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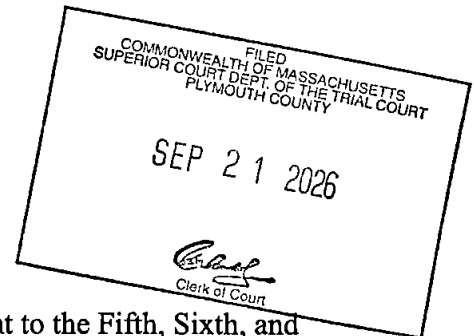
PLYMOUTH, ss.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
NO. 2383CR00198

COMMONWEALTH

v.

LINDSAY CLANCY

MOTION TO DISMISS

Now comes Lindsay Clancy and moves the Court, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, to dismiss Counts 1 through 3 currently pending against her on the grounds that there was no manifest necessity for the declaration of a mistrial given the absence of judicial inquiry regarding repeated reports that one juror was refusing to apply the Court's instructions regarding reasonable doubt and, correspondingly, was failing to discharge his responsibility as a juror to follow and apply the law as instructed. Respectfully, contrary to the Court's stated belief at the time, it did have viable choices other than declaring a mistrial. Both state and federal precedents required that the Court conduct a meaningful and probing *voir dire* in order to make the necessary determinations as to whether there was a proper factual and legal basis for the Court to discharge the juror, which would have eliminated the need for a mistrial. The failure to meaningfully question either the relevant juror or the foreperson who authored the notes on behalf of the jury extinguished a viable alternative to the declaration of a mistrial thus preventing a finding of "manifest necessity," a precondition of which is the lack of any viable option other than the last resort of infringing the defendant's right to a verdict by the first empaneled jury. Accordingly, any successive trial would constitute a violation of Ms. Clancy's Double Jeopardy rights.

The jury twice informed the Court that one of its members was refusing to apply the Court's instructions regarding the fundamental concept of reasonable doubt. After the first such report, the Court asked each juror individually whether he or she was able to apply the law. Upon receiving the second report, the Court tempered its response even further, simply reminding all jurors as a group of their obligation to follow its instructions generally. The Court denied Ms. Clancy's explicit requests to go further. Ms. Clancy, through counsel, at various times requested that the Court: (1) inquire of the foreperson regarding the circumstances and concerns leading to her notes; (2) inquire regarding the jurors' ability to follow the Court's instructions on reasonable doubt; and (3) inquire in order to ascertain whether the non-compliant juror was subject to removal as "unable to perform his duty." Mass. R. Crim. P. 20(d)(3). All of those requests were denied. When it ultimately declared a mistrial, the Court stated it believed it had no option: "under the statute and the case law, I don't feel I have any choice but to declare a mistrial." Sept. 4, 2026 Tr. 16. That statement is the heart of this Motion: a court that believes the law leaves it no choice has neither followed the consistent caselaw requiring a judicial *voir dire* under similar and even indistinguishable facts nor exercised the discretion the manifest necessity doctrine requires.

"The Double Jeopardy Clause provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Blueford v. Arkansas*, 566 U.S. 599, 605 (2012) (quoting U.S. Const., Amdt. 5). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, 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." *Green v. United States*, 355 U.S. 184, 187 (1957). "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional

burden on the accused, prolongs the period in which [s]he is stigmatized by an unresolved accusation of wrongdoing, and *may even enhance the risk that an innocent defendant may be convicted.*” *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978) (internal footnotes omitted) (emphasis added); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (“At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression.”); *Blueford*, 566 U.S. at 605 (“The Clause guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting h[er] to embarrassment, expense and ordeal and compelling h[er] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [s]he may be found guilty.” (citation omitted)).

