to the trial court's comments to the jurors. After a 15-20 minute break in the proceedings (discussed *infra*), the trial judge returned to the courtroom and declared a mistrial. [RT A12-A13.][13] The trial court explained:

> As a result of what transpired in the earlier proceeding this morning, the Court declares a mistrial in this matter.
>
> We simply do not have qualified jurors who can serve, and as a result, *it was agreed that if we would have had only 12 jurors, we would start over*, and, in addition, I believe it was number 2 that made it fairly clear in all probability we would not have even one alternate before this was over with.

[RT A13; emphasis added.][14] Neither the prosecutor nor Petitioner's counsel

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[13] Based on the evidence adduced at the September 18, 2020 evidentiary hearing, by this point in time, it appears that the jurors already had been formally discharged and released from jury duty when the trial judge returned to the courtroom after the 15-20 minute break. [*See* Dkt. 143, Ex. A at 15:5-17:6.] Petitioner asserts that, as a result, under California law, the trial judge lacked the power to recall the jurors at the time he actually declared the mistrial; Respondent does not disagree. [Dkt. 143 at 6-7; Dkt. 144 at 10.] The Court has assumed this factual and legal issue in Petitioner's favor, *i.e.*, that the jurors could not have been recalled by the time the trial judge returned to the courtroom after the 15-20 minute break.

The Court acknowledges Respondent's continuing objection to the holding of the evidentiary hearing and any consideration of the evidence adduced at that hearing. Given that this case is governed by Section 2254(d), the Court agrees with Respondent that, under prevailing law, holding an evidentiary hearing and considering evidence from it is premature unless and until Petitioner had surmounted Section 2254(d)'s threshold requirements. Nonetheless, as previously explained, in light of the Ninth Circuit's July 2 Order, the Court has felt constrained to hold that hearing and consider the evidence therefrom, which, as discussed *infra*, ultimately makes no difference to the Court's analysis and conclusions.

[14] At that point, Jurors Nos. 3 and 32 had been dismissed and the trial court's prior comments to the jurors and to counsel made clear that the trial judge believed Jurors Nos. 2 and 4 also had to be excused. Thus, even if Juror No. 6 had been kept and the trial had been delayed for two days, there were no alternates remaining.

disputed the trial court's description of what had occurred. Indeed, when the trial court then proposed a new trial date, Petitioner's counsel expressed his desire to proceed quickly with a retrial:

> Your Honor, I am assuming that is the earliest possible date. Obviously we are unhappy with the way things proceeded this morning, and I know that [Petitioner] is anxious to get the matter to trial, and I also know this Court has its other calendar matters. Is the 22nd the earliest we can conceivably --

[RT A13-A14.]

Approximately one month later, Petitioner filed a motion to dismiss on the ground of double jeopardy, which included a declaration made by Petitioner's counsel. [CT 341-61.] Counsel stated that, when Juror No. 6 raised his pinkeye diagnosis, counsel believed that there remained 11 jurors and three alternates, because he thought only Jurors No. 3 and 32 had been dismissed and excused and that Juror No. 4 had not been excused. Counsel did not explain why, given such a belief, he did not question or dispute either the prosecutor's statement that, if Juror No. 6 were to be excused, "I don't think we have any," or the trial court's related observation that, "we are down three people at this point," nor does he explain why he did not advise them that he did not agree with their shared view as to the number of jurors remaining.

In his declaration, Petitioner's counsel did acknowledge that the trial court then made the following statements, namely that: if Juror No. 6 were to be excused, "we are down to no alternates"; therefore, the trial court would confer with the remaining jurors about the trial lasting potentially until late November and ask them to let him know if that possible length gave rise to any problems; and if any juror raised a hand indicating a problem, "we are done." [CT 355.] Petitioner's counsel stated that the trial court's reasoning was "not clear" to him given his own opinion that the trial would not last that long regardless of any delay while waiting for Juror No. 6. However, rather than ask for clarification or advise the trial court that he disagreed,

Petitioner's counsel again chose to say nothing, advising that he simply "set aside [his] confusion regarding the court's comments" and instead talked to the prosecutor (rather than the trial court) about the options that existed with respect to Juror No. 6. [CT 355-56.]

Petitioner's counsel conceded in his declaration that, following the trial court's statements above, counsel responded only by noting that, "Right now where we are at, the only problem I have is making sure my expert's testimony," and that the prosecutor interrupted him by stating that she would not mind taking the defense expert out of order, she wanted to wait for Juror No. 6 to return so that they would have "at least one alternate," and she was "uncomfortable without an alternate." Petitioner's counsel did not claim that he disputed or sought to correct the prosecutor's belief that three jurors already had been excused. Rather, counsel averred that the prosecutor's statements were made only to him and that the trial court did not hear them, even though the prosecutor's statements were reported in the transcript (and, thus, the court reporter plainly heard them). [CT 356.] Inconsistently, Petitioner's counsel then conceded that the trial court *did* hear the prosecutor state that she was uncomfortable at having no alternate jurors, noting that the trial court immediately responded with the comment, "[t]he bottom line is we are done." [*Id.*] Counsel stated that he "was confused" by the trial court's remark but, once again, he chose not to seek clarification and instead opted to remain silent. Counsel averred that, rather than seek clarification, he decided to interpret the remark to mean that the trial court believed that petitioner's counsel and the prosecutor had "disagreed over the best solution to juror 6's availability." [*Id.*]

Continuing in his declaration, Petitioner's counsel stated that, following the trial judge's "bottom line is we are done" remark, the trial judge "abruptly" left the area and went over to where the judicial assistant worked, and that counsel and the prosecutor returned to the attorney tables. Petitioner's counsel stated that he then asked for leave to address the court and the trial court directed the parties to return to

the side bar area. [CT 356-57.] This scenario, however, is not reflected in the record. Instead, the transcript shows only that immediately after the trial judge made his "[t]he bottom line is we are done" comment, the prosecutor stated that she wished to keep Juror No. 6 rather than have no alternates and that if doing so required delaying the trial until November 9, that was fine with her and she had agreed to have the defense expert testify out of order. [RT A9.]

Petitioner's counsel acknowledged in his declaration that the trial court then spoke to the jury about the juror issues that had arisen, including stating, "I am not even going to start this if someone tells me you can't do it." [CT 356.] When Juror No. 2 asserted that he had suffered a heart attack, Petitioner's counsel was "confounded" by this statement but, at the same time, was not concerned, because despite all the comments to the contrary made by the trial judge and the prosecutor, he "still believed that there remained 11 jurors and three alternates." [CT 357.] Petitioner's counsel acknowledged that immediately after Juror No. 2 made his heart attack assertion, the trial court held a sidebar proceeding and said, "I believe they win," but counsel again claimed to have been confused, stating that he "had no idea what" the trial court "meant by this comment." [CT 357-58.] For the third time, however, Petitioner's counsel did not ask for an explanation and remained silent. Petitioner's counsel acknowledged that the trial judge then addressed the jurors as described earlier and that he heard the trial judge say, "[a]t this point, I cannot go forward," and directed the jurors to return to the assembly room. [CT 358.] Petitioner's counsel did not contend that he raised an objection or said anything at all. Rather, he stated that as the jurors left, the trial court left the courtroom and then returned 15-20 minutes later. [*Id.*].[15]

[15] Although the transcript does not reflect the length of any such a recess [RT A13], it does appear to reflect a break of some type in the proceedings, and in a 2012 filing in the state appellate court, Respondent asserted that there was a 20-minute recess between the dismissal of the jurors and the trial court's return to declare a mistrial and its related explanation. [Lodg. No. 4 at 13.] Given that both parties agree on this point and that the relevant statement of Petitioner's counsel was made

According to the declaration of Petitioner's counsel, when the trial judge returned to the courtroom and declared a mistrial, counsel heard the word trial judge utter the word "mistrial" but did not listen to the trial court's explanation, because Petitioner started asking questions about what had happened and counsel elected to confer with Petitioner rather than listen to the trial court. Counsel does not explain why he and Petitioner chose to confer at this moment instead of discussing the situation during the 15-20 minutes they had together before then, while they waited in the courtroom for the trial judge to return, or at least why he did not wait to confer with his client, or ask for a moment to do so, until the trial judge had completed his brief mistrial remarks. [CT 358.] Petitioner's counsel claimed that, as a result of his choice to stop listening to the trial judge, counsel did not hear the two sentences uttered by the trial judge that were sandwiched between his utterance of the word "mistrial" and his statement regarding rescheduling the trial – namely, the trial judge's intervening, brief observation that "it was agreed" that they would not proceed if there were only 12 jurors left and that Juror No. 2's comments made it clear there would not be any alternates left. Although Petitioner's counsel claims that he did not hear this brief critical comment, he concedes that he was able to hear the very next statement made by the trial court about setting the next trial date and responded to it. [*Id.*][16]

On January 3, 2012, the trial court held a hearing on the motion to dismiss. [CT 396; Lodg. No. 2, Ex. H (transcript of January 3, 2012 hearing.] The trial court indicated that it had read the parties' briefs, and both sides advised that they had nothing additional to add. [Lodge. No. 5, Ex. H at 3.] The trial judge emphasized

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under penalty of perjury, the Court has assumed that there was a 15-20 minute recess after the jury was told to return to the assembly room, thus resolving the first factual issue noted in the Ninth Circuit's Remand Order.

[16] The uncontradicted declaration of Petitioner's counsel, thus, resolves the third factual issue noted in the Ninth Circuit's Remand Order.

that during the events at issue, he "spoke a lot" so that the attorneys would "know at any given moment exactly where the court was so there would be no surprises, nobody can say anybody had sandbagged them in any way," including through speaking at sidebar conferences at which the trial court said "what it was intending to do, what it was thinking about doing." [*Id.* at 4.] The trial court agreed with the prosecution's argument that the foregoing events constituted an implied consent situation for purposes of the mistrial declared and double jeopardy. The trial court noted that the transcript reflected that the court "left options open [and] [i]f there was any problem whatsoever, I would have expected some opposition to it and again the court stated what it was going to do and again the court heard no opposition by either party." [*Id.* at 4-5.] The trial court found it "reasonable to conclude, under the circumstances, that there was no objection to the court's perceived manner in handling this case" and that the circumstances indicated implied consent, and therefore, it denied the motion. [*Id.* at 5.]

C. The State Court Decision

As noted earlier, in the *Stanley II* appeal following Petitioner's conviction, the California Court of Appeal determined that its earlier *Stanley I* discussion, analysis, and ruling on the merits of the double jeopardy issue constituted the law of the case and then adhered to it. In both *Stanley I* and *Stanley II*, the California Supreme Court denied review without comment. Accordingly, the state court's decision in *Stanley I* [Lodg. No. 12], as adopted in *Stanley II*, is the relevant merits decision to be reviewed under Section 2254(d) (hereafter, also referenced as the "State Court Decision").

In *Stanley I*, the California Court of Appeal extensively reviewed the record. [Lodg. No. 12 at 5-17.] The state appellate court considered and addressed the declaration submitted by Petitioner's counsel in support of the motion to dismiss. For example, with respect to counsel's professed confusion about the trial court's advice

to the attorneys before the trial court addressed the remaining jurors – namely, that, if Juror No. 6 were to be excused, "we are down to no alternates"; that the trial court would confer with the remaining jurors about the possible trial length and request that they indicate if this created problems; and that, if any juror raised a hand indicating a problem, "we are done" – the state appellate court stated:

> If counsel did not understand what the court was saying, he was obligated to seek clarification. By instead saying, "the only problem" he had was making certain his expert could testify, he was very clearly leading the court to believe that he agreed with everything else the court had proposed.

[*Id.* at 9-10 n.9.] Similarly, with respect to counsel's assertion that he "had no idea" what the trial court meant when it made its "I believe they win" as an "expression of defeat" after Juror No. 2 claimed to have had a heart attack, the state appellate court observed: "Defense counsel should have sought clarification, rather than allow the trial court to believe that he understood the court's statement and agreed with it." [*Id.* at 14 n.18.]

The California Court of Appeal also address the assertions of Petitioner's counsel in his declaration that: after the prosecutor expressed her discomfort at proceeding without any alternate juror and the trial court responded, "[t]e bottom line is we are done", counsel understood this to mean that the trial court believed that the prosecutor and Petitioner's counsel could not agree on what to do about Juror No. 6; and after leaving the sidebar area, counsel then asked permission to address the trial court. [Lodg. No. 12 at 10 n.10 and 11 n.11.] As the state appellate court explained:

> Preliminarily, the record gives no indication that counsel left sidebar, asked to reapproach, and returned to the sidebar. More than that, if *defense counsel* had asked for leave to address the court, one might expect the record to reflect that defense counsel subsequently addressed the court; yet the record shows that the prosecutor was the only one to speak once the parties purportedly returned to sidebar. Furthermore, if defense counsel's concern was that the trial court did not realize that the parties had reached *an agreement* as to Juror 6, there is no reason why

> the prosecutor's restatement of *her own* position would have been sufficient without some indication from defense counsel *that he agreed with it as well*. While we have substantial doubts regarding defense counsel's after-the-fact interpretation of the record, the key point we take away from counsel's declaration is that defense counsel *believed* there was an agreement with the prosecutor and that the court agreed to it as well. This is critical because, as we discuss in the body of the opinion, the prosecutor's statement of the terms of her understanding included her desire that the trial not proceed without an alternate. As defense counsel never indicated to the court any disagreement with that statement, there was no possible basis on which the court could have inferred that defense counsel agreed with that part of the prosecutor's statement relating to continuing the trial to retain Juror 6, but disagreed with that part which related to not proceeding without an alternate.

[*Id.* at 11 n.11.]

The California Court of Appeal then reviewed the protections afforded by the Double Jeopardy Clause. [*Id.* at 18-19.] The state appellate court determined that, under California law, it was "clear" that a defendant can impliedly consent to the declaration of a mistrial, but that there is a split in the state courts and the federal circuits regarding whether a defendant's silence may constitute implied consent. [*Id.* at 19-21.] The California Court of Appeal then turned to the decision in *Curry v. Superior Court*, 2 Cal. 3d 707, 713 (1970), in which the California Supreme Court opined that "mere silence" in the face of a proposed discharge of the jury and declaration of mistrial does not constitute a waiver. The state appellate court noted that the state high court had rendered this statement without analysis and, instead, had simply cited three California decisions to support its conclusion. The California Court of Appeal reviewed these decisions and explained why, in its view, they had been undermined by later decisions and/or did not support the rule announced in *Curry*. [*Id.* at 22-29.] The state appellate court concluded that, under the circumstances before it, Petitioner's mistrial situation was not controlled by *Curry*, because the decision was inapplicable "when conduct preceding defense counsel's

silence leads the court to reasonably believe defendant consented to the mistrial." [*Id*. at 29-32.]

> This is not a case of "mere silence," and certainly not a case of silence following a statement indicating a lack of consent to a mistrial. While it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial, he had previously fully participated in the discussion and led the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court. Thus, the issue presented by this case is one of whether defense counsel's affirmative conduct was sufficient to give rise to an implication of consent. We conclude that it was.

[*Id.* at 33.] After reiterating that "California law is clear that consent can be implied from defense counsel's conduct," the state appellate court found that

> [A]n uncritical application of the language of *Curry* could result in a substantial injustice when, although defense counsel was silent when the mistrial was declared, such silence occurred in the following circumstances: (1) defense counsel earlier participated in a discussion which led the trial court to reasonably believe defense counsel consented to the declaration of a mistrial; (2) defense counsel was aware, or should have been aware, that counsel had given the trial court that impression; (3) defense counsel was presented with the opportunity to disabuse the court of that belief, but failed to do so; and (4) dismissal of the jury and the declaration of a mistrial occurred prior to the submission of the case to the jury (i.e., Penal Code section 1140 has no application) and, indeed, prior to the opening statements or presentation of any evidence.

[*Id.* at 33-36.]

The California Court of Appeal concluded that various policy considerations supported its finding that, under the circumstances before it, implied consent existed. It noted that the California Supreme Court had recognized that flexibility is required in analyzing double jeopardy claims and expressed its belief that "the California Supreme Court would not be in favor of a literal application of the language of *Curry*, without first considering relevant factual distinctions, intervening legal developments,

and whether the policies underlying the principles of double jeopardy are advanced or frustrated by the result." [Lodg. No. 12 at 35.] In addition, while noting the reluctance to infer consent from the silence of a defendant himself who may not be aware of his rights, "different considerations are at issue when defense counsel is given the trial court's proposed solution to a problem for counsel's input."

> Counsel should not be permitted to remain silent in this situation, "leaving the false impression of acquiescence even while anticipating a subsequent objection. If this were permissible, attorneys could—by their silence—lull the court into taking actions that could not later be undone." . . . A defendant's constitutional rights are valuable, and must be respected; but they are not tools for defense counsel to use in order to trap the court into giving up the state's right to try the defendant.

[Lodg. No. 12 at 35-36; citation omitted.]

In addition, citing two Supreme Court decisions, the California Court of Appeal noted society's "strong interest in giving the prosecution one complete opportunity to convict those who have violated its laws." [Lodg. No. 12 at 36-37.] The state appellate court reasoned: "Clearly, there was no government overreaching by the prosecutor in this case; just an attempt by the trial court to conserve judicial resources when it became reasonably apparent that the impaneled jury had lost so many members as to make it unlikely that sufficient jurors would remain to render a verdict in what promised to be a lengthy trial." [*Id.* at 37.]

Finally, the California Court of Appeal found that the record supported the trial court's finding that there had been implied consent to the dismissal of the jury.

> Giving due deference to the trial court as trier of fact, we conclude that the record supports the trial court's findings.[17] Preliminarily, it cannot be disputed that the

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[17] Footnote 37 in original: "While we have before us only the cold record, the trial court was present at the actual hearing when the mistrial took place. Thus, the court was able to rely on its own recollection of the proceedings, including body language, tones of voice, nods, and so forth. While the better procedure is clearly to place any agreement to dismiss the jury on the record, expressly obtaining the verbal consent of both counsel, it would be a miscarriage of justice to allow a double jeopardy defense to prevail simply because defense counsel made his consent to the

> trial court believed, at the time it dismissed the jury, that it did so with the consent of both counsel. Indeed, moments after it dismissed the jury, the court expressly stated, "it was agreed that if we would have had only 12 jurors, we would start over...." Clearly, the court would not have made such a statement had it not believed, at the time, that there was such an agreement.[18]
>
> *a. The Trial Court Reasonably Believed There Was Consent*
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> The record indicates that the court was reasonable in its belief that there was an agreement. Preliminarily, we believe that it is improper to focus our review of the record on any specific words spoken at any single point in time, without regard to the context of the proceedings. It is apparent that the court and both counsel were attempting to respond to constantly changing circumstances, and the nature of the agreement between the court and counsel was continually evolving. [fn. om.] With that understanding, we review the proceedings on the morning of November 7, 2011 as reflected by the record.
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> By that morning, two things had already occurred. First, the jury and four alternates (at defense counsel's request) had been sworn. Second, one member of the panel, Juror 3 (who stated he could not be impartial), had already been dismissed. Before calling the case, the court had learned that issues had arisen with "other jurors," and went on the record, with counsel, outside the presence of the jury "to attempt to deal" with those issues. As discussed above, the court next discussed Juror 4 (fiancée broke ankle) with counsel. When defense counsel suggested asking the juror whether there was any alternative to him being the caretaker for his fiancée, the court immediately made the inquiry. The result was in the negative, and it appeared to the court that there was no way to retain the juror. The next juror was Juror 32 (childcare obligations). Although the trial court was initially inclined to retain the juror due to her failure to timely raise the issue during voir dire, defense counsel

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dismissal known to the court by means other than an expressly stated approval."

[18] Footnote 38 in original: "Moreover, an experienced trial judge, such as the one in this case, certainly would have understood the consequences of dismissing a sworn jury without the consent of defense counsel and would not have dismissed the jury had he not believed that counsel had consented."

requested her dismissal, and the court complied.

At this point, the jury was down three members, and the court and counsel had not yet addressed Juror 6 (pinkeye). As this created the potential that this lengthy trial would begin without any alternates (when counsel and the court had agreed to four, because of the upcoming holidays), the court proposed a course of action to follow "if we are down to no alternates." Seeing the panel already falling apart, the court proposed that, if no alternates were left, it would ask the jurors if they would be able to serve into the last week of November. If any juror indicated an inability to do so, the court would end the matter. Not only did defense counsel *fail to object* to this statement, he expressly stated that "[r]ight now where we are at, the *only problem* I have" is making certain his expert would testify. (Italics added.) Thus, it was reasonable for the court to assume that defense counsel agreed to the court's proposed procedure.

Thereafter, the prosecutor stated that she would agree to take defendant's expert out of order because she wanted to wait for Juror 6 and preserve one alternate. Defense counsel did not disagree, thus causing the court to reasonably believe that the parties had agreed to proceed if an alternate could be preserved. Or, putting it another way, the court reasonably believed that the prosecutor would not have agreed to defendant's request to take the expert out of order, unless the alternate could be preserved.

Thus, defense counsel, by his participation in the discussion, his express statements, and his failure to disagree with the prosecutor's statement regarding preserving an alternate, gave the trial court reason to believe that (1) the trial court's proposed procedure for asking the jury about additional problems was acceptable and (2) the parties did not wish to proceed without an alternate. Further evidence of defendant's agreement to these terms is the fact that defense counsel made no objection when the trial court subsequently questioned the jury, nor when the trial court subsequently stated on the record that the parties had agreed not to proceed without an alternate. [fn. om.]

b. Defense Counsel Knew or Should Have Known the Trial Court Held This Belief

Defense counsel's declaration in support of the

motion to dismiss is notable for its failure to indicate, for example, that counsel *disagreed* with the court's intent to declare a mistrial but believed, under *Curry*, that he was not required to bring this disagreement to the court's attention. Instead, defense counsel states, no fewer than *four* times, that he did not understand or hear what the court had stated, yet he sought no clarification.[19] This is not a legitimate basis on which to obtain a dismissal. The trial court, throughout the proceedings, expressed its plan for dealing with the collapse of the jury panel, giving counsel the opportunity for input at every turn. Defense counsel's participation in these discussions provided an ample basis for the trial court to believe that counsel consented to the procedure ultimately implemented. Counsel should not be heard to argue, after the fact, that his participation did not constitute consent, on the basis that he did not hear or understand the trial court. If defense counsel did not hear or understand, he was obligated to seek clarification. By failing to do so, defense counsel is barred from now relying on the claim that he did not know what the court stated. In short, it appears from the record that defense counsel was well aware of the trial court's understanding of the agreement on how to proceed; if defense counsel was not actually aware because he misunderstood the court, his failure to obtain clarification should result in counsel being charged with such knowledge.

c. Defense Counsel Had an Opportunity to Inform the Court That There Was No Agreement, but Failed to Do So

Finally, our review of the record indicates that defense counsel had several opportunities to inform the court that the court's understanding of the agreement on

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[19] Footnote 41 in original: "In his declaration, defense counsel stated that, when the court proposed asking the jurors if they could serve to the last week in November, 'the reasoning behind the court's statement was not clear' to him, as he believed such an inquiry was unnecessary. He nonetheless 'set aside [his] confusion' without seeking clarification. Defense counsel next stated that, when the court stated, 'The bottom line is we are done,' defense counsel 'was confused by the court's comment.' Rather than seek clarification, defense counsel moved on. Defense counsel also stated that, when, just prior to dismissing the jury, the trial court called counsel to sidebar and stated, 'I believe they win,' defense counsel 'had no idea what [the court] meant by this comment.' Finally, defense counsel stated that, when the court expressly placed the terms of the agreement on the record after the jury was dismissed, he 'did not hear [the trial court] make this comment ... as [he] was conferring with' defendant. Defense counsel did not ask the court to repeat what he now states he had failed to hear."

> how to proceed given the unusual circumstances was not, in fact, correct. Counsel's input was sought repeatedly and, in fact, accepted in every instance it was given.[20] Immediately prior to dismissing the jury, the trial court called counsel to sidebar and stated, "I believe they win." The court was clearly indicating its belief that the jurors who did not want to serve had "won," requiring dismissal of the panel under the terms of the agreement with counsel. The court was seeking input from counsel on whether, in fact, this was the case. It is significant that the court did not simply dismiss the jury once Juror 2 indicated that he had suffered a heart attack; the court gave counsel a final chance to disagree. Counsel did not do so. Under all of the circumstances of this case, we conclude that counsel's failure to state any disagreement constituted implied consent to the dismissal of the jury.

[Lodg. No. 12 at 38-43.]

D. Under Section 2254(d), Deference Is Owed To The State Court Decision.

The State Court Decision found that double jeopardy had not been violated by Petitioner's retrial due to implied consent to mistrial on his part. Petitioner contends that this finding was contrary to clearly established federal law, because under the Double Jeopardy Clause, affirmative consent to a declaration of mistrial is required and "the state court allowed Petitioner's mere silence to substitute for" the allegedly required affirmative consent. (Reply at 14.) Petitioner, thus, contends that the state court got the relevant federal law wrong in finding that implied consent can suffice. In addition, Petitioner contends that, even if implied consent can suffice under federal law, the state court erred in finding that the conduct of Petitioner's counsel constituted implied consent. (Reply at 17.)[21]

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[20] Footnote 42 in original: "The court (1) questioned Juror 4 as suggested by defense counsel; (2) immediately dismissed Juror 32 when defense counsel argued for her dismissal; and (3) made certain that any agreement satisfied defense counsel's concern that his expert witness be heard out of order."

[21] Petitioner also argues that under *Curry v. Superior Court*, 2 Cal. 3d 707 (1970), his counsel had no obligation to object to the trial court's declaration of mistrial and that, therefore, counsel's silence was legally "meaningless" and it was objectively unreasonable under Section 2254(d) to

find that the "silence" of Petitioner's counsel constituted implied consent for federal double jeopardy purposes. [Reply at 22-23.] More recently, Petitioner asserts that, by reason of *Curry*, "California courts had instructed Petitioner's counsel *not* to object to an unlawful mistrial declaration" and that therefore, his failure to say anything is irrelevant for federal habeas purposes. [Dkt. 147 at 8.] Petitioner's *Curry*-based argument fails on its face, and will not be considered further, for two reasons.

First, Petitioner overstates *Curry*'s import. In *Curry*, the California Supreme Court opined that "[w]hen a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver." 2 Cal. 3d at 713. The *Curry* Court did not hold or even intimate that defense counsel are precluded from saying anything or from raising objections when a trial court raises the possibility of declaring a mistrial. And the *Curry* Court did not have before it the situation at issue here, when defense counsel's ongoing conduct during discussions with the trial court and the prosecutor about the potential for mistrial due to juror attrition are claimed to have led the trial court to believe the parties were in agreement and to constitute implied consent under federal law. Petitioner improperly conflates a matter of state law – namely, was his counsel was entitled to decline to vocalize an objection under state law – with the distinct *federal habeas* question to be resolved here – namely, whether, under clearly established federal law, the state court was precluded from finding that counsel's conduct constituted implied consent for federal double jeopardy purposes.

Second, Petitioner's *Curry* argument is one of asserted error under California law, *viz.*, that in applying state law to the facts, the state court drew the wrong legal conclusion in light of *Curry* when it found that counsel's conduct satisfied the legal standard for implied consent. Critically, the California Court of Appeal considered Petitioner's *Curry* argument and rejected it, finding that "*Curry* has no application when counsel's conduct goes beyond 'mere silence,' and his words and actions reasonably lead the court to believe he consents." *Stanley*, 206 Cal. App. 4th at 269; *see also id.* at 287-91 (explaining why *Curry* was inapplicable to Petitioner's case). The California Supreme Court denied review. In this circumstance, the state appellate court's ruling on this issue of state law is entitled to deference and must be accepted as binding by this Court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); *see also Hicks v. Feiock*, 485 U.S. 630 & n.3 (1988) (a federal habeas court is not at liberty to disregard a California Court of Appeal's rulings on state law when the California Supreme Court has denied review). Moreover, federal habeas courts may not issue a writ of habeas corpus on the basis of a perceived error of state law interpretation or application. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *see also Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam) ("'We have stated many times that federal habeas corpus relief does not lie for errors of state law.'") (citation omitted). "[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts," because "[t]he habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) (citing 28 U.S.C. § 2254(a)). Whether or not the state courts misapplied *Curry* in assessing the double jeopardy effect of the

1. The State Court Decision's finding that consent may be implied from conduct and/or silence was not objectively unreasonable.

Petitioner contends that, under clearly established federal law within the meaning of Section 2254(d)(1), the Double Jeopardy Clause is violated unless the defendant affirmatively consents to a proposed mistrial. Petitioner argues that his counsel's behavior was no more than "mere silence," which cannot properly rise to the level of the required affirmative consent. Petitioner asserts that there is no federal precedent that permits silence by a defendant or his counsel to suffice, and thus, the State Court Decision erred in finding that implied consent by Petitioner's counsel could preclude a finding of a double jeopardy violation. Petitioner is mistaken.

The Double Jeopardy Clause will not bar a retrial when the defendant has consented to a declaration of mistrial – whether affirmatively or impliedly – or mistrial was supported by manifest necessity. *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *United States v. You*, 382 F.3d 958, 964 (9th Cir. 2004); *United States v. Gaytan*, 115 F.3d 737, 742 (9th Cir. 1997). As the California Court of Appeal correctly noted [Lodg. No. 12 at 19], this was not a manifest necessity situation and only the question of consent to mistrial is at issue in this case. "Implied consent, like express consent, 'removes any double jeopardy bar to retrial.'" *You*, 382 F.3d at 984 (citation omitted). Consent to mistrial may be implied only when the circumstances "'positively indicate a defendant's willingness to acquiesce in the mistrial order.'" *Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995) (citation omitted). Consent will not be implied when the defendant has no opportunity to object after the trial court declares a mistrial, but may be implied when there is such an opportunity and no objection is made. *United States v. Bates*, 917 F.2d 388, 393 (9th Cir. 1990)

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behavior of Petitioner's counsel is of no moment for the *federal* issue that must be considered here under Section 2254(d). In any event, as discussed *infra*, the federal case law (including that from this Circuit) making clear that silence and/or a failure to object when an opportunity to do so existed can constitute implied consent all existed well before the 2011 declaration of mistrial at issue here.

(collecting cases for both situations).

Contrary to Petitioner's assertion, the Supreme Court has never held that implied consent will not suffice. Petitioner's contention that *Lee v. United States*, 432 U.S. 23 (1977), must be read as requiring an affirmative request or consent to discharge of the jury (Reply at 14-15) is misguided. In *Lee*, following the prosecutor's opening statement, the defendant moved to dismiss the information for failure to allege specific intent. The district court provisionally denied the motion but agreed to consider it further, and the trial proceeded. Following the presentation of evidence, the district court noted that, although guilt had been established beyond a reasonable doubt, it was compelled to grant the original motion to dismiss due to the defective nature of the information. The defendant was again charged and was convicted following a second trial. *Id.* at 25-27. The Supreme Court found that the dismissal of the first trial happened at the defendant's request and consent, and thus there was no double jeopardy violation, because: it occurred pursuant to his initial motion to dismiss (as opposed to a *sua sponte* decision by the trial judge); the defendant had "offered no objection when the court, having expressed its views on [his] guilt, decided to terminate the proceedings without having entered any formal finding on the general issue"; and "the failure of counsel to request a continuance or otherwise impress upon the court the importance to [defendant] of not being placed in jeopardy on a defective charge" demonstrated that no error occurred. *Id.* at 32-34. *Lee*, thus, rested its finding of consent on *both* an initial express motion and the defendant's subsequent behavior, namely (and critically), silence and failure to object in the face of dismissal. The *Lee* decision does not support Petitioner's argument and, if anything, serves to refute it.

Petitioner's reliance (Reply at 15) on *United States v. Jorn*, 400 U.S. 470, 471 (1971), and *Green v. United States*, 355 U.S. 184, 224 (1954), for the proposition that the Supreme Court has held that a silence and/or failure to object to a mistrial cannot

constitute implied consent is equally misplaced.[22] *Jorn* stemmed from a mistrial declared when the district court became concerned that prosecution witnesses, who were about to incriminate themselves, had not been properly warned of their constitutional rights, and the district court's subsequent finding that double jeopardy barred retrial. In the Government's appeal, no question was raised about whether or not the defendant had consented to the declaration of mistrial; the only issue was whether or not the declaration of a mistrial was error. The Supreme Court found that under the circumstances involved – including district court action so abrupt that neither the prosecutor had the opportunity to suggest a continuance nor the defendant the opportunity to object to discharging the jury – the district court had abused its discretion in declaring a mistrial. *Jorn* did not address, directly or by implication, the question of what behavior by a defendant will suffice to evidence consent to mistrial. *See* 400 U.S. at 479-88. *Green* did not even involve a mistrial situation but, rather, a retrial following an original conviction overturned on appeal. The Supreme Court merely observed in passing "that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." This dicta statement plainly did not intimate anything about what "consent" means, much less to intimate that implied consent would not suffice. *See* 355 U.S. at 224.

While the Supreme Court has never held that a defendant's silence or failure to object to a mistrial declaration may not suffice to constitute consent, in contrast, the Circuit Courts repeatedly have found that consent to mistrial may be implied from the circumstances – including silence and/or a failure to object – and that, when this occurs, a retrial does not violate the Double Jeopardy Clause. For example, in *United States v. You*, 382 F.3d 958 (9th Cir. 2004), on the second day of trial, an interpreter problem arose. The district court asked You's counsel if he wanted to make a record

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[22] Petitioner's reliance on a pinpoint citation to the Reporter's Syllabus in *Jorn* (at p. 471) rather than to the Supreme Court's decision itself, is inappropriate.

and he declined. Counsel for You's co-defendant (Yim), however, objected, moved for a mistrial, and "stated categorically" that he would not interpose a double jeopardy objection. The district court indicated that, perhaps, the government could find another interpreter. You's counsel said he had no objection to that approach, but Yim's counsel stated that "we should just terminate and begin anew." After a recess, the government was unable to find another interpreter. The district court stated that it was going to declare a mistrial and schedule a new trial, and it asked the attorneys if they wished to make a record, but counsel for You and Yim stated that they did not. The district court dismissed the jury and asked both defense counsel if they had anything further, and they again responded they did not. After a new trial date was set, both You and Yim moved to dismiss on double jeopardy grounds, and the motions were denied. *Id.* at 962. The Ninth Circuit found that, under the circumstances, You had impliedly consented to the mistrial and, thus, no double jeopardy violation occurred. The Ninth Circuit distinguished two of its prior decisions (both of which Petitioner relies on here), finding that it was faced with "a far different situation." *Id.* at 965.[23]

> The district court provided You with ample opportunity to object to the mistrial. When the parties first discovered the problem with the interpreter, the court discussed the situation with counsel and offered several options for avoiding a mistrial. You's counsel's only contribution, however, was to agree that the government could attempt to find an alternate interpreter. Once the court established that an alternate interpreter was not available, You's counsel did not opine on the proper course of the trial. You's silence gave the district court no way of knowing if he opposed a new trial. Yim's counsel, meanwhile, clearly stated his desire for a mistrial and that he would

[23] The Ninth Circuit found that *Weston, supra*, involved a defendant who had moved for mistrial on the express condition that "jeopardy would attach," and given the conditional nature of his motion, he did not impliedly consent. *You*, 382 F.3d at 965. In *Gaytan, supra*, the trial judge, "in a matter of seconds," had admonished the prosecutor, dismissed the case and left the bench "in a burst of anger" and had not afforded the parties "any opportunity for further collogues"; given the timing and lack of any party's ability to object, no implied consent existed. *You*, 382 F.3d at 965.

not interpose a double jeopardy objection to a new trial.

> Where one defendant moves for a mistrial, and the other defendant, despite adequate opportunity to object, remains silent, the silent defendant impliedly consents by that silence to the mistrial and waives the right to claim a double jeopardy bar to retrial. You's counsel's failure to participate in the colloquy and repeated failure to take advantage of the trial judge's offer to make a record thus constituted an implied consent to the mistrial.

