

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, \* S.C. Case No. 2010-1636  
Plaintiff-Appellant, \* On Appeal from the Clark County  
vs. \* Court of Appeals, Second Appellate  
District Case No. 09-CA-0013  
TONEISHA GUNNELL, \*  
Defendant-Appellee. \*

**MERIT BRIEF OF AMICUS CURIAE, ALICIA McALMONT,  
IN SUPPORT OF APPELLEE**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Alicia McAlmont was a co-defendant of Appellee, Toneisha Gunnell, in the Clark County Common Pleas Court. The Second District Court of Appeals correctly held in *State v. Gunnell*, Clark App. No. 09-CA-0013, 2010-Ohio-4415, presently under consideration herein, that the Appellee's protection against double jeopardy was violated by the trial court's denial of her motion to dismiss after an improper declaration of mistrial at the close of her second trial. The decision of the Second District in *State v. McAlmont*, Clark App. No. 09-CA-0021, 2010-Ohio-5879, was based upon the holding in *State v. Gunnell*, supra.

This Court has accepted the appeal of *State v. McAlmont* in case no. 2011-0065, and further ordered the briefing schedule stayed and that matter held for the decision herein. Therefore the decision of this Court herein directly affects the State's appeal of Ms. McAlmont's case.

## STATEMENT OF THE CASE AND FACTS

The Appellee, Toneisha Gunnell, and three co-defendants, Alicia McAlmont, Renada Manns, and Mahogany Patterson, have been subjected to three separate trials dating back to 2005.

All four defendants were first tried in November 2005, resulting in convictions for murder, aggravated robbery, involuntary manslaughter, and theft. Appellee and McAlmont were each given a sentence of eighteen (18) years to life. The convictions from the first trial

were reversed by the Court of Appeals due to a violation of *Batson v. Kentucky*.

The second trial commenced in September 2007. The jury began deliberations on October 1<sup>st</sup>. During this first day of deliberations, the jury requested of the trial court a definition of “perverse.” October 2, 2007, Excerpt of Jury Trial transcript, attached to the Joint Motion to Bar Retrial and Motion to Dismiss and Request for Oral Hearing, filed Nov. 6, 2007 (Oct. 2, 2007, Tr., pp. 5-6. The requested definition was declined. Oct. 2, 2007, Tr. 22. The morning before the second day of deliberations by the jury, Juror no. 6 had returned with two papers, one bearing a handwritten definition of “perverse” and the other a printed hypothetical of “involuntary manslaughter.” Neither item had been shown to any other juror, nor had Juror no. 6 communicated any of the information to any other juror. Oct. 2, 2007, Tr. 10. The bailiff brought the matter to the attention of the judge before the information was shared with any other juror and before deliberations were resumed. *Id.*

The trial court notified counsel and brought in Juror no. 6 to inquire what had occurred. *Id.* at 2-12. After a brief examination of the juror by the trial court, limited in scope to the substance of the juror's research, the trial court offered counsel an opportunity to examine the juror, which was universally declined. *Id.*

Thereafter the trial court had a discussion with counsel concerning the juror's misconduct. The State did not move for a mistrial, leaving it “to the Court's discretion whether [the misconduct] was fatal.” *Id.* at 12. The State elaborated that if the trial court did not think it automatically a mistrial, the juror should be strongly instructed specifically that

the definitions she reviewed were not Ohio law, should be disregarded, and should not be communicated to the other jurors. *Id.* at 13. All defense counsel likewise requested a curative instruction. *Id.* at 13-16. At this point the trial court addressed the State, informing it that the information which Juror no. 6 had reviewed was, in the court's opinion, prejudicial to the State. *Id.* at 16-17. The State clarified its position that Juror no. 6 had been contaminated, and that the State would need to be assured by a subsequent examination of the juror that the contamination would not affect her decision, otherwise a mistrial would be requested. *Id.* at 17-18.

