

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Adverse Party,

v.

MARK LYLE MOORE, aka Mark
Lyle Moore, Sr.,

Defendant-Relator.

Multnomah County Circuit
Court No. 14CR12536

SC S063946

MANDAMUS PROCEEDING

ADVERSE PARTY'S BRIEF ON THE MERITS

Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable CHRISTOPHER J. MARSHALL, Judge

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ADVERSE PARTY'S BRIEF ON THE MERITS

INTRODUCTION

This case is before this court, under its original mandamus jurisdiction, following the trial court's denial of defendant's motion to dismiss murder and arson charges. His motion was based on his former-jeopardy challenge to continuing the prosecution after his first trial ended in a mistrial. Whether dismissal was required depends on whether the trial court abused its discretion when it concluded, based on the options it faced at the time, that failure to grant a mistrial would defeat the public's interest in the fairness of the trial proceedings.

A criminal defendant has constitutional and statutory rights to be tried before a single tribunal. Those rights, however, are not absolute, and may, in some circumstances, be subordinated to the interests of the public in fair trials that are designed to end in just judgments. If a trial court grants a mistrial over a defendant's objection, based on a reasonable conclusion that failure to do so would defeat the ends of justice, a new trial on the charges will not be barred.

In this case, the trial court granted a mistrial on its own motion—and over defendant's objection—to address concerns raised by defendant about its midtrial ruling allowing the state to offer the testimony of a newly discovered expert witness. It did so only after hearing the parties' positions, considering all

of the alternatives to a mistrial that had been raised, and carefully explaining its conclusion that those alternatives were inadequate. It agreed with defendant's arguments that a continuance of an indefinite—and therefore unacceptable—duration would be necessary to address the newly discovered witness's testimony. It also agreed that it would need to allow the parties to re-commence opening statements and re-question witnesses who already had testified, and that curative jury instructions would be ineffective. Defendant was present when the court articulated its considerations, and did not assert that the court had failed to consider other alternatives. In particular, he did not suggest that the trial court should have considered as an option the possibility of proceeding immediately to trial without giving defendant a continuance to investigate and prepare for the unexpected expert's testimony.

In those circumstances, the court correctly denied defendant's later motion to dismiss based on his former-jeopardy claims. It rejected defendant's attempt to raise new "alternatives" that had not presented to it when it ruled on the mistrial, and concluded that the circumstances that were before it at the time of its ruling demonstrated a high degree of necessity to terminate the trial.

Question Presented

Did the trial court abuse its discretion in concluding that a mistrial was the only reasonable option in light of its midtrial evidentiary ruling, which otherwise would have necessitated an indefinite trial continuance after which

the parties would need to redo opening statements and witness questioning, and which would require curative instructions that it believed would be ineffective?

Proposed Rule of Law

No. Under the circumstances presented, the trial court did not abuse its discretion by concluding that no reasonable alternative to a mistrial existed, and that it was manifestly necessary to grant a mistrial over defendant's objection. For that reason, former-jeopardy principles do not prohibit a retrial.

Summary of Argument

The need for a mistrial in this case arose after the trial court announced its mid-trial ruling allowing the state to call an expert witness of whom none of the parties was aware until the morning of the first day of trial. Although the court concluded that no basis for exclusion of the testimony existed—a conclusion that defendant does not challenge before this court—it agreed with defendant's assertions that curative instructions would be inadequate, and that a lengthy continuance would be both necessary and fundamentally impractical from the standpoint of a sitting jury. The court also found that the change in the landscape of the case would require the parties to begin again with new opening statements and different questions for witnesses who already had testified. In light of the problems that would be presented by any attempt to hold over and later resume the trial before the same jury under those circumstances, the court granted a mistrial. After much deliberation, it concluded that defendant's right

to be tried to a single tribunal should be subordinated to the public interest in a fair trial designed to end in a just judgment.

The trial court reasonably concluded that the mistrial was necessary based on *defendant's* persuasive showing—both before and after the court's ruling that the state would be permitted to present testimony by the late-discovered expert—that continuing the proceedings before the same jury would be both unworkable as a matter of judicial administration and irremediably prejudicial to the defense. Although defendant made a statement, before the court granted the mistrial, that he wanted to proceed before the same jury, he did so only in the context of his assertion that the court should exclude the evidence rather than granting a mistrial. He did not inform the court that, if it were to adhere to its ruling admitting the evidence, he would proceed without the continuance that he had previously insisted would be necessary. Because defendant did not affirmatively request to proceed *without* an opportunity to respond to the new evidence, the trial court reasonably did not consider that as an alternative to a mistrial. The court reasonably would have known that forcing defendant to proceed unwillingly would be reversible error, given defendant's persuasive arguments about the prejudice he would suffer as a result of the court's decision to admit the evidence at that time.

Thus, from the trial court's perspective, the options were to either grant a mistrial or to continue the trial for an unduly lengthy period of time. After such

a continuance, the parties would need to re-present opening statements and witnesses, and the court would need to craft curative jury instructions— instructions that defendant had persuasively argued would be ineffective. The trial court exercised its sound discretion and concluded that a mistrial was necessary because of a lack of any reasonable alternative. Under those circumstances, the court correctly denied defendant’s motion to dismiss, because neither federal nor state constitutional or statutory jeopardy protections preclude a retrial.

Supplemental Statement of Facts

A. Before opening statements, the prosecutor alerted the court that the state had learned of an expert with information on the key contested issue in the case.

Defendant and codefendant Golden are charged with murder and arson in this case. A key issue for each charge is the cause of the garage fire that killed the victim. The state’s theory is that Golden wanted to kill and that another codefendant assaulted and left him in a garage before setting the garage on fire. (9/28/15 Tr 14-15). Although firefighters began an arson investigation, they alerted the Portland Police Bureau homicide unit as soon as they learned of head injuries, and “backed out” of the investigation to avoid disrupting the crime scene. (9/28/15 Tr 16-17). As a result, the arson investigation was inconclusive as to the cause of the fire. But the state intended to call a number of associates of the men, who would testify that both Golden

and defendant had admitted to having assaulted the victim and that Moore had set the fire. (9/28/Tr 23-24).

On the morning before opening statements, the prosecutor alerted the trial court that the state had become aware that the insurance company had done an arson investigation, and that the state was attempting to obtain other “potential evidence.” (9/24/15 Tr 5). The prosecutor explained that he had informed defense counsel the day before. (9/24/15 Tr 5). The trial court asked whether it needed to take any action before opening statements commenced. The prosecutor responded in the negative, and defense counsel were silent. (9/24/15 Tr 5-6).

