23-5711

No. 23-_____

SUPREME COURT OF THE UNITED STATES

MITCHELL D. GREEN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) this Court addressed under what circumstances the Double Jeopardy Clause permits a defendant to be retried after a mistrial was declared due to defense counsel's inadmissible comment which "may have affected the impartiality of the jury." 434 U.S. at 511.

Petitioner's case presents a counter-scenario to *Washington*: whether, and under what circumstances, a defendant may be retried after a mistrial was declared due to the jury hearing admissible evidence.

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PETITION FOR WRIT OF CERTIORARI

Mitchell D. Green, *pro se*, respectfully petitions this Court for a writ of certiorari to review the decision of the Supreme Court of Wisconsin.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin denying Petitioner Green's interlocutory appeal seeking dismissal on Double Jeopardy grounds is reported at *State v. Green*, 2023 WI 57, 408 Wis.2d 248, 992 N.W.2d 56, reversing an unpublished decision of the Wisconsin Court of Appeals listed at 401 Wis.2d 540, 974 N.W.2d 51.

JURISDICTION

The decision of the Supreme Court of Wisconsin was issued on June 29, 2023. Mr. Green invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this petition for certiorari within 90 days of this decision.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural history

A complaint dated March 3, 2019 alleged three counts: trafficking a child in violation of Wis. Stat. §948.051(1); physical abuse of a child in violation of Wis. Stat. §948.03(2)(b) and disorderly conduct while armed in violation of Wis. Stat. §947.01 and §939.63(1)(a). 1: 1-3.

After the Honorable Janet Protasiewicz sought a court to spin the case (79: 3), the case proceeded to jury trial before the Honorable David Borowski on January 27-28, 2020. The State called two witnesses:

alleged victim SAB (82: 67-110) and an investigating police officer (83: 4-78). The State then rested. 83: 78.

The defense presented testimony of witness Jonathan Cousin. 83: 78-93. After a conference with counsel, the court, *sua sponte*, rendered a decision from the bench declaring a mistrial. Apx. D 152-159; 86: 26-33.

On February 18, 2020 Mr. Green filed a motion and supporting brief seeking dismissal on Double Jeopardy grounds. 42: 1; 43: 1-6. The State filed a response which not only opposed dismissal, but also opposed continued representation by the attorney representing Mr. Green at the mistrial. 46: 1-11. At a pretrial on June 22, 2020 Judge Borowski rendered a decision from the bench that the motion for dismissal be denied. Apx. 111-113; 88: 4-6.

Mr. Green's counsel later withdrew (89: 9), and new counsel assumed representation of Mr. Green. 90: 2.

On December 22, 2020 new trial counsel filed a motion for reconsideration of the motion to dismiss on Double Jeopardy grounds.

58: 1-28. The State filed a response. 62: 1-3. On February 3, 2021 the Court heard oral argument on the motion and issued a decision from the bench that the motion for reconsideration be denied. Apx. F 163-169; 91: 35-41. On February 4, 2021 the Circuit Court entered a written order denying reconsideration. Apx. C 150-151; 63: 1-2.

The Court of Appeals of Wisconsin accepted Mr. Green's petition to review the non-final order denying reconsideration. 81: 1. In a decision dated March 22, 2022 the Court of Appeals reversed the denial of the motion to dismiss and remanded with directions to dismiss the complaint with prejudice. Apx. B 141-149.

The Supreme Court of Wisconsin granted the State's petition for review. In a 4-3 decision, the Supreme Court reversed the Court of Appeals and remanded for trial. Apx. A 101-140.

Jonathan Cousin's testimony

After calling alleged victim SAB and an investigating officer in support of the prosecution theory that Mr. Green knowingly provided a ride to SAB to a downtown hotel to consummate a prostitution date, the

State rested. 83: 78. Mr. Green then called Jonathan Cousin to testify for the defense. Although Mr. Cousin was listed on the defense witness lists (18: 1; 27: 1-2), and named on the record as a witness at the start of trial (80: 7-8), Mr. Green's counsel had not provided the written report of Mr. Cousin's anticipated testimony and had not filed any motion seeking the trial court's approval of Mr. Cousin's testimony.