After the State had twice requested curative instructions and the defense had agreed, the trial court again opined that the hypothetical was prejudicial to the State and that the court could not be convinced by an examination of the juror that she could disregard it. *Id.* at 18-19. After the trial court's repeated statements that it considered the involuntary manslaughter hypothetical "very prejudicial", the State moved for a mistrial. *Id.* at 19-20. Defense counsel addressed the court, and several noted that the material to which Juror no. 6 was exposed was less prejudicial than the information to which she had been exposed prior to jury selection. *Id.* At 20-24. Moreover, defense counsel repeatedly requested that the trial court examine the juror and attempt to rehabilitate her by inquiring whether she could disregard the outside information and rely on the court's instructions. *Id.* One defense counsel argued that if the juror answered that she could continue to deliberate without considering the outside research, there would be no prejudice or grounds for mistrial. *Id.* At

23-24.

The trial court declined to undertake further examination of juror no. 6 and declared a mistrial over the objection of all defense counsel, finding the juror to be “irreparably tainted.” *Id.* At 26. Thereafter, Appellee and her co-defendants jointly filed a motion to dismiss on double jeopardy grounds, alleging the lack of a manifest necessity for the mistrial at the close of the second trial. That motion, as well as a concurrent motion for recusal from hearing the motion to dismiss, was heard and denied by the same judge who had ordered the mistrial.

Defendants sought habeas corpus relief in the United States District Court for the Southern District of Ohio. Incorporated in their habeas petition were affidavits of ten of the twelve jurors stating that their deliberations prior to the mistrial had been favorable to the defendants. The District Court ultimately denied habeas corpus relief, and three of the four defendants, including Appellee and McAlmont, were tried a third time in January 2009.

During the third trial, a document marked as an exhibit, but neither mentioned during trial nor admitted into evidence, was inadvertently sent to the jury room together with the exhibits. Transcript of Case no. 05-CR-502, Vol VIII, January 29, 2009, pp. 1768-1785. The document, acknowledged as false by the State, was a handwritten “Official Statement” of an inmate incarcerated at the Clark County Jail at the same time as Appellee and her co-defendants. *Id.* at 1770. The statement claimed that two of Appellee's co-defendants were laughing about hitting and killing John Deselem, the pedestrian at the mall. *Id.*

Because of the obvious prejudicial nature of the exhibit and the fact that all of the

jurors acknowledged reviewing and discussing the exhibit, Appellee and her co-defendants moved for a mistrial. *Id.* at 1817-1818. The Court denied that motion after conducting a lengthy inquiry involving the individual examination of each juror once immediately after discovery of the error and again after the conclusion of deliberations. *Id.* at 1785-1820, Tr. Vol IX, January 30, 2009, pp. 1847-1862. Appellee and her co-defendants were convicted on all counts. Verdicts, filed February 2, 2009. They appealed their convictions.

In their appeals to the Second District, Appellee and her co-defendant McAlmont both assigned as error the denial of their motion to dismiss on double jeopardy grounds due to the erroneous granting of the mistrial during the second trial. *State v. Gunnell*, Clark App. No. 09-CA-0013, 2010-Ohio-4415; *State v. McAlmont*, Clark App. No. 09-CA-0021, 2010-Ohio-5879. McAlmont's second assignment of error, being identical to the second assignment of error in *State v. Gunnell*, was sustained on the authority of that opinion. This Court has accepted the appeal of *State v. McAlmont* in case no. 11-0065, and further ordered that matter held for the decision herein and the briefing schedule stayed.

All references below to the Second District's decision are to *State v. Gunnell*.

## ARGUMENT

Appellee alleged the denial of the Motion to Bar Retrial and Motion to Dismiss was error in violation of the Appellee's rights against double jeopardy, which arise as a result of the mistrial declared by the trial court during the second trial. The Second District sustained this assignment of error, holding that Appellee's rights against being twice placed in jeopardy were violated when the trial court declared a mistrial in the absence of a manifest necessity.