The opening statements by both parties made clear that the evidence that the state would be offering to prove that defendant and Golden intentionally set the fire would come from the criminally-involved associates of those men. (9/24/15 Tr 35-37). Counsel for defendant argued that the state would not be able to prove arson because no expert could say that the fire was intentionally set, and because the criminally-involved witnesses should not be believed. (9/24/15 Tr 29-39). On that first day of trial presentation, the parties questioned eight state witnesses. (9/24/15 Tr 277). At the end of the day, the court ordered that the case resume after the weekend. (9/24/15 Tr 277).

When the parties reconvened after the weekend, both parties asked the court to address whether the state would be able to call Gunsolley, the

investigator who had done the arson investigation for the insurance company.

The prosecutor represented that Gunsolley would testify to his opinion that the fire was set intentionally, rather than accidentally. (9/28/15 Tr 9). Specifically, Gunsolley had ruled out any electrical cause of the fire, and instead had concluded that a handheld, open-source flame had been used to ignite some materials in the garage. (9/28/15 Tr 9). The state explained that Gunsolley was a “completely independent” investigator, and that the information that the investigator could provide would be “incredibly valuable information that will help the trier of fact determine material issues in this trial.” (9/28/15 Tr 10).

B. The court ruled that it would allow the expert testimony despite defendant’s arguments for preclusion.

Defense counsel¹ argued for preclusion of the expert’s testimony, arguing that the state had committed a discovery violation and that the court should exercise discretion under OEC 403 to exclude the testimony. The court rejected both arguments, and, although that ruling is not at issue in this proceeding, the discussions of those issues are crucial background to the court’s ultimate decision to grant a mistrial.

¹ Defendant was represented by two attorneys, Barnett and Castleberry. His co-defendant was represented by attorney Salle. (9/28/15 Tr 1). For clarity’s sake, the state quotes only the statements by defendant’s own attorneys, and not the statements of his co-defendant’s counsel, even though all defense counsel took a unified front with respect to exclusion of the evidence.

In addressing the late discovery of the expert, defense counsel took the firm position that the expert's testimony should be precluded:

[Defense counsel]: Judge, there is absolutely no way that [defendant] can get a fair trial if the state is allowed to call an arson expert to offer an opinion on whether an arson occurred, in the middle of trial, without any advance notice that they were going to call this witness, without any advance ability to investigate this person's credentials, their history. It completely and dramatically changes the complexion of the case and the theories that we would adopt, from our opening statement to our questions to the witnesses that they've already put on.

(9/28/15 Tr 19). The state asserted that there was no discovery violation because it had just learned about the witness's existence, and suggested that the court could grant a recess to allow the defense to address the new development. (9/28/15 Tr 22). Defense counsel responded that a recess would be insufficient for that purpose:

A recess is appropriate for [an] issue where I just got a bunch of documents, I'm about to cross-examine this guy, I'm going to ask for a, you know, an afternoon's recess to go through this. Judge, if we have to now have a battle of the experts, that means we have to find one, hire one, and then find a time when it's convenient to get to court.

(9/28/15 Tr 26).

Defense counsel also explained that a recess of any length was not a solution:

There is no amount of time that can be afforded the defense to deal with this issue if that witness is allowed to testify. The prejudice that attaches from the opening statement, to all of the witnesses, including the fire people that they've already put on, there's no way to undo that. It doesn't matter how long we have to

prepare, it doesn't matter how good the expert is that we hire or how scathing the cross-examination of this individual that they are proposing to put on the stand is, we cannot take that back, that is why exclusion is the only remedy.

(9/28/15 Tr 47). He later asserted that the state—in its arguments in favor of admitting the new evidence—had tried to “downplay” the effect of that evidence on the argument by both defendants in opening statement that there would be no expert testimony, saying:

[Y]ou cannot unring that bell. Mistrials are routinely granted for things that happen in opening statements even before the evidence is put on. There's no way to cure this, there is just not, except to exclude the witness.

(9/28/15 Tr 51). Counsel then explained that a continuance would be insufficient: “We cannot have jurors under oath, instructed not to talk about this case, and then go away for a couple of months, because that's what we're talking about, because I'm going to have to find * * * an arson expert.”

(9/28/15 Tr 52).

Counsel for defendant, in his arguments in favor of precluding the state's expert's testimony, was the first to raise the specter of a mistrial, informing the court that he “believe[d]” that the defense would be forced to ask for a mistrial if the court were to admit the testimony. (9/28/15 Tr 58). Shortly thereafter, defense counsel asserted that the court should not declare a mistrial as an “easy way” to avoid the preclusion issue. (9/28/15 Tr 61). In other words, defense

counsel asserted that the witness's testimony should be excluded because the prejudice was incurable, and argued that no other alternatives existed.

The court took a recess and, after the parties reconvened, it announced its ruling that the expert could testify. (9/28/15 Tr 67-68). It concluded that the state had complied with its discovery obligations after learning of the expert's existence. (9/28/15 Tr 68). It rejected the defense argument that the probative value of the evidence was substantially outweighed by the risk of prejudice and that OEC 403 required exclusion of the testimony. (9/28/15 Tr 70-71).

C. Even after it was clear that the court would allow the testimony, defendant insisted that nothing could “cure” the effect on the trial; the court agreed and concluded that a mistrial was necessary.

After declining to preclude the state's proposed expert testimony, the court asked the parties to discuss ways to dispel the effects of the court's ruling allowing the expert to testify. (9/28/15 Tr 71). It expressly asked the defense to discuss the effect of a continuance of trial or curative instructions. Defendant's attorney explained:

Well, Judge, there is no way that a continuance could solve this. Okay. Because we are now in a position of finding an expert and getting the information that we don't even know is – what all is out there to that person. I mean, that's – that's just not a practical solution.

(9/28/15 Tr 71). Defense counsel also soundly rejected the notion that curative instructions—including a possible instruction, described by counsel for defendant, that the “defense had no idea that this was coming and the

government brought this in, in the middle of trial, and they had no way to prepare for it”—could remedy the late discovery of the witness. (9/28/15 Tr 72). Defense counsel commented: “I’m not sure how one could be fashioned, and agreed with the court’s acknowledgement that a curative instruction would “be curative to one issue and create all sorts of other issues[.]” (9/28/15 Tr 72).

Counsel then resumed arguing that exclusion was the only remedy:

Which is why this needs to be excluded, Judge. * * * I don’t believe this can be addressed with a curative instruction. I believe it would be fatally erroneous to this case if it were allowed and it were up for review.

