COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJ-2024-

KAREN READ,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR RELIEF PURSUANT TO G.L. c. 211, § 3

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Now comes the Defendant Karen Read, who was aggrieved by an August 23, 2024, Memorandum of Decision and Order ("Order") denying her motion to dismiss on Double Jeopardy grounds in *Commonwealth v. Karen Read*, No. 22-00117 (Norfolk County Superior Court, Hon. Beverly J. Cannone). The Order, as it currently stands, will result in Ms. Read being retried on January 27, 2025, for the same two alleged crimes, including second-degree murder, that a jury of her peers has already unanimously agreed the Commonwealth failed to prove beyond a reasonable doubt following trial. Because the jury reached a final, unanimous decision to acquit Ms. Read on those charges, and because there was no manifest necessity supporting the declaration of a mistrial with respect to charges on which the jury unanimously agreed, retrial on such counts would violate the Double Jeopardy protections of both the federal and state constitutions and the common law decisions of this Court enforcing the protections of Double Jeopardy.

Ms. Read seeks relief from this Court through its discretionary superintendence powers under G.L. c. 211, § 3. In support of this petition, the defense has submitted a Memorandum of Law incorporated herein and has attached a record including the following documents:

a. Full docket report (R. 1-44);

b. Norfolk County Superior Court Indictment numbers 2282CR00117-001, 002, and 003 (R. 45-50);

c. Transcript of the charge to the jury, June 25, 2024 (R. 51-113);

d. Transcript of jury trial, June 26, 2024 (R. 114-36);

e. Defendant's motion to amend the jury verdict slip associated with Count 2 and supporting affidavit, filed June 26, 2024 (R. 137-45);

f. Transcript of jury trial, June 27, 2024 (R. 146-52);

g. Transcript of jury trial, June 28, 2024 (R. 153-63);

h. Transcript of jury trial, July 1, 2024 (R. 164-77);

i. Defendant's motion to dismiss and supporting affidavits, filed July 8, 2024 (R. 178-94);

j. Defendant's supplemental memorandum in support of her motion to dismiss and supporting affidavit, filed July 10, 2024 (R. 195-200);

k. Commonwealth's opposition to defendant's post-trial motion to dismiss, filed July 12, 2024 (R. 201-15);

l. Defendant's reply to the Commonwealth's opposition to her motion to dismiss, filed July 15, 2024 (R. 216-25);

m. Defendant's second supplemental memorandum in support of her motion to dismiss and supporting affidavit, filed July 18, 2024 (R. 226-30);

n. Commonwealth's post-trial notice of disclosure, filed August 1, 2024 (R. 231-32);

o. Defendant's third supplemental memorandum in support of her motion to dismiss and supporting affidavit, filed August 5, 2024 (R. 233-37);

p. Transcript of non-evidentiary hearing on motion to dismiss, August 9, 2024 (R. 238-93); and

q. Memorandum of decision and order on defendant's motion to dismiss, issued August 23, 2024 (R. 294-314).

Under G.L. c. 211, § 3, the Supreme Judicial Court has

> general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts . . . which may be necessary to the furtherance of justice and to the regular execution of the laws.

"[A] criminal defendant who raises a double jeopardy claim of substantial merit is entitled to review of the claim before [s]he is retried," and "G.L. c. 211, § 3, is the appropriate route for obtaining that review." *Papp v. Commonwealth*, 491 Mass. 1019, 1019 (2023) (citation omitted). "[B]ecause the double jeopardy right is a *right not to be tried*," this Court has "held that appellate review of [the denial of a motion to dismiss on that basis] after trial and conviction

would not provide adequate relief if the defendant were to prevail . . . ." *Flood v. Commonwealth*, 465 Mass. 1015, 1016 (2013) (citation omitted); *see also Abney v. United States*, 431 U.S. 651, 660-61 (1977) ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. . . . [T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.").

REQUEST FOR ORAL ARGUMENT

Ms. Read respectfully requests that the Court hold oral argument on this petition.

INTRODUCTION

The ancient right to a jury trial is no mere "procedural formalit[y] but [rather a] fundamental reservation[] of power to the American people." *Erlinger v. United States*, 144 S. Ct. 1840, 1850 (2024) (citation omitted). "By requiring the Executive Branch to prove its charges to a unanimous jury beyond a reasonable doubt, the Fifth and Sixth Amendments seek to mitigate the risk of prosecutorial overreach and misconduct, including the pursuit of 'pretended offenses' and 'arbitrary convictions.'" *Id.* (quoting The Federalist No. 83, p. 499 (C. Rossiter ed. 1961)). "Prominent among the reasons colonists cited in the Declaration of Independence for their break with Great Britain was the fact Parliament and the Crown had 'depriv[ed] [them] in many cases, of the benefits of Trial by Jury.'" *Id.* at 1848 (citation omitted). "After securing their independence, the founding generation sought to ensure what happened before would not happen again. As John Adams put it, the founders saw representative government and trial by jury as 'the heart and lungs' of liberty." *Id.* (citation omitted). It follows that a jury acquittal is

entitled to the utmost respect in our criminal justice system. *See Commonwealth v. Taylor*, 486 Mass. 469, 481 (2020) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)).

"The Double Jeopardy Clause provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Blueford v. Arkansas*, 566 U.S. 599, 605 (2012) (quoting U.S. Const., Amdt. 5). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green v. United States*, 355 U.S. 185, 187 (1957). "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which [s]he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. . . . Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 504-05 (1978) (internal footnotes omitted); *see also Martin Linen*, 430 U.S. at 569 ("At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."); *Blueford*, 566 U.S. at 605 ("The Clause guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting h[er] to embarrassment, expense and ordeal and compelling h[er] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [s]he may be found guilty." (citation omitted)).

Here, the very day after the trial court declared a mistrial, counsel for Ms. Read began receiving unsolicited communications from five of the twelve deliberating jurors (in four instances, directly from the jurors themselves) indicating in no uncertain terms that the jury had a firm and unwavering 12-0 agreement that Ms. Read is ***not guilty*** of two of the three charges against her, including the charge of murder in the second degree. Crucially, neither the Commonwealth, which frankly acknowledged receiving communications from one juror to the same effect, nor the Superior Court judge, who expressly credited the veracity of juror statements relayed in affidavits by counsel, disputed the factual basis for the defense motion in any meaningful respect. Given the central importance that acquittals have held in our criminal justice system for hundreds of years, the defense respectfully submits that the jury's unanimous agreement precludes re-prosecution of Ms. Read on Counts 1 and 3 and mandates dismissal of those charges. This presents an issue of first impression for this Court, as does the defense's alternative contention that Ms. Read was entitled to a post-verdict inquiry to substantiate her claim and that this Court's precedents permitting such inquiry regarding claims of racial bias should be extended to the present context.

