IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	**CASE NO. 23SC189192**
v.	
AYLA ELEGIA KING **Defendant.**	**JUDGE: THE HONORABLE KEVIN M. FARMER**

PLEA IN BAR/MOTION FOR JUDGMENT OF ACQUITTAL ON CONSTITUTIONAL AND STATUTORY DOUBLE JEOPARDY GROUNDS

COMES NOW THE ABOVE-NAMED DEFENDANT, Ayla Elegia King, by and through undersigned counsel, and hereby moves to dismiss pursuant to O.C.G.A. § 16-1-8 and the Double Jeopardy Clauses of the United States and Georgia Constitutions.[1]

I. Introduction

This case comes before this Court in a bizarre and unprecedented procedural posture. The Court of Appeals ordered that the trial court declare a mistrial in light of its erroneous courtroom closure, despite the facts that Mx. King's direct appeal sought no remedy other than a complete acquittal, the only order appealed by Mx. King was the denial of their motion for acquittal pursuant to O.C.G.A. § 17-7-170,[2] and Mx. King never requested or consented to a

[1] If this Court intends to deny this Plea in Bar/Motion for Judgment of Acquittal, Mx. King respectfully requests the prompt entry of a written order to this effect so that they may promptly pursue a direct appeal of right. *See*, *e.g.*, *Roberts v. State*, 309 Ga. 639, 640, 847 S.E.2d 541, 640-41 (2020) (recognizing that the denial of statutory and constitutional double jeopardy claims are directly appealable pursuant to the collateral order doctrine).

[2] Notably, Mx. King's challenge to the courtroom closure was one basis upon which they grounded their statutory speedy trial claim, and Mx. King did *not* independently appeal the

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mistrial without prejudice in any court.[3] Mx. King is not aware of even a single other Georgia appellate decision ordering a mistrial under such circumstances. Over the dissent of three justices, including Chief Justice Peterson, the Georgia Supreme Court ultimately declined to review the Court of Appeals' anomalous mandate.

If the evidentiary posture of this case were the same as it were when this issue was considered on appeal, this Court would be bound by the Court of Appeals' tenuous and hasty conclusion that manifest necessity existed to justify a mistrial—at least with respect to Mx. King's *constitutional* double jeopardy claims.[4]

But in this Court, prior to the declaration of a mistrial, Mx. King made clear that if given the choice between a mistrial and a waiver of their right to a public jury selection, they would choose the latter in order to retain the "valued right to have [their] trial completed by a particular tribunal." *Crist v. Bretz*, 437 U.S. 28, 36 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). This is a meaningful change to the procedural and evidentiary posture underlying the Court of Appeals' manifest necessity finding, which is necessarily a fact-bound determination that requires consideration of "any other available and less drastic alternatives" to a mistrial. *See Sanders v. State*, 358 Ga. App. 241, 246, 855 S.E.2d 19, 24 (2021).

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closure order or request any remedy for the closure other than an acquittal on statutory speedy trial grounds.

[3] While stylized as a "Motion to Dismiss Pursuant to O.C.G.A. § 17-7-170[,]" substantively, Mx. King's motion sought absolute discharge and acquittal, consistent with the remedy set forth in Georgia's speedy trial statute. *See* O.C.G.A. § 17-7-170(b).

[4] The Court of Appeals has made no findings that bind this Court in any way with respect to Mx. King's *statutory* double jeopardy claim. *See* Section IV, *infra.*

The State has denigrated Mx. King's willingness to waive error in this regard as a "procedural maneuver by the Defendant to use" the previously selected and sworn jury. State's Response to Defendant's Objection to Mistrial Or, in the Alternative, Motion for Mistrial, p. 5. In doing so, the State grossly undervalues Mx. King's right to proceed with their chosen tribunal. As Georgia courts have made clear:

> Given the importance of the constitutional right at stake, a trial judge contemplating a mistrial "must always temper the decision whether to abort a trial by considering the importance to the defendant of being able, once and for all, to conclude [their] confrontation with society through the verdict of a tribunal [they] might believe to be favorably disposed to [their] fate."

Sanders, 358 Ga. App. at 244, 855 S.E.2d at 23 (quoting *Meadows v. State*, 303 Ga. 507, 511 (2), 813 S.E.2d 350, 354 (2018)).

This Court should not give short shrift to Mx. King's well-established constitutional and statutory protections against double jeopardy. Dismissal with prejudice is now required.

II. Mx. King Neither Consented Nor Waived Their Right to Object to a Mistrial.

Contrary to the State's assertion, there is no doubt that Mx. King preserved their right to object—and did timely object—to the discharge of their chosen jury. *See*, *e.g.*, *Sanders*, 358 Ga. App. at 244-46, 855 S.E.2d at 23-24 (first determining that defendant did not impliedly consent to a mistrial before addressing the issue of manifest necessity). It goes without saying that double jeopardy does not bar retrial when a defendant moves for or consents to a mistrial without prejudice. None of Mx. King's actions in this proceeding, however, amount to an express or implied waiver of their right to complete their trial before "a tribunal [they] might believe to be favorably disposed to [their] fate." *See id.*, 358 Ga. App. at 244, 855 S.E.2d at 23.

Moving for a judgment of acquittal—the only relief Mx. King sought in relation to the violation of O.C.G.A. § 17-7-170 and the closure of the courtroom during *voir dire*—does not waive the right to object to a mistrial declared without prejudice. In *Evans v. Michigan*, 579 U.S. 313, 326 (2013), the Supreme Court explicitly recognized the crucial distinction between "circumstances [when] the defendant consents to a disposition that contemplates reprosecution" and circumstances, like this case, "when a defendant moves for acquittal." Mx. King's motion for discharge on speedy trial grounds was the only motion at issue on appeal and contemplated only a final acquittal—not the commencement of a second trial. *See* O.C.G.A. § 17-7-170(b) (a defendant who is not timely tried "shall be absolutely discharged and acquitted of the offense charged"). And while Mx. King's challenge to the courtroom closure was one basis upon which they grounded their statutory speedy trial claim, Mx. King did *not* independently appeal the closure order or request any remedy for the erroneous order other than an acquittal on statutory speedy trial grounds.

