

No. SJC-13663

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

KAREN READ,
Defendant-Appellant.

On Appeal from Reservation and Report of G.L. c. 211, § 3 Petition
Supreme Judicial Court Single Justice (Dewer, J.), No. SJ-2024-0332

**BRIEF OF *AMICUS CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS**

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CORPORATE DISCLOSURE AND RULE 17(c)(5) STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”) is a nonprofit corporation organized under the laws of Massachusetts. ACLUM does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in ACLUM.

No party or party’s counsel authored the brief in whole or in part. No party, party’s counsel, or any other person or entity, other than ACLUM, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief. ACLUM and its counsel do not represent and have not represented one of the parties to the present appeal in another proceeding involving similar issues; and were not parties in, and did not represent, a party in a proceeding or legal transaction that is at issue in the present appeal.¹

INTERESTS OF AMICUS CURIAE

ACLUM is the Massachusetts affiliate of the national American Civil Liberties Union. ACLUM is dedicated to protecting and advancing the civil rights and civil liberties of all people in the Commonwealth, including those guaranteed by the Constitution and the Bill of Rights. ACLUM frequently engages in litigation

¹ Prior to seeking leave to file this brief, ACLUM asked counsel for Ms. Read (Appellant) and the Commonwealth (Appellee) whether they would assent to or oppose ACLUM’s motion to file this brief. Appellant’s counsel assented, and the Commonwealth took no position.

and other advocacy to protect the rights of people involved in the criminal legal system. As part of that work, ACLUM has filed many amicus briefs before the Supreme Judicial Court. *See, e.g.*, Brief for American Civil Liberties Union of Massachusetts, et al., as Amici Curiae, *Baez v. Commonwealth*, 494 Mass. 1001 (2024) (No. SJC-13467); Brief for American Civil Liberties Union of Massachusetts as Amicus Curiae in Support of Neither Party, *Commonwealth v. Gaines*, 240 N.E.3d 193 (Mass. 2024) (No. SJC-13446); Brief for American Civil Liberties Union of Massachusetts as Amicus Curiae in Support of Defendant, *Commonwealth v. Shepherd*, 493 Mass. 512 (2024) (No. SJC-12405); Brief for American Civil Liberties Union of Massachusetts as Amicus Curiae, *Commonwealth v. Buckley*, 478 Mass. 861 (2018) (No. SJC-12344).

Here, ACLUM takes no position on what the evidence presented at trial did or did not show. Rather, this brief addresses the trial court’s decision not to respond to compelling evidence that there was a potential mistake or misunderstanding concerning the outcome of the jury’s deliberations—and what processes will be employed by trial courts addressing any similar circumstances in the future.

INTRODUCTION & SUMMARY OF ARGUMENT

Defendant-Appellant Karen Read faces the possibility of being retried on multiple criminal charges for which numerous jurors now claim they acquitted her. A retrial on acquitted charges would violate the prohibition against double

jeopardy—a critical right enshrined in the Fifth Amendment to the United States Constitution and Massachusetts common law. If the Court does not grant Appellant’s requested relief to dismiss or otherwise preclude the counts on the current record, then this Court can—and should—prevent the potential for injustice by ordering the trial court to conduct an evidentiary hearing and determine whether the jury in her first trial agreed to acquit her on any count, such that it was not manifestly necessary for the trial court to declare a full mistrial. This brief provides the Court with additional context regarding the justifications for an evidentiary hearing into a lack of manifest necessity.

At Appellant’s first trial, the court declared a mistrial on all three counts after receiving notes indicating jurors were struggling to reach a unanimous verdict. But the court did so without polling jurors to confirm they were deadlocked on all counts (or even asking the parties whether they consented to a mistrial or wanted the jurors polled). Soon after that hasty mistrial declaration, multiple jurors reported that the jury had actually agreed to acquit Appellant on Counts 1 and 3—and so were only deadlocked on Count 2. Appellant promptly moved the trial court to either dismiss Counts 1 and 3 or, at minimum, conduct a post-verdict evidentiary hearing to assess the truth of the jurors’ reports. But the trial court denied the motion to dismiss and refused to conduct a hearing—leaving open the possibility of Appellant being retried in violation of her right to be free from double jeopardy.

