IN THE SUPREME COURT OF THE STATE OF OREGON

THE STATE OF OREGON, Plaintiff-Adverse Party, v. MARK LYLE MOORE, aka Mark Lyle Moore, Sr., Defendant-Relator.	) MANDAMUS PROCEEDING))) Relation to: Multnomah) County Circuit Court) No. 14CR12536))) S063946)	

BRIEF ON THE MERITS OF THE RELATOR, MARK LYLE MOORE

From an order of the Circuit Court of Multnomah County,
Honorable Christopher J. Marshall, Judge

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Table of Contents

Argument

Table of authorities

Constitutional authority

United States Constitution

Oregon Constitution

Cases

Statutes and rules

Question presented

Background:

After a mistrial is declared in a criminal case, the prosecution can try the defendant again under two circumstances: if the defendant sought the mistrial, or if the mistrial was declared over the defendant's objection, due to "manifest necessity."

In this case, two defendants were joined for trial. After the jury was selected and sworn, the trial court made a ruling for the prosecution, over the objection of both defendants. In response to the ruling, one defendant moved for a mistrial, and the judge allowed it. The second defendant did not move for a mistrial, and affirmatively wished to continue with the trial.

Question:

Under these circumstances, was there "manifest necessity" for the mistrial as to the second defendant? Or do ORS 131.525, the Oregon Constitution, and the United States Constitution prohibit a retrial for the defendant who did not want the mistrial?

Summary of argument

The state charged two defendants with murder and arson. A trial jury was selected and sworn, opening statements were given, and eight state witnesses testified and were cross-examined.

The prosecutor learned of a new expert witness, whose testimony could be quite incriminating and could fundamentally change the theory of the defense. Both defendants moved to exclude the new witness, but the trial court ruled the new witness could testify. The defense argued, and the court agreed, that neither a continuance (which would be lengthy), nor a jury instruction, could cure the error. The codefendant moved for a mistrial. However, the relator did not move for a mistrial. He affirmatively stated he wanted to continue with the selected jury, the new witness notwithstanding. The court granted the mistrial as to both defendants.

The relator may not be forced to stand trial a second time. The trial jury had been sworn, jeopardy had attached, and therefore a second trial is prohibited under the Oregon statute, and under the state and federal constitutional protection against former or double jeopardy.

That is, if a criminal defendant seeks a mistrial, and one is granted, he has waived his former/double jeopardy rights, and can be tried again. However, if a mistrial is granted over a defendant's objection, that defendant can be tried again only if the trial court correctly found that there was "manifest necessity" for the mistrial. "Manifest necessity" is narrowly defined. In this case, there was no physical or legal reason not to continue the relator's trial, and the state never claimed that it was necessary to try the defendants together. The mistrial was declared without manifest necessity over the relator's objection, and the state

may not retry him.

The trial court ruled, "In foreclosing the defendant's option to go forward with the original jury, this Court concluded that no reasonable alternative action was available under the unique factual scenario and that the ends of public justice could not be served by a continuation of the proceedings to a later date with the original jury." In so ruling, the trial court imposed its opinion about what was in the defendant/relator's best interest (a mistrial), in direct opposition to the opinion of the relator himself and his defense counsel (to continue with trial).

Once it had forced the mistrial on the relator, the trial court was required to dismiss the relator's indictment, with prejudice. A retrial is prohibited.

This court has issued an alternative writ, directing the trial judge to dismiss the relator's indictment, with prejudice, or to show cause. The trial court has elected to show cause. The memorandum in opposition did not explain why the trial court was not required to dismiss the indictment with prejudice. This court should issue a peremptory writ directing the trial court to dismiss the indictment with prejudice.

Statement of the facts

Background

The defendant/relator, Mark Lyle Moore ("the defendant"), Ervin "Dirty" Golden, and Dwayne Allan Richardson, were jointly indicted in August 2014 for

assault, arson, and murder, for the February 11, 2013, injury and death of

“ ER-1.[1]

Richardson was charged only with assault in the third degree for injuring while aided by another person present. The defendant and Golden were charged only with intentional murder of felony murder by arson of and with three counts of arson in the first degree by setting a fire and endangering human life.

The defendant has been in custody since July 2014.

Richardson pled guilty, and agreed to testify. His sentencing is pending.

The joint trial of the defendant and Golden began on Wednesday, September 23, 2015, before the Honorable Christopher J. Marshall, in Multnomah County.

Voir dire, jury sworn

All three parties exercised all peremptory challenges. 9/23/15 Tr 8-18. At the end of the process, the defendant’s counsel said the defendant was “satisfied,” and the state said it was “more than satisfied with the jury that we have selected.” 9/23/15 Tr 18-19.

The trial judge then read off the names of the 12 jurors to be seated. The state asked, “can I made a change?” and the court replied, “no.” The state

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[1] “ER-x” refers to a document in the relator’s excerpt of record, submitted with his petition for a writ. All the transcripts mentioned in this brief have been submitted to the AG and to this court.

continued, "Oh, God, this is sad. I literally just saw something that I misread, judge." The court cited the statute [ORS 136.240], and ruled that the state's misreading of its own notes did not constitute "good cause" to remove the juror after the state had announced that it was satisfied. 9/23/15 Tr 20-21. The state argued, "I'm still set on – I misread something on my card and I truly picked – the wrong person. * * * It's affecting my decision and what I did." The court again denied the state's request to change the composition of the 12 jurors. 9/23/15 Tr 26. Two alternates were selected, and the jury was sworn.

Remarks, opening statements, and eight state's witnesses

On Thursday, September 24, 2015, the parties gave opening statements and the state presented eight witnesses.

Before the jury arrived Thursday morning, the prosecutor reported that, "I advised counsel of today, something that I learned of yesterday as we finished for the day * * * I learned that there was actually an insurance investigation that was done into the cause and origin of the fire in this case from Detective Slater yesterday. And when * * * he tried to obtain the records, they told him, 'no' and that he would...." The court cut the prosecutor off, asking if this issue needed to be resolved before opening statement, because the jurors were waiting. The state responded that the court did not have to make a ruling then, but, "there is a potential of other evidence in this case * * * that we are seeking to obtain * * *."

The court said, "OK," and brought the jurors in for opening statement. 9/24/15 Tr 5-6.

The state's opening

The state's opening, in sum, set out its theory that was killed in revenge for stealing Golden's vehicle and wallet. The prosecutor told the jury, " death was no accident, and neither was the fire that caused his death." 9/24/15 Tr 8, 11.

The state's theory, articulated in opening statement, was as follows.

Richardson lived in the detached garage at SE Yukon, in Portland, with the owner's permission; the only condition was that Richardson have no guests. Nevertheless, in early February 2013, Richardson allowed to sleep in the garage. By the night of February 10-11, 2013, had outstayed his welcome, and Richardson wanted him gone. 9/24/15 Tr 12-13.

Richardson had known the defendant since childhood, and the defendant knew Golden. The three made a plan.

They drove to the garage. Richardson went in alone, confronted about leaving, but allowed him to stay. Richardson left the garage, leaving the door unlocked. According to the prosecutor, Golden and the defendant then went into the garage, beat up, and set a fire. When firefighters arrived, was still alive, but he later died of smoke inhalation. 9/24/15 Tr 15.

The burned garage was partly cleaned up before the authorities deemed it a crime scene and began to investigate. pants had been cut off at the scene. Investigators found the pants in a pile of rubble, and Golden's wallet was in the pocket. 9/24/15 Tr 15-17.

Soon after the fire, Richardson returned to the garage, and encountered the investigators there. He told them a version of what happened, indicating the fire was accidental.

About two months later, on April 30, Richardson told investigators that he had beaten up and then left the area; Golden and the defendant then started the fire. Richardson also told investigators that Golden later said the fire had not been planned, and Golden promised Richardson he would compensated him for the belonging that had burned. 9/24/15 Tr 18. Richardson cooperated with the state in exchange for charge and sentencing consideration.

