No. ______

# In the Supreme Court of the United States

AL CANNON, SHERIFF,
*Petitioner*,

v.

BRODERICK WILLIAM SEAY, JR.,
*Respondent*.

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

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

I.

In review of a state decision under 28 U.S.C. § 2241, when a federal appellate court must determine if double jeopardy protection bars retrial after a mistrial is granted over a defendant's objection based upon the absence of a critical prosecution witness, does the required strict scrutiny applied to the legal determination of manifest necessity constrain in equal or greater measure the deference universally accorded a trial court's fact-finding.

II.

Whether in granting relief under 28 U.S.C. § 2241 the Fourth Circuit egregiously failed to apply clearly established federal law as determined by this Court in *Arizona v. Washington* and accord deference to the state court's ruling finding manifest necessity for mistrial when it resolved that omission of a reference to consideration of alternatives in the court's oral ruling made the ruling fatally insufficient even though the record shows the state court did not act rashly in granting a mistrial, but pursued a cautious approach that included suspending the trial to allow a search for the missing witness prior to considering and granting the State's mistrial motion.

## STATEMENT OF PROCEEDINGS

*Seay v. Cannon*, No. 18-7242 (4th Cir.) (opinion issued June 21, 2019) (mandate stayed by Order of this Court entered August 19, 2019).

*Seay v. Cannon*, No. 2:17-2814-TMC-MGB (D.S.C.) (final order issued September 11, 2018; summary judgment entered final judgment entered September 12, 2018).

*State of South Carolina v. Startaeshia Grant*, Bench Warrant # 2016B0729201600 (General Session, Ninth Judicial Circuit, State of South Carolina, Charleston County) (Order finding contempt of court entered August 24, 2016).

*State of South Carolina v. Broderick Seay, Jr.*, Indictment No. 2015-GS-10-00972 (General Session, Ninth Judicial Circuit, State of South Carolina, Charleston County) (indictment for murder; order after mistrial to continue proceedings until completion of federal habeas proceedings granted October 18, 2017, entered October 20, 2017).

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Sheriff Al Cannon of Charleston County, ("the State") currently holds Respondent, Broderick William Seay, Jr., in pre-trial detention on a charge of murder brought by the State of South Carolina. A divided panel of the U.S. Court of Appeals for the Fourth Circuit found the Double Jeopardy Clause prohibits South Carolina from bringing Seay to trial and directed the District Court grant a writ of habeas corpus. The published opinion demonstrates the need for this Court's guidance on how federal courts should treat state criminal matters on habeas review under 28 U.S.C. § 2241. The Fourth Circuit disregarded federalism concerns inherent in habeas corpus review by failing to apply any deference to a state judge's fact-finding while, it would, as a matter of ordinary appellate review, accord deference to district court fact-finding. Further, the Fourth Circuit broke with this Court's long-established precedent requiring appellate courts to respect a trial judge' discretion in finding manifest necessity to grant a mistrial over a defendant's objection, and accord deference to the trial judge's fact-finding. These errors resulted in an incorrect opinion and improper intrusion into the state criminal law process. This Court has stayed the mandate until the State's petition may be considered. The State submits this petition seeking reversal of the Fourth Circuit's opinion and the opportunity to bring Seay to trial on the charge of murder.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 927 F.3d 776 (4th Cir. 2019). (App. 1-48). The decision of the Federal District Court denying Seay relief may be found at 2018 WL 4346872 (D.S.C. Sep. 11, 2018). (App. 49-74). The Federal Magistrate's Report and Recommendation suggesting relief be denied may be found at 2018 WL 4957399 (D.S.C. July 31, 2018). (App. 75-96). The state court's order denying a motion to dismiss the charge is not reported. (App. 97-107). The Order finding the witness who failed to appear in contempt of court is not reported. (App. 108-109). The Order granting mistrial was made orally on the record and is part of the trial transcript, but is not otherwise reported. (App. 134-36).

## JURISDICTIONAL STATEMENT

The Fourth Circuit Court of Appeals issued its opinion on June 21, 2019. (App.1). A timely petition for rehearing was denied on July 19, 2019. (App. 110). The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment which prohibits, in relevant part, a person from being "twice put in jeopardy of life or limb…." U.S. Const. amend. V.

This case also involves 28 U.S.C. § 2241, which provides, in relevant part, that "[w]rits of habeas corpus may be granted by the Supreme Court, any

justice thereof, the district courts and any circuit judge…" when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States…." 28 U.S.C.A. § 2241(a) and (c)(3).

## STATEMENT OF THE CASE

a. The Murder Charge

The State of South Carolina has charged Seay with murder. On March 29, 2012, the body of Adrian Lyles was found in a remote area on Wadmalaw Island in Charleston County South Carolina. Adrian had been shot ten times with three different guns. (App. 98; 116-18; 126).