382 F.3d at 965.

In *United States v. Smith*, 621 F.2d 350 (9th Cir. 1980), on the second day of trial, a medical emergency prevented a juror from attending, there were no alternates, and defendant Smith declined to consent to proceed with 11 jurors. The district court declared a mistrial and then discussed with counsel what would be said to the jurors when dismissing them and the logistics of retrial. In particular, Smith's counsel wished to have the trial judge admonish the jurors not to discuss the case and make clear that the mistrial was not his client's fault, in case Smith should "see these people in other trials." The trial judge noted it was conceivable the jurors could serve again and agreed to do so, and Smith's counsel said nothing. Smith's counsel then agreed that his schedule would allow him to participate in a retrial in two weeks. When the trial judge suggested conducting "voir dire and rulings on two evidentiary matters" right then to save time for the retrial, Smith's counsel said he had "no problem" with doing so. Finally, when the trial judge asked about bringing the jurors in to excuse them, Smith's counsel responded that this was "fine." The Ninth Circuit concluded that, by this behavior, Smith's "counsel not only did not object to the order of mistrial, but affirmatively indicated his understanding that there would be a retrial" and that this was "enough to constitute implied consent." Citing the Supreme Court's decision in *Lee*, *supra*, the Ninth Circuit found that, due to such implied consent, double jeopardy did not bar retrial. *Id.* at 352.[24]

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[24] Significantly, the Ninth Circuit expressly found that certain language in *Himmelfarb v. United States*, 175 F.3d 924, 931 (9th Cir. 1949), indicating that a defendant's consent will not be

As examples of decisions from other Circuits, *see, e.g.*: *United States v. DiPietro*, 936 F.2d 6, 9-12 (1st Cir. 1991) (collecting cases for proposition that "consent may be inferred from" "effectual consent to a mistrial" or "silence where a defendant had the opportunity to object and failed to do so"; and finding no double jeopardy bar to retrial when "the error [that prompted the mistrial] and the fact that the court was considering how to deal with it were not surprises," and thus, defense counsel should have anticipated the possibility of a mistrial and been prepared to object or suggest alternatives when the mistrial ruling was announced); *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir. 1987) (opining that "it has certainly never been the rule that consent need be express" and finding implied consent, and no double jeopardy violation, when: upon learning of a jury deadlock, the district judge instructed that if no verdict could be reached, a mistrial would be declared, and defense counsel did not object; the jury deadlocked again and the court asked the jurors to return to the courtroom; and as a result of the above instruction, defense counsel must have known of the judge's intent to declare a mistrial but did not object and, after a mistrial was declared, renewed several other motions but said nothing about the mistrial); *United States v. Haim*, 58 F.3d 78, 82-84 (4th Cir. 1995) (collecting cases holding that consent may be implied from the failure to object to the court's dismissal of the jury when an opportunity to object exists).

Petitioner's argument – that the State Court Decision's reliance on a theory of implied consent necessarily is erroneous because, under clearly established federal law, consent to mistrial must be affirmative and cannot be implied (whether from circumstances, behavior, or silence) – is fatally flawed for federal habeas purposes. There is no Supreme Court decision clearly holding what Petitioner argues, as is

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implied from his silence, was dicta and "no longer valid law." *Smith*, 621 F.2d at 352 n.3. Thus, Petitioner's reliance on this language in *Himmelfarb* as the primary support for his assertion that "a defendant's failure to object to a mistrial declaration is *not* sufficient to establish that the defendant consented to the mistrial" (Reply at 15) is ill-advised.

required to surmount the Section 2254(d)(1) threshold, and the weight of Circuit authority is contrary to Petitioner's argument. When, as here, there is an absence of clearly established Supreme Court precedent to support the petitioner's theory of constitutional violation, the state court's rejection of the petitioner's claim cannot be contrary to, or an unreasonable application of, clearly established federal law. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law. Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." (citation and internal quotation marks omitted)); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court . . . , it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" (citation omitted)). Moreover, when the standard involved is a general one, state courts have "more leeway . . . in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). While the Supreme Court has made clear that either manifest necessity or defendant consent is needed to prevent a double jeopardy bar to retrial, it has not defined the contours of the consent requirement in any way at all. Indeed, as it made clear in *Jorn*, in the double jeopardy context, it has been disinclined to "formulate rules based on categories of circumstances which will permit or preclude retrial" and that "bright-line rules" in this area are not appropriate. 400 U.S. at 481, 486.

The State Court Decision found that under California and federal law, consent to mistrial may be implied, although a "split in the law" existed as to whether silence could serve as implied consent. (Lodg. No. 12 at 19-21, citing decisions of the First, Fifth, and Seventh Circuits holding that consent to mistrial may be found or implied based on a defendant's silence or failure to object). The California Court of Appeal concluded that, under the prevailing law, the nature of the "silence" involved in this case – *i.e.*, the failure to affirmatively object to mistrial – was more than "mere silence" and included conduct by Petitioner's counsel prior to the mistrial declaration

that could be found to constitute implied consent. (*Id.* at 32-33.) Given the state of the law regarding implied consent in mistrial situations, the State Court Decision finding that implied consent can preclude finding a double jeopardy violation, in itself, was objectively reasonable under federal law. In finding that consent to mistrial can be implied and can be based on silence or other conduct, the California Court of Appeal did not render a decision that was contrary to or an unreasonable application of any Supreme Court precedent and reached a result that was consistent with Circuit authority. Petitioner's claim – that the state court committed legal error in concluding that a finding of behavior constituting implied consent can avoid a finding of a double jeopardy violation – fails under the law and fails to pass the Section 2254(d)(1) threshold. The Court now will turn to whether the state court's conclusion that counsel's behavior actually did constitute implied consent was objectively reasonable or not for purposes of Section 2254(d)(1) and (2).

2. Petitioner has not satisfied Section 2254(d)(1) or (d)(2).

Petitioner next contends that, even if a defendant's implied consent can suffice to prevent a double jeopardy violation, the state court erred legally and factually in finding that his counsel impliedly consented. Petitioner argues that the state court erred in finding that his counsel's "mere silence" could serve as an agreement or implied consent "to a mistrial declaration in the event that twelve jurors remained" and in finding that Petitioner's counsel had several opportunities to inform the trial court that its understanding of the agreement on how to proceed was not correct. (Reply at 14, 17.) The Court finds no such error, legally or factually, for purposes of the Section 2254(d)(1) or (2) barrier that Petitioner must cross.

The Court has reviewed the record carefully and earlier set forth a description of the events that occurred on November 3 and 4, 2011, when the jury was selected and the problem with one juror (Juror No. 3) arose, and on November 7, 2011, when further jury attrition occurred. To recap, the pertinent behavior of Petitioner's

counsel includes the following:

By the start of November 7, 2011, Juror No. 3 had been excused, leaving 12 jurors with three alternates. After Juror No. 4 conveyed his inability to serve, the juror was told to wait in the hall. While Juror No. 4 was not formally excused at that time, the record shows that both the trial judge and the prosecutor believed that this effectively had occurred or would occur given their comments on the record (described earlier at p. 30 and Note 11) indicating that, with the dismissals of Juror Nos. 3 and 32, they now already were down by three jurors (trial judge) and if Juror No. 6 also were to be dismissed, there would be no alternates left (trial judge and prosecutor).

Petitioner's counsel, in his post-mistrial declaration, made clear that he heard these statements but disagreed and was confused by the remarks, because he thought that no more than two jurors had been dismissed by that point. Petitioner's counsel admitted, however, that he did nothing to cure that confusion or attempt to correct what he believed were the mistaken beliefs held by the trial judge and prosecutor regarding the dwindling numbers of jurors. Instead, Petitioner's counsel affirmatively chose to "set aside" his confusion and say nothing, even after the trial judge, in stating his plan to talk to the jurors about whether delaying the trial would cause any issues for them, clearly stated that if even one more juror raised an issue with service, the case would be "done."

It is important to note one thing at this point. While the above choice made by Petitioner's counsel to stay mum despite his disagreement with the statements of the trial judge and the prosecutor is a puzzling one, for purposes of its Section 2254(d) analysis, the Court has accepted counsel's assertions about what he was thinking and why he acted the way he did as "true." There is no need to resolve the accuracy of his statements about the actual number of jurors remaining at any given moment and/or his credibility, because the actual thought processes of Petitioner's counsel are

not the issue here (with one possible exception).[25] Whether Petitioner's counsel believed, or not, that he had impliedly consented does not answer, and ultimately is irrelevant to, the Section 2254(d) issue. Rather, the Ground One habeas question here is not *why* counsel acted the way he did but, rather, *how* he acted and whether those actions and/or failures to act, viewed objectively, could be said to constitute implied consent. Put otherwise, the AEDPA question here is whether any fairminded jurist could find that the behavior of Petitioner's counsel, viewed as a whole, could be found to rise to the level of implied consent.

Turning back to the factual record as amplified by the declaration statements of Petitioner's counsel and the evidence adduced at the evidentiary hearing, after Petitioner's counsel admittedly chose to "set aside" his confusion and keep silent in the face of the trial court's statement that the trial would be over if another juror raised an issue, counsel further admitted that his only comment in response to that explicit threat was to state, "Right now where we are at, *the only problem I have* is making sure my expert's testimony . . ." (emphasis added). While this statement was reported on the record, Petitioner's counsel claims that he made it to the prosecutor in a private conversation. Even assuming this is so, it is undisputed that: (1) Petitioner's counsel made this statement directly on the heels of the trial court's advice that dismissal would occur if no alternates remained; (2) counsel admitted that the prosecutor, on the record, responded to his "only problem" comment by stating that she wanted to keep Juror No. 6 so that they would have "at least one alternate," because she would be "uncomfortable without an alternate"; and (3) counsel did not

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[25] As noted earlier, in the Remand Order, the Ninth Circuit flagged as an open factual issue whether or not, after a mistrial was declared, Petitioner's counsel heard the trial judge immediately refer to the agreement between the court and the parties. As also noted earlier, in his declaration, Petitioner's counsel stated clearly that he did not hear that "agreement" statement and the Court has accepted that representation. While counsel's failure to hear the "agreement" statement could explain his failure to object to it, the lack of any such objection at that particular juncture does not alter or affect the Court's conclusion that the state court's finding of implied consent was not objectively unreasonable, as discussed *infra*.

respond to this concern or advise the prosecutor that he disagreed with her calculation as to the available remaining jurors. Instead, Petitioner's counsel for the second time chose to say nothing. Moreover, as Petitioner's counsel admits, the trial judge clearly heard what was being said, because in direct response to the prosecutor's "uncomfortable without an alternate" statement, the trial court interjected, "And then we are done." Even if, as Petitioner's counsel claims, his "the only problem I have" comment was directed to the prosecutor, counsel made that comment – without any clarification – knowing that both the trial judge and the prosecutor believed that the case was on the verge of having no alternate jurors and, critically, that the circumstances indicated that the trial judge overheard the conversation. Yet Petitioner's counsel said nothing to advise that witness scheduling was not his "only problem" after all.

The undisputed record thus shows, at this point, the situation was that two out of three parties to an ongoing juror attrition situation already had expressed repeated concerns that they were about to end up without any alternates and that the trial therefore would be "done," and the third party – who disagreed with their numbers count – chose to keep silent on that issue and to, instead, tell them that his "only problem" was how he would schedule his expert witness. The Court agrees with the state court that, under these circumstances, it was reasonable at that point in time for the trial judge to believe that Petitioner's counsel shared the trial court's views about the dwindling juror numbers and related concern that the trial would have to be halted. It was particularly reasonable for the trial court to believe that it and both parties were in agreement with respect to how to handle the ongoing juror attrition given that *all* that Petitioner's counsel had said at that point – in response to the trial court's and prosecutor's repeated expressions of concern about the possibility of a mistrial – was that his "only problem" was as to scheduling his expert witness. While Petitioner's counsel has asserted that he didn't mean for his statement to convey the impression it plainly did, when it became clear that the trial judge had heard the

prosecutor-defense counsel discussion, Petitioner's counsel did not bother to let the trial court know that, in addition to being concerned about scheduling his expert, he also disagreed with the trial court about the juror count and believed that adequate alternate jurors still remained. This certainly would have been an, if not *the*, opportune time to do so, but Petitioner's counsel has admitted that he affirmatively chose to forego this ready opportunity to say anything in response to the trial court's *twice*-expressed threats that the case was on the verge of being "done."[26]

This purposeful inaction by Petitioner's counsel did not end there. When the trial court then spoke to the jurors, it stated that Juror No. 4 would have to give his fiancée "his constant attention," signaling the intent to excuse Juror No. 4. No matter his prior disagreement with the trial court's and prosecutor's juror attrition count, once Petitioner's counsel heard this statement, he had to have known that the case now was down by three jurors (or should have so known had he been paying attention). That knowledge was critical in light of the trial court's repeated statements that if even one more juror "raise[d] their hand, we are done." At that point, Petitioner's counsel actually knew or should have known that a mistrial would be declared if one more juror sought to be excused. And if the situation was not clear enough, the trial judge then expressly told the jurors that, due to the prior juror losses, the trial would not commence if any juror said he or she could not serve. The trial court went on, telling the jurors that if any juror raised a hand, "I will tell them that it's done at this point because I cannot risk doing this." In short, the trial judge now had made abundantly clear, for the **third** time, that the trial would not happen if a fourth juror had an issue that precluded serving. And a fourth juror (no. 2) did.

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[26] The record does not reveal any impediment to Petitioner's counsel seeking to clear up his confusion. The discussions between the trial court and the parties appear, in the written transcript, to have been wholly civil if not quite friendly, and the trial judge made clear that he would do what the parties wanted. [RT A3, A8, A9.] There is no indication that the trial judge would not have listened to any concerns had Petitioner's counsel raised them. Petitioner's counsel has never claimed that he could not have obtained clarification for his repeated instances of confusion. Rather, he asserts that he affirmatively chose not to seek clarification and to say nothing.

Petitioner's counsel did not state in his declaration that he did not hear these statements or find them confusing. Rather, his only response to this situation was to feel "confounded" by Juror No. 2's failure to indicate an inability to serve earlier but, again and for the third time, chose to say nothing and let matters take their course.

After Juror No. 2 claimed to have had a heart attack, the trial judge spoke to the prosecutor and Petitioner's counsel at side bar and said, "I believe they win." Although Petitioner's counsel stated that he "had no idea" what the trial judge meant by this comment, given the above events and the trial judge's numerous prior statements, it was obvious that the trial judge believed that they now would have lost four jurors and there were no alternates – a scenario that the judge had made clear, again and again, would mean that the trial could not proceed. Remarkably, Petitioner's counsel did not seek clarification despite his asserted confusion and instead, for a **fourth** time, affirmatively chose to say nothing. When the trial judge then expressed his frustration with the delay in jurors raising issues with service, thanked the jurors, and told them the case could not "go forward" and to return to the jury room, Petitioner's counsel *again* did not object and continued to stay silent. As Petitioner now argues, by sending the jurors to the jury room for discharge, the trial court lost its power to recall them. [Dkt. 143 at 5-10.] Plus, the trial judge had said that the case could not "go forward," signaling that a declaration of mistrial was imminent. Had Petitioner actually wished to object to this course of action and said anything at that point in time, including asking the trial court to hold off dismissing the jurors, the jurors could have been instructed to remain in the courtroom and could have been recalled even once the trial court declared a mistrial 15-20 minutes later. *See People v. Hendricks*, 43 Cal. 3d 584, 597 (1987) (as long as a complete verdict has not been rendered and the jury remains under the trial court's control, a trial court can reconvene the jury).

A 20-minute break then occurred while the trial judge was absent from the courtroom, giving Petitioner's counsel ample time to formulate any questions he had

for the trial court or any objection to what had just occurred. Instead, however, when the trial judge returned, Petitioner's counsel did not ask to address the court, either before or after the trial judge uttered the word "mistrial." Instead, by his own admission, Petitioner's counsel stopped listening to the trial judge as he explained why a mistrial had been declared, responding only to participate in a discussion about scheduling the retrial, seeking to obtain as early a trial date as was possible.

The behavior of Petitioner's counsel was much more than a single instance of "mere silence" in the face of a trial court's stated intent to declare a mistrial. The record clearly and unequivocally demonstrates that both the trial judge and the prosecutor repeatedly expressed the viewpoint that they were on the cusp of losing their last alternate juror, and the trial court repeatedly stated that, if this happened, the case would be "done." Petitioner's counsel admittedly heard all these statements making clear that dismissal was nigh but, again and again, he affirmatively made the choice to not comment or object or share his contrary views and, in fact, said in response to the situation that his "only problem" was as to scheduling a witness. Any reasonable trial judge under those circumstances would have perceived counsel's behavior to indicate acquiescence in the court's repeatedly-stated plan to dismiss if they went down to only 12 jurors.[27]

By the time the trial judge expressed defeat through his "I believe they win" comment to Petitioner's counsel and the prosecutor and indicated that the case could not "go forward" and he would send the jurors back to the assembly room, yet Petitioner's counsel said nothing, the record amply supported a finding of implied consent, regardless of any subsequent events. The Court believes it reasonable to

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[27] As the California Court of Appeal observed, it would have been prudent for the trial court to have placed the agreement it perceived to exist on the record, but its failure to do so does not mean that federal habeas relief is warranted. As discussed earlier, there is no clearly established federal law that double jeopardy bars retrial unless there was an express and placed on the record agreement to proceed with mistrial if a certain condition occurs, *to wit*, affirmative consent. Indeed, the implied consent doctrine could not exist if an express agreement of record were constitutionally required.

conclude that the behavior of Petitioner's counsel up until and immediately after Juror No. 2 raised his hand and sought to be excused due to a claimed heart attack was ample to support a finding of implied consent as of that point in time. Thus, it does not matter that, 15-20 minutes later, counsel did not hear or object to the trial judge's reference to an "agreement" or that, given the evidence adduced at the evidentiary hearing ordered by the Ninth Circuit, the jurors could not have been recalled by the time the trial court formally declared a mistrial following the 15-20 minute break. Put otherwise, even when the three factual issues identified in the Remand Order are resolved in a manner that "favors" Petitioner, there nonetheless was adequate evidence to support the state court's finding of implied consent and to find that it was not objectively unreasonable. Petitioner's counsel plainly was on notice that the trial judge intended to declare a mistrial if the case reached the point of having no alternates, and counsel had had ample opportunities to disabuse the trial court of its belief that Petitioner acquiesced in this plan. If Petitioner, in fact, wanted the trial to proceed despite the lack of alternates, his counsel simply could have said so at any point in the discussions about the ongoing juror attrition. Once the event of concern – *i.e.*, being down to 12 jurors with no alternates – actually did happen and the trial court said "they win," Petitioner's counsel plainly could have spoken up and, at a minimum, could have interjected once the trial judge indicated that the case could not "go forward" and started to excuse the jurors and asked the judge to allow the jurors to remain. Instead, as counsel admittedly did all along, he stayed mute and chose to do nothing.

Petitioner's Section 2254(d)(1) theory, boiled down, is that a trial judge may repeatedly warn that mistrial will happen if a particular juror event occurs, a defendant who does not want a mistrial can nonetheless affirmatively choose not only to stay silent every time the threat of a mistrial is raised but can make a misleading remark in response indicating his acquiescence in the trial court's planned course of action, and when that juror event occurs and mistrial is a hair away, the defendant can

continue to stay silent and participate in scheduling the new trial, opting instead to wait and cry "double jeopardy" in a "gotcha" move later on. Petitioner's view that a defense attorney may mimic Harpocrates (the ancient Greek god of silence and secrecy) in the face of repeated warnings of impending mistrial is not consistent with ample federal law on the issue of implied consent and mistrials. More importantly for Section 2254(d)(1) purposes, his theory has no support in clearly established Supreme Court precedent.

As discussed earlier, the Supreme Court has never promulgated standards about what sort of behavior, silence or otherwise, may suffice to show implied consent, which in itself causes Ground One to fail under Section 2254(d)(1). Moreover, as the California Court of Appeal observed, federal circuits are "split" on the question of whether silence alone can constitute implied consent to mistrial. This fact alone dooms Ground One under Section 2254(d)(1). *See Ponce v. Felker*, 606 F.3d 596, 605-06 (9th Cir. 2010) (finding that the Section 2254(d)(1) standard was not met when, at the time of the state court's decision, there was an eight-to-four split in the circuit courts on the legal issue in question, even though that issue subsequently was resolved by the Supreme Court); *Clark v. Murphy*, 331 F.3d 1062, 1071 (9th Cir. 2003) ("The very fact that circuit courts have reached differing results on similar facts leads inevitably to the conclusion that the [state] court's rejection of [petitioner's] claim was not objectively unreasonable.").

But regardless of this fatal flaw for Section 2254(d)(1) purposes, ample legal support existed for the state court's implied consent finding, because as discussed earlier, numerous Circuit Courts, including the Ninth Circuit, have held that silence and/or a failure to object can establish that there was implied consent as long as there was an opportunity to object. Petitioner's counsel had ample opportunities to object to the trial court's statements about the number of jurors left and his intent to dismiss the case if they reached the point of having no alternate jurors, yet as counsel admits, while he personally did not agree with the trial court's factual assessment of the juror

numbers, counsel chose to keep that disagreement to himself and to say nothing about the trial court's stated plan to dismiss. The behavior of Petitioner's counsel strikes the Court as the very type of behavior for which the implied consent exception to the double jeopardy bar was promulgated, namely, behavior that lulls a trial judge into believing that there is an agreement with the parties that a mistrial will be declared if certain circumstances occur. At a minimum, given the state of the law and the facts at hand, the possibility for fairminded disagreement exists about whether or not the circumstances of record establish implied consent and the state court correctly found it to exist, and thus, Section 2254(d)(1) is not satisfied. *See Richter*, 562 U.S. at 102-03. Given the deferential standard of review that governs Ground One, the Court cannot find that Section 2254(d)(1) has been satisfied with respect to the State Court Decision.

With respect to Section 2254(d)(2), Petitioner asserts that the State Court Decision is unreasonable factually, because the state court found that "Petitioner had consented to a proposal by the trial judge that the trial not proceed without alternate jurors." [Reply at 18, citing the State Court Decision's language at 11: "The trial court understood that . . . the parties also agreed that the trial would not proceed without at least one alternative."] Petitioner argues that this finding was erroneous, because the trial court "never made a proposal to dismiss the jury when twelve jurors remained able to serve," and thus, Petitioner never "was even asked to contemplate such a proposal." [Reply at 18.]

Petitioner's contention that the state court's finding was factually baseless is flatly refuted by the record. As outlined above, the trial judge repeatedly indicated that, if no alternate jurors remained – *i.e.*, when only "twelve jurors remained able to serve" to use Petitioner's wording – the case was "done" and Petitioner's counsel admittedly heard those statements. In the midst of discussing whether or not to excuse Juror No. 6, the trial court expressly advised the parties that when he spoke to the jurors about the possible delay that would result from keeping the juror, if any

other juror raised an issue with serving and had to be excused and they were in a "down to no alternates" status, "we are done." While the trial court did not then turn directly to Petitioner counsel and ask him, "What do you think about that, Petitioner's counsel?" or use the express word "dismiss" rather than "done," the trial court made its intent plain. The parties and the trial court then continued to talk and, in response to the prosecutor's expression of concern about proceeding "without an alternate," the trial court reiterated that the case would be "done" in that instance. Petitioner's counsel had ample opportunities to respond to the trial court's repeated indications that he planned to dismiss the case if no alternates remained and to object had he wished to do so. Counsel's declaration, however, makes clear that he repeatedly made the conscious choice *not* to respond and to keep his "confusion" and contrary views as to the remaining number of jurors hidden from the trial court and the prosecutor. That Petitioner's counsel made the affirmative choice not to exercise the repeated opportunities he had to object does not mean he lacked such opportunities.

Petitioner also asserts that the State Court Decision is factually erroneous on the ground that, when the trial judge brought the jurors back in and inquired of them whether they had any issue with serving, he did this "*without warning counsel*." [Reply at 21; emphasis in original.] This assertion by Petitioner plainly is untrue and fails under Section 2254(d)(2). As noted above, the record shows that before the jurors were called back in, the trial judge explicitly told both counsel that he intended to call the jurors back in "before we go any further," to tell them he did not "know exactly when this will end at this point," and to ask them to "let [him] know right now" if they had a problem serving, and he concluded this advice by stating that the case would be "done" if a juror hand were to be raised. [RT A8-A9.] Petitioner's counsel admittedly heard this statement and had ample "warning" of the trial court's plan to speak with the jurors regarding his concern about juror attrition.

Petitioner next asserts that the State Court Decision contains an erroneous factual finding that Petitioner had several opportunities to advise the trial court that

"Petitioner had not agreed to a mistrial when twelve jurors and two alternates remained on the jury," because the "trial court never advised Petitioner's counsel that he intended to declare a mistrial when twelve jurors and two alternates remained on the jury." [Reply at 23.] This assertion is specious, because the State Court Decision does not contain any such purported finding. As the Court's discussion of the record makes clear, the trial court's statements that the case would be "done" were predicated on the possible event of there remaining only 12 jurors and *no* alternates, not 12 jurors and two alternates. Neither the trial court nor the California Court of Appeal opined that the trial court and the parties had agreed that mistrial would be declared when only two alternates remained and that it was as to this "agreement" that Petitioner had foregone opportunities to object.

Finally, Petitioner represents that his counsel "expressed his displeasure with the mistrial declaration," and thus, the state court erred factually for purposes of Section 2254(d)(2) in finding that Petitioner's counsel failed to avail himself of opportunities to inform the court that there was no agreement. [(Reply at 24, citing RT A14.] At the portion of the transcript on which Petitioner relies, his counsel asked the trial court whether the indicated date for retrial was "the earliest possible date" and then said, "Obviously we are unhappy with the way things proceeded this morning, and I know that Mr. Stanley is anxious to get the matter to trial." [RT A14.] Petitioner's characterization of this statement as his counsel's interposition of an objection to the declaration of mistrial is makeweight and unavailing. Indeed, according to the sworn statement of Petitioner's counsel, he did not hear either the trial court's explanation of why a mistrial had been declared or its use of the words "it was agreed," because counsel was chatting with Petitioner instead, so how could the above-quoted statement by Petitioner's counsel actually have been an objection to a trial court statement he claims not to have heard?

Petitioner's attempt to establish error under Section 2254(d)(2) rests on a series of inaccurate characterizations of the state court record and/or the state court's

findings and fails to establish any unreasonableness in the State Court Decision. Petitioner devotes a substantial amount of time trying to establish that his counsel had it right as to the number of jurors who remained able to serve at any given moment and that the trial court and the prosecutor were wrong in their head counts, and thus, there could not have been any "agreement" as to why and when a mistrial would be declared. The flaw in this theory is that the implied consent issue here does not turn on whether or not defense counsel's calculations actually were "right," whether in November 2011 or now. The implied consent question, instead, turns on the legal effect of the behavior of Petitioner's counsel in response to the trial court's repeated statements that the loss of even one more juror would would mean that no more alternates remained and a mistrial would then have to be declared. The prosecutor plainly agreed with that intended course of action and Petitioner's counsel never let on that he did not. Instead, Petitioner's counsel remained silent every time the trial court and the prosecutor expressed concern about the rapidly dwindling jury and a possible resulting mistrial, and in the throes of the discussions about juror attrition, the "only problem" Petitioner's counsel noted was his concern about scheduling his expert witness's testimony. When the trial court followed through on its stated plan, spoke with the jurors, and learned that another juror needed to be excused, and then told the jury to return to the assembly room, Petitioner's counsel said not a word. And despite a 15-20 minute break, which would have given Petitioner's counsel ample time to formulate any objection to mistrial, counsel again said nothing after the trial court uttered the word "mistrial," instead choosing to chat with his client and then participate in scheduling the retrial.

Given the factual record and the existing state of the law, the State Court Decision's conclusion of implied consent on Petitioner's part – and thus no double jeopardy violation – was neither an objectively unreasonable application of any clearly established federal law nor was it based upon an objectively unreasonable factual determination in light of the evidence. At a minimum, it is possible that

fairminded jurists could disagree on this issue and on the correctness of the state court's conclusion, which under Section 2254(d)(1) and (2), forecloses federal habeas relief. Accordingly, federal habeas relief is precluded based on Ground One.

II. Ground Two: The Sufficiency Of The Evidence Challenge

Petitioner's second habeas claim challenges the sufficiency of the evidence to support his convictions for the murders of Manuel and Roberto[28] and possession of a firearm by a felon. Petitioner contends that, by its not guilty verdict on a different charge – the Count 3 attempted possession of a drug for sale charge – the jury necessarily rejected the prosecution's theory as to why the shootings occurred (*i.e.*, motive). Petitioner asserts that any evidence related to that count (including any evidence that he tried to buy drugs from one of the victims) must be disregarded and cannot be considered in the sufficiency analysis. [FAP attachment at 6.] Petitioner reasons that, as a result, there "was no physical evidence connecting [him] to the shooting" and the sole evidence of guilt was the eyewitness testimony. Petitioner argues that the testimony of the prosecution's eyewitnesses was conflicting and not credible, and therefore, there can be no confidence in the verdicts. [FAP attachment at 1, 7-10.]

A. The Clearly Established Federal Law That Governs Ground Two

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The federal standard for determining the sufficiency of the evidence to support a jury finding is set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, "the relevant question is whether, after viewing the evidence

[28] As did the California Court of Appeal, this Court refers to the victims by their first names alone to avoid any confusion due to their shared last name.

in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original); *see also Coleman v. Johnson*, 566 U.S. 650, 656 (2012) (*per curiam*) ("the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality"); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (*per curiam*) (a habeas court "may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury"). "Put another way, the dispositive question under *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Chein v. Shumsky*, 373 F.3d 978, 982-83 (9th Cir. 2004) (*en banc*) (quoting *Jackson*); see also *Drayden v. White*, 232 F.3d 704, 709-10 (9th Cir. 2000) (explaining that the evidence may be sufficient to support a jury's finding even if it does not "compel" that finding).

When reviewing the record, the Court "must consider all of the evidence admitted by the trial court, regardless whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (*per curiam*) (quotation marks omitted). "'Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction.'" *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). The Court "must respect the province of the jury to ascertain the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict." *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006) (citation omitted). The reviewing court does not decide whether it would have found the trial evidence sufficient or scrutinize "the reasoning process actually used by the fact-finder." *Jackson*, 443 U.S. at 318-19 & n.13 (noting that a reviewing court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt"). The *Jackson* standard also does not require that the prosecutor affirmatively "'rule out every hypothesis except that of

guilt.'" *Wright v. West*, 505 U.S. 207, 296 (1992) (citation omitted). When the factual record supports conflicting inferences, the federal court must presume – even if it does not affirmatively appear on the record – that the trier of fact resolved any such conflicts in favor of the prosecution and defer to that resolution. *Jackson*, 443 U.S. at 326. "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial," and it requires only that they draw "'reasonable inferences from basic facts to ultimate facts.'" *Coleman*, 566 U.S. at 655 (citation omitted).

Under "*Jackson*, federal courts must look to state law for 'the substantive elements of the criminal offense,' 443 U.S., at 324, n. 16 . . ., but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Johnson*, 566 U.S. at 655. Further, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (*per curiam*).

Finally, when, as here, a case is governed by Section 2254(d)(1), the federal habeas court must "apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005); *see also Johnson*, 566 U.S. at 651 ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.") Under AEDPA, "[a]n additional layer of deference is added to [the *Jackson*] standard by 28 U.S.C. § 2254(d), which obliges [a petitioner] to demonstrate that the state court's adjudication entailed an unreasonable application of ... *Jackson*." *Briceno v. Scribner*, 555 F.3d 1069, 1078 (9th Cir. 2009); *see also Johnson*, 566 U.S. at 651. "[A] federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Cavazos*, 565 U.S. at 2 (citation omitted); *see also Boyer v.*

Belleque, 659 F.3d 957, 965 (9th Cir. 2011) ("Stated another way, to grant relief, [a federal court] must conclude that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e. that each required element was proven beyond a reasonable doubt, was objectively unreasonable.").

B. **The State Court Decision**

Ground Two was raised and resolved on its merits in *Stanley II* [Lodg. No. 31]. After describing the applicable standard of review – which was stated consistently with the foregoing [Lodg. No. 31 at 26-27] – the California Court of Appeal first addressed Petitioner's contention that the eyewitness testimony implicating him in the charged crimes was unworthy of belief.

> In this case, the trial court suppressed the testimony of two eyewitnesses because the investigating detectives used unduly suggestive procedures to obtain the identifications.[29] Although two additional eyewitnesses, Jorge Duke and Devondre Haynes, identified [Petitioner] from the same six-pack used by the excluded witnesses, the trial court allowed the prosecution to present their identification testimony over defense objection.
>
> [Petitioner] also raises a concern with respect to the testimony of Bustos—the only witness other than Haynes to identify [Petitioner] as the shooter. Immediately after the shooting, Bustos identified two people as the possible shooter—a civilian bystander and a photograph of a dead gang member on the police station wall. Then, eleven days after the shooting, Bustos was shown the suggestive six-pack.[30] Bustos took his time and looked carefully at the pictures. He told the detective that while another man looked the most like the shooter, the shooter was not in the lineup. Montoya and Bustos both described a man with a

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[29] Footnote 20 in original: "Among other issues, detectives presented witnesses with a six-pack photographic lineup in which [Petitioner] was the only person with braids and his photograph was a different color than the other photos."

[30] Footnote 21 in original: "The police used the same six-pack for every witness. The court denied the defense motion to exclude the identifications by Duke and Haynes, but it does not appear the defense moved to exclude the Bustos identification."

> tattoo, a white tank top, and tight braids around his entire head. Bustos told the detective that the hair in the photos did not match—defendant had a dreadlock mohawk, not tight braids—but the detective asked Bustos to look again and focus on their faces. Bustos looked again. Again, Bustos told the detective the shooter was not in the lineup. This time, the detective asked Bustos to focus on a series of facial features. Bustos looked again. Again, Bustos told the detective the shooter was not in the lineup. Bustos could not remember whether the detective next suggested the lighting in the photos might be different—but he did remember that, 11 days after the shooting, the shooter's photograph was not in the six-pack. Bustos testified he did not pick [Petitioner] out of the lineup because the shooter "wasn't there. It wasn't him. I said that one of them looked a little bit like him, but he was not there."
>
> A year and a half later, at the preliminary hearing, Bustos identified [Petitioner] for the first time. He indicated the shooter was wearing blue and was sitting "with the attorney or, you know, the other white male." At the time, [Petitioner] was wearing a blue prison jumpsuit, was handcuffed to a chair, and was the only African–American man in the room. Bustos also identified [Petitioner] at trial.[31] The defense expert explained the problem with identifications like these: "If, in fact, there is only one person at counsel table who even remotely matches the description that [the witness] gave a year or more [after the crime], it renders that identification invalid. It's not a real test of whether they recognize what the perpetrator looked like. [¶] Also, the courtroom situation is a biased context, in that eyewitnesses often assume that by the time they have someone in court, they have other compelling evidence against that person, and [the witness's] job is to then identify that person .... So it's a biased context for making an identification, as opposed to a fair and unbiased photographic lineup administered closer in time to the situation."
>
> However, a positive in-court identification following an earlier failure to identify need not necessarily be excluded. (*People v. Dominick* (1986) 182 Cal. App.

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[31] Footnote 22 in original: "We note the prosecutor apparently stood behind [Petitioner] during in-court identifications by at least one witness. The record does not reveal whether she used this technique during every in-court identification, and it does not appear that defense counsel objected."