Georgia courts have found waiver of the protection against double jeopardy when a defendant moves for a mistrial, *see*, *e.g.*, *Mathis v. State*, 367 Ga. App. 588, 887 S.E.2d 664 (2023), or moves for dismissal of the indictment, *see*, *e.g.*, *Daughtrey v. State*, 138 Ga. App. 504, 226 S.E.2d 773 (1976); *cf. Dean v. State*, 214 Ga. App. 768, 770, 449 S.E.2d 158, 159-60 (1994) (granting plea of former jeopardy when trial was improperly terminated subsequent to, but not in response to, defendant's demurrers). Conversely, and consistent with the Supreme Court's decision in *Evans*, counsel for Mx. King has been unable to locate a single Georgia appellate decision holding that, by moving for an acquittal, a defendant forfeits their right to object to being brought to trial before two different juries. Nor has Mx. King or counsel engaged in any

prejudicial conduct which could amount to the "affirmative action" addressed in O.C.G.A. § 16-1-8(e)(1). *See State v. Abdi*, 162 Ga. App. 20, 22, 288 S.E.2d 772,773 (1982) aff'd, *Abdi v. State*, 249 Ga. 827, 294 S.E.2d 506 (1982) (holding that a defendant had no right to object when his counsel's conduct in questioning a witness precipitated the mistrial).

Mx. King thus fully retained their right to object to the declaration of a mistrial and appropriately raised objections before both this Court and the Court of Appeals. They objected to the dismissal of their chosen jury before the Court of Appeals even recognized that its ruling amounted to the functional equivalent of ordering a mistrial. *See* Exhibit A, pp. 9-11 (Mx. King's Motion for Reconsideration, timely filed in the Court of Appeals on November 7, 2024).[5] Though Mx. King did not offer to waive their objection to the courtroom closure in the Court of Appeals, it is dubious whether that court could even have considered such a waiver at that stage, given the "well established appellate procedure that [the Court of Appeals] is unable to consider matters outside the record and the transcript." *See*, *e.g.*, *Fedina v. Larichev*, 322 Ga. App. 76, 81 n. 17, 744 S.E.2d 72, 76 n. 17 (2013), quoting *Seamon v. Seamon*, 279 Ga. App. 151, 151 n. 1, 630 S.E.2d 659, 659 n.1 (2006).

[5] The State's claim that Mx. King "remained silent on the mistrial issue" in the Court of Appeals and thereby waived any objection to a mistrial (*see* State's Response to Defendant's Objection to Mistrial Or, in the Alternative, Motion for Mistrial by the State of Georgia, p. 6) is flagrantly inaccurate. The State's representation that Mx. King "never filed any response or objection" to the State's motion requesting a mistrial in the Court of Appeals (*see id.*) is similarly misleading. Mx. King's Motion for Reconsideration in the Court of Appeals, wherein they explicitly objected to a mistrial on Double Jeopardy grounds, was filed *after* the State's Motion for Reconsideration. (The State's Motion for Reconsideration is attached as Exhibit B.)

Finally, when the case was ultimately remanded to this Court on June 11, 2025, Mx. King filed a timely objection to a mistrial that very same day, stating that they would rather waive the public trial error that occurred during *voir dire* than give up their chosen jury.

III. Retrial is Barred by the Double Jeopardy Clauses of the United States and Georgia Constitutions Because There Was No Manifest Necessity for a Mistrial—Especially Given Mx. King's Offer to Waive the Public Trial Error.

The question of whether manifest necessity exists has long determined whether a mistrial implicates the Fifth Amendment's Double Jeopardy Clause. *United States v. Dinitz*, 424 U.S. 600, 607 (1976). The analysis under article I, section I, paragraph 18 of the Georgia Constitution follows the same standard. *See Laguerre v. State*, 301 Ga. 122, 124, 799 S.E.2d 736, 739 (2017). After initially remanding for selection of a new jury without addressing double jeopardy concerns at all,[6] the Court of Appeals held, in its revised opinion, that "the absence of remedies other than new jury selection . . . and the State's interest in prosecuting King" amounted to a "high degree of necessity" for the trial court to declare a mistrial on remand. 373 Ga. App. at 729, 908 S.E.2d at 368.

This post hoc finding of manifest necessity does not render a new trial permissible. First, the Georgia Supreme Court has held that a trial court's own error during trial is an improper basis for declaring a mistrial. *Oliveros v. State*, 120 Ga. 237, 240, 47 S.E. 627, 629-30 (1904).[7]

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[6] The Court of Appeals' initial opinion cited O.C.G.A. § 17-7-170(d), the provision addressing reversal of a case on appeal, rather than § 17-7-170(e), which specifically addresses cases where a mistrial is declared.

[7] In *Oliveros v. State*, the Georgia Supreme Court provided a definitive answer to the question of "whether the trial judge may declare a mistrial for an error of law committed by him during the progress of the case." 120 Ga. at 239. The Court held that such error did not authorize a judge

Second, even assuming *arguendo* that a mistrial declared to avoid reversal on appeal is sometimes permissible, Mx. King's willingness to waive the public trial error in order to keep their chosen jury has eliminated the basis on which the Court of Appeals grounded its manifest necessity determination. Thus, the Court of Appeals' prior finding of manifest necessity is not binding on this Court—in fact, this Court is *obligated* to conduct a new analysis of this issue that considers the current procedural and evidentiary posture of the case. *See*, *e.g.*, *Carson v. Brown*, 366 Ga. App. 674, 683, 883 S.E.2d 908, 916 (2023) ("[I]f subsequent to an appellate decision, the evidentiary posture of the case changes in the trial court, the law of the case rule does not limit or negate the effect that such change would otherwise mandate." (quoting *Guthrie v. Wickes*, 295 Ga. App. 892, 895, 673 S.E.2d 523, 526 (2009))).