The State would show that the motive for the murder was Kevin Howard's belief that Adrian had become a "snitch" working for law enforcement. (App. 126). Howard, and another man named "Ty," kidnapped Adrian from his home. Seay joined the men, and they drove Adrian out to a remote area on the island then executed him. (App. 98). Howard and the man named "Ty," then met with Howard's girlfriend, Startasia[1] Grant, at her apartment. (App. 132-33). Eventually Seay rejoined the group as they went to a local Waffle House before they began a search for different hotels in which to hide out. (App. 133). Howard and Seay had an argument at the Waffle House and Seay was left behind. Seay then began calling Grant's phone. (App. 133). "Based on Grant's

[1] There are various spelling used for the witness' first name. The State uses the spelling in the Fourth Circuit Opinion. (See App. 4 n. 1).

information, cell tower records, hotel records, and post arrest records, Broderick Seay was arrested on March 28, 2014 and charged with murder." (App. 98).

b. State Procedural History

Howard was identified and tried first. In 2014, a jury found Howard guilty of murder, kidnapping, and burglary first degree. Grant had cooperated with the State and testified against Howard. (App. 98). Following the Howard trial, the State dismissed a charge of "obstruction of justice for her role in attempting to 'cover up' the crime." (App. 4). Grant continued to work with the State in preparation for Seay's trial scheduled to begin the week of July 25, 2016. She "was cooperative with the State … showed no reticence in cooperating" and "frequently met with the State and participated in interviews each time it was requested." (App. 98). On June 23, 2016, a member of the prosecutor's office personally served Grant – while Grant was in the prosecutor's office – with a subpoena for the scheduled July 2016 trial. (App. 143). The subpoena allowed for contact information to be provided so that the witness is called when needed. (App. 142-44; 162-63). The State met with her on Friday July 22, 2016, and spoke to her by phone on Saturday July 23, 2016, before the trial week beginning July 25, 2016. (App. 124-25). Defense counsel spoke with Grant the Sunday before the trial week. (App 125).

After a brief one day delay not related to the witness, the jury was sworn on Tuesday, July 26, 2016. Grant was called to appear on Wednesday, July 27, 2016. She failed to appear. (App. 125). The State

notified the trial judge, Judge Cooper, and advised Grant was a critical witness who inexplicably did not appear when called. The State advised the judge that, as outlined above, they had met with Grant the Friday before trial, spoke with her by phone on Saturday, and that defense counsel also spoke with the witness on Sunday, a fact defense counsel stated he could "corroborate … that I did speak to the witness that we're discussing … Sunday." (App. 120). The State advised their investigator received a text message purportedly from Grant "indicating that she was not going to come, that she was frightened." (App. 119; 125; see also 153-55). Family members were contacted and they informed the State they had not seen her since the Saturday before trial. (App. 125). The family members told the State the witness "indicated that she had been threatened." (App. 119). The trial judge asked if Grant had testified in the prior trial and the State advised that she had. (App. 120). The trial judge issued a bench warrant at 10:06 AM that same day. (App. 140). A continuance was granted until the next day to allow law enforcement, including the United States Marshals Service, to search for Grant and, critically, *to determine what had happened*. (See App. 99 and 122-24). The trial judge also took Seay into custody *noting the uncertainty of what had happened*. (App. 123).

The following day, the State reported to the court that no one had been able to locate Grant. (App. 125). The prosecution moved for a mistrial noting it was not seeking a mistrial to address a weakness or otherwise gain an advantage, rather, at the time, they did not know whether she was "alive … injured … just scared"

or "threatened." (App. 125). The prosecutor noted there was "no manipulation on the part of the State," that they had been "prepared … had her served … met with her." (App. 126 -28). The State asked for one fair opportunity to present its case and "a just end result not only for the public's interest, but for the interest of the victim as well." (App. 128).

The defense recognized the discretion vested in the trial judge in determining whether mistrial was appropriate, and argued they were in a "gray" area. (App. 130). He argued jeopardy had attached, the jury had heard from "seven or eight witnesses" and the prosecution "still has I believe three or four witnesses they could call," but the trial had started. (App. 130). He argued the case was several years old, there was no advantage to the defense having heard some of the State's case because "we have a transcript from the previous trial so we know exactly what every witness is going to say," and of the evidence then presented "none of the witnesses whatsoever link Mr. Seay to this crime." (App. 131).

In reply, the State underscored the importance of the witness, the uncertainty of the situation, and argued that a mistrial "is necessary and it is in the public interest … so that we can number one, determine why she is not here in case any threat occurred, and number two, to secure her for purposes of the next trial." (App. 133).

The judge found that the State was surprised by the previously cooperating and duly subpoenaed critical witness's failure to appear when called; there was no reason presented to believe otherwise; both parties

pointed out she had been available as late as Sunday before the Monday of the trial week; and there had been no determination of why she had disappeared. (App. 134-35). The judge acknowledged Seay's right, but found, in these circumstances, "the interest of public justice … to a fair trial" warranted finding manifest necessity and declared a mistrial. (App. 135-36).

A second[2] state court judge, Judge Harrington, subsequently found the witness in contempt of court for failure to appear on the day called. (App. 108-109). Grant admitted, through counsel, there was no defense to her failure to honor the subpoena and the resulting finding of contempt. (App. 150).