“[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Washington*, 434 U.S. at 505. This rule is rooted in “the importance to the defendant of being able, once and for all, to conclude h[er] confrontation with society through the verdict of a tribunal [s]he might believe to be favorably disposed to h[er] fate.” *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion); *see also Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (“[T]he Double Jeopardy Clause affords a criminal defendant a valued right to have h[er] trial completed by a particular tribunal.” (citation omitted)). The law has long and repeatedly recognized that, as noted above, re-trial “enhanc[es] the possibility that even though innocent” the defendant “may be found guilty.” *Commonwealth v. Love*, 452 Mass. 498, 503 (2008) (quoting *Serfass v. United States*, 420 U.S. 377, 387-88 (1975)); *see also King v. Commonwealth*, 442 Mass. 1043, 1043 (2004) (same); *Commonwealth v. Gonzalez*, 437 Mass. 276, 281 (2002) (same); *Donavan v. Commonwealth*, 426 Mass. 13, 15 (1997) (same);

Commonwealth v. Woods, 414 Mass. 343, 352 (1993) (same); *Commonwealth v. Andrews*, 403 Mass. 441, 447 (1988) (same) (quoting *United States v. Dinitz*, 424 U.S. 600, 606 (1976)); *Berry v. Commonwealth*, 393 Mass. 793, 796 (1985) (similar) (quoting *Washington*, 434 U.S. at 503-05); *Custody of a Minor*, 375 Mass. 733, 746 (1978) (same) (quoting *Green*, 355 U.S. at 187-88); *Costarelli v. Commonwealth*, 374 Mass. 677, 681 (1978) (same); *Commonwealth v. Lovett*, 374 Mass. 394, 397 (1978) (same).

Thus, “after a mistrial has been declared without the defendant’s request or consent,” or here, over the defendant’s objection, the permissibility of re-trial “depends on whether there [wa]s a manifest necessity for the [mistrial].” *Dinitz*, 424 U.S. at 606-07 (citation omitted). Importantly, the “heavy” burden of establishing “manifest necessity” is exclusively on the prosecution. *Washington*, 434 U.S. at 505. Ultimately, as the Supreme Court observed more than 200 years ago, the “power” to discharge a jury without a verdict “ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.” *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).¹

The declaration of a mistrial here did not present such a “plain and obvious” case. Ms. Clancy, like all criminal defendants, had a Constitutional right to have her fate decided by an impartial jury of her peers, faithfully applying the law as instructed rather than superimposing the juror’s own view of legal right and wrong, including the foundational principle that, absent proof beyond a reasonable doubt of her guilt, she must be acquitted. The multiple reports of a

¹ Because the Fifth Amendment’s Double Jeopardy Clause is “binding on the States through the Fourteenth Amendment,” state protections against Double Jeopardy must be at least coextensive with federal law. *Commonwealth v. Steward*, 396 Mass. 76, 78 (1985); see also *Commonwealth v. Tinsley*, 487 Mass. 380, 391 n.6 (2021) (“Unlike the United States Constitution, the Massachusetts Declaration of Rights does not include a double jeopardy clause, but our statutory and common law have long embraced the same principles and protections.” (citation omitted)).

juror violating this bedrock principle, therefore, required a judicial inquiry sufficient to ascertain whether her right to an impartial jury was being violated. The Supreme Judicial Court, and other state and federal courts, have frequently and consistently stated that such inquiry is required where there is a credible report of juror misconduct, regardless of whether or not the juror was ultimately discharged. Respectfully, further inquiry was certainly required where, as here, the inevitable result of the failure to do so was a mistrial, declared over the defendant's objection, carrying all the risks of unfairness and abuse repeatedly emphasized by both the Supreme Judicial Court and the United States Supreme Court. Absent further steps not taken here, the Commonwealth cannot meet its burden of establishing manifest necessity for the mistrial, which precludes re-prosecution of Ms. Clancy on Counts 1 through 3 and mandates dismissal of those charges.

I. BACKGROUND

On September 15, 2023, Ms. Clancy was charged via separate indictments with three counts of murder (Counts 1-3), in connection with the deaths of her three children.² At the trial, which began with jury selection on July 20, 2026, Ms. Clancy contended that she was not guilty on all charges because she was not criminally responsible due to a mental disease or defect. On August 27, 2026, jury deliberations began.