Mr. Cousin testified that he agreed to give a ride to a family member, Delmar, as he frequently did because Delmar did not own a car. 83: 85. In return, Delmar agreed to provide gas money. 83: 85-86. After Delmar got in the passenger seat of Mr. Cousin's car, Delmar pointed to two other persons and asked if they could ride along with them; Mr. Cousin agreed as long as he received gas money. 83: 86. These other two persons, SAB and JR, rode in the back seat, while Delmar was the front passenger. 83: 86.

Mr. Cousin drove them from an apartment building on Appleton Avenue to downtown in the area of 6th and Wisconsin and stopped in front of "the blue building." 83: 86-87. SAB and JR got out of the car,

and Delmar asked Mr. Cousin to stay. 83: 87. Mr. Cousin was ready to leave, but Delmar promised more gas money if he stayed to drop SAB and JR off, as they have no other way home. 83: 87. After fifteen minutes, SAB and JR reentered the car. 83: 87.

During the ride back to drop them off on Appleton Avenue, Mr. Cousin heard SAB tell JR about a guy asking her if he can spit in her mouth, which she allowed, causing her to regurgitate. 83: 88. Finding this disgusting, Mr. Cousin turned up the radio. 83: 88. Mr. Cousin had assumed SAB and JR were boyfriend/girlfriend and did not know what was going on. 83: 88. He did not know he was driving an underage sex worker to a hotel. 83: 91-92. He had never seen SAB before that night and had not seen her since then. 83: 89, 91. He never conversed with SAB, but only with Delmar. 83: 91.

Mr. Cousin is a cousin of Mr. Green. 83: 79-80. Mr. Cousin became aware that this incident was connected to Mr. Green's case only after Mr. Green was arrested, when Mr. Green showed Mr. Cousin paperwork from his case. 83: 83-84. In particular, reading an account

of some guy spitting into a girl's mouth made Mr. Cousin realize he was reading about an event in which he had taken part. 83: 85, 88.

The testimony recounted above occurred in the direct- and cross-examination of Mr. Cousin. As Mr. Green's counsel was about to commence re-direct examination, the Court declared a noon recess. 83: 93.

The mistrial

After the noon recess, proceedings resumed outside of the presence of the jury.

Ms. Kort, the prosecutor, asserted that Mr. Cousin's testimony amounted to a third-party perpetrator "*Denny*" defense [referring to *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984)], presented without prior notice, motion or ruling on its admissibility. 86: 3. She further asserted that Mr. Cousin's testimony amounted to an admission, at least to the level of probable cause, of child trafficking and that such admission was made without counsel or the opportunity to assert the privilege against self-incrimination. 86: 4-5.

Mr. Green's counsel asserted Mr. Cousin did not admit to any crime. 86: 5. Thus, in speaking to Mr. Cousin, counsel saw no need to give him any warnings or to recommend that Mr. Cousin obtain counsel. 86: 5-6, 13. Counsel provided a written account of Mr. Cousin's statement to the Court; after paraphrasing the contents, the Court concluded Mr. Cousin was saying he, not Mr. Green, committed the crime. 86: 5-8.

The Court noted two issues: whether Mr. Cousin should have had counsel before testifying and the *Denny* issue. 86: 9.

Ms. Karshen, a second prosecutor appearing at the hearing, noted that the counsel issue might be mitigated if Mr. Cousin were to testify no further. 86: 10. She further asserted that the admissibility of Mr. Cousin's testimony under *Denny* should have been determined pretrial. 86: 10-11. While mentioning as possible remedies a curative instruction or striking testimony (but not mistrial), Ms. Karshen left to the Court's discretion what to do next. 86: 11.

The court and counsel engaged in a colloquy addressing the

degree to which Mr. Cousin's testimony matched the events in the trafficking charge. 86: 12-16. The Court concluded that Mr. Cousin's testimony is clearly *Denny* evidence offered to exculpate Mr. Green. 86: 16, 19. The Court further stated that had the evidence been proffered and allowed, the Court would have had an attorney speak to Mr. Cousin, and such attorney would have advised Mr. Cousin not to testify, although Mr. Cousin need not have followed such advice. 86: 19-21.