> 3d 1174, 1197.) Further, Bustos previously had seen [Petitioner] in the area at least once, and Bustos testified it was easier for him to recognize [Petitioner] in court than in a photograph. Moreover, in the end, the jury was well apprised of all these problems. During the trial, defense counsel extensively and skillfully cross-examined eyewitnesses concerning the accuracy and reliability of their memories; a defense expert testified about the pitfalls of eyewitness identifications; the court gave the jury a thorough instruction explaining how to evaluate this type of evidence (CALCRIM No. 315); and in closing argument, defense counsel argued at length about the weaknesses of eyewitness identification, including the specific problems of cross-racial identification and the effects of stress on memory and of information received after the event.
>
> The jury was provided with all the information it needed to evaluate the reliability and credibility of these witnesses—and the record reveals that the jury took its responsibility seriously. The jurors requested read-back of the eyewitness testimony; after a one-week trial, they deliberated for nearly eight hours over three days; and they acquitted on count 3. We may not reweigh the evidence or reevaluate the witnesses' credibility. (*People v. Albillar* (2010) 51 Cal. 4th 47, 60.) Despite the concerns relating to Bustos's testimony, the jury believed him; under these circumstances—and in light of Haynes's testimony and the corroborating evidence—we cannot second-guess the jury's determination.

[Lodg. No. 31 at 31.]

The California Court of Appeal then turned to Petitioner's arguments regarding the effect of the jury's failure to convict him of Count 3:

> [Petitioner] argues the eyewitness testimony was particularly problematic because the jury acquitted him of attempted possession of methamphetamine for sale, and we must therefore reject the prosecution's motive theory—that the shooting was in retaliation for an attempt to sell him baking soda in lieu of drugs—and must also disregard the evidence supporting it; once we discard that evidence, he argues, only the eyewitness testimony remains.
>
> With respect to the drug evidence, we note at the outset that the prosecution is not generally required to prove motive. (*People v. Hillhouse* (2002) 27 Cal. 4th

> 469, 503-504 [motive describes the reason a person chooses to commit a crime and is usually not an element of the offense]; see CALCRIM No. 370 [same].) In any event, in light of the evidence that Manuel's van contained only a single baggy that did not contain a controlled substance, the count 3 verdict does not necessarily imply the jury rejected the prosecution's theory of the case. The jury may have decided [Petitioner's] plan to purchase methamphetamine for sale did not progress beyond the planning stage, and thus there was no direct, unequivocal act. (§ 21a [attempt requires specific intent to commit the target crime and a direct, ineffectual act done towards its commission]; *People v. Johnson* (2013) 57 Cal. 4th 250, 258 [to avoid punishing nothing more than guilty mental state, there must be act toward completion of crime before attempt will be recognized]; see CALCRIM No. 460.) Alternatively, given that the item [Petitioner] attempted to possess was not actually methamphetamine, the jury may have believed [Petitioner] attempted to do something that was not actually a crime. (See, e.g., *People v. Siu* (1954) 126 Cal. App. 2d 41, 43 ["Defendant also argues that his case is similar to the old law-school classics that there can be no corpus delicti when a husband fires a gun at a dummy in a bed, thinking it the paramour of his wife, or when an attempt is made to poison with an innocuous substance, or when a person points an unloaded gun at another"].) Since Manuel was making phone calls about cocaine, not methamphetamine, the jury could have concluded [Petitioner] attempted to buy cocaine. Or, as the People suggest, because the evidence of specific intent to sell was sparse, the jury may have believed [Petitioner] attempted to possess methamphetamine for personal use.[32]

Viewed in the light most favorable to the

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[32] Footnote 23 in original: "[Petitioner] cites two cases in support of his position that we should disregard all drug-related evidence— *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337 (*Mitchell*) and *People v. Medina* (1995) 39 Cal. App. 4th 643 (*Medina*). *Mitchell* is not binding on this court and regardless, has not been good law since the Ninth Circuit overruled it in 1998. (*Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242.) In *Medina*, the jury was presented with two inconsistent versions of events. Because the verdicts indicated the jurors believed the codefendant, not the victim, the court analyzed the sufficiency of the evidence using the only facts supporting the codefendant's version. (*Medina*, at pp. 646-647, 651-652.) In this case, because the jury was not presented with two incompatible versions of events, its conclusion that the People did not prove count 3 beyond a reasonable doubt does not mean they rejected the evidence entirely or found it unworthy of belief.

> prosecution, there was sufficient evidence to support the jury's verdicts. Kathi, Bustos, Haynes, and Duke placed [Petitioner] at or near the scene of the shooting on the evening of May 4, 2008. [Petitioner's] mobile phone also placed him in the area. Haynes saw [Petitioner] with a gun and Duke saw him with an item shaped like one. Bustos and Haynes identified [Petitioner] as the shooter. They provided consistent details of how the murders occurred, from vantage points that were mere feet away. After the shooting, someone using [Petitioner's] mobile phone made multiple calls—including a call to Haynes's home—while travelling from the vicinity of the shooting in Los Angeles to Las Vegas, where [Petitioner] lived; although [Petitioner] remained in the area until an hour after the shooting, the jury could reasonably have viewed the timing of this drive as evidence of flight and consciousness of guilt. Notwithstanding [Petitioner's] arguments to the contrary, taken together, this testimony was sufficient to convince a rational trier of fact, beyond a reasonable doubt, that [Petitioner] committed the offenses of which he was convicted.

[Lodg. No. 31 at 31-33.]

C. **Petitioner Has Not Surmounted Section 2254(d).**

Ground Two rests on a layered series of premises. The base premise is that the jury's not guilty verdict on attempted possession of a drug for sale charge means that the jury necessarily rejected the prosecution's theory of motive, *i.e.*, that the murders stemmed from a drug deal gone wrong. The next level premise is that, because the jury assertedly rejected the prosecution's motive theory, any and all evidence related to the drug charge (including evidence tending to show that Petitioner tried to buy drugs from one of the victims) must be disregarded in determining the sufficiency of the evidence to support Petitioner's murder convictions. Thus, according to Petitioner, in conducting a sufficiency of the evidence analysis, the state court could not consider (and neither can this Court) the evidence that a note with Petitioner's name and telephone number was found in victim Manuel's pocket, as well as, *inter alia*, expert testimony that the powder in Manuel's van was not a drug and the testimony that Petitioner asked Manuel to get methamphetamine for him. [*See* RT

1593, 1915, 1929-30, 1960, 2165, 2167-69, 2257-59.] Building further, the next level premise is that, when the evidence of an aborted drug buy is excluded, all that is left tying Petitioner to the murders is eyewitness testimony, and that testimony is too conflicting and lacking in credibility to support his conviction.

The problem with Petitioner's Ground Two argument is that if any of his premises falter, the succeeding, dependent premises do as well. And from the start, Petitioner's assertions fail.

First, with respect to the jury's asserted repudiation of the prosecution's motive theory, as the California Court of Appeal observed, the prosecution was not required to prove motive in Petitioner's case [Lodg. No. 31 at 31]. *See People v. Hillhouse*, 27 Cal. 4th 469, 503-04 (2992) (explaining that motive is "different" than a required mental state element such as malice or intent) Thus, even if the jury's not guilty verdict on the Count 3 drug possession charge could be read as a rejection of the theory of murder motive articulated by the prosecutor, this in itself would not invalidate the murder convictions.

In any event, Petitioner's argument – that by declining to convict Petitioner of the attempted possession of a drug for sale count, the jury *necessarily* rejected the prosecution's theory that the shootings were in reprisal for an attempted drug buy that failed – is contrary to the *Jackson* standard and the rules that govern this Court's review. As the California Court of Appeal found, under the evidence before the jury, there were a variety of scenarios that could have served as the reason why the jury declined to convict Petitioner of the attempted possession count and yet which were fully reconcilable with the jury having accepted the prosecution's murder motive theory at the same time. These could have included, among other things, the jury finding that: the direct, unequivocal act element of the Count 3 drug crime was unsatisfied; Petitioner's acts directed toward buying drugs were not a crime, because the items found in the van tested negative for drugs; and Petitioner's attempted

purchase was for personal use.[33] [Lodg. No. 31 at 31-32.] The jury could have found any one of these scenarios *and* also found that Petitioner's motive in shooting the two victims was anger that his attempt to buy drugs had not proved successful, whether because the "drugs" in victim Manuel's van were not actually drugs or otherwise. It is long and well established that the Court must view the evidence in the light most favorable to the prosecution and presume that the jury resolved any conflicting inferences arising from the evidence in favor of the prosecution and, thus, defer to that resolution. *Jackson*, 443 U.S. at 319, 326; *see also Coleman*, 566 U.S. at 654. Given that the evidence of record did not permit as the sole inference that the jury had rejected the prosecution's motive theory and, instead, permitted inferences favorable to the prosecution, the Court must defer to the latter. Hence, the underlying premise on which Ground Two rests – that the jury necessarily rejected the prosecution's theory of motive – fails, and the state court's rejection of it was objectively reasonable under *Jackson* and its progeny.

As a result, Petitioner's argument that the jury's verdict on Count 3 requires the Court to disregard any evidence tending to show that Petitioner attempted to buy drugs from victim Manuel also necessarily fails. Moreover, and regardless of the flaw in Petitioner's base premise, Petitioner ignores the well established rule that a court reviewing a sufficiency of the evidence claim must review *all* of the evidence presented at trial, regardless of a petitioner's contention that some of it should not be considered. *McDaniel*, 558 U.S. at 131.

In addition, as the California Court of Appeal correctly explained [Lodg. No. 31 at 32 n.23], Petitioner's reliance on *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997), and *People v. Medina*, 39 Cal. App. 4th 643 (1995), is misplaced. Neither

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[33] As Respondent correctly observes, the jury was not instructed on the lesser included offense of attempted simple possession of a controlled substance. Under the evidence before it, the jury could have rejected Count 3 because it believed that Petitioner wished to buy drugs for himself, not for the purpose of sale.

decision serves as a basis for disregarding Supreme Court precedent and ignoring evidence that the jury considered. In *Mitchell*, the jury found Mitchell guilty of the murder of the victim, who had been run over after having been shot, but also rendered special findings that Mitchell had not been driving the car and had not personally used a firearm. 107 F.3d at 1338-39. The Ninth Circuit concluded that, due to these special findings, the jury had to have convicted Mitchell under an aiding and abetting theory, but that the evidence was insufficient to establish that Mitchell possessed the requisite special intent or instigated, encouraged, or assisted the driver in crushing the victim with the car and, thus, did not support guilt under an aiding and abetting theory. *Id.* at 1340-42. A year later, however, an *en banc* Ninth Circuit overruled *Mitchell*, finding that its premise – that because of its special findings, the jury necessarily had rested its murder verdict on an aiding and abetting theory – was incorrect under California substantive law. *Santamaria v. Horsley*, 133 F.3d 1242, 1248 (9th Cir. 1998) (*en banc*). Apart from the fact that *Mitchell* rested on jury special findings that are absent in Petitioner's case and therefore is distinguishable on that basis alone, the decision has been overruled in pertinent part, and Petitioner's continued reliance on it is puzzling.

The same is true as to *Medina*, which involved an acquittal on a kidnapping by carjacking charge, a guilty verdict on a carjacking charge, and jury findings plainly indicating that the jury had accepted the codefendant's version of events and not the victim's inconsistent version. The California Court of Appeal analyzed Medina's sufficiency of the evidence challenge to the carjacking conviction by looking to the codefendant's version of events and found the conviction supported under a theory that was not inconsistent with the codefendant's version of events. 39 Cal. App. 4th at 651-52. This case, unlike *Medina*, did not involve two inconsistent versions of events requiring the jury to accept one and reject the other. Put otherwise, under the evidence, Petitioner could be innocent of the attempted possession of drugs for sale charge and still be guilty of murdering the victims out of anger that his attempt to buy

drugs had not worked out.

Petitioner's argument that the Court cannot consider the drug-related evidence is contrary to clearly established law for Section 2254(d)(1) purposes and fails for that reason alone. But regardless of that problem, Petitioner has not articulated a cogent reason why the acquittal on Count 3 means that the non-eyewitness evidence tying him to the crime cannot be considered simply because the jury acquitted him of the attempted possession of drugs for sale crime. Even if the jury believed that all of the elements of the charged drug crime had not been proven, the fact that Manuel had a note in his pocket with Petitioner's name and telephone number tended to tie Petitioner to Manuel, which was relevant to the murder charge regardless of the acquittal on the drug charge. The same is true of the evidence that Petitioner had been overheard asking Manuel to get methamphetamine for him. The cell phone evidence showed that Petitioner's cell phone called victim Manuel's cell phone approximately 45 minutes before the shootings (from a distance within a half-mile of Manuel's van) and that Petitioner's cell phone was in Las Vegas the day before the murders, then traveled toward Los Angeles, was near the shooting site at the time of the murders, moved away from that site immediately after the murders, and was back in Las Vegas the next day. [RT 2187, 2448-53, 2458-64.] That relevance of that evidence to the charged murders plainly was not vitiated simply because the jury did not convict Petitioner of the separate charge involving an attempt to possess drugs for sale.

In sum, there is no tenable basis for disregarding the non-eyewitness evidence that would have allowed the jury to conclude that Petitioner had contacts with Manuel around the time of the shooting and had tried to buy drugs from him but it did not go well, thus in turn tying or tending to tie Petitioner to the shootings. Contrary to Petitioner's assertions, this simply is not a situation in which the sole evidence of guilt is eyewitness testimony.

Turning to the eyewitness testimony, Petitioner asserts that eyewitness

testimony, as a general matter, is untrustworthy "and worthy of little independent weight." He contends that the eyewitness testimony in this case is particularly untrustworthy and lacking in credibility, because three of the eyewitnesses contradicted themselves or others. In addition, Petitioner argues that because the trial court made a pretrial ruling that excluded testimony about the six-pack photographic identification made by two eyewitnesses on the ground that the six-pack procedure had been unduly suggestive, the trial testimony of the three other eyewitnesses who identified Petitioner as the shooter should be deemed unreliable and not worthy of consideration.[34]

Petitioner's latter argument is unpersuasive. Petitioner did not bring an in limine or other motion to exclude the testimony of eyewitness Bustos on the ground that his identification of Petitioner was based on unduly suggestive procedures, and the trial court considered Petitioner's arguments and denied the motion to exclude brought as to eyewitnesses Haynes and Duke. Petitioner did not challenge the trial court's ruling as to Haynes and Duke on direct appeal, nor did he raise a claim on appeal that the testimony of these three eyewitnesses should have been excluded due to suggestive or otherwise improper identification procedures. His indirect attempt to do so here is unavailing. The testimony of these three witnesses was before the jury and, as discussed below, the jury was apprized of the manner in which to evaluate it. That two other witnesses were prevented from testifying about their six-pack based identifications is of no moment to the Court's *Jackson* analysis, and this eyewitness testimony given at trial and that was before the jury will be viewed under the standards that guide this Court's *Jackson* and AEDPA review. The jurors heard the

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[34] The record shows that at Petitioner's original trial, Petitioner moved to exclude evidence of identifications made by eyewitnesses Jorge Duke, Carlos Montoya Ramos, Lashanta Tausaga, and Devondre Haynes, based on the ground that their identifications stemmed from photographic six-pack procedures that were unduly suggestive. [Lodg. No. 18, Exs. 2, 4,6.] The trial court granted the motion only with respect to witnesses Lashanta Tausaga and Carlos Montoya. [Lodg. No. 2, Ex. B (Feb. 8, 2011 minute order); Lodg. No. 5, Ex. 1 at 4; Lodg. No. 18, Ex. 7; RT 2774-75, 2802-03.]

following testimony:

Around 5:00 p.m. on the day in question, Petitioner showed up to Kathi Preston's home to visit. Petitioner had grown up in the area with Preston. Petitioner, Peterson and her son (Haynes) visited for 30 minutes to an hour. During this visit, Haynes saw that Petitioner had a handgun tucked into his waistband. [RT 1583-84, 2106-07, 2112, 2115.] Haynes then went with Petitioner to join a group of men hanging out near victim Manuel's van, which included Duke and Manuel. Duke got a good look at Petitioner and shook his hand. The men were smoking marijuana and drinking beer. Victim Roberto and Roberto Carlos Bustos arrived a bit later, and the men continued to hang out, although Bustos had parked behind Manuel's van and stayed in his car's front seat. [RT 1236-37, 1587-91, 1600-01, 1925, 1927-28.] Haynes heard Petitioner ask Manuel about buying some dope, and Manuel began to make calls. Manuel told Duke that he had to get some meth for Petitioner, who would pay him for it. [RT 1592-94, 1926, 1929-32.] Duke heard Petitioner tell some of the other men that he gets a good profit selling drugs in Las Vegas. [RT 1936-37.] Duke had seen a bulky shape on Petitioner's waistband that appeared to be a gun. [RT 1938.] At some point, Manuel and Roberto walked through an alley and were gone around 10-15 minutes. [RT 1601-02.] While they were gone, Petitioner grabbed his gun and walked toward two of the men and asked Haynes about them, then retreated when Haynes explained who they were. [RT 1603-06.] At another point, Petitioner and the woman waiting in the SUV went to look at Petitioner's old home and then returned. [RT 1934-35, 1940-41.] Duke became uncomfortable with the talk about drugs and guns and left; as he walked away, he saw Petitioner and the woman walking toward Manuel's van. [RT 1942-43.]

When Manuel and Roberto returned, Manuel went to his van and Roberto stood in the street. Petitioner stood near Manuel and Haynes was standing on the grass adjacent to the van. [RT 1606-08.] Haynes saw a muzzle flash of a gun and heard a gunshot come from where Petitioner and Manuel were standing, and Haynes

ran to his grandmother's house. He heard at least three more gunshots and bullets whizzing past him. [RT 1608, 1614-16.]

As Bustos was resting in his car's front seat, he saw Manuel come out of the side door of the van and lean against it. A few minutes later, Petitioner also got out of the van through the side door. Petitioner was standing close to Manuel. Bustos saw Petitioner raise his arm and fire a shot; Bustos saw the flash come out of the gun and Manuel fall. Petitioner turned and looked in Bustos's direction twice and Bustos got a look at his face and appearance. Then Petitioner walked around Manuel's van to the front of it and raised his arm. Bustos heard more shots, then saw Petitioner coming back and heard another shot. Bustos saw Petitioner get into the passenger's side of an SUV, which drove off quickly. [RT 1237-43, 1253, 1256, 1261-66.]

Days after the shooting, the police showed Bustos photographs but he was not able to identify any of them as the shooter. Bustos told the police one of them looked a little like the shooter but "he was not there." [RT 1272.] At the preliminary hearing, however, Bustos did identify Petitioner as the shooter, as he did at trial. [RT 1273.]

Five months after the shooting, Haynes was taken into custody in connection with another murder. Haynes was shown a photographic six-pack containing Petitioner's photograph, but he did not select Petitioner's photograph and pointed to another man as looking like the shooter. Haynes then was arrested for the other murder. When Haynes was shown a six-pack again four days later, he identified Petitioner. Haynes testified that he did not identify Petitioner in the first instance because he was afraid for his safety and that of his grandmother. On cross-examination, however, Haynes responded "Yes" when Petitioner's counsel asked if identified Petitioner as the shooter because he was worried about retaliation from the real shooter. Then, on redirect examination, Haynes again testified, repeatedly, that Petitioner was the person who shot Manuel and Roberto. [RT 1631-37, 1639, 1648-51, 1862, 1867-68, 1874, 1876.]

Petitioner argues that Bustos's identification of Petitioner was not credible, because Bustos failed to select Petitioner's photograph out of a photographic six-pack shown to him shortly after the shooting and, instead, identified Petitioner a year and a half later at the preliminary hearing, when Petitioner was the only Black male seated at the counsel table. Petitioner argues that Haynes's identification of Petitioner is not credible, because he lied to the police, was inconsistent in his statements and testimony, was a suspect in a murder when he identified Petitioner, and later was released after identifying Petitioner. Petitioner argues that both eyewitnesses were contradicted by the defense witness testimony of Carlos Montoya Ramos,[35] who described the shootings differently and testified that the shooter had a tattoo (unlike Petitioner), and that Montoya Ramos's testimony was more credible. Petitioner reasons that because the Bustos and Haynes testimony was the only testimony specifically identifying Petitioner as the shooter but was flawed, his murder convictions are not supported by sufficient evidence.

Again, the Bustos and Haynes testimony was not the only evidence tying Petitioner to the murders. As discussed above, there was ample evidence before the jury to allow it to conclude that Petitioner was involved with Manuel in an attempted drug transaction that failed, including the note in victim Manuel's pocket. The

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[35] The California Court of Appeal accurately described Montoya Ramos's trial testimony for the defense. [Lodg. No. 31 at 13.] Briefly summarized, Montoya Ramos described two Black men (one with long braids, a tattoo, and not wearing a chain, and the other almost bald) who had been speaking with Manuel while in their car, one of whom uttered an expletive as Manuel walked away, and then followed Manuel to his van and had a gun. After seeing this, Montoya Ramos went into his sister's house. While in the house, he heard gunshots. [RT 2865-71, 3053-55, 3059.]

The jury did not hear that, at the preliminary hearing and in a Rule 402 hearing during the trial shortly before he testified in front of the jury, Montoya Ramos identified Petitioner as the man with the braids who followed Manuel to his van. [RT 2779-82, 2786, 2790.] The trial judge ruled that Montoya Ramos was not allowed to make an in-court identification of Petitioner during his defense testimony, because it had not been shown that his identification was independent of the earlier suggestive six-pack photographic line-up. [RT 2802-03, 2805.] Just before Montoya Ramos testified, the trial judge expressly instructed him that he was not allowed to state that he had identified Petitioner as the man with braids he had seen follow Manuel to the van. [RT 2805.]

testimony of Duke, Bustos, and Haynes, placed Petitioner at the site of the shootings, which was corroborated by Peterson's testimony and the cell phone evidence, which placed Petitioner nearby. In short, both objective cell phone evidence (as well as the note in the victim's pocket) and the testimony of four people – two of whom directly identified Petitioner as the shooter – placed Petitioner at or near the shooting and in contact with victim Manuel at the relevant time, if the jury chose to believe such evidence.[36]

According to Petitioner, the jury should not have believed such evidence and found the eyewitness identifications to lack credibility. Petitioner, however, ignores the rules that govern this Court's doubly deferential review under *Jackson* and Section 2254(d)(1). In asking this Court to re-weigh the evidence to decide whether or not the eyewitnesses were credible and to find the defense witness more credible, Petitioner ignores that "[a] jury's credibility determinations are . . . entitled to near-total deference under *Jackson*." *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004); see also *Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review"); *Walters*, 45 F.3d at 1358 (the reviewing court "must respect the province of the jury to determine the credibility of witnesses"). Even if, as Petitioner argues, Haynes was a troubled witness, it was up to the jury to assess what weight to give to his testimony. Even if the jury had found Haynes not credible, the testimony of Bustos identified Petitioner as the shooter. Significantly, there was no evidence that negated or called into question Bustos's testimony that he was present and close to the van, had a clear opportunity to view the shooter's face and appearance, and viewed the shooting of Manuel and Petitioner's subsequent actions. The testimony of a single witness, if believed, is sufficient to support a conviction. *See United States v. McClendon*, 782

[36] Petitioner chose not to testify based on the trial court's ruling that he could be asked about a murder Petitioner committed as a juvenile (although not about the fact of the juvenile adjudication), along with allowing questioning about his other prior convictions. [RT B51, B71, 4-5, 3073-76.]

F.2d 785, 790 (9th Cir. 1986); *United States v. Larios*, 640 F.2d 938, 940 (9th Cir. 1981); *see also People v. Boyer*, 38 Cal. 4th 412, 480 (2006) ("Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime.").

Critically, the jury was instructed on the issue of witness credibility and the factors bearing upon the jury's evaluation of witness testimony and its weight, such as the opportunity of the witness to observe, the ability of the witness to remember and describe what happened, and any inconsistencies in a witness's prior and current accounts. [CT 688-89.] The jury received a separate instruction specific to eyewitness testimony and how to evaluate it, which told the jury to consider the above factors among others, including how much time had passed between the event and the identification, whether the eyewitness ever had failed to identify the defendant when earlier asked or had changed his or her mind about the identification, and how closely the eyewitness's description compared to the defendant. [CT 694-95.] The jury was instructed that the "testimony of only one witness can prove any fact" and that if there was a conflict in the evidence, the jurors must decide what evidence, if any, to believe. [CT 692-93.] Any discrepancies in or issues with respect to the believability of the eyewitness testimony were factors for the jury to consider. *See Jones v. Wood*, 207 F.3d 557, 564 (9th Cir. 2000) (noting, in the context of performing *Jackson* review, that determining witness credibility is a "key question for a jury").

In addition, the jury heard the testimony of Kathy Pezdek, the defense eyewitness testimony expert, who opined about the factors that affect, and the fallibility of, eyewitness identifications, including as they are made pursuant to photographic line-ups. [RT 3014-27, 3030-34, 3036-42, 3064-66, 3069-72.] Petitioner's counsel cross-examined the prosecution's witnesses extensively and in closing argument, asserted that Montoya Ramos – who said that the man he saw had a tattoo – should be believed and that Duke, Bustos, and Haynes should not. [RT 3392-

94, 3396-98, 3403-10, 3414-17, 3423-26.] The jury asked for a readback of the testimony of Bustos, Duke, Haynes, and Montoya Ramos limited specifically to the four witnesses' descriptions of the clothing of the person they observed, but not of any other portion of the witnesses' testimony. [CT 674 (stating "we only want the testimony related to the clothing descriptions only"; RT 3905.] This indicates that the jury had considered the identification testimony carefully and had honed in on a particular area they needed to resolve based on a further review of the evidence. Having heard all of this, the jury nonetheless convicted Petitioner of the murders of Manuel and Roberto and, thus, plainly concluded that Petitioner *was* the shooter. Given the jury's verdict on the murder charges, the Court must assume that the jury resolved the question of the credibility of the eyewitnesses in the prosecution's favor and defer to the jury's credibility determination.

Based on its own review of the record, and after viewing the evidence presented at trial in the light most favorable to the prosecution, and presuming that the jury resolved all conflicting inferences from the evidence against Petitioner, the Court finds that the state court's conclusion that the prosecution had offered sufficient evidence to identify Petitioner as the perpetrator of the murders of Manuel and Roberto is consistent with the record and cannot be characterized as an unreasonable application of *Jackson*. As the state court's decision on Ground Two was not objectively unreasonable, Section 2254(d) precludes federal habeas relief based on the second claim.

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RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the First Amended Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: December 30, 2020

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file objections as provided in the Local Rules, as well as to review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX F

Court of Appeal, Second Appellate District, Division Three - No. B252979

S239407

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSEPH CARL STANLEY, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

MAR 01 2017

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

Filed 12/8/16 P. v. Stanley CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CARL STANLEY, Defendant and Appellant.	B252979 Los Angeles County Super. Ct. No. BA348056

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Jr., Judge. Affirmed in part as modified and reversed in part.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James W. Bilderback II, and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Joseph Carl Stanley was sentenced to two consecutive terms of life without the possibility of parole after a jury convicted him of murdering brothers Manuel and Roberto Romero.[1] On appeal, defendant contends, notwithstanding this court's decision in *Stanley v. Superior Court* (2012) 206 Cal.App.4th 265 (*Stanley I*), that he did not impliedly consent to a mistrial in his case, and that the Double Jeopardy Clause therefore barred his retrial. We conclude *Stanley I* is law of the case and therefore do not reexamine the merits of that opinion; thus, retrial was proper.

Defendant also contends his convictions are not supported by substantial evidence. We reject defendant's challenge to the sufficiency of the evidence. We also conclude the trial court erroneously imposed state surcharges and penalty assessments totaling $324, an inapplicable $300 parole revocation fine, and four, rather than three, $30 court facilities assessments. We therefore reverse the state surcharge, penalty assessments, and fine, and modify the judgment to remove the extra $30 assessment. In all other respects, and as modified, the judgment is affirmed.

PROCEDURAL BACKGROUND

By information filed October 14, 2009, defendant was charged with premeditated murder of Manuel and Roberto Romero (Pen. Code,[2] § 187, subd. (a); counts 1 and 2); attempted

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1 Because the Romeros share a last name, for clarity we sometimes refer to them by their first names.

2 Undesignated statutory references are to the Penal Code.

possession for sale of methamphetamine (§ 664, Health & Saf. Code, § 11378; count 3); and possession of a firearm by a felon with a prior (former § 12021, subd. (a)(1); count 4).[3] As to counts 1 and 2, the information alleged defendant committed multiple murders—a special circumstance under section 190.2, subdivision (a)(3)—and during the commission of the murders, defendant personally and intentionally discharged a firearm (§ 12022.53, subds. (b) [personal use], (c) [personal and intentional discharge], (d) [personal and intentional discharge causing death]). The information also alleged three 32-year-old prior convictions and one 35-year-old juvenile adjudication constituted strike priors (§ 1170.12, subds. (a)–(d); § 667, subd. (b)–(i)) and serious-felony priors (§ 667, subd. (a)(1)). Defendant pled not guilty and denied the allegations.

1. *Mistrial and Stanley I.*

On Friday, November 4, 2011, a jury was sworn to try the case. The following Monday, November 7, 2011, the court declared a mistrial and set a new trial date. On December 12, 2011, defendant moved for dismissal based on double jeopardy and also proffered a plea of once in jeopardy. The trial court denied the dismissal motion after finding defense counsel had impliedly consented to dismissal of the jury and the resulting

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[3] The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005, 16010.) Effective January 1, 2012, former section 12021, subdivision (a) (count 4) was recodified without substantive change at section 29800, subdivision (a). (Stats. 2010, ch. 711 (S.B.1080), § 4 [repealed]; stats. 2010, ch. 711 (S.B.1080), § 6 [reenacted].)

mistrial. In light of that conclusion, the trial court refused to accept the proffered plea of once in jeopardy.[4] Defendant petitioned this court for writ of prohibition and a stay was granted. On May 22, 2012, a different panel of this court denied the petition by published decision on the ground that defendant had impliedly consented to a mistrial. (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 294–295 (*Stanley I*).) The California Supreme Court denied review. Proceedings resumed in the trial court on September 28, 2012.

On November 8, 2012, defendant, through counsel, filed a federal habeas petition in the United States District Court for the Central District of California. (See *Stanley v. Baca* (C.D.Cal. June 25, 2013, No. CV 12-9569-JAK (SH)) 2013 U.S. Dist. Lexis 89456.) Defendant claimed he was being prosecuted in violation of the Double Jeopardy Clause because the mistrial was declared without necessity or consent. The district court found abstention proper under *Younger v. Harris* (1971) 401 U.S. 37, 43–54 [91 S.Ct. 746] and dismissed the petition on June 25, 2013. (*Stanley v. Baca*, *supra*, at p. *6.) On July 3, 2013, defendant appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. (See *Stanley v. Baca* (9th Cir. Feb. 19, 2014, No. 13-56172) 555 Fed.Appx. 707 (*Stanley II*).) On July 8, 2013, the Ninth Circuit denied defendant's request to stay his trial, indicating the denial was without prejudice to defendant renewing his request before the state trial court. Trial was not stayed, and jury selection began the next day. Defendant's

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[4] Defendant has not argued that the trial court erred in rejecting his plea of once in jeopardy.

federal appeal was not resolved until after he was tried, convicted, and sentenced in this case.

2. *The second trial.*

Defendant's second jury trial began on July 15, 2013. After an eight-day trial followed by nearly eight hours of deliberations, a jury found defendant guilty of the first degree, premeditated murders of Manuel and Roberto Romero (§ 187, subd. (a); counts 1 and 2), and found true the multiple-murder special circumstance (§ 190.2, subd. (a)(3)) as well as the firearm allegations (§ 12022.53, subd. (b)–(d)). The jury also convicted defendant of possession of a firearm by a felon (former § 12021, subd. (a)(1); count 4)[5] but acquitted him of attempted possession of methamphetamine for sale (§ 664, Health & Saf. Code, § 11378; count 3).

Defendant waived jury trial on the prior-conviction allegations. After a bench trial, the court found the prior strikes true. The court denied defendant's motion for a new trial and his motion to reduce the degree of the crime, and sentenced him to two consecutive terms of life without the possibility of parole plus two consecutive terms of 25 years to life. For count 1 (§ 187, subd. (a)), the court sentenced defendant to life without the possibility of parole based on the special circumstance (§ 190.2, subd. (a)(3)) and the strike priors (§ 1170.12, subds. (a)–(d); § 667, subd. (b)–(i)); the court added 25 years to life for the firearm allegation (§ 12022.53, subd. (d) [personal use and discharge causing death]), to run consecutive, and stayed the remaining

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[5] For purposes of count 4 only, the court found defendant had been convicted of the predicate felony.

firearm allegations under section 12022.5, subdivision (f). The court imposed an identical, consecutive sentence for count 2 (§ 187, subd. (a)). The court stayed count 4 under section 654, and struck the serious-felony prior under section 667, subdivision (a)(2).

Defendant filed a timely notice of appeal on November 19, 2013.

3. *Stanley II and Stanley III.*

On February 19, 2014, after briefing and oral argument, the Ninth Circuit vacated the district court's order dismissing defendant's federal writ petition and remanded for an evidentiary hearing to determine whether he impliedly consented to the discharge of his first jury and the resulting mistrial. (*Stanley II*, *supra*, 555 Fed.Appx. at pp. 708–709.) This appeal was fully briefed on January 8, 2015. On May 13, 2015, we deferred further consideration of the appeal pending resolution of defendant's petition for writ of habeas corpus in *Stanley II*.

On July 24, 2015, the Honorable Gail J. Standish, United States Magistrate Judge, issued a report and recommendation, which the district court adopted on September 15, 2015. (*Stanley v. Baca* (C.D.Cal. 2015) 137 F.Supp.3d 1192 (*Stanley III*).) The district court characterized defendant's pending federal writ petition as a petition for writ of habeas corpus under 28 U.S.C § 2254 and ordered him to address "how he wishes to proceed, including whether he wishes to proceed solely with his existing double jeopardy claim or have this action stayed while he exhausts any additional claims arising from his intervening conviction." (*Stanley III*, at p. 1193.) On October 15, 2015, defendant asked the district court to stay his federal case until his state appeal is resolved. The district court granted his

request, and on December 4, 2015, we resumed consideration of this appeal.

FACTS

In May 2008, defendant was living in Las Vegas with his wife, Tracey. He owned a barbershop, and wore his hair in dreadlocks, with the sides of his head shaved—a style described at trial as a dreadlock mohawk. Although he lived in Las Vegas, defendant grew up in Los Angeles—on West 74th Street between Figueroa and Flower—and still had family in the area. Defendant's customers called him by his childhood nickname, JoJo.

Defendant's mobile phone number was (702) 352-5550. The phone was used on May 3, 2008, in North Las Vegas, Nevada. Late that night, defendant traveled from North Las Vegas to Los Angeles. By 3:17 a.m. on May 4, 2008, defendant had reached South Los Angeles. On May 4, 2008, defendant spent the day in the city.

Manuel Romero lived in a van, which he parked in front of his family's house at 528 West 74th Street, between Hoover and Figueroa in Los Angeles. Manuel and his brother Roberto had a nephew named Jorge Duke. Manuel raised Duke, and Duke thought of Manuel as his father. Kathi Preston also lived on West 74th Street, west of Figueroa. Her mother, Jean Preston,[6] and her son, Devondre Haynes, lived with her.

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[6] Because Kathi and Jean Preston share a last name, we refer to them by their first names.

1. *May 4, 2008.*

Around 5:00 p.m. on May 4, 2008, defendant arrived at Kathi's house in an SUV. He wore his hair in blonde and black dreadlocks with the sides of his head shaved and was accompanied by an African-American woman. Defendant was looking for Tymore Haynes—defendant knew him as T-Mo—a childhood friend who used to live there. T-Mo was Devondre Haynes's father; he died in 1991. Defendant had grown up down the street from T-Mo—and from Kathi. Haynes, however, had never met him. Kathi and Haynes visited with defendant for about an hour.