The Court instructed the jury, consistent with blackletter Massachusetts law, that the Commonwealth was required to prove beyond a reasonable doubt that Ms. Clancy was criminally responsible for her actions. *See Commonwealth v. Berry*, 457 Mass. 602, 612 (2010); *Commonwealth v. Goudreau*, 422 Mass. 731, 735 (1996).

² Ms. Clancy was also charged with three counts of strangulation, but the Commonwealth filed a notice of *nolle prosequi*, and the counts were dismissed.

On September 2, 2026, the jury reported via a note to the Court, [REDACTED]

[REDACTED] Sept. 2, 2026 Tr. 3. The Court gave a *Tuey-Rodriguez* charge, *see Read v. Commonwealth*, 495 Mass. 312, 315 n.4 (2025), after which the jury resumed deliberations.

On September 3, 2026, the jury foreperson sent another note to the Court stating, [REDACTED]

[REDACTED] Sept. 3, 2026 Tr. 3 (emphasis added). [REDACTED]

[REDACTED]³

Ms. Clancy objected, [REDACTED]

[REDACTED] Ms. Clancy

contends that this procedure was legally mandated. *See infra* at pages 12-23. The Court denied that request and instead proceeded to individually ask jurors, [REDACTED]

³ One of the cases cited by the Commonwealth expressly held, directly contrary to its position, that “preliminary inquiry of the juror who made the allegations” of misconduct during deliberations was required. *Commonwealth v. Ralph R.*, 490 Mass. 770, 784 (2022); *see also infra* at pages 25-26. The other authority cited was inapposite because it involved no indication that a juror was refusing to comply with the court’s instructions. *See Commonwealth v. Russell*, 470 Mass. 464, 467 (2015) (“During deliberations, the jury asked for clarification of the reasonable doubt standard.”).

beyond a reasonable doubt to allow that jury to return a verdict of not guilty.” Id. at 7 (emphasis added). The Commonwealth responded that “[t]he note indicates that the parties disagree on what is reasonable doubt or what doubt is and how it should be applied, and we are in no position to judge if the eleven are right or the one is right.” Id. Facially, the note said no such thing. And the only way to tell whether or not the Commonwealth’s extrapolation might be correct was to conduct further inquiry of the foreperson as to the circumstances underlying her note.

The Court aptly observed that “[t]he discharge of a deliberating juror is a sensitive undertaking fraught with potential error,” and that a deliberating juror “properly may be discharged only for reasons personal to that juror, having nothing whatsoever to do . . . with the issues of the case or . . . the juror’s relationship with their fellow jurors.” *Id.* at 7-8. The Court then found “no showing of the need for inquiry of this particular juror.” *Id.* at 8. In doing so, the Court did not directly respond to Ms. Clancy’s argument that the juror’s (twice) reported refusal to follow the law *was* a “personal” issue and proper subject of juror inquiry. The Court also failed to acknowledge the precedents where courts in this Commonwealth and elsewhere have found such inquiry to be required before a court could reliably determine whether to discharge the juror whose conduct is at issue, permit the jury to continue to deliberate, or, as here, declare a mistrial. *See infra* pages 12-23.

The Court further opined that, “reading that note carefully and strictly,” it did “not indicate that this is a person who has refused to follow the law” because proof beyond a reasonable doubt “does not mean proof beyond all possible doubt.” Sept. 4, 2026 Tr. 8. This observation overlooked that the foreperson had already informed the Court that the juror was [REDACTED] Sept. 3, 2026 Tr. 3 (emphasis added). *Respectfully, it also presupposed one of multiple interpretations of the note without the*

Court having made any judicial, and Ms. Clancy contends required, inquiry into whether the juror was unable or unwilling to follow the Court's instructions.