* * * * *

And that can all be avoided by not allowing in, you know, an eleventh hour substitute that we have not had time to prepare for, that we could not adequately be expected to prepare for. Exclusion is the only remedy.

(9/28/15 Tr 72-73).

After co-defendant’s counsel indicated that he intended to ask for a mistrial, the court addressed defendant’s counsel with respect to his previous arguments in favor of exclusion of the witness based on assertions of unfair prejudice under OEC 403. (9/28/15 Tr 73). Counsel for defendant reiterated his arguments that the prejudice was substantial:

And we acknowledge that that is tremendously prejudicial, that a continuance will not be the cure, a curative instruction cannot be fashioned. We don’t want a mistrial. We like this jury; we like how we’re doing. That prejudices my client even further, and that’s assuming arguendo the Court were inclined to grant a

mistrial, which we're not there yet. And so the prejudice, just how much prejudice do we have to show you [to obtain exclusion of the evidence]?

(9/28/15 Tr 74). The court reminded counsel that it was faced with a difficult question because the probative value of the expert testimony "is enormous."

(9/28/15 Tr 74). The court noted that the defense had focused on the absence of expert testimony in its opening statements, and referred to the PowerPoint slides that say, "in big black letters," that the state would have no expert. The court stated, "And, you know, looking back at all of this, sort of theme, that you laid out for the jurors, clearly, you would have done something very different. Or I assume you would have done something very different if you were aware of this evidence there." (9/28/15 Tr 75). Counsel for defendant responded, "Correct." (9/28/15 Tr 75). The court reaffirmed its ruling admitting the testimony, and counsel for co-defendant formally moved for a mistrial. (9/28/15 Tr 75).

After defendant's counsel stated that defendant would not be asking for a mistrial, the court asked the prosecutor what should happen, now that "we have a codefendant trial with one defendant moving for a mistrial and the other one not joining that motion." (9/28/15 Tr 78).² The prosecutor again suggested a

² The state agrees with defendant that the jeopardy right is personal to the defendant, and that a mistrial based solely on practical concerns about "severance" after the co-defendant obtained a mistrial may not be sufficiently "necessary" to allow retrial. To be sure, the trial court referred to those

Footnote continued...

possible continuance and curative instructions, and the court asked defense counsel how much time the defense would need if it granted a continuance. Defense counsel responded, “I just want to reemphasize our position is that the only appropriate remedy is exclusion, that no continuance, that no amount of time * * * can repair the damage done here.” (9/28/15 Tr 79-80).

The court asked counsel to describe the steps that the defense would need to take to prepare for the testimony, saying, “But if you were allowed time, I would – I mean you’ve got to go out and start from scratch and hire an expert of your own, I would assume.” (9/28/15 Tr 80). Defense counsel agreed, and explained that they would first have to get “funding for that expert,” “then we have to find that expert; then we have to make arrangements with that expert to get whatever material we provide. Then we have to find a time when that expert can testify.” (9/28/15 Tr 80). Defense counsel also told the court that he would need to obtain transcripts and supply them to the expert to review the

(...continued)

practical difficulties (9/28/15 Tr 87)—difficulties that this court recently noted in *State v. Turnidge*, 359 Or 364, 389, 374 P3d 853 (2016) (“[a]s a simple matter of practicality, it is difficult to see how a joint trial can be severed into separate trials once the trial has begun”). But those practical difficulties ultimately did not supply the basis of the court’s rulings, either at the time of the mistrial, and later, in ruling on the motion to dismiss. Rather, its extensive explanation of its ruling confirms that the court considered—and rejected—the possibility that defendant’s trial could continue on its own by use of other curative means.

witness testimony that had been presented, and argued, “This is going to take too long for a jury that has been sworn and impaneled.” (9/28/15 Tr 80).

In addition to the need for a lengthy continuance, the court also addressed the difficulty of drafting curative instructions and noted that any instruction would create “perhaps some bigger issues for the finder of fact.” (9/28/15 Tr 80). Defense counsel agreed, asserting that that problem “argues for exclusion legally. And I’m not – just logically, Judge, we just keep coming back to that.” (9/28/15 Tr 81).

After the court asked the prosecutor to describe the manifest-necessity standard for a mistrial over the defendant’s objection, defense counsel responded: “Respectfully, Judge, with regard to the double jeopardy issue, my client has a jury he likes; he has a right to that jury for a trial. There is no manifest necessity that annuls or vanquishes former jeopardy.” (9/28/15 Tr 85). The prosecutor asserted that the defense was attempting to “lock the court in” by claiming that no cure existed for the prejudice from the late witness but also insisting that a mistrial was unnecessary. (9/28/15 Tr 85). Defense counsel responded: “Other than to state the obvious, that this is not, with respect, that difficult. We can keep the evidence out; the trial can go forward.” (9/28/15 Tr 86).

After several more transcript pages of argument by defendant asking the court to revisit its evidentiary ruling and preclude the evidence on the ground

that no “cure” for the new evidence could be devised, the court stated its belief that a mistrial was the only option to address the change in trial circumstances. (9/28/15 Tr 89). The court specifically addressed the considerations underlying its conclusion:

- The reliance by the defense on the absence of any state expert in developing the “theme” of the defense opening statements;
- The fact that the defense would need a midtrial continuance to investigate and to obtain expert witnesses;
- The fact that the expert’s testimony would require “a different approach to all of the cross-examination” of the eight witnesses who already had testified; and
- That any curative instruction “may create more issues than it cures.”

(9/28/15 Tr 89). Defendant did not challenge the court’s description of the relevant factors, nor did he suggest that any additional factors should be considered. Instead he suggested only the option of excluding the witness: “So, the Court is saying it’s less onerous to stop this trial, give the – to start all over, rather than suppress or exclude a eleventh-hour, newly discovered expert?” (9/28/15 Tr 92).

The trial court stated that it believed that “everybody [had] made their record,” and that it wished to release the jurors. (9/28/15 Tr 93). Defense counsel asked to be heard on the court’s return, “to make sure our record is complete,” and the court agreed. (9/28/15 Tr 94). After the court released the

jury, counsel argued that defendant had been “irreparably prejudiced” by the mistrial. (9/28/15 Tr 96). He asserted that defendant had been “very pleased” with the particular jurors, and that defendant now had been “deprived of the opportunity for me to make the argument that I was more than happy and ready to make to the jury that, yeah, you heard our opening, and then somewhere in the middle of this, things weren’t going as well as the state wanted and they came up with another witness. That’s a very compelling closing argument. That has now been deprived of Mr. Moore.” (9/28/15 Tr 96). The prosecutor reminded the court that the parties had specifically discussed the availability of such an argument—and even discussed a similar curative instruction on the late discovery of the witness—and that defense counsel had decried it as an unworkable option. (9/28/15 Tr 97-98).

