IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GAMBINO GRANDA-RUIZ,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

CASE NO: 72446

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed March 8, 2017, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 7th day of April, 2017.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Steven S. Owens*
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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES PRESENTED

1. Whether double jeopardy bars reprosecution where Petitioner impliedly assented to the mistrial.
2. Whether the district court abused its discretion in finding that there was manifest necessity for a mistrial, after a juror obtained extrinsic information that was shared with other jurors and discussed during deliberations.

RELEVANT FACTS

On March 13, 2015, Petitioner Gambino Granada-Ruiz ("Petitioner") was charged by way of Indictment with: Count 1 – Murder (Category A Felony – NRS200.010, 200.030), and Count 2 – Battery Resulting in Substantial Bodily Harm (Category C felony – NRS 200.481).

Trial began on September 8, 2015. On Friday, September 18, 2015, the parties submitted the case to the jury for deliberations. The jury returned on Monday, September 21, 2015, and began deliberations that morning. At about 11:30 am, the district court received a note from the jury foreperson stating that one of the jurors, Juror Number 3, was feeling ill, had high blood pressure, and wanted to go home. 1 AA 102. The district court advised the marshal to have medical staff attend to Juror No. 3. Id. The marshal then went to Juror No. 3 and

advised him that medical staff was on its way, and Juror No. 3 indicated he was also experiencing some visions problems. 1 AA 103. The marshal advised medical staff of the issues once they arrived, and they proceeded to examine Juror No. 3. Id. Following examination by medical staff, Juror No. 3 indicated he could take blood pressure medicine he had for his high blood pressure, and advised he would like to continue to deliberate. Id. The jury resumed deliberations shortly thereafter. Id.

Later that afternoon, at around 3:00 pm, the district court again received a note from the jury foreperson advising that the jury was deadlocked at 11 to 1. 1 AA 104. When the marshal entered the jury deliberation room to get the note, he noticed Juror No. 3 had physically distanced himself from the other jurors; the marshal relayed this observation to the district court. Id. Based upon how the jurors were situated in the room, the marshal did not think the jury was actually deliberating—Juror No. 3 had separated himself from the remaining jurors. 1 AA 105. However, although the district court was concerned about a possible hung jury, the jury was told to continue deliberating. 1 AA 104-05.

The district court then received two additional notes from the foreperson—one authored by Juror No. 3, and one authored by Juror No. 12. Id. The first note, from Juror No. 3, stated that he had researched and fact checked a law on the internet, and that he refused to disregard the information he researched on the

internet in his deliberations, even though the district court had instructed the jury that it was not to consider outside evidence or conduct any outside research. 1 AA 105. The second note, from Juror No. 12, stated that Juror No. 3 had done research on the internet over the weekend, and apparently had shared that with the other members of the jury. 1 AA 105-06. It was unclear to the district court, based upon these notes, whether Juror No. 3 had shared any extrinsic research with the rest of the jury, and to what extent. 1 AA 106.

After receipt of these two notes, the district court called the parties to appear. 1 AA 106. At that point, the district court was unsure of whether this issue rose to the level of declaring a mistrial, or if it was a situation where an alternate juror could be seated to allow the jury to continue with deliberations. 1 AA 106.

After considering the available options, the district court decided to canvass the jurors. 1 AA 107. The district court felt that the canvass was necessary to determine whether a mistrial was required. Id. The State agreed with the district court's assessment: the canvass would help determine if information was shared amongst the jurors, and whether jurors were tainted by the information or whether they could disregard the information and continue with deliberations. 1 AA 107-08. Defense counsel disagreed with the State. 1 AA 108. According to defense counsel, it would be a "huge problem" if the information had been shared, regardless of whether the other jurors disagreed with Juror No. 3 and were standing by a

different vote. Id. Defense counsel believed it was an issue just for Juror No. 3 to have shared outside information. Id. The district court indicated it would still need to canvass the jurors to determine whether a mistrial was appropriate, acknowledging it was clear from Juror No. 3's note that he was unwilling to disregard the extrinsic evidence he looked up on the internet. 1 AA 110-11.

Petitioner appeared for the proceedings at this point. 1 AA 111-13. In explaining to Petitioner what had happened, the district court acknowledged that it would carefully consider the extent of the information shared with the jury and whether it would be possible to replace Juror No. 3 with an alternate, or whether the jury was so impermissibly tainted that a mistrial was necessary. 1 AA 113-14. The district court would wait to base its decision on whether to declare a mistrial until after the jurors had been canvassed. 1 AA 114-15.

During arguments, the State cited Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003), and indicated the inquiry involved not only whether the information was shared, but also whether (1) the remaining members of the jury could disregard the information and (2) the extrinsic information was so prejudicial as to render the verdict unreliable. 1 AA 115-17. In contrast, Petitioner directed the court to Zana v. State, 125 Nev. 541, 216 P.3d 244 (2009). 1 AA 117-18. He argued that the inquiry should focus not on whether the information could be disregarded by the other jurors, but on what the extent of the information shared was, whether it was

material to the case, how long the jurors discussed the extrinsic information, and the relative specificity of the information. 1 AA 117-18. He went on to argue, "I don't think that asking if they could set it aside cured the problem of what might have been discussed." 1 AA 118.