A neighbor (Heather approached the detectives at the scene April 30, and reported she had seen Golden and Moore running away from the garage after the fire started. She also reported that at a different time, Golden confessed to her that he killed for revenge. Sometime after making the reports to the police, Golden repeatedly showed up at her home in a manner she found threatening. 9/24/15 Tr 20-21.

Tyson told the police that Golden admitted that he wanted to kill

that the defendant helped to locate and that the defendant was present "when it all went down." 9/24/15 Tr 21-22.

Shauntae and Robert were incarcerated with Golden, and they would testify that Golden confessed to them that he and the defendant had beaten up They would also testify that the defendant confessed that he lit the fire. The prosecutor acknowledged that and "have their own self-interest" for testifying. 9/24/15 Tr 23.

In a body wire worn by Richardson, the defendant stated that he was "over there that night." 9/24/15 Tr 25.

The defense opening

This defendant's counsel's told the jury in opening statement that the state's theory depended on proving arson, a fire "that somebody lit." 9/24/15 Tr 28.

To determine if the fire was accidental or was arson, the jury had to weigh the state's case, "the pros and the cons." 9/24/15 Tr 29.

The pros, the professionals, will testify that the cause of the fire, and of the death, were undetermined, and there was no physical evidence that incriminated this defendant. The defendant's counsel argued that the fire was accidental, and without proof of an arson, there was no proof of a murder. Counsel assured the jury that there would be no expert testimony that there was an arson.

The cons, the state's other witnesses, all had lengthy criminal histories and

pending charges, and were highly motivated to testify in a manner pleasing to the prosecutor. The evidence would show that when Richardson (the cooperating codefendant) came forward on April 30, and admitted he beat on February 11, Richardson was in jail facing significant charges. After Richardson came forward with his new story, he was released from custody, and was not charged with murder or arson in this case. will get a significant sentence reduction after his testimony. was facing a sentence of 28 years, and after agreeing to testify, he received a sentence of about 1/3 of that. 9/24/15 Tr 28-38.

The defendant presented a Power Point (9/28/15 Exhibit 101) with slides that read:

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The state wants you to believe this is an ARSON case.

NO ARSON NO MURDER

How do you decide? The PROS and the CONS

PROS [graphic of Portland Fire Bureau Lt. Jackson; photo of Lila an accelerant K9; graphic of Dr. Lewman the medical examiner]

CONS [mug shots of Shauntae Dwayne Richardson; Robert

[Lila, presence of accelerants:] NONE PRESENT

[Lt. Jackson, cause of the fire:] UNDETERMINED

[Dr. Lewman, cause of death:] ASPHYXIA FROM INHALATION OF SMOKE AND CARBON MONOXIDE.

[Dr. Lewman, manner of death:] UNDETERMINED

Physical evidence of arson . . . . NONE

Forensic evidence of arson . . . . NONE

Expert testimony of arson . . . . NONE

So where does the state's story come from?

CON #1 Dwayne Richardson [Mug shot, list of convictions]
Pled to Assault III against (not yet sentenced).

Body Wire #1:
Number of times Mr. Moore says he lit the fire: 0
Number of times Mr. Moore says he helped beat up Mr. 0
Number of times Mr. Moore says he was present when the fire occurred: 0

Body Wire #2:
Number of times Mr. Moore says he lit the fire: 0
Number of times Mr. Moore says he helped beat up Mr. 0
Number of times Mr. Moore says he was present when the fire occurred: 0

Number of times Dwayne Richardson brags that he's such a good **LIAR** he beat a lie detector test his probation officer gave him: 1

CON #2 Robert [Mug shot, list of convictions, "Meth Dealer"]

CON #3 [Mug shot, list of convictions, including witness tampering]

No **physical** evidence

No **forensic** evidence
No **expert** evidence
NO ARSON.

NO ARSON NO MURDER

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Golden's counsel's opening statement was consistent with the defendant's, asserting that there was no physical or forensic evidence that tied either defendant to a fire. 9/24/15 Tr 42. Golden's counsel reiterated "if it's not an arson, then it's not a murder." 9/24/15 Tr 56.

The testimony on the first day of trial

The state presented eight witnesses.

Joe a neighbor, saw smoke coming out of the garage, and called 9-1-1, at 7:15 a.m., February 11, 2013. 9/24/15 Tr 72, 95. The owner of the home (Rosanna testified that Dwayne Richardson had permission to sleep in her garage, provided he had no guests. 9/24/15 Tr 101-06. The owner was mad at Richardson, because she thought he had carelessly set the garage on fire, with the heater, or by cooking. 9/24/15 Tr 113.

A fire captain testified the cause of the fire was "undetermined," as far as he knew. 9/24/15 Tr 133, 144.

There was a lunch recess, and nothing was put on the record after the jury left, or before it returned to the courtroom. 9/24/15 Tr 144-45.

A fire lieutenant described the fire and the rescue efforts. 9/24/15 Tr 146-62.

Lt. Jackson, a fire investigator, testified that his K-9 partner, Lila, searched for accelerants, and she did not alert near the garage. 9/24/15 Tr 164-69, 203. There were extension cords all over the place inside the garage, and it was cluttered with combustible material. The investigator found blood on the floor, a propane tank, and numerous syringes. At that point he called the Portland homicide team. 9/24/15 Tr 172-183.

Jackson concluded that the fire probably started on or near the mattress, and possibly the tarp on the ceiling was ignited by a lamp. The garage was a fire trap. Jackson could not say that the fire was caused by arson; it could have been an accident. 9/24/15 Tr 185-88, 191, 196, 206.

A Fire Bureau arson investigator testified that the victim was beaten and burned. The investigator did not determine the cause of the fire. 9/24/15 Tr 208-12.

Richardson's mother (Sharon lived next door to the house with the burned garage. She testified that she telephoned Richardson when she saw the fire, and he was very upset, and yelled, "'Oh my God, there's somebody in there. Get them out." When Richardson arrived at the scene of the fire, he was crying and panicking. Richardson has always had a serious drinking problem, and it became

worse after the fire. 9/24/15 Tr 218-22.

The defendant lived about six blocks from the fire. He and Richardson have been friends since childhood. 9/24/15 Tr 215-19.

There was a afternoon recess and nothing was put on the record while the jury was gone. 9/24/15 Tr 225-28.

Heather testified that she lived in the neighborhood, and happened on the fire that morning. She testified she saw two guys coming from the garage, "Mark and Dirty" [the defendant and Golden]. 9/24/15 Tr 231-33.

At the time of these observations, she knew Golden, but had not met the defendant. After she saw the fire on the news, she called Richardson and asked him,

> 'Please tell me that it wasn't you that I seen – seen leaving the fence with Dirty.'
>
> And he said, 'No, it wasn't me'
>
> And I'm like, 'What?'
>
> and then he's like, 'It was Mark [the defendant].'
>
> And I'm like, 'Mark who?' you know. And that's when the told me Mark Moore. And then * * * he told me that he was – he was getting in trouble for this you know. * * * What I did see, I could go talk to the cops, you know. So I went and talked to the, you know * * * 'cause I couldn't see my – I couldn't see him [Richardson] go to prison for something he didn't do.
>
> * * * * *
>
> I'm not 100% sure it wasn't Dwayne [Richardson] you know. I know. But I

> don't know why I said, 'Please tell me it wasn't you' I don't know why I said – said that to him, but I did. But I know what I seen, you know.

9/24/15 Tr 236-37.