Around 6:00 p.m., defendant and Haynes left Kathi's house together, crossed the street, and walked toward the nearby Romero home. Haynes was in his early 30's and wearing a blue sweater. Defendant was wearing a white t-shirt and a big, gold chain. A group of people, including Duke and Manuel, was hanging out next to Manuel's van; defendant and Haynes joined them. Roberto arrived sometime after dark, and by 8:30 p.m., Roberto Carlos Bustos (Bustos) had parked his car behind the van. Bustos reclined his front seat and remained in the car, resting. Everyone was smoking marijuana and drinking malt liquor and beer. Defendant and Haynes ultimately stayed for three or four hours.[7]

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[7] The introductory paragraph of the dissent characterizes Haynes as an "in-custody murder-suspect." (Dis. opn., *post*, at p. 1.) In fact, Haynes was a percipient witness to the shooting, and although Haynes did not have a preexisting relationship with defendant, the record reflects that they spent several hours

Defendant told Manuel and Duke that he used to live on the block but had moved to Las Vegas. To Duke, it sounded like defendant was speaking with a Jamaican or Belizean accent, using phrases like "me likie" and "I love Cali people." According to Haynes, defendant asked Manuel about "buying some dope." Though Duke recalled Haynes speaking to Manuel, he did not know who asked Manuel about drugs. Manuel started making phone calls. Duke also heard defendant tell Manuel's friend Paisan that "he triples it out there[,]" and "gets a good profit." Someone else in the group mentioned weapons. Duke looked around and saw a bulky shape on defendant's waistband. Earlier in the day, Haynes had noticed a black handgun tucked in defendant's waistband.[8]

Defendant's female companion returned in the SUV and parked across the street. Defendant left the party with the woman; they walked down West 74th Street together to look at defendant's old house, which was four or five houses away. At 8:02 p.m., defendant's mobile phone was used to call Manuel's phone. The call was made within a mile of Manuel's van.

While defendant showed the woman his old neighborhood, Haynes waited by the van with Manuel, smoking marijuana and drinking beer. At some point, Haynes's brother Rodney Kirk

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together before the shooting. The trier of fact reasonably could credit Haynes's identification of defendant as the shooter.

[8] Haynes's preliminary hearing testimony was inconsistent on this point. At the preliminary hearing, Haynes testified he did not see a gun but was told defendant had one.

joined them. The conversation made Duke uncomfortable, and he left.

As Duke was leaving, the couple returned. The woman got back inside the SUV, and defendant returned to the group next to the van. Manuel and Roberto walked down a nearby alley. They returned 15 minutes later. Manuel went to the van; Roberto stood in the street. Manuel emerged from the van's rear passenger door, followed a few minutes later by defendant. Defendant looked directly at Bustos, who was still reclining in his car. Haynes was standing on the grass adjacent to the curb; Manuel and defendant stood between Haynes and the van.

2. *The shooting and aftermath.*

Around 8:45 p.m., Haynes saw a muzzle flash and heard a shot. Bustos saw defendant raise his arm, saw muzzle flashes, and saw Manuel fall. Meanwhile, Roberto was still standing in the nearby street. Bustos saw defendant walk to the front of the van, then heard more gunshots. As defendant walked past Bustos, he fired one more time. Haynes and Kirk ran away. Bustos saw defendant enter a nearby SUV; the SUV drove off "really fast[.]"

Police responded to the Romero home moments later. A Chevrolet Suburban or Tahoe was pulling away as they approached. Police found Manuel lying on the grass near his van. He was dead—killed by a gunshot wound to the head. Roberto was lying on the ground between two parked cars. He was alive, but died en route to the hospital from multiple gunshot wounds. An hour later, defendant was still in the neighborhood; he began the drive back to Las Vegas around 10:00 p.m. and arrived home by the next morning.

At the scene, police found five used nine-millimeter shell casings and one live nine-millimeter round. A search of Manuel's pockets revealed $219 cash, a mobile phone, and a slip of paper with the phone number (702) 352-5550 and the name JoJo. A search of the van revealed a small bag of white powder; the powder was not a controlled substance. The police collected fingerprints from the van and surrounding items; none of the fingerprints matched defendant's. Though the shell casings and live round were not tested for fingerprints, police did swab them for DNA. However, the lab was unable to extract a DNA profile. The record does not reveal whether police collected or analyzed additional DNA or other physical evidence.

3. *The investigation.*

On October 17, 2008, Haynes was taken into custody for the unrelated murder of Kevin Baldwin. Haynes thought—and at trial, appeared to still think—he was a suspect not only in the Baldwin murder, but also in the murders of Manuel and Roberto. During his interrogation, Haynes was shown a six-pack photographic lineup; he identified someone other than defendant as looking like the shooter. When the interview was over, police arrested him for the murder of Kevin Baldwin.

The police interrogated Haynes again four days later, and this time, Haynes identified defendant as the shooter.[9] Haynes

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[9] As discussed in the body of the opinion, though police showed Haynes the same six-pack array the court ruled unduly influenced two other witness identifications, the court denied the defense motion to exclude Haynes's identification. Although there were lengthy proceedings on this issue before the first trial, the record on appeal did not contain any motions or transcripts of

believed the police wanted him to identify someone in the Romero killings, and thought that if he failed to do so, he might be prosecuted for those murders too. As they began questioning him, the police told Haynes, "So whether this guy represented himself one way or whatever it might be, we just need to know everything—because it comes out later and then you don't come up front with it and you're telling me that's all the truth then later it looks bad for you because then it looks like you were hiding something." Haynes then described the events of May 4, 2008. He explained that the reason he did not identify defendant during their earlier interview was that he feared for his own safety and his family's safety.[10] Police released Haynes from custody that day. He was not prosecuted in either case.

A week later, on October 28, 2008, defendant was arrested in Las Vegas. At the time of his arrest, defendant wore his hair in dreadlocks, with the sides of his head shaved. He did not

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proceedings that occurred before November 7, 2011, and appellate counsel did not move to correct or augment the record to include them. In light of the seriousness of this case and the importance of this portion of the record, we augmented the record on our own motion.

10 On direct examination, Haynes testified that he was still afraid for the safety of his grandmother, Jean, who continued to live in the house. Then, on cross-examination, he explained, as he did at the preliminary hearing, that he had identified defendant as the shooter because he feared retaliation from the real culprit, not defendant. But on redirect, Haynes testified again that defendant was the shooter.

speak with an accent, and did not have any tattoos. A search of his house did not uncover any evidence of drug sales.

4. *Defense evidence.*

The defense acknowledged defendant was in Los Angeles on the day of the murders, but argued it was for an innocent purpose—defendant came to the city to see his family and his old neighborhood, spent some time there, then went home. The phone records and most of the testimony were consistent with that theory. As for the eyewitness testimony, the defense argued Bustos's identification was more consistent with testimony by Carlos Ramos Montoya, who also witnessed the shooting, than it was with the contradictory and confusing version presented by Haynes. Since Haynes was a liar trying to save his own skin, the jury should disregard Haynes's identification.

Montoya testified that on the evening of May 4, 2008, he drove to his sister's house on West 74th Street. Before Montoya got out of his car, his friend Manuel called out to him. As Montoya walked toward his sister's house, he saw Manuel speaking with two African-American men in a parked SUV. The driver had long braids covering his head and the passenger was nearly bald. Manuel turned away from the men and began walking back to his van.

The men got out of the SUV and followed Manuel. They were angry and aggressive, used vulgar language, and carried at least one gun. The men walked past Montoya. He noted their size, shoes, clothing, and hair. The man with braids was wearing a white and blue sleeveless shirt and denim shorts; he was not wearing a necklace or a chain. He had a tattoo on his left shoulder, which Montoya attempted to describe to detectives. The defense emphasized that Montoya's testimony was consistent

with the description Bustos gave the police: the shooter had long braids covering his head and was wearing a sleeveless shirt.

The defense expert, Dr. Kathy Pezdek, testified about factors that reduce the accuracy of eyewitness identifications. These include lighting and distance; length of exposure to a suspect; weapon focus; cross-racial identification; disguise; memory details; the passage of time between the event and the identification; lineup procedures—including biased lineups, double-blind procedures, and admonition comprehension; and bias of in-court identifications. Finally, Dr. Pezdek pointed to the "large number of studies" concluding the certainty of an eyewitness identification does not correlate with its accuracy.

Finally, the defense called Devondre Haynes. Haynes admitted drugs were sold out of his house. In 2003, he was convicted of felony drug sales. In contrast to Haynes, the defense argued, the police had uncovered no evidence connecting defendant to the drug business.

CONTENTIONS

Defendant contends double jeopardy barred retrial in this case and asks us to reconsider our opinion in *Stanley I*.[11] He also

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[11] In the appellant's opening brief, defendant *acknowledges* that his contention that retrial was barred by double jeopardy was rejected by this court in *Stanley I* "and is now the law of the case." However, he requests that in light of the Ninth Circuit's decision in *Stanley II*, this court reconsider its previous decision in *Stanley I* that there was implied consent to a mistrial. The opening brief also indicates that defendant is required to raise the double jeopardy claim at this juncture in order to petition for review of the issue.

contends his convictions are not supported by substantial evidence.

DISCUSSION

1. *This court's prior decision in* Stanley I, *which is law of the case, established that retrial was not barred by double jeopardy.*

a. *Double jeopardy.*

The double jeopardy clauses of the federal and state constitutions bar retrial of a criminal defendant following his acquittal. (*People v. Batts* (2003) 30 Cal.4th 660, 679-680 (*Batts*); *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 (*Curry*).) It is long established that once jeopardy has attached, discharge of the jury without a verdict is tantamount to an acquittal and prevents a retrial unless the defendant consented to the discharge or legal necessity required it. (*Id.* at p. 712.) Legal necessity exists, for example, "where physical causes beyond the control of the court such as the death, illness or absence of a judge, juror or the defendant make it impossible to continue. [Citation.] Legal necessity has also been found where it becomes necessary to replace defense counsel during trial due to the disappearance of counsel at a critical stage of trial." (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175.)

A defendant may also consent to a mistrial, either expressly or impliedly, and thereby waive any later double jeopardy claim. (*Batts*, *supra*, 30 Cal.4th at pp. 679-682.) Implied consent may be found where a defendant's "affirmative conduct . . . clearly evidences consent" to a mistrial. (*Curry*, *supra*, 2 Cal.3d at p. 713.) For example, consent may be implied when "the defendant actually initiates or joins in a motion for mistrial [citation]." (*Ibid.*) But consent will not be inferred from

silence, failure to object to a proposed order of mistrial, or simply bringing a matter to the court's attention. (*Ibid.*; *People v. Compton* (1971) 6 Cal.3d 55, 62–63.)

b. Stanley I *established the law of the case, so as to defeat defendant's contention that his retrial was barred.*

Defendant contends the court in this case erred in denying his motion to dismiss for a double jeopardy violation because the court dismissed his first jury without legal necessity or consent and his convictions were therefore obtained in violation of the Double Jeopardy Clause.[12] Defendant's attempt to avoid *Stanley I* is unavailing.

(1) Stanley I *determined that defense counsel impliedly consented to the mistrial.*

In *Stanley I*, this court addressed defendant's double jeopardy claim and concluded that defense counsel impliedly consented to a mistrial. (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 287-289.)[13] *Stanley I* acknowledged the rule of *Curry*, *supra*,

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[12] As for the trial court's refusal to accept defendant's proffered plea of once in jeopardy, as indicated, defendant has not argued that the trial court erred in rejecting his plea. Instead, defendant raised his claim of double jeopardy below by way of a pretrial motion to dismiss, which is an appropriate method of asserting that the accusatory pleading is allegedly barred by double jeopardy. (*Batts*, *supra*, 30 Cal.4th at p. 676.) Defendant then sought a writ of prohibition in *Stanley I*, challenging the trial court's denial of his motion to dismiss.

[13] We disagree with the dissent's discussion and analysis of the events leading up to the dismissal of the first jury. For example, with respect to Juror 4, who asked to be excused in order to stay at home with his fiancée who had just broken her

2 Cal.3d at page 713, that consent to a mistrial may not be implied from *mere silence*, but following a lengthy discussion of case law as applied to its fact situation, concluded this was not a case of defense counsel's " 'mere silence.' " (*Stanley I*, *supra*, at pp. 281, 288.) *Stanley I* reasoned, "[w]hile it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial," defense counsel "previously fully participated in the discussion and led

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ankle, the dissent states "there are disputed factual issues *as to whether the court intended to excuse* [Juror 4] and whether defense counsel wanted to keep him." (Dis. opn., *post*, at pp. 7-8, italics added.) The dissent's reading of the record is at odds with *Stanley I*, which stated "it appears that the trial court intended to excuse the juror [Juror 4]." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 271.) The dissent simply seeks to substitute its understanding of the record for *Stanley I*'s interpretation.

Similarly, with respect to whether Juror 4 could have served, the dissent states he did not "volunteer a solution" when the trial court asked for an alternative that would enable him to serve. (Dis. opn., *post*, at p. 7.) In this regard, *Stanley I* actually stated: "When the trial court had sought alternatives to dismissing [Juror 4], defense counsel had requested only that the juror be asked if there was any alternative to him being the sole caretaker. The question was posed to the juror *and he had responded that there was not.*" (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 271-272, italics added.) Although it was shown in *Stanley I* that Juror 4 had no feasible alternative to serving as his fiancee's caretaker, the dissent invites speculation that some alternative existed that might have enabled Juror 4 to serve. The law of the case doctrine does not permit us to reweigh the evidence in this regard.

the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court." (*Id.* at p. 288.) *Stanley I* construed this participation as affirmative conduct sufficient to support the trial court's finding that defendant impliedly consented to the mistrial. (*Id.* at pp. 287-289.)

(2) *The doctrine of law of the case.*

Under the law of the case doctrine, when an appellate court " ' "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." ' " (*People v. Stanley* (1995) 10 Cal.4th 764, 786 (*Stanley*); see, e.g. *People v. Jurado* (2006) 38 Cal.4th 72, 94-97 [double jeopardy claim barred by law of the case doctrine; *People v. Sons* (2008) 164 Cal.App.4th 90, 98-99 [same].)

It is "clear that the law of the case doctrine can apply to pretrial writ proceedings. When the appellate court issues an alternative writ [or an order to show cause], the matter is fully briefed, there is an opportunity for oral argument, and the cause is decided by a written opinion. The resultant holding establishes law of the case upon a later appeal from the final judgment. [Citations.]" (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894 (*Kowis*).)

If the rule were otherwise, a petitioner who was unsuccessful in the pretrial writ proceeding would be afforded a second bite of the apple, at the time of the subsequent appeal from the final judgment—the appellate court's decision on the alternative writ or order to show cause would be relegated to the status of a tentative opinion, subject to de novo review on the

appeal from the judgment. Therefore, the law of the case doctrine requires that an appellate decision in a writ proceeding, following plenary briefing, the opportunity for oral argument, and a written opinion, is entitled to finality and must be adhered to as the case progresses.

"The principal reason for the [law of the case] doctrine is judicial economy. 'Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding.' [Citation.] Because the rule is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' ([*People v.*] *Shuey* [(1975)] 13 Cal.3d [835,] 846 [disapproved on other grounds as stated in *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 4.]), or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]." (*Stanley*, *supra*, 10 Cal.4th at pp. 786–787.)

A mistaken ruling is not enough to avoid the doctrine: "Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." (*Tally v. Ganahl* (1907) 151 Cal. 418, 421, quoted with approval in *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 459.) Therefore, irrespective of whether *Stanley I* misapplied *Curry* and its progeny, or whether the current panel would have reached a different conclusion on the facts presented, if the law of the case doctrine "is to be other than an empty formalism more

must be shown than that a court on a subsequent appeal disagrees with a prior appellate determination. Otherwise the doctrine would lose all vitality and . . . would be reduced to a vapid academic exercise." (*Shuey*, *supra*, 13 Cal.3d at p. 846.)

(3) *No issue as to retroactivity;* Stanley I *implicitly but necessarily decided that its holding applies to this defendant.*

Defendant contends *Stanley I* announced a new rule of law which should not be retroactively applied to him. The argument is unpersuasive.

The doctrine of law of the case is applicable not only to questions expressly decided but also to questions *implicitly* decided because they were essential to the decision on the prior appeal. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399 (*Olson*).)[14]

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[14] The dissent rejects the Supreme Court's language in *Olson* that the doctrine of law of the case extends to questions "*implicitly* decided because they were essential to the decision on the prior appeal" (35 Cal.3d at p. 399, italics added) as mere dictum. Instead of following *Olson*, the dissent takes the position that the Supreme Court's later decision in *Kowis* established that the law-of-the-case doctrine "does not apply to issues that could have been raised, but were not. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.)" (Dis. opn., *post*, at p. 15.) However, *Kowis* does not support the point for which it is cited by the dissent, and *Kowis* did not overrule or supersede *Olson*. Our reading of *Kowis* is that it stands for the proposition that the summary denial of a writ petition, without issuance of an alternative writ and the opportunity for oral argument, does not establish law of the case. (*Kowis*, *supra*, 3 Cal.4th at pp. 892-901.)

Although *Stanley I* did not expressly address the issue of retroactivity, *Stanley I* implicitly decided the retroactivity issue in the People's favor when it denied defendant's request for a writ of prohibition. The question of retroactivity was essential to the decision on the prior appeal, because if *Stanley I* did announce a new rule which was to apply purely prospectively, *Stanley I* would have granted defendant's request for a writ of prohibition.

Thus, we conclude *Stanley I* implicitly but necessarily resolved the retroactivity question in the People's favor.[15] [16]

As for the dissent's dismissal of the relevant language in *Olson* as mere dictum, we are mindful that "our Supreme Court's decisions bind us, and [even] its dicta command our serious respect." (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66.) We are also not persuaded by the dissent's theory that case law *prior to* the 1983 *Olson* decision impliedly undermined *Olson*, and by the dissent's assertion that "*Olson* is bad law." (Dis. opn., *post*, at p. 18.) The dissent does not cite any post-*Olson* decision from the past 33 years calling into question *Olson*'s soundness. As an intermediate appellate court, we are bound by *Olson*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction"].)

[15] We reject the dissent's suggestion that the People have conceded *Stanley I* is not law of the case with respect to the issue of retroactivity. The People have argued there was no need for a retroactivity analysis in *Stanley I* because that decision did not make any new law. We agree that *Stanley I* simply applied existing law to a given fact situation. Further, *Stanley I* implicitly decided there was no issue as to retroactivity, by denying the petition for a writ of prohibition and thereby applying its legal determination to defendant's case.

(4) *No basis here for avoidance of law of the case; no manifest injustice in applying the holding in* Stanley I *to this defendant.*

The previous panel, in *Stanley I*, was presented with the same facts pertaining to the issue of double jeopardy. *Stanley I* found defense counsel's affirmative conduct amounted to implied consent. *Stanley I* reasoned that "despite defendant's argument to the contrary, we conclude that the instant case is not controlled by *Curry*. This is not a case of 'mere silence,' and certainly not a case of silence following a statement indicating a lack of consent to a mistrial. While it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial, he had previously fully participated in the discussion and led the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court. Thus, the issue presented by this case is one of whether defense counsel's affirmative conduct was sufficient to give rise to an implication of consent. We conclude that it was." (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 287-288.)

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[16] Because *Stanley I* implicitly determined its holding would apply to defendant, and *Stanley I*'s resolution of that issue is law of the case, it is unnecessary to address the dissent's extensive analysis as to why *Stanley I* should not be applied retroactively. Therefore, we do not respond, inter alia, to the dissent's arguments that the equities favor prospective application of *Stanley I*, that learned treatises did not place counsel on notice of the rule announced in *Stanley I*, and that ethics requirements did not place counsel on notice of the rule announced in *Stanley I*.

Even assuming *Stanley I* misread *Curry* by holding that defense counsel's affirmative conduct constituted implied consent, *Stanley I* contained an extensive discussion of *Curry* and the case law on which *Curry* relied, to wit, *Mitchell v. Superior Court* (1962) 207 Cal.App.2d 643, *Hutson v. Superior Court* (1962) 203 Cal.App.2d 687, and *People v. Valenti* (1957) 49 Cal.2d 199.) (*Stanley I, supra,* 206 Cal.App.4th at pp. 281-287.) *Stanley I* then went on to conclude that *Curry* should not apply when conduct preceding defense counsel's silence leads the court to reasonably believe that defendant consents to the mistrial. (*Stanley I,* at pp. 287-289.) At this juncture, defendant "simply seeks to have a subsequent appellate panel disagree with the first appellate panel." (*People v. Sons, supra,* 164 Cal.App.4th at p. 99.) However, as indicated, mere disagreement with the earlier decision in *Stanley I* is not a basis for departing from law of the case. (*Morohoshi v. Pacific Home, supra,* 34 Cal.4th at p. 491.)[17]

Defendant also argues that the Ninth Circuit's opinion in *Stanley II* "altered or clarified" "the controlling rules of law" such

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[17] Although the denial of a petition for review is not regarded as expressing approval of the Court of Appeal's opinion (*DiGenova v. State Bd. of Ed.* (1962) 57 Cal.2d 167, 178), the denial of review is not "without significance" (*ibid.*), and we observe that the California Supreme Court denied a petition for review in *Stanley I.* (See *People v. Sons, supra,* 164 Cal.App.4th at p. 98 [noting that California Supreme Court denied petition for review of prior published Court of Appeal opinion (*Sons v. Superior Court* (2004) 125 Cal.App.4th 110) which rejected appellant's double jeopardy claim, denied a petition for writ of prohibition, and was law of the case].)

that we must disregard the law of the case. (*Stanley*, *supra*, 10 Cal.4th at p. 787.) We disagree. As a preliminary matter, decisions of intermediate level federal courts are not binding on us. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 882.) Moreover, *Stanley II* did not change the legal landscape with respect to double jeopardy; in *Stanley II*, the Ninth Circuit simply found that "[o]n the present record, we are unable to determine whether mistrial was supported by implied consent" (*Stanley II*, *supra*, 555 Fed.Appx. at p. 708), and it remanded to the district court for a hearing to determine whether mistrial was supported by implied consent. (*Id.* at p. 709.)

Finally, we reject the contention that applying *Stanley I* as law of the case will result in " 'an unjust decision.' " (*People v. Shuey*, *supra*, 13 Cal.3d at p. 842.) "As the United States Supreme Court stated in a somewhat different context, 'There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. . . . .' (*Ohio v. Johnson* (1984) 467 U.S. 493, 502 [104 S.Ct. 2536].) Clearly, there was no government overreaching by the prosecutor in this case; [the mistrial was] just an attempt by the trial court to conserve judicial resources when it became reasonably apparent that the impaneled jury had lost so many members as to make it unlikely that sufficient jurors would remain to render a verdict in what promised to be a lengthy trial." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 290, fn. omitted.)

We are guided by the recognition that "[a]t its core, the double jeopardy clause 'protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' (*Green v. United States* (1957) 355 U.S. 184, 187 [78 S.Ct. 221].) The policy underlying the

double jeopardy protection 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.' (*Id.* at p. 187.)" (*People v. Eroshevich* (2014) 60 Cal.4th 583, 588.) The fundamental principle is "that '[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' [Citation.] This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. [Citations.]" (*Tibbs v. Florida* (1982) 457 U.S. 31, 41–42 [102 S.Ct. 2211].) None of these things happened in the case at bar.

In short, as *Stanley I* observed, there was no governmental overreaching by the prosecutor; "the prosecution had only the opportunity to impanel a jury." (*Stanley I, supra,* 206 Cal.App.4th at p. 290, fn. 34.) Under these circumstances, we do not perceive a manifest injustice in adhering to *Stanley I* as law of the case.[18]

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[18] The dissent asserts it is manifestly unjust to apply *Stanley I* as law of the case because defendant was entitled to a jury trial on disputed factual issues underlying his plea of once in jeopardy. However, defendant has not contended on appeal that the trial court erred in refusing to entertain his plea of once in jeopardy, that issue has not been briefed, and is simply not before us. (See

For these reasons, we reject defendant's argument that retrial was barred by double jeopardy.

2. *No merit to defendant's challenge to sufficiency of the evidence.*

Defendant contends, given the weakness of the eyewitness identifications, the lack of physical evidence, and the jury's apparent rejection of the prosecution's theory of the case, there is insufficient evidence to support his convictions.

Our review is governed by settled principles. In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies where the conviction rests

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fn. 12, *ante*.) That argument not having been made by defendant, it is inappropriate for this court to now take the position that *Stanley I* is manifestly unjust because it denied defendant a jury trial on disputed factual issues. Our reading of defendant's appellate arguments herein is that this court in *Stanley I* erred in finding there was implied consent to a mistrial. We have already addressed that issue.

primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Except for accomplice testimony, which must be corroborated, the testimony of a single witness can be sufficient to uphold a conviction—even when there is significant countervailing evidence, or the testimony is subject to justifiable suspicion. (*Zamudio*, *supra*, 43 Cal.4th at p. 357; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Accordingly, we may not reverse for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

a. *Eyewitness testimony.*

Defendant emphasizes that no physical evidence connected him to the shootings, and he argues the jury had good reason to regard the eyewitness testimony with suspicion. Defendant suggests the eyewitness testimony in this case was particularly unworthy of belief because of the nature of the crime, the different races of the shooter and some witnesses, the importance of the eyewitness evidence to the case, and improper police tactics used to elicit some identifications.[19]

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[19] "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for

In this case, the trial court suppressed the testimony of two eyewitnesses because the investigating detectives used unduly suggestive procedures to obtain the identifications.[20] Although two additional eyewitnesses, Jorge Duke and Devondre Haynes, identified defendant from the same six-pack used by the excluded witnesses, the trial court allowed the prosecution to present their identification testimony over defense objection.

Defendant also raises a concern with respect to the testimony of Bustos—the only witness other than Haynes to identify defendant as the shooter. Immediately after the shooting, Bustos identified two people as the possible shooter—a civilian bystander and a photograph of a dead gang member on the police station wall. Then, eleven days after the shooting, Bustos was shown the suggestive six-pack.[21] Bustos took his time and looked carefully at the pictures. He told the detective that while another man looked the most like the shooter, the shooter was not in the lineup. Montoya and Bustos both

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observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*United States v. Wade* (1967) 388 U.S. 218, 228–229, fn. omitted.)

[20] Among other issues, detectives presented witnesses with a six-pack photographic lineup in which defendant was the only person with braids and his photograph was a different color than the other photos.

[21] The police used the same six-pack for every witness. The court denied the defense motion to exclude the identifications by Duke and Haynes, but it does not appear the defense moved to exclude the Bustos identification.

described a man with a tattoo, a white tank top, and tight braids around his entire head. Bustos told the detective that the hair in the photos did not match—defendant had a dreadlock mohawk, not tight braids—but the detective asked Bustos to look again and focus on their faces. Bustos looked again. Again, Bustos told the detective the shooter was not in the lineup. This time, the detective asked Bustos to focus on a series of facial features. Bustos looked again. Again, Bustos told the detective the shooter was not in the lineup. Bustos could not remember whether the detective next suggested the lighting in the photos might be different—but he did remember that, 11 days after the shooting, the shooter's photograph was not in the six-pack. Bustos testified he did not pick defendant out of the lineup because the shooter "wasn't there. It wasn't him. I said that one of them looked a little bit like him, but he was not there."

A year and a half later, at the preliminary hearing, Bustos identified defendant for the first time. He indicated the shooter was wearing blue and was sitting "with the attorney or, you know, the other white male." At the time, defendant was wearing a blue prison jumpsuit, was handcuffed to a chair, and was the only African-American man in the room. Bustos also identified defendant at trial.[22] The defense expert explained the problem with identifications like these: "If, in fact, there is only one

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[22] We note the prosecutor apparently stood behind defendant during in-court identifications by at least one witness. The record does not reveal whether she used this technique during every in-court identification, and it does not appear that defense counsel objected.

person at counsel table who even remotely matches the description that [the witness] gave a year or more [after the crime], it renders that identification invalid. It's not a real test of whether they recognize what the perpetrator looked like. [¶] Also, the courtroom situation is a biased context, in that eyewitnesses often assume that by the time they have someone in court, they have other compelling evidence against that person, and [the witness's] job is to then identify that person . . . . So it's a biased context for making an identification, as opposed to a fair and unbiased photographic lineup administered closer in time to the situation."

However, a positive in-court identification following an earlier failure to identify need not necessarily be excluded. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197.) Further, Bustos previously had seen defendant in the area at least once, and Bustos testified it was easier for him to recognize defendant in court than in a photograph. Moreover, in the end, the jury was well apprised of all these problems. During the trial, defense counsel extensively and skillfully cross-examined eyewitnesses concerning the accuracy and reliability of their memories; a defense expert testified about the pitfalls of eyewitness identifications; the court gave the jury a thorough instruction explaining how to evaluate this type of evidence (CALCRIM No. 315); and in closing argument, defense counsel argued at length about the weaknesses of eyewitness identification, including the specific problems of cross-racial identification and the effects of stress on memory and of information received after the event.

The jury was provided with all the information it needed to evaluate the reliability and credibility of these witnesses—and

the record reveals that the jury took its responsibility seriously. The jurors requested read-back of the eyewitness testimony; after a one-week trial, they deliberated for nearly eight hours over three days; and they acquitted on count 3. We may not reweigh the evidence or reevaluate the witnesses' credibility. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Despite the concerns relating to Bustos's testimony, the jury believed him; under these circumstances—and in light of Haynes's testimony and the corroborating evidence—we cannot second-guess the jury's determination.

b. *We may consider the corroborating evidence notwithstanding the jury's verdict on count 3.*

Defendant argues the eyewitness testimony was particularly problematic because the jury acquitted him of attempted possession of methamphetamine for sale, and we must therefore reject the prosecution's motive theory – that the shooting was in retaliation for an attempt to sell him baking soda in lieu of drugs – and must also disregard the evidence supporting it; once we discard that evidence, he argues, only the eyewitness testimony remains.

With respect to the drug evidence, we note at the outset that the prosecution is not generally required to prove motive. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504 [motive describes the reason a person chooses to commit a crime and is usually not an element of the offense]; see CALCRIM No. 370 [same].) In any event, in light of the evidence that Manuel's van contained only a single baggy that did not contain a controlled substance, the count 3 verdict does not necessarily imply the jury rejected the prosecution's theory of the case. The jury may have decided defendant's plan to purchase methamphetamine for sale

did not progress beyond the planning stage, and thus there was no direct, unequivocal act. (§ 21a [attempt requires specific intent to commit the target crime and a direct, ineffectual act done towards its commission]; *People v. Johnson* (2013) 57 Cal.4th 250, 258 [to avoid punishing nothing more than guilty mental state, there must be act toward completion of crime before attempt will be recognized]; see CALCRIM No. 460.) Alternatively, given that the item defendant attempted to possess was not actually methamphetamine, the jury may have believed defendant attempted to do something that was not actually a crime. (See, e.g., *People v. Siu* (1954) 126 Cal.App.2d 41, 43 ["Defendant also argues that his case is similar to the old law-school classics that there can be no corpus delicti when a husband fires a gun at a dummy in a bed, thinking it the paramour of his wife, or when an attempt is made to poison with an innocuous substance, or when a person points an unloaded gun at another"].) Since Manuel was making phone calls about cocaine, not methamphetamine, the jury could have concluded defendant attempted to buy cocaine. Or, as the People suggest, because the evidence of specific intent to sell was sparse, the jury may have believed defendant attempted to possess methamphetamine for personal use.[23]

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[23] Defendant cites two cases in support of his position that we should disregard all drug-related evidence—*Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337 (*Mitchell*) and *People v. Medina* (1995) 39 Cal.App.4th 643 (*Medina*). *Mitchell* is not binding on this court and regardless, has not been good law since the Ninth Circuit overruled it in 1998. (*Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242.) In *Medina*, the jury was presented with

Viewed in the light most favorable to the prosecution, there was sufficient evidence to support the jury's verdicts. Kathi, Bustos, Haynes, and Duke placed defendant at or near the scene of the shooting on the evening of May 4, 2008. Defendant's mobile phone also placed him in the area. Haynes saw defendant with a gun and Duke saw him with an item shaped like one. Bustos and Haynes identified defendant as the shooter. They provided consistent details of how the murders occurred, from vantage points that were mere feet away. After the shooting, someone using defendant's mobile phone made multiple calls—including a call to Haynes's home—while travelling from the vicinity of the shooting in Los Angeles to Las Vegas, where defendant lived; although defendant remained in the area until an hour after the shooting, the jury could reasonably have viewed the timing of this drive as evidence of flight and consciousness of guilt. Notwithstanding defendant's arguments to the contrary, taken together, this testimony was sufficient to convince a rational trier of fact, beyond a reasonable doubt, that defendant committed the offenses of which he was convicted.[24]

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two inconsistent versions of events. Because the verdicts indicated the jurors believed the codefendant, not the victim, the court analyzed the sufficiency of the evidence using the only facts supporting the codefendant's version. (*Medina*, at pp. 646–647, 651–652.) In this case, because the jury was not presented with two incompatible versions of events, its conclusion that the People did not prove count 3 beyond a reasonable doubt does not mean they rejected the evidence entirely or found it unworthy of belief.

[24] The dissent, in a footnote and without elaboration, asserts there are "real concerns about actual innocence in this case."

3. *Erroneous fees and penalty assessments.*[25]

"In passing sentence, the court has a duty to determine and impose the punishment prescribed by law." (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) An unauthorized sentence may be challenged "for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) Based on our review of the record, it appears the trial court made three errors when imposing the fines and assessments below.

First, the court imposed and suspended a $300 parole revocation fine under section 1202.45. Normally, the court is required to impose and stay a probation or parole revocation fine equal to the restitution fine. But the court in this case sentenced defendant to life in prison *without* the possibility of parole. Since, notwithstanding its indeterminate portion, the sentence does not include a period of parole, section 1202.45 is inapplicable. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1181–1186.) The fine should not have been imposed, and we reverse it. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 637.)

Second, the sentencing court must impose one $40 court security fee (§ 1465.8) and one $30 court facilities assessment

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(Dis. opn., *post*, at p. 1, fn. 1.) The dissent's assertion is undeveloped and therefore we do not address it.

[25] In the interest of judicial economy, we correct these errors without first requesting supplemental briefing. Any party wishing to address these issues may petition for rehearing. (Gov. Code, § 68081.)

(Gov. Code, § 70373) on every criminal conviction, including any conviction stayed under section 654. (*People v. Woods* (2010) 191 Cal.App.4th 269, 273–274; *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1112 ["imposition of an assessment under Government Code section 70373(a)(1) is required"].) Here, defendant was convicted of three felonies—two counts of first-degree murder (§ 187, subd. (a); counts 1 and 2) and one count of possession of a firearm by a felon (former § 12021, subd. (a)(1); count 4). The court properly imposed three $40 court security fees (§ 1465.8), for a total of $120. However, the court erred by imposing four $30 court facilities assessments (Gov. Code, § 70373) totaling $120 rather than three assessments totaling $90. Because one of the four assessments is erroneous, we modify the judgment to impose only three $30 court facilities assessments totaling $90.

Third, the court improperly imposed $324 in penalty assessments on these two fees—namely, a $120 state penalty assessment under section 1464, a $24 state criminal surcharge under section 1465.7, a $60 DNA assessment under Government Code section 76104.6, a $60 DNA assessment under Government Code section 76104.7, and a $60 court construction assessment under Government Code section 70372.

The state penalty assessment is levied "upon every fine, penalty, or forfeiture imposed by the courts for all criminal offenses . . . ." (§ 1464, subd. (a).) The state surcharge is "levied on the base fine used to calculate the state penalty assessment . . . ." (§ 1465.7, subd. (a).) The two DNA assessments and the court construction assessment appear in Chapter 12 of Title 8 of the Government Code, and are levied on the same base fine as the state penalty assessment and the state

surcharge. However, as the statutes themselves state, neither the court facilities assessment (Gov. Code, § 70373) nor the court security fee (§ 1465.8) are part of that base fine—and both are exempt from the additional penalty assessments imposed by the trial court. (Gov. Code, § 70373, subd. (a)(2) ["This assessment . . . *may not be included in the base fine* to calculate the state penalty assessment as specified in subdivision (a) of Section 1464 of the Penal Code. The *penalties authorized by Chapter 12* (commencing with Section 76000) [of Title 8 of the Government Code], *and the state surcharge authorized by Section 1465.7* of the Penal Code, *do not apply to this assessment*." (Italics added)]; § 1465.8, subd. (b) ["This assessment . . . may not be included in the base fine to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. *The penalties authorized by Chapter 12* (commencing with Section 76000) of Title 8 of the Government Code, *and the state surcharge authorized by Section 1465.7, do not apply to this assessment*." (Italics added)]; *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1394–1396 [may not impose DNA penalty on court security fee].) As there was no other fine on which to base these assessments, the court exceeded its jurisdiction in imposing them. (See *People v. McHenry* (2000) 77 Cal.App.4th 730, 732.)

