No. _____

In The
Supreme Court of the United States

DALE THRUSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Venar R. Ayar
Counsel of Record
Ayar Law
30095 Northwestern Hwy., #102
Farmington Hills, MI 48334
venar@ayarlaw.com
(248) 262-3400

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Included in double jeopardy is the constitutional protection of the Defendant "to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). However, the right to have one's trial completed by a particular tribunal is not absolute. The declaration of a mistrial does not bar retrial if the mistrial is supported by "manifest necessity." In reviewing a trial court's determination of manifest necessity, this Court established a sliding scale of review based on the cause of the mistrial. *Washington*, 434 U.S. at 508-09. The questions presented in this case are:

1. Whether this Court should adopt an objectively reasonable approach when evaluating whether the trial court's declaration of a mistrial was supported by manifest necessity and resolve the split in the approaches as to the level of scrutiny utilized among the First, Fourth, and Sixth Circuits.

2. Whether the standard of review of a trial court's determination of manifest necessity for a mistrial under *Arizona v. Washinton*, 434 U.S. 497, 508-09 (1978), requires a higher level of scrutiny than the most relaxed scrutiny utilized by the Sixth Circuit in this case, when the mistrial is in part based on

the absence of critical prosecution evidence, as would be determined in the Fourth Circuit under *Seay v. Connor*, 927 F.3d 776 (4th Cir. 2019).

PARTIES TO THE PROCEEDINGS

The Petitioner, Dale Thrush, was the Defendant-Appellant below.

The Respondent, United States of America, was the Plaintiff-Appellee below.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF ALL RELATED PROCEEDINGS

This case directly relates to the following proceedings:

United States District Court for the Eastern District of Michigan, Case No. 1:20-cr-20365, *United States of America v. Dale Thrush*, Opinion Issued June 30, 2022.

Sixth Circuit Court of Appeals, Case No. No. 22-1588, *United States of America v. Dale Thrush Petitioner*, Opinion Issued July 17, 2023.

Sixth Circuit Court of Appeals, Case No. No. 22-1588, *United States of America v. Dale Thrush Petitioner*, Order Issued September 7, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dale Thrush respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals denied Petitioner's petition for rehearing en banc on September 7, 2023. It did not publish the denial, but it is reprinted at App.70. The Sixth Circuit Court of Appeals did not publish its opinion denying the Petitioner's appeal of the District Court's decision, but it is (i) available at 2023 WL 4564769, and (ii) reprinted at App. 1. The United States District Court for the Eastern District of Michigan did not publish its opinion denying the Petitioner's Motion to Dismiss and Motion to Disqualify Prosecution Counsel, but it is (i) available at 2022 WL 2976214 and (ii) reprinted at App. 48.

STATEMENT OF JURISDICTION

The Petitioner timely files this petition from the Sixth Circuit Court of Appeals' Order dated September 7, 2023, denying his petition for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution sets forth the Petitioner's constitutional protection against double jeopardy. It provides that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

INTRODUCTION

This case presents a constitutional question of broad application in connection with the double jeopardy clause of the Fifth Amendment in the context of a mistrial. In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court reasoned that a trial court's determination of manifest necessity for a mistrial is subject to varying scrutiny based broadly on the facts and reasons present for the mistrial.

At one end of the spectrum, strict scrutiny applies when a mistrial is declared due to the unavailability of a critical government witness, as is the case here. *Washington*, 434 U.S. at 508. *Seay v. Cannon*, 927 F.3d 776, 781 (4th Cir. 2019). At the other end of the spectrum, the most relaxed scrutiny applies to a hung jury, in which case the trial court is normally afforded broad discretion. *Washington*, 434 U.S. at 509. Everything else, presumably, lies somewhere in between.

Exactly what standard of review should be applied, depending on the particular facts, has been the subject of continuing debate. Indeed, in this case, the disagreement between the majority and dissenting opinion centers on what level of scrutiny should be applied when reviewing the decision to declare a mistrial. App. 11, 29. The majority afforded the trial judge the most relaxed scrutiny, and the dissent found that the appropriate level of scrutiny lies between the two poles of "strictest scrutiny" and "great deference." App. 30. Applying these different standards was dispositive to the Sixth Circuit's decision.

STATEMENT OF THE CASE

A. Proceedings Before the Trial Court

In August 2020, a grand jury indicted the Petitioner for ten counts of failing to pay payroll taxes in violation of 26 U.S.C. § 7202 and four counts of failing to file income tax returns in violation of 26 U.S.C. § 7203. App. 2. After several continuances, the trial was set to begin the case on Thursday, November 4, 2021. App. 49.