After she spoke to the police, she learned that Richardson had reported that to Golden, and then she saw Golden outside her home every day. 9/24/15 Tr 238.

and Golden later spoke, and Golden told her that he had done what he did because took all of Golden's dope and a truck, and was a chomo [child molester] and a woman beater. 9/24/15 Tr 239.

later met the defendant, and talked to him about the fire. The defendant told her he was not there. 9/24/15 Tr 242.

has made a number of differing statements about what she saw that morning. 9/24/15 Tr 251-58. She appeared to lose her temper at Golden's counsel at one point, saying, "shame on you for making me even go through this shit," and then refused for a time to continue. 9/24/15 Tr 258-59. She acknowledged that the morning of the fire, she had been up for at least 24 hours, she was on crystal meth, and that the drug affects her memory. 9/24/15 Tr 259.

The court finished for the day (Thursday, September 24, 2015) a little early. The state said it had eight more witnesses to present, which it listed: three incarcerated witnesses (the cooperating codefendant (Richardson), a detective (Mark Slater), two housekeeping witnesses, and the

medical examiner. 9/24/15 Tr 278-79.

As the defendants were being taken from the courtroom, and defense counsel was saying something to the defendant, the prosecutor said, "* * * I'm still trying to track down information on the arson – the fire investigation from the insurance company." The judge said, "Okay." Immediately after that, the lawyers and judge engaged in pleasantries. 9/24/15 Tr 282-84. The remainder of the transcript is "whispered discussion between counsel, off the record." The lawyers appear to be discussing a transcript and computer cables. 9/24/15 Tr 285-88.

The court had other cases on Friday. The trial resumed Monday, September 28, at 9 a.m.

The second day of trial: the state's new expert witness

On Monday morning, after some discussion about other matters, the prosecutor said he had a matter for the court before the jury came in. The court asked, "is it something we have to address right away before the witnesses that you're going to present? Because we have jurors waiting for us." The prosecutor insisted, "Yes. * * * Your Honor, last week, Thursday, I believe, I apprised the Court and defense attorneys that the state had learned that the insurance company for the homeowner in the case....." The court interrupted, "We're not presenting the insurance company witness right now, right?" The prosecutor answered, "No. Judge. But this needs to be on the record: it needs to be addressed." The court

continued, "* * * Why do we need to take this up now?"

The prosecutor insisted that it needed to be discussed immediately. This defendant's lawyer stated, "And the results of this discussion could dramatically change the defense's theory of the case and how we question --." After some further discussion, the court said, "This is exactly what I didn't want to have happen. We have jurors sitting back in the jury room now, after being gone for three days, and now they are waiting. So what is the issue?"

The prosecutor replied, "* * * as you recall, last week, Thursday [September 24], the state apprised the Court and defense counsel that it had become aware that there is potentially information from the insurance company that an investigator, a fire investigator, did a complete investigation and made a determination as to the source and the cause of the fire, and that's all we knew at that time." The state subpoenaed the records, but did not yet have them.

The prosecutor reported that on Thursday he had spoken to the homeowner's insurance agent. The agent revealed the name of the investigator the company used. The investigator was contacted by the police detective on Friday [September 25]. The investigator said he needed to get his notes from archives, which he did. The prosecutor spoke to the insurance investigator Saturday [September 26], and received his notes. 9/28/15 Tr 6-9.

The prosecutor had provided the investigator's notes, and a page of the

expert's website, to defense counsel moments before. 9/28/15 Tr 10, 67; Exhibit 1, ER-3.

The judge interrupted the prosecutor again, saying, "we are losing sight of the fact that we have jurors, 14 jurors sitting back in a jury room * * *."

The prosecutor said his explanation would take five more minutes. The defendant's lawyer said, "Judge, this is a matter where the state is springing a midtrial expert on us, that we have never heard of him [and] * * * it changes the nature of our questioning, potentially. Or we [do] not allow this person to testify, which is the proper thing, and we proceed with the trial." 9/28/15 Tr 6-9.

The prosecutor described the potential testimony. The arson expert "had ruled out that this was a fire that was caused by electrical purposes and that he believed that a handheld, open source flame was used to light some materials in the garage to start the fire. In essence, my interpretation of that is he believed that somebody intentionally started the fire, that it was not accidental." 9/28/15 Tr 9.

There was a discussion about what was known, when, about the insurance investigation. Golden's lawyer noted that in discovery, the codefendant Richardson said something about an insurance investigation, so the state was on notice 15 months before trial. Golden's lawyer had subpoenaed the insurance file, he had received photographs, and he believed that was all that existed. The insurance company refused further inquiry. Golden's lawyer observed that the

state oftentimes receives more information from a third party when it asks, than a third party might be willing to give a criminal defense lawyer. This defendant's lawyer stated that the existence of an insurance company investigation was complete news. 9/28/15 Tr 14-18, 66.

The notes themselves give the names and phone numbers of Lt. Jackson, and who had testified for the state on Thursday, and Richardson, who was about to testify that day, as well as the name and phone number of a Portland police detective. Exhibit 1, ER-6 to ER-8.

The court expressed surprise that this information was coming out in the middle of trial, remarking, "Why, in a case where the state has charged arson as one of the charges, why are we in the middle of the trial and we're finding out that there is an insurance investigation from the very property that – I mean why is that not known from day one?" 9/28/15 Tr 12.

The prosecutor said he didn't realize there was an investigation, that was not "in in my fount of knowledge." 9/28/15 Tr 12. One of the police investigators "called me on a whim one day and said, 'Hey do you know, not always, but sometimes insurance companies hire an investigator. Did you check?'" 9/28/15 Tr 18. As to its failure to learn of the insurance company investigation earlier, the prosecutor said, "shame on me," a number of times. 9/28/15 Tr 18, 23, 24, 56.

The defense moves to exclude the new expert witness; discussion of unfair prejudice to the defense

This defendant's lawyer protested, stating "there is absolutely no way that [this 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 * * *. It completely and dramatically changes the complexion of this case * * * from our opening statement to our questions to the witnesses that they've already put on. * * * It would be fundamentally unfair * * * The only possible remedy here is to exclude * * *." 9/28/15 Tr 19.

The state argued, "How could you exclude this evidence in the interests of seeking justice and – and the truth -- ." 9/28/15 Tr 20.

The court responded, at length, noting that the defense had had no reason to hire an arson expert, the new witness's name had not been given to the jury before voir dire, and observed that "if he state doesn't adequately prepare their case," the defense is ambushed. 9/28/15 Tr 20-22.

The defense argued that allowing the witness mid-trial would "encourage the state to remain willfully blind of something that was in discovery * * *." 9/28/15 Tr 23.

Discussion of remedies: exclusion, continuance, jury instruction, mistrial

The court asked the prosecutor, "how does the court allow the state to present [this witness]? The prosecutor suggested a recess.

This defendant's counsel said a recess could not begin to cure the prejudice, because the defense in opening statement said the state would not present any expert scientific or forensic evidence of arson, and every question on cross-examination was premised on that theory. Further, the defense was now required to hire an arson expert. The new information included that the investigator seized a can of debris, and the defense would need to test that. A recess, with the jury impaneled but not sequestered, would not be sufficient time to do that. "This is just not proper to allow the magic witness to just suddenly appear in the middle of the state's case because it's not going well for them." 9/28/15 Tr 24-26, 37.

The defense again requested the witness be excluded, and observed that although it had not had an opportunity to research the issue, *State v. Dyson*, [292 Or 26 (1981)] and *Chambers v. Mississippi.* [410 U.S. 284 (1973)] provided authority for exclusion of state's evidence based on late notice to the defense, and surprise. The court had authority to exclude the evidence as the gatekeeper, to protect the defendant's Due Process right to a fair trial. 9/28/15 Tr 31-32, 44-46.

The defendant argued that exclusion was the only appropriate remedy, and

he did not want to ask for a mistrial. 9/28/15 Tr 47, 52-53. This defendant argued, "a trial, once it begins, is basically a bound universe problem * * * and that's why we have discovery rules, deadlines statutes, case law. And my client has a * * * Fourteenth Amendment due process right to a fair trial. * * * . 9/28/15 Tr 56-57.

