No. SJC–13242

Commonwealth of Massachusetts
Supreme Judicial Court

COMMONWEALTH

v.

CHRISTIAN EDWARDS

BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF THE DEFENDANT & AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, *amici* make the following disclosures: The Committee for Public Counsel Services (CPCS) is a statutorily created agency established by G.L. c. 211D, § 1. The American Civil Liberties Union of Massachusetts is a 501(c)(3) organization under Federal law and the laws of the Commonwealth of Massachusetts. The Massachusetts Association of Criminal Defense Lawyers (MACDL) is a 501(c)(6) organization. *Amici* do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in any *amici*.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), *amici* and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;
(b) no party or party's counsel contributed money to fund preparing or submitting the brief;
(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and
(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

INTEREST OF THE AMICI CURIAE

The Committee for Public Counsel Services (CPCS), the Massachusetts public defender agency, is statutorily mandated to provide counsel to indigent persons in criminal proceedings. See G.L. c. 211D, § 1, 5. This brief addresses the confidential nature of information gathered in the course of client representation, including defects in the Commonwealth's case, and whether defense counsel may, shall or shall not disclose such information in response to judicial inquiry. The Court's decision in this case will affect the interests of CPCS' present and future clients and the manner in which defense attorneys counsel and represent those clients. CPCS has an interest in ensuring that indigent defendants receive the full protection of the duties of zeal, loyalty, and confidentiality to which they are entitled under the Massachusetts Rules of Professional Conduct.

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to defending the principles of liberty and equality embodied in the constitutions and laws of the

Commonwealth and the United States. Consistent with this mission, ACLUM regularly participates as amicus in matters involving criminal justice and legal ethics.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

ISSUES PRESENTED

1. Under the Massachusetts Rules of Professional Conduct, attorneys owe duties of confidentiality, loyalty, and zeal to their clients. Would those obligations be violated if a criminal defense lawyer alerted the Commonwealth to a fatal defect in its case at a pretrial hearing, thereby enabling the prosecutor to remedy that defect at trial?

2. After jeopardy attached, the trial judge concluded that the Commonwealth erred in failing to disclose mandatory discovery necessary to prove an essential element of the crime charged, and that a retrial would be fundamentally unfair to the defendant. He thus terminated the trial, characterizing his ruling as a dismissal with prejudice. Whether the judge's post-jeopardy termination of the trial is construed as a dismissal, a required finding of not guilty or a mistrial not justified by manifest necessity, is a retrial barred by double jeopardy principles?

SUMMARY OF THE ARGUMENT

Under the Massachusetts Rules of Professional Conduct, attorneys are bound by the duties of zeal, loyalty, and confidentiality. These duties prohibited defense counsel from disclosing the defect in the Commonwealth's case. The duty of confidentiality prohibits attorneys from revealing any information related to the representation that would be detrimental to the client if disclosed. Information that would assist the Commonwealth in proving the case against a criminal defendant meets this definition,

and therefore must be kept confidential. *Infra* at 14-16. The duties of loyalty and zeal also prohibit defense counsel from assisting the prosecution by revealing fatal flaws in the Commonwealth's case. *Infra* at 16-21. Except in the limited circumstances enumerated in Mass. R. Crim. P. 14(b), a defendant need not provide notice of the intended defense. As none of those exceptions, or their rationales, are applicable here, there was no basis to require the defendant to provide pretrial notice of his defense. *Infra* at 21-26.

Double jeopardy principles bar a retrial of this case. This is so whether the termination of the trial is construed as a dismissal with prejudice, *infra* at 27; a required finding of not guilty, *infra* at 28-29; or the declaration of a mistrial. Where, as here, a mistrial occurs after jeopardy has attached, a retrial is only permitted if the defendant consented to the mistrial, or if there was a manifest necessity for the mistrial. *Infra* at 30-31. Mr. Edwards did not consent to a mistrial, *infra* at 32-33; nor did the Commonwealth's lack of preparedness create a manifest necessity for a mistrial, *infra* at 33-37. Retrial is therefore barred.

ARGUMENT

I. The Massachusetts Rules of Professional Conduct prohibited trial counsel from revealing the defect in the Commonwealth's case.