Ms. Clancy objected to the Court's decision not to inquire further, specifically invoking the Sixth Amendment to the U.S. Constitution in addition to Massachusetts law. *See* Sept. 4, 2026 Tr. 10. The Court reminded the jurors of their duty to follow the law and then returned them to their deliberations. *See id.* at 13.

Also on September 4, 2026, Ms. Clancy filed a short Emergency Motion for Reconsideration of Denial of Limited Juror Inquiry, reiterating that "a limited inquiry [wa]s necessary to determine whether" the second note reflected "an ordinary disagreement about the evidence or law, or a refusal to follow the Court's instructions." The Court denied the motion by margin endorsement the same day.

Before noon on September 4, the jury sent its final note: "With a heavy heart . . . we report that we are unable to come to a unanimous decision and will not be able to." Sept. 4, 2026 Tr. 15. The Commonwealth argued that, "since the Tvey instruction has already been given, and then there was lengthy deliberation after that, I think that it would require a mistrial at this point." *Id.* at 15. The Court stated, "I would find that under . . . Massachusetts case law and statutory law, the jury did not ask to be sent back, which would be a possibility if they requested it to be sent back to them, but under the statute and the case law, I don't feel I have any choice but to declare a mistrial." *Id.* at 16.

Ms. Clancy filed an Emergency Request for Relief Pursuant to G.L. c. 211, § 3, after the Court granted a short stay, which was denied by a single justice of the Supreme Judicial Court without opinion. Ms. Clancy thereafter renewed her request for a hearing on the juror's reported refusal to follow the Court's instructions. Counsel argued that the juror "unfortunately" was "not

holding out based on the good faith issue on what the facts are under the law, but they're holding out as a result that even though they have agreed and expressed doubt, they are refusing to apply the law as you've given it. So I would ask again that you conduct a hearing and understand that you're probably going to deny that." *Id.* at 21-22. The Court rejected that third request for a judicial inquiry into the basis for the foreperson's notes indicating that one of the jurors would not follow the law and instead, over the defendant's objection, called the jury in and declared a mistrial. *See id.* at 22. Ultimately, the foreperson's report that a juror was refusing to comply with the law regarding reasonable doubt was never examined.

II. THERE WAS NO MANIFEST NECESSITY TO DECLARE A MISTRIAL

"[T]he [d]ouble [j]eopardy [c]lause affords a criminal defendant a 'valued right to have h[er] trial completed by a particular tribunal.'" *Commonwealth v. Taylor*, 486 Mass. 469, 483 (2020) (quoting *Kennedy*, 456 U.S. at 671-72). "Thus, where a mistrial is entered 'without the defendant's request or consent,' retrial is impermissible unless there was a manifest necessity for the mistrial." *Id.* (quoting *Dinitz*, 424 U.S. at 606-07). Here, Ms. Clancy clearly and expressly did not consent to the declaration of a mistrial, so the dispositive question is whether the Court's action was supported by manifest necessity. The "heavy" burden of establishing such "manifest necessity" remains, at all times, with the Commonwealth. *Washington*, 434 U.S. at 505.

While "there is no" particular "formula for determining when manifest necessity arises," "[t]wo principles emerge for guidance: (1) counsel must be given full opportunity to be heard and (2) the trial judge must give careful consideration to alternatives to a mistrial." *Commonwealth v. Nicoll*, 452 Mass. 816, 818 (2008) (citation omitted). In conducting this analysis, the Court must "resolve any doubt in favor of the liberty of the citizen" *Downum v. United States*, 372 U.S. 734, 738 (1963).

Here, there was a clear alternative, raised expressly and repeatedly by Ms. Clancy, to the declaration of a mistrial which forecloses any finding of manifest necessity: to inquire regarding the foreperson's report of a juror who was not following the Court's instructions. Respectfully, the Court's rejection of the multiple requests for judicial inquiry constitutes legal error which led, inexorably, to the mistrial being declared without manifest necessity.