The Second District's holding is founded upon long-established precedent, correctly applied to the facts of this case. The trial court failed to conduct the inquiry necessary to exercise sound discretion in determining whether a manifest necessity existed for declaring a mistrial during the second trial. As a result, the granting of the mistrial was erroneous and the Double Jeopardy Clause precludes the retrial of the Appellee and her co-defendants.

### **Appellant's Proposition of Law No. 1:**

When addressing a motion for mistrial based on juror misconduct, a trial court has broad discretion and flexibility as to the manner and length of inquiry that must be conducted with any juror as to the misconduct, and a reviewing court may not impinge upon that discretion with a standard script.

Appellant, the State of Ohio, alleges that the Second District Court of Appeals erred in its decision finding the trial court abused its discretion in granting a mistrial during the deliberation phase of the second trial in this matter. The alleged error in the Second District's

opinion, as framed by the Appellant, is that the Court of Appeals “insisted that the trial court perform several additional steps in investigating the [juror's] misconduct before declaring a mistrial.” Appellant's Brief, filed April 18, 2011, p. 1. Appellant variously refers to the inquiry which the Second District found to be lacking as a “veritable inquisition,” a standard that is “unworkable” and “flies in the face of longstanding law,” and a “useless exercise [that] may have created a larger record for review but had no material effect on the outcome.” *Id.* at 1, 15.

Admittedly the Second District goes into great detail in analyzing the law and facts, but the analysis contained in its decision is grounded in established precedent. The analysis and holding has nothing to do with creating a standardized script for trial courts or modifying existing law, but everything to do with how and why the trial court abused its discretion in this case.

Contrary to the State's assertions, the Second District's decision does not curtail the discretion vested in trial courts to determine the necessity for a mistrial, nor impose upon trial courts an “inflexible standard of review requiring the trial court to engage in a mandatory and lengthy inquiry.” *Id.* at 15. Neither does the Second District's decision substitute its own reasoning for that of the trial court in reviewing the decision to grant a mistrial during the second trial.

The Second District's applied existing precedent to the facts of this case, ultimately holding that the trial court failed to follow established procedure in its decision to grant a

mistrial. The Second District respected the discretion which rests in the trial court by applying the correct standard of review, abuse of discretion.

The Second District's opinion in *State v. Gunnell* cites the correct standard of review for the granting of a mistrial, abuse of discretion, and defines the standard appropriately. *Gunnell*, ¶¶ 54-56. Appellant concedes that this is the applicable standard of review. Appellant's Brief, p. 8-9. The Court of Appeals found that the decision to grant the mistrial constituted an abuse of discretion because the trial court failed to exercise the requisite "sound discretion" required by the manifest necessity standard.

The Court of Appeals cites no less than thirteen cases, both Ohio and Federal, over four pages in its discussion of the manifest necessity standard. *Gunnell* at 18-21. From its discussion:

{¶ 69} The Supreme Court has explained that "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Arizona v. Washington*, 434 U.S. at 506. "[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Id.* at 505.

\* \* \*

{¶ 73} The trial court "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn* (1971), 400 U.S. 470, 486, 91 S.Ct. 547, 27 L.Ed.2d 543.

\* \* \*

Hallmarks of the exercise of "sound discretion" include a trial court allowing the parties to state their positions, seriously considering their competing interests, and making a thorough inquiry into reasonable alternatives to a mistrial. *Ross v. Petro* (6th Cir. 2008), 515 F.3d 653.

The State repeatedly cites as error the fact that the Court of Appeals failed to acknowledge the steps the trial court took to determine the existence of manifest necessity, and instead focused on steps "it believed should have been taken." Appellant's Brief, p. 13. This position ignores the very purpose of appellate review: to determine if the proceedings below were proper and in conformity with law. The Court of Appeals examined the record to determine if a manifest necessity existed for the mistrial, as required by existing double jeopardy jurisprudence. The Second District's review revealed that a manifest necessity for mistrial did not exist due to the failure of the trial court to exercise sound discretion in ordering the mistrial. Part and parcel of this review is the identification of the factors of sound discretion not present.