We reverse the $120 state penalty assessment (§ 1464), the $24 state criminal surcharge (§ 1465.7), both $60 DNA assessments (Gov. Code, §§ 76104.6, 76104.7), and the $60 court construction assessment (Gov. Code, § 70372). The abstract of judgment must be amended to remove the assessment, penalties, and surcharge, as well as the $300 parole revocation fine (§ 1202.45) and the extraneous $30 court facilities assessment (Gov. Code, § 70373) discussed above. (*People v. Hamed* (2013)

221 Cal.App.4th 928, 940 [abstract of judgment must list fines, penalties, surcharge]; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [superior court clerk must specify fines, penalties, surcharge in abstract of judgment].)

DISPOSITION

The penalty assessments are reversed—specifically, the $120 state penalty assessment (Pen. Code, § 1464), the $24 state criminal surcharge (Pen. Code, § 1465.7), the $60 DNA assessment (Gov. Code, § 76104.6), the other $60 DNA assessment (Gov. Code, § 76104.7), and the $60 court construction assessment (Gov. Code, § 70372). The $300 parole revocation fine (§ 1202.45) is also reversed. The judgment is modified to impose only three Government Code section 70373, subdivision (a)(1) court facilities assessments totaling $90. In all other respects, the judgment is affirmed as modified.

Upon issuance of the remittitur, the court is directed to amend the minute order of November 19, 2013, and the abstract of judgment to reflect the judgment as modified and to send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I CONCUR:

ALDRICH, J.

LAVIN, J., Dissenting:

In 2008, defendant Joseph Carl Stanley, a 59-year-old Nevada resident last convicted of a felony in 1978, was visiting his family in South Los Angeles when a drug dealer and the dealer's brother were shot and killed. No physical or fingerprint evidence connected Stanley to the crime, and the gun was never found. The only evidence of Stanley's guilt came from the contradictory statements of an in-custody murder suspect and the cross-racial identification by an eyewitness—a man who could not identify Stanley until he saw him in court a year and a half after the shooting, handcuffed to a chair, wearing a jumpsuit issued by the county jail. Stanley was the only African-American in the room. Other evidence placed Stanley in the neighborhood around the time of the shooting and indicated he might have tried to buy drugs from one of the victims—but none of it connected Stanley to the murders. Stanley was nevertheless charged with two counts of special-circumstance murder, convicted, and sentenced to life in prison without the possibility of parole.

On these facts, the majority rejects Stanley's challenge to the sufficiency of the evidence and affirms under the procedural doctrine of law of the case.[1] But law of the case is a chimera here.

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[1] Because I would reverse based on the violation of California's Double Jeopardy Clause, I do not reach the issue of sufficiency of the evidence to support the conviction. In light of the contradictory, suggestive, and tainted eyewitness identifications, the lack of physical evidence connecting Stanley to the crimes, and the absence of any apparent motive, there are, however, real concerns about actual innocence in this case.

In reality, it is a prudential rule of judicial procedure. The doctrine acknowledges this court's power to fix its mistakes, and it does not absolve us from reckoning with them.

By not grappling with the prior opinion in any real way, the majority elevates procedural convenience over constitutional rights—then misapplies the procedural rule. (*Stanley v. Superior Court* (2012) 206 Cal.App.4th 265 (*Stanley I*).) As the People concede, *Stanley I* did not consider the retroactive application of its decision—and it cannot bind this court on that issue. Law of the case, therefore, does not excuse the majority's refusal to answer a central question of this case: When a defense attorney reasonably relies on a half-century of Supreme Court precedent to decide that he should not object to an unwarranted mistrial, does his client forfeit his rights under the Double Jeopardy Clause?

Stanley I was not just wrong on the law, however. It also disregarded Stanley's right to an evidentiary proceeding to resolve disputed factual issues concerning implied consent. Because it is manifestly unjust to apply the law-of-the-case doctrine under these circumstances, and because Stanley was deprived of the sacred constitutional right not to be placed twice in jeopardy, the judgment should be reversed.

I respectfully dissent.

DISCUSSION

The double jeopardy clauses of the federal and state constitutions bar retrial of a criminal defendant after an acquittal. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15;

People v. Batts (2003) 30 Cal.4th 660, 679–680; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 (*Curry*).)[2] "The right not to be placed twice in jeopardy for the same offense is as sacred as the right to trial by jury. [Citation.] 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.)

"It follows that a criminal defendant who is in the midst of trial has an interest, stemming from the double jeopardy clause, in having his or her case resolved by the jury that was initially sworn to hear the case—and in potentially obtaining an acquittal from that jury. (See *Wade v. Hunter* (1949) 336 U.S. 684, 689

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[2] Though the Fifth Amendment provides minimum standards for protection against double jeopardy, a state may accord criminal defendants greater protection under its state constitution. (*Benton v. Maryland* (1969) 395 U.S. 784, 795–796; *People v. Fields* (1996) 13 Cal.4th 289, 298.) California courts frequently interpret our state Double Jeopardy Clause more broadly than its federal counterpart. (*People v. Batts*, *supra*, 30 Cal.4th at pp. 685–689; see, e.g., *People v. Hanson* (2000) 23 Cal.4th 355, 358–360, 363–367 [in California, appellate reversal precludes more severe punishment after retrial]; *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 275 [rejecting federal rule that mistrial on court's own motion did not violate double jeopardy].)

[noting a defendant's 'valued right to have his trial completed by a particular tribunal'].)" (*People v. Batts*, *supra*, 30 Cal.4th at p. 679.) Thus, once a jury trial begins—that is, once jeopardy has attached—discharge of the jury without a verdict amounts to an acquittal and prevents a retrial unless legal necessity justified the court's action. (*Ibid.*; *United States v. Jorn* (1971) 400 U.S. 470, 486–487.) Legal necessity exists "where physical causes beyond the control of the court such as the death, illness or absence of a judge, juror or the defendant make it impossible to continue. [Citation.] Legal necessity has also been found where it becomes necessary to replace defense counsel during trial due to the disappearance of counsel at a critical stage of trial." (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175.)

A defendant may also consent to a mistrial, either expressly or impliedly, and thereby waive any later double jeopardy claim. (*People v. Batts*, *supra*, 30 Cal.4th at pp. 679–682.) Implied consent exists where a defendant's "affirmative conduct . . . clearly evidences consent" to a mistrial. (*Curry*, *supra*, 2 Cal.3d at p. 713.) For example, a defendant may signal his consent if he "actually initiates or joins in a motion for mistrial [citation]." (*Ibid.*) But consent will not be inferred from silence, failure to object to a proposed order of mistrial, or raising an issue of concern. (*Ibid.*; *People v. Compton* (1971) 6 Cal.3d 55, 62–63 (*Compton*).)

At Stanley's first trial, 12 jurors and four alternates had been empaneled and sworn when the court declared a mistrial on its own motion. Thus, the Double Jeopardy Clause barred Stanley's retrial unless the mistrial was supported by manifest necessity or Stanley's express or implied consent. The parties agree that neither legal necessity nor express consent justified

the mistrial in this case. (See *Stanley I*, *supra*, 206 Cal.App.4th at p. 279, fn. 22; *Stanley v. Baca* (9th Cir. Feb. 19, 2014, No. 13-56172) 555 Fed.Appx. 707, 708 (*Stanley II*).) The question in *Stanley I*, therefore, was whether Stanley impliedly consented. (*Stanley I*, *supra*, at pp. 287–289.) Stanley argues there was no implied consent, and asks us to reconsider *Stanley I*, in which a different panel of this court rejected that argument in a writ proceeding. The People argue that the doctrine of law of the case requires us to follow *Stanley I*. The majority, relying on *Stanley I* for the premise that *Stanley I* was a just decision, accepts this view.

Law of the case is only one of the issues before us, however. After the time for normal briefing had elapsed, we asked the parties to submit letter briefs answering a question raised in the petition for rehearing in *Stanley I*, but never answered by the prior panel: Should the rule announced in that opinion apply retroactively to Stanley? In response, Stanley argues that in "an abrupt departure from" California Supreme Court precedent, *Stanley I* "for the first time required defense counsel [to] disabuse the trial court of the assumption that counsel consented to a mistrial." Because the clear weight of authority previously held that he had no obligation to act, Stanley contends he should not be penalized for failing to do so. The People, on the other hand, argue that *Stanley I* "did not establish new standards or a new rule of law, but only elucidated prior law." Because the prior opinion did not announce a new rule, the People argue, retroactivity principles do not apply. The majority does not address either party's arguments. Instead, it relies on dictum from an inapt civil case to conclude that *Stanley I* impliedly

decided the retroactivity question and is therefore law of the case on that issue.

Yet even if *Stanley I* is law of the case on every issue before us, it "should not be applied woodenly in a way inconsistent with substantial justice." (*United States v. Miller* (9th Cir. 1987) 822 F.2d 828, 832.) As I will explain, *Stanley I* is not just wrong on the law. The prior panel, through its decision, also improperly appropriated the role of trier of fact, denied Stanley's express request for an evidentiary hearing, then resolved the disputed factual issues itself. Although efficiency and finality are important concerns underlying law of the case, procedural convenience should not trump correction of a clearly erroneous prior decision that violates a criminal defendant's fundamental constitutional rights.[3]

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[3] The majority's opinion extols the principle of finality, but overlooks the caveat that finality means different things in different contexts. In a case such as this, when a party seeks reconsideration of questions decided at an earlier stage of a single, continuing litigation, we would not upset a final judgment in another proceeding. A final judgment makes a difference: It marks a formal point at which considerations of economy, certainty, reliance, and comity take on more strength than they have before the judgment is entered. As for efficiency, few additional judicial resources would be expended if the majority reached the merits of Stanley's double-jeopardy claim—but by failing to reach the merits, the majority has ensured that the federal courts will ultimately have to resolve the issues presented here. In any event, when interests of efficiency and finality clash with the responsibility of this court not to issue a final judgment wrong on the facts and wrong on the law, we should err on the side of being right.

I begin by reviewing the events below, then address each issue in turn.

1. The First Trial

On Friday, November 4, 2011, 12 jurors and four alternates were sworn to try the case against Stanley. By the end of the day, the court had dismissed Juror 3 and ordered him to appear at a contempt hearing. On Monday morning, the parties agreed to excuse an alternate, Juror 32, who had childcare problems. At that point, two alternate jurors remained.

Meanwhile, Juror 4 asked to be excused because his fiancée had broken her ankle the night before and was too scared to stay home alone. The court was incredulous, but did not want to question Juror 4 in detail: "I mean the questions I would have to ask would be of an attack mode so I mean—his whole explanation assumed something that I don't assume, but I can't get into it. I don't know why a grown woman cannot stay downstairs for the day, but I don't know the configuration of his house. This is something I cannot get into, and I see no choice unless you have something better."

Defense counsel expressed reluctance to excuse Juror 4, and encouraged the court to inquire further: "I don't want the court to go into an area the court feels it can't go into. But whether there is any alternative to him being absent, any alternative to him being the sole caretaker at this point—" In response, the court asked, "Juror number 4, is there any alternative that you can live with that would allow you to participate in this trial and you are comfortable that your fiancé[e] could be taken care of during the day?" Juror 4 did not volunteer a solution, and neither party asked to excuse Juror 4—then or later. At a minimum, there are disputed factual issues as

to whether the court intended to excuse this juror and whether defense counsel wanted to keep him. Though counsel expressly asked the court to excuse Juror 3 and Juror 32, he tried to rehabilitate Juror 4. By the time the court declared the mistrial, no decision about Juror 4 had been made. The court told Juror 4 to wait in the hallway.

Juror 6 came next. He had arrived late that morning. Upon entering the courtroom, Juror 6 produced a document on Kaiser Permanente letterhead purporting to release him from jury service for two days. Juror 6 explained that he had contracted conjunctivitis—commonly known as pinkeye—and was highly contagious. He had gone to the doctor the previous day and was receiving treatment, but he needed to stay home on Monday and Tuesday of that week. He could return to court on Wednesday, November 9, 2011.

The court was willing to continue the trial for two days to accommodate Juror 6, but told the attorneys, "If that's not what you want to do, we'll move on that too." Defense counsel did not respond. At this point, the court had excused Juror 3 and Juror 32, leaving two alternate jurors remaining. Juror 4 (fiancée ankle problem) was in the hallway awaiting a decision. It was in this context that the court said, "I want to go back to this. If you don't want to wait for this [Juror 6], this person is gone also, and then you have maybe one left over [Juror 4]." The prosecutor, apparently believing Juror 4 had been excused, replied, "I don't think we have any."[4]

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[4] The record does not support the prosecutor's belief, and defense counsel did not correct her. The *Stanley I* court, however, viewed this statement as evidence that the court intended to

Without responding to the prosecutor's remark, the court continued, "The bottom line is, when this case goes, if this case goes, you let me know what you want to do. This person [Juror 4], I haven't heard a decision on him yet, and we are down three people at this point. [Jurors 3, 32, and 6]. Also what I want to say is, *if we are down to no alternates*, when I call them in the room before we go any farther, I'm going to say look, I don't know exactly when this will end at this point. You could be here until the last week in November. I don't know. I cannot do that. Let me know right now. If somebody raises their hand, we are done. . . . The bottom line is we are done." (Emphasis added.)

Though the record is unclear, it appears that the attorneys were having a side conversation about Juror 6 as the court

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excuse Juror 4. (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 268, 272, fn. 4–6.) In any event, delaying the trial by two days to accommodate Juror 6 and his pinkeye opened up additional possibilities for Juror 4. Juror 4 had repeatedly emphasized that but for his fiancée's broken ankle, he was ready to serve. His fiancée's mishap and trip to the emergency room had happened just the night before. That morning, when Juror 4 spoke with the court, the fiancée was having trouble with her crutches and was nervous about navigating the stairs alone. Juror 4 explained, "she has a hard time getting around with the crutches." Then emphasized, "she's having a hard time with the crutches." And again, "She's afraid to walk around . . . with the crutches." But it is also clear she was learning to use them. After only a few hours, the fiancée was able to get up the stairs unassisted; she only needed help getting back down. For everything else, she used a wheelchair. Whether delaying the trial for two days was feasible or would have resolved Juror 4's problem is another material factual issue that was never resolved.

finished its remarks. Defense counsel explained, "Right now where we are at, the only problem I have is making sure my expert's testimony—[.]" The implication was that if the defense expert could be accommodated, counsel was willing to delay the trial to keep Juror 6—that is, accommodating the expert was "the only problem" counsel had with continuing the trial for two days. The prosecutor agreed: "I don't mind taking her testimony out of order. I think we should wait for him [Juror 6]. I would rather have at least one alternate. That makes me uncomfortable without an alternate." Defense counsel did not correct the prosecutor's mistaken belief that Juror 4 had been excused and did not respond to the prosecutor's preferences or discomfort. At that point, the prosecutor turned to the court and summarized, "I would like to keep [Juror 6] than not have any alternates. If it means waiting until the 9th, that's okay with me, and I'm letting [defense counsel's] witness testify out of order." Defense counsel remained silent. The court replied, "All right. All right. Thank you."

The court then reconvened the jury and explained the situation to the remaining jurors. At this point, there were twelve sitting jurors and two alternates, including Juror 4 (fiancée ankle problem), who had not been excused, and Juror 6 (pinkeye) who would be able to resume his jury service in two days. The court concluded: "Here's the issue in a nutshell. Because we are so short of jurors, I'm not even going to start this if somebody tells me you can't do it. I don't want to invest the time and bring in all witnesses and do what we have to do if somebody believes they can't do this. All you need to do is raise your hand, and I will tell them that it's done at this point because I cannot risk doing this. I see your hand. I will talk to you. All

of a sudden—that's what is really funny with people like you. If you had done that when we were doing voir dire, we wouldn't be in this position. You have no problem now, but when you thought you would not be selected, it was okay. As soon as you got selected, then you are telling me, no, no, no, no, no. That's all I ask, that's all I ever ask, just tell me what your condition is. When people hide that, it puts us in a bad, bad, bad place. Again, please raise your hand, if you cannot do it."

In response to the court's solicitations—"if somebody tells me you can't do it," "[a]ll you need to do is raise your hand, and I will tell them that it's done[,]" "just tell me what your condition is," "please raise your hand, if you cannot do it"—Juror 2 raised his hand. The court asked him, "You cannot do it?" Juror 2 replied, "I don't think so because I had a heart attack. I called up the doctor, seen a doctor." Without inquiring further, the court called the attorneys to sidebar. The court said, "I believe they win." Both attorneys remained silent.

The court excused the jury and left the courtroom. After a recess, the court returned and declared a mistrial.[5] He explained, "We simply do not have qualified jurors who can serve,

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[5] While *Stanley I* implies that the court declared a mistrial immediately after excusing the jury (*Stanley I*, *supra*, 206 Cal.App.4th at p. 276), the record does not support that view. In any event, as the Ninth Circuit points out, "it is unclear how much time passed between the dismissal of the jury and the declaration of mistrial, [or] whether the jury could have been recalled had an objection been lodged immediately upon declaration of mistrial . . . . " (*Stanley II*, *supra*, 555 Fed.Appx. at pp. 708–709.)

and as a result, it was agreed that if we would have had only 12 jurors, we would start over, and, in addition, I believe it was number 2 that made it fairly clear in all probability we would not have even one alternate before this was over with. [¶] Subject to attorney input, I propose to put this matter out to December the 4, 45 of 60, January 4, 2012. [¶] There you have it."

Defense counsel replied, "Your Honor, I'm assuming that that is the earliest possible date. **Obviously we are unhappy with the way things proceeded this morning**, and I know that Mr. Stanley is anxious to get the matter to trial, and I also know this court has its other calendar matters. Is the 22nd the earliest we can conceivably—[.]" (Emphasis added.) At that point, the court cut him off and said, "That's when I'm going to set it." The prosecutor remained silent throughout this exchange.

2. What *Stanley I* Held—and What it Did Not Hold

In California, a defendant's consent to a mistrial cannot be implied by mere silence; there must be "affirmative conduct . . . that clearly evidences consent[.]" (*Curry*, *supra*, 2 Cal.3d at p. 713; *Compton*, *supra*, 6 Cal.3d at pp. 62–63.) Acknowledging this rule, the panel in *Stanley I* concluded this was not a case of passive silence. "While it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial," the panel held, "he had previously fully participated in the discussion and led the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 288.) Construing this participation as affirmative conduct, the panel held counsel's actions were sufficient to support the trial court's belief that Stanley consented to the mistrial, and

therefore to support a further finding of implied consent. (*Id.* at pp. 287–289.)

Specifically, *Stanley I* held defense counsel's affirmative conduct implied consent where counsel: remained silent when the court outlined its plan to dismiss the jury if no alternates remained and any remaining juror objected to a two-day continuance (*Stanley I*, *supra*, at pp. 270, 273, 276, 289, 293–294); told the prosecutor his "only problem" with continuing the trial for two days was making sure his expert could testify (*id.* at pp. 273, 289, 293); remained silent when the prosecutor said she wanted to preserve at least one alternate juror (*id.* at pp. 272–274, 277, 289, 293); remained silent when the court invited the remaining jurors to declare additional conflicts (*id.* at pp. 275, 293 & fn. 12); remained silent when the court dismissed the jury—a dismissal that violated the alleged agreement *Stanley I* gleaned from the record, since two alternates remained at that point (*id.* at pp. 276, 279, 289, 293); and participated in discussions about a new trial date without objecting to the new trial itself (*id.* at p. 277). The court also concluded that when he remained silent, "counsel was aware, or should have been aware," that his previous silences had "led the trial court to reasonably believe" that he consented to the mistrial. (*Id.* at pp. 289, 293–294.)

In sum, *Stanley I* did not find implied consent where defense counsel remained silent *while* the court declared the mistrial; instead, it found implied consent where defense counsel remained silent *before* and *after* the court declared a mistrial—that is, from counsel's pre-silence silence and his post-silence

silence. (*Stanley I, supra,* 206 Cal.App.4th at p. 288.)[6] Together, the court concluded, these silences constituted "affirmative conduct . . . [that] clearly evidences consent" to a mistrial. (*Curry, supra,* 2 Cal.3d at p. 713.)

Following this holding, Stanley filed a timely petition for rehearing seeking the opportunity to argue that the new rule should only be applied prospectively—an issue the court did not address in its opinion. The court summarily denied the petition.

2.1. Law of the case applies only to issues that were actually addressed in the prior opinion.

Under the law of the case doctrine, when an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." (*People v. Stanley* (1995) 10 Cal.4th 764, 786.) "The doctrine, as the name implies, is exclusively concerned with issues of law and not fact." (*People v. Shuey* (1975) 13 Cal.3d 835, 842.)

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[6] Although it erected a complicated structure that implies otherwise, *Stanley I* ultimately imposed a forfeiture for a simple failure to object. Even if counsel *did* impliedly agree not to proceed without at least one alternate, an issue that itself is subject to varying interpretations, the court below did not abide by that agreement. When the court dismissed the jury, two alternates remained. Thus, the only silences that really mattered were counsel's failure to object immediately before the court dismissed the jury and his failure to object to the later declaration of mistrial.

The law-of-the-case doctrine applies only to issues that were actually addressed in the prior opinion. It does not apply to issues that could have been raised, but were not. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.) Thus, the legal rule announced in *Stanley I*—that ambiguous silence could constitute the sort of affirmative conduct that clearly evidences consent to a mistrial—is arguably law of the case. But, as the People concede, since *Stanley I* did not consider whether that rule should apply retroactively to Stanley, the question of retroactivity is *not* law of the case. (See *City of Oakland v. Oakland Raiders* (1985) 174 Cal.App.3d 414, 418 [law of the case does not apply to issues that were not squarely presented and determined by prior appeal, even when addressed in an unsuccessful petition for rehearing].)

2.2. *Stanley I* did not implicitly decide retroactivity.

The People's explicit concession of this long-settled principle notwithstanding, the majority insists that the "doctrine of law of the case is applicable not only to questions expressly decided but also to questions implicitly decided because they were essential to the decision on the prior appeal. [Citation.] Although *Stanley I* did not expressly address the issue of retroactivity, *Stanley I* implicitly decided the retroactivity issue in the People's favor" by denying the writ petition. (Maj. opn., at p. 21.)

In support of its novel conclusion, the majority shuns recent binding authority that is directly on point in favor of dictum from a 1983 civil case, *Olson v. Cory*—dictum that itself rests on a disapproved interpretation of an even older case.

(*Olson v. Cory* (1983) 35 Cal.3d 390, 399; *Davis v. Edmonds* (1933) 218 Cal. 355, 358–359 (*Davis*).)[7] Decided in 1933, *Davis* involved a relatively discrete issue—how does an appellate holding about the failure to object to evidence impact a related evidentiary issue in a second appeal? (*Davis*, *supra*, at pp. 358–359.)[8] *Davis* thus stood for a much narrower proposition than the rule attributed to it in Witkin and *Nevcal*. (See 3 Witkin, Cal.

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[7] *Olson* quoted dictum from a 1971 probate case, which held that a prior appeal did *not* implicitly decide the USSR's jurisdiction over a decedent's American heirs. (*Estate of Horman* (1971) 5 Cal.3d 62, 73.) *Horman*, in turn, relied on a 1963 appeal about whether a Nevada court implicitly decided it had jurisdiction over a contract dispute. (*Nevcal Enterprises v. Cal-Neva Lodge, Inc.* (1963) 217 Cal.App.2d 799, 804 (*Nevcal*).) *Nevcal* based its conclusion on two sources, the 1954 edition of Witkin and a 1938 Supreme Court case (*Coats v. General Motors Corp.* (1938) 11 Cal.2d 601, 607; 3 Witkin, Cal. Procedure (1954) § 216, p. 2429), both of which gleaned their rules from an even earlier case, *Davis*, *supra*, 218 Cal. at pp. 358–359. Thus, *Olson* and *Horman* necessarily relied on *Davis* when they quoted *Nevcal*.

[8] In reaching this conclusion, *Davis* relied on another treatise, the 1921 version of California Jurisprudence, which dealt specifically with the future legal impact of evidentiary rulings. (2 Cal.Jur. (1921) § 569, pp. 967–968 ["A decision as to the admissibility of evidence is a decision of a question of law and is law of the case and is conclusive when the same question is raised on a subsequent appeal."].) As a general matter, however, that treatise cautioned that "of course, the [prior] decision is only law of the case as to what was actually adjudicated." (*Ibid.*)

Procedure, *supra*, at p. 2429; *Nevcal*, *supra*, 217 Cal.App.2d at p. 804.)

Thirty years later, in *DiGenova v. State Board of Education*, the Supreme Court impliedly disapproved any broader interpretation of *Davis* when it reversed an appellate decision that had relied heavily on the 1933 opinion. (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178–179 (*DiGenova*).) In *DiGenova*, the Court held that the opinion in a prior appeal did **not** impliedly decide retroactivity, and was not law of the case on that issue. (*Ibid.*) The Court also noted that applying the doctrine to the retroactivity question before it "would 'exalt form far above substance' and would result in a 'most unjust decision.' " (*Id.* at p. 179.) This represented a break with the doctrine's older, more draconian framework—and with those courts that read *Davis* as taking an expansive view of implied holdings. In the years since *DiGenova*, whenever the Court has addressed law of the case in any substantive way, it has hewed to these principles.[9]

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[9] See, e.g., *People v. Medina* (1972) 6 Cal.3d 484, 492–493 (relying on *DiGenova* to conclude law of the case does not apply to summary denial of pretrial writ petitions); *People v. Shuey*, *supra*, 13 Cal.3d at pp. 840–848 (examining *DiGenova* and rejecting pre-*DiGenova* view of law of the case); *Kowis v. Howard*, *supra*, 3 Cal.4th at pp. 892–902 (rejecting, based in part on *Medina* and *DiGenova*, the "sole possible ground" exception to the express-determination rule, citing *Shuey*, and expressly overruling another prior opinion that accorded law-of-the-case status to any implied holding " 'necessary to the prior decision' "); *People v. Stanley*, *supra*, 10 Cal.4th at pp. 786–790 (relying on *Medina*, *Shuey* and *Kowis*).

Nor can *Olson*'s later reliance on *Nevcal* be construed as redeeming *Davis*. "A precedent cannot be overruled in dictum, of course, because only the ratio decidendi of an appellate opinion has precedential effect [citations]; to hold otherwise . . . would be to conclude that a statement by this court that *is not* a precedent can somehow abrogate an earlier statement by this court that *is* a precedent. This is not the law." (*Trope v. Katz* (1995) 11 Cal.4th 274, 287) In short, *Olson* is bad law.[10]

In any event, the majority's conclusion fails even under the Cal.Jur.-*Davis-Nevcal-Horman-Olson* rule. The full quote from *Nevcal* on which *Olson* and *Horman* rely clarifies that any exception for necessarily determined issues is exceedingly narrow: "The rule seems now to be fairly well settled that 'Where the particular point was *essential to the decision*, **and** the appellate judgment *could not have been rendered* without its determination, a necessary conclusion in support of the judgment

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[10] The majority objects to this characterization of *Olson* and insists that because the *Olson* dicta has not been explicitly disavowed, they are obligated to follow it under *Auto Equity Sales*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Yet as the majority implicitly acknowledges, *Auto Equity Sales* only applies to holdings; the Court's dicta, while entitled to our respect, is not binding precedent. (Cf. *People v. Wiley* (1995) 9 Cal.4th 580, 587–588 [prior Supreme Court decision's brief mention of state constitutional right to a jury trial not a "considered decision" determining scope of California constitutional right to a jury trial].) On the other hand, we *are* obligated to follow the holdings in the half-dozen cases discussed above—just as *Stanley I* was required to follow *Curry* and its progeny.

is that it was determined.' [Citation.]" (*Nevcal*, *supra*, 217 Cal.App.2d at p. 804, bold emphasis added; accord *Eldridge v. Burns* (1982) 136 Cal.App.3d 907, 921 [exception applies only if "appellate judgment could not have issued without its determination"]; *Estate of Roulac* (1977) 68 Cal.App.3d 1026, 1031 ["The point relied upon as law of the case must have been essential to the decision before the doctrine of the law of the case can be invoked [citations]. Because our comment in the earlier decision, relied on here to invoke the doctrine of the law of the case, was not essential to the decision, it does not preclude us from considering the issue which is raised and argued for the first time on this appeal."].) Unlike fundamental jurisdiction, which was the narrow issue presented in *Nevcal* and *Horman*, the *Stanley I* court **could** have rendered the judgment without considering retroactivity.

Retroactivity is therefore properly before this court. Because resolution of that issue determines whether we must apply law of the case, I address it in detail in the next section.

3. Retroactivity of the rule announced in *Stanley I*

"Although as a general rule judicial decisions are to be given retroactive effect, there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied." (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378–379, internal citations omitted.)

"In determining whether a decision should be given retroactive effect, the California courts undertake first a threshold inquiry, inquiring whether the decision established new standards or a new rule of law. If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises." (*Donaldson v. Superior Court*

(1983) 35 Cal.3d 24, 36.) A decision involves a "clear break from the past" and raises an issue of retroactivity where it " 'explicitly overrules a past precedent[,]' " disapproves a practice the Supreme Court "has arguably sanctioned in prior cases [citations], or overturns a longstanding and widespread practice" that " 'a near-unanimous body of lower court authority has expressly approved.' " (*Id.* at p. 37 [case established new standard where it disapproved a practice arguably sanctioned by prior decisions] quoting *United States v. Johnson* (1982) 457 U.S. 537, 551.)[11]

3.1. *Stanley I* departed from prior case authority.

As discussed, a defendant's consent to a declaration of mistrial cannot be inferred from mere silence. (*Curry*, *supra*,

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[11] The People cite *People v. Martinez* (1999) 20 Cal.4th 225 for the proposition that retroactivity issues are relevant to a criminal case only if the case involves the unforeseeable expansion of criminal conduct in violation of the Ex Post Facto Clause. While *People v. Martinez* addressed the expansion of a criminal statute, it did *not* hold that retroactivity principles applied only in those circumstances. To the contrary, the Court recognized that in cases "not implicating ex post facto and due process" concerns, the "retroactivity analysis . . . focuses on reliance and policy considerations[.]" (*Id.* at p. 238; see, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 136–137 [no due process or reliance problems where court retroactively applies decision overruling prior rule that defendants had the right to jury instructions on lesser-related offenses]; *People v. Welch* (1993) 5 Cal.4th 228, 237–238 [declining to apply new forfeiture rule to defendant's case since prior case law overwhelmingly stated no objection was required].)

2 Cal.3d at p. 713; *Compton*, *supra*, 6 Cal.3d at p. 62.) However, "affirmative conduct by the defendant may constitute a waiver if it *clearly evidences* consent." (*Curry*, at p. 713, emphasis added.) The People argue *Stanley I* did not create a new rule because "the inadequacy of 'mere silence' to imply consent to a mistrial but the adequacy of affirmative conduct to do so" had been established before *Stanley I*. Thus, they contend, Stanley had "ample notice that affirmative conduct could imply consent to a mistrial."

Be that as it may, *Stanley I* was the first case to hold that *ambiguous silence* can constitute affirmative conduct sufficient to clearly evidence consent. (See, e.g., *Stanley I*, *supra*, 206 Cal.App.4th at p. 275 [discussing "proper interpretation of possibly ambiguous statements of defense counsel"] & fn. 12 ["The record strongly implies that defense counsel agreed with the court's procedure. Even if defense counsel did not agree with it, he allowed the court to believe that he did."].) Whatever the merits of that holding, it departs from nearly 50 years of California case law that reached the opposite conclusion. (See *People v. Scott* (1994) 9 Cal.4th 331, 357–358 & fn. 19 [applying rule prospectively where other cases had required the defendant to object to *omitted* sentencing factors, but instant case was the first to require an objection to *invalid* sentencing factors].)

Until *Stanley I*, California courts had always placed strict limits on the types of affirmative conduct that could imply a defendant's consent to a mistrial. Taken together, these cases held that a defendant's consent must be so strongly implied that it could not be misunderstood. While a defendant manifested implied consent with actions, and manifested express consent with words, the two forms of consent were functionally equivalent. Under this view of the law, "affirmative conduct"

that "clearly evidences consent" required something more than mere silence in the face of a prosecutor's preferences and a trial judge's confusing, angry monologue—actions *Stanley I* held were sufficient.[12]

The leading case on this issue is *Curry v. Superior Court.* (*Curry*, *supra*, 2 Cal.3d 707.) In *Curry*, a prosecution witness testified on cross-examination that she had been under psychiatric care, and testified on redirect examination that a third person told her the defendants' friends would shoot her. The defendants asked the court to instruct the jury that the third parties' statements—which they considered extremely prejudicial—could not be attributed to them. They did not request a mistrial. The trial court nevertheless concluded that it would be impossible for either the prosecution or the defendants to have a fair trial, and declared a mistrial on his own motion.

The Supreme Court concluded the defendants did not impliedly consent to this course of action. While affirmative conduct that clearly evidences consent may amount to a waiver—such as when a defendant expressly moves for mistrial—the request for jury instructions did not meet this test. (*Curry*,

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[12] *Stanley I* continues to be an outlier in this regard. In the four-and-a-half years since its publication, no other California court has adopted its approach. (Compare, e.g., *People v. Sullivan* (2013) 217 Cal.App.4th 242, 247 [no implied consent where, after the court declared a mistrial, defense counsel participated in discussions about a new trial date without objecting to the new trial itself] with *Stanley I*, *supra*, at p. 277 [significant that counsel participated in discussions of a new trial date without objecting to the new trial itself].)

supra, 2 Cal.3d at p. 713.) Nor did the defendants' failure to object forfeit the issue. The Court concluded that when a judge proposes to discharge a jury without legal necessity, "the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver." (*Ibid.*)

The Court based its holding on a criminal defendant's right to proceed with his chosen jury. It explained that a "defendant may choose not to move for or consent to a mistrial for many reasons. He may be of the opinion that no error in fact occurred, or if it occurred, that it was not prejudicial. . . . Indeed, even when a palpably prejudicial error has been committed a defendant may have valid personal reasons to prefer going ahead with the trial rather than beginning the entire process anew . . . . These considerations are peculiarly within the knowledge of the defendant, not the judge, and the latter must avoid depriving the defendant of his constitutionally protected freedom of choice in the name of a paternalistic concern for his welfare." (*Curry*, *supra*, 2 Cal.3d at pp. 717–718.) Accordingly, the Court concluded, "except in the limited instances of 'legal necessity,' the policy underlying the prohibition against double jeopardy will best be served by firmly adhering to the rule that after jeopardy has attached no mistrial can be declared save with the defendant's consent." (*Ibid.*)

The Court's opinion in *Compton* expanded this holding. (*Compton*, *supra*, 6 Cal.3d 55.) In *Compton*, defense counsel learned an alternate juror told his barber, mid-trial, that it was difficult for him to keep an open mind. Counsel brought this fact to the court's attention and requested further inquiry. He

explained that the juror's remarks were "harmful" and his conduct " 'undermines one of the very basic premises of the jury system. This juror is trifling with my client's natural life.' " (*Compton,* at p. 63, fn. 7.) The court questioned the alternate juror, then, without objection, declared a mistrial. (*Id.* at p. 59.) Before doing so, the court asked both parties, " 'do any of you have any strong objections to what I am going to do? Let me know now, but I think that is the only recourse.' " The prosecutor replied, " 'No comment, your Honor.' The court then asked defense counsel if he had 'anything further,' and the latter replied simply, 'No, your Honor.' " (*Id.* at p. 63.)