The Court inquired of the State as to a remedy, noting that the Court could not "unring the bell" since Mr. Cousin's testimony was nearly all *Denny* evidence. 86: 21-22, 29. Ms. Karshen again left the remedy to the Court. 86: 22. She further noted the failure to disclose Mr. Cousin's statement, and the Court noted that had the State done such a thing, the Court would have granted a mistrial and would have further expressed its displeasure to the parties. 86: 23.

In response, Mr. Green's counsel continued to argue that the testimony is not *Denny* evidence since Mr. Cousin denied knowledge of committing a crime; thus, there is nothing to fix, and the jury should

be allowed to weigh Mr. Cousin's testimony. 86: 23-24.

The Court announced its decision. Apx. D 152-159; 86: 26-33. The Court noted that *Denny* addresses parameters for presenting "a plausible theory of another person that committed a crime" and that Mr. Cousin "put himself in the place of Mr. Green as the perpetrator of this offense." Apx. D 152; 86: 26. The only reasons for presenting Mr. Cousin's testimony would be "*Denny* reasons." Apx. D 156; 86: 30. While finding Mr. Cousin's testimony to fall within the scope of *Denny*, the Court made no determination that the testimony was allowed or prohibited under *Denny*. The Court was not sure if it would have allowed Mr. Cousin's testimony, finding it "very problematic." Apx. D 156; 86: 30. The Court concluded that as things stand, the jury heard the testimony and is thinking either that Mr. Green is clearly innocent, or that Mr. Cousin is implausibly taking the fall. Apx. D 157; 86: 31. The Court declared a mistrial. Apx. D 158; 86: 32.

Motion to dismiss

On February 18, 2020 Mr. Green filed a motion to dismiss on

Double Jeopardy grounds and a supporting brief. 46: 1; 47: 1-6. On June 15, 2020 the State filed a response addressing not only the motion to dismiss, but also whether Mr. Green's trial counsel should continue to represent Mr. Green. 53: 1-11.

At a final pretrial on June 22, 2020, the State noted that several issues needed to be addressed, including the motion to dismiss. 69: 3-4. Without inviting further argument, the Court decided the motion to dismiss on the briefs. Apx. E 160-162; 69: 4-6. The Court noted that the main issue was whether the testimony was "effectively *Denny* . . . testimony" Apx. E 160-161; 69: 4-5. The Court agreed with the State that there were no legitimate alternatives, and that the State was "effectively blindsided" by the testimony. Apx. E 161; 69: 5. The case needs to be tried after any evidentiary issues regarding *Denny* evidence were cleared up. Apx. E 161; 69: 5. The Court denied the motion for dismissal. Apx. E 162; 69: 6.

Reconsideration

At the pretrial on November 12, 2020, Mr. Green's new trial

counsel informed Judge Borowski that the defense wished to seek reconsideration of the motion to dismiss filed by prior counsel, but that the transcript of the Court's decision was ordered but not yet prepared. 90: 4. Judge Borowski set a briefing schedule. 90: 9, 14. Mr. Green filed a motion for reconsideration. 58: 1-28. The State filed a response. 62: 1-3.

On February 3, 2021 Judge Borowski held a motion hearing. Judge Borowski first heard argument on Mr. Green's motion, in the event of a future trial, to admit Mr. Cousin's testimony in support of a third-party defense pursuant to *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). 56: 1-7; 91: 4-22. Judge Borowski granted this motion. 91: 22-24.

Judge Borowski then addressed Mr. Green's motion to reconsider the motion to dismiss on Double Jeopardy grounds which was made by predecessor counsel. The Court heard argument from counsel for Mr. Green (91: 24-31) and for the State (91: 31-35). Judge Borowski then announced his decision. Apx. F 163-169; 91: 35-41.

In his decision, Judge Borowski emphasized the need for courts to have a great deal of discretion in granting mistrials. Apx. F 163-164; 91: 35-36. Mr. Green had argued that in the absence of any discovery demand or motion in limine, the State was not entitled to prior notice of the content of Mr. Cousin's testimony. 91: 26-29. In apparent response, Judge Borowski noted that the "culture in Milwaukee [courts]" could be described as: "we all shrug our shoulders or everybody goes along to get along." Apx. F 164-165; 91: 36-37. Thus, courts do not employ scheduling orders because they are "routinely ignored," and witness lists and discovery demands are frequently not filed, although the State "should" have filed a discovery demand "in a perfect world." Apx. F 165; 91: 37.