All attorneys are bound by the duties of zeal, loyalty and confidentiality. See Mass. R. Prof. C. 1.3, 1.6, 1.7, 1.9. For criminal defense lawyers, these duties take on an added dimension and urgency. Unlike a prosecutor, whose obligation is to present the evidence, "[d]efense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case." *U.S. v. Wade*, 388 U.S. 218, 257 (1967) (White, J., dissenting in part and concurring in part). Rather, a defense attorney "must act zealously within the bounds of the law and applicable rules to protect the client confidences and the unique liberty interests that are at stake in a criminal prosecution." ABA Criminal Justice Standards for the Defense Function, Standard 4-1.4 (2017).

"In light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of

candor may be tempered by competing ethical and constitutional obligations." *Id.* In our system, a criminal defendant "must be able to rely on the undivided loyalty of his counsel to present the defense case with full force and zealousness." *Commonwealth v. Downey* (*Downey III*), 65 Mass. App. Ct. 547, 552 (2006). See Mass. R. Prof. C. 1.3 ("The lawyer should represent a client zealously within the bounds of the law").

To require defense counsel to assist the prosecution by revealing flaws in its case would rewrite the ethical obligations of defense lawyers and upend the foundation of attorney-client relationships. Such a result would be irreconcilable with our adversarial system and the Rules of Professional Conduct, and accordingly, this Court should emphatically reject it.

A. *Information defense counsel gathers relating to flaws in the prosecution's case is confidential and, under the Massachusetts Rules of Professional Conduct, must not be disclosed.*

Rule 1.6 of the Massachusetts Rules of Professional Conduct ("Rule 1.6") defines the duty of confidentiality that attorneys owe

their clients. Subject to carefully limited exceptions,[1] "[a] lawyer shall not reveal confidential information relating to the representation of a client." Rule 1.6. Comment 3A to Rule 1.6 defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential."[2]

This definition of confidentiality is expansive. It is "broader than the attorney-client privilege and the work product doctrine." Rule 1.6, Comment 3. "This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." Burkoff,

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[1] The exceptions, delineated in Rule 1.6(b), Add. 40, are inapplicable here because they are designed to avoid substantial harm or injury that is reasonably certain.

[2] Effective October 1, 2022, this definition of confidential information will be moved into the body of Rule 1.6. See Supreme Judicial Court Rules, Rules of Professional Conduct, Rule 1.6 Confidentiality of Information, available at https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-16-confidentiality-of-information (last visited August 3, 2022).

Criminal Defense Ethics: Law and Liability, § 5.8, at 227 (2022 ed.). "[T]he rule itself is straightforward and its structure simple … a broad category of information 'relating to the representation of a client' is put out of bounds; a lawyer simply and unequivocally 'shall not reveal it." Hazard, The Law of Lawyering §10.03, at 10-6 (4th ed. 2021) (discussing Model Rule of Professional Conduct 1.6).

A plain reading of the rule reveals that information regarding flaws in the prosecution's case meets the definition of "confidential information": it is gathered "during" the representation, "relating to the representation" and it is "likely to be … detrimental to the client if disclosed" to a prosecutor who could then use the information to salvage their case against the defendant. See Rule 1.6. As such, the information at issue here could not be revealed.

B. *Safeguarding the defense's trial strategy was compelled by the defense attorney's duty to his client and did not violate the attorney's duty of candor to the court.*

The judge at the trial readiness conference should not have asked, "Is there any problems with service," (T1:4)[3] as the question

[3] This brief follows the format used in the defendant's brief for citations to the transcript. The January 8, 2020 trial readiness

called for the disclosure of confidential information that defense counsel was prohibited from revealing information. It is the Commonwealth's burden to prove each and every element; a deficiency on any one element may give rise to a viable defense. The defendant's knowledge of the abuse prevention order—the undergirding of the mens rea element of the crime—is an essential element. See *Commonwealth v. Crimmins*, 46 Mass. App. Ct. 489, 491 (1999). It therefore is always at issue without special notice from the defense. Thus, trial counsel's articulation of his role was perfectly apt: "I can't be expected to, and I won't, help the government prove their case against Mr. Edwards, point out fatal flaws in their cases for them so that they can prove their cases" (T3:18). He further recognized that revealing this information would violate his ethical obligations. As he later told the trial judge, "That would be unethical, for me to tell the Court that the government cannot prove

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conference transcript is cited as "(T1__)", the February 25, 2020 trial transcript is cited as "(T2__)", the February 26, 2020 the trial transcript is cited as "(T3__)" and the March 2, 2020 motion to reconsider transcript is cited as "(T4__)." The record appendix is cited as "(R.__)" and the Commonwealth's brief is cited as "(C. Br. ___)."

