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No. 22- 588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 17, 2023
DEBORAH S. HUNT, Clerk

NITE STATES O AMERICA,)
P laintiff-Appellee,)
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v.)
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ALE THR SH,)
D 1 efendant-Appellant.)

ON A EAL F ROM THE NITE STATES DISTRICT CO RT FOR THE EASTERN ISTRICT O MICHIGAN

O INION

Before: CLAY, WHITE, and THAPAR, Circuit Judges.

WHITE, J., delivered the opinion of the court in which THA AR, J., joined. CLAY, J. (pp. 3–33), delivered a separate dissenting opinion.

WHITE, Circuit Judge. efendant Dale Thrush appeals the district court's denial of his motion to dismiss the charges against him, asserting that the district court improperly declared a mistrial in violation of the ouble Jeopardy Clause of the ifth Amendment. We **AFFIRM.**

I.

Thrush owned and operated several businesses, including 402 N Mission St, LLC, which provided employer-related payroll services. A grand jury indicted Thrush in August 2020 on ten counts of failing to pay payroll taxes, in violation of 26 .S.C. § 7202, and four counts of failing to file a tax return, in violation of 26 .S.C. § 7203. The indictment alleges that Thrush failed to pay the IRS $238,223 in payroll taxes that 402 N Mission withheld from employees' wages from 20 4 to 20 6.

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From 200 through 2016 Thrush employed Donna Henke as his bookkeeper. Both Thrush and the government subpoenaed Henke to appear for trial and listed her as a witness. Henke was expected to testify that she prepared bookkeeping entries for Thrush from 2014 through 2016 and that Thrush instructed her to pay third-party and personal expenses from 402 N. Mission bank accounts and not to make payroll-tax payments that were due to the IRS.

On November 3 2021 the day before trial was scheduled to begin Henke who was fully vaccinated informed the government that she had tested positive for COVID-19 on a rapid test but was asymptomatic. She took a polymerase-chain-reaction ("PCR") test the same day and was waiting for the results. The government failed to share this information with the court or defense counsel.

On November 4 a Friday the district court impaneled a jury and began trial. Both the government and defense counsel referred to Henke's testimony in their opening statements. The government asserted that "you'll hear about the various stories that the defendant gave to the IRS as to why he didn't or wouldn't pay over the payroll tax he owes," including that he "blam[ed] one of his bookkeepers." R.102, 1535. Defense counsel referred to Henke by name extensively and argued that Henke's poor bookkeeping caused the failure to make payments. After opening statements the government presented testimony from several witnesses and then the district court adjourned the trial until Monday morning.

On November 5—the Saturday after the first day of trial—Henke informed the government that she received a positive result on the PCR test. At that point the government informed the court and defense counsel that Henke had tested positive for COVID-19.

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On S nday November 6 the government filed a motion seeking leave to present Henke's testimony thro gh alternative means. First the government asked the court to "permit live, two-way videoconference testimony of [Henke]." R.55, PID 474. Specifically, the government so ght permission for Henke to "testify from a public parking area adjacent to the relevant federal co rtho se via videoconference (while seated in a covered canopy tent area) with the defendant and defense co nsel present (at a safe distance and seated in folding chairs at a foldable 6-foot banq et table) and defense co nsel able to cross-examine D.H." *Id.* at PID 47 –79. Alternatively the government asked the co rt to a thorize a video deposition of Henke that wo ld be shown to the jury before the conclusion of the government's case. Thr sh objected to these proposals on Confrontation Cla se gro nds.

On Monday morning the co rt convened a telephone hearing to address the government's motion. The court briefly summarized the government's motions and Thrush's opposition to those motions. The co rt then explained that two additional circ mstances had arisen over the weekend: 1) a j ror had reported that her son had the fl and she co ld not leave her residence; and 2) the judge's spouse tested positive for COVID-19 altho gh the j dge had tested negative on a rapid test. The co rt laid o t two alternatives: it co ld adjo rn the trial ntil November 30 the next available date on the court's calendar; or it could "simply mistry the case and re-calendar it for attention a little bit later in 2022." R.60, PID 510-11.

Thrush's counsel immediately rejected the court's mistrial s ggestion. He explained that "[i]t is our position that if we mistry this case then we cannot bring it back witho t violating the [D]o ble [J]eopardy [C]la se of the Constit tion beca se the prosec tion knowingly took [the] risk" that Henke would be unavailable to testify when they learned of her positive rapid test result. R.60, PID 511. The court then asked the government, "what's your assessment of the alternative

of pro eeding on November the 30th or simply mistrying the ase and beginning it again in 2022?" *Id.* at 513. The government agreed to adjourn the trial until November 30 2021. Thrush's counsel then obje ted to the adjournment expressing on ern that Thrush would be prejudi ed be ause a delay would "give the jury three weeks to look stuff up on the internet and talk to their friends and families and be influenced by outside decisions." *Id.* at 513.

The ourt determined that the "easiest thing to do" would be to "at least poll the jury to see the extent to which an extended adjournment to November the 30 is feasible" and added "[i]f it isn't [feasible] my intention will be to declare a mistrial." *Id.* at 514. The judge then appeared before the jury by Zoom to poll the jurors regarding their ability to resume jury servi e on November 30th. Five jurors reported possible onfli ts:

- Juror 12 answered "I will actually be in Mexico that week for a friend's wedding" and said his flight arrangements and other bookings were already made.
- Juror 11 answered "my husband has upcoming appointments that he really needs me to go with him on." The ourt asked if these were medi al appointments and Juror 11 confirmed that the husband "sees a psychologist."
- Juror 6 answered "I start a new job on the 15th working for the state government, so I can't really miss any days of work."
- Juror 4 answered "I have OB testing that week."
- Juror 14 answered "I have stuff in December that went further with my daughter that plays travel basketball whi h we have hotels and everything up in the UP just that we already have s heduled but I ould rearrange it but I do—I would like to see her games, if possible."

Id. at PID 517-519.

The ourt then excused the jury and asked for "any brief remarks from the Government." *Id.* at 519. The government stated that "it appears more than three of the jurors have conflicts with returning on November 30th" and "[t]hat means with the—even with the two—three alternates I don't think we have enough for a full panel." *Id.* at 519-20. In response the ourt stated "I would

agree My belief is at this point we need to mistry the case The Government agree or disagree?" *Id.* at 520 The government agreed and explained that mistrial was necessary based on "jury unavailability to return " *Id.* Thrush's counsel stated, "Defense agrees with the mistrial, You Honor, but our position remains with respect to the jeopardy " *Id.*

Before adjourning, Thrush's counsel asked "is the reason that we're mistrying the case [] because the jury isn't available as opposed to you not being available?" *Id.* at 520. The court explained that the mistrial was due to a "confluence of factors " *Id.* Then the government asked

> Just to clarify the basis for the mistrial my understanding it is a confluence of circumstances that includes the illness of the witness DH your exposure to a COVID-positive person and the impracticability of continuing the case to November 30 because some of the jurors are not available. Are those all the factors?