The Second District reproduced in its opinion a significant portion of the transcript of proceedings which occurred after the trial court became aware that a juror had conducted an independent investigation. The most salient portion of the transcript is the following statements made by the trial court:

{¶ 137} "So I guess my point is: We can bring her in, and we can all ask her and try to rehabilitate her; and I'm sure she's going to say all the right things because, again, I think she's a nice person. And she's going to want to try to be accommodating and pleasing, and I know or I'm certain she doesn't want to be responsible for a mistrial.

{¶ 138} "So she's going to try to appease us and say what she needs to say; but, you know, I just - - *I feel like that may be an exercise of futility. I don't know that I can be convinced that she's going to be able to put this out of her mind.*

\* \* \*

{¶ 150} "So the issue isn't whether or not she intended to sabotage the case, but the point is is that she's now been exposed to a definition and a hypothetical of involuntary manslaughter that's contrary to the laws of the State of Ohio; and *I believe that she's been irreparably tainted as a result of that. I think there's substantial prejudice to the State of Ohio.* Gunnell, paragraphs as numbered in original, emphasis added.

The above portions of the record demonstrate the trial court's approach to its inquiry concerning the juror misconduct: after a brief examination of the juror, inquiring solely into what independent investigation she had done, the trial court proceeded to presume prejudice in the absence of any further inquiry.

By confining its examination of Juror no. 6 solely to the nature of the misconduct, and thereafter presuming a resulting prejudice, the trial court dismissed all possible remedies but one, mistrial. From the outset of the inquiry into and discussion of the juror misconduct, the trial court presumed the existence of prejudice resulting from the juror's exposure to outside information. At no time did the court conduct the slightest inquiry into whether Juror no. 6's exposure to the information affected her impartiality. Moreover, the trial court not only presumed the existence of prejudice in the absence of any inquiry, it likewise presumed that any such prejudice could not be cured.

The court did not offer any additional opportunity for counsel to examine the juror at any time after the trial court clearly stated that it could not be convinced by Juror no. 6 that she could remain impartial. Contrary to the State's assertion, counsel for the Defendants all requested that the trial court conduct a further inquiry into the juror's impartiality and attempt

to rehabilitate her if necessary. Oct. 2, 2007, Tr. 20-24. The trial court denied those requests, finding both prejudice and the inability to cure said prejudice solely from the content of the involuntary manslaughter hypothetical.

Absent from the investigation of this juror's conduct in the trial court was any inquiry into the effect of the outside information on the juror. At no time was the juror examined concerning her understanding of the involuntary manslaughter hypothetical. She was never asked if she understood the hypothetical was one of many examples of conduct which could fall under that heading. Nor was she asked her understanding of how that hypothetical related to the instructions of the trial court. Nor was she asked if she could put aside anything contained in that hypothetical and rely upon the instructions given by the trial court.

The trial court's failure to conduct any real hearing prior to declaring a mistrial is the crux of the holding by the Second District:

The trial court did not conduct any inquiry into what effect, if any, the definition of involuntary manslaughter Juror #6 found had on her impartiality. The trial court did not even inquire whether Juror #6 recalled any of the information contained in her research, or what her understanding of it was. Without such an inquiry, the trial court lacked sufficient information to exercise sound discretion in ruling upon the State's motion for a mistrial. *Gunnell* at ¶169.