-- you know, I can't tell the Court that" (T3:15). He understood, correctly, that his duty of confidentiality forbade him from revealing information that would assist the Commonwealth in proving their case against his client.

Trial counsel's conduct also embodied the zeal and loyalty that is ethically required of all attorneys. Cf. ABA Comm. On Ethics & Prof. Responsibility, Formal Op. 94-387 (1994) ("A lawyer has no duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claim; to the contrary, it would violate Rules 1.3 and 1.6 to reveal such information without the client's consent"). A criminal defendant "must be able to rely on the undivided loyalty of his counsel to present the defense case with full force and zealousness." *Downey III*, 65 Mass. App. Ct. at 552. These twin duties are required under the Rules of Professional Conduct. See Mass. R. Prof. C. 3.1; Mass. R. Prof. C. 1.9, Comment 31.

Executing a defense based on the Commonwealth's failure to prove an element is explicitly sanctioned by Rules of Professional Conduct: a criminal defense lawyer may "so defend the proceeding as to require that every element of the case be established." Mass. R.

Prof. C. 3.1. Accordingly, any question to defense counsel regarding potential problems of proof on an element risks premature disclosure of the defense trial strategy and irremediable prejudice to the defendant. See *State v. Sugar*, 84 N.J. 1, 19 (1980) ("any disclosure of counsel's trial strategy puts the defense at an immeasurable disadvantage"). Given the importance of the ethical duties at stake, judges should refrain from inquiries that call for confidential information or risk revelation of a defense trial strategy.

The duty of candor toward the tribunal, articulated in Mass. R. Prof. C. 3.3, does not counsel a different result. As relevant here, Rule 3.3(a) states: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Trial counsel made no false statement of fact or law. When asked, "Is there any problems with service?" he replied, truthfully, "I've been provided discovery" (T1:4).[4] He answered the

[4] This exchange occurred after trial counsel had shown the prosecutor the copy of the abuse prevention order he had previously received in discovery and asked her to check it against her copy. The prosecutor then compared the two sets of documents

judge's question about service in a way that was honest, carefully avoided the revelation of confidential information and satisfied *all* of his ethical duties.

Trial counsel recognized his distinct role and responsibilities and conducted himself in an ethically permissible way. As he correctly told the trial judge, "Your Honor, the position of the D.A.'s Office and the Court cannot be that it is my job to help the government prove the case against Mr. Edwards" (T3:18). In our adversarial system, the Commonwealth, and only the Commonwealth, bears the responsibility of proving a criminal charge and rectifying any deficiencies in its evidence.[5] "It is simply not the role of the client's counsel to assume responsibilities that

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and confirmed that they were the same (T3:13, 19-20; R.23). Trial counsel gave the prosecution a chance to verify that the provided discovery was accurate; he was certainly not required to do more.

[5] As the trial judge noted, it was "the Commonwealth's obligation at the trial readiness to make sure that, however many prosecutors had their hands on the file, that all of the discovery that they intend to use has been provided to the defendant" (T4:11).

belong to others." *In re Guardianship of L.H.*, 84 Mass. App. Ct. 711, 730 (2014) (Agnes, J., dissenting).[6]

C. *A defense based on the Commonwealth's failure to disclose evidence supporting an element of the offense is readily distinguishable from the enumerated defenses for which advance notice can be required under the Massachusetts Rules of Criminal Procedure.*

In general, "a defendant need not reveal his defense." *Commonwealth v. Edgerly*, 372 Mass. 337, 342 (1977). This rule is necessary because "any disclosure of counsel's trial strategy puts the defense at an immeasurable disadvantage … [P]remature disclosure of trial strategy upsets the presumed balance of advocacy that lies at the heart of a fair trial." *Sugar*, 84 N.J. at 19. Except in the very limited circumstances discussed below, a defendant must be allowed to prepare for trial without alerting the prosecution of his

[6] *Amici* emphatically reject the framing of defense counsel's conduct in the third question of the amicus solicitation announcement in this case. Trial counsel did not "sandbag" the prosecutor. The Commonwealth can hardly claim surprise when defense counsel "defend[s] the proceeding as to require that every element of the case be established." Mass. R. Prof. C. 3.1. Trial counsel acted conscientiously and in full compliance with his ethical obligations. The term "sandbag"—which does not appear anywhere in the Commonwealth's brief— unfairly suggests otherwise.