Compton found no implied consent in these circumstances, noting: "The circumstance that it is defense counsel who initiates the court's inquiry into a matter which ultimately results in an order of mistrial does not ipso facto transform counsel's expression of concern into an implied consent to such drastic ruling." (*Compton*, *supra*, 6 Cal.3d at p. 62.) The Court also rejected the assertion that it could infer consent from counsel's failure to object, despite the express opportunity to do so. (*Id.* at p. 63 ["The effect of a failure to object is no longer an open question"]; accord *Larios v. Superior Court*, *supra*, 24 Cal.3d at pp. 327–332 [no necessity or implied consent where defense counsel asked the court to inquire into juror's independent investigation, juror testified that improperly-obtained information would prevent him from judging the case fairly, no alternate jurors were available, defense counsel would not stipulate to an 11-person jury, and counsel remained silent in the face of the ensuing declaration of mistrial].)

The Court expanded the rule again in *People v. Upshaw* (1974) 13 Cal.3d 29 (*Upshaw*). In that case, the Court held that

silence could not imply consent even where defense counsel's misstatements of law caused the need for the mistrial. (*Id.* at p. 34.) The Court explained that the "purpose of the constitutional provision against double jeopardy is to prevent harassment of a defendant by repeated trials on the same criminal charge. [Citation.] This purpose would be frustrated were we to allow remarks of counsel, even if legally untenable, to result in a vicarious waiver by the defendant of his constitutional protection against double jeopardy." (*Ibid.*)

In each of these cases, the Court considered whether a defendant has a duty to act to prevent an unnecessary mistrial. In *Curry*, the Court concluded the defense has no duty to help the trial court correct legal or factual errors. In *Compton*, the Court found no duty to act where counsel initiated the inquiry that ended in an unnecessary mistrial. And in *Upshaw*, the Court found no duty to act where counsel's own errors and misstatements led to the mistrial. The California Supreme Court has not reconsidered these holdings in the 40 years since *Upshaw*—and has continued to rely on them. (See, e.g., *People v. Batts*, *supra*, 30 Cal.4th at pp. 687–688 [describing *Curry* as "construing [the] state double jeopardy provision to bar retrial after the granting of a mistrial on the trial court's own motion and without the defendant's consent, but for the defendant's benefit, and declining to adopt the applicable federal constitutional rule"]; *People v. Chatman* (2006) 38 Cal.4th 344, 368 [citing *Upshaw* for conclusion that defendant could not argue the court should have granted a mistrial he did not request since "the strictures of double jeopardy . . . severely restrict such an action."]; *People v. Saunders* (1993) 5 Cal.4th 580, 592 & fn. 6 [no objection required to preserve double jeopardy claim].)

The intermediate appellate courts have gleaned two fundamental principles from *Curry*, *Compton*, and *Upshaw*—that defense counsel has no duty to act to prevent an unnecessary mistrial, and that a reviewing court should not lightly presume implied consent to a mistrial. (See *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244 ["the courts have deliberately declined to impose a duty upon the defendant to forewarn the trial court of legal error that will permit the defendant to assert the defense of double jeopardy in subsequent proceedings. It is because the defendant has no obligation to alert the trial court that it is about to err in a manner that sets up a double jeopardy defense that the defendant's silence does not constitute waiver or consent when the court declares a mistrial without legal necessity."].) Consequently, while courts have occasionally found "affirmative conduct" that "clearly evidences consent" to a mistrial (*Curry*, *supra*, 2 Cal.3d at p. 713), they have done so only when counsel acts in a manner that cannot be misunderstood.

In *People v. Boyd*, for example, a defense witness was leaving the courtroom for lunch when officers arrested him in full view of the jury. (*People v. Boyd* (1972) 22 Cal.App.3d 714, 717–718.) Defense counsel complained that the arrest would prejudice the jury against the witness and the defendant, but did not move for a mistrial. (*Ibid.*) The court declared a mistrial on its own motion. (*Ibid.*) The reviewing court reversed. It reasoned, "It is manifest that under *Compton* consent may not be implied solely from defense counsel's initiation of the inquiry and assertion of prejudice. The refusal of both appellant and his counsel to move for the mistrial, or to consent thereto, negates any possible inference of *consent* and we so conclude." (*Id.* at

p. 718; accord *People v. Chaney* (1988) 202 Cal.App.3d 1109, 1113–1114, 1117–1118 [no implied consent where counsel remained silent when the court outlined its planned juror inquiry, remained silent when the prosecutor agreed to that plan, and remained silent when court said, " 'If you don't want me to [declare a mistrial] . . . you let me know' " even though counsel also made remarks that "clearly anticipated a mistrial might well be granted" such as asking the court to poll the jury " 'if the court declares a mistrial.' "]; *Hutson v. Superior Court* (1962) 203 Cal.App.2d 687, 692–693 [no implied consent where, "after the court had stated positively that it would grant a mistrial[,]" but before it did so, defense counsel told the prosecutor, " 'It's been a mistrial. You can file a new complaint.' "].)

In *People v. Allen*, on the other hand, the court found implied consent from defense counsel's affirmative conduct. (*People v. Allen* (1980) 110 Cal.App.3d 698.) In that case, the jury had reached a not-guilty verdict on the charged offense of first-degree murder but was deadlocked on the lesser-included offense of second-degree murder. (*Id.* at pp. 700–702.) Defense counsel urged the court to record the partial verdict and agreed that it would be " 'up to the district attorney's office . . . whether they will retry' " the defendant for the lesser-included offense. (*Id.* at p. 704.) Upon retrial, the defendant entered a successful plea of prior acquittal, and the People appealed. The court held that defense counsel impliedly consented to the retrial of the lesser-included offense. (*Ibid.*; see also *People v. Mills* (1978) 87 Cal.App.3d 302, 310–311 [defense counsel's persistent, strident assertions of prosecutorial misconduct and argument that dismissal was the "only appropriate remedy" implied consent to mistrial].)

Stanley I departed from this body of law in two ways—first, by imposing a new duty on defense counsel not to remain silent under circumstances that could mislead the court, even unintentionally, about whether he consented to a mistrial, and second, by holding that multiple instances of ambiguous silence, taken together, could constitute the sort of "affirmative conduct" that "clearly evidences consent" under *Curry*. (*Curry*, *supra*, 2 Cal.3d at p. 713.) In so doing, *Stanley I* did not "explain or refine the holding of a prior case, . . . apply an existing precedent to a different fact situation, . . . [or] draw a conclusion that was clearly implied in or anticipated by previous opinions." (*People v. Guerra* (1984) 37 Cal.3d 385, 399.) Instead, *Stanley I* departed from "a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities" and "impliedly sanctioned by prior decisions of" the California Supreme Court (*People v. Guerra*, at p. 401)—namely, that a criminal defendant could *always* preserve a claim of once in jeopardy by remaining silent in the face of an unnecessary mistrial. Thus, I conclude that *Stanley I* established "a 'new' rule or standard[.]" (*Donaldson v. Superior Court*, *supra*, 35 Cal.3d at p. 37.)

3.2. The equities favor prospective application of *Stanley I*.

Having concluded *Stanley I* adopted a new rule, I next explain why principles of notice, equity, and reliance compel this court to restrict that rule's retroactive application in this case. (See *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888–889; *People v. Welch*, *supra*, 5 Cal.4th at pp. 237–238 & fn. 5; *People v. Scott*, *supra*, 9 Cal.4th at pp. 356–358 & fn. 19; *People v. Birks*, *supra*, 19 Cal.4th at pp. 136–137.) Stanley contends that

because *Stanley I* imposed affirmative obligations on defense counsel where none had existed before, it would be unfair to apply the new rule to actions counsel took in reliance on the old one. The People argue that *Stanley I* did not adopt a new rule, that reliance considerations are only relevant in civil cases, and that in any event, counsel's ethical obligations required him to speak.[13] The majority does not address either party's arguments. I conclude Stanley is correct.

3.2.1. Learned treatises did not place counsel on notice of the rule announced in *Stanley I*.

As discussed, before *Stanley I*, published double jeopardy cases uniformly held that a defendant's silence could not imply consent to a mistrial in California. This rule was duly reported in popular treatises and practice guides. For example, one guide—often referred to as the Bible of criminal practitioners in this State—emphasized that "a defendant has no duty to object to

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[13] I concluded *ante* that *Stanley I* adopted a new rule. As to the People's second argument, retroactivity rules in civil and criminal cases turn on the same considerations of fairness and public policy. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151–157; accord *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372; see, e.g., *Johnson v. Department of Justice*, *supra*, 60 Cal.4th at pp. 888–889 [applying rule from civil case in determining there was no reason to deny retroactive application where criminal defendant did not justifiably rely on prior decision]; *People v. Trujeque* (2015) 61 Cal.4th 227, 249 [noting, in retroactivity context, that the " ' "guarantee against double jeopardy is significantly different from [the constitution's] procedural guarantees" ' "].) I address the ethics contention *post*.

the declaration of a mistrial not sought by him or her; thus his or her silence *cannot be deemed consent* or invited error that would waive the constitutional protection against double jeopardy." (Cal. Criminal Law Procedure and Practice (Cont.Ed.Bar 2013) § 26.27, p. 753, emphasis added; see also, 1 Torcia, Wharton's Criminal Law (15th ed.) Former Jeopardy, § 55 [suggesting that in California, a judge may declare a mistrial "only in response to a motion made by the defendant"], § 63 [noting "a defendant's silence or failure to object to the trial judge's discharge of the jury is not deemed a consent thereto."]; 19 Cal.Jur.3d. (2016) Criminal Law: Defenses, § 86 ["An accused has no duty to object to the court's declaration of a mistrial. Moreover, the mere fact that neither the accused nor the accused's counsel does so cannot result in a waiver of the defense of double jeopardy, notwithstanding that the error causing the mistrial was invited by defendant's counsel."].) Judicial education materials agreed that an unnecessary mistrial was "nonforfeitable error." (Hoffstadt, *To Object or Not to Object: What is the Consequence?*, Daily J. (Feb. 2012) <https://www.dailyjournal.com/mcle.cfm?ref=article&eid=920992&evid=1&qVersionID=372&qTypeID=8&qSPCtypeID=17&qcatid=13 > [as of Dec. 6, 2016].) Indeed, I have not uncovered any secondary source that advised counsel that silence *could* support a finding of implied consent.

"An attorney is not required to be clairvoyant. As a matter of common sense, an attorney is not required to raise an argument based on an as-yet-to-be-filed opinion." (*In re Richardson* (2011) 196 Cal.App.4th 647, 661.) Before *Stanley I*, a competent, diligent criminal defense attorney could reasonably conclude that remaining silent in the face of an unnecessary mistrial would *always* preserve a later plea of once in jeopardy

for his client. Because *Stanley I* changed the rules of the game, its holding should not be applied retroactively to Stanley. (See *People v. Scott*, *supra*, 9 Cal.4th at pp. 357–358 & fn. 19 [because court's adoption of new waiver rule was contrary to existing case law, treatises, and secondary authorities, holding would be applied prospectively]; *People v. Welch*, *supra*, 5 Cal.4th at p. 238 & fn. 5 [concluding, based in part on the fact that at least one practice guide advised no objection was required, that equitable and orderly administration of the law required court to apply new waiver rule prospectively and declining to apply new rule to defendant or any other litigant whose probation conditions were imposed before the new decision became final].)

3.2.2. Ethics requirements did not place counsel on notice of the rule announced in *Stanley I*.

The People appear to argue that even if governing case law and secondary authorities all assumed that silence could not imply consent to a mistrial, ethics rules nevertheless prohibited the silence in this case. Because all attorneys have an ethical obligation not to mislead the court, they contend, *Curry* and its progeny cannot "stand for the premise that defense counsel has no duty to correct a trial court's erroneous belief that counsel has consented to a mistrial." At its heart, this argument conflates an ethical issue—counsel's pre-*Stanley I* obligation not to *deceive* the court—with *Stanley I*'s new rule that defense counsel must affirmatively correct the court's mistaken beliefs, even if counsel did not cause the confusion.[14]

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[14] The People attempt to square this circle by arguing that though *Curry* and its progeny allow a defense attorney to remain

"The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." (ABA Stds. for Crim. Justice (4th ed. 2015), The Defense Function, std. 4-1.2(b) [hereafter, ABA Stds.].) Certainly, defense attorneys may not "intentionally" "seek to mislead" the court. (Bus. & Prof. Code, § 6068, subd. (d) [attorney has a duty "never to *seek to mislead* the [tribunal] by an artifice or false statement of fact or law."], emphasis added; Rules Prof. Conduct, rules 5-200(B) [attorney "[s]hall not *seek to mislead* [the tribunal] by an artifice or false statement of fact or law"], 5-200(C) [attorney "[s]hall not *intentionally* misquote" authority], 5-200(D) [attorney "[s]hall not, *knowing its invalidity*, cite" invalid authority], emphasis added; ABA Stds., *supra*, std. 4-1.2(f) ["Defense counsel should not *intentionally misrepresent* matters of fact or law to the court."], emphasis added.) But to violate these rules, counsel must act affirmatively, with wrongful intent. It is an attorney's "affirmative misrepresentation [that] creates a duty of full disclosure[;] while mere silence is not concealment unless a preexisting duty to disclose exists." (*Crayton v. Superior Court* (1985) 165 Cal.App.3d 443, 451.) Without an initial misrepresentation, therefore, counsel's silence is insufficient.

The People contend that passive silence can nevertheless constitute the active, intentional misrepresentation contemplated by the ethics rules. The courts, however, have not construed

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silent *after* he affirmatively expresses opposition to the mistrial, they do not allow him to decline to offer an opinion in the first instance or to remain silent generally.

silence so broadly. In each case cited to us, counsel "engaged in an affirmative presentation of facts to obtain judicial action and concealed material facts of which he knew the [tribunal] was not otherwise aware. Under these circumstances, the making of affirmative representations itself created the duty to also disclose other material facts that counsel knew were unknown to [the court]." (*Crayton v. Superior Court*, *supra*, 165 Cal.App.3d at p. 451.)

For example, in *United States v. Thoreen*, the court held a defense attorney in criminal contempt for secretly replacing his client with a third party at counsel table in effort to trigger a misidentification. (*United States v. Thoreen* (9th Cir. 1981) 653 F.2d 1332, 1336.) Throughout the proceedings, defense counsel misrepresented the substitute as his client, while the real defendant sat in the gallery with the press. (*Ibid.*) The Ninth Circuit concluded that although "vigorous advocacy by defense counsel may properly entail impeaching or confusing a witness, even if counsel thinks the witness is truthful, and refraining from presenting evidence even if he knows the truth," defense counsel's action fell outside this protected realm of behavior. (*Id.* at pp. 1338–1339.)

The People's reliance on *Sullins v. State Bar* (1975) 15 Cal.3d 609 is also inapt. In that case, an attorney concealed material evidence that could have affected the court's decision. (*Id.* at p. 614.) The attorney represented the executor of an estate in a probate action between the executor and the decedent's daughter. (*Id.* at pp. 614–615.) The decedent's will designated her nephew as the sole recipient of her house. (*Id.* at p. 614.) The attorney mailed the nephew a letter to notify him of the bequest. (*Id.* at p. 615.) The nephew replied by notarized

letter, explained that he renounced his claim to the house, and expressed his belief that the decedent's daughter should be her sole beneficiary. (*Ibid*). The attorney did not reply to the letter and failed to disclose its contents to the daughter or to the court. (*Ibid.*) He later sought and secured court approval of an increase in his contingent fee in the action to set aside the conveyance, representing that the matter was—and would continue to be—vigorously contested. (*Id.* at pp. 615–616.) When the daughter's attorney finally brought the letter to light four years after it was written, the court removed counsel for the executor. (*Id.* at pp. 616–617.) The reviewing court affirmed the removal order. (*Ibid.*) The Supreme Court concluded the attorney "intentionally misled the court" and affirmed the State Bar's disciplinary action. (*Id.* at pp. 621–622.)

Stanley I, by contrast, did not identify any intentional deception. Instead, the opinion rested on the broader conclusion that counsel knew *or should have known* the court was confused. The court's confusion, in turn, stemmed in part from defense counsel's silence in the wake of the *prosecutor's* statements—silence that was misleading only insofar as counsel failed to remedy the prosecutor's error about the number of remaining alternates or to express an opinion about the prosecutor's stated preferences. Whatever the merits of *Stanley I*'s conclusion that defense counsel's silence under these circumstances implied consent to the subsequent mistrial, his silence certainly did not violate his duty of candor to the court.

The Sixth Amendment compels this conclusion. " 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent

go free.' [Citation.] It is that 'very premise' that underlies and gives meaning to the Sixth Amendment." (*United States v. Cronic* (1984) 466 U.S. 648, 655–656.) If the adversarial "process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (*Id.* at pp. 656–657.) Accordingly, to " 'satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court'[.]" (*Id.* at fn. 17.)

While "the Sixth Amendment does not require that counsel do what is impossible or unethical[]" (*United States v. Cronic*, *supra*, 466 U.S. at fn. 19), requiring counsel to correct the prosecutor's misstatements is a bridge too far. Such a requirement would undermine the " 'very premise of our adversary system of criminal justice[.]' " (*Id.* at p. 655; see ABA Stds., *supra*, std. 4-1.2(a) [counsel "for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge . . . , counsel for the prosecution, and counsel for the accused."].) I therefore conclude that defense counsel reasonably relied on the prior rule notwithstanding his duty of candor to the court.

3.3. Under then-binding precedent, Stanley did not impliedly consent to a mistrial.

Having concluded that I would not retroactively apply *Stanley I* to Stanley, I next evaluate his double jeopardy claim under the governing case law prior to *Stanley I.*

Since this case does not involve manifest necessity or express consent, I examine counsel's "affirmative conduct" to determine whether it "clearly evidences [implied] consent." (*Curry*, *supra*, 2 Cal.3d at p. 713.) Because counsel has no duty

to disclose to the court that "it is about to err in a manner that sets up a double jeopardy defense" (*People v. Overby*, *supra*, 124 Cal.App.4th at p. 1244), his silence cannot constitute consent to a subsequent mistrial. (See *Crayton v. Superior Court*, *supra*, 165 Cal.App.3d at p. 451 ["affirmative misrepresentation creates a duty of full disclosure, while mere silence is not concealment unless a preexisting duty to disclose exists].)

Based on *Upshaw*, *Compton*, and *Chaney*, defense counsel's actions in this case did not clearly evidence consent. (*Upshaw*, *supra*, 13 Cal.3d 29; *Compton*, *supra*, 6 Cal.3d 55; *Chaney*, *supra*, 202 Cal.App.3d 1109; see "clearly, *adv.*" OED Online. Oxford University Press. <http://www.oed.com/view/Entry/34093?redirectedFrom=clearly> [as of Dec. 6, 2016] [defining *clearly* as "Manifestly; evidently" and "thoroughly; completely; unreservedly, entirely"].) Defense counsel's only affirmative conduct—a statement to the prosecutor about his "only problem" with continuing the trial for two days to accommodate Juror 6—is insufficient to manifestly or unreservedly imply consent to a mistrial, especially in light of his subsequent statement that he was "unhappy with the way things proceeded this morning[.]" On this record, and under the formerly-applicable legal rules, I discern no clear evidence of implied consent. I would therefore hold that Stanley's second trial violated the Double Jeopardy Clause of the California constitution.

In reaching this conclusion, I note that the prosecution was "not deprived of its 'one complete opportunity to convict those who have violated [the] laws.' [Citations.]" (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 77–78.) To the contrary, "the prosecution bears at least partial responsibility" for the mistrial in this case. (*Ibid.*; see *Stanley I*, *supra*, 206 Cal.App.4th at

pp. 273–274 & fn. 10–11.) "The consequences of an irregular verdict are well settled, and nothing precludes the prosecution from calling the deficiency to the court's attention before it discharges the panel. (See [Pen. Code,] §§ 1161–1164.) Since any failure to do so results from neglect rather than lack of notice and opportunity to be heard, the People's right to due process is accordingly not offended. (See *United States v. Jorn*, *supra*, 400 U.S. at p. 486; *United States v. Ball* [(1896) 163 U.S. 662,] 668 [prosecutor cannot " 'take advantage of his own wrong' "]; see also *Brown v. Ohio* (1977) 432 U.S. 161, 165 [double jeopardy guaranty "serves principally as a restraint on courts and prosecutors"].)" (*Marks*, *supra*, 1 Cal.4th at pp. 77–78, alterations in *Marks*.)

Certainly, I am mindful that such a holding would result in the reversal of a judgment of conviction for serious crimes. However, "we do not deal here with a mere technicality of the law." (*Curry*, *supra*, 2 Cal.3d at p. 718). "The United States Supreme Court has repeatedly counseled against subjecting a defendant to further proceedings to allow the prosecution the opportunity to ameliorate trial deficiencies, evidentiary or procedural, that could have been otherwise timely corrected. [Citations.]" (*Marks*, *supra*, 1 Cal.4th at p. 77.) " 'Assuming a failure of justice in the instant case, it is outweighed by the general personal security afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power.' " (*Curry*, *supra*, at p. 718.)

4. It is manifestly unjust to apply law of the case here.

In light of the majority's conclusion that the rule announced in *Stanley I* applies retroactively, I turn to the

question of whether there are good reasons not to follow *Stanley I* despite law of the case.

"The principal reason for the [law of the case] doctrine is judicial economy. 'Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding.' [Citation.] Because the rule is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' (*Shuey*, *supra*, 13 Cal.3d at p. 846), or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]." (*People v. Stanley*, *supra*, 10 Cal.4th at pp. 786–787; see *People v. Scott* (1976) 16 Cal.3d 242, 246–247 [declining to apply law of the case where prior opinion misapplied binding precedent].)

The law-of-the-case doctrine "is a prudential one." (Garner, et. al, The Law of Judicial Precedent (2016) p. 487.) The principles governing its use "are meant to be a 'guide to discretion,' and not 'a set of categorical rules, mechanically applied.' " (*Ibid.*; see *Citizens United v. Federal Election Comm'n* (2010) 558 U.S. 310, 378 (Roberts, C.J. concurring) ["When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."].) Thus, courts may—and typically do—exercise their discretion to disregard the law-of-the-case doctrine when justice requires it.

"When it comes to a court's *discretion* to change its mind about an earlier ruling, it is fair to ask how often courts insist on clear error and manifest injustice before reconsidering a prior ruling. It is a rare court . . . that concedes its prior ruling to have been wrong—not clearly wrong, just wrong—yet is unwilling to correct the earlier ruling. . . . What appellate court on direct review is going to uphold a mistaken first decision on the ground that it was later shown only to be wrong but not clearly wrong? None, to our knowledge. After all, it isn't an abuse of discretion under the law-of-the-case doctrine to put aright an erroneous prior ruling." (Garner, *supra*, The Law of Judicial Precedent, at p. 447.)

As I have discussed, *Stanley I* misapplied and disregarded binding precedent, redefined "affirmative conduct" to include passive silence, concluded that ambiguous silence could clearly evidence consent to a mistrial, applied the new rules without notice to a defendant who had plainly relied on the old ones, and created a hierarchy of double jeopardy violations. I would hold that any one of these issues, standing alone, compels us to set *Stanley I* aside—though fair-minded jurists could perhaps disagree. Taken together, any disagreement becomes harder to understand. But when combined, as these errors are, with the usurpation of the jury's fact-finding role, resulting in suppression of a criminal defendant's right to offer a complete defense to a double homicide, there is only one right answer.

In this case, the trial court erroneously rejected Stanley's proffered plea of once in jeopardy, thereby barring him from a jury determination of any disputed factual issue. Defense counsel objected, but before *Stanley I*, the disputed facts would not have mattered; Stanley was entitled to a dismissal as

a matter of law. Accordingly, he petitioned for a writ of mandate directing the trial court to dismiss the case. Once he discovered the law had changed and the disputed facts *did* matter, it was too late. Instead of ordering the trial court to enter the plea so the jury could resolve the question of implied consent, the prior panel elected to appropriate the role of trier of fact, disregard counsel's supplemental declarations, deny Stanley's request for an evidentiary hearing, and resolve the disputed factual issues itself. By usurping the jury's role in this manner, the prior panel deprived Stanley of his federal constitutional right to present a defense and his state right to present that defense to a jury. *Stanley I*'s constitutional errors compel this court to exercise its discretion to set things right.

In the face of these troubling issues of notice, reliance, stare decisis, and constitutional rights raised by this case,[15] the majority elects to quote *Stanley I* for the proposition that we should follow *Stanley I*. (Maj. opn., at pp. 24, 25.)[16] Then, it

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[15] In light of its view that *Stanley I* implicitly decided the retroactivity question, the majority concludes it need not decide whether it is fair to apply *Stanley I* to Stanley. I therefore emphasize that the views I expressed in the retroactivity section apply equally to why it is manifestly unjust to apply the law-of-the-case doctrine here.

[16] Indeed, the quote it chooses exemplifies *Stanley I*'s problems. *Stanley I* cited *Ohio v. Johnson* (1984) 467 U.S. 493, 502 for the proposition that there was no government overreach in this case because the mistrial was "just an attempt by the trial court to conserve judicial resources when it became reasonably apparent" that the jury was "unlikely" to last for the entire trial.

reduces the double jeopardy violation in this case to a matter of harmless error.

4.1. The attachment of jeopardy is a core principle of the Double Jeopardy Clause.

In choosing to apply *Stanley I*, the majority suggests that the attachment of jeopardy is not a core principle of double jeopardy jurisprudence. I disagree.

For more than half a century, the Supreme Court has repeated the same "bright-line rule": "Jeopardy attaches when 'a defendant is "put to trial," ' and in a jury trial, that is 'when a jury is empaneled and sworn.' [Citation.]" (*Martinez v. Illinois* (2014) 134 S.Ct. 2070, 2075 (per curiam).) The moment when

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(Maj. opn., at p. 24, quoting *Stanley I*, *supra*, 206 Cal.App.4th at p. 290.) As I discussed above, since the *defendant's* welfare is not a sufficient basis for an unnecessary mistrial, conservation of judicial resources is *certainly* not an adequate reason to dispense with the Double Jeopardy Clause. (See, e.g., *Larios v. Superior Court*, *supra*, 24 Cal.3d at pp. 329–332 [existence of good cause to replace a juror if an alternate *were* available does not mean that there is also a legal necessity for a mistrial where *no* alternate is available]; *Curry*, *supra*, 2 Cal.3d at pp. 717–718 [concern for defendant's welfare insufficient].) *Ohio v. Johnson* does not hold otherwise; it addresses an entirely different issue. There, the Court held that while the Double Jeopardy Clause protected a defendant against cumulative punishments for convictions on the same offense, the clause did not prohibit the state from *prosecuting* the defendant for multiple offenses in a single prosecution. Thus, under the federal constitution, defendant's guilty plea on a lesser-included offense did not bar continued prosecution on the remaining counts.

jeopardy attaches is " 'by no means a mere technicality, nor is it a "rigid, mechanical" rule.' [Citation.]" (*Ibid.*)

To the contrary, it is the very " 'lynchpin for all double jeopardy jurisprudence.' " (*Crist v. Bretz* (1978) 437 U.S. 28, 38.) "It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns—the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury—have combined to produce the federal law that . . . in a jury trial jeopardy attaches when the jury is empaneled and sworn." (*Id.* at pp. 37–38.) At that moment, the risks of injury to a defendant are so great that the government should have to shoulder the heavy burden of showing manifest necessity for repetitious proceedings. That moment matters. (See *Martinez v. Illinois*, *supra*, 134 S.Ct. at p. 2072.)[17]

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[17] The majority cites only inapt authority in support its view that *Stanley I* does not offend the "core principles" of the Double Jeopardy Clause. *People v. Eroshevich* (2014) 60 Cal.4th 583 involved a retrial following a trial court's erroneous grant of a new trial motion based in part on insufficiency of the evidence *after* the jury had returned a guilty verdict. The opinion emphasizes that had these actions occurred before the verdict, double jeopardy would have barred a retrial. (*Id.* at pp. 588–590.) *Tibbs v. Florida* (1982) 457 U.S. 31 involved the difference between a post-trial acquittal based on the weight versus the sufficiency of the evidence. The quoted language explains why retrial is allowed following a successful appeal based on legal errors.

4.2. Stanley was entitled to a jury trial on all disputed factual issues.

"Under California law, a defendant may not mount a double jeopardy defense of any kind under a plea of not guilty. [Citations.] In order to present a double jeopardy defense at trial, a defendant must first have entered a special plea of 'former acquittal,' 'former conviction' or 'once in jeopardy.' [Citations.] These pleas are favored by the law due to the importance of the double jeopardy rights they are employed to protect. [Citations.]

"Once the defense of former jeopardy has been raised by special plea, it is generally 'an issue of fact . . . which the jury alone possesse[s] the power to pass upon.' [Citation.] Consequently, when a defendant asserts former jeopardy as a defense at trial, 'he is entitled to a resolution by the jury of any material issues of fact raised by the claim.' " (*People v. Bell* (2015) 241 Cal.App.4th 315, 339–340 (*Bell*); see Pen. Code, § 1020.) These rights are so important that a trial court has no discretion to reject a legally sufficient jeopardy plea. (See Pen. Code, § 1016, subd. (3) [defendant may enter any plea without the court's consent except a plea of no contest]; *People v. Blau* (1956) 140 Cal.App.2d 193, 215 [plea that failed to state time, place, and court of former jeopardy was legally insufficient].)

The majority's final explanation for exercising its discretion to apply law of the case is the denial of review in *Stanley I*. It is hornbook law, however, that the Supreme Court's " 'refusal to grant a hearing in a particular case is to be given *no* weight[,]' " particularly where, as in this case, the " 'opinion is in conflict with the law as stated by [the supreme] court.' " (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 287, fn. 1.)

If the facts underlying the jeopardy plea are undisputed *and* there is only one inference to be drawn from those undisputed facts, former jeopardy can become a question of law that the court may resolve on a motion to strike the plea. (*Bell, supra*, 241 Cal.App.4th. at p. 341.) "If, however, a material issue of fact exists, then it is for the jury to resolve." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 509, fn. 1.) Put another way, entry of a plea of once in jeopardy triggers a criminal defendant's right to a jury determination of any disputed factual issues attendant to the plea. (*Bell, supra*, at pp. 338–341; Pen. Code §§ 1041 ["An issue of fact arises: . . . 3. Upon a plea of once in jeopardy."], 1042 ["Issues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state."]; Cal. Const., art. I, § 16 ["Trial by jury is an inviolate right and shall be secured to all . . . . A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."].)

Here, Stanley proffered a legally adequate plea of once in jeopardy and moved to dismiss the charges. After finding defense counsel had impliedly consented to dismissal of the jury and the resulting mistrial, the trial court denied the motion. Defense counsel then attempted to enter the once-in-jeopardy plea a second time, and specifically asserted the jury trial rights that flow from the plea. The trial court nevertheless rejected the proffered plea—a step it had no authority to take—and invited the court of appeal to sort it out.

The *Stanley I* court did not sort it out, however. *Stanley I* refers to the plea only in passing, when it notes, "defendant added a plea of once in jeopardy." (*Stanley I, supra*, 206 Cal.App.4th at pp. 270, 277 ["defendant added a plea of once

in jeopardy and moved to dismiss the prosecution."].) The opinion does not mention the trial court's actions at all. The prior panel appears to have believed that Stanley successfully entered the plea, thereby triggering a jury determination of any disputed issues of fact. The issue before the prior panel, therefore, was a legal one.

4.3. *Stanley I* resolved disputed factual issues.

Why, then, did the *Stanley I* court chose to resolve the facts itself, thereby denying Stanley the right to present his double jeopardy defense at trial? Faced with a legal issue, why did the court deny Stanley's request for an evidentiary hearing and make its own factual findings on the disputed issues? Whatever the reasons, the appellate courts are not natural fact finders—and the *Stanley I* court approached its task haphazardly.

In some places, *Stanley I* treats the trial court as the trier of fact. For example, *Stanley I* deferred to the trial court "as the trier of fact" and emphasized that "the court was able to rely on its own recollection of the proceedings, including body language, tones of voice, nods, and so forth" to conclude Stanley impliedly consented to the mistrial. (*Stanley I*, *supra*, 206 Cal.App.4th at p. 291; see *id.* at pp. 291–292 & fn. 37.) And although *Stanley I* does not explicitly disclose the standard of review used in that opinion, the panel appears to have applied a sufficiency of the evidence test.[18] (See, e.g., *Stanley I*, at p. 270 [circumstances

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[18] This standard of review, of course, is applied only to a trial court's rulings on *disputed* facts. Legal conclusions based on undisputed facts are reviewed de novo. (See *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.)

"were sufficient to cause the court to harbor a reasonable belief that counsel had consented"].) That is, even though the trial court's authority extended only to legal conclusions based on undisputed facts (*Bell*, *supra*, 241 Cal.App.4th at pp. 339–341), *Stanley I* deferred to express and implied factual findings the trial court had no authority to make.

Elsewhere, the opinion reveals that the prior panel assumed the role of fact-finder itself. (See, e.g., *Stanley I*, *supra*, 206 Cal.App.4th at p. 271 [finding it significant that "counsel did not ask the court to repeat what he now states he had failed to hear."], p. 272, fn. 4 [concluding the record "strongly suggests" the court intended to excuse Juror 4], p. 273, fn. 7 [speculating that jurors may have had prepaid travel plans], fn. 10 [concluding defense counsel's understanding of the court's comments was "unpersuasive" and "difficult to believe" and that there was a "rather more likely" way to interpret the comments], p. 275, fn. 12 [concluding, based on counsel's failure to object during the court's monologue to the jury, that the "record strongly implies that defense counsel agreed with the court's procedure."], p. 276, fn. 16 [speculating that Juror 2 might have needed a medical procedure and that this "medical procedure . . . might have been scheduled for one of the extended trial dates."], p. 277 [concluding prosecutor's preferences became part of the agreement, a conclusion that contradicts the trial court's factual findings], p. 279, fn. 22 ["It appears to us, however, that the record indicates the agreement between the parties was an agreement for dismissal of the entire panel, not simply Juror 2 [heart attack]. We therefore elect to consider the parties' agreement in terms of an implied consent to the mistrial itself, rather than an agreement to the dismissal of the fifth juror, which created

a legal necessity for the mistrial."], pp. 288–289 [interpreting defense counsel's possibly-ambiguous statements, particularly his comment that his "only problem" was making sure his expert could testify].)

The prior panel also found itself musing on the trial court's mental state. (See, e.g., *Stanley I*, *supra*, at p. 270 [counsel's conduct was "sufficient to cause the court to harbor a reasonable belief that counsel had consented [to the mistrial]. . . . [T]his was sufficient, under all the circumstances, to constitute implied consent."], p. 275, fn. 11 [speculating about the court's interpretation of counsel's failure to respond to the prosecutor's statements of preference], p. 293 [same], p. 276, fn. 17 ["The court's frustration and resignation are certainly understandable. The court had very likely expected that the juror who raised his hand would state an inability to serve during Thanksgiving week due to holiday travel plans"].) Then, it rested its holding in large measure on what it believed defense counsel should have inferred about the trial court's subjective understanding of the proceedings.

In short, when considering the legal issue before it, the *Stanley I* court did not limit itself to undisputed facts.

4.4. By usurping the role of fact-finder, the prior panel denied Stanley the federal constitutional right to present a defense.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution

guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; see *Washington v. Texas* (1967) 388 U.S. 14, 19 [discussing fundamental nature of Compulsory Process Clause].)

A defendant's "right to present relevant evidence is not unlimited," however, and at times must "bow to accommodate other legitimate interests in the criminal trial process[.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 308.) Thus, this state may require a defendant to follow a particular procedure before allowing him to present a former-jeopardy defense at trial. (See, e.g., *People v. Barry* (1957) 153 Cal.App.2d 193 [plea of not guilty does not raise the issue of former jeopardy]; *People v. Bennett* (1896) 114 Cal. 56 [defenses, such as former acquittal or jeopardy, must be raised in the manner provided by law].) Once the defendant has met the requirements, however, he must be allowed to proceed on any disputed factual issues.