Nowhere in its decision does the Second District mandate a "standard script" or specific inquiry which a trial court must undertake in consideration of a mistrial. The Second District's holding is grounded in the failure of the trial court to perform its mandatory duty to conduct the basic inquiry required by the manifest necessity standard. In the absence of such

an inquiry, the trial court could not have exercised the "sound discretion" required by the law:

The "findings" the trial court made and on which it ordered a mistrial are not the product of the exercise of "sound discretion" the court is charged to exercise in determining whether *a manifest necessity for a mistrial exists*. *United States v. Jorn*. The court instead piled possibility on top of likelihood to find the prejudice a mistrial requires, having both failed to make an inquiry necessary for that finding or a scrupulous search for alternatives to a mistrial. *Gunnell* at ¶191 (emphasis original).

The Second District's Opinion reviewed the actions of the trial court in investigating the juror misconduct and ultimately granting a mistrial according to long-standing jurisprudence applying the protections of the Double Jeopardy Clause of the Fifth Amendment. The Second District found the trial court failed to properly investigate the misconduct or consider alternatives less radical than a mistrial. As a result, the trial court failed to exercise sound discretion in considering the motion for mistrial. The Second District's holding does not impose new restrictions on the discretion of the trial court, but rather holds the trial court to the standards within which it must exercise its discretion. The judgment of the Court of Appeals should be affirmed.

**Appellant's Proposition of Law No. 2:**

When extrajudicial material contrary to the State's case is obtained through juror misconduct, the situation is presumptively prejudicial and the burden shifts to the defendant to establish that the juror was not prejudiced by her research.

The State of Ohio advances in its second proposition of law that any juror misconduct should create a rebuttable presumption of prejudice. This is an obvious attempt to excuse the

failure of the trial court herein to conduct the hearing required by the manifest necessity standard: "the Second District should have presumed the State to be prejudiced by the extraneous information. That presumptive prejudice should be sufficient to meet the State's burden of manifest necessity." Appellant's Brief, p. 19.

Such a presumption is in conflict with longstanding precedent on the subject of juror misconduct and manifest necessity:

The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. *Remmer v. United States* (1954), 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed.2d 654.

A presumption of prejudice would be directly at odds with the trial court's obligation to exercise sound discretion and conduct a scrupulous search for alternatives to a mistrial. It would also relieve the burden placed upon the State by double jeopardy jurisprudence: "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Washington v. Arizona*, *supra*, at 505.

The case relied upon most heavily by the State for its proposition is *State v. King* (1983), 10 Ohio App.3d 161, 10 OBR 214, 460 N.E.2d 1383. In *King*, the First District endorsed a presumption of prejudice arising from any instance of juror misconduct, which presumption had to be rebutted by the party which prevailed at trial:

Not every instance of juror misconduct requires reversal. The misconduct must be prejudicial. While Ohio has not spoken directly to the question of the burden of proof to demonstrate prejudice once the existence of juror misconduct has been established,

we believe the better rule is that all juror misconduct is presumed to be prejudicial, and the prevailing party (the state, in our case) has the burden to demonstrate that the misconduct was not prejudicial under the circumstances. At 165.

The presumption of prejudice in *King* clearly arose in the context of a post-conviction appeal, not consideration of juror misconduct in a motion for mistrial: note the requirement that the misconduct be prejudicial in order to warrant reversal. Moreover, the *King* court ultimately held that its presumption of prejudice was rebutted by the facts therein, where the trial court had inquired of the affected juror and determined him to be impartial despite his independent investigation.

The presumption of prejudice, as applied by the *King* court to instances of juror misconduct, arises in the context of appellate review only in cases where a jury has deliberated to judgment after an instance of juror misconduct has occurred. It is a result of the mandatory inquiry into such misconduct required of the trial court by *Remmer v. United States*. *King* at 165. This is the interpretation of *King* which was utilized by the Eighth District in *State v. Spencer* (1997), 118 Ohio App.3d 871: “[t]he trial court should have held an inquiry of the particular juror accused of misconduct to determine whether appellant would receive a fair trial Before [sic] twelve impartial jurors.” At 874. The *King* and *Spencer* courts' application of this presumption was limited to appellate review of cases where a juror has continued deliberating after the occurrence of misconduct. It has no application to consideration of juror misconduct by the trial court in the context of a motion for mistrial, nor appellate review of a declaration of mistrial under the manifest necessity/sound discretion

standard.