Independently, while a jury deadlock constitutes manifest necessity to support a mistrial, there is no authority for the proposition that disagreement as to ***some counts*** constitutes manifest necessity for the declaration of a mistrial with respect to ***all counts***. Put another way, there was no deadlock as to two of the counts on which the trial court declared a mistrial. The trial court's finding that Ms. Read's counsel consented to the mistrial is contrary to both the factual record and the clear binding caselaw placing the burden of establishing manifest necessity solely and exclusively on the prosecution. The trial court also failed to address the two guiding principles set forth by this Court in *Taylor* – that before a mistrial is declared "(1) counsel must [have been]

given full opportunity to be heard and (2) the trial judge must [have given] careful consideration to alternatives to a mistrial." 486 Mass. at 484 (citation omitted). Thus, whether the jury acquitted Ms. Read or, alternatively, was merely not deadlocked on the relevant counts, the Constitution requires the same result: dismissal. The Commonwealth's response on this issue, arguing that inquiry regarding partial verdicts should be prohibited under case law involving lesser included offenses within a single count (unlike the present case), raises an important issue regarding the interaction between that lesser included offense case law and Mass. R. Crim. P. 27(b), which plainly permits, and in fact requires, the court, before declaring a mistrial, to inquire of a jury whether there exist partial verdicts where multiple offenses are charged in separate counts.

PROCEDURAL HISTORY

On June 9, 2022, Ms. Read was charged in three separate indictments with second-degree murder in violation of G.L. c. 265, § 1 (Count 1); manslaughter while operating under the influence of alcohol in violation of G.L. c. 265, § 13½ (Count 2); and leaving the scene of a collision resulting in death in violation of G.L. c. 90, § 24(2)(a½)(2). (R. 45-50). A jury trial began on April 16, 2024.

On June 25, 2024, the jury began deliberations after receiving instructions from the trial court. The court instructed the jurors, "You should continue deliberating until you have reached a final verdict on each charge." June 25, 2024 Tr. at 46 (R. 96). It also noted that Count 2 contained "lesser include[d] charge[s]" of involuntary manslaughter and motor vehicle homicide, which the jury should consider "even if [the Commonwealth] fail[ed] to prove the greater charge of manslaughter while operating a motor vehicle under the influence of liquor." *Id.* at 35, 38 (R. 85, 88).

The following day, on June 26, 2024, outside the presence of the jury, counsel for Ms. Read raised an issue regarding the verdict form. With respect to Count 2, the original verdict slip provided only one option to find Ms. Read not guilty before going on to ask whether Ms. Read was guilty of the offense charged, or guilty of one of the two lesser included offenses. *See* Exhibit B to Affidavit in Support of Motion to Amend Jury Verdict Slip (R. 145). Counsel asked that the form be amended to provide "not guilty options for the subordinate charges under Count 2." June 26, 2024 Tr. at 5 (R. 118). The trial court initially indicated its disagreement with counsel's request. *See id.* at 8 (R. 121). However, after considering the matter further, the court agreed to provide supplemental instructions and an amended verdict slip. *See id.* at 9-14 (R. 122-27). Later that day, the court provided the supplemental instructions, telling jurors that "Count 2 encompasses three separate charges, the most serious of which is manslaughter while operating a vehicle under the influence of liquor." *Id.* at 16 (R. 129). The jury should first focus on that "lead charge" and, "if the Commonwealth . . . failed to prove that crime beyond a reasonable doubt, then . . . consider the remaining lesser included offenses in descending order." *Id.* (R. 129).

On June 28, 2024, the jury sent the following note to the court: "I am writing to inform you on behalf of the jury that despite our exhaustive review of the evidence and our diligent consideration of all disputed evidence, we have been unable to reach a unanimous verdict." June 28, 2024 Tr. at 4 (R. 156). The court asked counsel for their views "on whether there ha[d] been due and thorough deliberations" sufficient to support the giving of a so-called *Tuey-Rodriguez* charge. *Id.* at 5 (R. 157); *see also* G.L. c. 234A, § 68C (permitting charge "[i]f a jury, after due and thorough deliberation, returns to court without having agreed on a verdict"). The Commonwealth responded that the charge should not be given because there "simply ha[d]n't

been sufficient time yet." June 28, 2024 Tr. at 5 (R. 157). Counsel for Ms. Read disagreed, requesting that the court "read the *Tuey-Rodriguez* model instruction and go from there." *Id.* at 6 (R. 158). The trial court sided with the Commonwealth ruling, "I am not prepared to find that there have been due and thorough deliberations at this point. So I am going to send them back out." *Id.* at 7 (R. 159).

On July 1, 2024, the jury presented another note, stating:

> despite our commitment to the duty entrusted to us, we find ourselves deeply divided by fundamental differences in our opinions and state of mind. The divergence in our views are not rooted in a lack of understanding or effort but deeply held convictions that each of us carry, ultimately leading to a point where consensus is unattainable. We recognize the weight of this admission and the implications it holds.

July 1, 2024 Tr. at 7 (R. 170). Upon being asked by the court, the parties reiterated their same previously expressed views, with the Commonwealth taking the position that due and thorough deliberations had not yet occurred and Ms. Read's counsel arguing that the court should give a *Tuey-Rodriguez* instruction. *See id.* at 4-6 (R. 167-69). This time, the trial court decided to give the requested instruction.

Later that day, the jury sent yet another note. Thereafter, without reading the note to counsel, and without providing counsel with either an opportunity to be heard or an opportunity to consult with their client about the implication of a potential mistrial on one or more charges, the trial court simply stated, "The jury is at an impasse" and called in the jurors. *Id.* at 10 (R. 173). It then read the note on the record:

> despite our rigorous efforts, we continue to find ourselves at an impasse. Our perspectives on the evidence are starkly divided. Some members of the jury firmly believe that the evidence surpasses the burden of proof, establishing the elements of the charges beyond a reasonable doubt. Conversely, others find the evidence fails to meet this standard and does not sufficiently

> establish the necessary elements of the charges. The deep division is not due to a lack of effort or diligence but, rather, a sincere adherence to our individual principles and moral convictions. To continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs.

Id. at 11 (R. 174).

After reading the note, and without soliciting the views of counsel in any respect, the trial court stated, "I am not going to do that to you, folks. Your service is complete. I am declaring a mistrial in this case." *Id.* (R. 174). The jury was then excused and ordered to leave the courtroom. Counsel was not invited to speak during this entire interaction. *See id.* (R. 174).

The following day, on July 2, 2024, unsolicited by any party, one of the jurors ("Juror A") contacted one of the attorneys for Ms. Read, Alan Jackson. Juror A stated that s/he "wish[ed] to inform [Attorney Jackson] of the true *results*" of the jury's deliberations. Affidavit of Alan J. Jackson ¶ 4 (R. 192). According to Juror A, "the jury unanimously agreed that Karen Read is NOT GUILTY of Count 1 (second degree murder). Juror A was emphatic that Count 1 (second degree murder) was 'off the table,' and that all 12 of the jurors were in agreement that she was NOT GUILTY of such crime." *Id.* ¶ 5 (R. 193). "[T]he jury also unanimously agreed that Karen Read is NOT GUILTY of Count 3 (leaving the scene with injury/death)." *Id.* ¶ 6 (R. 193).