intended defense. It is for this reason that motion for funds and summonses may be heard ex parte. See *Blazo v. Superior Court*, 366 Mass. 141, 148 n.8 (1974) ("an impecunious defendant should be able to summons his witnesses without explanation that will reach the adversary"); see also *Commonwealth v. Dotson*, 402 Mass. 185, 187 (1988) (prosecutor's participation in motion for funds could prejudice the defendant if it "compelled the defendant to reveal trial strategy that would otherwise have remained undisclosed").[7]

The general rule that attorneys are not required to provide advance notice of the defense is subject to limited exceptions enumerated in Mass. R. Crim. P. 14(b): defenses of alibi, mental health issues, license, claim of authority, ownership, or exemption, and self-defense claims involving *Adjutant* evidence.[8] As discussed

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[7] The federal system also permits motions for funds to be heard ex parte. "The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case." *U.S. v. Abreu*, 202 F.3d 386, 391 (1st Cir. 2000), quoting *Marshall v. U.S.*, 423 F.2d 1315, 1318 (10th Cir. 1970).

[8] *Commonwealth v. Adjutant*, 443 Mass. 649, 650 (2005) (evidence of victim's prior violent conduct is admissible where a claim of self-defense is asserted, and the identity of the first aggressor is in dispute).

below, for those five exceptions the defendant *alone* has possession and control of the relevant information. That is not the situation in this case. Here the prosecution possessed all the relevant information and was on notice, as it is in every criminal case, that they had the burden to establish every element of the charged offense.

The notice requirements set forth in Mass. R. Crim. P. 14(b) address a potential imbalance between the parties. For instance, although "[i]t is true that a notice of alibi order upsets the traditional view that a defendant need not reveal his defense," *Edgerly*, 372 Mass. at 342, notice is nonetheless required because "alibi defenses are the most frequently and easily fabricated defenses." Reporter's Notes to Mass. R. Crim. P. 14(b)(1). The requirement of pretrial notice gives the Commonwealth "the tools necessary to uncover fabrication." *Id.*

Requiring notice of a defense involving mental health issues, such as lack of criminal responsibility and diminished capacity, largely serves a similar purpose. That is, the disclosure puts the Commonwealth on notice about a live trial issue that the prosecutor otherwise would have no reason to expect to litigate. Cases involving

mental health defenses are complicated; they typically involve expert psychiatric testimony. Because rebutting a mental health defense "requires a degree of expertise on the part of a cross-examiner that can only be gained through pretrial research, [the notice requirement] is intended to meet the need of a prosecutor to become familiar with the complex nature of this type of defense." Reporter's Notes to Mass. R. Crim. P. 14(b)(2).

The affirmative defenses of license, claim of authority or ownership, or exemption involve situations where the necessary information is often "peculiarly within the knowledge of the defendant." *Commonwealth v. Cabral*, 443 Mass. 171, 179 (2005), quoting Model Penal Code § 1.12(3)(c) (1985). See also *Morrison v. California*, 291 U.S. 82, 91 (1977) (shifting the burden in the case of an affirmative defense is appropriate where there is a "manifest disparity in convenience of proof and opportunity of knowledge"). When there is no other way for the Commonwealth to discover the information, and in the absence of a contrary constitutional concern, it is appropriate to require the defendant to give pretrial notice of such a defense. See *Morrison*, 291 U.S. at 88 (information relevant to

affirmative defense "would only be known to [the defendant] himself"), *Commonwealth v. Vives*, 447 Mass. 537, 541 & 542 at n.4 (2006) (defendant in robbery case required to give notice that he intended to rely on a defense of claim of authority where "the existence of the alleged debt of the victim was peculiarly within the knowledge of the defendant").

Similarly, specific acts of violence perpetrated by an alleged victim may be "peculiarly within the knowledge of the defendant." *Cabral*, 443 Mass. at 179. Requiring notice of the use of *Adjutant* evidence in a self-defense case is necessary to correct for this "manifest disparity in ... opportunity of knowledge." *Morrison*, 291 U.S. at 91.