Following argument by counsel, the district court began questioning the foreperson, Juror No. 10. 1 AA 118. The district court asked if Juror No. 10 was aware if Juror No. 3 had shared any extrinsic information with all of the jurors, or whether the information had been shared separately with just Juror No. 12. 1 AA 119-20. Juror No. 10 explained that Juror No. 3 had brought up the independent research earlier in the day, prior to lunch being served, and prior to his complaints about his well-being. 1 AA 120-21. All the jurors had discussed his findings in their deliberations. 1 AA 122-23. The extrinsic research was repeatedly brought up because of high tensions during deliberations. 1 AA 123. The district court asked whether the jury discussed the results of the research. 1 AA 124-26. Juror No. 10 clarified that they had (rather than just discussing whether they were allowed deliberate on it). Id.

The district court next considered whether this was a situation where the information could be potentially prejudicial to decision-making. 1 AA 126. Juror No. 10 explained that the research involved premeditation and the length of time associated with premeditation. 1 AA 127. The jury discussed the research presented

by Juror No. 3, but the focus of the discussion was not the jury instruction on the issue. 1 AA 126-27. The jurors continued to discuss the extrinsic evidence regarding premeditation. 1 AA 131. The foreperson "[didn't] think anyone really went back and focused on the instructions right there in front of them as much as listening to what Juror No. 3 was saying." 1 AA 131. Juror No. 10 was excused from the courtroom. Id.

The State specifically asked the district court to consider whether the jury could set the information aside. 1 AA 133. The district court noted that the testimony clearly indicated that the jurors had deliberated for a lengthy time on the information presented by Juror No. 3. 1 AA 133-34. Further, the jurors did not ultimately go back to the instructions and tailor their deliberations accordingly. Id. Rather, the jury continued to deliberate *only* upon the information given to them by Juror No. 3. 1 AA 134. Petitioner requested to hear from Juror No. 3, but agreed with the district court about the extent and breadth of the deliberations. 1 AA 134-35.

The district court then canvassed Juror No. 3. 1 AA 136. Juror No. 3 disagreed with the other jurors about a law quoted by the State in its closing argument; he said that the jury had differing views about the law. 1 AA 138. Juror No. 3 explained that he needed to clarify just what the law was, and so, he went home and conducted his own research online. 1 AA 140-41. The district court

asked whether he had looked at the instructions to resolve the issue, but Juror No. 3 advised that none of the jurors looked at the instructions to resolve the issue, so he researched it instead. 1 AA 141-43. Juror No. 3 admitted he had researched everything from premeditation to self-defense, to the blood alcohol content allegedly discussed at trial and what the numbers mentioned by the doctor could even mean. 1 AA 142-44.

The district court stated that "we are all coming to the incredibly difficult, incredibly sad realization that we have a juror who was probably unable to serve, frankly, from the discussion here today." 1 AA 151. Defense counsel agreed Id. The district went on to explain that the real issue was the length of the discussion the jurors had about the outside research. 1 AA 151-53. Petitioner understood the district court's concerns, but was upset with the idea of staying on house arrest because the case would have to be retried. Id.

The parties agreed to the district court's suggestion of asking the foreperson what the jury vote had been prior to the notes advising of the deadlock and the outside research. 1 AA 153. The State attempted to clarify whether the court was in fact, declaring a mistrial, prior to any inquiry of the foreperson. 1 AA 153. The district court stated it was declaring a mistrial:

> The Court has found that there is a clear basis for mistrial, that there is no way that the Court can be ensured that any product of deliberation of this juror can

> be fair and impartial and based on what is appropriate, if you will, to reach a verdict

1 AA 153-54. At no point did Petitioner object to the declaration of a mistrial, or ask for any further explanation for a mistrial. 1 AA 154. There was never a request from Petitioner to simply replace Juror No. 3 with an alternate. Id.

The district court then brought Juror No. 10 back to the courtroom and explained that it was declaring a mistrial because "the particular facts and circumstances that have been found to have occurred here in these deliberations are such that a fair and impartial trial has become impossible from the Court's review and that we have no choice but to conclude these proceedings." 1 AA 157. Petitioner did not object to the district court's declaration and did not ask for the court to consider alternatives to a mistrial. Id.

After stating its finding that manifest necessity dictated a mistrial, the district court asked Juror No. 10 what the vote was, and he indicated the jury voted 11 to 1 in favor of acquittal. 1 AA 157. The district court then specifically asked if there was anything further defense counsel needed, to which Ms. McNeill stated there was not. Id.

Petitioner did not attempt to object to the district court's determination. 1 AA 157. The district court then indicated to counsel and the jury that it did not find, based upon the testimony presented, that the deliberations could go forward. 1 AA 158-60. This finding was based on the outside information, the interference with

the deliberations cause by discussion of that information, and the fact that the jury had deliberated upon that information rather than reporting it to the district court, but rather, based their deliberations upon that information. Id. The jury was then discharged. 1 AA 162-63.

Following the mistrial, a new trial was set to begin in 2017. 2 AA 323, 328-29. On December 15, 2016, Petitioner filed a Motion to Dismiss – Double Jeopardy. 2 AA 173-200. The State filed its Opposition on January 13, 2017. 2 AA 201-21. On January 18, 2017, the district court heard argument from both parties. 2 AA 230-76. On February 22, 2017, the district court entered its Findings of Fact, Conclusions of Law and Order denying Petitioner's Motion to Dismiss – Double Jeopardy. 2 AA 277-83.