One day later, on July 3, 2024, another attorney for Ms. Read, David Yannetti, was contacted by "two different individuals (hereinafter, 'Informant B' and 'Informant C') who had received information from two distinct jurors (hereinafter 'Juror B' and 'Juror C') both of whom were part of the deliberating jury in this case." Affidavit of David R. Yannetti ¶ 2 (R. 189).

Informant B sent Attorney Yannetti "a screenshot he/she had received from someone (hereinafter, 'Intermediary B') of text messages that Intermediary B had received from Juror B.

In that screenshot, Juror B texted the following to Intermediary B: 'It was not guilty on second degree. And split in half for the second charge. . . . I thought the prosecution didn't prove the case. No one thought she hit him on purpose or even thought she hit him on purpose [sic].'" *Id.* ¶ 4 (R. 189). Juror B later placed an unsolicited phone call to Attorney Yannetti, confirming that the information contained in the publicly filed Affidavit was accurate. *See* Supplemental Affidavit of David R. Yannetti ¶ 4 (R. 236). "Juror B clarified, however, that he/she meant to write, 'No one thought she hit him on purpose or even knew that she had hit him.'" *Id.* (R. 236-37). Juror B further told Attorney Yannetti s/he "believe[d] that every member of the jury, if asked, w[ould] confirm that the jury reached Not-Guilty verdicts on indictments (1) and (3)." *Id.* ¶ 5 (R. 237).

Informant C had been in contact with another individual ("Intermediary C") who is a co-worker and friend of Juror C and joined a Zoom meeting during which Juror C discussed the trial. Informant C sent Attorney Yannetti the below screenshots of his/her text messages with Intermediary C regarding what Juror C revealed in the Zoom meeting:

Intermediary C:	"no consideration for murder 2. manslaughter started polling at 6/6 then ended deadlock @ 4no8yes."
. . . .	
Informant C:	"interesting. if it was no consideration for murder two, shouldn't she have been acquitted on that count. and hung on the remaining chargers [sic] goes back to the jury verdict slip that was all confusing"
Intermediary C:	"she should've been acquitted I agree. Yes, the remaining charges were what they were hung on. and that instruction paper was very confusing."

Affidavit of David R. Yannetti ¶ 10 (R. 190-91).

Ms. Read moved to dismiss Counts 1 and 3 on Double Jeopardy grounds, contending (1) that the jury reached a final, unanimous decision to acquit her on those charges; and (2) that there was no manifest necessity supporting the mistrial given the evidence that the jury was not deadlocked, but was instead in agreement, on those counts.

In the ensuing days, after the filing of Ms. Read's initial motion to dismiss, but before the Superior Court hearing on that motion, Attorney Jackson was contacted by two other deliberating jurors. The first, "Juror D," stated "that the jury reached NOT GUILTY verdicts on Count 1 and Count 3, and that the disagreement was solely as to Count 2 and its lesser offenses." Supplemental Affidavit of Alan J. Jackson ¶ 5 (R. 199). S/he recounted that, "after the jury was excused and aboard the bus, many of the jurors appeared uncomfortable with how things ended, wondering, *Is anyone going to know that we acquitted [Karen Read] on Count 1 and 3?*" *Id.* ¶ 8 (R. 199). Juror D unequivocally told counsel, "*Every one of us will agree and acknowledge that we found [Karen Read] NOT GUILTY of Counts 1 and 3. Because that's what happened.*" *Id.* ¶ 10 (R. 199). "Juror E" similarly stated "that the jury was 'unanimous on 1 and 3' that Karen Read was NOT GUILTY of those charges." Second Supplemental Affidavit of Alan J. Jackson ¶ 4 (R. 229).

The Commonwealth filed a Post-Trial Notice of Disclosure informing the Court that, "[o]n Sunday July 21, 2024, Assistant District Attorney Adam Lally received an unsolicited voicemail on his office's phoneline from an individual, who identified their self as a juror by full name and seat number." Commonwealth Notice at 1 (R. 231). The message stated, "it is true what has come out recently about the jury being unanimous on charges 1 and 3." *Id.* (R. 231). ADA Lally received a subsequent message from the same individual stating he could "confirm

unanimous on charges one and three, as not guilty and as of last vote 9-3 guilty on the manslaughter charges . . . ." *Id.* (R. 231). The Commonwealth additionally "received emails from three individuals who identified themselves as jurors" and "indicated they wished to speak anonymously." *Id.* (R. 231). The Commonwealth declined to substantively respond to the voice messages or emails, instead claiming in responsive emails that it was ethically prohibited from discussing such matters. *See id.* (R. 231).

After hearing oral argument on August 9, 2024, on August 23, the trial court issued an order denying Ms. Read's motion to dismiss. The court "accept[ed]," "for the purposes of" the motion to dismiss, that ***the juror statements quoted in the defense affidavits were "true and accurate."*** Order at 9 (R. 302) (emphasis added). It went on to hold, however, that "[b]ecause there was no open and public verdict affirmed in open court rendered in this case, the defendant was not acquitted of any of the charges." *Id.* at 10 (R. 303). The court similarly rejected the defense argument regarding lack of manifest necessity, finding that (a) Ms. Read's counsel consented to a mistrial via their failure to object; and (b) the jury notes reflecting an "impasse" established the requisite manifest necessity. *See id.* at 15-16 (R. 308-09). The court did not address the *Taylor* test for declaring a mistrial based on manifest necessity, nor did it address Ms. Read's contention that the burden of demonstrating manifest necessity is squarely on the prosecutor. The court instead erroneously equated a request for a *Tuey-Rodriguez* instruction, which is designed to encourage a ***verdict***, with consent to a ***mistrial***. Finally, the court rejected the defense's alternative request for a post-trial inquiry on these issues on the grounds that the request implicated "the substance of the jury's deliberations." *Id.* at 20 (R. 313).

Ms. Read's retrial is currently scheduled to begin on January 27, 2025. (R. 8).

MEMORANDUM OF LAW

I. The Jury's Unanimous Conclusion Following Trial that Ms. Read Is Not Guilty on Counts 1 and 3 Constitutes an Acquittal and Precludes Re-Prosecution

"[W]hat constitutes an 'acquittal' is not to be controlled by the form" of the action in question. *Taylor*, 486 Mass. at 482 (quoting *Martinez v. Illinois*, 572 U.S. 833, 841-42 (2014)). "Rather, [the Court] must determine whether" the action "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Commonwealth v. Babb*, 389 Mass. 275, 281 (1983) (quoting *Martin Linen*, 430 U.S. at 571). The mere presence or absence of "checkmarks on a form" is not dispositive. *Taylor*, 486 Mass. at 482 (citation omitted).