Had Mx. King been permitted to waive error as to the courtroom closure, as they offered to do in their objection to the mistrial in this Court, such a waiver would have precluded them from later using that error as a ground for reversal if the jury ultimately convicted them. No rule in Georgia "prohibits counsel from affirmatively waiving or withdrawing an objection previously made." *Lightsey v. State*, 316 Ga. App. 573, 574, 730 S.E.2d 67, 68 (2012). And a violation of

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to discharge the jury. *Id*. at 243. The *Oliveros* court also specifically considered—and rejected—the argument that a mistrial without a defendant's consent was justified because the trial court's error would have resulted in an inevitable reversal and a waste of time and resources. *Id.* at 241. In declining to credit this "commercial argument," the Court invoked the defendant's right to "a verdict at the hands of that particular jury." *Id*. Though in subsequent rulings addressing the manifest necessity standard, other courts have found that *jurisdictional* errors discovered during trial that can "not be waived by the defendant's failure to object" may justify mistrials, *see Illinois v. Somerville*, 410 U.S. 458, 460 (1973), no Georgia court has overruled the holding in *Oliveros.* Under the majority's ruling in *Oliveros*, a court may not declare a mistrial based on judge's error during trial, regardless of the potential outcome on appeal—particularly when the error is waivable and the defendant has in fact offered to waive such error.

the right to a public trial, though a structural error, can certainly be waived. *See*, *e.g.*, *Craven v. State*, 292 Ga. App. 592, 594, 664 S.E.2d 921, 924 (2008) ("It is generally held that the right to a public trial may be waived by a defendant." (quoting *Henderson v. State*, 207 Ga. 206, 214, 60 S.E.2d 345, 359 (1950))); *see also Alexander v. State*, 313 Ga. 521, 532, 870 S.E.2d 729, 738-39 (2022).

The Court of Appeals found manifest necessity to forestall the possibility of a future reversal based on a preserved structural error—i.e., the trial court's improper courtroom closure. *See King*, 373 Ga. App. at 729, 908 S.E.2d at 368 (citing two appellate decisions where convictions were reversed based on structural public trial error). If no reversal could in fact occur on that basis, then the justification for manifest necessity disappears; with it goes any plausible constitutional basis for ordering that Mx. King be put to trial twice.

Determining that Mx. King has a right to select a different jury if they so choose is fundamentally different from imposing a new jury on them against their will. By waiving the public trial error, Mx. King would have retained the "valued right to have [their] trial completed by a particular tribunal." *Bretz*, 437 U.S. at 36 (quoting *Wade*, 336 U.S. at 389); *see also*, *e.g.*, *Sanders*, 358 Ga. App. at 244, 55 S.E.2d at 23 (recognizing the "importance to the defendant of being able, once and for, to conclude [their] confrontation with society through the verdict of a tribunal [they] might believe to be favorably disposed to [their] fate" (quoting *Meadows*, 303 Ga. at 511, 813 S.E.2d at 354)).

When considering whether to declare a mistrial, courts must "give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives[.]" *Meadows*, 303 Ga. at 512, 813 S.E.2d at 355 (quoting *Harvey*

v. State, 296 Ga. 823, 832, 770 S.E.2d 840, 848 (2015)). It is error to declare a mistrial when there is an "obvious, feasible alternative[.]" *Sanders*, 358 Ga. App. at 247, 855 S.E.2d at 25. Mx. King presented an obvious, feasible alternative to this Court—waiver of the error that purportedly necessitated a mistrial in the first place. Given that the Court of Appeals did not grant Mx. King their requested relief, Mx. King should have at least been afforded the choice of whether they would proceed in this case by waiving one right (i.e., the right to a public *voir dire*) or losing another (i.e., the right to a trial before their selected jury).

In light of this Court's failure to consider the less drastic alternative to a mistrial proposed by Mx. King—which was not, and could not have been, considered by the Court of Appeals[8]—the mistrial was declared in violation of Mx. King's constitutional protections against double jeopardy. Mx. King now must be discharged.

IV. Retrial is Barred by the O.C.G.A. § 16-1-8 Because None of the Circumstances Specified in the Text of the Statute Apply to the Termination of Mx. King's Trial.

The statutory scheme set out in O.C.G.A. § 16-1-8 is both more specific and "afford[s] an accused more protection than the minimum standards" set forth in the United States and Georgia Constitutions. *State v. Lemay*, 186 Ga. App. 146, 367 S.E.2d 61 (1988) (internal quotations omitted) (considering whether mistrial that did not trigger constitutional protection against double jeopardy nonetheless triggered statutory double jeopardy bar); *see also*, *e.g.*, *State v. Adams*, 355 Ga. App. 875, 877, 846 S.E.2d 148, 151 (2020) ("Georgia statutory law provides

[8] *See*, *e.g.*, *Fedina*, 322 Ga. App. at 81 n. 17, 744 S.E.2d at 76 n. 17 ("[I]t is well established appellate procedure that [the Court of Appeals] is unable to consider matters outside the record and the transcript." (quoting *Seamon*, 279 Ga. App. at n. 1)).

protection against successive prosecutions that extends beyond that of the protection offered by constitutional double jeopardy."). Section 16-1-8(a) provides that "a prosecution is barred" if a former trial of the same offense "terminated improperly after the jury was impaneled and sworn." To guide courts in determining whether a trial has been "terminated improperly," § 16-1-8(e) specifically enumerates those circumstances when a termination is "not improper." This detailed list, coupled with the absence of any statutory language adopting a broader standard, indicates that the sole way a mistrial may fall within the exception to the prosecution bar in § 16-1-8(a) is by meeting one of the conditions set out in § 16-1-8(e).

The presence of specific language defining what is "not improper" within the meaning of § 16-1-8 "invites the application" of the following principles of statutory construction:

> [T]he venerable principle of statutory construction expressio unius est exclusio alterius: the express mention of one thing implies the exclusion of another; or the similar maxim more usually applied to statutes, expressum facit cessare tacitum, which means that if some things (of many) are expressly mentioned, the inference is stronger that those omitted are intended to be excluded than if none at all had been mentioned.