Seay filed a motion to dismiss the murder charge claiming double jeopardy barred retrial. A third state court judge, Judge Dennis, heard and denied Seay's motion to dismiss finding the record supported the trial judge's finding of manifest necessity. (App. 97-107).

At a hearing on the motion held September 15, 2017, Judge Dennis considered Seay's argument that the State took a chance because the witness was not in court at the time the jury was sworn, nor did the State know where she was as the trial progressed. (App. 158). However, Judge Dennis reasoned "we couldn't

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[2] Trial judges in South Carolina are required to rotate among the judicial circuits within the State. See S.C. CONST. Art. V, § 14. At the end of their terms for either civil cases or criminal cases, typically one week, the individual judges lose authority to act absent the timely filing of a post-trial motion. *See State v. Campbell,* 656 S.E.2d 371 (S.C. 2008).

function that way," and placed emphasis on the subpoena being duly served and effective. (App. 158-63). Judge Dennis noted that in his 21 years as a practicing attorney, he did not have witnesses come and sit in the courtroom throughout proceedings but obtained a number and called when ready to present testimony. (App. 162-63). Judge Dennis was also critical of Seay's argument that a prior charge against Grant had been dismissed thus she had less incentive to cooperate, reasoning simply being "on notice this person may be adverse to me" is not notice they are "not going to comply with what they are telling me they are going to do." (App. 164-65). He also questioned what ability the State would have to forcibly keep a witness in court: "Does that mean at the close of business, we do like we do with persons on bond… incarcerate them to make sure they come back tomorrow?" (App. 166).

In his written order, Judge Dennis concluded that Judge Cooper did not abuse his discretion in finding manifest necessity for the mistrial under the discrete circumstances before him. (App. 102). He found "the State had no advance notice their witness was missing." (App. 106). He also found "[t]he State did not impanel a jury with the knowledge that they could not locate their witness nor with the knowledge that the witness would refuse to cooperate due to being afraid." (App. 106). He noted "Judge Cooper made a very clear and very specific finding on the record that the State was not at fault for the facts leading to the mistrial" and "was caught by surprise." (App. 106). He acknowledged Judge Cooper found neither side was at fault. (App. 106). Judge Dennis noted that this Court's

precedent granted a trial judge discretion to find manifest necessity and grant a mistrial over a defendant's objection depending upon the varied circumstances that may be presented in a trial. (App. 103). He was also guided by this Court's direction that a judge must exercise that discretion soundly. (App. 103). He found "Judge Cooper properly acted within his discretion by determining that a mistrial was warranted by manifest necessity." (App. 107).

Judge Dennis also heard Seay's motion to stay all state proceedings to allow Seay to pursue federal habeas intervention. Judge Dennis granted the motion to stay the state proceedings as Seay requested, and that stay remains in effect. (See App. 7 n. 3).

c. Federal Procedural History

Seay's federal action was initially filed pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of South Carolina. Seay argued the Double Jeopardy Clause prevented retrial. South Carolina does not allow interlocutory appeals from the denial of a motion to dismiss based on double jeopardy. *State v. Rearick*, 790 S.E.2d 192, 199 (S.C. 2016). Thus, the Magistrate found the action could be considered without specific offense to *Younger v. Harris*, 401 U.S. 37 (1971) (holding federal courts should generally abstain from granting injunctive relief against ongoing state proceedings). (App. 83 n. 4). The Magistrate then found the record supported that the state court judge did not abuse his discretion in these circumstances – where the witness only stopped cooperating after the jury was sworn, and could not be

located after a continuance and search – and recommended relief be denied. (App. 91-95).

The District Court also found the state trial judge did not abuse his discretion based on the facts of record, specifically finding: "… there is no doubt that Grant, who at that time was the only witness who could link [Seay] to the murder, was a key witness, and the State was surprised by the refusal of Grant to appear and testify and not merely attempting to gain a tactical advantage." (App. 66). Further, the District Court found sufficient consideration of alternatives in light of the fact "a continuance had already been granted and substantial efforts were already made to locate the absent witness without success" concluding "the court defers to the trial judge's ruling that manifest necessity warranted a mistrial." (App. 66). The District Court denied relief on September 11, 2018. (App. 74). Seay appealed.

The Fourth Circuit allowed briefing and argument. On June 21, 2019, in a divided panel decision, the Fourth Circuit reversed and directed the District Court issue the writ, though it recognized that "[t]he clear loser in this scenario is the public, which had a strong interest in having Seay tried under the murder indictment." (App. 18). The majority found that the State was not surprised because the witness had not been in court when the jury was sworn, and that the trial judge failed to consider any alternative prior to the grant of the mistrial. (App. 10-17). Judge Niemeyer dissented and found "the majority's holding … unnecessarily challenges the traditional principles of comity and federalism that the Supreme Court has long

required in our habeas review of state court proceedings." (App. 44). The dissent also found this "case does not present any question of prosecutorial abuse, prosecutorial misconduct, or prejudice to the defendant – matters that the Double Jeopardy Clause was designed to forestall." (App. 48). Moreover, the dissent pointed out the majority rested its grant of federal habeas relief on new, appellate level fact-finding, and those "facts" were "unsupported by the record." (App. 20). The dissent considered "the majority's incautious application of the Clause in the circumstances presented" to be "a tragedy for public justice." (App. 48). The dissent concluded the record supported the state "prosecutor and the trial judge acted reasonably," the protections of the Double Jeopardy Clause were not offended in these circumstances, and South Carolina was being wrongly denied the opportunity to present its evidence in one fair trial proceeding. (App. 48).