Here, the affidavits by Attorneys Jackson and Yannetti reflect statements by five deliberating jurors that the jury had reached a final, unanimous conclusion that Ms. Read is not guilty of Counts 1 and 3. There was nothing tentative about the jurors' statements. To the contrary, they were definitive in describing the result of the jury's deliberations. *See* Affidavit of Alan J. Jackson ¶ 5 (R. 193) ("Juror A was emphatic that Count 1 (second degree murder) was 'off the table,' and that all 12 of the jurors were in agreement that she was NOT GUILTY of such crime."); Affidavit of David R. Yannetti ¶ 4 (R. 189) (reflecting text message from Juror B, "It was not guilty on second degree. . . . No one thought she hit him on purpose or even [knew that she had hit him]"); *Id.* ¶ 10 (R. 190-91) (reflecting Juror C's statement, relayed by Intermediary C, that there was "no consideration for murder 2" and Ms. Read "should've been acquitted" on that count); Supplemental Affidavit of Alan J. Jackson ¶ 10 (R. 199) ("Juror D, without hesitation, said in substance, *Every one of us will agree and acknowledge that we found [Karen Read] NOT GUILTY of Counts 1 and 3. Because that's what happened.*"); Second Supplemental Affidavit of Alan J. Jackson ¶ 4 (R. 229) ("Juror E explained that the jury was

'unanimous on 1 and 3' that Karen Read was NOT GUILTY of those charges."). As noted above, the trial court accepted the foregoing averments as true facts. *See* Order at 9 (R. 302).[1]

In rejecting Ms. Read's claim of acquittal, the court relied solely upon the lack of an "open and public verdict affirmed in open court." Order at 10 (R. 303). This reasoning is rooted in a formalism that has been consistently rejected by the United States Supreme Court and Supreme Judicial Court in a string of precedents spanning more than one hundred years. *See supra* page 13 (citing cases); *Ball v. United States*, 163 U.S. 662, 671 (1896) ("However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."); *Hudson v. Louisiana*, 450 U.S. 40, 41 & n.1 (1981) (holding that judicial grant of new trial prohibited retrial on Double Jeopardy grounds, notwithstanding that the state "Code of Criminal Procedure d[id] not authorize trial judges to enter judgments of acquittal in jury trials").

Indeed, under the trial court's reasoning, affidavits executed by all 12 jurors attesting to a final, unanimous decision to acquit would not be sufficient to mount a successful Double Jeopardy challenge. Surely, that cannot be the law. Indeed, it ***must*** not be the law. And, in the context of this highly publicized case, it strains credulity to suggest that, if the unequivocal statements of five jurors quoted above did not, in fact, represent the unanimous view of all 12, the remaining jurors would allow the inaccuracy to go uncorrected. Instead, they would

[1] Just days ago, an article was published online reflecting an interview with an anonymous juror quoted as saying, "It was very clear on charge 1 and 3. Murder was decided on day one. She did not have an intent to murder." Aidan Kearney, *Canton Coverup Part 397: Karen Read Juror Says They Switched on Manslaughter Verdict, Confirms Murder Acquittal, Says Jurors Couldn't Ask Judge Cannone Questions About 2 Verdicts* (Sept. 6, 2024), *available at* https://tbdailynews.com/canton-coverup-part-397-karen-read-juror-says-they-switched-on-manslaughter-verdict-confirms-murder-acquittal-says-jurors-couldnt-ask-judge-cannone-question-about-2-verdicts/.

predictably have notified the Commonwealth or the court of their own recollection. Here, to the contrary, the Commonwealth has received the exact same information as the defense regarding the jury's unanimous agreement to acquit Ms. Read on Counts 1 and 3.

The United States Supreme Court's decision in *Blueford* is not to the contrary, as it is factually distinguishable from the instant case. There, the foreperson had reported during deliberations that the jury "was unanimous against" the charges of capital murder and first-degree murder but split on manslaughter. 566 U.S. at 603-04. The court sent the jury back to continue deliberations and, when the jury remained unable to reach a verdict, declared a mistrial. *See id.* at 604. The Supreme Court rejected the defendant's argument that the Double Jeopardy Clause prohibited re-prosecution for capital and first-degree murder. In doing so, the Court relied heavily upon the lack of finality of the juror's report. "[T]he jury's deliberations had not yet concluded," and it "went back to the jury room to deliberate further." *Id.* at 606. "The foreperson's report was not a final resolution of anything," and there was no indication at the conclusion of deliberations that "it was still the case that all 12 jurors believed [the defendant] was not guilty of capital or first-degree murder." *Id.* Here, by contrast, the jurors' statements reflect a final and indelible determination that persisted through the end of deliberations and following.

The contrast with *A Juvenile v. Commonwealth*, 392 Mass. 52 (1984), is even clearer. In that case, after the conclusion of trial, a court officer found four verdict slips in the deliberation room, two of which reflected entries of "not guilty." There was no indication as to when the entries were made or in what circumstances, much less that they reflected a final, unanimous conclusion of all jurors.

Neither the Commonwealth nor the trial court has cited any case in which a defendant was forced to stand trial a second time for an offense a previous jury had found her not guilty of simply because such final, unanimous agreement was not announced in open court. *See* Aug. 9, 2024 Tr. at 18 (R. 255) (counsel arguing that Commonwealth had not cited "a single case with facts like this [that] have been ignored. Not a single precedent have they raised, nationwide, State Courts, murder cases, 50 States, [f]ederal, where there's been this kind of demonstration that we were silent when we shouldn't be, but she was acquitted").[2] The instant case squarely presents that issue, and the defense respectfully submits that this Court should hold that any lack of formality does not supersede the defendant's fundamental constitutional protections. This issue is one of existential importance—not merely to Ms. Read, but to the very foundation of the constitutional safeguards that protect her.

II. Alternatively, the Defense Is at Least Entitled to Conduct Post-Verdict Inquiry

The law is clear that, at least in the context of "juror bias," an affidavit by counsel is sufficient to entitle the defendant to a "post-verdict inquiry" on the issue. *Commonwealth v. McCalop*, 485 Mass. 790, 798 (2020) (citation omitted). No less than the right to an unbiased jury, it is "a fundamental tenet of our system of justice" that a defendant may not be retried for a crime of which she was previously acquitted by a jury, and the defense submits that post-verdict

[2] Other cases cited by the trial court on this issue did not involve Double Jeopardy challenges at all. *See Commonwealth v. Zekirias*, 443 Mass. 27, 31-34 (2004); *Commonwealth v. Floyd P.*, 415 Mass. 826, 830-32 (1993). Instead, these cases both vacated convictions where courts responded to ambiguous communications by jurors in such a way as to improperly influence the return of guilty verdicts. Given the gravity of criminal conviction, it makes sense to insist on observance of procedural formalities before taking away a defendant's liberty. However, in light of the fundamental constitutional prohibition on Double Jeopardy, refusing to give effect to a verdict of acquittal due to lack of formality is another matter altogether for which neither the Commonwealth nor the trial court has cited any precedent. Additionally, unlike in *Zekirias* and *Floyd P.*, there is nothing ambiguous or tentative about the post-trial evidence of verdicts here.

inquiry is equally warranted in the present context. *Id.* Other than generally noting that this case does not involve an allegation of juror bias, the trial court did nothing to distinguish *McCalop*.