The parties discussed scheduling matters, but the court did not immediately set the case for a new trial, based on defense counsel’s argument that it would be “ludicrous” to set a trial date at that time because he did not “know who my expert is going to be.” (9/28/15 Tr 100).

D. Defendant moved to dismiss on former-jeopardy grounds, arguing that no “cure” had in fact been necessary for the late-discovered witness.

A month later, defendant moved to dismiss on former-jeopardy grounds. At the hearing on that motion, he asserted—for the first time—that the court should have interpreted his statement in objection to the mistrial that he “did not

want a mistrial,” as a statement that he wanted to proceed to the jury *without* a continuance and without any of the other curative steps that the parties had discussed before the mistrial. The court asked defense counsel to explain, “now that you’ve had a chance to reflect on it,” his “vision” about what he would have done if the court had declined to grant a mistrial, defense counsel emphatically stated that he would not have taken a recess to get an expert witness, and instead would have continued *without* an expert. (11/20/15 Tr 26).

The court was skeptical:

[THE COURT]: But that is not what was discussed on the day of trial.

[Defense counsel]: Sir, that’s not – respectfully that’s not our problem. That’s not our issue. I’m preserving issues, preserving the issue for appeal.

(11/20/15 Tr 26). The court reminded defense counsel that the parties had discussed at length what the court should do in response to the late witness:

THE COURT: And it was discussed from Defendant Moore’s perspective that he would need to have time to retain an expert witness to deal with the fact that the state was going to have an expert witness on that subject; right?

[Defense counsel]: That’s our argument for why it should not, that evidence should not have been admitted. The Court did not find that persuasive apparently, and said, no, it comes in.

And from the way you’re phrasing –

THE COURT: Right. But then that issue doesn’t go away once the evidence comes in.

(11/20/15 Tr 28). The court then rejected defendant's argument that the court's decision on the mistrial should not have been based on those discussions about prejudice, explaining that the discussions about prejudice were necessary to its mistrial ruling. (11/20/15 Tr 29).

Defendant nevertheless insisted that his plan was to "go forward to trial" despite the prejudice from the admission of the evidence and the court expressed its frustration:

THE COURT: Immediately with no delay, no continuance?

[Defense counsel]: Yes, sir.

THE COURT: But that's not what discussed.

[Defense counsel]: Yes, sir, it was. We tried to show what the problems were. We'd like to have an expert if the state's going to have one, and since we can't, that's why you *shouldn't let it in*.

(11/20/15 Tr 30) (emphasis added). The court later summarized its understanding of defendant's change in position, and defendant confirmed that understanding:

THE COURT: * * * So the arguments that were made there now appear to be different than what you're espousing today in –

* * * * *

In that you're saying that, okay, we're going to argue against the admissibility issue and we're going to talk about how, well, if this evidence came in we'd have the continuance issue, it would delay things, my client wouldn't be able to proceed with the trial now.

And then once the evidence is admitted, then you're going to say, well, we were just arguing that to protect our appellate right on that issue.

But now it's admitted and now we have this motion to dismiss, now we're going to argue that, oh, well, we wouldn't have had to have a continuance of the trial, we would've just proceeded right ahead right away, we wouldn't have had to have an expert witness and we would've just proceeded with the trial without an expert.

[Defense counsel]: That is correct.

(11/20/15 Tr 32). Defense counsel explained that he had made the “irremediable harm” arguments only to preserve his challenge to the admission of the expert testimony, and that the court should not have relied on those arguments in ruling on the mistrial question. (11/20/15 Tr 32).

Later in the hearing, defense counsel referred to the fact that the court had used what counsel believed to be a “dismissive” tone in response to his claim that he would have gone ahead with the trial without delay and without an expert. The court explained:

THE COURT: I understand you're in a different context now, but that's entirely different than what was argued when we were dealing with the evidentiary ruling.

[Defense counsel]: Which has nothing to do with [this].

(11/20/15 Tr 43).

The court then denied the motion to dismiss. It made detailed oral statements explaining its , which it later followed with written findings and

conclusions. (11/20/15 Tr 45-48; ER 10-12). Defendant has included material excerpts of the court's written conclusions in his brief on the merits. (Rel Merits Br 26-28). In addition to those excerpted conclusions, the court made findings in support:

5. The Court thoroughly considered all possible alternatives to a mistrial once the Court determined that Mr. Gunsolley's testimony and his report were admissible.

6. The Court questioned the lawyers involved extensively as to how the trial could proceed after admitting Mr. Gunsolley's testimony and report.

7. The Court was cognizant of defendant Moore's counsel's prior statements on the record that there was no way to cure the prejudice caused by admitting Mr. Gunsolley's testimony. * * *

8. * * * [T]here is absolutely no reason to believe from the record before this Court that the prosecutor in any way used the superior resources of the state to harass or to achieve a tactical advantage over the accused.

9. In making the mistrial decision, this Court did fully bear in mind, as required by *Jorn*, the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject a defendant to repeated prosecutions. As also required by *Jorn*, this trial court did temper the decision "whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal" the defendant might believe to be favorably disposed to his fate.

(Relator's Memorandum, ER 11).

Defendant then filed a petition for an alternative writ of mandamus, challenging the trial court's denial of his motion to dismiss,

and this court issued the alternative writ. The trial court adhered to its ruling, and this briefing follows.

ARGUMENT

A. Mandamus relief is available only if the court violated a duty to dismiss the case.

This court's authority to issue a writ of mandamus is constrained by statute. ORS 34.110 provides:

A writ of mandamus may be issued to any inferior court * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but though the writ may require such court * * * to exercise judgment, or proceed to the discharge of any functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.

(Emphasis added.) Mandamus is thus an “extraordinary remedy and is not a writ of right.” *State ex rel Ricco v. Biggs*, 198 Or 413, 425, 255 P2d 1055 (1953).