On July 5, 2019, the State filed a timely petition for rehearing and rehearing *en banc* which was denied on July 19, 2019. (App. 110). The State then moved to stay the mandate to allow for the filing of a petition for writ of certiorari in this Court. On August 2, 2019, the majority denied the motion, while Judge Niemeyer voted to grant. (App. 168). As referenced above, this Court stayed the mandate with the caveat that the petition should be filed on or before September 3, 2019.

## REASONS FOR GRANTING THE PETITION

The petition presents two questions that are different facets of the same basic inquiry: are federal courts unrestricted by any deference when reviewing state court decisions under 28 U.S.C. § 2241? Contrary to this Court's history of respect for state decisions in federal habeas review, the Fourth Circuit failed to accord any deference due the state court decision here, either in fact-finding or review of a discretionary decision.

This Court's review is needed to provide guidance on how federal courts should conduct review of state decision under Section 2241, and, specifically, how they should apply the "strict scrutiny" standard in review of a finding of manifest necessity for a mistrial. Further, this Court should reverse a clearly erroneous decision not supported by the facts of record, and allow South Carolina the opportunity to bring Seay to trial for murder.

### I. The Fourth Circuit's refusal to defer to the state court's fact-finding offends the respect this Court has historically accorded the state courts and conflicts with long-settled law.

#### A. The Fourth Circuit grievously erred in reviewing the state court findings without any deference as unrestrained review on appeal conflicts with federalism concerns and ordinary appellate review limitations.

1. "This Court has recognized that the States' interest in administering their criminal justice systems

free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." *Kelly v. Robinson*, 479 U.S. 36, 49 (1986). One way Congress acted to protect the balance between the sovereigns was to impose additional layers of deference in review of state court fact-finding in the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), which modified the habeas provisions in chapter 153 of Title 28. There is no dispute that the greatly heightened deference accorded review of state decisions under the 28 U.S.C. § 2254 section was not also incorporated into the general habeas statute in the 28 U.S.C. § 2241 section through the 1996 Act. However, in recognizing those heightened restrictions do not apply, the Fourth Circuit extrapolated that *no* deference applied. (See App. 7). There is admittedly little guidance from the 1996 statutory revisions as to review under Section 2241; however, this Court has said that the 1996 changes should guide the federal courts in review of state matters. *Felker v. Turpin*, 518 U.S. 651, 663 (1996) ("Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions."); *see also Calderon v. Thompson,* 523 U.S. 538, 554 (1998) ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute."). The Fourth Circuit's published opinion radically shifts the landscape in the wrong direction and does not square with this Court's precedent requiring a cautious review of the necessity of intrusion in the state criminal process.

2. 28 U.S.C. § 2241 in chapter 153 of Title 28 is the main provision for statutory federal habeas actions. "All applications for writs of habeas corpus are governed by 28 U.S.C.A. § 2241, which generally authorizes federal courts to grant the writ to both federal and state prisoners." 16 A Fed. Proc., L. Ed. §41:11. *See also Zadvydas v. Davis,* 533 U.S. 678, 687 (2001) (describing 28 U.S.C. § 2241 as the "primary federal habeas corpus statute"). Though separate from Section 2254, it is still federal habeas review available to state prisoners, and this court has long recognized "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Thompson,* 523 U.S. at 555–56 (internal quotation marks omitted); *see also Withrow v. Williams,* 507 U.S. 680, 699 (1993) (underscoring " 'prudential concerns' such as equity and federalism' ") (O'Connor, J., concurring in part and dissenting in part); *Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 286 (1970) ("…from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system."). Thus, respect for the state courts is a major and consistent concern even under the general statute.

3. However, the need for the Court to definitively speak on this matter is clear. Modern guidance as to deference due the state courts under Section 2241 review is limited. *See Felker, supra, Calderon, supra*; *see also In re Davis,* 557 U.S. 952 (2009) (transferring petition to the District Court noting "The District Court

may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this."). This Court has granted numerous petitions in recent terms in order to instruct the lower federal courts on the deference due state decisions under 28 U.S.C. § 2254 review. This case should be taken to address similar concerns under 28 U.S.C. § 2241 review.

4. While Section 2241 does not include the level of specific restriction added to Section 2254 by the 1996 AEDPA revisions, neither did the 1996 Act incorporate less restraint than historically accorded review of state matters. The concern of deference to a state court's ruling, though, has never been swept aside so fully as it was by the majority in this case. As the dissent found, "the majority's holding … unnecessarily challenges the traditional principles of comity and federalism that [this] Court has long required for our habeas review of state court proceedings." (App. 44). The dissent also correctly noted " 'historic and still vital relation of mutual respect and common purpose existing between States and the federal courts'" requires federal courts be " 'careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings.'" (App. 44, quoting *Williams v. Taylor,* 529 U.S. 420, 436 (2000)). The federalism concerns that underpin proper review of a state court decision are missing from the majority opinion.