A. Ms. Clancy Had a Right, Under Both the Federal and State Constitutions, to a Jury Able and Willing to Apply the Law, and a Corresponding Right to Judicial Inquiry Regarding Reported Misconduct

It is, of course, "improper for a juror to disregard the law as given by the judge."

Commonwealth v. Chambers, 93 Mass. App. Ct. 806, 817 n.13 (2018); *see also United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969) (stating that jurors' "duty is to apply the law as interpreted by the court . . ."). As the United States Supreme Court eloquently explained more than a century ago:

Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried.

Sparf v. United States, 156 U.S. 51, 101 (1895). Instead, our criminal justice system "hold[s] firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Id.* at 102; *see also, e.g., United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) ("Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court . . ."). The federal Constitution's guarantees of due process and trial by an impartial jury demand jurors who will "conscientiously apply the law to the facts adduced at

trial.” *Wainwright v. Witt*, 469 U.S. 412, 421 (1985); *see also Commonwealth v. Andrade*, 468 Mass. 543, 547 (2014) (“Article 12 of the Declaration of Rights of the Massachusetts Constitution and the Sixth Amendment to the United States Constitution, applied to the States through the due process clause of the Fourteenth Amendment, guarantee the right of a criminal defendant to a trial by an impartial jury.” (citation omitted)); *Commonwealth v. Eden*, 94 Mass. App. Ct. 1119, at *2 (2019) (unpublished) (“A judge has a duty to ensure the defendant’s right to a jury that can set aside their own biases, properly weigh the evidence, and follow the judge’s instructions.”). “The presence of even one juror who is not impartial violates a defendant’s right to trial by an impartial jury.” *Commonwealth v. Vasquez*, 495 Mass. 279, 283 (2025) (citation omitted).

Consistent with this Constitutional imperative, Massachusetts law provides the Court with authority to remove a deliberating juror “unable to perform his duty” or “for any other good cause shown to the court.” *Commonwealth v. Williams*, 486 Mass. 646, 651 (2021); *see also* Mass. R. Crim. P. 20(d)(3).⁴ As the Court acknowledged in framing its limited questioning of jurors in this case, a juror who cannot or will not follow the law is [REDACTED]
[REDACTED] Sept. 3, 2026 Tr. 3.

It follows that, where the Court receives information indicating that one or more jurors is not fulfilling his duty to apply the law as instructed, the Court has an obligation to inquire. As the Supreme Judicial Court has observed in the context of alleged racial bias, “the possibility . . . that defendant did not receive a trial by an impartial jury, which was h[er] fundamental right, cannot be ignored.” *Vasquez*, 495 Mass. at 284 (citation omitted). And, in the present context,

⁴ The statute containing this language, Mass. Gen. Laws ch. 234, § 26B, has been repealed, but the Supreme Judicial Court “has interpreted the current applicable statute,” Mass. Gen. Laws ch. 234A, § 39, “to be synonymous.” *Commonwealth v. Williams*, 486 Mass. 646, 651 n.2 (2021).

the law provides for a clear remedy: “[w]here reliable information comes to a judge suggesting a lack of impartiality, bias, extraneous influence, or inability to deliberate on the part of one of the jurors, a judge *should* conduct a voir dire of the juror.” *Commonwealth v. Ronchi*, 491 Mass. 284, 307 (2023) (emphasis added). The Supreme Judicial Court has repeatedly referred to such juror inquiry in mandatory terms. *See id.* at 308 (“A judge is *required* to hold a hearing to determine whether there is good cause to discharge a juror.” (quoting *Commonwealth v. Connor*, 392 Mass. 838, 843 (1984)) (emphasis added)); *Williams*, 486 Mass. at 651 (“To determine whether good cause exists for dismissal, a judge *must* hold a hearing with the juror in question.” (citation omitted) (emphasis added)); *Commonwealth v. Tiscione*, 482 Mass. 485, 490 (2019) (“To make this determination, a judge *must* hold a hearing with the juror in question.” (emphasis added)); *Commonwealth v. Holley*, 478 Mass. 508, 529 (2017) (“A judge *must* hold a hearing adequate to determine whether there is good cause to discharge a juror.” (citation omitted) (emphasis added)). Federal caselaw is in accord. *See, e.g., United States v. Christensen*, 828 F.3d 763, 809 (9th Cir. 2015) (“The remedy for allegations of juror misconduct is a prompt hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not the misconduct was prejudicial.” (citation omitted)).