On November 4, a jury was empaneled, and the trial court held opening statements. App. 50. The following day, the government called eight witnesses, and the case was set to resume on the following Monday. App. 50. Shortly after the close of trial on Friday, the defense counsel emailed counsel for the

government to ascertain if they had heard from a primary government witness. App. 20. In response, the government informed the trial court and defense counsel that they had discovered the witness tested positive for COVID-19 on a polymerase chain reaction (PCR) test. App. 20. Over the weekend, the government motioned to permit the witness to testify via a live two-way feed from the courthouse parking lot. *Id.* The Petitioner opposed the motion on confrontation clause grounds. App. 4.

When the parties appeared on Monday morning, counsel for both parties were ushered into chambers for a hearing, ostensibly for the trial court to rule on the government's motion regarding the witness's testimony. App. 4. When the parties were in chambers, the trial judge appeared via telephone and revealed that he had been exposed to COVID-19 over the weekend but that he had tested negative on a rapid test. App 74. The trial court found that his COVID-19 exposure would not be an issue and would not prevent him from entering the courthouse if he continued to test negative. *Id.* Otherwise, the trial court stated that the case could proceed with the judge operating remotely or with another judge filling in for him. App. 86. When addressing the witness's unavailability in the trial court's introductory comments, the court proposed two alternatives: (i) a continuance of the trial for three weeks to November 30, or (ii) declare a mistrial. App. 74-75.

In response, the defense counsel challenged the government's knowledge about when the witness took the PCR test and her reasons for taking it. App. 75-76. Only then, after being asked to respond by the trial judge, the government reluctantly admitted that it had known that the witness tested positive for COVID-19 on a rapid test a day before the jury was empaneled and the trial began. App. 76-77.

At this point, the trial court should have ruled that the government proceeded with its case under this Court's mandate in *Downum v. United States*, 372 U.S. 734 (1963). Nevertheless, the trial court examined if it could continue the case for three weeks to accommodate the government. App 79-84. Through a video feed, the trial court polled the jurors to assess the feasibility of continuing the case to November 30. Five jurors stated they had conflicts such as (i) obstetrics testing "that week," (ii) starting a new job, (iii) accompanying their husband to his psychologist, (iv) traveling to a wedding in Mexico, and (v) traveling to their daughter's basketball games in December that the juror admitted could be rearranged. *Id.* The trial court did not probe the jurors to determine if any conflicts merited excusal from jury duty and whether a continuance to November 30, 2021, was impracticable. App. 82-84. The trial could be completed in another two or three days. App. 81. Also, there were three alternate jurors to step in if needed. App. 84.

The trial court left the issue of whether manifest necessity existed for the mistrial to the briefs rather than hearing argument or granting a short continuance to provide time for argument. App. 85. The trial court spent a total of 30 minutes at the hearing; eleven were spent discussing the witness's availability, fifteen minutes were spent transitioning from chambers to the courtroom and polling the jury, and the remaining four minutes were spent discussing the mistrial. App. 73-87.

At the end of the hearing, the trial court *sua sponte* declared a mistrial over the Petitioner's objection, based on a "confluence of factors" of (i) COVID-19 rendering a witness unavailable, (ii) the impracticability of continuing the case to November 30, 2021, due to juror unavailability, and (iii) the trial judge's exposure to COVID-19. App. 69. The government agreed to the mistrial on grounds of juror unavailability. App. 85. The trial court never ruled on the government's motion to permit the witness to testify via live two-way testimony from the courthouse parking lot. Rather than ruling on the motion, the trial court found the issue moot. App. 32.

Significantly, regarding the Court's exposure to COVID-19, the trial court stated on the record that he had tested negative for the virus and would be able to reenter the courthouse after a few days if he continued to test negative. App. 74. The trial court appeared and presided remotely while polling the jury during the hearing. App. 79. The trial judge said

he could preside remotely or get another judge to fill in for him. App. 86.

Following the mistrial, the court issued an order reaffirming the mistrial for the reasons in the trial record. App. 65. As discussed above, the Petitioner then motioned to dismiss the case on grounds of Double Jeopardy. App. 7. The district court denied this motion on June 30, 2022, for three reasons: (i) the government believed in good faith that the witness would be available if she tested negative on a PCR test, (ii) the government did not seek the mistrial, and (iii) the witness's unavailability was only one of several reasons for the mistrial. App. 56-59.