Petitioner then filed the instant Petition for Writ of Mandamus in the Nevada Supreme Court. The State responds herein.

ARGUMENT

I. ALTHOUGH MANDAMUS IS AN AVAILABLE REMEDY TO BAR REPROSECTION, THE INSTANT PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED.

Petitioner argues that a writ of mandamus should issue to prevent his second trial because reprosecution is barred by double jeopardy. He asserts that the district court abused its discretion in finding manifest necessity for the mistrial.

Petitioner's attempt to invoke double jeopardy stems from a statement by the jury foreperson that the vote tally was 11 to 1 in favor of acquittal. 1 AA 158. The

foreperson's statement was made after mistrial was appropriately granted without objection from Petitioner (in fact, Petitioner argued in favor of manifest necessity for mistrial). After the foreperson's statement, Petitioner realized that the jury was in fact split in his favor, and he now claims that the district court abused its discretion in granting the mistrial. But, as the district court noted when considering Petitioner's Motion to Dismiss – Double Jeopardy, Petitioner's claim "really is entirely a hindsight argument." 2 AA 254. Petitioner's subsequent realization that the jury was hung in his favor does not negate Petitioner's consent to, and arguments in favor of, the mistrial. Petitioner's regret about the outcome also does not mean that the district court abused its discretion in finding manifest necessity, particularly when the record shows that the district court undertook careful deliberation before declaring a mistrial.

Mandamus is not intended to provide a means to re-argue, with the benefit of hindsight, the points that a defendant wishes had gone differently during trial and the subsequent deliberation. Rather, a writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion or an arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981). A writ of mandamus will not issue, however, if the petitioner has a plain, speedy, and adequate remedy

in the ordinary course of law. See NRS 34.170. Mandamus is an extraordinary remedy, and it is within the discretion of this Court to determine whether these petitions will be considered. Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Mandamus is an appropriate vehicle to challenge reprosecution following a mistrial. See Benson v. State, 111 Nev. 692, 895 P.2d 1323 (1995). A writ of prohibition will issue to interdict retrial in violation of a defendant's constitutional right not to be put in jeopardy twice for the same offense. Hylton v. District Court, 103 Nev. 418, 421, 743 P.2d 622, 624 (1987) (citing U.S. Const. amend. V; Nev. Const. art. 1, § 8).

The Double Jeopardy Clause of the United States Constitution and the Constitution of the State of Nevada protect individuals from multiple punishments for the same offense. U.S. Const. amend. V; NV Const. art. 1, § 8. Jeopardy attaches when a jury has been selected and sworn. Downum v. United States, 372 U.S. 734 (1963); Wheeler v. District Court, 82 Nev. 225, 415 P.2d 63 (1966). The Double Jeopardy Clause, however, does not dictate that "every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." Wade v. Hunter, 336 U.S. 684, 688, 69 S. Ct. 834, 837 (1949). Reprosecution is not barred, for example, when the district court declares a mistrial because of manifest necessity resulting from factors out of the prosecution's control, nor is it barred when a defendant consents to the mistrial.

Glover v. Dist. Ct., 125 Nev. 691, 709, 220 P.3d 684, 696 (2009).

The crux of Petitioner's argument is that the extrinsic information obtained by Juror No. 3 was not prejudicial, and the remaining jury members could therefore not have been prejudiced by the discussion of it. Thus, Petitioner argues, there was no manifest necessity for a mistrial, and the district court's failure to employ alternative remedial measures in place of a mistrial – such as replacing the jury member who committed misconduct with an alternate – constituted an abuse of discretion. As discussed in Sections II and III, this claim fails.

Although mandamus is generally an appropriate vehicle to challenge reprosecution, the instant Petition should be denied. Following careful deliberation, the district court correctly found that manifest necessity dictated the declaration of a mistrial. The record also reveals that Petitioner impliedly consented to the mistrial when he did not object to the district court's finding of manifest necessity, and when he argued that the jury pool had been impermissibly tainted by the juror misconduct. Thus, reprosecution is not barred by double jeopardy, and Petitioner's request for a Writ of Mandamus should be denied.

II. THERE IS NO DOUBLE JEOPARDY BAR TO REPROSECUTION BECAUSE DEFENSE COUNSEL IMPLIEDLY AGREED TO MISTRIAL.

When hearing Petitioner's Motion to Dismiss – Double Jeopardy, the district court found that "the State was the one who was arguing, well, let's not throw the

baby out with the bath water, so to speak. Let's see if we can save this matter, if it's only been a few things, or if it hasn't been pervasive." 2 AA 233. Petitioner sat silent while the State argued against mistrial because the parties and the district court thought that the jury was hung at 11-1 in favor of finding Petitioner guilty. 1 AA 158; 2 AA 254. Thus, for Petitioner, a mistrial would have been preferable to the potential alternatives of replacing the juror with an alternate (which might have led to a guilty verdict, if the alternate agreed with the 11 other jurors) or allowing the jury to continue to deliberate (which might have resulted in the lone holdout changing his mind). Despite the clarity of hindsight, however, Petitioner's documented failure to object to the finding of manifest necessity and his arguments that the deliberation process was irreparably tainted constitute implied consent to the mistrial. Petitioner not only sat silent, but actively argued that the jury was tainted; thus, his reprosecution is therefore not barred by double jeopardy.