That did not happen in this case. Nor did other procedural safeguards attend *Stanley I*'s fact-finding expedition. As noted above, when it became clear that the prosecution disputed the relevant facts, both sides submitted supplemental declarations, and Stanley requested an evidentiary hearing to resolve the issues. By that point, it should have been clear to the court that it did not face a purely legal issue. Nevertheless, the court struck the declarations and refused to hold a hearing. In support of its actions, the court cited a footnote from a California Supreme Court opinion. (*Stanley I*, *supra*, 206 Cal.App.4th at p. 278, fn. 21, citing *People v. Lavi* (1993) 4 Cal.4th 1164, 1173, fn. 5.) In that footnote, the Court had cautioned that "it 'is singularly inappropriate for appellate courts, which are not equipped to try

issues of fact [to do so].' " (*People v. Lavi*, *supra*, at p. 1173, fn. 5, alteration in *Lavi*.)

Then, when the opinion issued, Stanley requested rehearing based in part on the court's resolution of the disputed facts in a way not suggested by any party. At minimum, the petition demonstrated again that there were indeed disputed issues of fact. The court's conclusion that Stanley had "added" a plea of once in jeopardy required that these disputed issues be tried to a jury or resolved at an evidentiary hearing. Nevertheless, the court summarily denied both requests.

4.5. The issue is not forfeited.

The majority contends Stanley has not argued that the trial court erred in rejecting his plea. (Maj. opn., at fn. 4, 12.) Be that as it may, that narrow question is not before us. The question here is whether *Stanley I*'s usurpation of the jury's fact-finding role compels us to exercise our discretion to set aside a rule of judicial convenience, an issue that Stanley argues at length—and the majority declines to address.

In his opening and supplemental briefs, Stanley asks this court to reconsider *Stanley I*—in large part because that court resolved disputed factual issues. For example, he notes that "to find an implied waiver in this case, the *Stanley [I]* Court speculated as to the meaning of discussions in which mistrials were not even mentioned, [and] engaged in conjecture about what happened in the trial court in light of an ambiguous record." He specifically objected to *Stanley I*'s speculation about the meaning of counsel's failure to respond to the prosecutor's preferences. And he explained that "reviewing courts are not required (or permitted) to engage in such speculation."

Moreover, as the majority acknowledges, Stanley asks us to reconsider *Stanley I* in light of the Ninth Circuit's opinion in *Stanley II*. (Maj. opn., at fn. 11.) His reliance on that case further clarifies his argument here. That court, which follows the federal constitution's narrower Double Jeopardy Clause, found it was "unable to determine [from this record] whether mistrial was supported by implied consent." (*Stanley II*, *supra*, 555 Fed.Appx. at pp. 708–709.) Although it had the benefit of *Stanley I*'s factual analysis, the Ninth Circuit found it had questions that could only be resolved by a true trier of fact. "For example, it [was] unclear how much time passed between the dismissal of the jury and the declaration of mistrial, whether the jury could have been recalled had an objection been lodged immediately upon declaration of mistrial, and whether defense counsel heard the state trial court refer to an agreement that trial would not go forward without at least one alternate juror." (*Ibid.*)[19]

The Ninth Circuit also noted that the record in this case allowed for some *unreasonable* factual determinations: "In this case, there is no evidence that the state trial court concluded that jurors' asserted hardships had fatally undermined their ability to discharge their responsibilities diligently and impartially. No such conclusion would have been reasonable." (*Stanley II*, *supra*, 555 Fed.Appx. at p. 708.) The only reasonable conclusion to be gleaned from these passages, is that the Ninth Circuit recognizes that the prior panel imprudently, and improperly resolved issues that were properly reserved for the trier of fact.

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[19] *Stanley I*, of course, explicitly resolved the last of these disputed issues.

The Ninth Circuit is correct. *Stanley I*'s resolution of disputed factual issues and usurpation of the jury's fact-finding role rendered the trial court's error irredeemable. By the time *Stanley I* was through, there was nothing left for a jury to decide.

CONCLUSION

I end by noting that the "history of liberty has largely been the history of observance of procedural safeguards." (*McNabb v. United States* (1943) 318 U.S. 332, 347.) For many criminal defendants, the state appellate courts are the last guardians against constitutional violations. Regrettably, that is not the case today. I urge the federal courts not to overlook these violations and, at a minimum, to provide Stanley with the evidentiary hearing he has never received.

LAVIN, J.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CARL STANLEY, Petitioner - Appellant, v. LEROY D. BACA, Sheriff, Respondent - Appellee.	No. 13-56172 D.C. No. 2:12-cv-09569-JAK-SH MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Argued and Submitted February 4, 2014
Pasadena, California

Before: PREGERSON, BERZON, and CHRISTEN, Circuit Judges.

Joseph Carl Stanley appeals a district court order dismissing his pretrial petition for a writ of habeas corpus, in which he asserted a double jeopardy claim. The district court dismissed Stanley's petition under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). We have jurisdiction pursuant to 28

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

U.S.C. § 1291 and § 2253(c). We vacate the district court order dismissing Stanley's habeas petition, and we remand for consideration of that petition on the merits.[1]

Though the *Younger* abstention doctrine generally counsels federal courts to abstain from adjudicating challenges to criminal prosecutions pending in state courts, "federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy." *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992). "A double jeopardy claim is colorable if it has 'some possible validity.'" *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005) (quoting *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002)). Thus, if Stanley's double jeopardy claim has some possible validity, the district court erred in dismissing that claim under *Younger* abstention.

Stanley's double jeopardy claim has some possible validity. "It is long established that '[c]riminal defendants have a right to have the jury first empaneled to try them reach a verdict.'" *United States v. Bonas*, 344 F.3d 945, 947-48 (9th Cir. 2003) (alteration in original) (quoting *United States v. Bates*, 917 F.2d 388, 392 (9th Cir. 1990)). At Stanley's first trial, twelve jurors and four alternates had

[1] Pretrial habeas petitions are governed by 28 U.S.C. § 2241 rather than § 2254. *See Stow v. Murashige*, 389 F.3d 880, 882 (9th Cir. 2004).

already been empaneled and sworn when the state trial court declared a mistrial. Thus, the Double Jeopardy Clause barred Stanley's retrial unless the state trial court's declaration of mistrial was supported by manifest necessity or the defendant's consent, either express or implied. *See United States v. You*, 382 F.3d 958, 964 (9th Cir. 2004).[2] Mistrial was not supported by manifest necessity or express consent, and on the present record we are unable to determine whether mistrial was supported by implied consent.

Mistrial was not supported by manifest necessity. "Once the jury is empaneled and sworn . . . . even severe hardship may not be sufficient to justify excusing an empaneled juror, particularly if doing so will result in a mistrial." *Bonas*, 344 F.3d at 950. "The defendant's right to proceed to verdict with the jury first selected can only be set aside if the [trial] judge reasonably concludes that the hardship is so severe that it fatally undermines the juror's ability to discharge his responsibilities diligently and impartially." *Id*. In this case, there is no evidence that the state trial court concluded that jurors' asserted hardships had fatally undermined their ability to discharge their responsibilities diligently and impartially. No such conclusion would have been reasonable. On the contrary,

[2] Despite Respondent's contrary suggestion at oral argument, manifest necessity and consent are two separate and independent inquiries. *See, e.g.*, *Bates*, 917 F.2d at 392.

even if the state trial court was justified in excusing four jurors, that court was still left with twelve jurors sworn to serve diligently and impartially, who were ready to proceed to trial on November 9, 2011—just two days later.

Because mistrial was unsupported by manifest necessity, and because there is no indication that Stanley expressly consented to a mistrial, the Double Jeopardy Clause barred Stanley's retrial unless mistrial was supported by implied consent. On the present record, we are unable to determine whether mistrial was supported by implied consent. For example, it is unclear how much time passed between the dismissal of the jury and the declaration of mistrial, whether the jury could have been recalled had an objection been lodged immediately upon declaration of mistrial, and whether defense counsel heard the state trial court refer to an agreement that trial would not go forward without at least one alternate juror. On remand, the district court should determine whether "the circumstances positively indicate [Stanley's] willingness to acquiesce in the mistrial order." *Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995) (citation and internal quotation marks omitted).

We VACATE the district court order dismissing Stanley's habeas petition, and REMAND for the district court to determine, after a hearing, whether mistrial was supported by implied consent. Each party shall bear its own costs on appeal.

VACATED and REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....*(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

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Court data last updated: 10/31/2017 05:01 PM

Docket (Register of Actions)

STANLEY v. S.C. (PEOPLE)
Case Number S203673

Date	Description	Notes
06/28/2012	Petition for review filed	Petitioner: Joseph Carl Stanley Attorney: John Hamilton Scott
06/29/2012	Record requested	
07/03/2012	Received Court of Appeal record	one doghouse
08/22/2012	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including September 26, 2012, or the date upon which review is either granted or denied.
09/04/2012	Change of contact information filed for:	Serena R. Murillo, counsel for real party in interest.
09/12/2012	Petition for review denied	
09/18/2012	Returned record	1 doghouse

Click here to request automatic e-mail notifications about this case.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOSEPH CARL STANLEY,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

B238486

(Los Angeles County Super. Ct. No. BA348056)

ORIGINAL PROCEEDINGS in writ of prohibition. Bob S. Bowers, Judge. Petition denied.

Ronald L. Brown, Public Defender, Michael Pentz and John Hamilton Scott, Deputy Public Defenders, for Defendant and Petitioner.

Steve Cooley, District Attorney, Phyllis Asayama, Brentford Ferriera and Serena R. Murillo, Deputy District Attorneys, for Plaintiff and Real Party in Interest.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and Scott A. Taryle, Supervising Deputy Attorneys General as Amicus Curiae on behalf of Plaintiff and Real Party in Interest.

In *Curry v. Superior Court* (1970) 2 Cal.3d 707, 713 (*Curry*), our Supreme Court held that "mere silence" in the face of the proposed discharge of a jury does not constitute consent to the dismissal of the jury, and the subsequent mistrial, so as to defeat a defense assertion of double jeopardy. In this case, defense counsel participated in discussions which led the trial court to believe that counsel had consented to the procedure which ultimately resulted in the dismissal of the jury, prior to opening statements. When defendant subsequently moved for dismissal, asserting double jeopardy, the trial court held that defense counsel's conduct constituted implied consent, and denied the motion. We conclude that the record supports the trial court's conclusion; *Curry* has no application when counsel's conduct goes beyond "mere silence," and his words and actions reasonably lead the court to believe he consents. We therefore will deny defendant's petition for a writ of prohibition.

Very shortly after the jury and four alternates were sworn in a double-murder case, a number of jurors asserted reasons why they needed to be excused from service. One juror revealed a previously undisclosed bias, and was dismissed. An alternate juror revealed a previously undisclosed child care obligation, and was dismissed at the request of the defendant. Another juror's fiancée had broken her ankle and required the juror's constant attention. The record does not reflect whether this juror was actually dismissed, but it appears that the trial court and counsel assumed that he had been excused. A fourth juror asserted that he had contracted contagious conjunctivitis (pinkeye), and was under doctor's orders to stay home for two days. The trial court posited the question as to whether it should wait for this juror to get well, and

a discussion was held with counsel. Both the prosecutor and the trial court believed that the result of the conversation was an agreement that the trial would not proceed unless there was *at least* one alternate. As a single alternate would be preserved if the trial were continued in order to retain the juror with pinkeye, the trial court proposed to counsel that it would ask the remaining jurors if they all would still be able to serve if the commencement of the trial were delayed for two days. The trial court expressed the view that if any other jurors asserted an inability to serve if the trial were continued, the court would grant a mistrial and dismiss the jury. Hearing no objection, the trial court proceeded with that course of action. A fifth juror then expressed concern, stating that he had "had a heart attack." The trial court held another conference with counsel and, relying on what it believed to be the agreement it had previously reached with counsel, and hearing no objection, dismissed the jury and declared a mistrial. A new trial date was set.

Thereafter, the defendant added a plea of once in jeopardy. He moved to dismiss the criminal charges against him on the ground of double jeopardy, arguing that there was no legal necessity for, or consent to, the mistrial. As already noted, the trial court denied the motion on the basis that defendant had impliedly consented to the dismissal of the jury and the resulting mistrial. Defendant sought review by petition for writ of prohibition. We issued an order to show cause and now will deny the petition.

A careful review of the record reflects that the actions and statements made by defense counsel during the discussions with the trial court regarding the reduction in the number of available jurors, including, but not limited to, counsel's failure to object to the court's

proposed plan of action, were sufficient to cause the court to harbor a reasonable belief that counsel had consented thereto. As we explain in this opinion, this was sufficient, under all of the circumstances, to constitute implied consent.

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2009, defendant was charged by information with two counts of murder, in addition to other offenses. It was alleged that he had suffered four prior serious or violent felony convictions or juvenile adjudications. He entered a plea of not guilty. The prosecution elected not to seek the death penalty.

Jury selection commenced on November 3, 2011. Prior to the commencement of voir dire, defense counsel mentioned that a defense expert witness would be unavailable from November 16 through the middle of December. He requested permission to take the witness out of order if the prosecution had not finished its case-in-chief by November 15. Both the prosecutor and the trial court agreed to that request.

Jury selection took place on November 3 and November 4, 2011. Once the panel was selected, the trial court inquired of counsel as to the number of alternate jurors sought. Defense counsel stated, "You know, because we are butting up against the holidays, I am thinking four." The prosecutor and the trial court agreed. Counsel then stipulated to four alternate jurors. The trial court swore the jury and alternates. After an introductory instruction regarding conduct of independent research or discussion about the case, the trial court excused the jury until Monday, November 7, 2011.

Shortly thereafter, Juror 3 asked to speak with the court. He indicated that he had previously worked as a victim's advocate for the City Attorney's office. He stated,

"I think it is highly unlikely that I will be fair and impartial as a juror." The juror was excused;[1] defendant concedes that it was proper to dismiss Juror 3.

Thus, when the matter reconvened on Monday, November 7, it was necessary to select an alternate to replace Juror 3, leaving only three alternates. However, some additional issues had arisen with other jurors.[2] The trial court, with counsel present, therefore called in several of the jurors individually.

The first juror was Juror 4. He explained that his fiancée, with whom he lived, had slipped on a wet towel and broken her ankle. They went to the emergency room "last night." The juror's fiancée was using crutches and had a hard time getting up and down the stairs. The juror believed someone had to be home with his fiancée to look after her, and asked to be excused in order to do so.[3] At sidebar, the trial court indicated that it did not know why a grown woman could not stay downstairs during the day, but that it could not pursue that line of inquiry without going into "an attack mode" and questioning the juror about the configuration of his house, which the court was reluctant to do. The trial court stated to counsel, "I see no choice unless you have something better" – the comment apparently referred to excusing the juror. Defense counsel

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1 The court made a preliminary finding that the juror's statements were not credible, and set a contempt hearing.

2 When the court stated that there were issues with other jurors, defense counsel stated, "This went too fast." The court replied, "I don't think so. I think what I didn't take into consideration – nothing." While the subject of these comments is unclear, it appears that defense counsel and the trial court both sensed that there might be problems keeping enough jurors on the jury.

3 Juror 4 represented that "the cleaning lady" was with his fiancée that day.

understood the trial court's statement as such, replying, "Well, the only thing that is starting to worry me is we haven't begun the trial." The trial court responded, "It gets worse, trust me. I'm just worried about [Juror] 4 at this point." Defense counsel agreed that the trial court should not question the juror about the configuration of his house, but asked the court to inquire if there was any alternative to Juror 4 being the caretaker for his fiancée. The trial court inquired; Juror 4 responded, "Not really. We live alone. It's just the two of us. She's afraid to walk around without the, with the crutches." The trial court directed Juror 4 to wait in the hallway. However, it appears that the trial court intended to excuse the juror. When the trial court had sought alternatives to dismissing the juror, defense counsel had requested only that the juror be asked if there was any alternative to him being the sole caretaker. The question was posed to the juror and he had responded that there was not.[4]

The next juror with a problem was an alternate, Juror 32. She had previously stated in voir dire that she had a 3-year-old child. Now, she stated that she was the only person who could care for the child from 9:00 a.m. to 2:00 p.m., while her husband was at work. The trial court did not doubt the juror's representation, but questioned why she did not raise the issue when questioned earlier. After hearing the juror's explanation, the trial court concluded that the juror had made "a conscious decision to sit throughout this entire jury selection process, hoping that they won't pick [her] and so if [she was] not picked, then [she would] fulfill [her] jury service for this year and everything

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[4] As already noted, the record strongly suggests that the court intended to excuse this juror, but does not reflect that it actually did so.

[would] be okay." Concluding that the juror had gambled and lost, the trial court stated that she was required to remain on the panel. However, defense counsel later requested that the juror be excused and the court granted the request.

The final juror with an issue for the court was Juror 6. He presented the trial court with a piece of paper on Kaiser Permanente letterhead, entitled "Temporary Jury Duty Release." The document stated, "This patient is placed on temporary jury duty release from November 6 through November 8th. Prognosis good. Patient is home bound or bed bound." When the trial court asked for an explanation, the juror stated, "Basically I have a case of [pinkeye], and my eye has been bothering me so I went to the doctor on Sunday, and she gave me medication for it, and she said it's really contagious and I should stay home." A sidebar conference followed.

The trial court stated, "With this man, all I can say is we put it over to the 9th, if I can be assured he would come back on the 9th. At any rate, we can do that. If that's not what you want to do, we'll move on that, too." The trial court then stated, "If you don't want to wait for this, this person is gone also, ..."[5] Subsequently, the trial court

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[5] The trial court's full statement was, "If you don't want to wait for this, this person is gone also, and then you have maybe one left over." The "maybe one left over" was perhaps a reference to Juror 4, the juror who had to care for his fiancée. Jurors 3 and 32 were already excused, and the trial court's statement presumed not waiting for Juror 6 and excusing him as well. Indeed, in response to the trial court's statement, the prosecutor said, "I don't think we have any," in apparent reference to her belief that Juror 4 would be excused.

stated, "This person, I haven't heard a decision on him yet, and we are down three people at this point."[6]

The trial court also proposed the following course of action: "Also what I want to say is, if we are down to no alternates, when I call them in the room before we go any farther, I'm going to say look, I don't know exactly when this will end at this point. You could be here until the last week in November. I don't know. I cannot do that. Let me know right now. If somebody raises their hand, we are done."[7] Neither counsel disagreed with this proposition. Defense counsel's[8] only response was "Right now where we are at, the *only problem* I have is making sure my expert's testimony --"[9] (Italics added.) The following colloquy then occurred:

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[6] This statement appeared to agree with the prosecutor's earlier understanding (see footnote 5, *ante*) that Juror 4 would, in fact, be excused.

[7] The court's suggestion was not unreasonable. While extending a criminal trial an extra two days is not generally cause for concern regarding whether the jury would remain intact, it was in this case. The trial court had indicated, immediately after the jury was sworn, that it expected the evidence to go to November 18, which was the Friday prior to Thanksgiving week. If trial were delayed two days, the evidence might well go into the Tuesday before Thanksgiving (and deliberations into the day before Thanksgiving). It was certainly reasonable to assume that one or more jurors might have had prepaid travel plans for Thanksgiving week. If the jury had no alternates and the trial reached the point where it implicated prepaid Thanksgiving travel plans, the parties would *then* have to agree to a further continuance, into the last week in November, in order to preserve the jury.

[8] The reporter's transcript attributes this statement to defendant. Defense counsel represents that this is erroneous and the statement was counsel's.

[9] Defense counsel would subsequently take the position, in his declaration in support of his later motion to dismiss, that he was not clear as to what the court was saying when it indicated that, if there were no alternates left, it would inquire as to whether any juror could not serve to the end of the month. Defense counsel stated, "The

"[The prosecutor]: I don't mind taking her testimony out of order. I think we should wait for him. I would rather have at least one alternate. That makes me uncomfortable without an alternate.

"The court: The bottom line is we are done.[10]

"[The prosecutor]: I would like to keep him than not have no alternates [*sic*]. If it means waiting until the 9th, that's okay with me, and I'm letting his witness testify out of order.

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reasoning behind the court's statement was not clear to me," as, the only reason in which they would be without alternates would be if Juror 6 was dismissed, but if Juror 6 was dismissed, there would be no reason for the trial to go into the last week of November. If counsel did not understand what the court was saying, he was obligated to seek clarification. By instead saying, "the only problem" he had was making certain his expert could testify, he was very clearly leading the court to believe that he agreed with everything else the court had proposed.

[10] In defense counsel's declaration in support of the motion to dismiss, defense counsel argued that certain events occurred which were not reflected in the record. As we discuss here and in footnote 11, *post*, defense counsel's after-the-fact interpretation of the record, and his assertion that certain events occurred, is unpersuasive. For example, in his declaration filed in support of defendant's motion to dismiss, defense counsel stated that, when the trial court said, "The bottom line is we are done," he interpreted this to mean that the court believed the prosecutor and defense counsel disagreed on the proper course of action as to Juror 6. We find this difficult to believe. Even if counsel disagreed as to the disposition of Juror 6, there are no circumstances under which the trial would be "done." If the trial court dismissed Juror 6, as would be necessary if defense counsel refused to agree to continue the trial to wait for Juror 6 to recover from pinkeye, there would be four dismissed jurors and a full jury of 12 would remain. Moreover, the record indicates that, when the trial court said "The bottom line is we are done," defense counsel had already stated that his *only* problem with continuing the trial would be taking his expert out of order, and the prosecutor had already stated that she "didn't mind" taking the testimony out of order and that she thought they "should wait for" Juror 6 to recover. It seems rather more likely that the trial court's statement, "The bottom line is we are done," was simply a continuation of the court's immediately previous statement that he intended to ask the jurors if they had problems with the trial running into the last week of November, and if anyone raised their hand indicating that they could not serve, "we are done."

"The court: All right. All right. Thank you."[11]

Clearly, it would have been the better practice for the trial court to have restated its understanding of the parties' agreement and expressly elicited their consent to it on the record. Nonetheless, it seems clear that the trial court understood that: (1) both parties agreed to the court's proposed procedure that, if they were down to no alternates, the court would ask if there were any additional jurors who would be unable to serve if the trial were delayed for two days, and to dismiss the jury if any jurors indicated they were so unable; and (2) the parties also agreed that the trial would not proceed without at least one alternate. Thus, the second agreement modified the first. As it was

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[11] In his declaration filed in support of defendant's motion to dismiss, defense counsel states that the following course of events occurred. After the court said, "The bottom line is we are done," counsel left the sidebar area. As defense counsel believed the court's statement meant that the court thought there was no agreement as to Juror 6, defense counsel then asked for leave to address the court and returned to sidebar, where the prosecutor set forth their agreement to wait for the juror and allow the defense expert to testify out of order. Preliminarily, the record gives no indication that counsel left sidebar, asked to reapproach, and returned to the sidebar. More than that, if *defense counsel* had asked for leave to address the court, one might expect the record to reflect that defense counsel subsequently addressed the court; yet the record shows that the prosecutor was the only one to speak once the parties purportedly returned to sidebar. Furthermore, if defense counsel's concern was that the trial court did not realize that the parties had reached *an agreement* as to Juror 6, there is no reason why the prosecutor's restatement of *her own* position would have been sufficient without some indication from defense counsel *that he agreed with it as well*. While we have substantial doubts regarding defense counsel's after-the-fact interpretation of the record, the key point we take away from counsel's declaration is that defense counsel *believed* there was an agreement with the prosecutor and that the court agreed to it as well. This is critical because, as we discuss in the body of the opinion, the prosecutor's statement of the terms of her understanding included her desire that the trial not proceed without an alternate. As defense counsel never indicated to the court any disagreement with that statement, there was no possible basis on which the court could have inferred that defense counsel agreed with that part of the prosecutor's statement relating to continuing the trial to retain Juror 6, but disagreed with that part which related to not proceeding without an alternate.

necessary to continue the trial in order to retain one alternate, the court proceeded to ask the jurors if any of them would be unable to serve.[12]

The trial court then called the jury in, and made the following statement to the remaining jurors: "Ladies and gentlemen, I have to gauge my words very carefully. An incredible course of events has occurred since you stood up and were sworn in last Friday afternoon. [¶] Juror number 3 immediately after that swearing in and after you left, came up with some reasons all of a sudden as to why he could not serve and be a fair and impartial juror. I will have a contempt hearing with him this Wednesday. [¶] Another one of your number's significant other had an accident over the weekend, which will now require his constant attention.[13] [¶] Another of your group all of a sudden we find has a three-year-old daughter who has no one to look after her for the period of time in which she will be on jury duty in this case. That was not made known. [¶] And lastly, another of your number has a condition that requires that we basically would, in essence, have to shut down until the 9th, which would be Wednesday. We would resume Wednesday. [¶] But here's where we are, and I'm going to leave it

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12 It is noteworthy that at no point in the court's discussion with the jurors did either counsel object and indicate this procedure was not, in fact, the procedure to which they had agreed. As we shall discuss, defendant's argument on appeal is based on authority that a defendant need not expressly object to the dismissal of a jury in order to assert the defense of double jeopardy. However, at this point in the proceedings, the issue was not whether the court would dismiss the jury, but whether it would proceed as agreed in the event the jury was down to its last alternate. The record strongly implies that defense counsel agreed with the court's procedure. Even if defense counsel did not agree with it, he allowed the court to believe that he did.

13 The fact that the trial court expressed Juror 4's situation in these terms confirms that the court intended to excuse Juror 4.

totally up to you because it is very critical. Sometimes I think I'm talking and I'm making sense and people look at me like they understand me and it turns out it was not true. [¶] Again, I want you to clearly understand if we go forward, this matter won't even start again until Wednesday. But secondly, I'm making no assurances, assurances about anything at this point. And all I can tell you is you have my individual pledge as a bench officer to use your time as efficiently as possible. [¶] Now here's where we are. Come back on the 9th. It will be a full day on the 9th. The 10th would be a half day. You come in the morning on the 10th. You will not come in the afternoon. [¶] The 11th is a court holiday. The following week would be all the way through. The 21st to the 23rd would be all the way through.[14] I'm not sure where we will end up so I'm letting you know that flat out front. [¶] Here's the issue in a nutshell. Because we are so short of jurors, I'm not even going to start this if somebody tells me you can't do it. I don't want to invest the time and bring in all [the] witnesses and do what we have to do if somebody believes they can't do this. All you need to do is raise your hand, and I will tell them that it's done at this point because I cannot risk doing this. [¶] I see your hand. I will talk to you.[15] All of a sudden – that's what is really funny with people like you. If you had done that when we were doing voir dire, we wouldn't be in this position. You have no problem now, but when you thought you would not be selected, it was okay. As soon as you got selected, then you are telling me, no, no, no,

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14 The 24th was Thanksgiving Day.

15 As the record subsequently discloses, this was likely a reference to Juror 2, with whom the trial court then spoke.

no, no. That's all I ask. That's all I ever ask, just tell me what your condition is. When people hide that, it puts us in a bad, bad, bad place. [¶] Again, please raise your hand, if you cannot do it.

Juror 2 raised his hand, and the court asked, "Number 2, you cannot do it?" Juror 2 responded, "I don't think so because I had a heart attack. I called up the doctor, seen a doctor." As the court had previously stated that the case would be over if a juror expressed an inability to serve, the trial court did not further question Juror 2. Thus, it was not known when the juror had suffered the heart attack, his doctor's recommendation, and whether the heart attack impacted his ability to serve *at all* or somehow limited only his ability to serve if the trial went longer than originally planned.[16]

In any event, the trial court held another sidebar conference with counsel, in which the court stated, "I believe they win."[17] Neither counsel expressed disagreement with the court's expression of defeat.[18] The trial court then dismissed the jury and declared a mistrial. In explaining this ruling, the trial court stated, "We simply do not

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[16] For example, a medical procedure for the juror might have been scheduled for one of the extended trial dates.

[17] The court's frustration and resignation are certainly understandable. The court had very likely expected that the juror who raised his hand would state an inability to serve during Thanksgiving week due to holiday travel plans; that the juror had suffered *a heart attack* was clearly viewed by the court as, to put it idiomatically, "the last straw."

[18] Defense counsel, in his declaration in support of the motion to dismiss, stated that he "had no idea" what the court meant by this statement. Defense counsel should have sought clarification, rather than allow the trial court to believe that he understood the court's statement and agreed with it.

have qualified jurors who can serve, and as a result, it was agreed that if we would have had only 12 jurors, we would start over, and, in addition, I believe it was number 2 that made it fairly clear in all probability we would not have even one alternate before this was over with." At no point did either counsel indicate any disagreement with the trial court's statement, "it was agreed that if we would have had only 12 jurors, we would start over." Defense counsel, who now asserts there was no such agreement, stated, in his declaration in support of the motion to dismiss, "I did not hear his honor make this comment during the court proceedings as I was conferring with [defendant] at counsel table."

The trial court set the matter for a new trial date. Defense counsel took part in this conversation, and at no time suggested that the mistrial had been declared without consent and a new trial would therefore be barred by principles of double jeopardy.

Approximately one month later, defendant added a plea of once in jeopardy and moved to dismiss the prosecution. Defendant argued that there was neither a legal necessity for, nor consent to, the declaration of mistrial.

The prosecutor opposed the motion on the basis of implied consent. The prosecutor noted that: (1) when the trial court proposed its plan to ask the jurors if any of them had a problem serving into the last week in November, and to end the proceedings if any of them answered in the affirmative, defense counsel made no objection to the court's proposal;[19] (2) when the prosecution indicated that it wanted to

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[19] As we discussed above, defense counsel did more than make no objection; he stated that his "only problem" was making certain his expert could testify.

preserve at least one alternate, even if it meant taking defendant's expert out of order, this, too, became part of the agreement; and (3) after the trial court dismissed the jury, it placed on the record that the parties had agreed to start over if they did not have at least one alternate. The prosecutor argued that defense counsel's entire course of conduct led the trial court to believe that he had consented to the course of action which led to the mistrial.[20]

The trial court agreed with the prosecution and denied the motion. The court noted that, prior to receiving the prosecution's opposition, it had planned out a lengthy ruling, but concluded that the prosecution had argued exactly what the court had intended to hold. At the hearing, the trial court explained, "That particular jury panel was, for lack of a better term, a perfect storm, so to speak, in that once the panel has been sworn in, then a whole series of people came up with excuses. And all I can tell you is a couple of things about that, and that is I view my job to do justice as best as possible." The court stated that it had explained to counsel how it had intended to proceed, and there had been no objection. The trial court stated, "I believe that any reading of the transcript shows clearly the court left options open. If there was any problem whatsoever, I would have expected to have some opposition to it and again the court stated what it was going to do and again the court heard no opposition by either party." The court ultimately concluded, "So I think it's reasonable to conclude, under

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[20] The prosecution argued, "Although the defense has no affirmative duty to object, it cannot mislead the judge into believing there was mutual agreement not to go forward if we did not have at least one alternate and then claim it did not consent to the mistrial."

the circumstances, that there was no objection to the court's perceived manner in handling this case. I tell you what. As a result of this matter, we all learned, and I think the better practice in the future for this court, is I have to dot every 'i' and cross every 't.' " [¶] Again, I believe one thing was happening. Again, I think under these circumstances, there is an implied consent so I deny your motion."

Defendant filed a timely petition for writ of prohibition. We issued an order to show cause,[21] and now deny the petition.

CONTENTIONS OF THE PARTIES

Defendant contends that double jeopardy principles preclude any further prosecution of the charges against him, as the jury had been sworn but was subsequently dismissed without legal necessity or consent. The prosecution replies that defendant impliedly consented to the course of action which led to the dismissal of the jury. We requested amicus briefing from the Attorney General, who argues that legal necessity required the mistrial, in that five jurors were unable to serve. We agree, in part, with the prosecution; the record provides support for the trial court's conclusion that defendant impliedly consented to the mistrial.

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[21] In connection with his reply in support of the petition, defendant included a declaration of counsel, setting forth, among other things, a post-writ-petition discussion with the prosecutor regarding their recollection of key events. The prosecutor responded with a declaration disagreeing with defense counsel's declaration in several respects, and defense counsel submitted yet another declaration and requested this court resolve the disputed factual issues. We deny the request and disregard all of the supplemental declarations; the only declarations relevant to the disposition of this writ are those which were before the trial court when it ruled on defendant's motion to dismiss. (*People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1173, fn. 5.)

DISCUSSION

1. *Double Jeopardy Principles*

"The Fifth Amendment to the United States Constitution provides that '[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .' This guarantee is applicable to the states through the Fourteenth Amendment. [Citation.] Similarly, article I, section 15, of the California Constitution provides: 'Persons may not twice be put in jeopardy for the same offense . . . .' " (*People v. Saunders* (1993) 5 Cal.4th 580, 592-593.)

The policies and protections underlying or afforded by double jeopardy principles include: "(1) protecting the defendant from being subjected to the embarrassment, expense, ordeal, and anxiety of repeated trials, (2) preserving the finality of judgments, (3) precluding the government from retrying the defendant armed with new evidence and knowledge of defense tactics, (4) recognizing the defendant's right to have trial completed by a particular tribunal, and (5) precluding multiple punishment for the same offense. [Citations.]" (*People v. Hernandez* (2003) 30 Cal.4th 1, 8.) In this case, as the trial had not yet begun, the only policy implicated is protection of the defendant's right to have trial completed by a particular tribunal. Under that policy, once banded together, a jury should not be discharged until it has completed its solemn task of announcing a verdict. (*Id.*, at p. 9.)

Jeopardy attaches once the jury and the alternates are sworn. (*People v. Hernandez, supra,* 30 Cal.4th at p. 8.) Granting an unnecessary mistrial after jeopardy has attached precludes retrial. (*Ibid.*) Retrial, however, is not barred if the defendant

consented to the mistrial or legal necessity required it. (*Curry, supra,* 2 Cal.3d at p. 712.) In this case, we are concerned only with the issue of consent.[22]

2. *Implied Consent*

California law is clear that a defendant[23] can impliedly consent to the declaration of a mistrial. (*People v. Boyd* (1972) 22 Cal.App.3d 714, 717.) For example, if the defendant affirmatively moves for a mistrial, or joins in such a motion, the defendant will be held to have consented. (*Ibid.*) Similarly, if the defendant requests a lengthy

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[22] As already noted, we requested amicus briefing from the Attorney General on the legal necessity argument. While we need not reach the argument, as we resolve this writ petition on the consent issue, we have concerns which would have to be addressed in order for the legal necessity argument to succeed. In order for there to have been a legal necessity for the mistrial, the trial court would had to have properly dismissed *five* jurors – that is, the number of available jurors would have had to have been reduced to 11. While arguments can be made that the court dismissed, or very clearly expressed its intention to dismiss, three jurors (Juror 3, who said he could not be fair; Juror 32, with the child care obligation; and Juror 4, whose fiancée broke her ankle), we are not at all convinced that the record indicates that the court formally dismissed Juror 6 (pinkeye) or Juror 2 (heart attack). Even if we were to conclude that the trial court had dismissed all five jurors, we would then have to review the manner in which the trial court conducted its inquiry of the dismissed jurors. (*People v. Fuiava* (2012) 53 Cal.4th 622, 712.) As the court's questioning of Juror 2 was cursory at best, we would return to the issue of whether the parties had agreed that Juror 2 would be dismissed without further questioning. It appears to us, however, that the record indicates the agreement between the parties was an agreement for dismissal of the entire panel, not simply Juror 2. We therefore elect to consider the parties' agreement in terms of an implied consent to the mistrial itself, rather than an agreement to the dismissal of the fifth juror which created a legal necessity for the mistrial.