Id. at 521 The court answered, "[c]orrect, yes " *Id.* The following week the district court issued an order declaring a mistrial, denying the government's motion to present video testimony of Henke as moot, and setting a new trial date "on the earliest practicable date " R 61, PID 525

In December 2021 Thrush moved to dismiss the indictment on double jeopardy grounds. He primarily argued that the Double Jeopardy Clause barred retrial and that Henke's unavailability did not provide "manifest necessity" for a mistrial R 64, PID 540 Thrush also highlighted that the court "acknowledged that the Judge could conduct the trial via video or a magistrate could conduct the trial " *Id* at 542 In a separate motion, Thrush moved to disqualify the government's prosecutors based on their failure to disclose Henke's initial rapid-test results.

The district court denied both motions. The court reasoned that there was "manifest necessity" for the mistrial and Henke's unavailability was only "one of several reasons for the

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mis rial." R.96, PID 1505. The dis ric cour also denied Thrush's mo ion o disqualify he prosecutors.

Thrush imely appealed he dis ric cour 's denial of bo h mo ions.[1]

II.

Although our jurisdiction is usually limited to appeals from final judgments,"[a]n order denying dismissal on double-jeopardy grounds lacks finality but is appealable under the collateral-order doc rine provided he claim is 'colorable.'" *ted States v. Wil s* 9 1 F.3d 511 514 (6th Cir. 2020) (quoting *R chardso v. ted States* 46 U.S. 317 322 (19 4)). The district court determined that Thrush's claim is colorable and we agree.

A.

Our review of a dis ric cour 's denial of a mo ion o dismiss an indic men on double jeopardy grounds is de novo. *ted States v. Koubr t* 509 F.3d 746 74 (6th Cir. 2007). The Fif h Amendmen o he Uni ed S a es Cons i u ion requires ha no person be "subjec for he same offense o be wice pu in jeopardy of life or limb." U.S. Const. amend. V. Jeopardy attaches to a criminal defendant when the jury is impaneled and takes its oath. *ted States v. You g* 657 F.3d 408, 416 (6 h Cir. 2011). And "[b]ecause jeopardy a aches before judgmen becomes final, he cons i u ional pro ec ion" agains double jeopardy "also embraces the defendan 's 'valued righ o have his rial comple ed by a par icular ribunal.'" *Ar zo a v. Wash gto* 434 U.S. 497 503 (197) (quoting *Wade v. Hu ter* 336 U.S. 6 4 6 9 (1949)). So under normal circumstances the government cannot re-try a criminal defendan if he defendan 's rial ends before a final judgment but after the jury has been impaneled and taken its oath.

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t [1] Because Thrush's briefing addresses only the double jeopardy issue we consider the disqualification issue forfeited.

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Howe er the prohibition against double jeopardy is not an absolute bar to retrial in all circumstances. *Orego v. Ke edy* 456 U.S. 667 672 (19 2). Because of the ariety of reasons

> that may make it necessary to discharge a jury before a trial is concluded and because those circumstances do not in ariably create unfairness to the accused, [the criminal defendant's] valued right to ha e 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 e idence to an impartial jury.

Ar zo a 434 U.S. at 505. Accordingly when a trial is terminated o er the objection of the defendant "retrial is permissible when 'manifest necessity' requires it." *Walls v. Ko teh* 490 F.3d 432 43 (6th Cir. 2007) (citing *ted States v. Perez* 22 U.S. (9 Wheat.) 579 5 0 (1 24)).

A mistrial may not be declared without due consideration of the defendant's Fifth Amendment rights. We re iew a mistrial in a criminal case on a "sliding scale of scrutiny" to determine whether it was justified by "manifest necessity." *Colv v. Sheets* 59 F.3d 242 253 (6th Cir. 2010) (citing *Ross v. Petro* 515 F.3d 653 669 (6th Cir. 200) *cert de ed* 555 U.S. 1099 (2009)). The "strictest scrutiny applies when the mistrial is based on prosecutorial or judicial misconduct " *d.* and "the most relaxed scrutiny" is due when the mistrial is based on a deadlocked jury or circumstances "akin to a deadlocked jury situation (i.e., where fault is not attributed to a party counsel or the judge) " *Ross* 515 F.3d at 661 669. In determining the proper le el of scrutiny we consider "whether the underlying reasons for the mistrial concern issues best left to the informed discretion of the trial judge or issues that resemble pure questions of law for which closer appellate re iew is appropriate." *ted States v. Steve s* 177 F.3d 579 5 3 (6th Cir. 1999).

Here se eral factors were in ol ed ranging from COVID exposures to juror a ailability and the feasibility and lawfulness of a remote trial. To the extent that typical calendar constraints guided the judge's decision, ordinary abuse-of-discretion scrutiny arguably applies. Howe er at v least one of the factors confronting the judge—his COVID exposure—was outside the judge's and

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the parties' control. Decisions regarding such matters ordinarily receive the "most relaxed a scrutiny." *Ross* 515 F.3d at 661. Either way the result is the same. Therefore rather than resolve this question we assume that ordinary deference applies and review the mistrial order to ensure that "the trial judge exercised 'sound discretion.'" *Washington* 434 U.S. at 514.

B.

As Judge Clay correctly observes in his dissent the district court's first reason for a mistrial, Henke's unavailability, should not have figured in its reasoning at all. Although the district court determined that no bad faith was involved Henke's unavailability after jeopardy attached was solely the fault of the government—the prosecutors knew that Henke had tested positive for COVID-19 on a rapid test on November 3 2021 in advance of jury selection on November 4 2021 and elected to keep that information to itself until Henke received a positive PCR test result after the first day of testimony. To be sure the district court had discretion to grant an adjournment if practicable but Henke's unavailability does not qualify as "manifest necessity" justifying a mistrial given that the government unilaterally took the risk that Henke might not be available to testify after the jury was selected. Thus it was an abuse of discretion to factor Henke's unavailability into the mistrial determination. *Cf. Downum v. United States* 372 U.S. 734 737 (1963) (holding that the prohibition against double jeopardy barred retrial where a jury was discharged "because prosecution witness had not been served with summons and because no other arrangements had been made to assure his presence."); *Arizona* 434 U.S. at 50 n.24 (explaining that when "a prosecutor proceeds to trial [w]here the key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred").

