No. 19-311

In the Supreme Court of the United States

AL CANNON, SHERIFF, PETITIONER

v.

BRODERICK WILLIAM SEAY, JR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JASON SCOTT LUCK
Counsel of Record
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
(843) 554-5515
jluck@garrettlawsc.com

SARA ALEXANDRA TURNER
The Law Office of Sara A. Turner, LLC
105 Wappoo Creek Drive, Suite 1 A
Charleston, SC 29412
(843) 277-2431
sara@saraturnerlaw.com

Attorneys for Respondent

QUESTIONS PRESENTED

I.

Did the Fourth Circuit apply the well-settled precedent of this Court's Double Jeopardy decisions to the unusual facts of this case, where a prosecutor proceeded to trial without a critical witness present?

II.

Did the Fourth Circuit correctly find the state court's failure to explore alternatives to mistrial violated the Respondent's right to have his trial decided by the jury he selected?

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STATEMENT OF THE CASE

A. Background and Trial

On March 29, 2012, the body of Adrian Lyles was found on Wadmalaw Island, South Carolina, shot execution-style by three different firearms. (Pet. App. 98, 116-18, 126). Kevin Howard, Lyles' cousin, was arrested for his murder that year. (Pet. App. 98).

Howard was incarcerated at the Al Cannon Detention Center pending trial. During this time, Howard used the jail phone to speak with his girlfriend, Startaeshia Grant. (Resp. App. 9). Law enforcement was listening to these calls, where Howard allegedly attempted to manufacture an alibi with Grant's assistance. (Pet. App. 164; Resp. App. 9). Grant was subsequently arrested for obstruction of justice. (Pet. App. 157, 164).

Howard was tried and convicted of Lyles' murder in 2014. (Pet. App. 98). The then-pregnant Grant testified against Howard, albeit reluctantly and only under the compulsion of a pending charge of obstruction of justice. (Pet. App. 98, 131-32, 157-58, 164; Resp. App. 6-7). Grant, who was interested in beginning a music career, knew that being a "snitch" would not be helpful; however, the pending charge against her allowed her to "save face". (Resp. App. 6). After her testimony, the prosecution dismissed and expunged the charges against Grant. (Pet. App. 120, 131, 157).

Grant provided information on Howard and his alleged associates' behavior after Lyles' death, and particularly alleged contacts with Respondent Broderick Seay. (Pet. App. 118-119). Based on the information from Grant, Seay was arrested on March 14,

2014. (Pet. App. 98). On June 23, 2016, Grant also supposedly[1] identified another associate named Tyrone Drayton. (Pet. App. 63-64). On this date Grant was served with a subpoena to appear for Seay's trial, beginning on July 25, 2016. (Pet. App. 141, 143).

Grant stopped responding to the prosecution's attempts to communicate after July 23, 2016, two days before her subpoena compelled her to appear for trial. (Pet. App. 119, 124, 141, 154). However, the prosecutor and her investigator continued to attempt to contact her, sending messages "throughout the week" reminding her of the obligations of her subpoena and the potential for her arrest. (Pet. App. 53, 119, 154, 157).

Grant did not appear in court on July 25, 2016, the first day of trial. (Pet. App. 5). The parties proceeded with jury qualification, but when the prosecution produced new evidence to Seay's attorneys the trial was continued to July 26, 2016. (Pet. App 50).

Grant did not appear in court on July 26, 2016, and the prosecution proceeded with impaneling the jury, who were sworn in around 11:30 a.m. (Pet. App. 5, 25). That same day the prosecutor gave her opening statement, which featured

[1] The District Court's description of Grant's identification (Pet. App. 63-64) omits one sentence from the prosecution memorandum it cites: "When I showed [Grant] the photo of Tyrone Laval Drayton (Attachment 1), based on Rosa Green telling us he was someone that had access to the car we know was used during the murder, Ms. Grant said she was 90% sure that was the Ty involved in the murder of Adrian Lyles." The suggestive nature of this statement calls into question this photo lineup's compliance with *Neil v. Biggers*, 409 U.S. 188 (1972).

prominently the assertion that "[Grant] would never cooperate with the police". (Resp. App. 9). The prosecution called eight witnesses that day. (Pet. App. 5). None of these witnesses could establish a link between Seay and the alleged murder, whether through eyewitness testimony or through forensic evidence. (Pet. App. 131).