This court has invoked its mandamus jurisdiction in cases involving pretrial challenges on jeopardy grounds, because the ordinary right to appeal after conviction would not vindicate the defendant's right not to be tried twice for the same offense, and therefore would not be an adequate remedy at law. *State v. Sawatzky*, 339 Or 689, 724 n 4, 125 P3d 722 (2005); *State ex rel. Turner v. Frankel*, 322 Or 363, 376, 908 P2d 293 (1995). Nevertheless, because mandamus is not available to control judicial discretion, relief is

available only if the trial court's decision amounts to "fundamental legal error" or is "outside the permissible range of discretionary choices." *Oregon State Hospital v. Butts*, 358 Or 49, 56, 359 P3d 1187 (2015).

Although a trial court's ruling on former-jeopardy grounds is ultimately reviewed as a question of law, the question before this court requires this court to evaluate the trial court's exercise of discretion in its underlying ruling granting a mistrial. A trial court's conclusion as to whether a mistrial is necessary to rectify trial prejudice is an inherently discretionary one. *State v. Thompson*, 328 Or 248, 271, 971 P2d 879, *cert den*, 527 US 1042 (1999). Because the trial court is in the best position to assess the options and the potential prejudice from an event at trial, this court defers to the trial court's assessment of the need for a mistrial. *State v. Wright*, 323 Or 8, 12, 918 P2d 321 (1996). That is, the question is not "whether *this court* would have granted" the mistrial, but whether the trial court abused its discretion in doing so. *State v. Rogers*, 313 Or 356, 836 P2d 1308 (1992), *cert den*, 507 US 974 (1993).

For those reasons, this court, in addressing the trial court's ultimate decision denying defendant's motion to dismiss on former-jeopardy grounds, must defer to the trial court's analysis of the events before it at the time that it ruled that a mistrial was necessary. Based on the circumstances presented, the trial court concluded that a mistrial was manifestly necessary—*i.e.*, that it was

the only reasonable means to address the prejudice created by its ruling allowing the newly discovered evidence. For the reasons explained below, that decision was not an abuse of discretion, and the granting of the mistrial does not preclude defendant from facing trial before a new jury.

B. A criminal defendant’s right to be tried to a single tribunal may be required to yield if a mistrial is manifestly necessary to ensure the public’s interest in a fair trial.

Unlike a situation in which a trial has ended in an acquittal or conviction, a second trial is not automatically barred when a criminal proceeding is terminated without a verdict. That is, although the constitution establishes a “policy of finality for the defendant’s benefit,” the United States Supreme Court has recognized that it “is also true that a criminal trial is, even in the best of circumstances, a complicated affair to manage.” *United States v. Jorn*, 400 US 470, 479, 91 S Ct 547, 27 L Ed 2d 543 (1971). For that reason, “a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant’s consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment that” such a rule would provide. *Id.* at 480.

Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Arizona v. Washington, 434 US 497, 505, 98 S Ct 824, 54 L Ed 2d 717 (1978).

A former prosecution does not bar retrial if the state meets its burden of showing that a mistrial was granted for “manifest necessity.” *State v. Cole*, 286 Or 411, 419-22, 595 P2d 466, *cert den*, 444 US 968 (1979); *Washington*, 434 US at 505; *United States v. Perez*, 22 US (9 Wheat) 579, 6 L Ed 165 (1824). That doctrine is recognized by Oregon’s former-jeopardy statute, the Oregon Constitution, and the United States Constitution. The Oregon Court of Appeals has held that the state and federal constitutional requirement of “manifest necessity” and the statutory language of ORS 131.525 “are functionally equivalent statements of the same concept.” *State v. Embry*, 19 Or App 934, 940, 530 P2d 99 (1974); *see also State v. Kimsey*, 182 Or App 193, 47 P3d 916 (2002) (double jeopardy protection embodied in Oregon Constitution is, in principle, same as that in federal constitution).³

Because of the importance of the defendant’s right, the prosecutor has the burden to show a “high degree” of necessity for a mistrial over the defendant’s objection. *Id.* That is, the “key word ‘necessity’ cannot be interpreted literally”; rather, there are “degrees of necessity.” *Id.* at 506. Review of a

³ ORS 131.525(1)(b)(C) provides in part that a previous prosecution is not a bar to a subsequent prosecution when the “trial court finds that a termination, other than by judgment of acquittal, is necessary” due to any of certain enumerated reasons.

mistrial granted over the defendant's objection is for whether, in the context of the particular trial, the declaration of a mistrial was dictated by "manifest necessity" or the "ends of public justice." *Illinois v. Somerville*, 410 US 458, 463, 93 S Ct 1066, 35 L Ed 2d 425 (1973).

As explained above, the ultimate question whether defendant was entitled to dismissal on jeopardy grounds is a legal one. But a trial court's ground-level decision whether a mistrial was "manifestly necessary" due to the inadequacy of alternatives to address trial developments is one that requires consideration of a range of possible responses, perhaps with more than one permissible outcome. The trial court in this case carefully exercised its discretion based on the circumstances, heard the parties' positions on alternative responses, and thoughtfully explained its conclusion that no action short of a mistrial could adequately address the effects of its evidentiary ruling. That was not an abuse of discretion. The court concluded that a mistrial was necessary to eliminate the potential prejudice to defendant's defense that would result from the court's ruling admitting the new evidence. It also expressed concerns that the jurors would not be able to avoid confusion and to remain neutral after a long continuance and a redoing of significant parts of the trial with new evidence and new theories and arguments by counsel. At the hearing on the motion to dismiss, the court rejected defendant's later attempt to claim that it should have ordered the trial to proceed without a continuance and without giving the

defense a chance to investigate, reasoning that that was not an option presented to it at the time it ruled that a mistrial was necessary.

1. The court granted a mistrial based on the lack of alternatives to address its midtrial ruling admitting the expert testimony—a ruling that defendant does not challenge in this court.

Although defendant argued before the trial court that it should exclude the expert witness testimony to eliminate the prejudicial results from the late discovery of the witness, he does not assert in this court that the ruling allowing the new evidence was legally flawed. That is, he does not argue that the mistrial was not “manifestly necessary” because exclusion of the testimony was an available legal option. Because defendant does not challenge the underlying ruling admitting the evidence, the state agrees with defendant that “this is not the forum” to debate the issue. (Rel Merits Br 34). Rather, the focus of the analysis of whether the trial court abused its discretion in concluding that a mistrial was “manifestly necessary” must begin with the understanding that there was no basis on which to exclude the evidence, and that the task before the trial court was to remedy the prejudicial effects on the trial of its midtrial ruling allowing the evidence.

2. The trial court cannot be faulted for not considering alternatives that it reasonably did not believe were available when it granted the mistrial.