This is consistent with the Supreme Judicial Court’s repeated holdings in other contexts that a court confronted with a claim of juror misconduct must conduct an inquiry sufficient to permit a reasoned decision on the issue. *See Vasquez*, 495 Mass. at 283-84 (holding that, after “limited voir dire” produced allegation of racist comments during deliberations, “it was incumbent on the judge to inquire about the content of the statements . . . in order to determine whether they were racially biased as alleged”); *Commonwealth v. Ralph R.*, 490 Mass. 770, 785 (2022) (“It constituted an abuse of the judge’s discretion to not conduct a preliminary inquiry to

determine what the foreperson meant in order to assess whether the jury remained capable of impartially rendering a verdict.”); *Commonwealth v. Kincaid*, 444 Mass. 381, 387-92 (2005) (affirming grant of new trial after post-verdict inquiry regarding jury’s exposure to extraneous evidence of co-defendant’s flight); *see also United States v. Zimny*, 846 F.3d 458, 464 (1st Cir. 2017) (observing in context of post-trial evidence of extraneous influence, “where a defendant makes a colorable or plausible claim of juror misconduct, the district court must investigate it”); *Remmer v. United States*, 347 U.S. 227, 229-30 (1954) (holding that post-trial hearing was required regarding FBI’s unauthorized contact with jurors).

Connor is a seminal case. There, during deliberations, after the court had received prior complaints but decided not to excuse the juror at that time, it “received a note from the foreman stating, ‘[a] particular juror says he cannot keep the oath.’” 392 Mass. at 843. “Defense counsel requested that the court inquire more deeply into the facts and circumstances relevant to the juror’s conclusion.” *Id.* The court called the juror in, “read him the oath and asked him whether he could fulfil the obligation imposed by it. The juror replied negatively and was immediately discharged.” *Id.* The Supreme Judicial Court began, as this Court did, with the observation that “[t]he discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error.” *Id.* But this is precisely why “a judge *must* hold a hearing adequate to determine whether there is good cause to discharge a juror.” *Id.* at 843-44 (emphasis added). The Court, therefore, held that the discharge of the juror “without a hearing and without facts on the record” supporting its determination constituted error. *Id.* at 847. The trial judge was not permitted to rely exclusively upon the “juror’s mere assertion of inability to abide by his oath.” *Id.* at 846. Counsel submits that it is equally impermissible to accept, without more, the juror’s “mere

assertion” that he is able to comply with the law. In either case, further inquiry is required for the Court to make a reasoned decision.

In *Ronchi*, the very case cited by the Commonwealth in support of its position on September 4 that no *voir dire* should be conducted, the Supreme Judicial Court affirmed the trial judge’s decision to conduct such inquiry, as required by *Connor* and other precedents. There, the foreperson sent a note stating, “[w]e are concerned that one juror is not able to productively contribute to deliberations.” 491 Mass. at 307. The “judge questioned the foreperson with the caveat that the foreperson not reveal ‘anything about [the jury’s] deliberations.’” *Id.* “[T]he judge” then “determined . . . that he had enough information to inquire of” the non-compliant juror regarding “her alleged refusal to deliberate.” *Id.* After such questioning, the judge observed that the juror was “immediately strident,” “angry,” and “appeared to be incapable of following the judge’s instruction to keep an open mind.” *Id.* at 308. The court, accordingly, struck the juror, a decision upheld on appeal notwithstanding the trial court’s failure to provide the preliminary warning outlined by caselaw before questioning the juror. The information relied upon by the trial judge in *Ronchi*, including the juror’s demeanor and credibility that require meaningful judicial *voir dire* to assess, is just the sort of valuable data that the Court in this case needed, but deprived itself of, to rule on Ms. Clancy’s motion to strike the juror.