Grant did not appear in court on July 27, 2016, the third day of trial and the day the prosecution would have called her as a witness. (Pet. App. 5). The prosecution called one witness that morning, who did not link Seay to this crime, and then sought to call Grant. (Pet. App. 50, 127, 131). The prosecutor stated that Grant had not been cooperative with her office since a July 23, 2016, phone call.[2] (Pet. App. 119). Referencing conversations her investigator had with Grant's sisters, and an alleged message another investigator received, the prosecutor argued that Grant had been threatened and was frightened and requested a bench warrant for her arrest. (Pet. App. 119). The trial judge issued a warrant for Grant's arrest, took Seay into protective custody, and adjourned trial for the day at 11:15 a.m. (Pet. App. 5-6, 123-24). Later that day in chambers, the trial judge told the parties off-the-record he would be inclined to grant a directed verdict for Seay, due to the lack of evidence implicating Seay in the crime. (Pet. App. 68).

On July 28, 2016, Grant did not appear. Though the prosecution had as many as eighteen potential witnesses, the prosecution did not seek to call any of them, even though three or four of these witnesses were virtually certain to be called. (Pet. App.

[2] Seay's counsel had spoken with Grant on July 24, 2016. (Pet. App. 119).

17, 130). The prosecution also did not request a continuance; it instead moved for a mistrial. (Pet. App. 6). It had been less than twenty-four hours since the prosecution requested a bench warrant. (Pet. App. 124).

The prosecutor, facing a sinking case,[3] offered a bold argument: "We are asking for a mistrial because at this point we do not know if [Startaeshia] Grant is alive." (Pet. App. 125). Without mentioning his name, the prosecutor also insinuated Seay engaged in witness tampering and intimidation.[4] (Pet. App. 125-26, 131). The prosecutor did not present any evidence supporting her claims: the investigator who supposedly spoke to Grant's sisters never testified, Grant's sisters never testified, and the investigator who supposedly received a text from Grant never testified. The prosecutor did reference an unauthenticated and undated[5] transcription of a text message indicating fear and unwillingness to testify, but she never attempted to move this document into evidence. (Pet. App. 5-6, 153-55). The prosecutor also made the remarkable claim she never had such a situation arise in her thirty-year legal career, and her investigator never had such a situation arise in his twenty-six year career.

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[3] Roughly a month later, the prosecutor acknowledged the precariousness of her case at this point in the trial: "I very well could have found myself in a situation where I would [have] had to dismiss the charges against Mr. Seay if Judge Cooper had not gone along with my mistrial request." (Resp. App. 6).

[4] This same prosecutor walked back this allegation roughly a month later in Grant's contempt hearing: "It's my understanding they've never threatened her but the idea of not having them meet justice is unsettling to the State…" (Resp. App. 7).

[5] The email from Investigator Eckert with the transcription states that the message was "transcribed…on the day when the bench warrant was issued." (Pet. App. 154). This email does not establish when the message was received, much less its authenticity.

(Pet. App. 126). Seay's trial counsel opposed this motion on the ground that jeopardy had attached and the circumstances before the court did not constitute one of the "rare circumstances" where mistrial was appropriate. (Pet. App. 129-132).

The trial judge heard the prosecution's motion for mistrial, heard Seay's response, considered the arguments, and delivered his ruling in less than twenty-five minutes, and less than twenty-four hours after adjourning trial the day before. (Pet. App. 124; Resp. App. 9). The trial judge granted the mistrial motion and discharged the jury. The next day (July 29, 2016) Grant was taken into custody. (Pet. App. 108-109).