The trial court erred in refusing to conduct an evidentiary hearing. The Double Jeopardy Clause protects a defendant's fundamental right against successive prosecutions for the same offense. That right is deeply rooted in our nation's history and legal system and has been vigorously enforced by both the United States Supreme Court and this Court. To avoid improper, successive prosecutions, the Double Jeopardy Clause requires that courts carefully consider alternatives to declaring a mistrial—and to make such a declaration only after finding a mistrial to be a manifest necessity. A failure to do so can bar re-prosecution on double jeopardy grounds.

The trial court had a clear path to avoid an erroneous mistrial: simply ask the jurors to confirm whether a verdict had been reached on any count. Asking those questions before declaring a mistrial is permitted—even encouraged—by Massachusetts rules. Such polling serves to ensure a jury's views are accurately conveyed to the court, the parties, and the community—and that defendants' related trial rights are secure. It is also consistent with a nationwide practice of polling juries to ascertain verdicts, including before declaration of a mistrial. Here, a post-trial evidentiary hearing would serve the same purposes, enabling the trial court to determine whether the jurors had actually agreed to acquit Appellant on Counts 1 and/or 3, such that it was not manifestly necessary for the court to declare a full mistrial.

Accordingly, an evidentiary hearing is required to safeguard Appellant's rights under the Double Jeopardy Clause, and the Court should order the trial court to conduct one.

I. The Prohibition Against Double Jeopardy Is A Fundamental Constitutional Right That Protects Against The Burden Of Multiple Prosecutions.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”² U.S. Const. amend. V. “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.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Thus, the Double Jeopardy Clause exists to ensure that the government, “with all its resources and power,” is not allowed “to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.” *Green v. United States*, 355 U.S. 184, 187–88 (1957).

The historical roots of the Double Jeopardy Clause long predate the American Founding. “Its origins can be traced to Greek and Roman times, and it became

² The Double Jeopardy Clause has been incorporated against the States through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784 (1969).

established in the common law of England long before this Nation's independence.” *Benton*, 395 U.S. at 795; see *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting) (“Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.”). In Medieval times, canon law prohibited double jeopardy on the basis that “God does not punish twice for the same transgression.” Jay A. Sigler, *A History of Double Jeopardy*, 7 *Am. J. Legal Hist.* 283, 284 (1963). And “as early as the 15th century the English courts had begun to use the term ‘jeopardy’ in connection with the principle against multiple trials.” *United States v. Wilson*, 420 U.S. 332, 340 n.6 (1975). This thread continued through Sir Edward Coke’s 17th century treatise on the laws of England, which articulated a theory of double jeopardy. See 3 Edward Coke, *Institutes on the Laws of England* 212–213 (6th ed. 1680). And in his 1769 *Commentaries*, Sir William Blackstone famously wrote of the “universal maxim . . . that no man is to be brought into jeopardy of his life more than once for the same offence.” 4 William Blackstone, *Commentaries* *335.

Concerns about double jeopardy crossed the Atlantic with early American colonialists. In fact, the “American conceptualization of double jeopardy began with the Massachusetts colony.” Sigler, *supra*, at 298. The 1641 Body of Liberties provided for an expansive prohibition against double jeopardy that extended to criminal *and* civil offenses. See Massachusetts Body of Liberties, art. 42 (1641).

This provision was mirrored and extended in the Massachusetts Code of 1648, which required the express recording of past legal actions to prevent future jeopardy. *See* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 Wm. & Mary Bill Rts. J. 193, 222 (2005) (citation omitted). These foundational tenets of Massachusetts law arguably shaped the nation's subsequent adoption of the Double Jeopardy Clause in the Fifth Amendment. *See* Sigler, *supra*, at 299.