None of these rationales apply here. There is no potential imbalance to rectify. The prosecution well understands that, in every criminal case, it must prove each element of each charged offense. Where the defense is grounded in the prosecution's failure to produce evidence on a necessary element, there is no chance of fraud, there is no sophisticated expert evidence to combat, and the information is not "peculiarly within the knowledge of the

defendant." *Cabral*, 443 Mass. at 179; *Morrison*, 291 U.S. at 91. Accordingly, there is no basis to depart from the general rule and require the defendant to provide pretrial notice of his defense strategy.

II. Double jeopardy principles bar a retrial regardless of whether the termination of the trial is characterized as a dismissal with prejudice, a required finding of not guilty or a mistrial entered without the defendant's consent and without manifest necessity.

The judge's mid-trial termination of the case could be construed in any number of ways, including a dismissal, an entry of a required finding of not guilty, or a mistrial. *See U.S. v. Jorn*, 400 U.S. 470, 487 n.7 (1970) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of [appeal]").[9] However it is framed, the result is the same: double jeopardy principles prohibit a retrial of this matter.

[9] "Although Mr. Justice Harlan's opinion in *Jorn* was a plurality opinion of four Justices, we rely on it as one of the principal cases setting the parameters of the protection afforded by the double jeopardy clause." *Jones v. Commonwealth*, 379 Mass. 607, 616 n.18 (1980).

As the defendant argues, the trial judge did not abuse his discretion in ordering the case dismissed with prejudice. Dismissal with prejudice is warranted if the "failure to comply with discovery procedures results in irremediable harm to a defendant that prevents the possibility of a fair trial." *Commonwealth v. Lam Hue To*, 391 Mass. 301, 314 (1984). See *Commonwealth v. Cronk*, 396 Mass. 194, 198-200 (1985) (same). A trial judge's discretion to find prejudice "is much broader" than that of an appellate court. *Lam Hue To*, 391 Mass. at 309, quoting *Commonwealth v. Baldwin*, 385 Mass. 165, 177 (1982). This argument is comprehensively set out at pages 41-47 of the defendant's brief, and amici will not retread it here. Instead, this section will focus on two other possible characterizations of the judge's termination of the trial: a required finding of not guilty and a mistrial lacking manifest necessity. A judge may "terminate a trial prior to a verdict by the fact finder" under either of these procedures, and double jeopardy principles bar retrial in either case. *Commonwealth v. Taylor*, 486 Mass. 469, 481 (2020), citing *Evans v. Michigan*, 568 U.S. 313, 319-320 (2013).

A. *The trial judge's ruling could be viewed as the permissible entry of a required finding of not guilty.*

At the time the Commonwealth attempted to offer a copy of the abuse prevention order with a different return of service than the copy provided to the defendant, it had already voluntarily foreclosed any other means to prove the defendant's knowledge of the order. Although Officer Yamil Montanez of the Chicopee Police allegedly served Mr. Edwards with the order in August 2018 (R. 12), the prosecutor informed the judge at the outset of the trial that she would not be calling any police officer witnesses (T2:7). As the trial judge noted, the "Commonwealth chose not to call the police officer" (T4:13).

Without evidence of service or any other means to show the defendant's knowledge of the order, the Commonwealth's evidence was fatally deficient. See *Crimmins*, 46 Mass. App. Ct. at 491 (1999) (knowledge of the order is an essential element of the crime of violating an abuse prevention order), *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979) (to survive a motion for required finding the Commonwealth's evidence must be "sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged").

Once the judge recognized that, absent the undisclosed return of service, the Commonwealth did not have sufficient evidence to establish an essential element, he was permitted to terminate the case by way of a required finding of not guilty. A trial judge has the power to enter a finding of not guilty when it is clear that "the evidence that the prosecutor would present was inadequate to prove that the defendant has committed the crime[] of which he stood accused." *Commonwealth v. Lowder*, 432 Mass. 92, 100 (2000) (judge may enter required finding after prosecutor's opening statement. *Id.* at 99.). As with any acquittal, double jeopardy principles foreclose the possibility of retrial in this circumstance. *Id*. at 100, 105.

B. *The trial judge's ruling could be viewed as the declaration of a mistrial and a finding that manifest necessity did not justify a retrial.*

The judge's termination of the trial could also be construed as a mistrial barring retrial. See *Taylor*, 486 Mass. at 482, citing *Lee v. U.S.*, 432 U.S. 23, 31 (1977) (mid-trial dismissal was "functionally indistinguishable from a declaration of mistrial"). "[A]s 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,

503 (1978). The rationale underlying the prohibition against double jeopardy

> 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, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. U.S., 355 U.S. 184, 187-188 (1957).

