No. 23-5711

In the

Supreme Court of the United States

MITCHELL D. GREEN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court correctly affirmed the trial court's denial of Petitioner Mitchell D. Green's motion to dismiss on double-jeopardy grounds after it concluded that there was a manifest necessity for a mistrial in Green's first trial for sex trafficking a minor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

During Mitchell Green's trial on charges that he had sex trafficked an underage victim, Green presented testimony from his cousin, Jonathan Cousin, who claimed that it was he—not Green—who had driven the victim to a prostitution "date" on the night in question. After lengthy testimony by Cousin, the trial court declared a mistrial *sua sponte* over Green's objection, concluding that Cousin's testimony was barred third-party perpetrator evidence of which advance notice was not properly given.

As the parties prepared for Green's retrial, Green moved to dismiss the charge against him on double-jeopardy grounds, arguing that there was no manifest necessity for a mistrial. The trial court denied Green's motion but granted a request by Green to use Cousin's proposed testimony as evidence in the second trial. Green then sought interlocutory review of the decision, arguing that the admissibility of Cousin's testimony in the second trial meant that the jury in the first trial heard no improper evidence, thus obviating the need for the mistrial in the first place. The Wisconsin Court of Appeals reversed, concluding that there was no manifest necessity for the mistrial because the admissibility of the evidence meant there was no jury taint and because Cousin's testimony was not excluded by the trial court's pretrial orders.

The State appealed the court's decision, and in a 4-3 decision, the Wisconsin Supreme Court reversed. The court concluded that the trial court had exercised "sound discretion" in declaring a mistrial because it allowed the parties time to argue their positions, appropriately considered Green's right to completing the first trial, and considered the relevant facts. Green now seeks this Court's plenary review of that decision.

This case is not a good candidate for this Court's review. Green's framing of the issue conflates admissibility in the first trial with admissibility in the second trial. Just because Cousin's testimony was eventually deemed admissible for purposes of the second trial does *not* mean that the jury in the first trial heard only "admissible evidence." To the contrary, the evidence was inadmissible at the time it was introduced, and the trial court reasonably deemed that the error was not amenable to a cure short of mistrial. This distinction between admissibility in a first trial and admissibility on retrial is necessary to provide courts with control over trials. Otherwise, litigants could sandbag, and courts would be left without the tools necessary to enforce pretrial orders on notice requirements for certain types of evidence.

The Wisconsin Supreme Court decided this case correctly. This Court should deny Green's petition so that the State can try him for his role in a sex-trafficking ring that victimized underage girls.

STATEMENT OF THE CASE

This case relates to Green's sex trafficking of a minor, S.A.B.[1] S.A.B. was trafficked by Green and another man, Kimeo Conley. On one occasion when Conley was out of town, Green drove S.A.B. to a prostitution "date" at the Marriott in downtown Milwaukee, Wisconsin. (R. 1:2.)[2] S.A.B. remembered the evening distinctly because her abuser spit in her mouth, causing her to vomit. (R. 1:2.) After S.A.B. received payment and left the Marriott, Green took the money. (R. 1:2.)

After police arrested Conley on December 4, 2018, (R. 1:2), Green confronted S.A.B., accusing her of talking to the police (R. 1:2). Green punched S.A.B. in the face with a closed fist, pointed a gun at her, threatened to kill her, and took her phone. (R. 1:2.) At the time of these incidents, S.A.B. was 17 years old. (R. 1:2.)

Police initially knew Green only as "Money Mitch." They learned his identity when Green appeared as a witness at Conley's jury trial in February 2019. (R. 1:2; 82:75.) S.A.B. was present at that trial to testify against Conley, and she identified Green as "Money Mitch" after she saw him in the courtroom. (R. 1:2.)

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[1] Consistent with practice in Wisconsin's courts, this response refers to the victim by her initials rather than by name. *See* Wis. Stat. § (Rule) 809.86(4).

[2] Citations to "(R. __:__.)" are to the record in Wisconsin appeal number 2021AP267-CRLV, which will be transmitted to this Court if this Court grants Green's petition.