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But t e district judge's unavailability due to his wife aving COVID-19 was a sufficient neutral justification for at least adjourning t e trial until November 30t . At the time of Thrush's trial t e Eastern District ad issued instructions that anyone "exposed within the last ten days" to COVID-19 was "NOT PERMITTED TO ENTER THE COURTHOUSE." R.74-4 PID 1202. T ere is not ing in t is policy t at suggests a negative-test exception or contemplates a district judge consulting t e c ief judge about obtaining suc an exception. Requiring district judges to coordinate wit t eir c ief judges to skirt official court ouse policy during a nationwide pandemic is inconsistent with the "inherent authority, and even 'grave responsibility,' to determine w at safety measures are necessary to protect t e judge court personnel t e parties t e lawyers t e jurors, and the audience in and around the courtroom." *ted States v. Sm th* No. 21-5432 2021 WL 5567267 at *2 (6t Cir. Nov. 29 2021) (quoting *Morga v. Bu ell* 24 F.3d 49 51 (9t Cir. 1994)). T e district court's implicit assumption t at it was bound by Eastern District guidelines on COVID-19 exposure is a determination to w ic we owe deference. T e district court did not abuse its discretion by following Eastern District policy.

The district court's decision to explore adjournment rat er t an request a substitute judge or proceed remotely was also not an abuse of discretion. Because T rus was being tried for a felony a magistrate judge could not preside over t e trial. *Gomez v. ted States* 490 U.S. 5 72 (19 9). And because t e district judge was t e only district judge in t e Bay City court ouse any substitute judge would ave ad to travel to take over t e trial. Furt er t ere is not ing to suggest t at a substitute judge could ave presided over t e trial wit out an adjournment.

And proceeding remotely came wit its own complications. True t e district court stated during the hearing that "[y]ou could ave probably proceeded wit me working by video but my understanding is t at the defense also has objected to DH appearing by video conference as well."

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R.60 P D 521. But as the district court explained in its order denying Thrush's motion to dismiss, "courtroom technology was ill-suited for remote appearances as evidenced by the undersigned's reliance on courtroom staff to help conduct the hearing " and its brief remarks at the hearing "were meant to help explain the confluence of factors producing the necessity for a mistrial not to propose an alternative path forward." R.96 P D 1505 & n.6. The district court's determination that the courtroom technology was insufficient for the court to preside over a trial remotely is a conclusion that it was uniquely equipped to make and accordingly is ill-suited to searching appellate review. t was not an abuse of discretion for the district court to determine that a remote trial was beyond its capabilities.

So we are left with the district court's final and most problematic decision—whether an adjournment to November 30 was feasible. Before the district court polled the jury, Thrush's counsel objected to an adjournment. The court responded by explaining that it would poll the jury as to the feasibility of an adjournment and that if the jury was not available its "intention [was] to declare the mistrial." R. 60 Pg. D 514. The district court then polled the jurors on their availability. Five jurors provided reasons why an adjournment until November 30 would be inconvenient. The district court did not probe the jurors in any meaningful way with respect to the credibility or severity of the inconvenience. nstead it took at least four jurors' answers that they could not return for trial on November 30 at face value.

As a general matter Judge Clay is correct that a district court in this situation ordinarily should conduct the inquiry necessary to make an individualized determination regarding each juror's unavailability. But Thrush's counsel agreed at the hearing that continuing the trial on November 30th was not feasible: I

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> MR. MCDONALD [counsel for the United States]: Your honor, it appears more than three of the jurors have conflicts with returning on November 30th from what I observed.
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> THE COURT: Correct.
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> Mr. MCDONALD: That means with the—even with the two—the three alternates, I don't think we have enough for a full panel, Your Honor.
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> THE COURT: I would agree. My belief is at this point that we need to mistry the case. The Government agree or disagree.
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> MR. MCDONALD: Government agrees based on witness—or excuse me, jury availability to return, Your Honor . . . .
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> THE COURT: And defense?
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> MR. AYAR [counsel for Thrush]: Defense agrees with the mistrial, Your Honor, but our position remains with respect to double jeopardy.

R.60, PID 519-20. By first arguing against an adjournment without addressing the court's COVID-19 exposure and then answering as he did regarding juror availability, defense counsel conceded that an adjournment was not a viable option.[2] To be sure, counsel did so while preserving defendant's previously expressed position that retrial would be impermissible because the government was to blame for Henke's unavailability. However, defendant forfeited any argument that adjournment was the appropriate course rather than declaring a mistrial. And since counsel made this concession, the district court was not obliged to further explore the jurors' answers.

Were Henke's unavailability the only reason for the adjournment, we would conclude that there was no manifest necessity for a mistrial and that declaring a mistrial was an abuse of discretion that barred retrial. However, given the judge's exposure to COVID-19, an adjournment was proper and not an abuse of discretion. At that point, Thrush's objections to adjournment and agreement that an adjournment was not feasible precludes him from now arguing that the district

[2] Defense counsel similarly described an adjournment to November 30th as "impracticable" in Thrush's motion to dismiss. R.64, PID 542.

cour should no have accep ed he jurors' excuses and should have resumed the trial after an adjournment.

For these reasons we AFFIRM. t

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CLA , Circuit Judge, dissenting. The district court declared a mistrial over Defendant's objection based on circumstances which the district court deemed to create a manifest necessity for a mistrial. Because the district court abused its discretion in declaring a mistrial, Defendant's retrial will violate the Double Jeopardy Clause of the Fifth Amendment. I therefore respectfully dissent. Y

BACKGROUND

The majority's recitation of the facts presented by this case is in many ways misleading. Hopefully the following description of the factual background of the case will place the relevant events in proper perspective.

In August 2020 a grand jury indicted Dale Thrush on ten counts of failing to pay payroll taxes in violation of 26 U.S.C. § 7202 and four counts of failing to file a tax return in violation of 26 U.S.C. § 7203. In the indictment the government identifies Thrush as the owner and operator of several automobile-related businesses and of 402 N Mission St LLC which provided employer-related services. The government alleges that Thrush failed to pay the IRS approximately $238,000 in payroll taxes that 402 N Mission withheld from employees' wages from 2014 to 2016. Further the government alleges that Thrush failed to file individual income tax returns for 2013 2014 2015 and 2016.

Before trial both Defendant and the government listed Donna Henke as a witness and subpoenaed her to appear. Henke was Thrush's bookkeeper at 402 N Mission and Thrush's other businesses from 2007 to 2016. The government maintained that Henke would testify that Thrush instructed her to pay third parties and personal expenses but to withhold payroll tax payments due to the IRS. Defendant maintained that Henke was lying. Y

The ay before trial was sche ule to begin on November 3 2021 Henke informe the government that she ha teste positive for COVID-19 on a rapi test. At the time Henke was fully vaccinate an asymptomatic. Because of the positive rapi test result Henke took a COVID-19 polymerase chain reaction ("PCR") test. She advised the government that she hoped the rapi test reflecte a false positive result an that she was waiting to receive the results of the PCR test. The government did not inform Defendant or the court of Henke's positive COVID-19 rapi test result.