Defendant’s argument to this court depends exclusively on his assertion that the trial court denied him the opportunity to proceed to trial *without* a

continuance and to simply “take his chances” on appeal on the underlying ruling admitting the expert testimony. (Rel Merits Br 35). Notably, he does not suggest that, if that alternative had *not* been available, the trial court would have abused its discretion by granting a mistrial given the other concerns on which it based its ruling. And, for the following reasons, defendant’s argument that the trial court denied a request to proceed without a continuance is not a basis for concluding that the court’s grant of the mistrial was an abuse of discretion.

Before this court, defendant asserts that the trial court granted a mistrial despite his expressed objection that he wished to “continue with the trial” notwithstanding the existence of the new witness. (Rel Merits Br 1). That is, he asserts that the mistrial was unnecessary because, notwithstanding the trial court’s adverse decision on his motion to preclude the expert testimony, he was willing to resume the trial—without a continuance or investigation, and despite any inadequacies in curative instructions—and to appeal the underlying ruling admitting the testimony. (Rel Merits Br 25).

However, the record belies that contention. Although defendant told the court that he did not want the court to grant a mistrial, he did not at that time—and not until the hearing on the motion to dismiss—suggest that he would have been willing to proceed without a lengthy continuance to investigate the new witness. Nor did he suggest, until after the court granted the mistrial and had released the jury, that his previously expressed concerns could have been

addressed by jury instructions and arguments by counsel emphasizing the state's late discovery of the expert. The absence of any practical way of continuing immediately with the trial was central to the trial court's decision that a mistrial was necessary. Had defendant suggested otherwise before the mistrial was granted and the jury released, the trial court may have taken different action indeed.

The trial court, in ruling on the motion to dismiss, expressly—and correctly—rejected defendant's *post-hoc* attempt to recharacterize the position he took at the time the court considered the mistrial motion. A trial court's decision to grant the mistrial must be evaluated in light of the circumstances that the trial court was faced with at the time of the ruling. *See Cole*, 286 Or 411, 424-425 (mistrial caused by judge's incapacitation during trial met “necessity” standard despite possibility of proceeding with a new judge where defendant did not suggest at the time that he would have consented to trial before another judge). Defendant's change in position after the court granted the mistrial should not be part of this court's analysis, because the trial court cannot have been expected to consider circumstances of which it was not aware.⁴

⁴ The state does not mean to suggest that a trial court may consider only those alternatives expressly suggested to it. A trial court may consider an alternative not raised by the parties, and it is theoretically possible that failure to

Footnote continued...

As previously explained, the court had ruled that the state was entitled to call an expert witness whom defendant had not investigated. The very *existence* of an expert opinion in this case was inconsistent with the positions taken by the defendants through the trial up until that point. Moreover, throughout his exhaustive arguments for preclusion of the state's expert that preceded the first reference to a mistrial, defendant's counsel steadfastly had insisted that there was no way for him, in the middle of trial, to address the new evidence without a lengthy continuance. He emphatically rejected the prosecutor's suggestion that jury instructions could address the new development. He also asserted—and the trial court agreed—that there was no way to remedy the fact that the theme of his opening statement, and questioning of witnesses, was based on his expectation that the state would be presenting no expert testimony. Defendant repeatedly told the court that it should exclude the witness's testimony because no other remedy would cure the prejudice. But other than his argument that the court should reverse its ruling allowing the expert testimony, defendant did not suggest any alternative to a mistrial. After considering all of those

(...continued)

implement an obvious alternative not suggested by the parties would be outside the range of permissible discretion. But here, where the trial court necessarily had agreed with the defendant's assertions of prejudice to his ability to investigate and to meet the new evidence, the court was well aware that to require defendant proceed without any investigation at all would have amounted to reversible error.

circumstances, the trial court granted a mistrial over defendant's objection that it should instead preclude the witness from testifying so that the trial could proceed.

The trial court, in evaluating alternatives to a mistrial, could consider only the alternatives that it reasonably believed were legally available to it. Had defendant asserted that he was prepared to go to trial immediately, without the lengthy continuance that he repeatedly had insisted would be necessary, the trial court would have had an opportunity to consider that option and to determine whether it was a reasonable alternative to a mistrial. And, even if the another trial judge could have interpreted defense counsel's oblique reference to "lik[ing]" the jury as an invitation to resume the trial without a continuance, the trial court was not required to interpret it that way. Of course, that option would not have eliminated the court's stated concerns about how to deal with inconsistencies in the opening statements, the need to recall witnesses, and the effectiveness of any jury instructions—the implementation of which likely would have been the subject of claims of error on appeal. Nevertheless, if defendant had indicated that he wished to proceed without a continuance, the

trial court would have based its decision on factors different from those that it believed it were available at the time of the ruling in this case.⁵

In sum, defendant is not entitled to relief from this court based on arguments about alternatives that the trial court did not reasonably believe were available to it. And because his argument to this court depends entirely on the premise that the court should have allowed him to proceed without a continuance, his claim for relief fails.

3. The trial court's evaluation of the prejudice caused by the circumstances, as well as the efficacy of any "cure," is entitled to deference.

The trial court's decision to grant a mistrial in this case must be viewed in the context of the circumstances at the time. As explained above, the court had ruled that the state would be allowed to offer the newly discovered evidence—a ruling that defendant does not challenge before this court. The

⁵ The state does not concede that, had defendant attempted to proceed without a continuance, the trial court could not have concluded that the remaining problems supported a finding of manifest necessity for a mistrial. That is, even without the need for a continuance to investigate the expert, the trial court could have concluded that the need to deal with the state's new witness would still require redoing opening statements, recalling witnesses, and crafting jury instructions that defendant already had insisted would be ineffective. The trial court would not necessarily have been required to accommodate defendant's request to proceed with those "cures," which created significant risks of jury confusion and the possibility of reversible error in the implementation of those "cures." But because that was not the issue presented to the trial court at the time it granted a mistrial, this court need not decide that particular issue.

court had to address that development. Defendant had persuaded the court that he would be prejudiced because he needed time to investigate, and that no cure other than exclusion of the witness would allow him to have a fair trial.

Defendant did not, until the hearing on the motion to dismiss, suggest that he would have been willing to proceed without a continuance.