5. The Fourth Circuit failed to apply even ordinary appeal restrictions as would apply to a district court's

fact-finding. It is a settled principle of law that federal appellate courts grant substantial deference to trial level fact-finding. *See, e.g, First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947–48 (1995) (referencing ordinary federal appellate review of district court matters as "accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo.*"). Rule 52(a)(6), of the Federal Rules of Civil Procedure directs that fact-findings "must not be set aside unless clearly erroneous." *See also Cooper v. Harris*, 137 S. Ct. 1455, 1464–65 (2017) ("the court's findings of fact …are subject to review only for clear error."). This Court has long echoed that separate treatment in regard to 28 U.S.C. § 2254 habeas review. *See, e.g., Miller v. Fenton,* 474 U.S. 104, 117 (1985) (acknowledging the deference accorded fact-finding, but not the legal conclusion, in a federal court's habeas review of state decisions). Using the absence of Section 2254 heightened restrictions to loosen all appellate review limitations places an unacceptable harshness on review of matters from state court. Further, the majority opinion is incorrect that "strict scrutiny" in a double jeopardy analysis allows for the abandonment of fact-finding deference.

### B. The Fourth Circuit grievously erred in finding appellate courts reviewing manifest necessity determinations under strict scrutiny do not need to accord deference to a trial judge's fact-finding.

1. The Fourth Circuit's refusal to accord any deference to the state court findings (by three different state court judges) cannot be justified by the type of

legal issue presented, in this case, review of a plea of double jeopardy. It is true that "the strictest scrutiny" is used in review of a decision to grant a mistrial over a defendant's objection because of "the unavailability of critical prosecution evidence." *Arizona v. Washington,* 434 U.S. 497, 508 (1978). However, even while instructing on strict scrutiny review, this Court still recognized deference to fact-finding. *Id.* at 510, 514. Not even the dissent in *Washington* questioned the "truism that findings of fact by the trial court may not be set aside on appeal unless 'clearly erroneous,' and that on review appropriate deference must be given to the trial court's opportunity to judge the credibility of the witnesses." *Id.* at 519 n. 1 (Marshal, J., dissenting). The Fourth Circuit's opinion offends these settled principles and produced new fact-finding on appeal that is at odds with the state court record. It is important to curtail that type of egregiously flawed review, especially where the flaw upends the careful balance this Court has struck between state and federal courts.

2. For nearly two hundred years this Court has reserved a measure of discretion to trial courts to grant a mistrial over a defendant's objection upon a finding of manifest necessity to ensure one fair trial for all parties:

> …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. They

> are to exercise a sound discretion on the subject….

*United States v. Perez*, 22 U.S. 579, 580 (1824). Craving reference to Section 2241 review and "strict scrutiny," the majority granted relief on the federal appellate level by review of a cold record without consideration of the discretionary nature of the ruling and deference to the fact-finding. Strict scrutiny was critical to the majority departing from the deference ordinarily accorded fact-finding and is referenced repeatedly in the opinion. (See App. 3-15). Judge Cooper and Judge Dennis found the prosecution was actually surprised. (App. 134-35 (Judge Cooper); 106 (Judge Dennis)). The majority concluded through new, appellate level fact-finding that there was no surprise; it was the government's burden to show facts supporting the surprise; and the State did not persuade the majority that the prosecution had been surprised. (App. 10-14). The majority completely wrote out the trial court's decision and engaged in its own view of what selected parts of the record could mean to the finding of manifest necessity for mistrial. (App. 9-13). The majority erred in relying on strict scrutiny to deny deference to the state court's fact-finding.

3. Strict scrutiny review does not equate with the absence of discretion. *See McCorkle v. State,* 619 A.2d 186, 200 (Md.Ct.Spec.App.1993) ("strictest scrutiny" equates with "*limited* discretion to grant mistrial") (emphasis in original). Nothing in strict scrutiny of the legal determination of manifest necessity directly speaks to factual-findings made by the trial judge. Moreover, the critical finding is still manifest necessity

and the trial judge is vested with discretion in determining whether manifest necessity exists. This Court has clearly set out that "manifest" does not equate with strict necessity, but a "high degree." *Washington,* 434 U.S. at 506. Thus, there is logically a degree of deference warranted if discretion is retained by the trial court. Applying strict scrutiny to a trial court's legal conclusion does not render a deathblow to fact-finding deference. In fact, this Court has instructed that reviewing courts must consider whether "the trial judge exercised 'sound discretion' in declaring a mistrial," *Washington*. 434 U.S. at 514. For example, where there is an abrupt grant of a mistrial, there is no deference and the Clause bars retrial. *See United States v. Jorn*, 400 U.S. 470, 487 (1971) (retrial prohibited where trial judge "acted so abruptly in discharging jury" that he "made no effort to exercise a sound discretion"). That falls much more toward process than contested facts. Consequently, the review of the exercise of discretion can be, and should be, done without the wholesale rejection of deference as to fact-finding.