[23] The defendant's implied consent is often expressed through statements of defendant's counsel. As we discuss below, there was, initially, some dispute in the law as to whether a defendant must personally consent to a mistrial and only a request by counsel *inconsistent* with a lack of consent to a mistrial (such as a motion for a mistrial) would be sufficient to constitute consent. Except where we are expressly discussing the development of this law, our references to a "defendant's" implied consent should be read to include the implied consent of defendant's counsel.

continuance, and agrees that the case should be assigned back to the criminal department for reassignment, consent will be implied. (*People v. Ramirez* (1972) 27 Cal.App.3d 660, 670.) In contrast, a defendant's request that a court look into possible jury misconduct is not, standing alone, sufficient to justify a finding of implied consent to a subsequent declaration of mistrial as a result of that investigation. (*People v. Compton* (1971) 6 Cal.3d 55, 62.) In short, if the defendant's conduct " ' "clearly evidences consent," ' " consent will be implied. (*People v. Boyd, supra,* 22 Cal.App.3d at p. 717.)

3. *Silence as Consent*

There is a split in the law, among various states and federal circuits, as to whether a defendant's silence may constitute consent to a declaration of mistrial. (Annot., What Constitutes Accused's Consent to Court's Discharge of Jury or to Grant of State's Motion for Mistrial Which Will Constitute Waiver of Former Jeopardy Plea (1959) 63 A.L.R.2d 782, §§ 5[a], 5[b] and cases cited.) California is considered to be aligned with those jurisdictions which do not permit silence to constitute consent, largely due to the Supreme Court's decision in *Curry*. Other states and circuits, however, disagree. (See, e.g., *United States v. Lara-Ramirez* (1st Cir. 2008) 519 F.3d 76, 83 ["Consent may sometimes 'be implied from a defendant's acts or failures to act, such as where the defendant sits silently by and does not object to the declaration of a mistrial even though he has a fair opportunity to do so.' "]; *United States v. El-Mezain* (5th Cir. 2011) 664 F.3d 467, 559 [" 'If a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of mistrial, that defendant will be held to

have impliedly consented to the mistrial and may be retried in a later proceeding.' "]; *United States v. Gilmore* (7th Cir. 2006) 454 F.3d 725, 729 [stating, "in this Circuit a defendant who fails to object to a mistrial gives his or her implied consent to it."]; *In re Marte v. Berkman* (N.Y. 2011) 925 N.Y.S.2d 388, 390 [a party cannot remain quiet when the court suggests a mistrial, "leaving the false impression of acquiescence even while anticipating a subsequent objection. If this were permissible, attorneys could—by their silence—lull the court into taking actions that could not later be undone."].)

As noted above, in California, the courts have taken the position that silence alone cannot constitute consent to a mistrial. However, as we now discuss, the legal underpinnings of the cases setting forth that proposition no longer exist, calling into question the scope and extent of *Curry's* application. Moreover, the facts at issue in *Curry* and its progeny generally involve silence following a statement expressly rejecting the idea of a mistrial or seeking a lesser remedy. In contrast, the facts at issue in the instant case involve silence following a lengthy discussion in which counsel agreed to the procedure followed as the facts evolved. As we now explain, it is our view that, where, under all of the facts and circumstances, defense counsel leads the trial court to believe that counsel consents to a procedure which ultimately results in the declaration of a mistrial, the defendant cannot properly rely on *Curry* to argue that counsel's ultimate silence at the moment the mistrial is declared should be interpreted as a lack of consent.

4. *Silence as Consent in California*

In *Curry*, our Supreme Court stated, "When a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver." (*Curry, supra*, 2 Cal.3d at p. 713.) The Supreme Court did not support this proposition with any analysis; instead, it simply relied on three prior opinions: *Mitchell v. Superior Court* (1962) 207 Cal.App.2d 643 (*Mitchell*), *Hutson v. Superior Court* (1962) 203 Cal.App.2d 687 (*Hutson*), and *People v. Valenti* (1957) 49 Cal.2d 199 (*Valenti*).[24] We therefore turn to those opinions, in order to understand the basis on which California appears to have adopted the rule that mere silence cannot constitute consent to the discharge of a jury.

a. *Mitchell*

In *Mitchell*, the trial judge dismissed the jury after a few hours of deliberations, on the theory that it was preferable to dismiss the jury than sequester it for the night.[25] (*Mitchell, supra,* 207 Cal.App.2d at pp. 645-646.) "It does not appear from the record that either counsel had anything to say for or against the discharge of the jury or that defendant or his counsel in any way manifested consent thereto." (*Ibid.*) In

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[24] The *Valenti* case was cited in *Curry* with a "cf." As we shall discuss, it provides little authority for the proposition for which it was cited.

[25] In fact, the judge who had presided over the trial was unavailable, so had left word for a different judge to dismiss the jury if they were unable to reach a verdict at the end of the first day of deliberations. The second judge did not exercise its own discretion, but simply dismissed the jury at the instruction of the first judge. (*Mitchell, supra,* 207 Cal.App.2d at p. 646.)

determining whether the jury was properly dismissed, the Court of Appeal turned to Penal Code section 1140, which provides, "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, *unless by consent of both parties, entered upon the minutes*, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (Italics added.) In *Mitchell*, there was no consent recorded in the minutes. Thus, *Mitchell* stands for the straightforward proposition that, *when a jury is discharged after the cause has been submitted to them*, any consent to the discharge must appear in the minutes, as provided by Penal Code section 1140. It does not, however, provide support for the general proposition that, when dismissing a jury to whom the case has not yet been submitted, a defendant's silence cannot constitute consent.

b. *Hutson*

Hutson did not involve the discharge of the jury after the case had been presented to it, so Penal Code section 1140 did not apply. Instead, *Hutson* was concerned with a problem which arose *during* trial. Hutson and a co-defendant had been jointly represented by counsel at the preliminary hearing. At trial, Hutson had new counsel, but the co-defendant was represented by the same attorney who had represented both defendants at the preliminary hearing. When the co-defendant's counsel sought to cross-examine Hutson on representations learned by counsel while counsel had been representing him, Hutson refused to waive the attorney-client privilege. The trial court stated that, under the circumstances, it saw no other choice but to declare a mistrial.

The mistrial was declared, and Hutson subsequently asserted once in jeopardy. (*Hutson, supra,* 203 Cal.App.2d at p. 689.) When considering whether Hutson had impliedly consented to the mistrial, the Court of Appeal stated, "Silence on the part of a defendant in the circumstances could not properly be construed as consent." (*Id.* at p. 691.) For this proposition, the *Hutson* court cited two non-California authorities, which we discuss below.

The *Hutson* court went on to state: "Our conclusion is supported by the fact that Hutson was not present during the proceedings in the judge's chambers [where the potential mistrial was discussed] and was not asked personally whether he would consent to a declaration of mistrial. [Citation.] As is pointed out in [citation], this action by the court involved a basic constitutional right of the defendant. While it is true that a formal motion for a mistrial made by defendant through his counsel is construed as consent to a mistrial on the defendant's part, still that is not the situation here. No such motion was made. The court declared on its own initiative that a mistrial would be ordered. It would seem that with such an important right involved[,] the defendant personally should have been given an opportunity to consent to the procedure or specifically to refuse."[26] (*Hutson, supra,* 203 Cal.App.2d at pp. 692-693.)

Thus, *Hutson* relied on three things – two cases and the proposition that a defendant should *personally* be given the opportunity to consent (or refuse to consent) to a mistrial. We examine each of these in turn.

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[26] The court also concluded that comments made by defense counsel *after* the trial court had positively indicated it would grant a mistrial could not be construed as a consent. (*Hutson, supra,* 203 Cal.App.2d at p. 692.)

First, as support for the proposition that "[s]ilence on the part of a defendant in the circumstances could not properly be construed as consent," the *Hutson* court cited *Himmelfarb v. United States* (9th Cir. 1949) 175 F.2d 924. (*Hutson, supra,* 203 Cal.App.2d at p. 691.) In *Himmelfarb*, the Ninth Circuit stated, "[t]he mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity." (*Himmelfarb, supra,* 175 F.2d at p. 931, fn. 1.) It also stated, "it is plain that no stipulation of counsel waiving his client's constitutional right could be effective without the client's specific assent." (*Id.* at p. 931.) Yet neither of these propositions are still the law in the Ninth Circuit. "The dictum of *Himmelfarb* [citation], that even if counsel has consented a defendant must also personally give consent to waive his double jeopardy right, and that such consent will not be presumed from his silence, is no longer valid law. [Citations.]" (*United States v. Smith* (9th Cir. 1980) 621 F.2d 350, 352, fn. 3.)

Second, for the proposition that the silence of a defendant cannot be construed as consent, the *Hutson* court also relied on *State v. Richardson* (S.C. 1896) 25 S.E. 220, a South Carolina case in which the prosecutor moved to withdraw the case from the jury when the prosecutor discovered that its second witness was missing. The defendant did not object, and the case was subsequently retried. The South Carolina Supreme Court concluded that defendant's silence did not constitute consent, stating: "It is true that it is stated in the 'case' that when the solicitor moved to withdraw the case from the jury, no objection was made by the prisoner; but it also appears in the 'case' that the prisoner was not at that time represented by counsel, and it would be a harsh rule to hold that

defendant consented to a withdrawal of the case from the jury simply because he interposed no objection, which, possibly, he did not know he had a right to do. Besides, consent is active, while not objecting is merely passive. The old adage, 'Silence gives consent,' is not true in law; for there it only applies where there is some duty or obligation to speak. [Citation.] If it had appeared in the 'case,' as it does not, that the prisoner was asked whether he objected to the motion to withdraw the case from the jury, and he had said 'No,' or had even remained silent, then the result would have been different. As it was, however, we think it would be going too far to hold that he consented to a withdrawal of the case." (*Id.* at p. 222.)

Third, *Hutson* relied on the proposition that protection against double jeopardy is such an important right that a defendant must personally waive it for any waiver to be valid. The validity of this proposition was not directly addressed in California until 1983. In *People v. Moore* (1983) 140 Cal.App.3d 508, 511, the court held, contrary to *Hutson*'s assumption, that "the right of the defendant to request a mistrial or proceed to a conclusion with the same jury, though a fundamental one, is one that should and can properly be exercised by experienced legal minds and is not beyond the control of counsel." (*Id.* at pp. 513-514; see also *People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175 ["Although the right to request a mistrial or proceed to a conclusion with the same jury is a fundamental right, the law does not require that it be personally waived by an accused, nor does the law require that an accused be admonished concerning the nature of the right."].)

In sum, *Hutson* did conclude that silence on the part of a defendant could not properly be construed as consent to a mistrial. However, *Hutson* reached this conclusion while under the belief that the right to consent or refuse a mistrial is a right personal to the defendant which he must personally exercise – a proposition which has since been rejected by California courts. In addition, *Hutson* relied on Ninth Circuit authority which was based on the same premise; and the Ninth Circuit has since rejected that premise, as well as the conclusion that silence cannot constitute a waiver. Finally, *Hutson* relied on a South Carolina case in which the defendant was not represented by counsel, which held only that a defendant's failure to sua sponte object could not be held to be a consent when the defendant might not have even known that he had the right to object.

Hutson, and the authority on which it relied, was concerned largely with the silence of a defendant, not the silence of the defendant's counsel. It therefore can provide little support for the proposition that the silence of *defense counsel*, in circumstances in which counsel could reasonably be expected to object to the declaration of a mistrial, cannot constitute consent.

c. *Valenti*

In *Curry*, the Supreme Court cited to *Valenti, supra,* 49 Cal.2d 199, with a "cf" cite, in support of the proposition that "[w]hen a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver." (*Curry, supra,* 2 Cal.3d at p. 713.)

Yet *Valenti* does not support that proposition; it was not a "consent" case and discussed double jeopardy only in dicta. *Valenti* considered the prosecution's attempt to appeal from the trial court's erroneous dismissal of a case in the middle of a jury trial, based on its finding that the defendant's arrest was illegal. The Supreme Court in *Valenti* concluded that the order was not appealable, and noted that, even if it were, no reversal could be ordered as the defendant had been once in jeopardy. While the court discussed double jeopardy in general (*id.* at pp. 208-209), the *Valenti* opinion does not touch on whether silence constitutes consent to a mistrial, and is therefore of little use to our analysis.

d. *Curry*

With this understanding of the case law on which *Curry* relied, we now return to *Curry* itself. In *Curry*, the court was concerned with a situation in which a witness had testified to inadmissible matters prejudicial to each side in the case. Defense counsel sought a cautionary jury instruction, while the prosecutor was unconcerned by the testimony prejudicial to the prosecution. The trial court replied that it was unsure whether it could " 'save this trial.' " The trial court called a recess and, upon returning, indicated an intention to declare a mistrial. Neither side objected (although the prosecutor asked for the basis for the ruling). The jury was dismissed, and the defendant subsequently entered a plea of once in jeopardy. (*Curry, supra,* 2 Cal.3d at pp. 711-712.) On appeal, the Supreme Court upheld that plea.

The Supreme Court recognized that consent can be implied by conduct, such as the request for a mistrial, but noted that defense counsel did not request a mistrial here,

but sought only a limiting instruction. (*Curry, supra,* 2 Cal.3d at p. 913.) While the Supreme Court did not expressly address counsel's silence *after* the court indicated an intention to declare a mistrial, the court did state that "[w]hen a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver." (*Id.* at p. 713 [citing *Miller, Hutson,* and *Valenti*].) As discussed above, none of the cases on which the Supreme Court relied considered the circumstance of a mistrial declared *before the case was given to the jury* in which defense counsel *legally possessed the right to consent on the part of the defendant* and remained silent. Moreover, in *Curry*, defense counsel had requested a remedy less severe than a mistrial – a limiting instruction. When defense counsel has requested a limiting instruction, it can be inferred that counsel would oppose the more severe remedy of a mistrial.[27]

e. *Curry's Progeny*

There have been several cases which have simply cited *Curry*, without considering: (1) whether the facts of the case involved defense counsel's request for

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[27] Indeed, while the *Curry* court did not phrase it in quite these terms, it concluded that counsel's request for a limiting instruction could in no way be read as a consent to a mistrial. "When the record is fairly read, it is clear that defense counsel requested no more than a cautionary instruction advising the jury that the alleged threats of Louis Lee, reported in the testimony of [the witness], were hearsay as to these petitioners. Counsel neither objected to this testimony as such, nor moved to strike it; indeed, he expressly represented to the court that he had no quarrel with it. In these circumstances, petitioners' simple request for an admonition on an evidentiary matter cannot be magnified into a waiver of their constitutional protection against double jeopardy." (*Curry, supra,* 2 Cal.3d at p. 713.)

a lesser remedy than mistrial; or (2) whether the legal underpinnings of *Curry* should be reconsidered given subsequent authority that the defendant need not personally consent to a mistrial.[28]

In *People v. Compton, supra,* 6 Cal.3d 55, the Supreme Court considered the case of the mid-trial dismissal of an alternate juror who, it appeared, may have been biased against the defendant.[29] Defense counsel brought the issue to the attention of the trial court. The court asked defense counsel if he was seeking a mistrial; counsel "squarely denied that was his purpose." (*Id.* at p. 62.) Although the trial court expressly found that the alternate juror was not unable to serve, the court dismissed the juror out of an abundance of caution. (*Id.* at p. 60.) Although 12 jurors remained, the trial court sought consent of counsel to proceed without an alternate. Without receiving such consent, and erroneously believing that trial could not continue in the absence of a stipulation, the court stated that it felt a mistrial was the only remaining course left,

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[28] Supreme Court cases citing *Curry* without discussion include *People v. Upshaw* (1974) 13 Cal.3d 29, 34 [silence does not constitute consent to the mistrial even when defense counsel invited the error which caused the mistrial]; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 77, fn. 20 [citing *Curry* as support for a similar rule in a different context]; and *People v. Saunders, supra,* 5 Cal.4th at pp. 591-592 [failure to object to the discharge of a jury waives a claim of statutory error, but not a claim of double jeopardy]. The latter case is particularly interesting because, while it accepts without question that *Curry* is still the law, it discusses at length policy reasons which support the general rule that a failure to object results in forfeiture of the right sought to be asserted. (*People v. Saunders, supra,* 5 Cal.4th at pp. 589-590.)

[29] The alternate juror, while getting a haircut, told his barber that he found it hard to keep an open mind in a case such as this one, and that other jurors were stricken for similar thoughts. The alternate juror was apparently unaware that the barber's partner, who was in the shop at the time, was the defendant's brother. (*People v. Compton, supra,* 6 Cal.3d at p. 59, fn. 2.)

and asked counsel whether they had any " 'strong objections' " to it. The prosecutor said " '[n]o comment.' " The court asked defense counsel if he had " 'anything further' "; he did not. (*Id.* at p. 63.) The trial court declared a mistrial and dismissed the jury. (*Id.* at p. 61 & fn. 5.)

On appeal, the Supreme Court upheld the defendant's plea of once in jeopardy. As to the issue of consent, relying on *Curry*, the Supreme Court stated, "The effect of a failure to object is no longer an open question." (*People v. Compton, supra,* 6 Cal.3d at p. 63) The court further stated, "No grounds are shown to distinguish the present case from *Curry* on this point, and no consent to a mistrial may therefore be implied from defendant's failure to voice an objection." (*Ibid.*)

Compton is similar to *Curry* in that it was not a case involving solely the silence of defense counsel. Instead, defense counsel had earlier placed on the record his position that he was *not* seeking a mistrial. Counsel's refusal to speak when subsequently asked if he had "anything further" cannot be interpreted as implied consent to a mistrial when it was likely simply a reaffirmation of counsel's earlier statement that he was not seeking a mistrial.

In *People v. Chaney* (1988) 202 Cal.App.3d 1109, the jury informed the trial court that it was unable to reach a verdict. While the trial court initially believed further deliberation would not assist the jury, it was persuaded by defense counsel to further inquire of the jury as to the number of ballots it had taken. The trial court agreed to so inquire, but stated, " 'If it doesn't change my mind, I will grant a mistrial. If you don't want me to do it after I ask that, you let me know.' " (*Id.* at p. 1113.) After the jury

indicated that it had taken six or seven ballots, the trial court found the jury hopelessly deadlocked and declared a mistrial. (*Id.* at p. 1114.) Defendant subsequently entered a plea of once in jeopardy. On appeal, the court considered the issue of consent to the mistrial.[30] Division One of the Second District Court of Appeal stated, "Contrary to the People's characterization, defense counsel's remarks and subsequent silence when invited to object do not clearly evidence consent; there simply is no qualitative difference between the circumstances at hand and those present in [*Compton*] and [*Curry*]." (*Id.* at p. 1118.) Apparently, it was not raised before the court that, since the case had been submitted to the jury, Penal Code section 1140 *prohibited* discharge of the jury by consent, unless the consent of both parties was entered upon the minutes. Thus, silence could not have constituted consent in *Chaney* in any event, regardless of *Compton* and *Curry*.[31]

5. *Curry Should Not Apply When Conduct Preceding Defense Counsel's Silence Leads the Court to Reasonably Believe Defendant Consents to the Mistrial*

Although we have a concern as to the current scope and extent of the application of *Curry,* given the history of the law and intervening developments, we are, of course, bound by the Supreme Court's opinion. However, despite defendant's argument to the

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[30] The court rejected legal necessity as a justification, as it appeared that the trial court should have taken a partial verdict. (*People v. Chaney, supra,* 202 Cal.App.3d at pp. 1118-1120.)

[31] Moreover, we disagree with the *Chaney* court to the extent it saw "no qualitative difference" between the facts in *Chaney* and those of *Curry* and *Compton*. In both *Curry* and *Compton*, defense counsel had previously indicated that the defendant did not want a mistrial, either expressly or by seeking a lesser remedy; in *Chaney*, there was no such expression.

contrary, we conclude that the instant case is not controlled by *Curry*. This is not a case of "mere silence," and certainly not a case of silence following a statement indicating a lack of consent to a mistrial. While it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial, he had previously fully participated in the discussion and led the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court. Thus, the issue presented by this case is one of whether defense counsel's affirmative conduct was sufficient to give rise to an implication of consent. We conclude that it was.

As we discussed above, California law is clear that consent can be implied from defense counsel's conduct (*People v. Boyd, supra,* 22 Cal.App.3d at p. 717). Cases have held that consent is implied when:[32] (1) the defendant moves for, or joins in a motion for, a mistrial (*Curry, supra,* 2 Cal.3d at p. 713); (2) counsel states that, as the result of an error, the case " 'should either result in a mistrial or an instructed verdict' " (*People v. Kelly* (1933) 132 Cal.App. 118, 122); or (3) after the prosecution successfully

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[32] It must be remembered that these cases were issued before it was determined that defense counsel could consent to the dismissal of the jury on behalf of a defendant. Thus, at the time that those cases considered implied consent, they required the defendant personally to consent, and were thus considering the circumstances in which *the defendant* would be considered to have impliedly consented, based on defense counsel's affirmative request for relief. Logic suggests that since it has now been decided that defense counsel alone may consent to a mistrial, without the defendant's express affirmance, a somewhat broader scope of conduct on the part of defense counsel should be sufficient to constitute consent. In other words, while a *defendant's* consent will be implied when *defense counsel* affirmatively seeks relief that would be inconsistent with a lack of consent to a mistrial, *defense counsel's* consent may be implied in circumstances shy of such an affirmative request.

amended the information after the jury was sworn, defense counsel moves for a two- or three-week continuance in order to prepare to meet the new charges, and agrees that the case should be referred back to the criminal department for resetting (*People v. Ramirez, supra,* 27 Cal.App.3d at pp. 668-670).

As to the issue of the proper interpretation of possibly ambiguous statements of defense counsel, the *People v. Kelly* court stated as follows: "It may be further observed that the statements [defense counsel] made were such as would naturally lead the court to believe that the defendant consented to a mistrial order. Had nothing been said in this regard, the court could have protected the rights of the People by proceeding with the case. Even if the statements made are capable of a double construction, they should be viewed in the light of the circumstances in which they were uttered and with a view of determining what was intended. Thus viewed, we think the statements made were such as to justify the court in believing that an order of mistrial was consented to. Under such circumstances an appellant may not insist upon such a construction of statements made by him as would only tend to show that the court was misled thereby." (*People v. Kelly, supra,* 132 Cal.App. at pp. 123-124.)

Considering all of the foregoing, we conclude that an uncritical application of the language of *Curry* could result in a substantial injustice when, although defense counsel was silent when the mistrial was declared, such silence occurred in the following circumstances: (1) defense counsel earlier participated in a discussion which led the trial court to reasonably believe defense counsel consented to the declaration of a mistrial; (2) defense counsel was aware, or should have been aware, that counsel had

given the trial court that impression; (3) defense counsel was presented with the opportunity to disabuse the court of that belief, but failed to do so; and (4) dismissal of the jury and the declaration of a mistrial occurred prior to the submission of the case to the jury (i.e., Penal Code section 1140 has no application) and, indeed, prior to the opening statements or presentation of any evidence.

6. *Policy Considerations Support Our Conclusion*

Several policy considerations support our holding. First, the California Supreme Court has recognized that a certain flexibility is required in approaching claims of double jeopardy. " ' "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . " ' [Citation.] Courts 'have disparaged "rigid, mechanical" rules in the interpretation of the Double Jeopardy Clause. [Citation.]' [Citation.] 'The exaltation of form over substance is to be avoided.' [Citation.] The standards for determining when a double jeopardy violation has occurred are not to be applied mechanically. [Citations.]" (*People v. Saunders, supra,* 5 Cal.4th at p. 593.) Thus, we believe that the California Supreme Court would not be in favor of a literal application of the language of *Curry*, without first considering relevant factual distinctions, intervening legal developments, and whether the policies underlying the principles of double jeopardy are advanced or frustrated by the result.

Second, we return to *State v. Richardson, supra,* 25 S.E. 220, the South Carolina case on which *Hutson*, and therefore *Curry*, relied. While the South Carolina court was reluctant to infer consent from silence of *a defendant* who might not be aware of the

rights at issue (*id.* at p. 222), different considerations are at issue when defense counsel is given the trial court's proposed solution to a problem for counsel's input. Counsel should not be permitted to remain silent in this situation, "leaving the false impression of acquiescence even while anticipating a subsequent objection. If this were permissible, attorneys could—by their silence—lull the court into taking actions that could not later be undone." (See *In re Marte v. Berkman, supra,* 925 N.Y.S.2d at p. 390.) A defendant's constitutional rights are valuable, and must be respected; but they are not tools for the defense counsel to use in order to trap the court into giving up the state's right to try the defendant.[33]

Third, concluding that defense counsel's silence constituted consent to the mistrial in this case, in which the trial had not really begun, would support one of the most important public policies related to the double jeopardy issue. Society has a strong interest in giving the prosecution one complete opportunity to convict those who have violated its laws. (*Arizona v. Washington* (1978) 434 U.S. 497, 509.) As the United States Supreme Court stated in a somewhat different context, "There simply has been

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[33] Indeed, defendant's briefing in this case *recognizes* the proposition that a failure to object generally constitutes consent. For example, defendant's opposition to the brief of amicus curiae argues that counsel had agreed to delay the trial for Juror 6, stating, "if the parties had not agreed to such a delay, one might have expected one or the other of the attorneys to have voiced an objection to the court's comments [to the jury regarding delaying the trial]. No such objection was made because of the obvious understanding that trial would be delayed to November 9 and petitioner's expert witness called out of order if necessary." Yet, according to the trial court and the prosecutor, that understanding *also* included the terms that trial would not go ahead without at least one alternate, and that if any juror indicated an inability to serve (if the trial were delayed), the case would not go ahead. Defendant would have a failure to object constitute consent to *some* terms of an agreement, but not *other* terms of the very same agreement.

none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws." (*Ohio v. Johnson* (1984) 467 U.S. 493, 502.) Clearly, there was no government overreaching by the prosecutor in this case;[34] just an attempt by the trial court to conserve judicial resources when it became reasonably apparent that the impaneled jury had lost so many members as to make it unlikely that sufficient jurors would remain to render a verdict in what promised to be a lengthy trial.

Fourth, *Curry* itself explained its rationale for respecting a defendant's right to withhold consent from the declaration of a mistrial.[35] "A defendant may choose not to move for or consent to a mistrial for many reasons. He may be of the opinion that no error in fact occurred, or if it occurred, that it was not prejudicial. He may believe that any error in admitting improper evidence can be cured by a motion to strike or a request for admonition, or can be refuted by impeachment of the witness or contrary defense

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[34] In *People v. Superior Court (Marks), supra,* 1 Cal.4th at p. 71 the Supreme Court concluded that, when a defendant's conviction is deemed to be of a lesser degree due to the jury's failure to determine the degree of the crime (Pen. Code, § 1157), the defendant may invoke double jeopardy to the same degree as if the defendant's conviction had followed an express finding by the jury of the lesser degree. The Supreme Court stated, "We perceive no unfairness to the People in our holding. The prosecution is not deprived of its 'one complete opportunity to convict those who have violated [the] laws' " as the prosecution had an opportunity to convict defendant of the greater offense. (*People v. Superior Court (Marks), supra,* 1 Cal.4th at p. 77.) In the instant case, by contrast, the prosecution had only the opportunity to impanel a jury.

[35] California law differs from the law of the United States Supreme Court on the issue of whether a mistrial declared for defendant's benefit, although without his consent, is sufficient to constitute jeopardy. In California, it is. (*Curry, supra,* 2 Cal.3d at pp. 715-716.)

evidence. Indeed, even when a palpably prejudicial error has been committed a defendant may have valid personal reasons to prefer going ahead with the trial rather than beginning the entire process anew, such as a desire to minimize the embarrassment, expense, and anxiety mentioned above. These considerations are peculiarly within the knowledge of the defendant, not the judge, and the latter must avoid depriving the defendant of his constitutionally protected freedom of choice in the name of a paternalistic concern for his welfare." (*Curry, supra*, 2 Cal.3d at p. 717.) None of these considerations are applicable to this case, where the trial had not yet begun, and new jury selection could have started shortly thereafter.[36]

All of these policy factors support our conclusion that a literal or mechanical application of the language of *Curry* to the facts in the instant case is not appropriate. The trial court found that, by defense counsel's conduct over the course of the proceedings, there was an implied consent to the dismissal of the jury and the resulting mistrial. We now turn to whether this conclusion is supported by the record.

7. *The Record Supports the Trial Court's Findings*

The trial court, in ruling on defendant's motion to dismiss, found that there had been implied consent to the dismissal of the jury. Giving due deference to the trial court

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[36] Moreover, we note that defense counsel never asserted that any of these reasons came into play. Defense counsel's declaration submitted in support of the motion to dismiss stated only that counsel failed to hear or misunderstood the court's comments and that he had not thought the court would declare a mistrial; he never stated that he or his client had any tactical or personal reason for not wanting to consent to the mistrial.

as trier of fact, we conclude that record supports the trial court's findings.[37] Preliminarily, it cannot be disputed that the trial court believed, at the time it dismissed the jury, that it did so with the consent of both counsel. Indeed, moments after it dismissed the jury, the court expressly stated, "it was agreed that if we would have had only 12 jurors, we would start over." Clearly, the court would not have made such a statement had it not believed, at the time, that there was such an agreement.[38]

a. *The Trial Court Reasonably Believed There Was Consent*

The record indicates that the court was reasonable in its belief that there was an agreement. Preliminarily, we believe that it is improper to focus our review of the record on any specific words spoken at any single point in time, without regard to the context of the proceedings. It is apparent that the court and both counsel were attempting to respond to constantly changing circumstances, and the nature of the agreement between the court and counsel was continually evolving.[39] With that

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[37] While we have before us only the cold record, the trial court was present at the actual hearing when the mistrial took place. Thus, the court was able to rely on its own recollection of the proceedings, including body language, tones of voice, nods, and so forth. While the better procedure is clearly to place any agreement to dismiss the jury on the record, expressly obtaining the verbal consent of both counsel, it would be a miscarriage of justice to allow a double jeopardy defense to prevail simply because defense counsel made his consent to the dismissal known to the court by means other than an expressly stated approval.

[38] Moreover, an experienced trial judge, such as the one in this case, certainly would have understood the consequences of dismissing a sworn jury without the consent of defense counsel and would not have done so had he not believed that counsel had consented.

[39] However, we do agree with the trial court's statement at the hearing on the motion to dismiss that the "better practice" when such a situation arises is "to dot every 'i' and cross every 't'."

understanding, we review the proceedings on the morning of November 7, 2011 as reflected by the record.

By that morning, two things had already occurred. First, the jury and four alternates (at defense counsel's request) had been sworn. Second, one member of the panel, Juror 3 (who stated he could not be impartial), had already been dismissed. Before calling the case, the court had learned that issues had arisen with "other jurors," and went on the record, with counsel, outside the presence of the jury "to attempt to deal" with those issues. As discussed above, the court next discussed Juror 4 (fiancée broke ankle) with counsel. When defense counsel suggested asking the juror whether there was any alternative to him being the caretaker for his fiancée, the court immediately made the inquiry. The result was in the negative, and it appeared to the court that there was no way to retain the juror. The next juror was Juror 32 (child care obligations). Although the trial court was initially inclined to retain the juror due to her failure to timely raise the issue during voir dire, defense counsel requested her dismissal, and the court complied.

At this point, the jury was down three members, and the court and counsel had not yet addressed Juror 6 (pinkeye). As this created the potential that this lengthy trial would begin without any alternates (when counsel and the court had agreed to four, because of the upcoming holidays), the court proposed a course of action to follow "if we are down to no alternates." Seeing the panel already falling apart, the court proposed that, if no alternates were left, it would ask the jurors if they would be able to serve into the last week of November. If any juror indicated an inability to do so, the

court would end the matter. Not only did defense counsel *fail to object* to this statement, he expressly stated that "right now where we are at, the *only problem* I have" is making certain his expert would testify. (Italics added.) Thus, it was reasonable for the court to assume that defense counsel agreed to the court's proposed procedure.

Thereafter, the prosecutor stated that she would agree to take defendant's expert out of order because she wanted to wait for Juror 6 and preserve one alternate. Defense counsel did not disagree, thus causing the court to reasonably believe that the parties had agreed to proceed if an alternate could be preserved. Or, putting it another way, the court reasonably believed that the prosecutor would not have agreed to defendant's request to take the expert out of order, unless the alternate could be preserved.

Thus, defense counsel, by his participation in the discussion, his express statements, and his failure to disagree with the prosecutor's statement regarding preserving an alternate, gave the trial court reason to believe that: (1) the trial court's proposed procedure for asking the jury about additional problems was acceptable; and (2) the parties did not wish to proceed without an alternate. Further evidence of defendant's agreement to these terms is the fact that defense counsel made no objection when the trial court subsequently questioned the jury, nor when the trial court subsequently stated on the record that the parties had agreed not to proceed without an alternate.[40]

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[40] Had defense counsel disagreed with this statement, there would have been no possible tactical reason for failing to object when the trial court placed it on the record, as the trial court had already dismissed the jury.

b. *Defense Counsel Knew or Should Have Known the Trial Court Held This Belief*

Defense counsel's declaration in support of the motion to dismiss is notable for its failure to indicate, for example, that counsel *disagreed* with the court's intent to declare a mistrial but believed, under *Curry*, that he was not required to bring this disagreement to the court's attention. Instead, defense counsel states, no fewer than *four* times, that he did not understand or hear what the court had stated, yet he sought no clarification.[41] This is not a legitimate basis on which to obtain a dismissal. The trial court, throughout the proceedings, expressed its plan for dealing with the collapse of the jury panel, giving counsel the opportunity for input at every turn. Defense counsel's participation in these discussions provided an ample basis for the trial court to believe that counsel consented to the procedure ultimately implemented. Counsel should not be heard to argue, after the fact, that his participation did not constitute consent, on the basis that he did not hear or understand the trial court. If defense counsel did not hear or understand, he was obligated to seek clarification. By failing to do so, defense

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[41] In his declaration, defense counsel stated that, when the court proposed asking the jurors if they could serve to the last week in November, "the reasoning behind the court's statement was not clear" to him, as he believed such an inquiry was unnecessary. He nonetheless "set aside [his] confusion" without seeking clarification. Defense counsel next stated that, when the court stated, "The bottom line is we are done," defense counsel "was confused by the court's comment." Rather than seek clarification, defense counsel moved on. Defense counsel also stated that, when, just prior to dismissing the jury, the trial court called counsel to sidebar and stated, "I believe they win," defense counsel "had no idea what [the court] meant by this comment." Finally, defense counsel stated that, when the court expressly placed the terms of the agreement on the record after the jury was dismissed, he "did not hear [the trial court] make this comment . . . as [he] was conferring with" defendant. Defense counsel did not ask the court to repeat what he now states he had failed to hear.

counsel is barred from now relying on the claim that he did not know what the court stated. In short, it appears from the record that defense counsel was well aware of the trial court's understanding of the agreement on how to proceed; if defense counsel was not actually aware because he misunderstood the court, his failure to obtain clarification should result in counsel being charged with such knowledge.

c. *Defense Counsel Had an Opportunity to Inform the Court That There Was No Agreement, But Failed To Do So*

Finally, our review of the record indicates that defense counsel had several opportunities to inform the court that the court's understanding of the agreement on how to proceed given the unusual circumstances was not, in fact, correct. Counsel's input was sought repeatedly and, in fact, accepted in every instance it was given.[42] Immediately prior to dismissing the jury, the trial court called counsel to sidebar and stated, "I believe they win." The court was clearly indicating its belief that the jurors who did not want to serve had "won," requiring dismissal of the panel under the terms of the agreement with counsel. The court was seeking input from counsel on whether, in fact, this was the case. It is significant that the court did not simply dismiss the jury once Juror 2 indicated that he had suffered a heart attack; the court gave counsel a final chance to disagree. Counsel did not do so. Under all of the circumstances of this case, we conclude that counsel's failure to state any disagreement constituted implied consent to the dismissal of the jury.

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[42] The court: (1) questioned Juror 4 as suggested by defense counsel; (2) immediately dismissed Juror 32 when defense counsel argued for her dismissal; and (3) made certain that any agreement satisfied defense counsel's concern that his expert witness be heard out of order.

DISPOSITION

The petition for writ of prohibition is denied.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.