B. Post-Trial Proceedings

On July 17, 2017 (supplemented September 14, 2017), Seay moved to dismiss the indictment against him as barred by Double Jeopardy. The Charleston County Circuit Court denied this motion by order dated October 17, 2017. Seay moved to continue any retrial until such time as a federal habeas corpus application may be heard, which the Charleston County Circuit Court granted on October 18, 2017.

Seay filed a pro se application for habeas corpus under 28 U.S.C. § 2241 on October 18, 2017. Cannon filed his response to the application and a motion for summary judgment on February 2, 2018. The undersigned Jason Luck appeared for Seay on March 5, 2018. Seay filed a cross-motion for summary judgment on March 15, 2018. The Magistrate Judge issued her report and recommendation on July 31, 2018, recommending Seay's motion be denied and Cannon's granted. Seay timely objected to the report and recommendation on August 14, 2018, and the District Court issued its order denying Seay's application on September 11, 2018. The District Court

directed summary judgment on September 12, 2018. Seay filed his notice of appeal on October 8, 2018.

Seay filed his opening brief and a motion to expedite before the Fourth Circuit on October 16, 2019. The Fourth Circuit granted the motion and scheduled oral arguments for January 29, 2019. The Fourth Circuit issued its opinion on June 21, 2019, reversing the District Court. (Pet. App. 1-48). Judge Keenan, writing for the majority, held that the prosecution allowed jeopardy to attach with the awareness that Grant might not appear to testify and the trial judge did not consider alternatives to mistrial. (Pet. App. 1-18). The majority's position was well-summarized by the penultimate line of the opinion:

> [A]s a result of the government's ill-advised request for a mistrial, approved by the state court without consideration of existing alternatives, Seay is entitled to the habeas corpus relief that will afford him his constitutional rights under the Double Jeopardy Clause.

(Pet. App. 18). Judge Niemeyer, dissenting, took issue with the majority's fact-finding. (Pet. App. 19-48).

On July 23, 2019, Cannon filed a motion to stay the Fourth Circuit's mandate, which was denied by order dated August 2, 2019. Cannon then filed an application with this Court to stay the Fourth Circuit's mandate on August 6, 2019; this application was granted on August 19, 2019. Cannon filed his petition for a writ of certiorari on September 3, 2019. Seay filed a waiver on October 3, 2019; on October 15, 2019, this Court requested he provide a response to Cannon's petition.

REASONS FOR DENYING THE PETITION

This case presents a straightforward issue of a prosecutor failing to secure a critical witness and seeking a mistrial to avoid the consequences of this self-inflicted wound. The Fourth Circuit properly stated and applied the long-standing and well-settled precedent of this Court: petitions under 28 U.S.C. § 2241, and particularly mixed questions of law and fact like "manifest necessity", are reviewed de novo. Under this standard of review, the Fourth Circuit correctly found that the prosecution was not surprised by the fact its recalcitrant star witness refused to appear for trial when no longer motivated by pending criminal charges. The Fourth Circuit also correctly found that the trial judge failed to consider any simple and reasonable alternatives to mistrial, such as altering the order of proof or a continuance.

I. The Fourth Circuit appropriately applied long-standing precedent of this Court.

A. This case presents a straightforward application of well-settled Double Jeopardy precedent to an unusual set of facts.

1. This Court has held that circumstances where a prosecutor "took a chance" and elected to proceed when a material witness is unavailable is no legitimate basis for mistrial. *Downum v. United States*, 372 U.S. 734, 737-38 (1963); *see also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (Central to Double Jeopardy is the prohibition of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.). A case quoted with approval by the *Downum* court, *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931), is instructive in this matter. In *Cornero*, the defendant (Frank Cornero) was charged with conspiracy to violate the National Prohibition Act; two of his co-defendants pled guilty and were

released on bond. *Id.* at 69. These co-defendants were also witnesses in Cornero's trial; when his trial was called, these two "absolutely indispensable" witnesses did not appear. *Id.* at 71. The trial court excused the jury, forfeited the witnesses' bonds, and issued bench warrants for the witnesses' arrest. *Id.* When the witnesses could not be located, the trial court discharged the jury five days after it was impaneled. *Id.* at 70. A new jury was impaneled and Cornero was found guilty; he appealed the conviction on the ground that the second trial was barred by Double Jeopardy. The Ninth Circuit agreed that Double Jeopardy applied, in a holding quoted verbatim by *Downum* court:

> "**The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.** While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses." [*Cornero*,] 48 F.2d at 71.
>
> That view, which has some support in the authorities[,] is in our view the correct one. We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." [*United States v. Watson*, 28 Fed. Cas. 499, 501 (1868).]

Downum, 372 U.S. at 737-38 (emphasis added). Here, just as in *Cornero*, the prosecution took a chance in impaneling a jury without first ascertaining whether or not the prosecution's "critical" witness was present. As Grant's subpoena commanded her to appear on July 25, 2016, the first day of trial (J.A. 32-33), she should have been present before the jury was impaneled. However, Grant was not present any day of trial. The trial court issued a bench warrant for Grant, just as the trial court did for the recalcitrant witnesses in *Cornero*, though in this case the prosecution did not request such a warrant until the third day of trial (instead of the first day, when she failed to appear). The five day unsuccessful search for the *Cornero* witnesses was insufficient to give rise to manifest necessity; the one day search for Grant in this case likewise cannot support a finding of manifest necessity.

2. The Fourth Circuit correctly applied this Court's precedent to the unusual facts of this case; Cannon's complaints lie with the Fourth Circuit's allegedly erroneous findings of fact, which this Court does not consider. *See* Sup. Ct. R. 10.

B. Courts have plenary review over habeas corpus petitions filed under 28 U.S.C. § 2241.

1. A court reviewing a petition for habeas corpus under 28 U.S.C. § 2241 reviews the state court proceedings, including the factual findings, de novo:

> This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. The duty of the Federal District Court on habeas is no less exacting.

Townsend v. Sain, 372 U.S. 293, 316 (1963) (citations omitted). De novo review is also recognized as the law in every circuit, except the Federal Circuit, which has not yet

taken a position. *See Francis v. Maloney*, 798 F.3d 33 (1st Cir. 2015); *Hoffler v. Bezio*, 726 F.3d 144 (2nd Cir. 2013); *Johnson v. Folino*, 705 F.3d 117 (3rd Cir. 2013); *Fontanez v. O'Brien*, 807 F.3d 84 (4th Cir. 2015); *Martinez v. Caldwell*, 644 F.3d 238 (5th Cir. 2011); *Phillips v. Court of Common Pleas, Hamilton Cty., Ohio*, 668 F.3d 804 (6th Cir. 2012); *Hill v. Werlinger*, 695 F.3d 644 (7th Cir. 2012); *Hill v. Morrison*, 349 F.3d 1089 (8th Cir 2003); *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2004); *Walck v. Edmondson*, 472 F.3d 1227 (10th Cir. 2007); *Dohrmann v. United States*, 442 F.3d 1279 (11th Cir. 2006); *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012). The Fourth Circuit correctly applied this standard of review. (Pet. App. 7).

2. Plenary review of habeas petitions does not raise any significant issues of "comity and federalism". As this Court recognized over a generation ago: "There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion [to review state court findings in habeas petitions]." *Townsend*, 372 U.S. at 318. Cannon's petition places much emphasis on the deference to trial judges in determining the existence of manifest necessity. "Simply arguing for deference, in and of itself, however, is insufficient to demonstrate why such deference should insulate a trial judge's manifest necessity determination in an individual case." *Walck*, 472 F.3d at 1241. After all, the burden of proving manifest necessity falls on the prosecution. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978) ("[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar."). A mechanical deference to state court factual findings would

run counter to the courts' mandate to "resolve any doubt [regarding Double Jeopardy] in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion…" *Downum*, 372 U.S. at 738.