While enactment of the Double Jeopardy Clause was relatively uneventful, *see* Rudstein, *supra*, at 226-30; Sigler, *supra*, at 306, early American jurists quickly recognized its importance. An 1824 Kentucky supreme court opinion referred to the prohibition on double jeopardy as a “wise rule, so favorable and necessary to the liberty of the citizen.” *Commonwealth v. Olds*, 15 Ky. (5 Litt.) 137, 139 (Ky. 1824). An 1833 decision by the New Jersey supreme court observed that “this great principle forms one of the strong bulwarks of liberty.” *State v. Cooper*, 13 N.J.L. 361, 370 (N.J. 1833). And in 1834, Justice Joseph Story called the Double Jeopardy Clause a “constitutional recognition” of that “fundamental rule of the common law” which has been “recognised by elementary writers and courts of justice from a very early period down to the present times.” *United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (No. 15,204) (Story, Circuit Justice); *see also* Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 387 (1840)

(listing the Double Jeopardy Clause as a provision enacted to “secure th[e] great palladium of liberty, the trial by jury, in criminal cases, from all possibility of abuse”).

In modern times, the Supreme Court has recognized the fundamental import of the Double Jeopardy Clause by expanding its scope. Notwithstanding the text of the Fifth Amendment, double jeopardy protection extends to all crimes, capital or otherwise. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). And the existence of an acquittal is a question of federal—not state—law, with a constitutional floor that prevents the States from impeding a defendant’s double jeopardy rights. *See McElrath v. Georgia*, 601 U.S. 87, 96-97 (2024). Jeopardy also attaches when a jury is impaneled and sworn in, not when a verdict has been given. *See Crist v. Bretz*, 437 U.S. 28 (1978).

Finally, as relevant to this case, the Double Jeopardy Clause can bar retrial even when the first trial ends in a mistrial (with no acquittal or conviction). For “[e]ven if the first trial is not completed, a second prosecution may be grossly unfair” and burdensome to the defendant. *Arizona v. Washington*, 434 U.S. 497, 503 (1978). Moreover, the defendant has a “valued right to have his trial completed by a particular tribunal,” *Wade v. Hunter*, 336 U.S. 684, 689 (1949), or “chosen jury,” *Crist*, 437 U.S. at 35, such that only the showing of “manifest necessity” will allow a trial court to declare a mistrial without barring a retrial on double jeopardy grounds,

Wade, 336 U.S. at 690 (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). The decision to declare a mistrial without a defendant’s consent is only justified by a “high degree” of necessity, *Arizona*, 434 U.S. at 506, and requires “a scrupulous exercise of judicial discretion,” *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality). In Massachusetts, where there is no specific constitutional protection against double jeopardy but where the common law protection thereof may be “greater . . . than either the State or the Federal Constitution requires,” *Berry v. Commonwealth*, 393 Mass. 793, 798 (1985), the declaration of a mistrial requires the trial court to both (1) provide defendant’s counsel with a “full opportunity to be heard” and (2) carefully consider alternatives to a mistrial, *see Commonwealth v. Taylor*, 486 Mass. 469, 484-85 (2020).

Together, the above sources sing a simple but powerful melody regarding the importance of the right against double jeopardy in criminal proceedings, which is “deeply ingrained” in “the Anglo-American system of jurisprudence,” *Green*, 355 U.S. at 187, and bolstered by recent precedent. Accordingly, when the government asserts the power to retry a defendant who has already gone through the burdens of one full trial, as is the case here, courts must safeguard the defendant’s fundamental rights by carefully scrutinizing that assertion in light of all available information.

II. Trial Courts Regularly Poll Juries Both After A Verdict Is Announced And Before A Mistrial Is Declared.

In her motion to dismiss, Appellant asked for a post-verdict evidentiary hearing to determine whether the jury had agreed to acquit her on Counts 1 and 3. *See* R. 280-81. The Commonwealth opposed this request as “improper,” R. 306, and the trial court rejected it as “prohibited,” R. 408. But the propriety, and sometimes necessity, of inquiring about the outcome of a jury’s deliberations is confirmed by the fact that trial courts regularly poll juries on verdict-related issues. Massachusetts courts frequently poll juries to determine whether the announced verdict was correct. Consistent with Massachusetts procedural rules, courts in this state and others also poll juries to determine whether deadlock exists or if future deliberation would be useful.