On November 4 2021 the court impanele a jury. On the next ay a Fri ay the court con ucte the first ay of the trial. The government in its opening statement i not refer to Henke by name but argue that the evi ence woul show that Thrush trie to blame his failure to pay payroll taxes on one of his bookkeepers. In contrast Defen ant in his opening statement argue that the evi ence woul show that Henke was responsible for the failure to pay. That d afternoon the court a journe an continue the trial to the next Mon ay.

Following the court's adjournment, on that same day efense counsel inquire of the government whether it inten e to call Henke as a witness on Mon ay. In response the government aske Henke about her COVID-19 iagnosis an learne that her PCR test result was positive which the government then communicate to efense counsel an the court.

On Sun ay November 7 2021 the government move the court for leave to present live two-way vi eoconference testimony of Henke. The government propose that Henke testify from the courthouse parking lot in a tent that the government ha procure with Defen ant an efense counsel physically present at a safe istance. In the alternative the government requeste that the court permit a vi eo eposition of Henke with the recor e vi eo testimony to be later shown to the jury. In response Defen ant move to bar the government's proposal.

The ne t morning in response to these motions the court convened a hearing. In addition to addressing the parties' motions, the court informed the parties of two additional circumstances that had arisen over the weekend. First one of the jurors had indicated that her son was sick with the flu and she could not leave her residence as a result. Second the trial judge's spouse tested positive for COVID-19. Though the trial judge tested negative for COVID-19 on a rapid test he participated in the hearing by telephone because he did not believe he should enter the courthouse x due to his e posure. Considering these circumstances the court informed the parties that there were two possible courses of action: either to adjourn the case until November 30 2021 (the ne t available day on the court's schedule) or to mistry the case and reschedule it for early in 2022.

The government agreed to adjourn the trial until November 30 2021. Defendant objected to adjourning the trial and objected to a mistrial on double jeopardy grounds. To determine the feasibility of a continuance the court polled the jurors about their availability for trial on November 30 2021. To poll the jurors the trial judge appeared on a video screen in the courtroom and addressed the jurors through the court audio system. Five jurors indicated that they had a conflict with a continuance to that date: Juror 3 reported that she had obstetrics testing that week; Juror 6 reported that he started a new job on November 15 and could not miss any days of work; Juror 11 reported that she had to accompany her husband to a medical appointment on November 30; Juror 12 reported that he was traveling to Mexico that week for a friend's wedding; and Juror x 14 reported that she was traveling for her daughter's travel basketball games. The court made no further inquiry of the jurors about their supposed conflicts and instead took their reports at face value.

After polling the jurors the trial judge stated that he believed that the court "need[ed] to mistry the case." Hr'g Tr., R. 60, Page ID #520. Though there were three alternate jurors the

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cour reasoned ha here were no enough jurors for a full panel because in i s view five jurors were unavailable. The governmen agreed on he need for a mis rial and Defendan did no objec hough Defendan main ained his objec ion o a mis rial on double jeopardy grounds. The cour clarified that the basis of the mistrial was a "confluence of factors" including Henke's positive COVID-19 test, the trial judge's exposure to COVID-19 and he imprac icabili y of adjourning the trial because of the jurors' unavailabili y. *Id.* a Page ID #520–521. The nex week he cour issued an opinion and order declaring a mis rial for he reasons s a ed on he record and denying as moo he mo ions regarding wi ness es imony.

On December 16 2021 Defendan moved o dismiss on double jeopardy grounds. Defendan argued ha he double jeopardy clause barred re rial because he governmen knew of Henke's positive COVID-19 rapid es before he rial began. Defendan con ended ha he rial could have continued without Henke's es imony wi h ei her he dis ric judge presiding by video or a magis ra e judge presiding in his place. Defendan also moved o disqualify governmen counsel for "dishonest and overzealous" behavior, based on their failure to disclose Henke's posi ive COVID-19 rapid es resul . Mo . o Disqualify Prosecu ors R. 65 Page ID #54 –549. The governmen opposed bo h mo ions.

The court denied Defendant's motion to dismiss based on i s de ermina ion ha manifes necessi y exis ed for he mis rial and denied Defendant's motion to disqualify government counsel. The cour reasoned ha he governmen did no know Henke would be unavailable based on he posi ive COVID-19 rapid test result, given the possibility of a false negative and Henke's status as vaccina ed and asymp oma ic. Fur her he governmen did no seek a mis rial bu ra her sough for Henke o es ify via al erna ive means or for an adjournmen . Finally in the court's view he t rial judge's exposure to COVID-19 also suppor ed he mis rial because i was imprac ical for him

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to pr sid r mot ly giv n courtroom t chnology and magistrat judg s may not pr sid ov r f lony trials.

Defendant timely appealed the district court's denial of his motions to dismiss and to disqualify gov rnm nt couns l. D f ndant also mov d to stay trial p nding app al. Th court granted the stay pending resolution of Defendant's appeal.

DISCUSSION

W r vi w a district court's d nial of a motion to dismiss an indictm nt on doubl j opardy grounds d novo. *ted States v. Camero* 953 F.2d 240 243 (6th Cir. 1992) (citation omitt d). In this cas th district court d clar d a mistrial bas d on th impossibility of continuing th trial due to jurors' scheduling conflicts and what th district court b li v d to b a "confluence of factors" preventing the trial from imm diat ly r suming. Op. and Ord r R. 96 Pag ID #1500. These factors included the unavailability of the witness Henke and the trial judge's possibl xposur to COVID-19. Th district court d t rmin d that th s circumstanc s warrant d a mistrial. Quite the contrary, the circumstances in Defendant's case, even when considered tog th r did not warrant a mistrial and th trial judg improp rly x rcis d his discr tion in d claring on .

I. Relevant Legal Principles

Th Fifth Amendment's Doubl J opardy Claus provid s that a p rson shall not "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional right prot cts against not only b ing punish d twic but against b ing plac d in j opardy twic . *Ball v. ted States* 163 U.S. 662 669 (1 96). In a jury trial j opardy attach s wh n th jury is impan l d and sworn. *Serfass v. ted States* 420 U.S. 377 3 (1975) (citing *Dow um v. ted States* 372 U.S. 734 (1963)). "[T]he prohibition against placing a d f ndant

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twic in j opardy r fl cts a constitutional policy of finality for th d f ndant's b n fit in all criminal proceedings, and is 'fundamental to the American scheme of justice.'" *Jo es v. Hogg* 732 F.2d 53 54 (6th Cir. 19 4) (quoting *ted States v. Jor* 400 U.S. 470 479 (1971)). According to th Supr m Court:

> Th und rlying id a on that is d ply ingrain d in at l ast th Anglo-Am rican syst m of jurisprud nc is that th Stat with all its r sourc s and pow r should not b allow d to mak r p at d att mpts to convict an individual for an all g d off ns th r by subj cting him to mbarrassm nt xp ns and ord al and comp lling him to liv in a continuing stat of anxi ty and ins curity as w ll as e nhancing th possibility that v n though innoc nt h may b found guilty.