The first justification offered by the trial court that the "government believed in good faith" that the witness would be available, is wrong as a matter of law under *Downum*. App. 56. The government gambled in proceeding to trial, knowing its witness tested positive for COVID-19, and bears the consequences of the resulting mistrial. App. 34. For the same reason, the jury's unavailability in the event of a continuance was not a valid justification since the continuance was only explored to accommodate the critical government witness. App. 74-75.

Further on, in its June 30, 2022, opinion, almost eight months after the mistrial was declared, the court recanted its statement, made contemporaneously with the declaration of a mistrial and its order, that the case could proceed with the

judge working remotely or that another judge could fill in. App. 58-59.

The Petitioner appealed to the Sixth Circuit Court of Appeals. App. 2.

B. The Sixth Circuit Appeal

The Sixth Circuit considered each factor of the "confluence of factors" independently as to whether the reason could justify the mistrial. App. 11-15.

The Sixth Circuit majority correctly determined that the trial court abused its discretion by considering the witness's unavailability in its reasoning for a mistrial. App. 12.

However, it went on to uphold the lower court's decision anyway, finding that the judge's exposure to COVID-19 was a sufficient "neutral justification" for the mistrial. App. 13. The Sixth Circuit majority found that the trial court "implicitly" considered Eastern District guidelines and found that the trial judge was unable to enter the courthouse for ten days. *Id.* The trial judge stated on the record that he could enter the courthouse in a "day or so" with continuing negative tests. App. 74. Without any support in the record, the Sixth Circuit majority inferred that the trial court either considered and determined impracticable the option of finding a substitute judge or was not required to consider alternatives to the mistrial. App. 14. Significantly, this contradicts the

trial court's statement at the hearing that another judge could preside.[1] App. 86. Indeed, as pointed out by the dissent, the Eastern District of Michigan had another 21 judges. App. 37. Perhaps one of the judges could have stepped in for the two or three days required to complete the trial, but the option was never explored. App. 81. The Sixth Circuit majority allowed the trial judge to recant his contemporaneous statements that the court could preside remotely. App. 14.

The Sixth Circuit majority found that the judge's exposure to COVID-19 justified exploring adjournment and polling the jury as to future availability. App. 13. It should be noted that the trial court never stated that the adjournment was related to the trial judge's exposure. App. 74-75. Indeed, the only reason for the possible adjournment was to accommodate the government witness. *Id.* Although the Sixth Circuit majority found that the trial court's lack of probing of the jury was problematic, the majority determined that the Petitioner waived objecting to the jury's unavailability by objecting to the continuance. App. 15-16. As discussed in the dissent in the Sixth Circuit, the Petitioner never made such a waiver. App. 45-46. Nonetheless, even if there was a waiver, the only purpose for the

[1] [1] The trial court stated that a magistrate judge could fill in for him. Magistrate judges may not preside in felony trials. *Gomez v. United States*, 490 U.S. 858, 872 (1989). Despite the error of law, this statement shows that the trial judge believed a replacement could be found.

continuance was to allow additional time for the government witness to recover from COVID-19. App. 68.

The dissent applied a stricter abuse-of-discretion standard. The dissent found that the trial court did not exercise sound discretion in declaring a mistrial for the following reasons:

i. The court failed to rule on the government's motion to allow testimony by alternative means. App. 33-34.
ii. The court factored the witness's unavailability into its decision to declare a mistrial, even though, according to the dissent, the issue of the witness's availability was not ripe for consideration. App. 34-35.
iii. The court failed to defer the decision as to the mistrial until after the judge received test results from a PCR test or additional rapid tests. App. 36.
iv. The court failed to obtain guidance from the chief judge of the Eastern District of Michigan on the effect of continuing negative tests or a negative PCR test on his ability to preside in the case. App. 37.
v. The court failed to establish on the record that the district judge could not enter the courthouse. *Id.*
vi. The court failed to preside remotely over the trial when the trial court effectively

presided remotely at the hearing and stated that it could preside remotely. App. 38.

vii. The court failed to seek the substitution of another district judge to preside over the trial. App. 38-39.

viii. The court failed to scrutinize the jurors' explanations for why they could not appear for the trial after a three-week continuance. App. 40-41.

Considering all these inactions, the dissent found that the Court did not exercise sound discretion in finding the manifest necessity required for a mistrial. App. 46-47.