With the benefit of hindsight, Petitioner wishes to now argue against reprosecution. However, Petitioner is not entitled to double jeopardy protection. "As a general rule, a defendant's motion for, or consent to, a mistrial removes any double jeopardy bar to reprosecution." Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 111 (1983). Consent to a mistrial may be express or implied. In determining implied consent, the totality of the circumstances of each case must be considered, and consent to double jeopardy should not be lightly presumed.

Benson, 111 Nev. at 696, 895 P.2d at 1327. Where the mistrial is provoked by the prosecution, a defendant's silence is not necessarily indicative of consent. However, where the trial court has declared a mistrial without either party seeking one, this Court has concluded that the "failure of defense counsel to object or express an opinion to the district court regarding the propriety of the mistrial implied consent and indicated tacit approval." Gaitor v. State, 106 Nev. 785, 788, 801 P.2d 1372, 1374 (1990).

In Gaitor, a juror saw one of the State's witnesses in handcuffs outside the courtroom before the witness went into the courtroom to testify. Id. at 787, 801 P.2d at 1374. The juror told the foreman and other jurors what he had seen. Id. The district court then declared a mistrial because of manifest necessity. This Court upheld the declaration of mistrial upon appeal. The Court determined that, in addition to the existence of manifest necessity, Gaitor's silence and failure to object despite ample opportunity to do so constituted implied consent. Id. at 788, 801 P.2d at 1374-75.

The facts surrounding the mistrial declaration in this case make it similar to Gaitor. Here, as in Gaitor, the juror's statements to other jurors about extrinsic information tainted the deliberation process. As in Gaitor, the mistrial was not requested by either party, but was declared by the district court. As in Gaitor, Petitioner had multiple opportunities to express an objection to the declaration of a

mistrial. As in Gaitor, Petitioner did not object, nor did he propose any alternative remedies. As in Gaitor, Petitioner was silent when the district court informed counsel that the court did not believe it had any other alternative but to declare a mistrial. In essence, Petitioner had multiple opportunities to challenge the district court's determination of a mistrial, or to argue that a mistrial was not appropriate. However, he chose not to do so.

Indeed, the totality of the circumstances surrounding the declaration of mistrial in this case reveal that Petitioner's implied consent to mistrial was more explicit than that of the defendant in Gaitor. Not only did Petitioner never object to the district court's declaration of a mistrial despite being given multiple opportunities to voice any concerns, he at times argued in favor of declaring a mistrial. When the State suggested that one possible alternative would be for the Court to canvass Juror No. 3 thoroughly and then, if appropriate, instruct him to disregard his extrinsic research and return to the deliberations, counsel responded, "That's frightening." 1 AA 110. After the State argued that, if the extrinsic research had been shared, that did not necessarily mean that it had influenced the other jury members, Petitioner contended that the extrinsic information had infected the jury:

> MS. ALLEN: Your Honor, I just – I would disagree with Mr. Palal that if it was shared that's a huge problem and I think that probably creates a bad record regardless of whether or not they are on one side of the issue or the other. He went outside of what he was supposed to do and he shared that with the jury.

> I was not prepared for this issue. I was prepared for something else entirely, but I think that there is actually case law on sort of infecting the jury and that it can't stand.

1 AA 108. Later, after the district court canvassed the jury foreperson and stated that it would next canvass Juror No. 3, Petitioner again claimed that the deliberation process was tainted:

> THE COURT: I did not want Juror No. 10 to speak for Juror No. 3, so to speak, I just wanted his take as the foreperson on the overall and to kind of get nailed down how much did this permeate the deliberations and generally what it was and that kind of thing, but I want to hear from Juror No. 3.
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> MS. ALLEN: That is our only request. At this point, sadly, I think I somewhat agree with the Court on the permeated; it was not a little bit. And premeditation, whatever he researched is pretty huge in this case. That is a huge issue. It is like the issue.

1 AA 135.

Then, after canvassing Juror No. 3, the district court explicitly asked for Petitioner's thoughts on the developments before the district court ruled. 1 AA 152. Petitioner did not object or state that he believed the deliberation process was not influenced, or in any way contradict his previous assertions that the jury had been impermissibly infected. Id. Instead, counsel replied only that Petitioner was surprised and angry at the turn of events. Id.

Over the course of the proceedings, the district court asked counsel several

times what else would be necessary in determining whether there was manifest necessity for a mistrial; never once was an alternative remedy deemed to be an appropriate avenue by Petitioner, nor was there a voiced objection to the mistrial. Instead, Petitioner agreed with the district court that the deliberation process was tainted. After considering Petitioner's Motion to Dismiss – Double Jeopardy, the district court found that, at the time of the mistrial, "there wasn't any doubt in anyone's mind that a mistrial was an absolute manifest necessity." 2 AA 254.

Given this sequence of events, Petitioner consented to the mistrial, and cannot now later claim the mistrial was inappropriate and that a subsequent trial would be barred. Because Petitioner failed to object despite multiple opportunities to do so – and in fact argued to the district court that the deliberation process was irreparably tainted – he impliedly consented to the district court's determination of mistrial. Accordingly, double jeopardy does not bar reprosecution in this case. Therefore, the Petition for Writ of Mandamus should be denied.