Five Star Athlete Mgmt., Inc. v. Davis, 355 Ga. App. 774, 780, 845 S.E.2d 754, 759 (2020) (quoting *Morton v. Bell*, 264 Fa. 832, 833, 452 S.E.2d 103, 104 (1995)). The express enumeration of circumstances under which termination is "not improper" in § 16-1-8(e) functions to exclude those circumstances that are not addressed in the text of the statute. Courts must presume that the legislature deliberately declined to include any other permissible justifications for ending a trial prior to verdict. *See Esteras v. United States*, No. 23-7483, 606 U.S. ----, 2025 WL 1716137, at *6 (June 20, 2025) (invoking the "*expressio unius est exclusion alterius*" canon and holding that the statutory instruction to consider factors in eight specific

sections of 18. U.S.C. §3583(a) barred courts from considering factors in sections that were not specified); *Bush v. Liberty Mut. Ins. Co*., 361 Ga. App. 475, 479, 864 S.E.2d 657, 661 (2021) (holding that expression of certain duties of insurer to employee "implies the exclusion of other similar duties"); *In the Interest of R.F.T.*, 228 Ga. App. 719, 722, 492 S.E.2d 590, 592 (1997) (holding that the legislature's detailed list of what qualified as a "weapon" under O.C.G.A. § 16-11-127.1(a)(2) deliberately excluded single razor blades).

Other principles of statutory interpretation point to the same result. A statute is "presumed to be enacted by the legislature with full knowledge of the existing condition of the law." *Mahone v. State*, 348 Ga. App. 491, 495, 823 S.E.2d 813, 817 (2019) (quoting *McPherson v. City of Dawson*, 221 Ga. 861, 862, 148 S.E.2d 298, 299 (1966)). Had the legislature intended to give judges complete discretion within the bounds of constitutional Double Jeopardy constraints to determine what circumstances could justify putting a defendant to trial before a second jury, the statute could simply have stated that the termination of a trial is "not improper" if "manifest necessity" for the termination exists—a well-established constitutional term of art dating back to at least 1824. *See United States v. Perez*, 22 U.S. 579, 580 (1824) (holding that courts have authority to discharge a jury when there is "manifest necessity for the act, or the ends of public justice would otherwise be defeated").

Furthermore, "courts should construe a statute to give sensible and intelligent effect to all of its provisions and should refrain, whenever possible, from construing the statute in a way that renders any part of it meaningless." *West v. City of Albany*, 300 Ga. 743, 745, 797 S.E.2d 809, 811 (2017); *see also*, *e.g.*, *Kinslow v. State*, 311 Ga. 768, 774-75, 860 S.E.2d 444, 449-50 (2021) (applying canon against surplusage). § 16-1-8(e) sets forth a sensible, meaningful, and exclusive

list of situations in which a mistrial does not bar retrial. Interpreting this section as merely a set of examples within a broader universe of permissible justifications for a mistrial would render § 16-1-8(e) superfluous.

Rather than adopt wholesale the evolving manifest necessity standard as articulated by the courts, § 16-1-8(e) put statutory guardrails on Georgia courts' mistrial declarations. Reviewing courts have appropriately used § 16-1-8(e) to draw the line between cases where a mistrial permitted a second trial and cases where a plea of former jeopardy barred retrial. *Puplampu v. State*, 257 Ga. App. 5, 6, 570 S.E.2d 83, 84-85 (2002) (quoting full text of § 16-1-8(e) and finding that allowing prosecutor to better prepare for trial was "clearly not a proper basis" for termination); *Phillips v. State*, 197 Ga. App. 491, 493, 399 S.E.2d 234, 236 (1990) (holding second prosecution barred when court "did not terminate defendant's trial for a reason of necessity enumerated in O.C.G.A. § 16-1-8(e)(2)"); *cf. Seymour v. State*, 262 Ga. App. 823, 825, 586 S.E.2d 713, 715 (2003) (rejecting assignment of error because although § 16-1-8(e)(1) did not apply to the case, "another statutory example of proper termination applie[d]"). This Court should likewise apply the statutory framework of § 16-1-8(e) to the mistrial in Mx. King's case and find that their trial was improperly terminated.

As explained in section II, *supra*, Mx. King neither consented to a mistrial nor took affirmative action that would waive their right to object, and their case thus does not fall within § 16-1-8(e)(1). The circumstances in § 16-1-8(e)(2)(A) (physical impossibility of proceeding), (e)(2)(C) (deadlocked jury), and (e)(2)(D) (false statements in *voir dire*) are entirely inapplicable.

§ 16-1-8(e)(2)(B) refers to situations in which a mistrial is declared to avoid "injustice to the defendant" and likewise does not render the mistrial in this case "proper" within the meaning

of § 16-1-8(a)—for at least three reasons. First, it is doubtful that § 16-1-8(e)(2)(B) can ever apply when a defendant objects that the declaration of a mistrial would impose a greater injustice than the injustice that the mistrial is intended to avoid and offers to waive error premised upon the other injustice in order to retain a chosen jury.

Second, assuming *arguendo* that, in certain narrow circumstances, a court could declare a mistrial for a defendant's benefit over that defendant's objection under § 16-1-8(e)(2)(B), these circumstances do not exist here. Importantly, § 16-1-8(e)(2)(B) refers only to a *specific type* of trial error—"[p]rejudicial conduct in or out of the courtroom[.]" A common-sense reading of the word "conduct" does not encompass an erroneous ruling of the trial court, as is at issue here.