In sum, the trial court decided to declare a mistrial for three reasons: (i) the witness's unavailability, (ii) the impracticability of a continuance to allow time for the witness to recover, and (iii) the trial judge's exposure to COVID-19. App. 86-87. The first reason was an error of law under *Downum*. The Sixth Circuit majority and dissent agreed. App. 12. As to the continuance, its only purpose was to allow time for the government witness to recover. App. 68, 74. When the trial court found that an adjournment to November 30 was not possible, the government should have been compelled to proceed with its case. *Downum*, 372 U.S. at 738. Indeed, the risk here fell on the government. With respect to the judge's exposure, he stated that it was not a bar to the trial going forward. App. 74. Therefore, there was no

manifest necessity on the court record for the mistrial.

The Sixth Circuit majority found manifest necessity by misapplying the sliding scale of scrutiny established in *Arizona v. Washington*, 434 U.S. 497 (1978). App 11. The Sixth Circuit circumvented the trial court's failures and granted the trial court unfettered discretion, filling in the gaps in the record, supplanting the trial court's reasoning with its own, and allowing the trial court to post hoc rationalize whether the trial could be completed remotely. App. 12-17. Whether an alternative judge could complete the trial was not even meaningfully considered. App. 38-39. The Sixth Circuit majority did all this under the guise of some abuse of discretion review. App. 30 n.1.

REASONS FOR GRANTING WRIT

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It prohibits the government from subjecting criminal defendants to a second trial when they have already been tried and acquitted. *See, e.g., Smith v. Massachusetts*, 543 U.S. 462 (2005); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). The principle behind the clause's prohibition is the government "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green v. United*

States, 355 U.S. 184,187 (1957). Repeated attempts at prosecution are profoundly unfair, increase the likelihood that an innocent defendant is found guilty, and subject the defendant to continued ignominy, strain, and expense. *Id.* at 187-88.

Included in double jeopardy is the constitutional protection of the Defendant "to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). Thus, jeopardy attaches once the jury is empaneled. *Crist v. Bretz*, 437 U.S. 28, 35 (1978). However, the right to have one's trial completed by a particular tribunal is not absolute. The declaration of a mistrial does not bar retrial if the mistrial is supported by "manifest necessity." *United States v. Perez*, 22 U.S. 579, 580 (1824). Manifest necessity is defined as a "high degree of necessity" and should only be exercised "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Id.* "The discretion to discharge the jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances." *Downum v. United States*, 372 U.S. 734, 736 (1963) (internal quotations omitted). All doubt is resolved in favor of the liberty of the citizen. *Id.* at 738.

The evaluation of whether manifest necessity exists for a mistrial is a matter within the "sound discretion" of the trial court. *United States v. Jorn*, 400 U.S. 470, 481 (1971).. The trial court should weigh the defendant's valued right to have his trial

completed by a particular jury against "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Although the trial court's "obligation" is to exercise this discretion, the burden is on the government to ensure that the record justifies the determination of manifest necessity. *Washington*, 434 U.S.at 505.

In reviewing a trial court's determination of manifest necessity, this Court established a sliding scale of review based on the cause of the mistrial. *Washington*, 434 U.S. at 508-09. "[T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence" or prosecutorial or judicial misconduct. *Id.* at 508. At the other extreme is the classic situation of a hung jury. In that situation, the trial court "may exercise broad discretion." *Id.* at 509. All other situations lie along a spectrum of trial problems between broad discretion and strict scrutiny. *Id.* at 510.

The circuits and state court's application of this sliding scale has been anything but consistent. The circuits and state appellate courts across the country have misinterpreted the standard. In some cases, the reviewing court grants near-absolute discretion in the trial court to declare a mistrial and, in other instances, no discretion. *See, e.g., People v. Michael*, 394 N.E.2d 1134 (N.Y. 1979) (a mistrial found solely upon the convenience of the court and the jury is

certainly not manifest necessity and therefore the indictment should be dismissed); *State v. Melton*, 983 P.2d 699 (Wash. 1999) (lower court's determination that a mistrial is appropriate will not be disturbed unless the trial court acts patently unreasonable); *McCorkle v. State*, 619 A.2d 186, 200 (Md.Ct.Spec.App. 1993). This has created inconsistent and incongruous applications of double jeopardy analysis and unjust decisions.

The First Circuit recently rejected the sliding scale approach in *United States v. Dennison*, 73 F.4th 70 (2023), in favor of a holistic review of the record of the trial court to see: "(1) whether the district court consulted with counsel (2) whether the court considered alternatives to a mistrial; and (3) whether the court adequately reflected on the circumstances before making a decision." *Id.* at 78. The First Circuit urged that this was only a baseline and that the review must be tailored to the issues facing the district court. *Id.* We recommend this Court to hear this issue and adopt the decision of the First Circuit.