3. Cannon correctly notes: "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 statue in the 28 U.S.C. § 2241 section through the 1996 Act." (Pet. Brief p. 13). If Congress had sought to establish a new standard of review in habeas petitions under 28 U.S.C. § 2241, it could have included language to this effect in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA). *See City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 338 (1994) ("Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."). Congress did not make such a change, and therefore pre-AEDPA precedent like *Townsend* is applicable to petitions under 28 U.S.C. § 2241.

C. The Fourth Circuit's findings would have been proper under "clear error" review.

1. Cannon argues the Fourth Circuit did not apply "even ordinary appeal restrictions" to the state court findings, advancing the argument that such findings should only be set aside if "clearly erroneous". (Pet. Brief pp. 15-16). Even if this standard of review applied, mixed questions of law and fact, particularly when they involve constitutional issues, are reviewed de novo. *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring) (citing *Miller v. Fenton*, 474 U.S. 104, 112 (1985)); *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). The question of manifest

necessity is consistently recognized as a mixed question of law and fact. *E.g. United States ex rel. Russo v. Superior Court of New Jersey*, 483 F.2d 7, 15 (3rd Cir. 1973); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997); *Walck,* 472 F.3d at 1241.

2. Cannon highlights the prosecution's "surprise" as a central issue in this case. "Surprise" is inextricably part of the question of manifest necessity, which is reviewed de novo. *See Fiske*, 274 U. S. at 385-386 (de novo review of factual finding when federal question and finding of fact are intermingled). Even if the state court's "surprise" finding could somehow be extricated from the manifest necessity analysis and subjected to a "clearly erroneous" standard of review, it may nonetheless be reversed if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

3. If this standard of review applied, the Fourth Circuit correctly reversed the finding of "surprise" by reviewing the "record in its totality" (*i.e.* the entire evidence) before making its findings. (Pet. App 11). The prosecution was fully aware, from years of prior experience, that Grant would be a recalcitrant witness. Grant's testimony in Kevin Howard's 2014 trial was obtained only through the coercive effect of a pending criminal charge. This charge did not exist at the time of Seay's trial. Even though the prosecution lost contact with Grant after Saturday, July 23, 2016, and she refused to communicate with the prosecution the week of July 24, 2016, the prosecution did not see fit until the third day of trial to bring Grant's absence to the trial judge's attention. On that day, the trial judge issued a bench warrant but also warned the prosecution

he was contemplating a directed verdict for Seay. Facing the likely acquittal of Seay, the prosecution then moved for a mistrial less than 24 hours after it obtained a bench warrant. In light of the record, the prosecution's claim of "surprise" is disingenuous at best, and the Fourth Circuit would have rightly disregarded it if it were required to review the state court's findings for clear error.

D. The Petitioner's deference argument is not preserved for review.

1. Cannon's petition argues that a court considering an application for habeas corpus under 28 U.S.C. § 2241 must give the state courts some unspecified amount of deference. Cannon's response to Seay's original petition argued the District Court review the state court de novo, without any special deference. (Resp. App. 3-4). Neither the District Court Judge nor the Magistrate Judge who reviewed the state court indicated any special deference was appropriate under 28 U.S.C. § 2241. Cannon's brief to the Fourth Circuit likewise argued that the District Court's decision is reviewed de novo.[6] (Resp. App. 1). Cannon's deference argument was not raised before the District Court, and it should not be considered now. *See e.g. Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007) (failure to object to magistrate's report constitutes waiver of argument).

[6] The deference argument Cannon presents to this Court first appeared in his petition for rehearing before the Fourth Circuit.