Massachusetts Guide to Evidence Section 606(b) and Rule of Criminal Procedure 27(d) both allow the court to poll juries after a verdict has been returned. Granted, “it is within the trial judge’s discretion whether to poll the jury.” *Commonwealth v. Hardy*, 431 Mass. 387, 399 (2000). But “[t]here are times . . . when a judge *should* use the discretion accorded by [Massachusetts law] to poll a jury after the verdict is returned.” *Commonwealth v. Zekirias*, 443 Mass. 27, 33 (2004) (emphasis added); *see also Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 960-61 (1st Cir. 1986) (discussing the benefits of jury polling). For example, in *Commonwealth v. Nettis*, 418 Mass. 715, 470-71 (1994), the trial court properly

conducted a poll of the jury when one juror indicated her disapproval of the announced verdict. As with the evidentiary hearings discussed above, the court's polling of juror votes does not impermissibly intrude into the jury's deliberative process. *See Commonwealth v. Spann*, 383 Mass. 142, 151 (1981).

Federal trial courts have also polled juries to determine whether they are truly deadlocked ahead of a mistrial declaration. In *United States v. Barbioni*, 62 F.3d 5, 7 (1st Cir. 1995), the jury deliberated for ten hours but could not reach a verdict. Before declaring a mistrial, the district court polled each juror individually and "with great care." *Id.* All stated that the jury was deadlocked and not likely to reach a verdict. *See id.* at 6. On appeal, the First Circuit found these actions supported manifest necessity for a retrial. *See id.* at 7. Many other federal courts have also polled individual jurors to ask whether a deadlock exists before declaring a mistrial. *See, e.g., United States v. Jefferson*, 566 F.3d 928, 932 (9th Cir. 2009); *United States v. Wecht*, 541 F.3d 493, 496 (3d Cir. 2008); *United States v. Charlton*, 2006 WL 4990834, at *2 (D. Mass. June 12, 2006), *aff'd*, 502 F.3d 1 (1st Cir. 2007); *Clark v. Irvin*, 844 F. Supp. 899, 906 (N.D.N.Y. 1994).

State trial courts have likewise polled jurors ahead of mistrial declarations, in order to determine whether manifest necessity exists. In *State v. Jandreau*, 157 A.3d 239, 241 (Me. 2017), the jury sent three notes that indicated potential deadlock. The trial court individually polled the jurors after each note to determine whether

deadlock truly existed. *See id.* On appeal, the Maine supreme court characterized this effort as “thorough and appropriate” to determining whether a mistrial was manifestly necessary. *See id.* Other state courts have exercised similar care to thoroughly assess whether a mistrial was necessary. *See, e.g., People v. Halvorsen*, 165 P.3d 512, 543–45 (Cal. 2007); *Guerra v. State*, 690 S.W.2d 901, 908–09 (Tex. App. 1985); *Ex parte McNabb*, 879 So. 2d 1166, 1167 (Ala. 2003), *overruled on other grounds by* 66 So. 3d 220 (Ala. 2010); *Parker v. State*, WL 1038301, at *4 (Md. Ct. Spec. App. Mar. 18, 2021); *Leisenring v. Castellino*, 120 A.D.2d 837, 837–38 (N.Y. App. Div. 1986).³

This kind of pre-mistrial polling is not only permitted under Massachusetts law, it is encouraged. Under Rule of Criminal Procedure 27(b), a court intending to declare a mistrial may ask that a jury “return verdicts on those charges upon which the jury can agree.” The Reporter’s Note to Rule 27(b) states even more definitively 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.”

³ Some courts have gone even further. For example, in *Halvorsen*, the jury was potentially deadlocked on the punishment for one count. *See* 165 P.3d at 543. After asking the jurors whether additional deliberation would be useful, the trial court specifically asked where the jury was leaning, numerically. *See id.* The California supreme court concluded that the judge’s actions supported his later declaration of a mistrial. *See id.* at 545.