A. There Is a Split Among the Circuit Courts in Their Approach to Applying the Principles Articulated by This Court in Arizona v. Washington

In the wake of *Washington*, many of the Circuits have adopted some form of the sliding-scale approach.

The Fourth Circuit focuses on the language in *Washington,* finding that "the strictest scrutiny" applies when "the basis for the mistrial is the unavailability of critical prosecution evidence." *Seay v. Cannon*, 927 F.3d 776, 781 (4th Cir. 2019; *see also United States v. Schafer*, 987 F.2d 1054, 1058 (4th Cir. 1993). To fulfill the requirements of strict scrutiny, the Fourth Circuit reviews if "the trial court gave careful consideration to the availability of reasonable alternatives to a mistrial, and that the court concluded that none were appropriate." *Id.* at 784.

The Third Circuit, Fifth Circuit, and Tenth Circuit have adopted formulations similar to the Fourth Circuit. *United States v. Fisher*, 624 F.3d 713, 718 (5th Cir. 2010); *United States v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004); *Walck v. Edmondson*, 472 F.3d 1227, 1238 (10th Cir. 2007).

On the other hand, the Sixth Circuit has found that the "strictest scrutiny applies when the mistrial is based on prosecutorial or judicial misconduct. *Colvin v. Sheets*, 598 F.3d 242, 253 (6th Cir. 2010); App. 78. The Sixth Circuit finds the most relaxed scrutiny applies when fault is not attributable to any party or the court. *Ross v. Petro*, 515 F.3d 653, 669 (6th Cir. 2008). However, the Sixth Circuit has not articulated what strict, relaxed, or any middle ground of scrutiny requires the judge to establish on the record. As a result, the Sixth Circuit has been quick to adopt the most relaxed level of scrutiny, as

identified by the dissent in the court below. App. 30 n.1. In so doing, it has disregarded the mandate of this Court in *Jorn* that the trial judge weigh the defendant's valued right to have his trial completed by a particular tribunal" against "the public's interest in fair trials designed to end in just judgments." *Jorn*, 400 U.S. at 480. In this case, the Sixth Circuit upheld the lower court's decision by backfilling the record, rewriting the trial court's reasoning, and engaging in appellate fact-finding. App. 12-15.

The First Circuit recently decided to eschew the sliding scale approach used in *Washington*, finding it dicta. *Dennison*, 73 F.4th at 77. Instead, the court opted for a holistic abuse of discretion review focused on three factors: "(1) whether the district court consulted with counsel; (2) whether the court considered alternatives to a mistrial; and (3) whether the court adequately reflected on the circumstances before making a decision." *Id.* at 78 (citing *United States v. Garske*, 939 F.3d 321, 334 (1st Cir. 2019); *United States v. McIntosh*, 380 F.3d 548, 553 (1st Cir. 2004. In the First Circuit's analysis, these factors serve as the baseline for all fact patterns to be analyzed. *Id.* But, whenever an error of law occurs, it is always tantamount to an abuse of discretion. *Id.* (citing *Garske*, 939 F.3d at 329; *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 336 (1st Cir. 2008)); *Koon v. United States*, 518 U.S. 81, 100 (1996). If the Sixth Circuit adopted this approach, it would have found that the trial court abused its discretion by making an error of law and failing to consult with

counsel, consider alternatives, and adequately reflect on the circumstances on the record. App. 31-46.

Although the courts have not explicitly rejected the sliding scale, the Second and Ninth Circuits have considered similar factors as explored by the First Circuit in *Dennison*. *United States v. Mastrangelo*, 662 F.2d 946 (2d Cir. 1981) (considering whether the court explored and rejected alternatives to the mistrial); *United States v. Bates*, 917 F.2d 388, 396 (9th Cir. 1990).

Petitioner is confident that if the instant case were decided using the approach articulated by the First, Third, Fourth, Fifth, or Tenth Circuit, it would have resulted in reversal.

B. This Case Presents Important Constitutional Questions of Broad Impact

Double jeopardy is an important fundamental right guaranteed by the Fifth Amendment to the Constitution. In the context of a mistrial, this Court has made it clear that the proper standard for a mistrial is manifest necessity. *Perez,* 22 U.S. at 580 (1824). Manifest necessity requires a high degree of necessity, and a mistrial should be a remedy of "last resort, only to be implemented if the taint is ineradicable." *United States v. Lara-Ramirez*, 519 F.3d 76, 82 (1st Cir. 2008). Despite the numerous decisions of this Court, the double jeopardy protections have eroded and become routinely

disregarded by the trial court for the sake of judicial economy or convenience.