Judge Borowski noted that Mr. Green's counsel at trial was a "good attorney" and "certainly more than competent," Apx. F 165; 91: 37. Either counsel "made a mistake" or he engaged in "misconduct from the standpoint that he darn well knows that you can't spring a witness on the State, especially a witness of this nature." Apx. F 165-

166; 91: 37-38. Judge Borowski explained the reason for declaring a mistrial:

> Now the State has time to send out their own investigator, send out more detectives, figure out a way that they can blow up or eviscerate or cross-examine Mr. Cousin and make it clear that he's lying; that he's making up the story only to cover for Mr. Green.

Apx. F 166; 91: 38. Judge Borowski reaffirmed his decision to grant a mistrial, and declined to reconsider the prior decision denying dismissal. Apx. F 168-169; 91: 40-41.

Decisions on appeal

The Court of Appeals of Wisconsin, after granting leave to appeal a non-final order, found that the trial court's decision declaring a mistrial was not based upon a manifest necessity and that retrial would violate Mr. Green's constitutional right prohibiting Double Jeopardy. Apx. B 141, ¶1; apx. B 149, ¶25. The Court of Appeals enumerated five respects in which the Circuit Court erred in finding manifest necessity. First, the trial court failed, before granting the mistrial, to determine whether Mr. Cousin's testimony was inadmissible and thus tainted the

jury. Apx. B 146-147, ¶18. Second, the Circuit Court's later determination that this testimony was admissible showed the jury was not tainted. Apx. B 147, ¶19. Third, the trial court's assumption that the State was entitled to prior notice of Mr. Cousin's testimony was incorrect, since the State had not filed any discovery demand or applicable motion in limine or taken any other action to seek to discover the substance of Mr. Cousin's testimony. Apx. B 147-148, ¶¶20-22. Fourth, any violation of Mr. Cousin's right to counsel did not support finding manifest necessity, since a mistrial would not erase his testimony. Apx. B 148-149, ¶23. Fifth, contrary to the State's assertions, the State and the Circuit Court have tools to require pretrial disclosure of third-party defense evidence. Apx. B 149, ¶24.

The Supreme Court of Wisconsin granted the State's petition for review. In a 4-3 decision, the Court determined that the trial court exercised sound discretion in declaring a mistrial, noting "The court ordered a mistrial because 'the State has the right to know about and . . . respond to' testimony implicating a third-party perpetrator 'and the

court is required to make a ruling on it before it comes out of a witness' mouth during the middle of the trial.'" Apx. A 115, ¶27. The Court noted Mr. Green's argument that the trial court later determined that the third party perpetrator evidence was admissible and not precluded by *Denny*, but found that this was "irrelevant" and that "the court grounded its mistrial decision in the law." Apx. A 119-120, ¶¶33-35. While recognizing that the record did not reflect any pretrial order regarding *Denny* evidence, the Court found this "irrelevant." Apx. A 133, ¶38. The Court determined that because Judge Borowski was assigned the case on the first day of trial, "it was not unreasonable for Judge Borowski to presume Judge Protasiewicz had granted the motion." Apx. A 133, ¶38.

In dissent, Justice Ann Walsh Bradley argued that the majority erred in two respects: first by discounting "the clearly relevant fact that . . . Cousin's testimony was ultimately deemed to be admissible[;]" and second, by allowing "the trial court to simply assume that a motion in limine had been granted when the record contains no order or indication

that that is actually the case." Apx. A 132, ¶56. She further found that even if the State's motion in limine had been granted, such a ruling would not extend to cover *Denny* evidence. Apx. A 129 & 137, ¶49 & footnote 6. To the extent the State was surprised by Cousin's testimony, it was the fault of the State for failing note him listed on the witness list or to demand his statement. Apx. A 137, ¶68.