Gree v. ted States 355 U.S. 1 4 1 7– (1957). "Cons qu ntly as a g n ral rul th pros cutor is ntitl d to on and only on opportunity to r quir an accus d to stand trial." *Ar zo a v. Wash gto* 434 U.S. 497 505 (197).

How v r if a criminal proc ding is t rminat d without finally r solving th m rits of th charg s against th accus d th Claus is not an absolut bar to r trial. *Orego v. Ke edy* 456 U.S. 667 672 (19 2). Wh r th trial is t rminat d ov r th obj ction of th d f ndant th classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard first articulat d by Justic Story:

> W think that in all cas s of this natur th law has inv st d Courts of justic with th authority to discharg a jury from giving any v rdict wh n v r in th ir opinion taking all th circumstanc s into consid ration th r is a manif st n c ssity for th act or th nds of public justic would oth rwis b d f at d. Th y ar to x rcis a sound discr tion on th subj ct; and it is impossibl to d fin all th circumstanc s which would r nd r it prop r to int rf r . To b sur th pow r ought to b us d with th gr at st caution und r urg nt circumstanc s and for v ry plain and obvious caus s.... But aft r all th y hav th right to ord r th discharg ; e and th s curity which th public hav for th faithful sound and consci ntious x rcis of this discr tion r sts in this as in oth r cas s upon th r sponsibility of th Judg s und r th ir oaths of offic .

ted States v. Perez 22 U.S. 579 5 0 (1 24); *see also Ke edy* 456 U.S. at 672. As this formulation shows, "a d f ndant's valu d right to hav his trial compl t d by a particular tribunal

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mus in some ins ances be subordina ed o he public's in eres in fair rials designed o end in jus judgmen s." *Wade v. Hu ter* 336 U.S. 6 4 6 9 (1949).

In *Jor* he Supreme Court emphasized that Justice Story's formulation in *Perez* remained the "standard of appellate review for testing the trial judge's exercise of his discretion in declaring a mistrial without the defendant's consent." 400 U.S. at 481. In that case, he rial judge *sua spo te* declared a mis rial when he de ermined ha nonpar y wi nesses should have he oppor uni y o consul wi h counsel prior o giving es imony ha migh lead o self-incrimina ion. *Id.* a 473. The Cour decided ha he Fif h Amendmen barred re rial. *Id.* a 4 6– 7. In so holding i rei era ed that "the *Perez* doc rine of manifes necessi y s ands as a command o rial judges no o foreclose he defendan 's op ion un il a scrupulous exercise of judicial discre ion leads o he conclusion ha he ends of public jus ice would no be served by a con inua ion of he proceedings." *Id.* a 4 5; *see also Fulto v. Moore* 520 F.3d 522 52 (6 h Cir. 200) (s a ing ha he *Jor* decision "turned largely on the court's finding ha he rial judge ac ed abrup ly gave no considera ion o a rial con inuance and allowed he par ies no oppor uni y o argue or even object").

Similarly in *Ar zo a v. Wash gto* , the Supreme Court relied on Justice Story's formula ion of when a judge in his discre ion may de ermine here is manifes necessi y for a mis rial. 434 U.S. a 506. In ha case he rial judge declared a mis rial because defense counsel made improper and prejudicial remarks which he rial judge de ermined were likely o have affec ed he impar iali y of one or more of he jurors. *Id.* a 511. The Supreme Cour held ha he Fifth Amendment did not bar retrial because the trial judge's assessment of possible juror bias was o be accorded a high degree of respec and he record reflec ed a sound exercise of discre ion. *Id.* a 511, 516. The Court reasoned that the trial judge "evince[d] a concern for the possible double

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jeopardy consequences of an erroneous ruling," "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial," and "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding"—the trial judge did not act "precipitately," "hast[il]y," or improvident[ly]." *Id.* at 514 n.34 515–16.

This precedent makes clear that a mistrial may not be declared without caution deliberation, and consideration of the defendant's Fifth Amendment rights. Whilepwe accord deference to the trial court "discretion does not equal license; the Fifth Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of 'necessary' mistrials were in fact to go unreviewed." *United States v. Sanders* 629 F.2d 1174 117 (6th Cir. 1980). As to how we review mistrial declarations the Supreme Court in *Washington* "established a 'sliding scale of scrutiny' for determining whether manifest necessity existed." *Coleman v. Sheets* 59 F.3d 242 253 (6th Cir. 2010) (citing *Ross v. Petro* 515 F.3d 653 669 (6th Cir. 200)). At one end the "strictest scrutiny applies when the mistrial is based on prosecutorial or judicial misconduct." *Id.* At the other end, "great deference" or "special respect" is due when the mistrial is based on a deadlocked jury. *Id.* Where a mistrial is premised on circumstances "akin to a deadlocked jury situation, (i.e., where fault is not attributed to a party, counsel or the judge)," "great deference" similarly applies and the case warrants "the most relaxed scrutiny." *Ross* 515 F.3d at 669; *Coleman* 59 F.3d at 253.

We determine the appropriate level of scrutiny by looking to "whether the underlying reasons for the mistrial concern issues best left to the informed discretion of the trial judge or issues that resemble pure questions of law for which closer appellate review is appropriate." *United States v. Stevens* 177 F.3d 579 583–584 (6th Cir. 1999). As *Perez* and its progeny intimate

alth ugh c urts are rarely t declare mistrials due t "manifest necessity," the test f r d ing s is a flexible ne, "with reviewing c urts analyzing the trial c urt's exercise of discretion in light of the particular facts and circumstances f each individual case." *Harpster v. Oh o* 12 F.3d 322 32 (6th Cir. 1997). Nonetheless a trial judge must "temper the decisi n whether r n t t ab rt o 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 disp sed t his fate." *Wash gto* 434 U.S. at 514 (quoting *Jor* , 400 U.S. at 4 6).

On the sliding scale of scrutiny established in *Wash gto* the appropriate level of scrutiny in this case lies between the tw p les f "strictest scrutiny" and "great deference." Because n pr secut rial r judicial misc nduct ccurred, the "strictest scrutiny" d es n t apply. *Colv* 59 F.3d at 253. Nor, h wever, d es "the m st relaxed scrutiny" apply, *Ross* 515 F.3d at 669 contrary t the maj rity's suggesti n. This case is n t akin t a deadl cked jury situati n, where fault f r the mistrial cannot be attributed to any party or counsel or the judge. *See d.* Though no misconduct occurred the judge exercised discretion over and made judgments on matters that affected his ultimate judgment on the necessity of a mistrial—namely, the g vernment's pr p sal t present Henke's testim ny thr ugh alternative means the alleged unavailability of the jurors and the feasibility of presiding over the trial remotely.[1] As these are matters of courtroom administrati n, this C urt sh uld acc rd the district c urt's judgments deference, in the rdinary sense and review f r abuse f that discreti n. And n the district c urt's ultimate declarati n f o

[1] The maj rity suggests that the "m st relaxed scrutiny," *Ross* 515 F.3d at 669 is warranted because the district judge's "COVID exp sure" was utside the judge's and the parties' control. Majority Op. at 7–8. H wever, the district judge's *respo se* to his COVID exposure was well within his c ntr l. We review a district judge's exercise f discreti n in resp nse t circumstances, n t whether the circumstances themselves were f the judge's making.