4. Further, it makes good sense to give deference to the trial judge fact-findings. The trial judge makes critical fact-findings from the front line – fact-finding that this Court has historically and universally found to be entitled to deference: "When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination." *Wade v. Hunter,* 336 U.S. 684, 689 (1949). *See also Clemons v. Mississippi,* 494 U.S. 738, 766 (1990) ("… 'even if we wanted to be fact finders, our capacity for such is limited in that we

have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.'") (Blackmun, J., concurring in part and dissenting in part) (quoting *Gavin v. State,* 473 So.2d 952, 955 (Miss. 1985)). In further deference to trial judges, in *Washington,* the Court did not require an "explicit finding" of manifest necessity, but affirmed because "the record provide[d] sufficient justification for the state-court ruling." 434 U.S. at 525. This affirms once again what *Perez* teaches: reviewing courts must assure themselves the discretion was "soundly" exercised based on the circumstances of record.

5. The critical fact-finding here was that the state prosecutor was prepared for trial but had been surprised by the sudden non-cooperation and disappearance. Authority that holds a federal appellate court – unfamiliar with the individuals and the rules and customs of state practice, sitting in a separate geographical area of the country, considering a cold record over two years after the event – would be in a better position to determine credibility of the representations, arguments, and evidence, is elusive. It does not add any reliability to the correctness of the legal determination. *See Salve Regina Coll. v. Russell,* 499 U.S. 225, 233 (1991) (acknowledging precedent applying "deferential review of mixed questions of law and fact … when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will

not contribute to the clarity of the legal doctrine."). *See also United States v. Mastrangelo,* 662 F.2d 946, 953 (2d Cir. 1981) (deferring to trial judge's "observation of the witnesses, the parties, and the jury"). The Fourth Circuit disagreed with the two findings by two state judges that the prosecution was surprised, but disagreement does not prove lack of factual support. Thus, any measure of deference would have made a difference. Further, as the dissent points out, the majority's new fact-finding was simply wrong based on the records that were submitted in the appeal. (App. 20).

**C. The Fourth Circuit's error in making its own fact-finding is magnified because the record does not support the majority's findings.**

1. The Fourth Circuit is doubly wrong in its appellate level fact-finding because its opinion depended only on isolated, select facts picked from the record. *See generally Abbott v. Perez,* 138 S. Ct. 2305, 2356 (2018) (finding an "analysis is too cursory even for *de novo* review" where "majority does not meaningfully engage with the full factual record below") (Sotomayor, J., dissenting). Consequently, its findings lack actual record support. The Fourth Circuit concluded the State could not have been surprised because the witness was not in court on Monday or Tuesday, before she was called to appear on Wednesday. (App. 11). There has never been a serious dispute that whether the prosecutor, at the time the jury is sworn, is aware there is a problem with his witness attending is a critical finding. *See, e.g., Downum v. United States,* 372 U.S.

734 (1963). The issue has been whether there was really surprise. The state court judges found the prosecution was actually surprised and did not allow the jury to be sworn with the knowledge there was any problem with the witness. (App. 134-35 (Judge Cooper); 106 (Judge Dennis)). The dissent points out in plain fashion the reasons the majority's new and contrary fact-finding is not supported by the record:

> … while the majority correctly points out that the Supreme Court in *Downum* "explained that the double jeopardy inquiry focuses on the state's *knowledge* at the time the jury is empaneled," *ante* at 8 (emphasis added), it wrongfully imputes to the prosecutor in this case a *knowledge and awareness* that the prosecutor did not have. The record demonstrates this factual error, showing that:
>
> 1) Grant was a cooperating witness who had already testified on behalf of the State against a codefendant involved in the same murder, leading to that defendant's conviction.
>
> 2) Grant met regularly with the prosecution, cooperating in the preparation for the trial of Seay.
>
> 3) At a trial preparation meeting in June 2016, prosecutors issued Grant a subpoena to appear for the week of July 25, and she expressed no reticence about responding to the subpoena as required.

4) The prosecution met with Grant on the Friday before trial and spoke with her by telephone on the Saturday before trial, giving the prosecution a firm belief that she would appear to testify at the trial the next week, when called.

5) Seay's counsel spoke with Grant on the Sunday before trial to introduce himself to her, and he did not dispute the prosecutor's statements.

6) Both the lead prosecutor and her investigator left telephone messages and texts with Grant, instructing her to appear for trial on Wednesday, July 27. While they did not reach her by telephone, she did receive their messages, as indicated by her return text during the night of July 26.

7) There was no evidence that when the jury was picked and empaneled on July 26, the prosecutor or defense counsel had any knowledge or awareness that Grant would not appear to testify on Wednesday, July 27. Indeed, the prosecutor later stated affirmatively that she had no such awareness, as Grant "never indicated she would not testify."

8) When Grant did not appear on July 27 as instructed, claiming fear of retribution, the prosecutor claimed surprise, noting that this was the first time such a situation had

> occurred in her 30-year career and in her investigator's 26-year career.
>
> Thus, not only does the majority engage in factfinding — finding as fact that the prosecutor expected Grant to appear in court on both July 25 and July 26 and therefore *knew* that there was a real risk that she would not appear for trial — but its findings are not supported by the record. And this is especially troubling when the majority overrules the findings of three different state judges…

(App. 39-41).