In a criminal complaint filed March 3, 2019, the State charged Green with one count each of trafficking of a child, physical abuse of a child, and disorderly conduct. (R. 1:1.)

Green filed a witness list that included two names, one of which was Green's cousin, Jonathan Cousin. (R. 18:1.) The State filed an omnibus pretrial motion in limine. (R. 21:1.) The motion sought an order "[p]rohibiting the defense from introducing any other-acts evidence involving a third-party perpetrator" unless the evidence was previously ruled admissible by the court. (R. 21:2.) Green never objected to the State's request. (R. 73:2.)

Green's trial began on January 27, 2020. (R. 80.) On the first day, S.A.B. testified about her experiences with Conley and Green. (R. 82:68–78.) S.A.B. stated that Green drove her to the prostitution meeting at the downtown Milwaukee Marriott and said that although she did not remember the specific date that the meeting occurred, it stood out to her because of the man spitting in her mouth. (R. 82:70.) On the second day of trial, Milwaukee Police Officer Gerardo Orozco testified about his work with the FBI Human Trafficking Task Force and his investigation into Green. (R. 83:4–7, 18–24.) Following Officer Orozco's testimony, the State rested. (R. 83:78.)

Green's first witness was Cousin. (R. 83:78.) Cousin testified that he was the one who gave S.A.B. the ride to the Marriott on the evening she described. (R. 83:85.) He claimed that he agreed to give S.A.B. and two men—Delmar and J.R.—a ride

downtown in exchange for gas money. (R. 83:85–86.) According to Cousin, when they arrived at a hotel downtown, Delmar asked him to wait in exchange for more money, and Cousin agreed. (R. 83:87.) Meanwhile, S.A.B. and J.R. left the car. (R. 83:87.) About 15 minutes later, Cousin said, they returned to the car and S.A.B. mentioned the man spitting in her mouth to J.R. (R. 83:87–88.) The State briefly cross-examined Cousin about inconsistencies in his story, his knowledge that prostitution was occurring, and his relationship with Green. (R. 83:90–93.) The court then took a recess for lunch. (R. 83:93.)

After the break, the court stated that there had been an off-the-record discussion for about five minutes in which the State expressed concern about Cousin's testimony, and that the court shared the State's concern. (R. 86:2.) The State noted that it was never told that Green intended to use Cousin's testimony to identify a third-party perpetrator, which is governed under Wisconsin law by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). The State pointed out that there was "no *Denny* investigation, no *Denny* motion hearing, and no ruling on the admissibility of that evidence." (R. 86:3.) The State further commented that Cousin had effectively admitted to trafficking S.A.B. without the advice of counsel. (R. 86:4–5.)

The court explained that it saw two main issues: whether Cousin "did or did not need . . . counsel before he testified," and "the *Denny* issue, which wraps together with the whole, both sides have a right to a fair trial issue." (R. 86:9.) Green argued that Cousin was not necessarily offering *Denny* evidence because there was no

specificity as to the dates on which Green and Cousin allegedly drove S.A.B., but the court replied that if Cousin's testimony was not meant to suggest that Cousin had driven S.A.B. instead of Green, then Cousin's testimony was completely irrelevant. (R. 86:13–14.) Green continued to argue that Cousin had not actually admitted to committing a crime, but the court disagreed, saying that "the State has enough to arguably get past probable cause right now based on what [Cousin] said on the stand." (R. 86:19.)

After further discussion by the parties, the court recapped Cousin's testimony, concluding that "[t]he only purpose for Mr. Cousin to testify is to take the fall for Mr. Green . . . ." (R. 86:26–28.) The court considered a curative instruction, but it reasoned that an instruction would be ineffective because it would require the jury to disregard approximately 25 minutes of testimony. (R. 86:29.) It also noted that it was not fair to the State for Cousin's testimony to be offered without notice, and that it should have been vetted in advance:

> I'm not sure that I would have allowed Mr. Cousin to testify. I would have needed it to be vetted bit more. I would have wanted to hear more of an argument and briefing from both sides as to the *Denny* issues. It strikes me as very, very problematic, and I agree with the State that it clearly is *Denny* evidence.