While Cannon devotes two sentences on page nine of his Fourth Circuit brief to deference on appellate review (Resp. App. 2), this passing reference does not sufficiently raise this issue for appeal. *See Johnson v. Williams*, 568 U.S. 289, 299 (2013) ("Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development."). Further, the portion of *Washington* Cannon cited references appellate deference when improper prosecution argument has tainted the jury. *See Washington*, 434 U.S. at 514. This is fundamentally different from the "strictest scrutiny" that is necessary when a critical prosecution witness becomes unavailable and the government seeks a mistrial to buttress its weakened case. *See Washington*, 434 U.S. at 508. (Pet. App. 15).

2. Cannon's deference arguments are also barred by the doctrine of judicial estoppel. Judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U. S. 211, 227 n. 8 (2000)). Though there is no general formula for the application of judicial estoppel, this Court has noted that the following factors are frequently considered: (1) whether the estopped party's positions are clearly inconsistent, (2) the estopped party's success advancing the earlier argument, (3) the estopped party's unfair advantage in asserting the later argument (or detriment to the party asserting estoppel). *Id.* at 750-51.

The equities favor Seay. Before the District Court, Cannon prevailed, twice, by arguing that no special deference to the state court was appropriate, going as far as

including the following quote from a Sixth Circuit decision in a parenthetical in his return to Seay's petition: "We agree with our sister circuits and hold that habeas petitions governed by § 2241 are not subject to the heightened standards contained in § 2254(d). Accordingly, we must conduct a de novo review of the state court proceedings in addressing Phillips's petition." (Resp. App. 3-4) (citing *Phillips*, 668 F.3d at 810). The "heightened standards" enumerated in 28 U.S.C. § 2254(d), and disclaimed in *Phillips*, represent the type of deference Cannon now argues is necessary. Cannon will be unfairly advantaged by asserting this argument now, as it affords the prosecution another opportunity to convict Seay (much like the prosecution's use of mistrial in this case). It is inequitable to allow Cannon to advance this new argument, and his petition should be denied.

II. There is no record the trial judge considered two obvious alternatives to mistrial, which mandates reversal under this Court's precedent.

1. Seay has a "valued right" to have his trial completed by the jury he selected. *Crist v. Bretz*, 437 U.S. 28, 35-36 (1978). This Court's precedent mandates a lower court must consider all reasonable alternatives to mistrial before depriving a defendant of this right. *E.g. United States v. Perez*, 22 U.S. 579, 580 (1824) (mandate to take "all the circumstances into consideration…"); *United States v. Jorn*, 400 U.S. 470, 487 (1971) (plurality opinion) (manifest necessity did not exist when trial judge gave "no consideration…to the possibility of a trial continuance" instead of a mistrial); *see also Washington*, 434 U.S. at 508 (When the basis of mistrial is the unavailability of critical prosecution evidence, a reviewing court must use the "strictest scrutiny" in reviewing the trial court's decision.).

2. This case is an inappropriate vehicle for considering deference to the state court, as there is no record of the trial judge considering alternatives to mistrial; a reviewing court cannot defer to a finding that does not exist. The trial judge's "complete record of this proceeding" (Pet. App. 134-136) contains no evidence he considered two reasonable alternatives to mistrial: (1) a change to the order of proof and (2) continuance of the trial. The District Court noted, with concern, "the trial judge's failure to discuss and consider" these alternatives. (Pet. App. 65-66). The hearing on the prosecution's motion for mistrial, including counsels' arguments and the trial judge's decision, lasted less than 25 minutes. (Pet. App. 124; Resp. App. 9). Within this short period of time, the trial judge did not take testimony from any witnesses, did not consider admissible evidence, and generally did not conduct any inquiry into the prosecution's professed justification for mistrial. This hearing evinces the trial judge's failure to apply any real scrutiny to the prosecution's position, much less the "strictest scrutiny" required by *Washington*.

3. Whether the prosecution could have called two additional witnesses or fourteen additional witnesses, it is undisputed that the prosecution had additional witnesses to call. (Pet. App. 17). Two of these witnesses were to testify as to Seay's location during the alleged murder via his mobile phone's "pings" on transmission towers. (Pet. App. 90). While Grant allegedly could corroborate this testimony, this type of forensic testimony was not dependent on Grant and could have been presented before she testified. Unfortunately, the trial judge did not discuss or evaluate this alternative to mistrial. (Pet. App. 17).