In discussing the range of circumstances that support a “high degree” of necessity for a mistrial, the United States Supreme Court has recognized that some questions are more easily answered than others. *Arizona v. Washington*, 434 US 497, 506, 98 S Ct 824, 54 L Ed 2d 717 (1978). The Court described trial problems that can justify a mistrial as falling along a “spectrum,” and that, depending on their type, may require more or less deference to the trial court’s decision. *Arizona v. Washington*, 434 US at 509. A grant of a mistrial at the prosecutor’s request, to achieve a tactical advantage over the accused, requires the strictest scrutiny. *Washington*, 434 US at 510.⁶ But, in this case, the prosecutor did not request the mistrial, and, in fact, had affirmatively suggested each of the alternatives to a mistrial that the trial court considered. As for the late discovery of the witness, the trial court in this case expressly rejected defendant’s claim that the prosecutor acted for an improper purpose, stating:

⁶ As an example of what it meant by “tactical advantage,” the *Washington* court referred to the “abhorrent” practice by English judges of discharging juries whenever it appeared that the Crown’s evidence would be insufficient to convict. *Washington*, 434 US at 508.

[T]here is absolutely no reason to believe from the record before this Court that the prosecutor in any way used the superior resources of the state to harass or to achieve a tactical advantage over the accused.

(ER 11).

At the other end of the spectrum of issues that lead to a mistrial is a trial event that creates the risk that the fairness of the proceedings might be compromised. Although the Court in *Washington* acknowledged that the problems that may lead to a mistrial “vary in their amenability to appellate scrutiny,” a circumstance that the trial judge believes may compromise the impartiality of the jury “falls into an area where the trial judge’s determination is entitled to special respect.” 434 US at 510.

In *Washington*, the concern underlying the trial court’s determination that a mistrial was necessary arose from an improper comment by defense counsel during opening statement that the court believed “may have affected the impartiality of the jury.” 434 US at 511. The Court noted that, because the *extent* of the possible bias could not be measured by any objective scale, other trial judges may have decided to proceed with the trial after giving appropriate cautionary instructions to the jury. *Id.* That is, “in a strict, literal sense, the mistrial was not ‘necessary.’” *Id.* Nevertheless, because of the “overriding interest in the evenhanded administration of justice,” the Court held that the trial judge’s evaluation of the likelihood that the impartiality of one or more

jurors may have been affected by the comment was entitled to “the highest degree of respect.” *Id.*

The trial judge’s decision in this case should be entitled to the generous degree of deference described in *Washington*. Although the circumstances in *Washington* were triggered by improper conduct by defense counsel—a circumstance not present in this case—the focus of the Court’s analysis was on the need of the trial court to have the ability to address the *effect* of that event on the factfinder—and the availability of options to address it. The Court reasoned that, because the comment was made in opening statements, and may have tainted the entire jury panel, the trial court was entitled to conclude that curative actions would not necessarily remove the risk of bias. *Washington*, 434 US at 513.

In this case, the evidentiary issue was not prompted by misconduct by either party; therefore, concerns about the effect of *misconduct* on the integrity of the trial were not at play. Nevertheless, the trial court was entitled to conclude that the *degree* of the prejudicial effect of the court’s evidentiary ruling on the proceedings was unacceptable and not reasonably susceptible to any “cure.” As the Supreme Court noted in *Washington*, the trial judge is in the best position to evaluate the tone of the particular arguments made, and to view the jurors’ apparent reactions to those arguments. 434 US at 514. “In short, [the trial judge] is far more ‘conversant with the factors relevant to the

determination than any reviewing court can possibly be.” *Id.* (quoting *Wade v. Hunter*, 336 US 684, 687, 69 S Ct 834, 93 L Ed 974 (1949)).

Here, the trial court reasonably concluded that administering special jury instructions that it knew defendant would contest, granting an indefinite midtrial continuance, and redoing opening statements and witness testimony would be inadequate to eliminate the negative effects of allowing the expert testimony on the jury’s ability to fairly consider the evidence. As the United States Supreme Court has recognized,

If an error would make reversal on appeal a certainty, it would not serve ‘the ends of public justice’ to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

Somerville, 410 US at 464.

In his brief on the merits, defendant asserts that the trial court was in no better position to evaluate the situation than is this court, and that its ruling therefore deserves no deference. (Rel Merits Br 53). He asserts that, because the jury was not present during the parties’ discussion about the new witness, “there is nothing the trial court could see that this court cannot,” and that “there is no demeanor to evaluate.” (Rel Merits Br 53). But the trial court’s evaluation of the circumstances was not limited to the events of the hearing on the witness issue. Rather, the trial court had been present during *voir dire*, opening statements, and all of the witnesses’ testimony, and it was able to view

the jurors and determine their attention levels, receptiveness to instruction, and apparent reaction to opening statements by either party. Additionally, because the *voir dire* transcripts are not a part of the record before this court, the trial court was in a unique position to know whether a long delay in the trial events would have been a substantial hardship for any of the jurors, due to long-planned vacations, impending births, or scheduled surgeries or treatments for chronic illnesses. Those considerations informed the court's ability to evaluate the possible effects of continuances, reformulating opening statements and recalling witnesses, and on the effectiveness of potential curative instructions on the particular jurors before it.

Another reason for deference to the trial court's evaluation of its options is that the potential risks of proceeding notwithstanding a prejudicial event—as well as the effectiveness of any cures—almost always will require a prospective evaluation. The actual “risk” of prejudice or the ability of jurors to follow curative instructions can never be determined definitively: the court must gauge the likelihood that any cures will be effective and can result in a fair trial, without the ability to test its predictive powers. For example, even in the case of an apparently deadlocked jury—a classic, and almost unquestioned basis for a mistrial allowing a retrial—there will be, at the time the trial court must choose a course of action, a possibility that “further deliberations may produce a fair verdict”; on the other hand, if the court fails to discharge a jury that is

truly unable to reach a verdict, there is a “significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.” *Washington*, 434 US at 509. But despite the possibility that a proper verdict always *could* result from more deliberations, the trial court may make a judgment call to declare a mistrial to avoid placing improper pressure on the jury. For that reason, the trial judge’s decision to declare a mistrial—rather than instructing them to continue deliberating—when the jury appears to be deadlocked is given great deference by a reviewing court. *Id.* at 510.

The situation before this court required a similar predictive assessment about the potential effects of an indefinite continuance, unique jury instructions, and the need of both parties to reopen the case. The court also was aware of the risk that any of its decisions implementing those measures could provide a basis for reversal on appeal. The prospective determination that those circumstances allowed no reasonable alternative other than a mistrial requires deference.