(R. 86:30.)

Most importantly, the court reasoned, there was no way "that that bell can be unrung, because of the gravity of the testimony, because of *Denny* evidence, [and] because there were only three witnesses in this case." (R. 86:31.) Thus, the court

concluded, "the circumstances require[d] a mistrial." (R. 86:32.) It said that the matter would be reset for a new trial date, and that the *Denny* issue should be resolved before the second trial. (R. 86:33.)

After the mistrial, Green filed a motion to dismiss the case, arguing that retrial would violate his constitutional right against double jeopardy. (R. 42.) The State responded, arguing that the mistrial was necessary. (R. 46:2–6.) The State also argued that the defense's treatment of Cousin as an uncounseled party should disqualify Green's attorney from continuing on the case. (R. 46:6–10.) The court denied the motion to dismiss at a hearing on June 22, 2020. (R. 88:5.) The court stated that Cousin's testimony had "blindsided" the State, and that "there were no legitimate alternatives at that point in time other than a mistrial." (R. 88:5.)

Following the court's denial of the motion to dismiss, Green's counsel withdrew in light of the State's request to disqualify him. (R. 89:5.) After a delay for a change in counsel, Green moved the circuit court to reconsider its decision regarding the motion to dismiss. (R. 58.) The State filed a response (R. 62), and the circuit court denied reconsideration (R. 63). In the same hearing, the court granted Green's motion to present Cousin's testimony as *Denny* evidence in the second trial. (R. 91:22–24.)

Green then filed a petition for leave to appeal the circuit court's decision[3] (R. 66), which the court of appeals granted (R. 64).

In an opinion dated March 22, 2022, the Wisconsin Court of Appeals reversed. (Pet-App. B 141.) The court concluded that retrial would violate Green's constitutional right against double jeopardy because there was no "manifest necessity" for the mistrial during his first trial. (Pet-App. B 146.) It reasoned that because the circuit court eventually ruled that Cousin's testimony would be admissible, there was no need to "unring the bell" in the first trial. (Pet-App. B 147.) Based on a case citation in the circuit court's orders, the court interpreted the circuit court's pre-trial orders as covering only the introduction of *unknown* third-party perpetrator evidence, and that there was no restriction on the introduction of *known* third-party perpetrator evidence. (Pet-App. B 148.) The court further concluded that any issue with Cousin's testimony resulting from his being unrepresented by counsel was an issue for Cousin himself, not the State. (Pet-App. B 148–49.) The court remanded the case with instructions for the circuit court to dismiss the charges against Green with prejudice. (Pet-App. B 149.)

The Wisconsin Supreme Court granted the State's petition for review. After briefing and oral argument, the Wisconsin Supreme Court reversed the court of

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[3] Under Wisconsin law, interlocutory review of the denial of a defendant's motion to dismiss is discretionary. *See* Wis. Stat. § 808.03.

appeals' decision.[4] (Pet-App. A 102.) The court reasoned that the trial court had exercised sound discretion in declaring a mistrial because it had allowed Green ample time to argue against a mistrial, gave careful consideration to Green's interest in having the trial concluded in a single proceeding, and considered the relevant facts and applicable law in a reasonable way. (Pet-App. A 116–19.) It rejected Green's argument that the admissibility of Cousin's testimony in the second trial meant that there had been no need for a mistrial in the first place: it concluded that the later ruling was irrelevant to the mistrial decision, which had required only a sound exercise of discretion at the time it was made. (Pet-App. A 119–20.)