The Double Jeopardy Clause protects both "a defendant's financial and emotional interests in having his trial concluded in a single proceeding, as well as his interest in retaining a chosen jury." *Commonwealth v. Johnson*, 426 Mass. 617, 624 (1998) (citations omitted). These interests are accorded "deep respect." *Jones v. Commonwealth*, 379 Mass. 607, 617 (1980). *Illinois v. Somerville*, 410 U.S. 458, 471 (1973) ("the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one"). "[W]here the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'" *Jorn*, 400 U.S. at 484 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Because of the importance of the interests at stake, the prosecutor must shoulder the heavy burden

of demonstrating "'manifest necessity' for any mistrial declared over the objection of the defendant." *Washington*, 434 U.S. at 505. The Commonwealth cannot carry that heavy burden here.

Without question, jeopardy had attached here because the jury had been sworn. *Commonwealth v. Love*, 452 Mass. 498, 503 (2008). After jeopardy attaches, double jeopardy principles bar a retrial unless (1) the defendant consented to the mistrial; or (2) there was a manifest necessity for the mistrial.[10] Here, Mr. Edwards did not consent, nor did the prosecution's avoidable error give rise to a manifest necessity for the mistrial. Therefore, as the judge implicitly found, retrial would violate Mr. Edwards' right to not "be twice put in jeopardy of life or limb" under the Fifth and Fourteenth Amendments to the United States Constitution, and the statutory and common law of the Commonwealth. See *Benton v. Maryland*, 395 U.S. 784 (1969). *Thames v. Commonwealth*, 365 Mass. 477 (1974). G.L. c. 263 §§ 7, 8, 8A.

[10] As Mr. Edwards argues at pp. 30-32 of his brief, the Commonwealth forfeited any claim of manifest necessity.

1. Mr. Edwards did not consent to a mistrial.

"Under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent" only if "'there is a manifest necessity for the mistrial.'" *U.S. v. Dinitz*, 424 U.S. 600, 606-607 (1976) (quoting *U.S. v. Perez*, 22 U.S. 579, 580 (1824)). Here, the judge terminated the trial *sua sponte*, "without the defendant's request or consent."

"The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *Dinitz,* 424 U.S. at 609. Thus, when a defendant successfully moves for a mistrial, retrial is generally permitted because, in choosing to make the mistrial motion, "the defendant consents to a disposition that contemplates reprosecution." *Evans*, 568 U.S. at 326. Mr. Edwards did not move for a mistrial or dismissal and did not "deliberately choos[e] to seek termination of the proceedings." *U.S. v. Scott*, 437 U.S. 82, 98 (1978). Where the judge acted *sua sponte*, Mr. Edwards clearly did not "retain

primary control over the course to be followed." *Dinitz*, 424 U.S. at 609.[11]

Nor did Mr. Edwards consent to reprosecution. To the contrary, trial counsel stated that he wanted to impanel a jury in order to secure an acquittal (T3:16). After the dismissal, Mr. Edwards consistently maintained that double jeopardy principles barred any retrial (R. 20-29; T4:7). This conduct does not establish "active and express consent" to the termination of the case. *Commonwealth v. Cassidy*, 410 Mass. 174, 177 n.2 (1991), quoting *U.S. v. Gori*, 367 U.S. 364, 365 (1961). Consequently, retrial is only permitted if the Commonwealth can establish that there was a manifest necessity for the mistrial.

2. <u>There was no manifest necessity for a mistrial</u>.

The dismissal ruling, accompanied by the findings of Commonwealth error and the prejudice Mr. Edwards would suffer in the event of a retrial, can appropriately be construed as a declaration

[11] At the hearing on the motion to reconsider, the judge acknowledged that he did not act at the defendant's request: "And I have to say that I did not hear the defendant request that the matter be dismissed during argument. That was my decision" (T4:11-12).

of mistrial, and a simultaneous finding that the Commonwealth failed to establish a manifest necessity permitting a retrial. At the hearing on the motion to reconsider the judge reiterated, "[t]he dismissal was with prejudice because jeopardy had attached" (T4:12).