4. Cannon's implication the trial judge in this matter did not have the ability to continue this case to another term of court is incorrect. (Pet. Brief n.2). A South Carolina circuit court judge has the power to adjourn a term of common pleas court to complete an unfinished general sessions term. S.C. Code § 14-5-430; *see also* S.C. Code § 14-5-920 (Allowing a circuit court judge to order special term of general sessions).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

By: /s/ Jason Scott Luck

JASON SCOTT LUCK
Counsel of Record
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
(843) 554-5515
jluck@garrettlawsc.com

SARA ALEXANDRA TURNER
The Law Office of Sara A. Turner, LLC
105 Wappoo Creek Drive, Suite 1 A
Charleston, SC 29412
(843) 277-2431
sara@saraturnerlaw.com

Attorneys for Respondent

November 14, 2019
North Charleston, South Carolina

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

C/A No. 18-7242

[Filed November 15, 2018]

Broderick William Seay, Jr.,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
Sheriff Al Cannon,	)
	)
Respondent-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF OF RESPONDENT-APPELLEE
SHERIFF AL CANNON

* * *

[p. 8]

* * *

STANDARD OF REVIEW

This Court's review of decisions on habeas corpus petitions by the district court is *de novo*. *See, e.g., Yi v. Fed. Bureau of Prisons,* 412 F.3d 526, 530 (4th Cir. 2005) (28 U.S.C. §2241 action); *Allen v. Lee,* 366 F.3d 319, 323 (4th Cir. 2004) (28 U.S.C. §2254 action).

Under 28 U.S.C. § 2241(c) (3), the writ will not be granted unless a petitioner shows: "He is in custody in violation of the Constitution or laws or treaties of the United States..."

[p. 9]

A trial judge's finding of manifest necessity to support the grant of a mistrial over a defendant's objection is entitled to deference on appellate review. *Arizona v. Washington,* 434 U.S. 497, 514 (1978). Though the standard is abuse of discretion, "reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.* (*quoting United States v. Perez*, 22 U.S. 579 (1824)).

* * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C/A No. 2:17-2814-TMC-MGB

[Filed February 2, 2018]

Broderick William Seay, Jr.,	)
	)
Petitioner,	)
	)
v.	)
	)
Sheriff Al Cannon,	)
	)
Respondent.	)

RETURN TO § 2241 PETITION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR[…]SUMMARY JUDGMENT

* * *

[p. 9]

* * *

DISCUSSION

Petitioner has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He seeks to be released from state custody and for this Court to prohibit a retrial on his state murder charge, claiming double jeopardy bars the retrial. (ECF #1). Because this action is filed pursuant to § 2241, review is *de novo.* See, *e.g., Phillips v. Court of Common Pleas, Hamilton Cty., Ohio,* 668 F.3d 804, 810 (6th Cir. 2012) ("We agree with our sister circuits and hold that habeas petitions governed by § 2241 are

not subject to the heightened standards contained in § 2254(d). Accordingly, we must conduct a de novo review of the state court proceedings in addressing Phillips's petition"); *Walck v. Edmondson,* 472 F.3d 1227, 1235 (10th Cir. 2007) (same). The critical consideration in reviewing a double jeopardy claim is whether the trial judge abused his discretion in granting the mistrial in light of the attending circumstances. *Arizona v. Washington,* 434 U.S. 497, 514 (1978). ("In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial."). Respondent submits the following summary of relevant law to provide structure for review.