But there is no apparent reason to limit a defendant's entitlement to a post-trial inquiry to the issue of racial bias alone. Recently, in *United States v. Tsarnaev*, 96 F.4th 441, 449 (1st Cir. 2024), the First Circuit Court of Appeals remanded the matter for further proceedings in the Boston Marathon bombing case due to two jurors' postings on social media "regarding the bombings and the district court proceedings," which came to light after the jurors had been provisionally selected to serve. *Id.* at 449. The comments did not reflect racial bias in any way, but rather possible bias specific to the defendant. *See id.* at 454, 461. The comments were also inconsistent with the jurors' assurances that they had not discussed the case online. *See id.* at 455, 461. The First Circuit held that the district court erred by ***failing to inquire*** about these issues with the jurors. *See id.* at 458, 462. Given that "[t]he right to an impartial jury is a constitutional bedrock[,] . . . when there is a plausible claim that a prospective juror lied in a manner that may reveal bias, a court need conduct some inquiry reasonably calculated to determine whether the prospective juror did lie and, if so, why." *Id.* at 458 (citation omitted).

Crucially for present purposes, the First Circuit ordered the district court to *voir dire* the jurors. In doing so, the court acknowledged, "[n]o doubt any juror would have strong incentives to avoid admitting having committed perjury during voir dire. We also expect that most jurors, having taken time out of their daily lives to receive evidence at trial, deliberate with other jurors, and reach a verdict that they believe is just, would prefer not to have that verdict disturbed – especially as a result of their own actions. . . . . [W]e have no doubt that the able district court judge can do what judges regularly do – form a considered opinion about the sufficiency of the jurors' explanations once those explanations are given and explored." *Id.* at 464.

In another high-profile case, the South Carolina Supreme Court recently agreed to hear claims by Alex Murdaugh that, during his murder trial, the clerk of court improperly influenced deliberating jurors. *See State v. Murdaugh*, No. 2023-000392 (Aug. 13, 2024), Order attached hereto as Exhibit A. Jurors came forward after the clerk published a book about the trial describing her "efforts to obtain" a "guilty verdict through improper jury tampering." Brief of Appellant (attached hereto as Exhibit B) at 2. The clerk allegedly told jurors after the defense began its case "not to let the defense 'throw you all off,' or 'distract you or mislead you,'" and warned them "'not to be fooled' by Mr. Murdaugh's testimony in his own defense." *Id.* The trial court held an evidentiary hearing on the motion for new trial, including testimony by jurors. *See id.* at 4-8. As in *Tsarnaev*, the issue was not racial bias, but nonetheless implicated fundamental constitutional rights like Ms. Read's right not to be retried for offenses of which she has already been acquitted.

The trial judge dismissed Ms. Read's reliance upon *Tsarnaev* and *Murdaugh* in a brief footnote, simply stating that the circumstances "are readily distinguishable" from those at issue here. Order at 21 (R. 314). But this misses the forest for the trees. While it is certainly true that all three cases raise different issues, the fundamental point remains the same: a defendant who comes forward with credible evidence of a serious constitutional violation post-trial is entitled to an opportunity to prove those claims. There is no apparent reason to artificially limit the availability of such constitutional inquiry to the singular context of racial bias.

The defense request does not, in any manner, infringe upon "the substance of the jury's deliberations." Order at 20 (R. 313). To the contrary, the motion to dismiss was predicated solely upon the ***result*** of such deliberations, namely a unanimous decision that Ms. Read is not guilty of murder in the second degree. The relevant inquiry could be accomplished by a single

"yes" or "no" question posed to jurors: *did you unanimously acquit Karen Read of the charges in Counts 1 and 3*? Of course, the results of a jury's deliberations are not secret. They are, in fact, routinely announced in open court. Here, the defense has learned post-trial that the jury reached a verdict that was not so announced. It was at least entitled to the opportunity to substantiate that fact in order to ensure Ms. Read is not unconstitutionally forced to stand trial for criminal offenses of which she has already been acquitted. Such inquiry in no way intrudes on the deliberative process of the jury.

Indeed, it was the trial court, not the defense, that injected issues regarding jury deliberations into the inquiry. It is simply not true that, "given the content of the jury's final note to the Court, . . . [a]ny inquiry would necessarily require the Court to understand why the jury's final note communicated a deadlock on charges when post-trial, certain deliberating jurors are purportedly stating that the jury was, in fact, unanimous on most of the charges." Order at 20 (R. 313). As explained *infra* pages 28-29, in light of the trial court's instructions repeatedly characterizing the lesser included offenses within Count 2 as discrete "charges," the jury's note is readily susceptible to interpretation consistent with the post-trial evidence supporting the defense motion.[3] In any event, if the jurors state that they acquitted Ms. Read, no further inquiry

[3] This distinguishes the case from *A Juvenile*, where the jury foreman had expressly indicated "that the jurors were deadlocked on the complaint which charged murder," and the jurors subsequently reaffirmed that fact in open court. 392 Mass. at 53. In these circumstances, a post-trial subpoena to the foreman regarding verdict slips recovered from the deliberation room after trial regarding that very count "could only be aimed" at impermissible "impeachment, months after the fact, of the jury's report to the judge in open court." *Id.* at 57. Here, by contrast, no statement or inquiry was made regarding whether the impasse related to any specific count. *Cf. also Fuentes v. Commonwealth*, 448 Mass. 1017, 1018 (2007) (jury note expressly "stated that the jury could not reach a unanimous verdict as to either" of the two indictments).

regarding the contents of the jury note could possibly remove the clear constitutional implications of such acquittal.[4]

III. Re-Prosecution Is Independently Barred Because There Was No Manifest Necessity to Declare a Mistrial on Counts on which the Jury Was Not Deadlocked

Absent the defendant's consent, "State and Federal double jeopardy protections bar, 'as a general rule,' retrial of a defendant whose initial trial ends . . . without a conviction." *Ray v. Commonwealth*, 463 Mass. 1, 3 (2012) (quoting *Washington*, 434 U.S. at 505). This rule is rooted in "the importance to the defendant of being able, once and for all, to conclude h[er] confrontation with society through the verdict of a tribunal [s]he might believe to be favorably disposed to h[er] fate." *Cruz v. Commonwealth*, 461 Mass. 664, 670 n.9 (2012) (quoting *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion)); *see also Taylor*, 486 Mass. at 483 ("[T]he [d]ouble [j]eopardy [c]lause affords a criminal defendant a 'valued right to have h[er] trial completed by a particular tribunal.'" (quoting *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982)). "Thus, where a mistrial is entered 'without the defendant's request or consent,' retrial is impermissible unless there was a manifest necessity for the mistrial." *Id.* (quoting *United States v. Dinitz*, 424 U.S. 600, 606-07 (1976)).