Third, even if the erroneous closure order could be deemed "conduct" within the meaning of § 16-1-8(e)(2)(B), this subsection still does not apply because the order did not "make[ ] it impossible to proceed to trial without injustice to the defendant[.]" Here, the Court of Appeals found that "the trial court committed reversible error in excluding the public and the media from the courtroom during voir dire," and used this finding to justify declaring a mistrial. 373 Ga. App. at 729, 908 S.E.2d at 368. On appeal, Mx. King raised the issue of the public's exclusion during *voir dire* primarily to argue that what occurred before the expiration of their speedy trial deadline did not amount to the "speedy and public trial" to which they were entitled. *See*, *e.g.*, U.S. Const. Am. VI. Though the Court of Appeals disagreed with this argument, it did find that the trial court's complete closure violated the public trial requirements set forth in *Presley v. Georgia*, 558 U.S. 209, 213 (2010). *See* 373 Ga. App. at 726-29, 908 S.E.2d at 366-68. Mx. King never argued, and the Court of Appeals never found, that the exclusion of the public during

jury selection actually prejudiced the defense case, or that the closure concealed any "prejudicial conduct" that could influence the trial.

To the contrary, the Court of Appeals based its disapproval of the closure not on any prejudicial consequence of the closure itself, but on the failure of the previous trial judge to enter "a written order with specific findings" justifying the closure. 373 Ga. App. at 728, 908 S.E.2d at 368; *see also* State's Response to Defendant's Objection to Mistrial Or, in the Alternative, Motion for Mistrial, p. 4 (acknowledging that "the Court of Appeals . . . limited the error to the trial court's failure to reduce the [closure] order to writing"). While an improper courtroom closure amounts to a structural error that entitles a defendant to automatic reversal if a proper and timely objection is lodged, in the absence of an objection, prejudice resulting from a public trial violation is not presumed. *Weaver v. Massachusetts*, 582 U.S. 286 (2017); *see also id.* at 298 ("It would be unconvincing to deem a trial fundamentally unfair just because a judge omitted to announce factual findings."). The nature of the public trial right has led courts to conclude that defendants need not always show prejudice to be entitled to relief; this does not mean that such error renders trials "fundamentally unfair in every case." *Id.* Thus, the previous judge's failure to enter a written closure order, while clearly erroneous, did not "mak[e] it impossible to proceed with the trial without injustice to the defendant[.]" *See* O.C.G.A. § 16-1-8(e)(2)(B). Instead, Mx. King now faces the injustice of the denial of their statutory and constitutional right to proceed with their chosen venire.

There are a variety of circumstances when declaring a mistrial is not improper within the meaning of Section 16-1-8. A case in which a defendant would rather waive their objection to a

structural error premised upon the court's failure to enter a written order than be forced to dispose of their chosen tribunal is simply not one of them. Under the plain language of Section 16-1-8, the State is barred from continuing to prosecute Mx. King.

V. **Conclusion**

For the foregoing reasons, Mx. King requests that this matter be dismissed with prejudice. Mx. King requests a hearing on this Motion, and, if this Motion is ultimately denied, they request the prompt entry of a written order so that they may promptly pursue a direct appeal of right. *See*, *e.g.*, *Roberts*, 309 Ga. at 640, 847 S.E.2d at 540-43 (recognizing that the denial of statutory and constitutional double jeopardy claims are directly appealable pursuant to the collateral order doctrine).

Respectfully submitted July 7, 2025.

_/s/ Surinder K. Chadha Jimenez__
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Attorney for Defendant

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	**CASE NO. 23SC189192**
v.	
AYLA ELEGIA KING **Defendant.**	**JUDGE: THE HONORABLE KEVIN M. FARMER**

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this **PLEA IN BAR/MOTION FOR JUDGMENT OF ACQUITTAL ON STATUTORY AND CONSTITUTIONAL DOUBLE JEOPARDY GROUNDS** by electronic filing, by hand delivery, by facsimile, or by depositing a copy of same in the United States Mail with sufficient postage attached thereon, addressed as follows:

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Respectfully submitted July 7, 2025.

_/s/ Surinder K. Chadha Jimenez__
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Exhibit A

IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A24A1125

AYLA KING,

APPELLANT,

v.

STATE OF GEORGIA,

APPELLEE.

MOTION FOR RECONSIDERATION

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IN THE COURT OF APPEALS
STATE OF GEORGIA

AYLA KING, APPELLANT, v. STATE OF GEORGIA, APPELLEE.	CASE NO. A24A1125

MOTION FOR RECONSIDERATION

COMES NOW, Appellant Ayla King ("Appellant"), by and through undersigned counsel, pursuant to Ga. Ct. App. R. 37, and respectfully submits this Motion for Reconsideration regarding this Court's Order in the above-styled action, affirming in part and reversing in part the instant appeal. In support thereof, Appellant states as follows:

A reconsideration will be granted on motion of the requesting party when it appears that the Court has either "overlooked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority." GA. CT. APP. R. 37(e). As more fully set out herein, this Court failed to consider relevant canons of statutory construction and case law in its October 28, 2024 Order.

ARGUMENT AND CITATION TO AUTHORITIES

I. A defendant is "tried" under O.C.G.A. § 17-7-170(b) when there has been some meaningful substantive portion following jury selection and swearing has begun.

The crux of this appeal concerns the meaning of the word "tried" in the context of the statutory speedy trial demand O.C.G.A. § 17-7-170(b), which applies to all cases except capital cases. The speedy trial demand analogue for capital cases uses the language "is . . . given a trial." O.C.G.A. § 17-7-171(b). In contrast, the statute here uses the language "is . . . tried." O.C.G.A. § 17-7-170(b). This Court has previously held that a defendant is "given a trial" when the jury is selected and sworn. *Bailey v. State*, 209 Ga. App. 390, 390–92 (1993). In *Bailey*, this Court rejected the argument that a defendant is only given a trial upon the conclusion of trial. *Id.* The Court now extends the same construction to the phrase "is . . . tried" in O.C.G.A. § 17-7-170(b), noting that it does "not discern any meaningful difference between the two phrases."