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a mis rial "reviewing cour s have an obliga ion o sa isfy hemselves ha in he words of Mr. Justice Story, the trial judge exercised 'sound discretion.'" *Wash gto* 434 U.S. a 514.

Having set forth the legal principles governing a trial court's application of the manifest necessity standard and the reviewing court's responsibility, I turn to whether the trial judge's conduc in his case evinced he sound discre ion ha preceden requires. t

II. Alternatives to Declaring a Mistrial

1. Immediately Continuing the Trial

Considering the circumstances of this case, the trial court's first obvious alternative to declaring a mis rial was o con inue he rial immedia ely or af er an adjournmen of one or wo days. The supposed barriers to continuing the trial immediately were Henke's inability to testify in-person and the trial judge's potential exposure to COVID-19. These barriers o he ex en hey were barriers a all were far from insurmoun able ones. Under he circums ances presen ed he rial cour could have—and should have—con inued wi h he rial wi hou delay and i was error no o do so. t

A. *W t ess He ke* t

Because Henke es ed posi ive for COVID-19 she was unable o en er he cour house o t es ify in-person. Given this circumstance, the government moved to present Henke's testimony o he jury hrough al erna ive means. The firs me hod he governmen proposed was o presen Henke's testimony through a live wo-way videoconference. Under his me hod he governmen proposed o si ua e Henke in he cour house parking lo in a en ha he governmen had procured wi h Defendan and defense counsel physically presen a a safe dis ance. The second me hod he government proposed was to present Henke's testimony through a video recording, by taking Henke's deposi ion in advance. t

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Baff ing y, the tria judge did not ru e on the merits of the government's motion to allow testimony by alternative means. Instead the trial judge declared a mistrial and then declared the motion moot. In other words by declaring the mistrial the trial court created the supposed mootness that justified ignoring the detailed a ternative methods of presenting Henke's testimony proposed by the government. The trial court thereby abdicated its responsibility to protect Defendant's "va ued right to have his tria comp eted by a particu ar tribuna ." *Wash gto* 434 U.S. at 503; *see also Jor* 400 U.S. at 485 (ho ding the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.").

On review I see no reason why Henke could not have provided testimony by video. Defendant objected to any form of testimony other than in-person testimony in the courtroom based on his right under the Confrontation Clause of the Sixth Amendment. However the right to confrontation is not absolute. *See Maryla d v. Cra g* 497 U.S. 36 50 (1990) (holding a witness's physica presence in the courtroom is not required to satisfy a defendant's right to confront an accusatory witness if the witness's physica absence "further[s] an important pub ic po icy" and "the re iabi ity of the testimony is otherwise assured"); *see also ted States v. Be so* , 79 F. App'x 813, 820– 21 (6th Cir. 2003) (affirming the district court's decision to a ow an elderly witness who was too ill to travel to testify via video conference). The Supreme Court has articulated the reasons underlying the right to confrontation which include: (1) the giving of testimony under oath (2) the opportunity for cross-examination; (3) the ability of the factfinder to observe demeanor evidence; and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant. *Cra g* 497 U.S. at 45– 46.

The overnment proposed a method by which Defendant could have been physically present with Henke in a temporary structure in the courthouse parkin lot while she testified and while defense counsel cross-examined her with her testimony bein broadcast by video to the jurors in the courtroom. This arran ement would have preserved all the characteristics of in-person testimony: Henke would have been sworn; she would have been subject to full cross-examination; she would have testified in full view of the jury and the court; and she would have iven her testimony in the physical presence of Defendant and his counsel. *See Be so* , 79 F. App'x at 821 (citin *ted States v. G ga te* 166 F.3d 75 0 (2d Cir. 1999). Since this arran ement would have subjected Henke to "testin in the crucible of cross-examination," *see Crawford v. Wash gto* 541 U.S. 36 61 (2004), it would not have violated any of Defendant's rights.

On appeal Defendant ar ues that even if Henke were unable to testify such unavailability would not support a mistrial because the overnment knew she had tested positive for COVID-19 before the trial and failed to inform defense counsel or the trial court and therefore the overnment assumed the risk that she would be unable to testify. Defendant relies on *Dow um v. ted States* 372 U.S. 734 (1963) which provides that the Double Jeopardy Clause bars a second prosecution if a prosecutor proceeds to trial aware that a key witness is not available to ive testimony and a mistrial is later ranted for that reason. *Id.* at 737; *see also Wash gto* 434 U.S. at 50 n.24. On this point the majority a rees with Defendant. I am similarly troubled that the overnment knew that Henke had received positive a COVID-19 test result before the trial be an but made no effort to inform defense counsel or the trial court. Therefore thou h I conclude Henke was not strictly unavailable to testify because she could have testified by video I a ree with the majority that the circumstance of Henke's positive COVID-19 test result provided no round for a mistrial. g

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As a las resor if he rial judge were unwilling or unable o make al erna ive arrangemen s for Henke's testimony, the trial judge should have permitted the trial to proceed without Henke as a witness. It is not unusual that a witness' attendance at trial may no be ob ainable due o he witness' unavailability—for any number of reasons. When a wi ness is no available barring unusual circums ances no presen here he rial cour normally proceeds wi hou he wi ness. This is especially so in a case such as his where he wi ness was no unavailable due o any ac ion of t he Defendan and where he governmen chose o proceed o rial knowing ha he wi ness migh t be unavailable.

B. *The Tr al Judge*

Similarly, the trial judge's potential exposure to COVID-19 provided no ground for a mis rial. A he November 2021 hearing he rial judge informed he par ies ha his spouse had es ed posi ive for COVID-19 he day before. The rial judge himself es ed nega ive for COVID-19 on a rapid es . Bu based on his exposure o his spouse he rial judge s a ed ha he did no think he should enter the courthouse "until [he] had at least a day or so of" negative test results. Hr'g Tr., R. 60, Page ID #510. In relying on his po en ial exposure o COVID-19 as a ground for declaring a mis rial he cour s a ed ha "cour room echnology was ill-sui ed for remo e presiding, as evidenced by the undersigned's reliance on courtroom staff to help conduct the hearing." Op. and Order R. 96 Page ID #1505. Fur her he cour no ed ha a magis ra e judge could no preside over a felony rial.