In a separate opinion, Justice Hagedorn dissented, noting the problem with the mistrial decision was the failure to "consider an obvious and highly relevant alternative to mistrial: the possibility that the evidence might be admissible." Apx. A 139-140, ¶75. By failing to consider admissibility, the trial court did not reasonably conclude a mistrial was necessary. Apx. A 139-140, ¶75.

REASONS FOR GRANTING THE WRIT

The decision below, upholding a mistrial based upon the jury hearing admissible evidence as manifestly necessary, is incorrect and contrary to the decisions of several Federal and State decisions

The Fifth Amendment provides that: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." In the case of a jury trial, jeopardy attaches when the jury is sworn. *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). The Double Jeopardy clause acts as a shield to protect individuals against of power of the state:

> 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.

Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

In the event of a mistrial granted without the Defendant's

consent, Double Jeopardy does not prohibit a retrial in all circumstances. Nearly two centuries ago, Justice Story pronounced what has come to be called the "manifest necessity" standard:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

United States v. Perez, 22 U.S. 579, 580, 9 Wheat. 579 (1824). In exercising this authority, courts must exercise "sound discretion." *Perez*, 22 U.S. at 580. Applying this to Mr. Perez, whose jury had been discharged without his consent after being unable unanimously to agree to a verdict, the *Perez* Court allowed retrial. However, the *Perez* Court urged restraint in ordering retrial after a mistrial:

> To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.

Perez, 22 U.S. at 580.

Retrial of a defendant is generally permitted in the event that

Defendant's conviction is reversed on appeal. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896); *but see Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (prohibiting retrial where reversal was based on insufficiency of the evidence). The rationale for this general rule is the Defendant was not deprived of the right to a verdict before the first jury:

> [T]he crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his valued right to have his trial completed by a particular tribunal.

United States v. Jorn, 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (plurality opinion; quotation marks, citation and footnote omitted).

This Court has considered whether a mistrial was manifestly necessary when declared based on the jury's exposure to improper or inadmissible evidence. *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct.

824, 54 L.Ed.2d 717 (1978). Defense counsel in *Washington* told the jurors in his opening statement that they would hear that the prosecutor had purposely withheld and hidden evidence, and that the Arizona Supreme Court had granted a new trial because of the prosecution's misconduct. *Washington*, 434 U.S. at 499. The trial court declared a mistrial, finding these remarks improper and prejudicial, and this Court found no basis to reject these findings. *Washington*, 434 U.S. at 510-511. Therefore, in determining whether the mistrial was manifestly necessary, this Court proceeded "from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury" and stated that a trial judge's evaluation of the likelihood that impropriety may affect the impartiality of the jury merited "the highest degree of respect." *Washington*, 434 U.S. at 511.

In contrast, in Mr. Green's case, the trial court never determined whether the jury had heard anything inadmissible or improper before it declared a mistrial. Mr. Green's trial judge declared a mistrial based on Mr. Cousin's testimony not because it was inadmissible, but because

the State had not received prior notice and the court had not made a pretrial ruling. As the majority below noted:

> The [trial] court concluded Cousin's testimony was *Denny* evidence and therefore should not have been presented to the jury without the defense notifying the State in advance and the court ruling on its admissibility. Because the jury heard that evidence without either precondition being satisfied, the court determined a mistrial was necessary.

Apx. A 103, ¶2. While the trial court never addressed or determined the admissibility of Mr. Cousin's testimony before declaring the mistrial, the trial court later determined it to be admissible; the majority below found this later determination "irrelevant." Apx. A 120, ¶34. Since the trial court had never found Mr. Cousin's testimony to be inadmissible, the court did not find prejudice based upon the jury hearing the testimony, but rather only in the *timing* of the testimony in the course of trial: "In the court's estimation, the prolonged break immediately following Cousin's testimony unavoidably altered the jurors' take on the case and prejudiced the State." Apx. A 118, ¶31.