Manifest necessity is met "whenever the case cannot be proceeded with by reason of some physical or moral necessity *arising from no fault or neglect of the government*." *Commonwealth v. Juliano*, 358 Mass. 465, 467 (1970), quoting *Commonwealth v. McCormick*, 130 Mass. 61, 62 (1881) (emphasis added). The "prototypical example" of a manifest necessity is a deadlocked jury. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). Other examples include jury bias and illness of one of the trial participants. See, e.g., *Elder v. Commonwealth*, 385 Mass. 128, 133 (1982) ("There can be no doubt that actual bias among jurors renders mistrial manifestly necessary"); *Juliano*, 358 Mass. at 467 (illness of judge or juror). These events lift the double jeopardy bar because they are "unforeseeable circumstances that arise during a trial making its completion impossible." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

Manifest necessity is decidedly *not* met by a lack of preparedness on the part of the prosecution. See, e.g., *Downum v. U.S.*, 372 U.S. 734, 737 (1963) (double jeopardy principles barred retrial where prosecutor "impaneled the jury without first ascertaining whether or not his witnesses were present"). As the trial judge recognized, it was the Commonwealth's obligation to ensure "that all of the discovery that they intend to use ha[d] been provided to the defendant" (T4:11). Because it was prosecutorial error that led to the post-jeopardy termination of the trial, allowing the Commonwealth a second bite at the apple would be "fundamentally unfair to the defendant" (T3:21). The prosecution here had "one full and fair opportunity" to try the defendant. *Washington*, 434 U.S. at 505. The Commonwealth was entitled to that and nothing more. If their failure to disclose essential evidence to the defense entitled them a retrial, the rule against double jeopardy would be gutted, especially where, as here, the Commonwealth confirmed that they had given the defendant the correct evidence. See C. Br. at 10-11.

"[T]he Commonwealth must not use its power and resources in repeated trials, while it benefits from the knowledge gained in the

initial proceeding about any potential weaknesses in its case." *Love*, 452 Mass. at 503. For this reason, mistrials based on prosecutorial error are subject to a heightened scrutiny. See, e.g., *Washington*, 434 U.S. at 505 ("the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence").

The trial judge voiced this precise concern when he stated: "I think declaring a mistrial would be fundamentally unfair to the defendant. It would allow the Commonwealth to get another trial date absent some appellate issue or anything like that, to get a new trial date and cure this problem" (T3:21).

"The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case." *Id*. at 508 n.24 (quotations omitted). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. U.S.*, 437 U.S. 1, 11 (1978). When the Commonwealth "fail[s] to muster" essential evidence at trial, the prohibition on double jeopardy requires that it is the Commonwealth that bear the costs of that failure. *Id*.

Simply put, "prosecutorial error or oversight" does not suffice to establish a manifest necessity. *Commonwealth v. Clemmons*, 370 Mass. 288, 293 (1976).

CONCLUSION

For the foregoing reasons, the Court should reaffirm that the ethical duties of confidentiality, zeal, and loyalty plainly prohibit defense counsel from alerting the prosecution to flaws in its case.

Further, "the deep respect due a defendant's right to a single prosecution," *Jones*, 379 Mass. at 617, forbids a retrial of this matter whether the trial judge's ruling is construed as dismissal with prejudice, a required finding of not guilty or a mistrial in which the Commonwealth has not carried its burden to demonstrate a manifest necessity. A retrial would violate the defendant's right not to be twice put in jeopardy of life or limb under the Fifth and Fourteenth Amendments to the United States Constitution and the statutory and common law of the Commonwealth. Accordingly, this Court should affirm.

Respectfully submitted,

/s/ Anne Rousseve

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ADDENDUM

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Massachusetts Rules of Professional Conduct

Rule 1.6

(a) (effective until October 1, 2022)

A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(a) (effective October 1, 2022)

A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the legal community or in the trade, field, or profession to which the information relates.
(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1, or 8.3 must reveal, such information:

(1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;

(2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;

(3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to the extent permitted or required under these Rules or to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.

(d) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this Rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the

treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this Rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (d) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this Rule.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in 14-point Athelas font and contains 5312 non-excluded words, as determined through the "Word Count" feature in Microsoft Word for Office 365.

/s/ Anne Rousseve
Anne Rousseve

CERTIFICATE OF SERVICE

I hereby certify that I have today made service of this amicus brief by directing copies through the electronic filing service provider to Assistant District Attorney David Sheppard-Brick of the Hampden County District Attorney's Office and to Attorney Joseph N. Schneiderman, counsel for Mr. Edwards.

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