Thus, Massachusetts law expressly enables judges to poll juries ahead of a mistrial to determine whether a full or partial mistrial should be declared. That fact supports Appellant’s requested evidentiary hearing because such a hearing would achieve the same goal as polling—i.e. for the Court (and the parties) to receive an accurate assessment of the jurors’ conclusions, without probing “the subjective mental processes of jurors, such as the reasons for their decisions.” *Commonwealth v. Hebert*, 379 Mass. 752, 755 (1980) (internal quotation marks and citation omitted).

III. Trial Courts Also Routinely Hold Post-Verdict Evidentiary Hearings To Address Irregularities In Jury Proceedings Affecting Constitutional Rights.

The propriety of Appellant’s requested post-verdict evidentiary hearing is also supported by Massachusetts precedent, which allows for post-verdict evidentiary hearings that inquire into irregularities with jury proceedings that affect constitutional rights, including double jeopardy.

The most prominent example of such post-verdict hearings implicates the Sixth Amendment right to an impartial jury. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .”). Trial courts may conduct a post-verdict evidentiary hearing where evidence suggests that “extrinsic influence may have had an impact upon the jury’s impartiality.” *Commonwealth v. Dixon*, 395 Mass. 149, 152 (1985).

The refusal to do so can itself constitute “reversible error,” *id.*, and where the case is “close,” courts “should exercise discretion in favor of conducting a judicial inquiry,” *id.* at 153. Thus, trial courts regularly hold evidentiary hearings to determine whether extraneous influence had an impact on the jury’s impartiality. *See, e.g., Commonwealth v. Werner*, 81 Mass. App. Ct. 689, 696-97 (2012); *Commonwealth v. Bright*, 463 Mass. 421, 444 (2012). And the refusal to hold a hearing to consider extraneous influence has frequently resulted in reversal on appeal. *See, e.g., Commonwealth v. Guisti*, 434 Mass. 245, 252-53 (2001); *Commonwealth v. Philyaw*, 55 Mass. App. Ct. 730, 736-41 (2002); *Commonwealth v. Morrison*, 97 Mass. App. Ct. 731, 742-43 (2020).

Evidentiary hearings have also been held to determine whether a jury’s verdict was unanimous, as required by Massachusetts Rule of Criminal Procedure 27(a) *and* as relevant for purposes of the Double Jeopardy Clause (since a prior acquittal or conviction bars a retrial for the same offense). In *Commonwealth v. Brown*, 367 Mass. 24 (1975), the jury foreman claimed that the verdict was erroneous, and the trial court held an evidentiary hearing wherein the jury corrected its verdict. On appeal, this Court found “no impropriety” in the trial court’s actions. *Id.* at 29. In *Commonwealth v. Dias*, 419 Mass. 698 (1995), a juror told the trial court that she had not agreed with the verdict. The court interviewed the “remaining deliberating jurors, the court officers, the clerk of the court, and any personnel who had

knowledge about the rendition of the verdict in this case,” before declining to disturb the verdict. *Id.* at 702. In the wake of this investigation, this Court affirmed the lower court’s denial of the defendant’s motion for a new trial. *See id.* at 702–03. Additional cases from this and other jurisdictions affirm the ability of courts to conduct such proceedings and take corrective action regarding jury verdicts. *See, e.g., Latino v. Crane Rental Co.*, 417 Mass. 426, 428-30 (1994); *Brown v. Gunter*, 562 F.2d 122, 125 (1st Cir. 1977); *Martin v. State*, 732 So. 2d 847, 854 (Miss. 1998).

To be clear, such inquiries need not reach the content of the jurors’ deliberations or the particular reasons for their decisions. *See, e.g., Commonwealth v. Moore*, 474 Mass. 541, 544-45 (2016); *Commonwealth v. Fidler*, 377 Mass. 192, 198 (1979). There is no obstacle to a trial court taking evidence as to the *outcome* of the jury’s deliberations—given that reporting such information is fundamentally the purpose of the jury. *See Hebert*, 379 Mass. at 755; *see also* Mass. G. Evid. § 606(b) (2024). Through such an inquiry, the court can determine the jury’s decision, which necessarily bears on whether the robust protections of the Double Jeopardy Clause will apply.