Importantly, the "heavy" burden of establishing "manifest necessity" to justify a mistrial is ***exclusively*** on the Commonwealth. *Commonwealth v. Nicoll*, 452 Mass. 816, 818 (2008) (quoting *Washington*, 434 U.S. at 505); *see also Commonwealth v. Steward*, 396 Mass. 76, 79 (1985). And this burden remains solely upon the Commonwealth regardless of whether or not a

[4] In *Commonwealth v. DiBenedetto*, 94 Mass. App. Ct. 682, 688 (2019), the defense argument that the jury's verdict (which had just been announced in open court) was not, in fact, unanimous depended upon "juror testimony concerning internal deliberations," namely "that they misunderstood the unanimity instruction." *DiBenedetto* also preceded this Court's opinion in *McCalop*, and therefore must be disregarded to the extent the Court perceives an inconsistency between the two.

defendant objects to the declaration of a mistrial. *See Nicoll*, 452 Mass. at 818; *Commonwealth v. Horrigan*, 41 Mass. App. Ct. 337, 340 (1996). Before a court declares a mistrial for manifest necessity, "(1) counsel must [have been] given full opportunity to be heard and (2) the trial judge must [have given] careful consideration to alternatives to a mistrial." *Taylor*, 486 Mass. at 484 (citation omitted).

Here, the defense respectfully submits that the lack of opportunity to be heard, alone, is dispositive. Upon receiving the final jury note, the court declared a mistrial and excused the jury without consulting counsel. This action "was sudden, brief, and unexpected, neither preceded nor accompanied by discussion with counsel." *Horrigan*, 41 Mass. App. Ct. at 341; *see also Picard v. Commonwealth*, 400 Mass. 115, 118-19 (1987) (finding no manifest necessity where "[n]o opportunity was given counsel to argue the propriety of the question or of the necessity of a mistrial"); *Steward*, 396 Mass. at 79 (finding no manifest necessity where "the trial judge . . . first ruled that he was going to declare a mistrial and then, almost as an afterthought, unenthusiastically asked whether counsel objected"). The defense was provided no opportunity to object to the declaration of a mistrial, or to advise the court of the imperatives of Mass. R. Crim. P. 27(b), request that the jury be polled, or discuss the issue with Ms. Read.

The defense respectfully submits that, given the importance of Double Jeopardy protections and the profound implications of a retrial for a criminal defendant, an opportunity to be heard must, in order to be meaningful, occur after a reasonable opportunity for counsel to consult with their client. *Cf. Gonzalez v. United States*, 553 U.S. 242, 250-51 (2008) (observing that "some basic trial choices," including the choices "to plead guilty, waive a jury, testify in . . . her own behalf, or take an appeal," "are so important that an attorney must seek the client's consent in order to waive the right." (citation omitted)); *see also* Aug. 9, 2024 Tr. at 24 (R. 261)

(arguing that counsel had "no opportunity . . . to speak to Ms. Read, after all, it's her rights, not theirs"). Counsel for Ms. Read clearly had no such opportunity here.[5] Whether or not the trial court was obligated to obtain Ms. Read's personal consent,[6] its failure to at least ensure that counsel had an opportunity to consult with Ms. Read on the issue undermines the existence of manifest necessity.

The record is independently lacking on the second prong, as it reflects no "careful consideration" of "alternatives to a mistrial." *Taylor*, 486 Mass. at 484 (citation omitted). Here, there was one obvious alternative: to simply ask the jury to specify the charge(s) on which it was deadlocked. This option is apparent from the face of Mass. R. Crim. P. 27(b) which states that "[t]he judge may declare a mistrial as to any charges upon which the jury cannot agree upon a verdict; ***provided***, however, that the judge may first require the jury to return verdicts on those charges upon which the jury can agree and direct that such verdicts be received and recorded." (Emphasis added). In fact, the reporter's notes expressly indicate that such reception of partial verdicts is ***required*** before a mistrial may be declared for manifest necessity. *See* Mass. R. Crim. P. 27, reporter's notes ("This rule also provides that the court may declare a mistrial in cases where the jury is unable to reach a verdict. However, it ***must*** first receive and record the verdicts which the jury can agree upon." (Emphasis added)). Had the court inquired as to the existence of any partial verdicts, and the jury articulated its verdict consistent with the statements of Juror A, Juror B, Juror C, Juror D, and Juror E, the Double Jeopardy implications would have been clear

[5] Notably, the trial judge did ensure that Ms. Read was personally consulted regarding less weighty matters. For example, on May 24, 2024, the court called Ms. Read to sidebar and personally asked her to verbally consent to Attorney Jackson's absence on the Tuesday following Memorial Day, and that co-counsel, Attorney Yannetti, could represent her on that day. *See* May 24, 2024 Tr. at 3-5.

[6] *But see Daniels v. Commonwealth*, 441 Mass. 1017, 1018 & n.2 (2004).

and decisive. "[I]ndeed, with virtual unanimity, the cases have applied collateral estoppel to bar the Government from relitigating a question of fact that was determined in defendant's favor by a partial verdict." *United States v. Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979); *see also Wallace v. Havener*, 552 F.2d 721, 724 (6th Cir. 1977) ("When the jury hands down a partial verdict, a final judgment is rendered on the counts upon which the jury has reached agreement.").

In denying the motion to dismiss, the trial court erred by relying primarily upon the lack of objection by defense counsel. In doing so, it utterly neglected to acknowledge the clear and longstanding caselaw placing the burden of establishing manifest necessity squarely on the prosecution. *Nicoll* provides a helpful analogue.

The defendant in *Nicoll* was charged with operating a vehicle under the influence of alcohol. Only six jurors were empaneled and, after trial began, one juror recognized a witness "and informed the trial judge that he might not be able to be impartial." 452 Mass. at 817. The judge excused the juror. "Left with five jurors, the judge and attorneys briefly discussed how to proceed. Defense counsel expressed his frustration over the empanelment of only six jurors and then stated, 'I don't think we can go forward with five jurors, can we?' The judge responded, 'Not in a criminal case. . . . Okay, I'm going to declare a mistrial.'" *Id.* After a retrial was scheduled, the defendant moved to dismiss on Double Jeopardy grounds. The trial judge allowed the motion finding "that contrary to his initial understanding, Massachusetts procedural rules would have allowed the trial to continue with five jurors (albeit with [defendant's] consent)." *Id.* The judge therefore found that he "had failed to give careful consideration to the alternative of proceeding with the trial before less than a full jury," and, accordingly, "there had been no 'manifest necessity' for the mistrial." *Id.* (internal quotation marks omitted).

On appeal, this Court began from the premise that, "[d]ue to the importance of the double jeopardy protection, the Commonwealth bears the 'heavy' burden of proving that a mistrial rested on manifest necessity." *Id.* at 818 (quoting *Washington*, 434 U.S. at 505). The Court then agreed with the trial judge that the defendant could waive his right to a trial by a jury of at least six. *See id.* at 821. It rejected the Commonwealth's argument that the defendant in the case at hand had not provided such a waiver observing, "the question is not whether [defendant] executed a valid waiver, but whether there was a 'manifest necessity' for declaring a mistrial. Such necessity would have presented itself if [defendant] had declined to execute a waiver, but the record is clear that neither the judge nor counsel was aware of or even considered the option." *Id.* at 821-22. "In these circumstances, the Commonwealth [wa]s unable to satisfy its ***heavy burden*** of proving that there was a 'manifest necessity' for declaring a mistrial." *Id.* at 822 (emphasis added).