III. THERE IS NO DOUBLE JEOPARDY BAR TO REPROSECUTION BECAUSE THE MISTRIAL WAS DUE TO MANIFEST NECESSITY.

Although a defendant's consent to a mistrial removes any Double jeopardy bar to reprosecution, Petitioner now claims that reprosecution is barred by double jeopardy. He alleges that that this is so because the district court abused its discretion in finding manifest necessity for a mistrial. This claim fails: as discussed in detail below, the district court did not abuse its discretion because (1) it followed

the procedures set forth by this Court in making a deliberate decision based on evidence, and (2) the misconduct by Juror No. 3 was sufficiently prejudicial to support a finding of manifest necessity.

A. Standard of Review.

"Manifest necessity" exists when the judge deems that the ends of justice cannot be attained without discontinuing the trial. Illinois v. Somerville, 410 U.S. 458, 462, 93 S. Ct. 1066, 1069 (1973); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824). A judicial determination of manifest necessity is reviewed for abuse of discretion, but the level of deference varies according to the circumstances in each case. Where, as here, the judge's determination of manifest necessity is based on her own observations and personal assessment that a fair trial would be impossible, that view must be given special deference. United States v. Chapman, 524 F.3d 1073, 1082 (9th Cir. 2008) (citing Arizona v. Washington, 434 U.S. 497, 510-11, 98 S. Ct. 824 (1978)). The goal of the Court in reviewing a district court's decision to declare mistrial is to ensure that the district court did not act rashly or precipitously, but only after a deliberate consideration of the facts before it. Glover, 125 Nev. at 710, 220 P.3d at 697.

Whether the district court abused its discretion in finding that there was manifest necessity for mistrial can be discerned first by examining the procedural steps taken by the district court in declaring the mistrial, and second by looking at

whether Juror No. 3's misconduct was sufficiently prejudicial to warrant a mistrial. These two points are addressed below in Sections II.B and II.C, respectively.

B. There are no procedural indications of an abuse of discretion in the district court's declaration of mistrial.

The Petition for Writ of Mandamus should be denied because, not only did Petitioner assent to the mistrial, but the district court followed proper procedure to ensure that its declaration of mistrial based on manifest necessity was not an abuse of discretion.

Abuse of discretion by a district court may be discerned by an examination of the procedures that the district court followed in declaring a mistrial. Glover, 125 Nev. at 714, 220 P.3d at 699. The procedural factors this Court examines when reviewing a district court's declaration of mistrial for abuse of discretion are whether the district court (1) heard the opinions of the parties about the propriety of the mistrial, (2) acted deliberately instead of abruptly, (3) considered the alternatives to a mistrial and chose the alternative least harmful to a defendant's rights, and/or (4) based the mistrial on evidence presented in the record. Glover, 125 Nev. at 710, 220 P.3d at 697. An examination of the procedural factors listed above demonstrates that the district court in this case did not abuse its discretion.

First, the district court solicited the opinions of both parties before declaring a mistrial. Glover, 125 Nev. at 714, 220 P.3d at 699-700. Both parties were given multiple opportunities to be fully heard before the district court declared a mistrial.

1 AA 108, 109, 110, 116-18, 133, 134, 135, 150, 152, 153. (The district court also gave both parties the opportunity to be fully heard and submit any arguments before it ruled on Petitioner's Motion to Dismiss – Double Jeopardy, filed after the start of the second trial. 2 AA 230-76.)

Second, the district court did not act precipitously in declaring a mistrial. Glover, 125 Nev. at 715, 220 P.3d at 701. Instead, the district court acted with deliberateness. This deliberateness included an acknowledgement of the multiple potential outcomes of its impending inquiry into the alleged misconduct by Juror No. 3. 1 AA 113-114. After explaining potential outcomes, but before canvassing jurors, the district court explicitly stated that it had not yet made a decision:

> THE COURT: But I do not know at this point what the outcome of this discussion with the jurors will be or whether we will be able to continue or whether we will have to have a mistrial.

1 AA 114.

The district court asked for argument from both parties and allowed them both to be fully heard, before the jurors were canvassed and after. 1AA 107-11, 114-18, 133-35, 150-53. The district court canvassed the jury foreperson and the juror who had committed the misconduct. 1 AA 118-31, 136-50, 154-58. During these canvasses, the district court heard testimony that the jury had deliberated on the extrinsic information gathered by Juror No. 3 and that, at one point, that extrinsic information had supplanted the jury instructions from the district court. 1

AA 130-31. It was only then that the district court declared that it had found the manifest necessity that would require a mistrial. 1 AA 154-55. Thus, the district court acted with appropriate deliberation in declaring a mistrial.

Third, a district court's failure to consider any alternatives to mistrial might indicate an abuse of discretion. Glover, 125 Nev. at 714-15, 220 P.3d at 700-01. Petitioner contends that the district court's statement that "I highly suspect that he has in some fashion or another shared this information that he has and then I do not have any choice but to consider this a mistrial and to end this case," indicates that the district court did not consider alternatives, and thus abused its discretion. Petition at 20. However, this contention is belied by the record, which shows that the district court did consider alternatives to mistrial.