IV. The Trial Court Should Be Compelled To Conduct An Evidentiary Hearing Given Reports From Jurors That The Jury Agreed Appellant Was Not Guilty On Counts 1 And 3, Such That The Court Did Not Have The Manifest Necessity To Declare A Full Mistrial.

In this case, after receiving a third note from the jury indicating difficulty reaching a completely unanimous verdict, the trial court declared a mistrial on all

counts and set the stage for a full retrial. *See* R. 267–70. But as Appellant’s brief cogently describes, her attorneys soon received multiple reports from jurors (in some cases via intermediaries) that the jury had unanimously agreed to acquit on Counts 1 and 3. *See* Blue Brief at 14–16. Juror A stated that the jury “unanimously” agreed to acquit Appellant on Counts 1 and 3, *see* R. 286–87; Juror B believed that “every member of the jury, if asked, w[ould] confirm” that the jury agreed to acquit Appellant on Counts 1 and 3, *see* R. 331; Juror D said that “[e]very one of us will agree and acknowledge” that the jury found Appellant not guilty of Counts 1 and 3, *see* R. 293; and Juror E confirmed that “the jury was ‘unanimous on [Counts] 1 and 3,’” *see* R. 323. The Commonwealth also received communications from individual jurors about the jury’s agreement on the first and third counts. *See* Blue Brief at 17. It is thus unsurprising that the trial court accepted the jurors’ statements about this agreement as “true and accurate.” R. 396 n.4.

Given such overwhelming evidence of the jury’s agreement on Counts 1 and 3, a post-verdict evidentiary hearing must be ordered to determine whether the jury decided to acquit Appellant on any counts, such that the trial court did not have manifest necessity to declare a full mistrial.

Such a hearing is warranted to assure the sanctity of Appellant’s right to be free from double jeopardy—a fundamental right, wide in scope, that is “deeply ingrained” in our legal system. *Green*, 355 U.S. at 187. In the area of manifest

necessity and mistrial, this Court enforces that fundamental right by requiring the “careful consideration” of “alternatives to a mistrial.” *Taylor*, 486 Mass. at 484 (quoting *Ray v. Commonwealth*, 463 Mass. 1, 4 (2012)); *see also Jorn*, 400 U.S. at 485 (a mistrial declaration calls for the “scrupulous exercise of judicial discretion”). Given Rule 27(b) and the nationwide practice of polling juries before mistrials are declared, *see supra* Part II, the trial court could have avoided the instant controversy by polling jurors individually before declaring a mistrial. Unfortunately, it did not; nor does the record reflect that the parties were given an opportunity to request or express their views on whether polling was appropriate. *See* Blue Brief at 35–36, 43–44. In any event, after the court declared a mistrial on all counts, it promptly received reports that its declaration of a mistrial was premised on an apparent mistake or misunderstanding concerning the jurors’ conclusions—i.e. that they were deadlocked on only one count and had actually agreed to acquit Appellant on others. At that point, the court not only could have—but *should have*—held an evidentiary hearing to determine whether, in fact, there was manifest necessity for a full mistrial. The court’s refusal to do so is reversible error.

An evidentiary hearing was and remains necessary because a lack of manifest necessity would mean that retrial on Counts 1 and/or 3 violates Appellant’s rights under the Double Jeopardy Clause. *See Downum v. United States*, 372 U.S. 734, 737–38 (1963); *Taylor*, 486 Mass. at 485. Because that clause protects against the

burden of enduring multiple trials, not merely the possibility of a conviction upon retrial, a violation of Appellant's double jeopardy rights cannot be remedied after a second trial, whether or not she is ever convicted. *See Green*, 355 U.S. 187–88 (Retrial subjects the defendant to “embarrassment, expense and ordeal” and compels her to “live in a continuing state of anxiety and insecurity.”); *cf. Ball v. United States*, 163 U.S. 662, 669 (1896) (“The prohibition is not against being twice punished, but against being twice put in jeopardy.”).