* * *

APPENDIX C

COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

2016B0729201600

[Dated August 22, 2016]

State of South Carolina,	)
	)
Vs.	)
	)
Startaeshia Grant,	)
Defendant.	)

Transcript of Record

August 22, 2016

Charleston, South Carolina

BEFORE:

The Honorable Kristi L. Harrington, Presiding Judge

APPEARANCES:

Jennifer Shealy, Assistant Solicitor

Attorney for the State

Rodney D. Davis, Esquire

Attorney for the Defendant

SHARON L. VIZER

CIRCUIT COURT REPORTER

* * *

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[MS. SHEALY:] So, you know, the situation -- it's the State's position that this was egregious. I very well could have found myself in a situation where I would of [sic] had to dismiss the charges against Mr. Seay if Judge Cooper had not gone along with my mistrial request.

* * *

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* * *

The crime was horrendous, Judge. Ms. Grant is without any question our most important witness. During our discussions with her she never indicated that she would not testify. She was concerned that Mr. Seay's family lived in the West Ashley area and that's the area that she lived in. She also commented that while she was able to testify against Mr. Howard that she felt like she

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could kind of save face with that because she was charged at the time.

She was charged with obstruction of justice after this trial. Mr. Davis in representing her asked if I would drop the charges against her feeling like she had been cooperative with the State. I did so. And she did mention to us that she was starting a music career and that it was not cool to be considered a snitch within the community. So the State was left with a devastating void when she did not show up for court. I had been given no information that she was threatened by the defendant or anybody on his behalf.

While she's been in jail she has been talking to people on the phone and we received her jail recordings. She did indicate that she still does not want to testify and will not testify. She has indicated that she would like to leave the area and was contemplating Myrtle Beach as the place to reside.

She also addressed the State in phone calls, and I know you are listening then used the complete work F-you. So as we are before Your Honor today I have no reason to believe that the import of what she did has registered. She is -- I know of nothing else to indicate she is now willing to testify. And, in fact, that which has been communicated on the jail recordings suggest to me

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that she is still indicating that she will not be cooperative, she will not testify, she will not come to court.

Of interest, the case, the underlying case, the only motive suggested was that the victim had been considered a snitch by Kevin Howard. And I point that out to show you that those guys are dangerous. It's my understanding they've never threatened her but the idea of not having them meet justice is unsettling to the State, and obviously we would like to prosecute Broderick Seay and ultimately find out who Tye [sic] is and prosecute him as well.

* * *

APPENDIX D

COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

2015-GS-10-00972

[Dated July 26-28, 2016]

STATE OF SOUTH CAROLINA,	)
	)
PLAINTIFF,	)
	)
VS.	)
	)
BRODERICK SEAY, JR.,	)
	)
DEFENDANT.	)
	)

TRANSCRIPT OF RECORD

JULY 26-28, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE THOMAS COOPER, JUDGE, AND A JURY

APPEARANCES:

JENNIFER SHEALY, ESQUIRE
CHRIS LIETZOW, ESQUIRE
Attorneys for the State

PETER MCCOY, ESQUIRE
SARA TURNER, ESQUIRE
Attorneys for the Defendant

* *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

* * *

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* * *

[MS. SHEALY:] Now, Kevin, CJ and Ty, they thought they were safe. Surely Starteasha would never cooperate with the police. And for two years she didn't. You will learn that my investigator, Keith Hair in the front row, listened to the recordings of Kevin Howard from jail. Talking to his girl. First we don't know who she is. We just have a

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phone number. He is telling her make sure those boys in the north are straight. Then he wants to get an alibi set up by some friends of his from another area. They want no part of it.

When the solicitor's office spoke with Starteasha, it was after she got arrested. Because listening to those jail recordings, we knew she was trying to obstruct justice with Kevin Howard.

* * *

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THE COURT: Bring the jury in.

(Whereupon the jury entered the courtroom at 10:45 a.m.)

THE COURT: Good morning, ladies and gentlemen.

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(Jury returned greeting.)

* * *

[THE COURT:] Given the fact that the State is unable to proceed, I have declared what is called a mistrial in this case. The case may be tried at some later date, but as far as you are concerned, as far as I'm concerned, this matter has ended as of about five minutes ago.

* * *