The district court plainly stated in its Findings of Fact, Conclusions of Law and Order denying Petitioner's Motion to Dismiss – Double Jeopardy that it considered alternate solutions and found that none were adequate. 2 AA 281. This finding is supported by the record. For example, the State suggested canvassing Juror No. 3 and instructing him to ignore his research as an alternative to mistrial. 1 AA 110. The district court also explicitly stated that it might be possible to bring an alternate juror in to replace Juror No. 3. 1 AA 113. However, the district court considered and eventually rejected these alternatives due to the extent of the misconduct and the pervasiveness of the extrinsic information in the deliberation

process:

> THE COURT: Well, I never intend to when I ask counsel to make a record to turn into a quibble with the record, but what I heard that foreperson say is they deliberated on what Juror No. 3 presented. They did not immediately say you shouldn't have done that.
>
> Had I heard this juror, this foreperson indicate to me that they had said, Hey, that's not cool, we can't talk about that and they had in any way turned to a legitimate discussion of the law and the instructions as given to them, you know, I might have a different inclination. But what I heard was that they had a significant period of time that they deliberated on what Juror No. 3 proposed.

1 AA 133-34. Furthermore, at a hearing on Petitioner's Motion to Dismiss – Double Jeopardy, the district court clarified the reasoning behind the comment that is cited by Petitioner as evidence of the district court's failure to consider alternatives. The district court explained that the comment was only intended to let both parties understand the playing field that the district court expected:

> THE COURT: One of the last things to wrap up before I throw it to you, Ms. Jackson, on your motion and hear any final argument for today's purposes is the Court had indicated before it brought in Juror No. 3 or the foreperson to have any discussions that, you know, if it turned out that the circumstances were such that this was limited or limited to discussions that occurred or some other reason to believe that this had not permeated the deliberations for this significant period of time and all the jurors had not been exposed that we'd consider some alternative. But if the circumstances turned out to be it was much more pervasive, then the Court was going to understand that that would be the necessity to declare the mistrial.
>
> I said it in advance so that – not necessarily to

> predetermine an outcome. But I said it in advance because of the circumstances of what I was anticipating, which was somehow we'd want to start to qualify the circumstances after the fact. I wanted everyone to know the playing field I expected.
>
> I didn't know what the information was that was going to come to light and where it would land on the spectrum, but I wanted everybody to understand the playing field.

2 AA 234-35.

At the time that the district court was considering a mistrial, Petitioner did not suggest any alternative courses of action to the district court. Instead, the district court considered remedial measures of its own volition and at the suggestion of the State. Now, in retrospect, Petitioner suggests that the district court abused its discretion by not adopting those remedial measures rather than declaring a mistrial. Petition at 33. However, as the district court noted, any potential alternatives were lacking because of the nature of the misconduct. Juror No. 3 researched the law on deliberation and the effects of certain blood alcohol contents. On Monday morning, Juror No. 3 shared this research with the foreperson. Rather than approaching the district court with this information, the jury deliberated for several hours on Juror No. 3's research about premeditation.

In light of this research and deliberation, the suggestion of simply replacing Juror No. 3 with an alternate would not have worked, as Juror No. 3's extrinsic research had already infected the jury deliberation process. See Bowman v. State,

387 P.3d 202, 206 (Nev. 2016) ("It is not necessary that the extrinsic material be disclosed to the jury; a single juror's exposure to extrinsic material may still influence the verdict because that juror may interject opinions during deliberations while under the influence of the extrinsic material."). Instructing the jury to begin the deliberations anew likewise would not have worked – the jury had the opportunity to do so in the deliberation room, but continued considering and discussing Juror No. 3's research.[1]

The determination of the adequacy of solutions is best left to the district court, which is in the best position to make the determination of whether extrinsic evidence affected the jury's deliberations. United States v. Steele, 785 F.2d 743, 746 (9th Cir. 1986). The alternate methods that Petitioner claims the district court should have implemented were correctly rejected by the district court, after it determined that the extrinsic evidence affected the jury's deliberations. Thus, the district court appropriately considered alternatives before declaring a mistrial.

Circumstances constituting a manifest necessity to declare a mistrial should appear in the record. State v. Eisentrager, 76 Nev. 437, 357 P.2d 306 (1960). Evidence in the record supports the district court's finding of manifest necessity for mistrial. The information introduced by Juror No. 3 was ambiguous, confusing, and related to a material issue. Juror No. 3 brought the extrinsic information to the

[1] As discussed in detail in Section II, *supra*, Petitioner agreed with this position when presenting his argument to the district court. 1 AA 108, 135.

deliberation room, where the jury impermissibly deliberated on it and allowed it to supplant instructions given by the district court. Additionally, before declaring a mistrial, the district court allowed all parties to be heard, acted deliberately, and considered alternatives to mistrial. For these reasons, the district court did not abuse its discretion in declaring a mistrial.

C. The district court did not abuse its discretion by finding manifest necessity because the extrinsic information introduced by Juror No. 3 was prejudicial and tainted the jury deliberation process.

The record reflects that the district court took care to follow proper procedure before declaring a mistrial. Even if the district court had not heard argument and made a deliberate decision, however, the form and the effects of Juror No. 3's misconduct was so prejudicial to the deliberation process that the district court did not abuse its discretion in declaring a mistrial.