Put another way, if the trial court lacked manifest necessity for a mistrial on Counts 1 and/or 3, then Appellant's double jeopardy rights will be irredeemably violated even if she is someday acquitted of those charges at a subsequent trial. Thus, a “wait and see” approach would potentially permit an irreversible violation of the Constitution, and an evidentiary hearing is necessary now.

The trial court denied Appellant's request for a hearing because it concluded that such a proceeding would “impermissibl[y]” intrude into “the substance of the jury's deliberations.” R. 407. In justifying that ruling, the court said that a hearing would “necessarily require the Court to understand” any supposed tension between the jury's notes to the court and their agreement to acquit the Appellant on two counts. *See* R. 407. But that is not so. The trial court is well-situated to set appropriate limits on any questioning, and it may only need to ask each juror whether the jury reached a unanimous verdict on Count 1, or Count 2, or Count 3. As cases

like *Spann* make clear, questioning to confirm or understand *what* the jury decided does not intrude into the deliberative process. *See* 383 Mass. at 151.

In response, the Commonwealth may claim that, because post-trial reports from Jurors A, B, D, and E were not in front of the trial court when it declared a mistrial, a partial verdict was not a reasonable alternative at the time of the court's declaration. But that argument fails for two reasons. First, as Appellant observes, *see* Blue Brief at 33, 45–46, the jury's communications with the trial court are susceptible to the interpretation that the only deadlock was related to the lesser included offenses of Count 2. So, the trial court had reason to believe that a poll aimed to return a partial verdict was a meaningful alternative to a full mistrial, especially given the existence of Rule 27(b). Second, cases like *Dias* and *Brown* demonstrate that post-verdict evidence can support a post-verdict evidentiary hearing into the content of the jury's agreement, even if the evidence was not known to the court *ex ante*. *See supra* Part III. Thus, the fact that evidence suggesting the jury reached a partial verdict arrived after trial does not preclude an evidentiary hearing.

The timing also supports the use of an evidentiary hearing. As memorialized in attorney affidavits, jurors began raising concerns about the mistrial the day after that declaration was made—and others quickly followed suit. *See* R. 283–88, 292–94, 323–24. So, there is robust, uniform, and contemporaneous evidence of what

the jury agreed to. Supported by that evidence, Appellant requested an evidentiary hearing within one week of the mistrial. *See* R. 272, 280–82. Beyond that, the specific nature of this mistrial context lessens the risk of externally influenced, post-hoc changes. This is not a situation where a court would be likely to find an agreement to acquit based on one juror’s changing view or post-trial misgivings—both because a significant portion of the jury has already come forward to evidence their agreement, and also because all of the jurors apparently remain available to testify.

Almost 400 years ago, the Massachusetts colony enacted the first formal prohibitions against double jeopardy on American soil. In accordance with this tradition, the Court should require an evidentiary hearing to ensure that Appellant’s double jeopardy rights are not violated by a second trial on counts for which the jury already agreed to acquit her and for which the trial court did not have manifest necessity to declare a mistrial. Such a remedy is necessary to maintain the Double Jeopardy Clause as that “strong bulwark[] of liberty,” *Cooper*, 13 N.J.L. at 370, which stands against “the devastating and onesided nature of the jeopardy” that confronts criminal defendants facing retrial, *Martin v. Commonwealth*, 492 Mass. 74, 81 (2023) (quotation omitted).

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the trial court denying Appellant's motion to dismiss and remand for the trial court to conduct an evidentiary hearing, if the charges are not otherwise disposed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the Massachusetts Rules of Appellate Procedures, including, but not limited to those specified in Rule 16)(k), 17, and 20. It complies with the type-volume limitation because it contains 4,843 non-excluded words. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

Dated: October 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2024, I served a copy of this brief on all parties through the e-file system and by electronic mail.

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