In *Downum*, this Court required that a jury be discharged without a verdict "only in very extreme and striking circumstance. *Downum*, 372 U.S. at 736. In *Jorn*, this Court required that the trial court exercise "sound discretion" and to consider all reasonable alternatives to protect the defendant's rights. *Jorn*, 400 U.S. at 487; *see also Seay v. Cannon*, 927 F.3d at 781. It is the responsibility of the trial court to "temper the decision whether or not to abort the trial by considering the importance of the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 514. And, in the event a mistrial was declared, the Government has the burden of establishing that the mistrial was required because of manifest necessity. *Washinton*, 434 U.S. at 505. "[T]his burden is a heavy one." *Id.*

However, through the passage of time, the "need" to protect a defendant's constitutional rights has been significantly degraded. Indeed, as the Sixth Circuit's opinion in this case illustrates, the courts have been quick to afford the trial court virtually unfettered discretion, to the point of engaging in appellate fact-finding and making inferences to support the lower court's findings. App. 12-15. It is important for this Court to make clear that the review, based on the record at the trial court, required under the well-

established principles set forth in *Downum, Jorn, and Washington,* is more than a rubber stamp. App. 73-87.

C. This Case Was Wrongly Decided and Is an Ideal Vehicle to Resolve the Questions Presented

The trial court declared a mistrial in this case on a "confluence of factors." App. 52. The primary factor was the unavailability of a witness for the government, whom the government knew tested positive for COVID-19 before the jury was sworn in and the trial started. App. 68, 74. In what can only be described as the classic case of *Downum*, the government deliberately withheld this information, rolled the dice, and proceeded to trial. App. 3. When the government later sought alternative means for the witness to testify, the trial court, for reasons unclear, felt the need to accommodate the government and pursued adjourning trial for three weeks to allow the witness time to recover. App. 78-79. When the court polled the jury about the continuance, the trial court found them unavailable. App. 85. As provided by this Court in *Downum*, the proper course of action was to order the government to continue with its case. App. 35. Indeed, neither the witness's nor the jury's unavailability offered a valid reason for a finding of manifest necessity. App. 35, 43. The trial court abused its discretion and committed reversible error in the reasons to support the mistrial. App. 46.

It is also important to note that at the time the mistrial was declared, the trial judge specifically found that his exposure to COVID-19 was not an impediment to continuing the trial. App. 74. The trial judge indicated that he had several alternatives available to him, including conducting the trial remotely and finding a replacement judge. App. 86. Rather than take the trial judge's contemporaneous statements on the record, the Sixth Circuit majority found that the trial judge's exposure to COVID-19 provided an independent reason to justify the mistrial. App. 13. Not only is the Sixth Circuit majority's ruling contrary to the record made when the mistrial was declared, but it also disregards the trial court's finding that there was a "confluence of factors" supporting the mistrial. App. 86. If the trial court abused its discretion in disregarding the well-established precedent of this Court in its reliance on two of the factors, how can the Circuit Court tear apart the "confluence of factors" and then apply the "most relaxed scrutiny?" App. 11, 52. This is especially true given the trial judge's statements on the record before declaring the mistrial. App. 74-75, 86.

The Sixth Circuit's decision was in error and should be reversed.

CONCLUSION

This case, at the Sixth Circuit, turned on the standard of review applied to the trial court's record at the time of the mistrial. The Sixth Circuit majority disregarded the record, affording the trial court unfettered discretion. The Sixth Circuit dissent applied an intermediate level of scrutiny and found the trial court plainly did not exercise sound discretion in declaring the mistrial. This case is the perfect vehicle to reconsider and clarify appellate courts' approach in reviewing double jeopardy cases. We recognize that COVID-19 created trying times, and courts operated under extreme circumstances. But COVID-19 does not justify flagrant errors of law, which leave an indelible taint on the trial court's decision. This Court should hear this case and remand it to the Sixth Circuit with instructions on what level of scrutiny to apply to the record.

Respectfully Submitted,

December 6, 2023

By: */s/ Venar Ayar*
Venar R. Ayar
Counsel of Record
Ayar Law
30095 Northwestern Hwy., 102
Farmington Hills, MI 48334
venar@ayarlaw.com
(248) 262-3400