In doing so, the Court has failed to apply the presumption-of-consistent-usage-and-meaningful-variation canon of statutory construction. Under this canon, "the same term usually has the same meaning and different terms usually have different meanings." *Pulsifer v. United States*, 601 U.S. 124, 149 (2024); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 25, at 170 (2012) ("[A] material variation in terms suggests a variation in

meaning."). The Eleventh Circuit has explained that when the legislature "uses ***different language in similar sections***, it intends different meanings." *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000) (emphasis added).

Here, Sections 17-7-170 and 17-7-171 both provide criminal defendants with a mechanism to demand a trial within a set timeframe after indictment or accusation. The language used in § 17-7-170 mirrors that used in § 17-7-171 in several places throughout the statute. Thus, the Legislature could have used the same language in subsection (b) of both statutes. However, it chose not to. Accordingly, the Legislature must have intended some meaningful difference between § 17-7-170(b) and § 17-7-171(b) when it opted to use different language to describe the point in time when a defendant shall be absolutely discharged and acquitted.

To discern the difference, this Court should focus on the sentence construction in these two phrases, particularly the choice of the verb. While both the phrases "is given a trial" and "is tried" are constructed in the passive voice, that is where the grammatical similarities end. In the former, the verb used is "to give" while in the latter the verb is "to try." Merriam Webster Dictionary defines the verb "give" as to grant or bestow by formal action, to accord or yield to another, to put into the possession of another for his or her use, to convey to

another, to offer to the action of another, and to allow one to have or take.[1] In contrast, the verb "tried" is defined as "to make an *attempt* at" or "to examine or investigate judicially."[2]

Perhaps the difference between these two phrases is best illustrated with an example Appellant provided during oral argument. Take, for example, the phrase "is given a drink." For the phrase to come true, a person need only be handed a beverage. In contrast, for it to be said that someone "drank" something, the person need only have taken a *sip* of the beverage—they need not have finished the entire glass, but they also cannot have left the glass untouched. This is what distinguishes § 17-7-170(b) from § 17-7-171(b). Selecting and swearing in a jury might be sufficient for a defendant to be allowed "to have a trial" just as handing a person a glass of water is sufficient for that person to have been given a drink. However, some further action must be taken in order for it to be said that the same person "drank" the water just as further action is necessary for a defendant to have been "tried."

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1 *See Give*, MERRIAM WEBSTER DICT., https://www.merriam-webster.com/dictionary/give (last visited Nov. 7, 2024).

2 *See Try*, MERRIAM WEBSTER DICT., https://www.merriam-webster.com/dictionary/try (last visited Nov. 7, 2024).

II. O.C.G.A. § 17-7-170(d) does not apply to this case as there has been no reversal of a conviction or dismissal.

Notwithstanding its well-reasoned and correct conclusion that the trial court committed a structural error during voir dire by excluding the public from the courtroom, this Court held that the failure to provide Appellant with a speedy and public trial does not warrant an acquittal and instead remanded with instructions to conduct jury selection anew. In so holding, this Court relied upon O.C.G.A. § 17-7-170(d), which provides:

> If a case in which a demand for speedy trial has been filed . . . is reversed on direct appeal, a new demand for speedy trial shall be filed within the term of court in which the remittitur from the appellate court is received by the clerk of court or at the next succeeding regular court term thereafter.

Respectfully, § 17-7-170(d) does not apply where, as here, **no** "case" has been "reversed." The most natural and reasonable reading of the phrase "a case . . . is reversed on direct appeal" is that there must be some undoing of the ultimate outcome of the litigation. In its opinion, this Court "reverse[d] the failure to leave the courtroom open during voir dire without the required written order." *See* Order at 22. But the trial court's failure to leave the courtroom open during voir dire was not a "case." No conviction, dismissal, or other final judgment in Appellant's case has been reversed by this Court. There was no resolution to this case at the time this appeal was taken, and it appears that it is

this Court's position that there will still be a case when it comes back down on remand. Therefore, § 17-7-170(d) does not control the outcome here.

III. The violation of Appellant's right to a public trial during jury selection means that the jury selected in this case was void and thus there has been no jury selection that can satisfy the statutory speedy demand even under this Court's logic.

Last year, the Georgia Supreme Court held that an unlawfully constituted jury results in "no trial" for the purposes of satisfying a defendant's speedy trial right. *Bowman v. State*, 315 Ga. 707, 711 (2023). In *Bowman*, the defendant had filed a demand for speedy trial pursuant to O.C.G.A. § 17-7-170. *Id.* at 707. A jury was selected but never sworn. *Id.* at 708. Evidence was presented to the unsworn jury who returned a verdict against the defendant. *Id.* All of this occurred prior to the deadline to satisfy the speedy demand—except for the administration of the jury oath. *Id.* After two terms of court had passed, the defendant moved for discharge and acquittal on the basis that the State failed to satisfy his statutory speedy trial demand because the jury was unlawfully constituted. *Id.* at 708–09. The Supreme Court agreed, stating that "[w]ithout the oath, there is no jury; and ***without the jury, there is no trial***." *Id.* at 711 (emphasis added); *see also Slaughter v. State*, 100 Ga. 323, 324–25 (1897) (stating that "there was no trial at all because there was no lawful jury").

Over 125 years ago, the Supreme Court held that "there must be a lawful tribunal; and where the trial is by jury, it must be legally constituted, or it will be

without authority to pass upon the issues submitted." *Slaughter*, 100 Ga. at 326. The *Bowman* Court relied on this logic to conclude that a proceeding before an unsworn jury does not satisfy the requirements of O.C.G.A. § 17-7-170 because it amounts to nothing more than an "attempted trial." *Id.* at 712. In other words, the requirements of O.C.G.A. § 17-7-170 are not satisfied if the jury is illegally constituted.

Here, this Court explained that the trial court's closure of the courtroom during jury selection was a **structural error** that must be remedied. *See* Order at 21. This Court has indicated that the remedy for this error is for the trial court to conduct jury selection in accordance with Appellant's right to a public trial. *Id.* This means that the trial court must select a new jury to try Appellant's case. In other words, the jury that was selected in December 2023 is insufficient to try Appellant's case based upon a legal defect in selecting that jury. Simply put, the selection of the jury was unlawful.