2. The majority's new appellate fact-finding rests in large part on speculation – what the prosecutor *could* have presented in addition to the record evidence; what the judge *could* have required; what the judge *could* have done. (See App. 9-15). In contrast, the trial judge critically assessed the facts before him and specifically found *no* fact supported that the critical witness's disappearance was anything other than surprise. (App. 135). It is the trial judge's careful finding supporting the prosecution's surprise which distinguishes this case from the cases where the prosecution "took a chance" in going to trial aware they had not secured a witness. Any measure of deference surely would make a difference. The State was deprived of that moderating governor – one that is otherwise universally accorded the trial judge on the scene. Even so, the Fourth Circuit's new fact-finding is wrong because it is inconsistent with the record.

3. In further example of error, the Fourth Circuit found the subpoena directed the witness to appear Monday of the trial week and there was no evidence the witness was instructed otherwise. (App. 12). The majority failed to consider the entirety of the subpoena in finding the witness failed to appear as instructed. (See App. 16). As the dissent points out, the subpoena specifically allowed for the witness to provide a number and be contacted during trial. (App. 23-24). Additionally, the record shows the prosecutor had the number, and texted her the night before the day she was to be called to testify. (See App. 119). Further, the witness received the subpoena well in advance of trial, and continued to meet with the prosecutor leading up to the trial. (App. 98 and 143). Extracting and relying on one sentence in a subpoena, and placing it outside the context of the case, simply does not show some error in either the state court's fact-finding or legal conclusion.

4. A further listing of the majority's omissions may be made: the majority either did not consider or discounted that the bench warrant which depended upon the assertion Grant failed to appear on Wednesday, (App. 140), and either did not consider or discounted that Grant was held in contempt for failing to appear on Wednesday, (App. 108). The majority either did not consider or discounted that Judge Cooper faced not just surprise, but great uncertainty, even to the point of not knowing whether the witness was alive – a reasonable concern in a case where the motive for the murder charge was purportedly that the victim had been a "snitch." *See Mastrangelo,* 662 F.2d at 951 (finding "impracticable in the situation of the killing of

a key witness to reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month”). The majority either did not consider or discounted Judge Dennis’ observations of practice in state court. (App. 162-63). Again, in addition to the failure to apply deference, and wrongly applying *Washington,* the Fourth Circuit’s new fact-finding is simply wrong.

5. The Fourth Circuit also relied upon a mechanical rule that is largely useless in addressing surprise after the swearing of the jury. The majority considers that surprise is measured only by whether the witnesses appear in court at the time the jury is sworn. It is a confused, mechanical standard that does not take into account the assurances the state may have and subpoenas properly issued. As Judge Dennis observed, the vague belief or fear that a witness may not wish to continue to cooperate does not equate with notice the witness intends to not honor a subpoena. (App. 164-65). Further, it does nothing to address a surprise absence of a critical witness during trial. Judge Dennis correctly pointed out there is no process by which to take an otherwise cooperating witnesses who appears in court into custody to force continued appearance. (App. 166). The ruling even adds a measure of danger in insisting to bring all witnesses together where safety may well be at issue.

Seay similarly urged this position in his objections to the Magistrate’s report, and asked the District Court to consider the bright line rule in *Cornero v. United States*, 48 F.2d 69 (1931). The District Court found no error, given this Court had rejected the rule. (App. 70-

71). The Court concluded "the magistrate judge did not err in mechanically applying the holding in *Cornero*, and instead analyzed all the facts" as this Court has directed. (App. 71). The District Court's ruling was correct. This Court has twice plainly rejected a rigid rule. *Downum v. United States,* 372 U.S. 734, 737 (1963); *Wade v. Hunter,* 336 U.S. 684, 691 (1949) ("a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere"). Consequently, the swearing of the jury is the mark when jeopardy *attaches*, not when surprise in trial is *measured*. *See Martinez v. Illinois,* 572 U.S. 833, 839 (2014) (the point at which jury is sworn is the "bright line at which jeopardy attaches"). The Fourth Circuit was too fixed on the presence of all witness at one time, and did not consider the evidence in the record.[3] That shows the primary problem with the position. The primary problem is that surprise doesn't occur on a schedule. In this case, had the witness been in court on Monday or Tuesday, it would not have prevented the

[3] A similar suggestion was rejected by a federal District Court in *Wilson v. Gusman,* No. CIV.A. 12-0386, 2012 WL 893471, at *7 (E.D. La. Mar. 15, 2012) (denying petition under 28 U.S.C. § 2241 reasoning though "Wilson makes much of the fact that J.T. was not present in court on June 2, 2011, when the jury was sworn. This fact is minimized, however, when one considers (1) the trial court's grant of a recess immediately after spending the 7–8 hours selecting the jury; (2) the record establishes that J.T. wanted to and endeavored to attend trial in New Orleans; and (3) the great lengths the State went to in attempting to secure J.T.'s presence.").

surprise that occurred on Wednesday when she failed to appear.[4]

At best, the majority establishes an unnecessary, unworkable and largely ineffective rule. At worst, as the dissent points out, "criminal defendants who engage in witness intimidation on the eve of trial may now be able to avoid a trial altogether." (App. 45). Again, the trial judge must have the flexibility to make his ruling. The Fourth Circuit failed to honor this Court's precedent protecting that flexibility.