Juror misconduct may provide grounds for mistrial due to manifest necessity. See, e.g., Simmons v. United States, 142 U.S. 148, 154, 12 S. Ct. 171, 172 (1891). Juror misconduct occurs either when a juror acts contrary to his instructions or oaths or when a third party attempts to influence the jury process. Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). The juror misconduct in this case occurred when Juror No. 3 violated the district court's instructions by discussing the case with his wife, investigating the meaning of deliberation on the internet, sharing the results of that investigation with the rest of the jury, and

researching blood alcohol content levels. 1 AA 129, 143-44, 149, 154-55.

While it is true that not every exposure by a jury to extrinsic information constitutes grounds for declaring a mistrial, in evaluating whether the extrinsic evidence affected the jury's deliberations, the trial court is in the best position to make that determination, and its decision is afforded substantial weight. Steele, 785 F.2d at 746.

Petitioner cites the elements used by the Tenth Circuit to determine whether juror misconduct based upon acquiring a definition during deliberations was prejudicial. Petition at 23-24. However, in Meyer, this Court laid out factors that should be considered when analyzing whether extrinsic information obtained through juror misconduct was sufficiently prejudicial to warrant a mistrial. Id. at 566, 80 P.3d at 456. These factors included how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time that the jury deliberated on the extrinsic information, the ambiguity of the information, and the materiality of the issue that motivated the search. Id. See Zana v. State, 125 Nev. 541, 548, 216 P.3d 244, 249 (2009). Applying these factors to the facts of this case establishes that the district court did not abuse its discretion in declaring a mistrial.

After Juror No. 3 brought his research back to the jury panel, the entire panel considered and discussed both the fact of Juror No. 3's extrinsic research and the

results of that research. 1 AA 123, 149. This discussion took over the deliberation process, as the deliberations became primarily about the information uncovered by Juror No. 3:

> THE COURT: So I guess I just want to make sure I am understanding this. Even though there were jury instruction that the Court read and jury instructions that were in writing that each person had a copy set of, your deliberations did not focus on what was in the instructions about the premeditation, they focused on what Juror No. 3 researched about premeditation?
> JUROR NO. 10: I think it was the conversation really got bent more on what Juror No. 3 was saying about premeditation.
> THE COURT: ***So did you at some point then turn to the jury instructions themselves for that discussion*** or did you just go back to deliberating on the facts on the evidence?
> JUROR NO. 10: We looked at it – it was so heated in there at one point in time. I think it was – ***I don't think anyone really went back and focused on the instructions right there in front of them as much as listening to what Juror No. 3 was saying about how he researched it*** and at some point kind of saying that you weren't supposed to do outside research.

1 AA 130-31 (emphasis added).

In Zana v. State, 125 Nev. 541, 216 P.3d 244 (2009), the Court held that, because the jury had only briefly discussed the juror's fruitless search and then continued with their normal deliberations, the brief exposure of the jury argued against the need for a mistrial. Id. at 548, 216 P.3d at 249. In contrast, the jurors in this case turned their focus to Juror No. 3's research, and that research supplanted

the jury instructions from the district court during deliberations. 1 AA 130-31. The district court's canvass of the foreperson indicates that the discussion of the extrinsic research was not brief and limited, but that it permeated the deliberations. 1 AA 125-128. Thus, the deliberation process was infected by the extrinsic research. Accordingly, Petitioner has failed to satisfy the first of the elements set forth in Meyer.

The next factor to consider in determining whether extrinsic information is prejudicial is ambiguity of the information. Meyer, 119 Nev. at 566, 80 P.3d at 456. The research that Juror No. 3 conducted was intended to answer a specific question. Petitioner argues it is insufficient for the district court to have found that, merely because the jury deliberated about the improper research, a mistrial was warranted. Petition at 16. This is so, Petitioner contends, because the legal research conducted by Juror No. 3 resulted in the same definitions as the Court's instructions to the jury. Petitioner goes on to assert that because the definitions were "correct" there can be no prejudice as a result of the misconduct.

This assertion, however, is belied by the record. The research conducted by Juror No. 3 introduced ambiguity into the deliberation process because it was confusing for the jury to have considered it. The district court noted, in considering information it gained from canvassing Juror No. 3, that Juror No. 3 was confused and unaware of what he was attempting to research. 1 AA 151. Juror No. 3 had

difficulty articulating his findings, or even why he felt he needed to do outside research to the Court. 1 AA 142-43. The district court repeatedly noted it was unclear what had been researched by Juror No. 3, and what his confusion was directed towards. 1 AA 142-43, 144, 148-49. Thus, the record does not demonstrate that Juror No. 3 looked up the proper law, and properly applied it to the case at hand.[2]

Juror No. 3 did not explain what website he visited, or exactly what the site said. 1 AA 143. It was unclear even from the answers provided by Juror No. 3 what he was attempting to clarify, and thus, to assert he had done correct and proper research is unsupported by the record. That the jury repeatedly returned to this potentially confusing information during its deliberations on Monday argues in favor of the necessity of declaring a mistrial. Thus, Petitioner has failed to satisfy this element of the test set forth in Meyer.