Three justices dissented in two separate opinions. Justice Ann Walsh Bradley stated that she would have affirmed the court of appeals' decision because "the jury heard *admissible* evidence," noting that the evidence was later deemed admissible in advance of the second trial. (Pet-App. A 128.) She further contended that the court's pretrial orders did not, in fact, require disclosure of the substance of Cousin's testimony before he took the stand. (Pet-App. A 132.) In a separate dissent, Justice Brian Hagedorn contended that the trial court erred in failing to consider "an obvious and highly relevant alternative to mistrial: the possibility that the evidence might actually be admissible." (Pet-App. A 139–40.)

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[4] The decision is reported at *State v. Green*, 2023 WI 57, 408 Wis. 2d 248, 992 N.W.2d 56.

Green has now petitioned this Court for plenary review of the Wisconsin Supreme Court's decision.

REASONS TO DENY THE PETITION

The state court's decision fits squarely within existing precedent because the admissibility of Cousin's testimony in the second trial is irrelevant to whether it was admissible in the first.

Green's petition for a writ of certiorari largely follows the logic of the dissenters in the Wisconsin Supreme Court. Green claims that this case "presents a counter-scenario to *Washington*[5]: whether, and under what circumstances, a defendant may be retried after a mistrial was declared due to the jury hearing admissible evidence." (Pet. 2.) The State disagrees with this description of the issue presented by this case. A mistrial was not "declared due to the jury hearing admissible evidence." Instead, a mistrial was declared due to the jury's hearing evidence the court deemed inadmissible in that trial, and that was declared admissible only for the subsequent trial.

Green's mistake, similar to the dissenting justices in the Wisconsin Supreme Court and the Wisconsin Court of Appeals, is that he conflates admissibility in the second trial with admissibility in the first. The fact that Green took the proper steps to give advance notice of Cousin's testimony before the second trial is irrelevant to

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[5] *Arizona v. Washington*, 434 U.S. 497 (1978).

the trial court's decision to grant a mistrial in the first trial. Rather, the question is whether, at the time the trial court was weighing its mistrial decision, the jury had heard inadmissible evidence. Because Green did not give advance notice of the content of Cousin's testimony, Cousin's testimony that he was the perpetrator was inadmissible. The circuit court's mistrial decision was grounded in a correct understanding of the situation, regardless of what happened in the lead-up to Green's retrial.

This assessment is consistent with precedent establishing that a trial court's decision to declare a mistrial should be based on the specific situation confronting it at the time, rather than a mechanistic application of rules. *See Arizona v. Washington*, 434 U.S. 497, 506 (1978). It would be unreasonable for reviewing courts to expect a trial court's assessment of the situation confronting it to include things that have not happened yet, such as a future ruling on the admissibility of evidence. Instead, the totality of the circumstances considered in a mistrial decision should include only those things that are reasonable to include under such circumstances, such as the nature of the evidence presented, the parties' compliance with notice requirements, the ability of a jury instruction to cure the issue, and the defendant's interest in completing the trial. The trial court considered those things here, reflecting that it properly exercised its discretion in finding a manifest necessity for a mistrial and thus properly denied Green's later motion to dismiss on double jeopardy grounds.

Green's contention that the law requires a trial court under these circumstances to make an admissibility determination before declaring a mistrial misses the point: the trial court did make an admissibility determination. It concluded that Cousin's testimony was inadmissible in the first trial because advance notice of its substance was not given. Nothing in the law requires a trial court to ignore its own pretrial rulings on the admissibility of evidence, including evidence inadmissible because of notice requirements.

Nor should it. A requirement that a trial court must interrupt a trial to hold a hearing on the admissibility of evidence that should have been cleared in advance—including overcoming any barriers to holding that hearing, such as securing counsel for a witness, briefing by the parties, subpoenaing other witnesses, and the like—would improperly limit trial courts' ability to control their courtrooms and would hand control of trials over to litigants. Where certain types of evidence are concerned, it would be unreasonable to require such an interruption just so the circuit court can hold an evidentiary hearing that should have occurred before trial. Testimony bearing on potential third-party perpetrators and expert witness testimony, for example, may require testimony from multiple witnesses, some of whom may need to be subpoenaed in order to guarantee their appearance. In some cases, the trial court may want to have the benefit of briefing and argument by both parties before deciding as to admissibility. This could delay an ongoing trial with an empaneled jury by days or weeks.