4. The trial court’s evaluation—and rejection—of alternatives short of a mistrial was not an abuse of discretion.

In this case, the trial court’s ruling deserves significant deference because it was based on concerns, articulated by both parties, about the fair administration of justice. The court gave the parties a full opportunity to explain their positions, and carefully considered all suggested alternatives to a

mistrial. It did not act abruptly, and fully explained its reasoning. Defendant claimed that he would need to investigate the expert, get funding for a defense expert, and arrange for the hiring of and evaluation by that expert of the evidence. All parties, and the court, agreed that any continuance would need to be a lengthy one. The court also had been informed by defendants that they would need to recall witnesses who already had testified, and—even more significantly—that their opening statements and “theme” of the case would be undermined by the appearance of an unanticipated witness. In other words, the case would essentially have to be re-tried. The only question was whether it would be re-tried to the same jury—under conditions that the court believed were prejudicial to the administration of justice and to the parties—or to a new one.

Given those concerns, the trial court exercised its sound discretion based on its conclusion that defendant’s interest in a trial to a single tribunal must yield to the interests of fair administration of justice. Because the trial court’s decision to grant the mistrial was well within the range of discretion available to it, defendant’s challenges do not warrant relief.

C. This court need not decide the statutory issues raised by defendant in his brief.

Under Oregon statutes, which were intended to codify the constitutional “manifest necessity” principle that existed at the time of their adoption, a

previous prosecution “is not a bar to a subsequent prosecution when the previous prosecution was properly terminated” without a verdict under certain circumstances. ORS 131.525. In this case, the trial court cited only constitutional sources in its analysis of the issue in this case; however, its constitutional analysis effectively mirrors one of the statutory exceptions. And because defendant did not argue below that those principles were materially distinguishable, this court need not—apart from the constitutional manifest-necessity issue—address the statutory arguments that defendant raises in his brief.

The statute that prescribes exceptions to the jeopardy bar when a trial terminates without a verdict describes general categories of events that will preclude the application of the usual jeopardy bar, including that the “trial court finds that a termination, other than by judgment of acquittal is necessary” due to any of certain enumerated reasons. ORS 131.525(1).⁷ The enumerated types

⁷ The general categories in ORS 131.525(1) are described as follows:

- (a) The defendant consents to the termination or waives, by motion, by an appeal upon judgment of conviction, or otherwise, the right to object to termination.
- (b) The trial court finds that a termination, other than by judgment of acquittal is necessary [due to certain enumerated reasons.]

of events that may make termination “necessary” are described in ORS

131.525(1)(b) as follows:

(A) It is physically impossible to proceed with the trial in conformity with law; or

(B) There is a legal defect in the proceeding that would make any judgment entered upon a verdict reversible as a matter of law; or

(C) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the state; or

(D) The jury is unable to agree upon a verdict; or

(E) False statements of a juror on *voir dire* prevent a fair trial.

Before the trial court, defendant argued that the mistrial ruling was not justified by the constitutional “manifest necessity” standard, and also opposed the application of either of two of ORS 131.525’s exceptions to the usual bar on retrial after a mistrial. He asserted that the circumstances did not constitute a “legal defect” that would make a verdict “reversible as a matter of law” within the meaning of ORS 131.525(1)(b)(B). (Motion at 13). He also argued that the exception in ORS 131.525(1)(b)(C) for prejudicial conduct that makes it

(...continued)

(c) When the former prosecution occurred in a court which lacked jurisdiction over the defendant or the offense.

(d) When the subsequent prosecution was for an offense which was not consummated when the former prosecution began.

“impossible to proceed without injustice” did not apply, based on his assertion that “there was absolutely no adequate reason why Mr. Moore’s trial could not continue.” (Motion at 14). The state specifically addressed only the constitutional “manifest necessity” standard, arguing that the standards were functionally the same. Notably, neither the parties nor the trial court distinguished between the interpretation of “necessity” under the constitutional standard and the “impossible to proceed” language in ORS 131.525(1)(b)(C).

The trial court’s description of its reasoning, although phrased in constitutional terms, is consistent with the “prejudicial conduct makes it impossible to proceed” exception contained in ORS 131.525(1)(b)(C). That provision has never been interpreted to be distinguishable in any way from the constitutional “manifest necessity” standard; and, as stated above, defendant did not assert below that it should be interpreted any differently from the constitutional standard. Therefore, this court should treat those standards the same, and, for the reasons explained in the constitutional discussion above, this court should conclude that the trial court’s mistrial decision meets the “manifest necessity” exception to the jeopardy bar.

This court should reject defendant’s attempt to raise a new statutory argument before this court. Specifically, defendant asserts that the jeopardy exception described in ORS 131.525(1)(b)(C) (retrial is not barred if prejudicial conduct made it impossible to proceed with the trial without injustice to either

the defendant or the state) applies only in two situations: (1) when the defense “waives” the defendant’s jeopardy rights by misconduct by counsel; and (2) when the defendant chooses to request a mistrial in response to prosecutorial misconduct. (Rel Merits Br 35-37).

But that argument is unpreserved. Moreover, because no court has interpreted ORS 131.525 to be substantively different from the constitutional standards for necessity—which contain no such limitation—his claim would not be reviewable as plain error in an appeal. *State v. Wyatt*, 331 Or 335, 346-47, 15 P3d 22 (2000). Moreover, because this is a mandamus proceeding, defendant is entitled to relief only if the trial court violated a plain duty to interpret the statutory text consistent with defendant’s argument, even without being asked to do so. Finally, even if defendant had made that argument before the trial court, his interpretation would insert language into the statute, contrary to the commands of ORS 174.010. In any event, his interpretation would also make that provision redundant to ORS 131.525(1)(a), which expressly provides—in a subsection separate from the five categories of circumstances that constitute “necessity” for a mistrial—that a mistrial is not a bar to a later prosecution if the defendant “consents to the termination, or waives [by motion or otherwise] the right to object to termination.”

For those reasons, this court need not address the statutory arguments made by defendant. Rather, the trial court’s analysis is consistent with the

federal and state constitutional standards, and this court should conclude that its conclusion that a mistrial was manifestly necessary under the circumstances was not an abuse of discretion. For that reason, the trial court correctly denied his motion to dismiss on jeopardy grounds.

CONCLUSION

This court should deny mandamus relief and remand for further proceedings.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 21, 2016, I directed the original Adverse Party's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Laura Graser, attorney for relator, by using the court's electronic filing system.

I further certify that on September 21, 2016, I directed the Adverse Party's Brief on the Merits to be served upon the Hon. Christopher J. Marshall, circuit court judge, by mailing two copies, with postage prepaid, in an envelope addressed to:

Hon. Christopher J. Marshall
Multnomah County Circuit Court
1021 SW 4th Ave.
Portland, Oregon 97204

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,668 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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