The defense respectfully submits that the same result is required here. It is the prosecution's burden alone to ensure that the declaration of a mistrial is supported by manifest necessity. Even where, unlike in the present case, defense counsel was expressly offered the opportunity to be heard on how to proceed, and explicitly shared the judge's mistaken view that the trial could not continue with fewer than six jurors, this Court held that the alternative to declaring a mistrial was not adequately considered. Here, there is no doubt that the Court was permitted to accept a partial verdict. *See, e.g.*, Mass. R. Crim. P. 27(b). But the record simply reflects no consideration of that option. Accordingly, as in *Nicoll*, the charges in this matter must be dismissed.

Neither Ms. Read nor her counsel consented to the declaration of a mistrial. Consent may be implied "where a defendant had the opportunity to object but failed to do so." *Pellegrine*

v. Commonwealth, 446 Mass. 1004, 1005 (2006) (citation omitted). But the law is clear that such consent may not be inferred from counsel's silence alone. *See Commonwealth v. Edwards*, 491 Mass. 1, 13 (2022) (rejecting argument "that the defendant consented to the declaration of a mistrial because he did not object when the judge ordered the case dismissed"); *Commonwealth v. Phetsaya*, 40 Mass. App. Ct. 293, 297-98 (1996) (holding that, where "the trial judge did not ask defense counsel to comment on the possible declaration of a mistrial," "the lack of an objection from defense counsel cannot be construed as consent" to such action). Here, no such consent was sought, nor was it given.

The trial court's ruling that Ms. Read's counsel impliedly consented to the mistrial was based primarily upon counsel's requests for a *Tuey-Rodriguez* instruction. Of course, whether the jury has engaged in "due and thorough deliberation" to support a *Tuey-Rodriguez* instruction and whether there is manifest necessity to declare a mistrial are distinct legal questions. In fact, the *Tuey-Rodriguez* charge is "designed to urge the jury to reach a verdict," not to avoid one. *Commonwealth v. Semedo*, 456 Mass. 1, 20 (2010). Unsurprisingly, neither the Commonwealth nor the trial court cited any case finding a defendant's consent to a mistrial can be based on a prior request for a *Tuey-Rodriguez* charge.[7] Here, defense counsel's requests did not reflect any implicit concession that the jury was deadlocked on all counts, nor did they commit the defense to any position regarding whether the court should *sua sponte* declare a mistrial. It is true that, if

[7] In *Ray*, 463 Mass. at 2-3, after the jury reported a deadlock, "the judge indicated that he was inclined to declare a mistrial." The parties responded by "request[ing] that the court give the jury a *Tuey-Rodriguez* instruction" as an alternative. *Id.* at 3. The judge "declined to give this instruction and declared a mistrial over the defendant's objection." *Id*. In these circumstances, where the request for a *Tuey-Rodriguez* charge came in response to a judge's statement of intent to declare a mistrial, it was a fair "inference that both parties were provided an opportunity to be heard on possible alternatives to a mistrial." *Id.* at 4. In the present case, by contrast, the *Tuey-Rodriguez* instruction was requested before any suggestion of a mistrial, not as a possible alternative thereto.

the jury reports an impasse after a *Tuey-Rodriguez* instruction, they "shall not be sent out again without their own consent." G.L. c. 234A, § 68C. That fact, however, does nothing to undermine the alternative of simply inquiring, pursuant to Mass. R. Crim. P. 27(b), whether the jury had reached any partial verdict. Doing so would not require the jury to be "sent out again." The trial court was in error in equating a request for a *Tuey-Rodriguez* charge with any acceptance of or acquiescence to a mistrial.

Moreover, the trial court's characterization of the jury's final note as "making it clear that [the jurors] would not consent to continuing their deliberations," is belied by case law cited in the court's Order. Order at 13 (R. 306). In *Commonwealth v. Jenkins*, 416 Mass. 736, 739 (1994), the jury similarly reported, after a *Tuey* charge, "that they felt strongly that there was no hope of progress and requested further instructions." The court responded by telling the jury, "I cannot force you to continue deliberations unless you agree to continue deliberations," but then asking them "to retire and decide whether further deliberations on the next day would be fruitful." *Id.* The jury "promptly reached a verdict." *Id.* at 740. This Court held that "[t]he object of" the statutory prohibition on sending the jury back out without consent "was fulfilled because the jury consented to continue their work. . . . [T]he jury's return of a verdict after sending their last note implicitly satisfied the statutory requirement of jury consent." *Id.* Thus, another alternative to a mistrial (which the trial court did not consider) in this case would have been to (a) inform the jury that it could not be required to continue deliberations without its consent and (b) ask it to retire to consider whether it was prepared to return any partial verdict.

Here, neither Ms. Read nor her counsel were provided an opportunity to object to the declaration of a mistrial (as opposed to the appropriateness of a *Tuey-Rodriguez* instruction). All of the cases cited by the trial court on this issue are readily distinguishable on that basis. For

example, in *Pellegrine*, a witness testified at trial to incriminating evidence that had not been disclosed to the defense. This Court held that the defense had an opportunity to object given that "[t]he mistrial was declared after a voir dire [of the witness] and colloquy after the jury were cleared from the court room." 446 Mass. at 1005. Here, by contrast, the defense did not learn of the contents of the jury note, or the court's intention to declare a mistrial, until the judge called the jury in and stated the declaration of mistrial on the record. Counsel was never shown the note from the jury. The judge indisputably never informed counsel of its intent to declare a mistrial, much less solicited counsel's views on the matter. *Compare United States v. McIntosh*, 380 F.3d 548, 555 (1st Cir. 2004) (ruling, in case where "defense counsel at one point implored the district court to declare a mistrial because the jury was deadlocked," "[i]t would be Kafkaesque–and wrong– . . . to allow parties freely to advocate on appeal positions diametrically opposite to the positions taken by those parties in the trial court"); *United States v. You*, 382 F.3d 958, 962 (9th Cir. 2004) (after co-defendant moved for mistrial, the "court subsequently stated that it was going to declare [one]" and "asked the attorneys if either wished 'to make any record?'"); *United States v. Goldstein*, 479 F.2d 1061, 1067 (2d Cir. 1973) ("Defendants had moved for a mistrial a scant two hours before one was declared, at the first suggestion of jury deadlock . . . .").

As the Appeals Court has explained in an analogous factual context, the suggestion that counsel could or should have immediately objected to the *sua sponte* declaration of a mistrial "underestimates or ignores the difficulty of reaching a decision (in which the defendant has an evident personal stake) whether the defense would be advantaged or the opposite by a second trial: the possibilities ahead (such as the appearance of a new prosecution witness) cannot be instantly calculated. Therefore, ***to equate silence with 'consent' when the occasion comes***

abruptly and unexpectedly seems quite unwise." *Horrigan*, 41 Mass. App. Ct. at 342 (emphasis added).