To start, the record reveals little about the true extent of the trial judge's unavailability to preside in-person a he rial. A he ime he cour decided o declare a mis rial he rial judge had aken only a rapid COVID-19 es which re urned a nega ive resul . The record con ains no indica ion ha he rial judge ever received a posi ive COVID-19 es resul . A he very leas he

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tri l judge could h ve briefly deferred his decision s to mistri l until he received the results from the more reli ble COVID-19 PCR test. This would h ve dispelled the uncert inty over whether the tri l judge could permissibly enter the courthouse nd preside over the tri l in-person. Though a the government st tes th t the COVID-19 protocols then in effect barred the trial judge's entrance to the courthouse due to his exposure to COVID-19 the protocols re silent on whether the tri l judge could h ve permissibly entered the courthouse fter receiving neg tive COVID-19 PCR test result despite his cl im of prior exposure.[2] It is re son ble possibility th t h d the tri l judge received neg tive COVID-19 PCR test result he in consult tion with the chief judge of the E stern District of Michig n could h ve been permitted to enter the courthouse to preside in-person over the tri l. Though the m jority dis grees it would h ve been entirely ppropri te for the district judge to seek the guid nce nd ssist nce from the chief judge in these circumst nces. a

Even were the tri l judge un ble to enter the courtroom bec use of COVID-19—which is not est blished on this record—the tri l judge could h ve presided over the proceedings remotely in smuch s the record does not indic te th t the tri l judge w s suffering from ny dverse symptoms due to COVID-19.

In the order denying Defendant's motion to dismiss, the trial judge summarily stated that "the courtroom technology w s ill-suited for remote ppe r nces." Op. and Order, R. 96, Page ID #1505. As evidence, the trial judge pointed to his "reliance on courtroom st ff to help conduct the he ring" on November 8, 2021. *Id.* But the trial judge's remote presiding on that day supports

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[2] Altern tively the tri l judge could h ve entered the courtroom to resume the tri l fter pl cing the tri l on hold for few d ys nd continuing to receive neg tive COVID-19 test results. (The Eastern District of Michigan's policy was less than clear, stating that anyone "exposed within the l st ten d ys" to COVID-19 w s not permitted to enter the courthouse but the policy f iled to state the length of time into the future that an "exposed" person was not permitted to enter the courthouse.)

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the o osite conclusion. At the hearing the trial judge a eared on a video screen s oke to the jurors, and listened to the jurors' responses through the courtroom's audio system. Far from showing the limits of courtroom technology, the trial judge's remote appearance at the hearing proved its basic functionality. As to the trial judge's reliance on courtroom staff to appear remotely there is no reason why the courtroom staff could not have assisted with the trial judge's remote appearance at the trial. Surely, facilitating a trial is a proper use of the courtroom staff's time.

Finally even if the trial judge could not have resided remotely—which he could have—he could have sought substitution of another district judge to reside over the trial in- erson. The Federal Rules of Criminal Procedure s ecifically rovide for substitution in the event of a trial judge's disability. Rule 25 states that, during trial, "[a]ny judge regularly sitting in or assigned to the court may com lete a jury trial if (1) the judge before whom the trial began cannot roceed because of death sickness or other disability; and (2) the judge com leting the trial certifies familiarity with the trial record." Fed. R. Crim. P. 25(a).

In this case the court did not raise to the arties substitution of judges as a ossibility and made no effort to discover whether another district judge was available to reside over the trial. The trial occurred in the Eastern District of Michigan to which twenty district judges are assigned. These judges' respective duty stations are all less than 120 miles from the courthouse in Bay City at which the trial occurred, or within a two hours' drive, and some of the judges may live significantly closer to Bay City. However the trial judge made no effort to inquire regarding their roximity to the trial location or their willingness or availability to attend a trial in that location. p
It is hard to fathom that the trial judge (with the aid and assistance of the district's chief judge)

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could ot have ide tified a si gle district judge out of the twe ty to preside over the trial i his stead.

Further the trial had o ly see a si gle day of testimo y a d the issues to be prese ted i Defendant's case were neither novel nor so complex that a substitute judge could ot have quickly grasped them. *See Camero* 953 F.2d at 245 (citi g *ted States v. Sartor* 730 F.2d 973 976 (4th Cir. 19 4)). Each district judge is well-versed i the Federal Rules of Evide ce a d Crimi al Procedure a d would have bee fully capable of steppi g i to assist u der these less tha ideal circumsta ces.

Though a district court " eed ot exhaustively co sider all possible alter atives before fi di g 'ma ifest ecessity' for a mistrial," *Ross* 515 F.3d at 669 the court erred by ot co sideri g substitutio of a other district judge to preside over the trial as provided for i Rule 25. Given the trial judge's failure to explore the substitution of another judge, and failure to wait the mi imal time ecessary to gai clarity about the status of his possible exposure to COVID-19 the trial judge's claimed possible exposure to COVID-19 provided o grou d for a mistrial.

2. Briefly Adjourning the Trial

Eve had the trial court stopped the trial—which for the reaso s discussed above the court had o basis to do a d should ot have do e—the trial court had a seco d obvious alter ative to a mistrial which was to co ti ue the trial to the later date of November 30 2021. The immi e t possibility of such a co ti ua ce u derscores the trial judge's improper exercise of discretion in declari g a mistrial. To start a co ti ua ce to this later date may well have allowed time for n Henke's COVID-19 infection and concerns about the trial judge's potential COVID-19 exposure to resolve. Thus it is e tirely possible that He ke would have bee available to testify i -perso i the courtroom a d the trial judge would have bee available to preside i -perso . With these

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suppos d barri rs out of th way th only r ason that r mains to xplain why a continuanc would have been impossible is the trial court's finding that an insufficient number of jurors would be availabl . Giv n th trial judge's deficient examination of the jurors' purported reasons for their unavailability on Nov mb r 30, 2021, the district court's finding lacks sufficient merit to deserve to b cr dit d.[3]

As a general matter, a district court has the power to excuse "any person summoned for jury service . . . upon a showing of undue hardship or extreme inconvenience." 2 U.S.C. § 1 66(c)(1). Examples of "undue hardship or extreme inconvenience" are "great distance, ith r in mil s or trav ltim [sic] from th plac of holding court" or "grave illness in the family" or e oth r m rg ncy. *Id.* § 1 69(j). Corr sponding with this statutorily provid d pow r is an obligation on th part of th trial court to v rify that a g nuin basis for th ass rt d hardship xists through inquiry of prosp ctiv jurors. *See Clevela d v. Clevela d Electr c Illum at g Co.*, 53 F. Supp. 1240 1256–57 (N.D. Ohio 19 0) (finding that abs nt agr m nt of th parti s a court should consid r hardship r qu sts individually and not m r ly grant th r qu st of v ry p rson who ass rts that jury s rvic in a protract d trial would caus p rsonal hardship).