The court agreed that the proposed new witness "goes to the core of the case, I mean the prejudice is huge." 9/28/15 Tr 58, 42.

The state again proposed a recess, or a jury instruction to cure the harm done to the defense by the late information. 9/28/15 Tr 54-55.

As to a mistrial, this defendant's counsel was unambiguous, "we do not want a mistrial. * * * We want to proceed forward * * *." This defendant wanted to proceed because "the defense is always prejudiced when they have to retry the case." The only appropriate remedy was to exclude the proposed new expert witness. 9/28/15 Tr 61.

The court ruled that because the late disclosure of the new expert was not a discovery violation, the court did not have the authority to exclude the evidence. It asked, "With the evidence coming in, is there a way to address the prejudice to the defense?" 9/28/15 Tr 67-69.

The court observed that it had failed to find any authority about what to do when the court admitted prejudicial evidence under these circumstances. This defendant argued that the reason there was a paucity of case law is because when

the proposed surprise evidence is an expert witness with radically different evidence at the heart of the case, the only remedy is to exclude the expert. "We can't have a circumstance where the Court says, yes, it's prejudicial, but we're going to let it in anyway. The Court's function as a gatekeeper is obviated with that position." 9/28/15 Tr 69-70. The trial court again ruled that the new testimony had to be admitted.

Codefendant Golden moves for a mistrial; this defendant wants to continue with this trial with this jury.

The codefendant's lawyer then requested a mistrial, saying, "we're obligated to * * * move for a mistrial." 9/28/15 Tr 73.

This defendant did not. "We don't want a mistrial. We like this jury; we like how we're doing." 9/28/15 Tr 74. After conferring with the defendant, his counsel repeated, "we are not joining [the codefendant's] motion; we are not seeking a mistrial. That is done in consultation with our client." This defendant then personally stated that he wanted to continue with the trial. 9/28/15 Tr 76-77.

The court asked about granting a mistrial for both defendants, when one only one had requested it. Mr. Golden's lawyer said the court had the authority to do that. This defendant's lawyer agreed the court had the authority to grant a mistrial as to both defendants, "but I believe jeopardy attaches for Mr. Moore if you do." 9/28/15 Tr 81.

The state argued that so long as the court found "manifest necessity," this defendant could be retried. 9/28/15 Tr 85, 87.

The defendant replied, "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." "The state was ready to prosecute whence we started this, and if we're in a situation where we like this jury * * *." 9/28/15 Tr 85, 86.

The court grants a mistrial for both defendants, with codefendant Golden's consent but over this defendant's objection.

The court ruled,

> * * * the court finds it * * * has to admit the evidence that the state is proposing here.
>
> * * * the court became aware of this, this morning [and] made the defense aware of this. [The defense moved to exclude, and] we would be denying that motion to exclude. * * * the court's not finding any discovery violation.
>
> * * * it's a unique situation were everyone involved in the case becomes aware of an expert witness when we're already in a trial and we've had * * * eight witnesses * * * the parties do their opening statements with certain themes, one of which was there's going to be no expert testimony on the issue of arson * * * And then we find out, well, that's just not going to be the situation now. [The new expert would require] * * * a different approach to all of the cross-examination on the witnesses that we've had * * *. It appears to be a case where any curative instruction may create more issues than it cures.
>
> And so the court finds itself in a position really, with no choice, but to find a manifest necessity to, in order to avoid an unfair trial to both of the defendants, to grant Defendant Golden's motion for a mistrial and to, on its

> own motion, grant a mistrial as to Defendant Moore, because Defendant Moore did not join in Defendant Golden's motion. And, unfortunately, after considering all of the other options, it appears the only option to assure that all the parties get a fair trial here, the state and the Defendant Golden and Defendant Moore.

9/28/15 Tr 89-90.

Defense counsel noted that only the defendants have constitutional rights to a fair trial. "And to give the government a redo, a whole chance to start over, because, quite frankly, their case wasn't going very well, and so now they get to start over with a whole new deck, that is manifestly unjust. If the court grants that, then we are asking that it be granted with prejudice for Mr. Moore, because we like this jury, we cannot be deprived of this jury." 9/28 Tr 93.

Nevertheless, the court announced a mistrial "on its own motion" as to this defendant, and said it would release the jurors. After that, the parties would "come back and address whatever issues the parties want to address right now." 9/28 Tr 91-94.

<u>This defendant's motion to dismiss due to jeopardy, the court's ruling</u>

This defendant filed a motion to dismiss the indictment, based on the defendant's double jeopardy rights under the statute, Article I, section 12, of the Oregon Constitution, and the Fifth Amendment to the United States Constitution. Motion and Memorandum of Law re: to dismiss indictment, created 10/28/15. The state responded (11/16/15) and the defense replied (11/18/15).

There was a hearing November 20, 2015. Golden's lawyer did not attend. This defendant and the state reprised the arguments they made before the jury was released. The state argued again that the mistrial had been required due to "manifest necessity," and the defendant repeated that the circumstances were not such that a mistrial was required by manifest necessity, and over this defendant's objection.

The defense repeated that it had wanted to proceed with the jury it had, and if the were to be convicted, he had been prepared to take his chances on appeal.

Defense counsel observed that any unfair prejudice created by the new expert had not been established, because the state had not proffered his testimony. The record also had not established whether there had been a discovery violation, because without evidence, nothing shows what the state knew about the insurance investigator, nor when a relevant state agent knew about the investigator. 11/20/15 Tr 14-15, 37. Counsel described his hypothetical closing argument about the new expert, as he would have given had the trial continued. He noted that the expert wrote no report, and the expert's notes never suggested an intentionally-set fire, or used the word "arson." Defense counsel pointed out that the trial did not continue long enough to learn what the expert would actually have said. 11/20/15 Tr 29-30, 42-44.

Defense counsel reiterated that it had not been the court's role to determine

what was in the defendant's best interest, over the objection of the defendant and his counsel.

The court ruled:

> We will find that the state has met its burden of proof to show that there was manifest necessity in declaring the mistrial that the ends of public justice could not be served by a continuation of the proceedings. The court considered all of the possible alternatives * * *.

11/20/15 Tr 46.

Defense counsel asked the court to enumerate the reasons that would have prevented the trial from occurring, and the court responded, "We're not saying the trial could not have occurred." 11/20/15 Tr 47. Counsel asked for findings of fact, and the court agreed to do so in writing. 11/20/15 Tr 49-50.

The court's Order, with findings, was created February 5, 2016. ER-10. It states:

> 1. * * * This Court discharged the original jury from giving any verdict because in this Court's opinion, taking all the circumstances into consideration, there was a manifest necessity for the Court to do so and the ends of public justice would have been otherwise defeated. * * *
>
> 2. The Court weighed heavily the impact that admitting [the insurance investigator] Steven Gunsolley's testimony and report would have on the trial, given the defense had no prior notice the state would be calling him to testify, as well as the fact that the trial was at a stage where the parties had completed their opening arguments and several witnesses had already testified.
>
> 3. The Court determined the state did not violate pretrial discovery rules with its mid-trial request to have Mr. Gunsolley testify, given that it learned

for the first time about Mr. Gunsolley's arson report during trial and promptly notified defense counsel and the Court.

4. The Court found that Mr. Gunsolley's anticipated testimony and his report were both extremely probative of a core issue in the case * * * and the report would also both be highly prejudicial to the defense. The Court determined that both the testimony and the report would be admissible and not excludable because their probative value was *not substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay or needless presentation of cumulative evidence as set out in Oregon Rule of Evidence 403, ORS § 40.160 (emphasis added).

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.

* * * * *

9. In making the mistrial decision, this Court did fully bear in mind, as required by *Jorn*, [400 US 470 (1971)] the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject a defendant to repeated prosecutions.

* * * * *

10. * * * The Court considered all alternatives, including but not limited to curative instructions, severing the trials of the two co-defendants, recalling witnesses who had already testified, and granting a recess of various lengths.