The trial court's suggestion that defense counsel had an opportunity to object to the declaration of a mistrial after it had occurred and the jury had been discharged is mistaken. The judge expressly told jurors, "Your service is complete. I am declaring a mistrial in this case." July 1, 2024 Tr. at 11 (R. 174).

Given counsel's lack of an opportunity to be heard and the court's lack of consideration of alternatives, the defense respectfully submits that the prosecution has not satisfied its high burden of establishing manifest necessity for the mistrial. While the trial court correctly observed that jury deadlock may be grounds for a mistrial, *see, e.g.*, *Ray*, 463 Mass. at 3, it cited no precedent for the counter-intuitive proposition that a deadlock with respect to some but not all counts constitutes manifest necessity for the declaration of a mistrial as to all. *Compare Fuentes v. Commonwealth*, 448 Mass. 1017, 1018 (2007) (affirming declaration of mistrial where note expressly "stated that the jury could not reach a unanimous verdict as to either" of the two indictments). This lack of precedential support is no accident: such a rule would run counter to the important interests underlying the constitutional safeguards against Double Jeopardy.

Contrary to the trial court's suggestion, there was nothing in the jury's notes that "directly contradict[ed]" the post-trial affidavits by counsel. Order at 9 n.4 (R. 302). As an initial matter, there is a facial tension between this observation by the court and its stated acceptance of the affidavits as true for purposes of the motion to dismiss. And the jury's reference to "charges" is easily reconciled with the post-trial affidavits affirming that the only deadlock related to the lesser included offenses of Count 2. Indeed, the court repeatedly referred to those lesser included offenses as distinct "charge[s]," both in its initial and supplemental

instructions to the jury. *See* June 25, 2024 Tr. at 35, 38 (R. 85, 88); June 26, 2024 Tr. at 16 (R. 129). In this context, the jury's note was facially susceptible to two alternative interpretations: (1) that the jury had reached an impasse as to all charges, or (2) that the deadlock applied to only some of those charges (*e.g.*, on multiple lesser included allegations within a single count such as Count 2). The information received from jurors post-trial proves the latter interpretation was correct. The jury's failure to expressly mention its agreement on Counts 1 and 3 is understandable in light of the court's instruction that it "should continue deliberating until" it had "reached a final verdict on each charge." June 25, 2024 Tr. 46 (R. 96).

This Court's holding, in *Commonwealth v. Roth*, 437 Mass. 777 (2002), that courts should not request partial verdicts on lesser included offenses charged in a single count does not pertain here. *Roth* was rooted in the belief that "[i]nquiry concerning partial verdicts on lesser included offenses" *that have not been separately charged* "carries a significant potential for coercion." *Id.* at 791; *see also Blueford*, 566 U.S. at 609-10 (declining to require court "to consider giving the jury new options for a verdict" in the form of partial verdicts on lesser included offenses where, "under Arkansas law, the jury's options . . . were limited to two: either convict on one of the offenses, or acquit on all"). Such inquiry, in effect, implies that the jury should consider conviction on the lesser count. No similar danger is present where, as here, the jury was asked to return three separate verdicts on three separate counts. *See Roth*, 437 Mass. at 793 n.13 (distinguishing situation "where a defendant has been charged in separate indictments or complaints, each with a separate verdict slip"); *A Juvenile*, 392 Mass. at 55 n.1 ("Where a complaint or indictment, in multiple counts, charges multiple crimes . . . a general verdict could be returned as to one of the counts, despite deadlock on the other counts."). In this circumstance, where the jury reports a deadlock without specifying the count(s) on which it has reached an

impasse, it is a straightforward (and, the defense contends, constitutionally required) follow-up to ask whether the deadlock relates to some as opposed to all counts. Contrary to the trial court's suggestion, an inquiry regarding whether the jury had reached a partial verdict on any of the three separately charged counts would not necessitate any forbidden inquiry on the lesser included offenses contained within Count 2. *See* Order at 18 (R. 311). There is simply nothing coercive about asking a jury reporting a deadlock that fails to specify which counts the deadlock relates to the single question of whether its deadlock is on certain but not all counts and if it has reached a unanimous verdict on ***any*** counts. *See Commonwealth v. Foster*, 411 Mass. 762, 766 (1992) (affirming trial judge's taking of partial verdicts on two of four separate indictments and observing, "[t]o conclude that the jury could have felt pressure to convert provisional verdicts against the defendant into final ones and to abandon all doubts that they may have privately entertained runs counter to the clear instructions of the judge and amounts to mere speculation without any support in the record"); *Roth*, 437 Mass. at 788 (noting, in the context of deadlocked jury, that "rule 27(b) permits taking verdicts on less than all of the charges set forth in . . . separate indictments"); *Commonwealth v. LaFontaine*, 32 Mass. App. Ct. 529, 534-35 (1992) (affirming partial verdicts taken after judge asked jury whether it had "reached a verdict on any of the indictments"); *Commonwealth v. Garteh*, 98 Mass. App. Ct. 1103, at *3 (2020) (unpublished) (holding that "the judge's decision to take a partial verdict and encourage the jury to agree on the remaining charges was sound where the jury indicated they were able to reach a consensus on some charges but not others").

The inflexible prohibition on judicial inquiry regarding partial verdicts advocated by the Commonwealth would inevitably undermine defendants' important, and constitutionally protected, interest in "being able, once and for all, to conclude [their] confrontation[s] with

society through the verdict of a tribunal [they] might believe to be favorably disposed to [their] fate." *Cruz*, 461 Mass. at 670 n.9 (quoting *Jorn*, 400 U.S. at 486 (plurality opinion)). And "[t]he danger of . . . unfairness to the defendant" from multiple prosecutions "exists when[] a trial is aborted before it is completed," as well as when the defendant is actually acquitted. *Washington*, 434 U.S. at 504. The Commonwealth's proposed rule would also undoubtedly hinder law enforcement interests by precluding courts from asking whether a jury may have reached a ***guilty*** verdict on some but not all stand alone counts.

It is uncontroverted that, according to the jury of her peers, following trial Ms. Read was unanimously found not guilty of Counts 1 and 3. That undisputed fact must not be lost in this analysis. It bears repeating that "[a]t the heart of this policy [against Double Jeopardy] is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression." *Martin Linen*, 430 U.S. at 569.

CONCLUSION

For the foregoing reasons, Ms. Read respectfully requests that this Honorable Court reverse the trial court and Order that Counts 1 and 3 must be dismissed.

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Dated: September 11, 2024

CERTIFICATE OF SERVICE

I, Martin G. Weinberg, do hereby certify that on this day, September 11, 2024, I have served a copy of this Petition, as well as all supporting exhibits and the record appendix, via email on Assistant District Attorney Adam Lally.

/s/ Martin G. Weinberg
Martin G. Weinberg