Th r cord shows that th trial judg did not car fully consid r or int rrogat th jurors with r sp ct to th ir r spons s. Th conc rns about mploym nt and family obligations that th jurors r port d to th trial court ar commonplac on s as jury s rvic is oft n inconv ni nt for th citiz ns who ar call d upon to p rform it. *See Th el v. S. Pac. Co.* 32 U.S. 217 224 (1946) ("Jury s rvic is a duty as w ll as a privil g of citiz nship; it is a duty that cannot b shirk d on a e

[3] B caus th r w r thr alt rnativ jurors availabl th district judg pr sumably only n d d to id ntify two jurors who could continu with th trial out of th fiv who claim d that th y w r unavailabl in ord r to continu with th trial.

pl a of inconv ni nc or d cr as d arning pow r."). Other than inquiring generally about the jurors' availability, the court did not conduct any further inquiry that might have revealed whether these jurors could have shown "undue hardship or extreme inconvenience" that would have justifi d th ir xcusal from th proc dings.

In th nd th district court fail d to mak any individualiz d d t rmination of juror unavailability. Rath r th district court stat d g n raliti s about th unavailability of th jury as an ntity. Accordingly th district court mad no factual findings about juror unavailability which this Court may r vi w on app al.[4]

The district court's failure to conduct further inquiry, or to make individualized d t rminations of unavailability for ach juror would hav b n improp r in s l cting jurors in th first instanc . How v r in this cas th court was not s l cting jurors in th first instanc . Rath r th court had alr ady scr n d th prosp ctiv jurors and impan l d a jury of thos of whom it approv d. B caus th jurors had b n s l ct d to s rv on th cas and had s rv d for a full day of trial, the court bore additional responsibility to scrutinize the jurors' requests to be xcus d. This was sp cially so b caus granting mor than thr of th r qu sts would r quir th court to discharg th jury. If a court discharg s a jury wh n furth r proc dings may produc a fair v rdict th d f ndant is d priv d of his "valued right to have his trial compl t d by a

[4] The majority mischaracterizes the dissent's position with respect to this issu as stating that "a district court in this situation ordinarily should conduct the inquiry necessary to make an individualized determination regarding each juror's unavailability," and then proceeds to argue that th district court was not so obliged in this case because of defense counsel's supposed "concession" that adjournment was not feasible. Majority Op. at 10–11. R sp ctfully th diss nt contains no such general admonishment about a district court's duty in "ordinary" circumstances. Rath r—under the facts and circumstances of this case, and regardless of Defendant's position on th issu —th district judg fail d to fulfill his r sponsibility to conduct th prop r individual inquiry with r sp ct to ach of th fiv jurors b for th court.

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par icular ribunal." *Wash gto* 434 U.S. at 509. The court seemingly failed to pay heed to this legal principle in i s rea men of he jurors' purpor ed conflic s.

The majority claims that Defendant waived or forfeited this issue based on the following exchange:

> MR. MCDONALD [counsel for the United States]: Your honor it appears more than three of the jurors have conflicts with returning on November 30th from what I observed.
>
> THE COURT: Correct.
>
> Mr. MCDONALD: That means with the—even with the two—the hree al erna es, I don' hink we have enough for a full panel, Your Honor.
>
> THE COURT: I would agree. My belief is at this point that we need to mistry the case. The Government agree or disagree?
>
> MR. MCDONALD: Government agrees based on witness—or excuse me jury availability to return Your Honor.
>
> THE COURT: And defense?
>
> MR. AYAR [counsel for Thrush]: Defense agrees with the mistrial Your Honor but our position remains with respect to the jeopardy.

Hr'g Tr., R. 60, Page ID #519–520. The majority attempts to argue that defense counsel thereby agreed o a mis rial, bu leaves ou ha counsel's agreemen was coupled, immedia ely following, wi h a rei era ion of Defendan 's posi ion wi h respec o double jeopardy. Accordingly, Defendant never relinquished his position that declaring a mistrial would bar his retrial.

The principles of forfeiture and waiver facilitate appellate review by having a district court address all issues and arguments in the first instance. *See W i ett v. Caterp llar, I c.* 553 F.3d 1000 1007 (6th Cir. 2009). I am at a loss to understand how these principles apply in this case. The issue of juror unavailability was the sole matter the district court considered to inform its decision whether to adjourn the trial. Once the district court had stopped the trial whether to adjourn the trial or to declare a mistrial—to which Defendant steadfastly objected on double

jeopardy grounds—turned on the key inquiry of whether the jury was unavailable at the later date. Accordingly the district court squarely considered—and then ruled on—this issue. The district judge should not be given pass for simply ruling on the issue poorly—on the basis of forfeiture or waiver when these concepts do not apply under the circumstances.

In truth, Defendant's motive is not difficult to divine. Defendant maintained a consistent position throughout—he objected to mistrial on double jeopardy grounds. Having established this position stopping the trial would have benefited Defendant because it would have ended the jeopardy Defendant was indicted double jeopardy bar to future prosecution. Accordingly defense counsel cannot be faulted for asserting positions consistent with stopping the trial. Rather the district court must be relied on to persevere in protecting a defendant's "valued right to have his trial completed by particular tribunal," *Wade* 336 U.S. at 69 "until scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by continuation of the proceedings." *Jorn* 400 U.S. at 485. When defendant objects we expect the district court to overrule or sustain the objection on its merits and not merely resign itself to the defendant's wishes, as the district judge did here.

On this record the court was without basis to conclude that critical number of the jurors would have had to be excused and that therefore there would be an insufficient number of jurors a for continuation of the trial. Thus it was not adequately established on the record that there was a credible reason why the trial could not have continued on November 30 2021. For this additional reason the district court erred in declaring mistrial.

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CONC USION

The magnitude of the COVID-19 pandemic and the disruption it caused to our national life is well-recognized. Some of the measures considered herein—including hearing witness L testimony from a tent and substituting the trial judge—constitute extreme procedures which only extraordinary circumstances justify. However the exercise of sound discretion while conducting a trial under the extraordinary circumstances presented by the COVID-19 pandemic called for the consideration and application of creative solutions which would preserve a defendant's right against being twice placed in jeopardy a right fundamental to our scheme of justice. *Jo es* 732 F.2d at 54.

On examining the circumstances surrounding the discharge of this jury it seems abundantly apparent that the trial judge made no effort to exercise sound discretion to assure that taking all the circumstances into account there was a manifest necessity for the declaration of this mistrial. Therefore it is patently obvious that in the circumstances of this case Defendant's retrial will violate the Double Jeopardy Clause of the Fifth Amendment. I therefore respectfully dissent. L

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