In foreclosing the defendant's option to go forward with the original jury, this Court concluded that no reasonable alternative action was available under the unique factual scenario and that the ends of public justice could not be served by a continuation of the proceedings to a later date with the original jury.

* * *

This Court concluded after carefully and thoroughly evaluating all the circumstances that this case was like the case before the United State

> Supreme Court in *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 384 (1949), where the Court determined that the defendant's valued right to have his trial completed by a particular tribunal must be subordinated to the public's interest in fair trials designed to end in just judgments.

Order, created 2/5/16, ER-10.

The second trial was set for June 6, 2016. The relator filed a petition for a writ of mandamus on March 7, 2016. This court issued a stay of both trials on May 11. This court requested the adverse party to respond, and the state filed a memorandum in opposition (M.O.) on June 8. The relator requested leave, and then filed, a reply on June 13.

This court issued an alternative writ of mandamus on July 14, 2016. It ordered the trial court "(1) To dismiss, as against Mark Lyle Moore, the indictment in Multnomah County Circuit Court No 14CR12536 with prejudice, as soon as practical after your receipt of the writ, and to promptly return the writ with your annexed certificate of having done that, an which time the current stay of trial court proceedings in the matter is dissolved, or

(2) In the alternative, to show cause for not doing so within 14 days from the date of this writ."

July 28, 2016, has passed, and the trial court has not dismissed the case with prejudice, or made any response.

After the mistrial, defense counsel moved for release, but the request was

denied. The defendant remains in custody, for two years and one month as this brief is being filed (August 2016).

Argument

1. Once a jury is sworn, a defendant has a fundamental right to be tried by that jury, absent very narrow exceptions.

A criminal defendant has a fundamental right to be put on trial only once. This is a rule set out in Oregon statutes, the Oregon Constitution, and the United States Constitution. The statute was intended to codify the constitutional right. On this issue, the state and federal protections are equivalent. *State v. Embry*, 19 Or App 934, 939, 530 P2d 99 (1994).

Article I, section 12, of the Oregon Constitution, provides, in part, that "[n]o person shall be put in jeopardy twice for the same offence [*sic*]."

The Fifth Amendment to the United States Constitution, provides, in part, that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." This protection applies to the states through the Fourteenth Amendment's Due Process Clause. *Benton v. Maryland*, 395 US 784, 794, 89 SCt 2056 (1969).

A jury trial begins, and jeopardy attaches, when a jury is impaneled and

sworn. ORS 131.505(5)(b),[2] *State v. Hattersley*, 294 Or 592, 597-98, 660 P2d 674 (1983); *Crist v. Bretz*, 437 US 28, 38, 98 SCt 2156 (1978) (Fifth Amendment to the United States Constitution); *State v. Stover*, 271 Or 132, 140-41, 531 P2d 258 (1975) (Article I, section 12, of the Oregon Constitution).

After jeopardy attaches, the trial must continue, and a new trial is barred, unless the defendant consents to the mistrial, or unless the state proves that there was "manifest necessity" for the mistrial. There was no debate below about whether the relator wanted a mistrial: he did not. Thus he can only be retried if there was "manifest necessity" for the mistrial.

The Oregon statute, ORS 131.525(b), *infra*, codifies the constitutional doctrine of manifest necessity, describing it as five exceptions to the retrial prohibition. *State v. Cole*, 286 Or 411, 418, 595 P2d 466, *cert denied*, 444 US 968 (1979). None of the exceptions applied. For convenience, we will discuss the constitutional doctrine as it is codified.

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[2] ORS 131.505(5):A person is "prosecuted for an offense" when the person is charged therewith by an accusatory instrument filed in any court of this state or in any court of any political subdivision of this state, and when the action either:

(a) Terminates in a conviction upon a plea of guilty, except as provided in ORS 131.525(2);

(b) Proceeds to the trial stage and the jury is impaneled and sworn; or

(c) Proceeds to the trial stage when a judge is the trier of fact and the first witness is sworn.

ORS 131.515 provides in relevant part:

Except as provided in ORS 131.525 * * *:

(1) No person shall be prosecuted twice for the same offense.

* * *

ORS 131.525 provides in relevant part:

A previous prosecution is not a bar to a subsequent prosecution when the previous prosecution was properly terminated under any of the following circumstances:

(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 because:

(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.

* * * * *

Thus, once the jury was sworn, the criminal defendant has the right to have

the trial heard by that particular jury. The former jeopardy protection of the Oregon Constitution, Article I, section 12, protects a criminal defendant from the "harassment, embarrassment and risk of successive prosecutions for the same offense." *State v. Kennedy*, 295 Or 260, 272-73, 666 P2d 1316 (1983). A similar right is protected under the United States Constitution, Fifth Amendment. *See e.g.*, *Arizona v. Washington*, 434 US 497, 98 SCt 824 (1978).

2. None of the exceptions applies in this case.

After jeopardy has attached, there may not be a mistrial, and then a second trial, over a defendant's objection, unless one of five "manifest necessity" exceptions apply. ORS 131.525(b).

The exceptions described in the statute first, fourth, and fifth indisputably do not apply. It would not have been physically impossible to continue, such as would be the case with if the judge were seriously ill. ORS 131.525(b)(A). *State v. Cole*, *supra*, 286 Or 411. The court acknowledged that, "Physically, the trial could have occurred." 11/20/15 Tr 47. Further, the jury did not fail to reach a verdict, and no juror gave a false statement during voir dire. ORS 131.525(b) (D), (E).

Neither of the two other exceptions apply, either.

a) The "prejudicial conduct" exception does not apply.

There is "manifest necessity" for a mistrial, and so a second trial is

permitted, if, as the statute puts it, "prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the state." ORS 131.525(b)(C).

Case law explains that the statute, to mirror the constitutions, is describing two kinds of "prejudice" in this clause, and two different sets of rules. Once the two kinds of prejudice are distinguished, it is apparent that neither type applies to the facts of this case in a manner that permits a second trial.

The two kinds of prejudice are what we will call garden-variety prejudicial conduct by either party, and *Kennedy* error: knowing prejudicial misconduct by the prosecutor that goads the defendant into seeking a mistrial. *State v. Kennedy supra*, 295 Or 276.

The statute and case law describe the constitutional mandate: a second trial is permitted after garden-variety prejudicial conduct in the first trial, under circumstances we will explain; a second trial is prohibited if the prosecutorial misconduct in the first trial was so horrible that it constitutes a *Kennedy* violation.

The relator is not claiming there was a *Kennedy* violation. The relator was obviously surprised and potentially extremely prejudiced by the new expert witness. Although the expert's notes were not particularly damaging, the prosecutor asserted that the expert would testify that the fire was intentionally set, in contrast to every other expert who opined the cause of the fire was

"undetermined." The relator argued that the court should exclude the new expert in these circumstances, under the evidence code (OEC 403,[3] "unfair prejudice"), under Oregon case law (*e.g.*, *State v. Dyson*, 292 Or 26, 636 P2d 961 (1981)), and under federal Due Process as articulated in, for example, *Chambers v. Mississippi*, 410 US 284, 93 SCt 1038 (1973). Defense counsel lost that argument, and this is not the forum to debate the issue.

Yet, the late unearthing of the insurance investigator was not a classic discovery violation. The prosecutor did not promptly disclose the expert witness to the defense, but the prosecutor did not "intend to offer" the witness until he knew about him. In addition, the witness was not exculpatory. ORS 135.815 (a), (c), (d), (g). Thus the prosecutor was not knowingly trying to cause a mistrial, as *Kennedy* requires.[4] In our case, the prosecutor did not goad the relator into asking for a retrial: the relator did not ask for a mistrial.