The issue was also material. At trial, the State argued that Petitioner had acted with willfulness, deliberation, and premeditation to kill his victim. 1 AA 009-

2 Even assuming, *arguendo*, that Juror No. 3 had applied the appropriate law and properly understood the instructions from this Court, a mistrial would have been the appropriate remedy nevertheless. If Juror No. 3 were applying the correct law, and his outside research did not improperly taint the jury, then the result of deliberations was a hung jury. Juror No. 3 was a holdout juror who refused to side with the remaining eleven jurors, despite hours of deliberations, and despite an edict from the district court to continue to deliberate. 1 AA 104-05. If the jury was not tainted and Juror No. 3's research was proper research, then the jury was a hung jury, and thus, warranted a mistrial.

10, 026-27. In contrast, Petitioner claimed that he acted in self-defense. 1 AA 033. Thus, the issues of self-defense and premeditation were critical to determining the verdict in this case. Defense counsel conceded the importance of premeditation in the jury's verdict, stating that premeditation was "the issue" that the jury needed to consider. 1 AA 135. The canvass of the jury foreperson indicates that Juror No. 3's research was sufficiently material that it supplanted the jury instructions provided by the district court. 1 AA 128-31. Applying the factors this Court has previously used to determine prejudice in cases of juror misconduct, Juror No. 3's extrinsic research was sufficiently prejudicial to warrant a mistrial.

Nevertheless, to support his position that the district court abused its discretion by declaring a mistrial, Petitioner relies on three cases – two from the Ninth Circuit, and one from the Ohio Supreme Court – because, he claims, the facts of those cases are similar to the facts here. Petition at 30. However, these cases are inapposite.

The cases cited by Petitioner all reflect situations in which the juror misconduct either did not reach the deliberation room or, if it did, was not discussed at length by the jury. First, Petitioner cites Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986). Petition at 30-31. In Bayramoglu, a juror visited the courthouse law library to research penalties for first and second degree murder. Id. at 882. The juror attempted to share the results of her research during deliberations,

but the issue died within one or two minutes because other jurors said that they should not be talking about the subject. Id. at 887. The instant case is also notably different from State v. Gunnell, 132 Ohio St. 3d 442, 973 N.E.2d 243 (2012), where the juror was stopped short of sharing the information by the bailiff at the entrance to the courtroom. Id. at 443, 973 N.E.2d at 245. Finally, Petitioner cites to United States v. Steele, 785 F.2d 743 (9th Cir. 1986), where jurors turned to a dictionary for the common definition of particular words, but ultimately resorted to the trial court's instructions. Petition at 32-33. In Steele, the Ninth Circuit noted that jurors did not supplant any legal definitions given by the court with those found in the dictionary. Id. at 745-49. Thus, the use of the dictionary to look up common definitions of words was found not to have influenced the jury's deliberations.

The facts of this case distinguish it from those cited by Petitioner. Juror No. 3's research was obtained not from a courthouse law library, but from an unspecified layman's internet site. 1 AA 143. Juror No. 3's use of the internet to search for issues relating to blood alcohol content, law on premeditation and deliberation, and law on self-defense from a website is markedly different and goes much further than a definition of a particular word. 1 AA 144. Additionally, the misconduct would not have been cured solely by Juror No. 3's removal, as the district court's instructions were supplanted by Juror No. 3's internet research

during deliberations. 1 AA 130-31, 147-49. Removing Juror No. 3 would not have "unrung the bell" of the extrinsic information he introduced.

The record shows that the extrinsic research conducted by Juror No. 3 concerned a material issue: premeditation. While deliberating, the jury referred to the research done by Juror No. 3 rather than jury instructions on the same subject from the district court. Thus, there is ample evidence to support the district court's finding that there was manifest necessity to declare a mistrial.

Where the trial court's findings are not clearly erroneous, they should be sustained on appeal. Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 112 (1983). Petitioner seeks to have it both ways: he did not object at trial or otherwise oppose the mistrial – in fact, he apparently agreed with the district court that extrinsic information had tainted the deliberation process – but now claims that he cannot be reprosecuted because he did not consent and because there was no manifest necessity that would compel a mistrial. However, both of Petitioner's assertions are belied by the record, which shows that Petitioner did impliedly consent to the mistrial and that there was manifest necessity. Reprosecution of a defendant following mistrial is not barred when the district court declares a mistrial because of manifest necessity or when a defendant consents to the mistrial. Glover, 125 Nev. at 709, 220 P.3d at 696. Accordingly, reprosecution of Petitioner is not barred by double jeopardy. Therefore, mandamus is not appropriate in this case; the

Petition for Writ of Mandamus should be denied.

CONCLUSION

The extrinsic research conducted by Juror No. 3 was introduced into the jury room and deliberated upon by the jury panel. This impermissible introduction of extrinsic information tainted the jury deliberation process and would not have been cured by solely by the removal of Juror No. 3. Additionally, Petitioner impliedly consented to the mistrial when he did not object to the district court's finding of manifest necessity, and when he argued that the jury had been impermissibly tainted by extrinsic information. Accordingly, the district court did not abuse its discretion in declaring a mistrial. Thus, Petitioner's reprosecution is not barred by the Double Jeopardy Clause. Therefore, the Petition for Writ of Mandamus should be denied.

Dated this 7th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 7, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that service of the above and foregoing was made this 7th day of April, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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