This case provides a clear example of why Green's approach is untenable. Here, the circuit court stated that it would have wanted briefing on the *Denny* issue in advance of a hearing about the admissibility of Cousin's testimony. (R. 86:30.) Indeed, both parties filed briefs before the hearing at which Cousin's testimony was ruled admissible following the mistrial. (R. 56; 61.) Moreover, the court stated that it would have wanted Cousin to consult with an attorney before testifying under oath. (R. 86:32.) To allow Green to force the circuit court to go without the benefit of briefing and Cousin to go without the benefit of counsel before the court made an admissibility determination would be unreasonable.

Green's approach would thus eviscerate any ability for courts to require defendants to clear certain types of evidence during pretrial proceedings. If courts have no ability to declare a mistrial when a defendant presents evidence with no advance notice in violation of a pretrial order, then any requirement courts establish that defendants give pretrial notice of certain evidence means nothing. This would conceivably extend to disclosure requirements under the Federal Rules of Criminal Procedure, such as those under Rule 16, as well. In cases involving the violation of such orders, trial courts should be allowed to weigh a mistrial decision on the principle that the evidence violating the order is inadmissible in the present case, even if it may become admissible on retrial.

The cases Green cites are easily distinguishable. *Gilliam* concerned photographs viewed by the jury that were not previously received as evidence, not

inadmissible evidence. *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir. 1996). Indeed, the state conceded in *Gilliam* that the evidence would have been admissible if offered with the proper foundation in the first trial. *Id. Taylor*, too, involved the introduction of evidence that was actually admissible in the aborted trial—the trial court there erroneously concluded that it was not. *Taylor v. Dawson*, 888 F.2d 1124, 1130 (6th Cir. 1989). *Padgett*, *Doumbouya*, and *Aldridge* all feature the same distinction: each case involved the introduction of evidence later determined to be admissible in the trial in which the mistrial was declared. *See Commonwealth v. Padgett*, 563 S.W.3d 639, 649 (Ky. 2018); *Doumbouya v. Cnty. Ct. of Cty. and Cnty. of Denver*, 224 P.3d 425, 428 (Colo. App. 2009); *State v. Aldridge*, 443 N.E.2d 1026, 1031 (Ohio Ct. App. 1981).

Here, by contrast, Cousin's testimony was not admissible in the first trial because the time for giving notice had passed, regardless of what happened in the lead-up to the second trial. Thus, unlike a case where the "errors upon which the trial court's mistrial order was based were not errors at all," *Taylor*, 888 F.2d at 1130, the defendant's error here of presenting an unnoticed witness was an error. The court subsequently determined that Cousin's testimony would be admissible in Green's second trial because pre-trial procedures were followed. But that said nothing about whether the testimony was improperly excluded from the first trial. The tate court's decision here was completely consistent with the cases Green cites.

Green seems to fault the trial court for not specifically explaining that Cousin's testimony was inadmissible because advance notice was not given. The trial court's ruling, however, makes clear that it did make an admissibility determination, and that it ruled Cousin's testimony inadmissible. While the reason for that ruling—the lack of advance notice—was something that could be cured in advance of Green's second trial, that did not render the evidence admissible at the time Cousin originally testified. Admissibility depends on the facts and circumstances of a particular proceeding. It is incorrect to say that the trial court declared a mistrial after hearing admissible evidence.

The real issue posed by this case is whether the circuit court properly exercised its discretion when it concluded that the only cure for the jury's hearing 20 minutes of inadmissible testimony was to declare a mistrial. That is a fact-specific inquiry that offers this Court little opportunity to develop the law on double jeopardy and mistrials. This case is thus not a good candidate for plenary review. This Court should deny Green's petition for a writ of certiorari.

CONCLUSION

For the reasons discussed, this Court should deny the petition for writ of certiorari.

Dated this 20th day of November 2023.

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