If the selection of the jury was unlawful, then it follows that there was no lawfully constituted jury. Call it an illegal jury, call it a void jury, call it "no jury"—either way the result is the same: If there was no lawful jury, then there was no "trial." *See Slaughter*, 100 Ga. at 324–29; *Bowman*, 315 Ga. at 711–12. And if there was no "trial," then Appellant was not "tried" for purposes of O.C.G.A. § 17-7-170.

Put differently, even applying this Court's holding that a defendant is "tried" under O.C.G.A. § 17-7-170(b) once the jury is selected and sworn, Appellant here was ***not*** timely "tried" because no jury was ***lawfully*** selected and sworn prior to the expiration of the speedy trial deadline. In this Court's Order, it stated that it was remanding the case to the trial court to conduct jury selection anew. *See* Order at 21–22 n.6. This Court should reconsider its Order with respect to the conclusion that this case is to be remanded for a new jury selection in light of the relevant authority discussed herein.

IV. An application of O.C.G.A. § 17-7-170(d) on remand would effectively require the trial court to declare a mistrial by discharging the current jury to which Appellant objects.

As discussed above, this Court states in a footnote that it is remanding the case to the trial court to conduct jury selection anew. *See* Order at 21–22 n.6. By requiring the trial court to "conduct jury selection anew," this Court has essentially ordered (without a request from either party to do so) the trial court to declare a mistrial on remand. In these proceedings, Appellant has consistently sought an acquittal on speedy trial grounds. Both in this Court and in the trial court below, Appellant has never sought or consented to a mistrial without prejudice or a new jury selection to remedy the erroneous courtroom closure. While the erroneous courtroom closure has resulted in the denial of Appellant's statutory right to a speedy trial, the closure itself was never the *per se* subject of

this appeal. As specified in the Notice of Appeal, Appellant noted an appeal from the trial court's February 5, 2024 and February 15, 2024 orders denying their *Motion to Dismiss Pursuant to O.C.G.A. § 17-7-170* and their *Motion to Reconsider* the denial of said motion. Appellant did not independently appeal the courtroom closure.

Accordingly, Appellant respectfully objects to this Court's mandate of a new jury selection process insofar as this would necessitate discharge of the current jury. The untimely empanelment of a second jury in this matter would violate not only Appellant's speedy trial rights, but also Appellant's "valued right to continue with the chosen jury" and have the "trial completed by a particular tribunal." *See Crist v. Bretz*, 437 U.S. 28, 38 (1978); Brief of Appellee at 13–14 (recognizing the importance of this right in both the speedy trial and Double Jeopardy contexts). A mandate of acquittal is appropriate for the reasons set forth above.

However, to the extent this Court finds error in the jury selection process but is unconvinced that dismissal is the appropriate remedy at this stage, the matter should be remanded to allow the parties to argue—and the trial court to consider—the issue of an appropriate remedy for the courtroom closure in the first instance, with the benefit of this Court's clarification that the closure was impermissible. *See* Brief of Appellant at 30 (requesting, as an alternative remedy

to acquittal, that the matter "be remanded for the trial court to address the public trial grounds in the first instance").

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court inquire into and reconsider its October 28, 2024 Order.

Respectfully submitted, this 7th day of November, 2024. This submission does not exceed the word count limit imposed by Rule 24.

/s/ Surinder K. Chadha Jimenez
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IN THE COURT OF APPEALS
STATE OF GEORGIA

AYLA KING, APPELLANT, v. STATE OF GEORGIA, APPELLEE.	CASE NO. A24A1125

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Motion for Reconsideration* upon the following counsel for Appellee, the State of Georgia, via email and the e-filing system:

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Pursuant to Court of Appeals Rule 6(d), I certify that there is a prior agreement with Mr. Fowler to allow documents in a PDF format sent via email to suffice for service. This submission does not exceed the word count limit imposed by Rule 24.

ON THIS, the 7th day of November, 2024.

[SIGNATURE PAGE FOLLOWS]

/s/ Surinder K. Chadha Jimenez
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Exhibit B

No. A24A1125

In the
Court of Appeals of Georgia

AYLA KING,
Appellant,
v.

STATE OF GEORGIA,
Appellee.

On Appeal from the Superior Court of Fulton County
Fulton County Superior Case No. 23SC189192

APPELLEE'S MOTION FOR RECONSIDERATION

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INTRODUCTION

This Court should reconsider a narrow portion of its opinion because the remanding directions in Division 2 cannot be squared with the holding of Division 1. The Court held in Division 1 that Appellant received a trial for the purposes of O.C.G.A. § 17-7-170 because the jury had been sworn and jeopardy attached. However, in Division 2, while the Court held that the parties shall select a new jury, it incorrectly remanded the case and instructed the Court to travel under O.C.G.A. § 17-7-170(d).

> "We note that O.C.G.A. § 17-7-170 (d) provides: 'If a case in which a demand for speedy trial has been filed, as provided in this Code section, is reversed on direct appeal, a new demand for speedy trial shall be filed within the term of court in which the remittitur from the appellate court is received by the clerk of court or at the next succeeding regular court term thereafter.' Therefore, the fact that we are remanding the case to conduct jury selection anew does not affect our conclusion in Division 1 that the trial court correctly denied King's motion to dismiss on speedy trial grounds."

King v. State, 2024 Ga. App. LEXIS 437.

While the Court correctly directed the parties to select a new jury, the Court incorrectly directs the Court to address the

Appellant's speedy trial demand under O.C.G.A. § 17-7-170(d) which would require Appellant to file a new demand for speedy trial. Instead, the Court should have directed the trial Court to travel under O.C.G.A. § 17-7-170(e) which addresses the implications for a demand for speedy trial in the event of a mistrial. Because the jury was sworn and jeopardy attached, the trial court will be required to declare a mistrial to discharge the originally selected jury and select a new jury. As a result, the Appellant does not have to file a new demand for speedy trial, and they "shall be tried at the next succeeding regular term of Court." O.C.G.A. § 17-7-170(e).