The determination by the Supreme Court of Wisconsin that a mistrial may be manifestly necessary because the jury heard admissible

evidence is contrary to decisions of two Federal Court of Appeals Circuits and several state appellate courts. *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) (en banc); *Taylor v. Dawson*, 888 F.3d 1124 (6th Cir. 1989); *Doumbouya v. County Court*, 224 P.3d 425 (Col. Ct. App. 2009); *Commonwealth v. Padgett*, 563 S.W.3d 639 (Ky. 2018); *State v. Aldridge*, 3 Ohio App 3d 74, 443 N.E.2d 1026 (1981).

In *Gilliam*, the trial court declared a mistrial based on the circumstances surrounding three sets of photos of the scene of a shooting. Set two and set three were introduced by the prosecution. Defense counsel used set one to refresh the recollection of a police officer witness, but did not move to admit set one. After a noon recess, all three sets of photos were found on the rail of the jury box, and the foreperson confirmed that jurors had viewed all of the photos. The prosecution moved for a mistrial, arguing the jury had viewed evidence not admitted. The defense objected and offered to recall the officer and move the photos in set one into evidence. The trial court declared a mistrial, although "neither the prosecution nor the state trial judge

indicated that the photographs were in any way prejudicial." 75 F.3d at 889. The Fourth Circuit in *Gilliam*, sitting en banc, held: "The record will not support a conclusion that manifest necessity existed: The jury was not exposed to any inadmissible evidence; the photographs in Set 1 could not have adversely affected the impartiality of the jury" and "did not present any realistic potential for juror confusion." 75 F.3d at 902.

Taylor concerned a mistrial in a homicide trial declared based on the jury hearing evidence of other bad acts of the decedent. In both the mistrial decision and the decision denying dismissal, the trial court stated that admission of this evidence violated a pretrial order. 888 F.2d at 1128-1129. However, the record showed that the trial court had not granted the prosecutor's request for such a pretrial order, but stated it would rule upon objections as the evidence unfolded. 888 F.2d at 1126-1127. Moreover, the evidence was admissible under state law as relevant to the defendant's state of mind, and the evidence leading to the mistrial was admitted at a subsequent trial.

In analyzing *Arizona v. Washington*, the Court in *Taylor* noted that this Court "'start[ed] with the premise that defense counsel's comment was improper and may have affected the impartiality of the jury.' 434 U.S. at 511, 98 S.Ct. at 833." However, since the evidence which prompted the mistrial was admissible, the analysis in *Taylor* could not start from this premise: "On the contrary, we start from the premise that such evidence ordinarily *is* admissible." 888 F.2d at 1132 (emphasis by the Court). The Court concluded:

> One cannot read the transcript of Ms. Taylor's aborted trial without experiencing a sense of amazement when, without any apparent warning at all, the trial court suddenly declares a mistrial because the jury has heard a snatch of testimony which, as we know from the subsequent opinions of Kentucky's appellate courts, would ordinarily be *admissible.*

888 F.2d at 1133 (emphasis by the Court).

The concern in *Washington* which made a mistrial manifestly necessary was that the jury may have been tainted by hearing something improper. Such concern was not present in *Taylor*, as the jury heard only admissible evidence. The *Taylor* court did not determine the admissibility of the evidence itself, but simply accepted the state

appellate decisions below which found admissibility. Likewise, in Mr. Green's case, the trial court declared a mistrial after the jury heard evidence that a person other than Mr. Green had driven the car in the trafficking incident at issue. The trial court later determined that such evidence would be admissible at a future retrial, and no one challenged the admissibility of the evidence on appeal. Instead, the Supreme Court of Wisconsin discounted the admissibility of the evidence: "The court's later determination on *Denny* is irrelevant." Apx. A 120, ¶34. The Court found the mistrial decision to be based on a proper consideration of the law, despite the admissibility of the evidence: "Although the circuit court may have later determined Cousin's testimony was in fact admissible, the court nonetheless grounded its mistrial order in the law, as applied to the particular facts of the case." Apx. A 120, ¶35.