Even if the presumption of prejudice in *King* could be grafted onto to a manifest necessity analysis, this Court has previously rejected the application of such a presumption. In *State v. Keith*, 1997-Ohio-367, 79 Ohio St.3d 514, 684 N.E.2d 47, this Court specifically rejected the presumption of prejudice arising from instances of juror misconduct:

To support his argument, appellant relies on *State v. King* (1983), 10 Ohio App.3d 161, 10 OBR 214, 460 N.E.2d 1383, paragraph one of the syllabus, for the proposition that any improper juror conduct automatically raises the presumption of prejudice. On numerous occasions, however, we have reaffirmed a long-standing rule that a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown. See, e.g., *State v. Grant* (1993), 67 Ohio St.3d 465, 480, 620 N.E.2d 50, 67; *State v. Hipkins* (1982), 69 Ohio St.2d 80, 83, 23 O.O.3d 123, 125, 430 N.E.2d 943, 946. In cases of improper outside juror communication, the defense must establish that the communication biased the juror. *State v. Phillips* (1995), 74 Ohio St.3d 72, 88-89, 656 N.E.2d 643, 661.

Further, were a presumption of prejudice arising in all instances of juror misconduct, as advocated by the Appellant, not contrary to precedent, the application of such a presumption is unworkable. Appellant claims that it is entitled to a presumption of prejudice in this case due to the contents of the involuntary manslaughter hypothetical to which Juror no. 6 was exposed. But considering the universe of potential juror misconduct, to whom would the presumption apply where the outside communication or independent investigation does not obviously prejudice one party? The existence of the presumption could only arise after an inquiry into the misconduct and any prejudicial effect thereof, exactly the inquiry required in the exercise of sound discretion. Lastly, what would such a presumption aid in

reviewing a case such as the one at bar, where the trial court failed to conduct the necessary inquiry to determine the existence of prejudice or whether the juror could be rehabilitated once prejudice was shown?

The State's Second Proposition of Law is in direct conflict with the jurisprudence embodying the rights guaranteed by the Double Jeopardy Clause of the Fifth Amendment. To hold that any instance of juror misconduct gives rise to a presumption of prejudice for purposes of reviewing a finding of manifest necessity for mistrial is to eviscerate the protections of the Double Jeopardy Clause. Appellant's Second Proposition of Law should be rejected.

### CONCLUSION

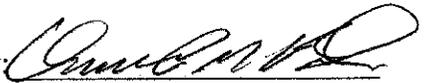
The Second District's holding that the trial court abused its discretion in granting the mistrial was a correct application of existing precedent to the facts in this matter. The trial court did not exercise sound discretion when it granted the mistrial without conducting the required inquiry to determine whether the State was prejudiced by the juror's independent research or considering remedies less radical than a mistrial.

Further, the State's proposition for the creation of a presumption of prejudice in such circumstances is in direct contravention of Double Jeopardy jurisprudence. It is not only at odds with precedent; it is unworkable in practice.

The Second District's holding should not be disturbed. Amicus Curiae respectfully requests that this Court affirm the decision of the Court of Appeals in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing and attached documentation was served upon Andrew R. Picek, Clark Cty. Prosecutor's Office, 50 E. Columbia Street, PO Box 1608, Springfield OH 45501, James N. Griffin, 8 North Limestone Street, Suite D, Springfield OH 45502, and Billie Jo Belcher, Lorain County Prosecutor's Office, 225 Court Street, 3<sup>rd</sup> Floor, Elyria OH 44035, via regular US Mail this 18<sup>th</sup> day of May 2011.



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