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[3] Oregon Evidence Code, Rule 403, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

[4] This court formulated a test, distinctly under the Oregon Constitution. Retrial is barred when:

> (1) the misconduct [by a prosecutor] is so prejudicial that it cannot be cured by means short of mistrial;
>
> (2) the prosecutor knew that the conduct was improper and prejudicial; and

What the prosecutor did was garden-variety prejudicial conduct, and the relator did not ask for a mistrial. The case law describes the constitutional mandate: when there is garden-variety prejudicial conduct, the other party can ask for a mistrial, and the court can grant a mistrial. But the effect of the granting of the mistrial is not the same for both parties in a criminal case.

First, when the defense lawyer repeatedly circumvented a trial court's ruling, and continued to do so, after repeated admonitions, a mistrial was permitted, and a second trial was permitted. *State v. Bayse*, 122 Or App 608, 859 P2d 542 (1993). Similarly, when a defense lawyer made a personal attack on the prosecutor in front of the jury, and said the prosecutor was "hiding all the facts" and defense counsel was "trying to bring out the truth," a mistrial was permitted, and a second trial was permitted. *State ex rel. Wark v. Freerksen*, 84 Or App 90, 733 P2d 100, *rev denied*, 303 Or 534 (1987). If the rule were otherwise, an unscrupulous defense lawyer could engage in improper conduct with impunity, perhaps triggering a mistrial and a permanent dismissal. *See also Arizona v. Washington*, 434 US 497, *supra* (improper statement by defense counsel that the prosecutor had hidden evidence). In these cases, the defendant has in effect waived his double jeopardy

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> (3) the prosecutor either intended or was indifferent to the resulting mistrial or reversal.

295 Or at 276. In *Kennedy* this court concluded that the prosecutorial misconduct was not at the level where retrial was barred.

rights by his counsel's misconduct.

It is noteworthy that in these cases, defense counsel must have actually made a mistake. When defense counsel mentioned some evidence that the trial court had incorrectly ruled was inadmissible, that was not a proper basis for a mistrial. "For a mistrial to be properly ordered, error [by a party] must have been committed." *State v. Jalo*, 27 Or App 845, 850, 557 P2d 1359 (1976), *rev denied*, 277 Or 491 (1977). In that case, after a mistrial was granted over the defendant's objection, a second trial was barred.

Second, the rule is quite different when there is prosecutorial misconduct.

When there is prosecutorial misconduct during trial, the defendant can move for a mistrial, and if the prejudice is sufficient, the motion should be granted. After it is granted, the debate (either by the defendant seeking a writ of mandamus before a second trial, or in an appeal after the second trial) is whether or not there was *Kennedy*-level misconduct that forced the defendant to ask for a mistrial. If that was the case, a retrial is barred. No Oregon case gives an example of what *Kennedy*-level misconduct would be, but that is not the point here. The point is that all the cases involve the defendant affirmatively seeking a mistrial, indeed, that is the constitutional requirement.

After prosecutorial misconduct and prejudice, even just garden-variety misconduct, the law gives the defendant the choice: he can continue, prejudice

notwithstanding, or he can move for a mistrial. If he does the latter, some defendants – not this one – might argue a trial is barred because of the misconduct.

Here, the relator is not focused on the prejudicial actions of the prosecutor. Rather, the relator is explaining that the law gives him the absolute choice to ask for a mistrial, or not. He did not elect to ask for a mistrial. Nevertheless, the trial judge ordered a mistrial. The trial court denied the relator his constitutionally-guaranteed choice, and a retrial is barred.

In every reported case we have found, when a mistrial was permitted due to actions by the prosecutor, the mistrial was after a defense motion for a mistrial. This is the constitutional requirement.

The defendant moved for a mistrial in *Kennedy*. *See State v. Kennedy*, 49 Or App 415, 418, 619 P2d 948 (1980), *rev'd*, 454 US 891 (1981) ("Defendant then was faced with a Hobson's choice - either to accept a necessarily prejudiced jury, or to move for a mistrial and face the process of being retried at a later time.") *See also Downum v. United States*, 372 US 734, 83 SCt 1033 (1963) (prosecution witness did not appear for trial, mistrial not necessary, and retrial barred).

There are two other cases we have found where sub-*Kennedy* prosecutorial misconduct permitted a defendant's motion for a mistrial, but did not bar a second trial.

When an inexperienced prosecutor made passing reference, in an ambiguous

manner, to suppressed evidence, and the defendant moved for a mistrial, a mistrial was permitted, but a retrial was not barred. *State v. Garner*, 234 Or App 486, 228 P3d 710, *rev denied*, 348 Or 621 (2010). When another inexperienced prosecutor asked a question that caused an officer to testify to the jury that the defendant remained silent, that permitted the court to grant the defendant's request for a mistrial, but did not bar a retrial. *State v. Kimsey*, 182 Or App 193, 47 P3d 916 (2002).

In our case, the prosecutor was asleep at the wheel, and did not notice in his own discovery that there was an insurance investigation. The prosecutor did not learn there was another arson expert until the lead detective, "on a whim," called the prosecutor, apparently the day of voir dire, to say, "Hey, do you know, not always, but sometimes insurance companies hire an investigator. Did you check?"[5] After the jury was sworn, the new witness materialized. Had the relator sought a mistrial, he would have been entitled to one, but he did not, and a mistrial could not be forced on him because of the state's careless lack of preparation.

In our case, the trial judge articulated the issue as: "what do you do when the state comes now, midway through trial, on something that, frankly, just seems like should have been available to the state [and] goes to the core of the case, I mean

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[5] The state has never explained why the detective asked the prosecutor if the prosecutor had done this investigation. Typically, detectives do the investigation of a case.

the prejudice is huge." 9/28/15 Tr 58. The defense said the only remedy, mid-trial, was exclusion. The court declined to exclude, but wanted to remedy the huge prejudice to the defense, so the relator could have a fair trial. The court asked counsel how to do so, noting correctly that "there's no case directly on point." 9/28/15 Tr 67.

The relator was correct when he replied, "There is a paucity of case law for any number of – no disrespect, very obvious propositions * * * [when the court finds the prejudice is huge, and will be unfair to the defendant, the court must] exclude that evidence." 9/28/15 Tr 69.

Yet the trial judge's ruled:

> In foreclosing the defendant's option to go forward with the original jury, this Court concluded that no reasonable alternative action was available under the unique factual scenario and that the ends of public justice could not be served by a continuation of the proceedings to a later date with the original jury.

That is, the court concluded that the relator continuing the trial with the sworn jury was not a "reasonable action." The court's ruling in effect substituted the trial judge's opinion about how to defend the case, in place of the relator's opinion and the opinion of experienced and competent trial counsel. That is not the trial judge's role, to say the least.

During the hearing on the relator's motion to dismiss, the prosecutor tried to bootstrap the state's own carelessness by arguing the direct result of that

carelessness -- the late unearthing of the expert witness -- was a basis for finding "manifest necessity." Indeed, the surprise witness created prejudice for the relator, but that prejudice to the relator cannot be used against the relator by deeming it "manifest necessity." Unfortunately, that was what the trial court did. It concluded that the new expert created prejudice to the relator, so the court took from the relator the jury the relator had found satisfactory, and wanted to keep. The relator was entitled to proceed to a verdict with that jury, and he cannot be prosecuted again.

b) The "legal defect" exception does not apply.

The other exception to the former/double jeopardy rule is that a second trial is permitted after a mistrial, when, "There is a legal defect in the proceeding that would make any judgment entered upon a verdict reversible as a matter of law." ORS 131.525(b)(B).

The exception applies to technical defects that prevents jeopardy from attaching in the first trial. For example, when a trial was aborted because the indictment did not state a crime, jeopardy had not attached – the defendant could not be convicted without a valid indictment. For that reason, the state could bring a new, correct, indictment, and proceed to trial. The underlying policy of this exception is that a defendant should not be able to avoid a conviction merely by delaying an attack on a defective indictment until the jury was sworn, and labeling

the attack a "motion for judgment of acquittal." The challenge is in effect a demurrer, not a true "acquittal." *State v. Wolfs*, 312 Or 646, 826 P2d 623 (1992).