In *Padgett*, the defendant was charged with assaulting a jail guard while in custody. The guard was demoted from sergeant to deputy after the incident for reasons unrelated to the incident, but the jury did not hear of this. During trial, in cross-examining the guard, the

defense established he was a sergeant at the time of the incident but was no longer a sergeant, prompting the prosecution to object and move for a mistrial, which the trial court granted. The Supreme Court of Kentucky observed that since a "mistrial is intended to cure prejudice," the court should scrutinize what has been uttered or presented "from the jury's point of view." 563 S.W.3d at 647. While the court and parties were aware of the guard's demotion and the reasons for it, the jury was not. Thus, from a bystander's or juror's viewpoint, the "snippet of testimony between defense counsel and [the guard] was hardly objectionable" and was "not prejudicial to the point of requiring a mistrial." 563 S.W.3d at 649. Thus, the court concluded:

> The court's decision to grant a mistrial was made in the heat of the moment in trial, admittedly, but it was made without being supported by firm, sound legal principles. The decision was arbitrary, without explanation of the prejudice it intended to cure through this extreme remedy.

563 S.W.3d at 649.

Two decisions of state intermediate appellate courts also held that legally proper cross-examination questions put to a prosecution

witness may not be the basis for manifest necessity for a mistrial.

In *Doumbouya*, the defendant was charged with assaulting his wife, with whom he was in a contentious custody battle. His theory of defense was that the wife fabricated the charge to gain leverage in the custody battle. After the defense asked the wife if she knew that a conviction would result in the defendant's deportation, the trial court granted the State's mistrial motion. The Colorado Court of Appeals determined the question was proper to show possible bias. 224 P.3d at 428-429. Since there was no error to be cured by a mistrial, there could be no manifest necessity.

Likewise in *Aldrich*, the defendant cross-examined a cooperating co-defendant regarding the deal he received which involved a reduction in charge that would make him eligible for probation. The trial court granted the prosecutor's mistrial motion and admonished defense counsel not to present any information at the next trial regarding deals. The Court of Appeals of Ohio found the cross-examination to be proper impeachment under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763,

31 L.Ed.2d 104 (1972), which "effectively nullifies any claim that the state's [mistrial] motion was for 'good cause shown.' Moreover, there could be no 'manifest necessity.'" 3 Ohio App. 3d at 78.

In *Washington*, this Court proceeded from the determination that counsel's comment "was improper and may have affected the impartiality of the jury." 434 U.S. at 511. This conclusion did not end the inquiry, for a reviewing court also must satisfy itself "that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." 434 U.S. at 514. In determining that the trial judge exercised sound discretion, this Court considered whether the trial judge showed concern for the possible double jeopardy consequences of an erroneous ruling, whether the trial judge gave both counsel an adequate opportunity to explain their positions on the propriety of a mistrial, and whether the trial court considered the accused's interest in having the trial concluded in a single proceeding. 434 U.S. at 515-516.

In Mr. Green's case, the Supreme Court of Wisconsin did not

proceed from any determination that Mr. Cousin's testimony, the evidence which prompted that mistrial, had possibly affected the impartiality of the jury. It regarded the question of whether the evidence was admissible to be irrelevant. Instead, the Court jumped to consideration of the factors to assess whether the trial court exercised sound discretion. Apx. A 115 et seq. The Court rejected the applicability of an earlier decision in which it had found error in declaring a mistrial without considering the admissibility of the evidence which was the basis for the mistrial. Apx. A 121, ¶36, discussing *State v. Seefeldt*, 2003 WI 47, 261 Wis.2d 383, 661 N.W.2d 822.

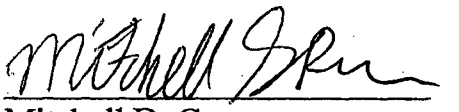
Thus, the decision below appears unique, so far as petitioner can determine, in finding manifest necessity for a mistrial declared after the jury heard admissible evidence. In this respect, it is in conflict with decisions from at least five other courts, including two Federal Circuits, which held that a mistrial declared after a jury was exposed to permissible argument or admissible evidence is not manifestly

necessary. Indeed, in declining to follow *Seefeldt*, the decision in Mr. Green's case also departs from prior Wisconsin authority holding that a jury hearing admissible evidence cannot support a finding of manifest necessity .

CONCLUSION

Petitioner Mitchell D. Green asks this Court to issue a writ of certiorari to review the decision of the Supreme Court of Wisconsin.

Respectfully Submitted:



Mitchell D. Green
Petitioner