BACKGROUND

Appellant filed this appeal after the trial court denied their Motion to Dismiss based upon a violation of Georgia's Speedy Trial Demand statute located at O.C.G.A. § 17-7-170. In their second argument, Appellant argued that the trial court improperly closed the courtroom and was thus entitled to reversal. This Court correctly affirmed the trial court's denial of Appellant's Motion to Dismiss based upon the alleged violation of O.C.G.A. § 17-7-170. However, this Court reversed the trial court regarding courtroom closure without written findings and remanded this case with instructions to select a new jury. This court then addressed the pending Demand for Speedy Trial by indicating that the trial court should travel under O.C.G.A. § 17-7-170(d). This Motion for Reconsideration follows.

ARGUMENT

I. This Court should direct the trial court to address Appellant's demand for speedy trial under O.C.G.A. § 17-7-170(e), and not § 17-7-170(d).

This Court directed the trial court to select a new jury for the Appellant. However, because a jury has already been sworn in the matter prior to this appeal, a mistrial must first be declared to discharge the original jury. If a mistrial is not declared, jeopardy will attach with two simultaneous sworn juries, and double jeopardy will arguably attach to the second jury. Once a mistrial is declared on the first sworn jury, the Appellant's demand for speedy trial must be addressed under O.C.G.A. § 17-7-170(e).

A. A mistrial must be declared because the original jury was sworn and must be discharged.

"A mistrial is not a proper remedy … before the jury has been empaneled and sworn." *Mitchell v. State*, 284 Ga. App. 209 (1) (644 SE2d 147) (2007). This is because "the time for making a motion for mistrial is not ripe until the case has begun, and the trial does not begin until the jury has been impaneled and sworn." (Citation and punctuation omitted.) *Purnell v. State*, 355 Ga. App. 899, 901 (843 SE2d 637) (2020). *Allen v. State*, 361 Ga. App. 300, 310.

If it is to be declared at all, a mistrial must be declared prior to the return of a verdict. *Washington v. State*, 339 Ga. App. 715, 722. Here, the jury was sworn, and, as held in Division 1 of this Court's underlying opinion, the Appellant received a trial. "We first conclude that a defendant "is … tried" under O.C.G.A. § 17-7-170 (b) when the trial begins and the jury is selected and sworn in." *King v. State*, 2024 Ga. App. LEXIS 437. As a result, to discharge the jury, a mistrial must be declared because no verdict has been returned by the jury.

B. The correct procedure addressing Appellant's demand for speedy trial is O.C.G.A. § 17-7-170(e).

"If the case in which a demand for speedy trial has been filed as provided in this Code section results in a mistrial, the case shall be tried at the next succeeding regular term of court." O.C.G.A. § 17-7-170(e). As previously discussed, to discharge the originally selected jury, a mistrial must be declared. As a result, the Appellant's demand for speedy trial is still active and valid, and they must be tried "at the next succeeding regular term of

court." Id. This Court directed the trial court to travel under O.C.G.A. § 17-7-170(d).

> We note that O.C.G.A. § 17-7-170 (d) provides: "If a case in which a demand for speedy trial has been filed, as provided in this Code section, is reversed on direct appeal, a new demand for speedy trial shall be filed within the term of court in which the remittitur from the appellate court is received by the clerk of court or at the next succeeding regular court term thereafter." Therefore, the fact that we are remanding the case to conduct jury selection anew does not affect our conclusion in Division 1 that the trial court correctly denied King's motion to dismiss on speedy trial grounds. *King v. State*, 2024 Ga. App. LEXIS 437.

Each case previously addressed by this Court regarding subsection (d) involved a pre-trial appeal or a post-verdict. *Fletcher v. State*, 213 Ga. App. 401, 445 S.E.2d 279, 1994 Ga. App. LEXIS 636 (1994); *Roberts v. State*, 279 Ga. App. 434, 631 S.E.2d 480, 2006 Ga. App. LEXIS 605 (2006), cert. denied, No. S06C1621, 2006 Ga. LEXIS 781 (Ga. Sept. 18, 2006), overruled in part, *DeSouza v. State*, 285 Ga. App. 201, 645 S.E.2d 684, 2007 Ga. App. LEXIS 478 (2007); *Pope v. State*, 265 Ga. 473, 458 S.E.2d 115, 1995 Ga. LEXIS 376 (1995); *Dennis v. Grimes*, 216 Ga. 671, 118 S.E.2d 923, 1961 Ga. LEXIS 307 (1961), overruled, *Henry v.*

James, 264 Ga. 527, 449 S.E.2d 79, 1994 Ga. LEXIS 824 (1994); *Oni v. State*, 285 Ga. App. 342, 646 S.E.2d 312, 2007 Ga. App. LEXIS 514 (2007); *Doehling v. State*, 238 Ga. App. 293, 518 S.E.2d 137; *Ramirez v. State*, 211 Ga. App. 356, 439 S.E.2d 4 (1993).

None of these prior cases order the remedy of a new jury prior to the discharge of the original jury, and therefore traveling under subsection (d) is proper for those cases. In previous cases decided on pre-trial appeal, no jury was empaneled and sworn, leaving no jury to be discharged. In the cases of post-verdict appeal, the juries were discharged after verdict, again leaving no jury to discharge. This case presents the unusual procedural scenario in which a jury is empaneled but not yet discharged by verdict thereby necessitating the trial court enter a mistrial to discharge that jury before further action is taken. Thus, the trial court must declare a mistrial, and subsection (e) of O.C.G.A. § 17-7-170 must apply upon remand.

CONCLUSION

For the reasons set above, the State respectfully requests that the Court reconsider its original opinion and order the trial court to travel under O.C.G.A. § 17-7-170(e).

Respectfully submitted.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of November, 2024, I served a copy of this brief by first-class U.S. mail, addressed as follows:

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