See also State v. Allbritton, 145 Or App 373, 931 P2d 797 (1996) (jeopardy attached when a trial began in District Court, mid-trial the judge discovered the case had been transferred to Circuit Court, and declared a mistrial. The District Court had concurrent jurisdiction, so the defendant could have been convicted, so a second trial in any court was barred.)

In our case, the trial judge may have erred in allowing the new expert witness to testify, or he may not have. But even if the trial judge erred in the evidentiary ruling, that of course did not deprive the trial court of jurisdiction, or make the proceedings in any way void. Jeopardy had attached, the relator did not consent to the mistrial, and he may not be retried.

3. **The trial was going well for this defendant/the relator.**

This court does not have to reach this point, but in the interest of completeness, the relator notes that nowhere in the record is there even a slight hint that the relator's decision to proceed with the sworn jury was in any way flawed, or that defense counsel's representation was in any way flawed. After the court ruled the insurance investigator could testify, the relator picked his poison: he preferred to continue with the jury he had. That was a constitutionally protected choice, and was a practical and realistic one.

The trial was going very well for the relator, for a number of reasons. First, the state needs all 12 votes for a murder conviction, and due to happenstance, the prosecutor was unhappy with the composition of the jury. By contrast, the defense was satisfied with the jury, and did not change its position about that.

Second, the evidence was developing in a manner that was tilting favorably towards the relator. From the state's opening statement, and its first eight witnesses, its best case against the relator was as follows.

The relator was a long-time friend of the cooperating codefendant, Richardson, and the relator was a friend of the codefendant, Golden. Richardson, who had obvious reasons to lie, and who was impeached by his own mother, told the police that the three of them had driven over to the garage where was sleeping, and then Richardson left the area. Richardson first told investigators the fire was accidental. He later told them he had been involved, and the relator and Golden set the fire.

Only Golden offered to compensate Richardson.

Heather testified that she first thought the people she saw leaving the scene were Golden and Richardson. Richardson later persuaded her to remember, more or less, that it was Golden and the relator. Golden, alone, threatened after she spoke to the police. Further, acknowledged she had been using methamphetamine at the time of her observations the morning

of the fire, she had not slept for some time, and those factors affected her memory.

said that Golden confessed to killing the victim; the relator denied he was there. On the witness stand, she had a temper tantrum in response to Golden's lawyer's cross-examination, further undercutting her credibility.

According to the state's opening statement, one jailhouse informant reported that Golden confessed, but that Golden said the relator only helped locate the victim and was present. Two more jailhouse informants also would say that Golden confessed that he and the relator had beaten the victim (which conflicts with Richardson's charges and plea to assault), and that the relator confessed to lighting the fire. The informants all had significant reasons to cooperate with the prosecution.

In a body wire the relator did not admit to harming the victim in any way, but said only that he was "over there that night."

In testimony, the owner of the garage thought the fire was accidental. An accelerant-seeking dog found no accelerants. Two fire bureau officers believed the cause was "undetermined," as did the expert arson investigator. The victim was, unfortunately, and irresponsible drug-user, and the arson expert characterized the garage as a "fire trap."

The medical examiner found the cause of death to be "undetermined."

That was the state's best case after the first full day of testimony. When an

insurance investigator materialized out of the blue, the relator of course urged the court to exclude his testimony. Arson investigations are complicated, the defense needed a good deal of time to refute this new expert arson investigator, and the new evidence completely changed the theory of the defense.

Yet, when the motion to exclude was denied, the relator was ready to take his chances with the jury he had. As defense counsel noted, the insurance investigator's notes made no mention of an intentionally set fire. They show that the victim used "heroin – meth – any drugs," and was "suicidal," and "a smoker." An electric heater and a stereo were available. Exhibit 1, ER-6. The prosecutor had reported that the insurance investigator would say the fire was lit with an open source, but the jury could find it curious that the insurance company paid the homeowner, that the insurance investigator wrote no report, and that the investigator materialized only after defense counsel's memorable opening statement ("evaluate the pros and the cons.")

And, of course, exactly what the insurance investigator would have actually said is unknown, because the trial judge aborted the trial before the investigator appeared in court or the state proffered any offer of proof.

The mistrial was improperly granted, and the relator cannot be prosecuted a second time.

4. The relator articulated the consequences of a mistrial before the jury was released.

Before the jury was released, the relator explained, twice, that granting a mistrial over his objections was a drastic remedy that would preclude a retrial. As described in the statement of facts, the relator's counsel said, "There is no manifest necessity that annuls or vanquishes former jeopardy." 9/28 Tr 85. "If the court grants [a mistrial to Mr. Moore], then we are asking that it be granted with prejudice for Mr. Moore, because we like this jury, we cannot be deprived of this jury." 9/28 Tr 93.

The state gives an inaccurate impression of the record when it quotes the trial judge, in the post-mistrial motion to dismiss, saying that proceeding with trial that day was "not what was discussed" before the jury was excused. 11/20 Tr 30. M. O. at 20. The next line of the transcript is the relator's counsel replying, "Yes, sir, it was. We tried to show what the problems were."

5. Constitutional rights are personal, and the codefendant's request for a mistrial did not bind this defendant/the relator.

As the state conceded in its memorandum in opposition, the relator's former/double jeopardy rights are personal to him. The codefendant's request for a mistrial did not operate as a request for a mistrial by the relator. M.O. at 15 n5. *See e.g., State v. Barber,* 343 Or 525, 529, 173 P3d 827 (2007); *United States v.*

Ramirez, 884 F2d 1524 (1st Cir 1989) (the court improperly granted a mistrial as to all six defendants. The four defendants who objected could not be retried). *United States v. Chica*, 14 F3d 1527 (11th Cir 1994) (judicial economy, and prosecutor's desire to try defendants jointly, is not reason to grant a mistrial to codefendants who do not want one; citing four other Circuits).

6. The trial judge's cited authority is not on point.

The trial court cited two cases to support its ruling that the state had established "manifest necessity." It concluded that "this case was like the case before the United State Supreme Court in *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 384 (1949)." That case does not support the court's ruling, as it involved a mistrial due to physical necessity. The trial was a court-martial set in Germany in March 1945, the trial location had become a war zone, and witnesses could not attend. That is not at all the situation in our case.

Nor does *United States v. Jorn*, 400 US 470, 91 SCt 547 (1971) support the trial court's ruling. That case involved the trial court declaring a mistrial on its own, to allow witnesses to further consult their lawyers, even thought the witnesses had not asked to do so. The mistrial was an abuse of the trial court's discretion, and a second trial was barred. This decision directly supports the relator's argument: notwithstanding the important goal of enforcing the law, the government is limited to one prosecution

> [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.
>
> * * * * *
>
> [I]n the final analysis, the judge must always 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 he might believe to be favorably disposed to his fate.

400 US at 479, 486.

7. The state's memorandum in opposition does not present an argument based on either the law or the facts in this record.

In its memorandum in opposition, the state argued that this court should not use its mandamus jurisdiction for two reasons: first, that the judge's error was merely an exercise of discretion, not a legal error, and second, that the defendant, by saying repeatedly that he "did not want a mistrial," did not sufficiently articulate that he wanted to continue with trial with the impaneled jury. The state obliquely articulates a third reason – connected to the first: that equity requires that the relator stand trial for a second time on the same charge after a mistrial was granted over his objection.

There is no support in law, or in the record, for those arguments.

The state cited no legal authority for those propositions, and there is none. The state misunderstands the facts in the record, and conflates argument which the

relator's trial counsel clearly separated in the trial court.

a) The trial court's error was one of law.