At bottom, all ills with the Fourth Circuit opinion trace back to the failure to apply some measure of deference. The structure of review was incorrect and resulted in an unjust disposition of this state matter.

## II. The Fourth Circuit egregiously erred in failing to apply clearly established federal law as determined by this Court in *Arizona v. Washington* and accord deference to the state court's ruling finding manifest necessity for mistrial based on mere omission to alternatives in the oral ruling when the record showed the court took a careful and measured approach to resolve the issue before declaring mistrial.

1. It is clearly established law that when "the record provides sufficient justification for the state-

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[4] Further, in this case, there was even a contempt hearing where it was determined it was indeed the witness's decision *after* cooperation with the State, and *after* receipt of her subpoena, to fail to come to court when called. (App. 108-109; see also 42).

court ruling, the failure to explain that ruling more completely does not render it constitutionally defective." *Arizona v. Washington,* 434 U.S. 497, 516-17 (1978). The Fourth Circuit resolved no deference should have been afforded the state court decision because the "record does not show that the court considered any available [mistrial] alternatives." (App. 16). Yet, the majority considered only possible discussions on the record that did not occur and not the actions taken by the state court judge prior to the mistrial. (App. 16). The record shows that alternatives to mistrial were not only considered but pursued. Both the Magistrate and the District Court judge found the record supported this.

2. The federal magistrate reasoned:

> The trial judge did NOT order a mistrial immediately after the State advised him that Ms. Grant was not cooperating. Instead, Judge Cooper issued a bench warrant for Ms. Grant's arrest, and he sent the jury home for the rest of the day with instructions to return the following morning. (Dkt. No. 29-2 at 233-36 of 258.) The following day, when Ms. Grant still had not been located–even with the assistance of the United States Marshals Service–Judge Cooper granted a mistrial. …

(App. 93). Further, the Magistrate noted that the trial was nearly complete when the surprise occurred, and the few remaining witnesses were dependent on Grant. (App. 92-93). This is consistent with Seay's argument to Judge Dennis that testimony from remaining

witnesses would be dependent on Grant's testimony. (App. 157).

3. The District Court was concerned that alternatives were not discussed at the time the mistrial was granted. (App. 66). The District Court then critically reviewed the record as *Washington* requires and determined "the only reasonable alternatives were to have the State present its remaining witnesses and hope Grant would be located or continue the trial while the State attempted to locate Grant." (App. 66). Then, affording *Perez* deference to the trial court faced with the circumstances unique to the matter before him, the District Court resolved, "[a]s a continuance had already been granted and substantial efforts were already made to locate the absent witness without success, the court defers to the trial judge's ruling that manifest necessity warranted a mistrial." (App. 66). This comports with the direction in *Washington* that a "failure to explain the ruling more completely" does not entitle a defendant to a bar from prosecution. 434 U.S. at 516-17.

4. Especially troubling on this point is that the majority rejected a concession by defense counsel at trial that there were only "three or four" witnesses left to call, and those witnesses "depended upon" Grant. (App. 130 and 157). This skewed the landscape of facts for the majority when there really was not such a great number of witnesses remaining. Seay suggested for the first time in the habeas action (through different counsel) that 18 witnesses remained and possibly could have been called – a suggestion the Magistrate rejected as Seay's "counsel at trial appeared

to recognize only a few witnesses remained. (App. 92). The majority, though, embraced Seay's new assertion for federal habeas and criticized Judge Cooper for not considering whether to allow the trial to continue with possibly calling "some of those [18] witnesses" and let the search efforts continue. (App. 10). The majority recognized the State's argument that only a few witnesses remained, but maintained that at the least there should have been more on the record about the remaining witnesses. (App. 17 n. 10). However, in light of the agreement on the witnesses, and the argument that no witness could tie Seay to the murder in the absence of Grant testifying, it is difficult to see what more could be said that would have made a difference. The trial judge certainly understood the importance of Grant's testimony and that the trial was nearly completed – facts that Seay did not contest, but agreed with, before Judge Cooper and Judge Dennis. The District Court did not err in his review of the record. The Fourth Circuit opinion is wrong.

5. Moreover, the fact-finding on alternatives was skewed by an additional error. The majority decided "[a]ll reasonable options must be evaluated, and all reasonable choices exhausted…." (App. 15). This is an impossible standard and conditions a bar to the state's ability to prosecute on the creativity of a reviewing court to envision one or more options not explored by the trial court. Further, it does not comport with the dictates of *Perez* and *Washington* that reserves discretion to the trial judge. There was no doubt on this record that the trial judge took a stepped and careful approach to the issue. He soundly exercised the

discretion granted to him by this Court's precedent. The Fourth Circuit erred in holding otherwise.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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