It is accurate to say, as a general position, that the decision to grant or deny a mistrial is within the trial court's discretion. But, as explained in this brief, after the jury has been sworn, when the trial court grants a mistrial, over the objections of a criminal defendant, without any claim by the state that the defense engaged in improper conduct, and without one of the five ("manifest necessity") exceptions applying, jeopardy has attached, it has not been waived, and the defendant may not be retried.

The state argued that our argument about the "five exceptions" was an effort to add to the statute, ORS 131.525. M.O. at 4, n2. That was not the point of our argument. As the state acknowledged, the Oregon statute, the Oregon Constitution, and the United States Constitution are the same in this area of the law. M.O. at 3. The relator discussed the statutory exceptions because the statute conveniently lists the constitutional exceptions. There are five. The state does not claim there is another one, let alone claim that there is another exception that applies in this case.

To reiterate: the constitutions (and the statute) bar a retrial when the defendant objected to the mistrial, if he did not provoke the need for a mistrial by engaging in misconduct. There is no claim of defense misconduct in this record.

The defendant unambiguously objected to the mistrial. The consequence is constitutionally required and automatic: a retrial is barred.

The trial court's error was one of constitutional (and statutory) law, it was not an exercise of discretion.

b) This defendant's objection to a mistrial, and the consequences of such a mistrial, were unambiguous, and were made while the jury was still impaneled.

The state distorts the records when it argues that the relator's counsel changed his arguments after the jury was dismissed.

At the beginning of the second day of testimony, the relator's counsel had two points to make: (1) the surprise witness should not be allowed to testify, and (2) the defendant was happy with the jury, and with how the trial was going otherwise, and he wanted to continue with the trial. Those are completely separate arguments, and trial counsel never conflated them. The state's memorandum in opposition conflated the arguments, but it misread the record to do so.

The relator continues to believe that it was legal error to allow the surprise witness to testify, but, to repeat, this is not the forum to discuss that issue. Trial counsel argued about it ardently, asserting that if the witness was allowed to testify, the relator would not have a fair trial. When it was clear that the trial court was going to allow the surprise witness to testify, trial counsel acknowledged that

reality, and moved on to the completely different issue of what to do after the ruling.

The trial judge agreed with the relator's argument that the surprise witness's testimony would create unfair prejudice. The trial judge also agreed that the unfair prejudice could not be cured by a jury instruction, and that a postponement of the trial, with the impaneled jury, was not a realistic solution. The other option was a mistrial.

Trial counsel then, very clearly, went back to his first set of arguments. Counsel told the judge that the entire problem (which was 'how to proceed with an unfair trial') could be avoided if the court would reverse its earlier ruling about the surprise witness. Without the surprise witness, a fair trial could continue. The trial court declined to reverse itself. The relator's counsel then addressed the problem at hand: how to proceed with an unfair trial.[6] It was a process of elimination: a reset was not realistic, a jury instruction would not help, the relator did not want a mistrial (he liked the jury, he liked how evidence was coming before the jury), and that left only one option: have a trial that, in the relator's view would be unfair, in

[6] In the end, the trial might not have been unfair. Perhaps the surprise witness's testimony would not have been compelling, or the jury would have been offended at the surprise. Perhaps, even with a compelling surprise witness, the jury would not have been convinced of the relator's guilt beyond a reasonable doubt. If the relator had been convicted, perhaps he would have relief on appeal. In other words, the relator's trial counsel was not agreeing to subject our client to "irremediable prejudice" (M.O. at 1), rather, trial counsel was trying to minimize the damage to the client by a legal ruling that trial counsel disagreed with.

front of the jury the defense and the state had chosen. As noted above, section 4, the relator's counsel was clear that if the judge ordered a mistrial over the relator's objection, jeopardy attached.

The arguments about the surprise witness and about the objections to the mistrial were distinct, and never conflated by relator's counsel. It simply misstates the record to argue that "defense counsel admitted having changed positions after the court had granted the mistrial," (M.O. at 17) and that the trial court "was not aware of the option that the defendant now insists was available"-- that trial continue forthwith (M.O. at 22).

Everybody agreed there would be no postponement (because a postponement would not cure anything). If the mistrial had not been declared, the next sentence in the transcript would be to the bailiff, "bring in the jury." The trial court would apologize for the delay, would explain that Mr. Golden was no long a part of the case, would tell the jury it should not speculate as to why that was, and then the court would say, "the state may call its next witness." The trial would have continued. There is no other reasonable way to read the record.

There was no reason given why the state needed Mr. Golden to try the relator. The state's citation to *State v. Turnidge*, 359 Or 364, 374 P3d 853 (2016), adds nothing: that involved a midtrial motion to sever. M.O. at 15.

c) The state's arguments about equity do not assist it.

The state, somewhat indirectly, also argued in its memorandum that equity demands that the defendant again be put in jeopardy. However, a direct examination of the equities demands that the defendant's constitutional right be upheld.

This case arose because the state investigators, and later the prosecutor, in a murder case, failed to pay attention to the fact that when there is a fire in a residence, the residence is insured, and the insurance company does an investigation before it pays the homeowner (or declines to do so). This chain of reasoning is so obvious that we submit that the court could judicially notice it, but that it not necessary. The record shows the insurance investigation was mentioned in the police reports. The surprise witness was a surprise only because the state's agents were careless in preparing this murder case. It would not be equitable to reward that carelessness.

And it bears repeating that at the end of voir dire, the prosecutor stated that he was "satisfied" with the jury, and then noticed that he had misread his notes and had left a juror on that was not acceptable to him. The court did not allow him to correct his mistake, but that meant that the state was not satisfied with one juror, in the one kind of case in Oregon where the state needs all 12 votes. We are not suggesting that any of this is misconduct by anyone, but when discussing the

equities, it is a factor.

The evidence was not coming out well for the state. For example, its star eyewitness had an emotional meltdown during cross-examination, and briefly refused to continue testifying.

The state argued in its memorandum that this court should defer to the trial court's ability to assess the impact of actions in the courtroom. M.O. at 5 - 6. But there is nothing the trial court could see that this court cannot. There was no jury in the courtroom when the events took place. There is no demeanor to evaluate. The precise prejudice to the defense from the surprise witness was no more clear to the trial court than it is to this court, as the prosecutor – the proponent of the evidence -- elected not to present any offer of proof when the topic of "prejudice to the defense" came up.

As the relator's counsel noted, a trial is a bound universe problem. Things go well, or go badly, for one side, or for the other. The process is stressful and unpredictable. The constitutions guarantee that a criminal defendant suffer the process only once, except when one of a small set of narrow exceptions apply. None apply here. There are no equitable considerations that overcome the defendant's constitution right to be put in jeopardy only once.

The state argued in its memo that this court should not issue a writ because the "fair administration of justice" requires that the defendant be again placed in

jeopardy. M.O. at 6 - 7. However, the fair administration of justice – and equity -- require that the relator's constitutional right be respected.

A peremptory writ of mandamus is the relator's only remedy to protect him from a second trial.

> Mandamus is an appropriate remedy in this case, because Relator's ordinary right to appeal after conviction does not vindicate his statutory right to be free from a second prosecution for the same offense.

State ex rel Turner v. Frankel, 322 Or 363, 376, 908 P2d 293 (1995).

This court should issue a peremptory writ.

Conclusion.

For these reasons, this court should exercise its jurisdiction to issue a peremptory writ of mandamus, ordering the trial court to dismiss this case with prejudice, and to release the relator.

Respectfully submitted,

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

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and the word count of this brief, as described by ORAP 5.5(2)(a), is less than 14,000 words, that it, it is approximately 13,170 words. I certify that the size of the type in this brief is not smaller than 14 points for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

s/Laura Graser, OSB 792463

CERTIFICATE OF E-FILING

The attached was eFiled to the Appellate Court Administrator on August 10, 2016.

s/Laura Graser OSB 792463,

CERTIFICATE OF SERVICE

I hereby certify that opposing counsel are registered eFilers.

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