In *Williams*, after another juror had been replaced for health reasons, the court received a note from a deliberating juror saying, “I fully feel at this point I am not capable of starting over the deliberations with an unbiased opinion nor able to engage in a discussion with any of the fellow jurors. . . .” 486 Mass. at 649. The trial judge struck the juror after questioning. The Supreme Judicial Court observed that the decision to hold a hearing on the issue had been “proper[.]” *Id.* at 652. However, “the juror’s inability to begin deliberations anew was at least in

part colored by his relationship with the other jurors and was not entirely personal to him,” such that the juror was improperly dismissed. *Id.*⁵ The Court observed, however, that, even “if a juror’s conduct has roots in interactions with other jurors during the course of deliberations but the juror’s response is idiosyncratic, such behavior may constitute a reason for dismissal that is personal to that juror.” *Id.* But, in the case at hand, “[t]he juror repeatedly framed his inability to begin anew in the context of his relationship with other jurors,” including in his initial note. *Id.* at 652-53. Crucially, the fact that the note implicated, to some degree, interactions among the jurors did not remove the obligation to inquire. And here, unlike in *Williams*, the two notes of import said nothing whatsoever about the non-compliant juror’s relationship with his peers.

In *Commonwealth v. Swafford*, 441 Mass. 329, 335 (2004), during deliberations, the foreperson sent a note to the court stating that a juror “doesn’t think she cannot [*sic*] work through the case.” The court officer further “informed the judge that he observed” the juror “eating lunch separately from the rest of the jury, and that she told him that she was not participating in the deliberations and wanted to leave.” *Id.* The court questioned the foreperson, asking him “to be more specific with regard to his note, ‘without revealing any of the Jury’s deliberative process or anything of that nature.’” *Id.* The court then questioned the juror at issue, who “complained of hostility, and name-calling between herself and another juror. On further inquiry by the judge,” the juror “described her complaint as ‘facial expressions’ that another juror made at one point while” the juror “spoke, and that the other juror commented that she was ‘silly’ and indecisive.” *Id.* The juror “repeatedly declared that she could not be fair and impartial if she were ordered to resume deliberations.” *Id.* The court found that the juror “had

⁵ The defense alternatively preserves the argument that this limitation on discharge of jurors to strictly personal reasons, imposed by Massachusetts caselaw, violates the Sixth Amendment’s guarantee of trial by an impartial jury.

some kind of animus which was entirely personal to her, [and had] decided in the circumstances . . . that she was not going to be fair and impartial,” and it dismissed the juror. *Id.* The defendants “objected and moved for a mistrial,” but the Supreme Judicial Court affirmed. *Id.* at 336. While “the juror’s dismissal obviously had its roots in perceived slights against her by another juror during the course of deliberations,” “the basis of the dismissal was the juror’s idiosyncratic response to” other juror’s “behavior . . .” *Id.* at 337. Decisions regarding whether or not a discharge of a juror is supportable differ, but such decisions unanimously follow a probing jury inquiry and its concomitant findings of fact that failed to occur in the matter *sub judice*.

Tiscione provides yet another example. During deliberations, “a court officer informed the judge that” one juror “had removed herself from the jury room,” was “visibly upset, visibly shaken,” and “stated that ‘she could not continue as a juror.’” 482 Mass. at 487. The court “asked the juror why she would not go back into the deliberation room,” with the juror responding that “a couple people [were] being argumentative,” another “juror accused her of putting words in [his] mouth,” and “it was just enough to upset [her].” *Id.* (internal quotation marks omitted). The judge expressly observed, “[a]t least preliminarily, it sounds like this is not a personal problem, but it relates to [the juror’s] views on the case, or at least that’s what I’ve heard so far.” *Id.* at 487 n.4. The court nonetheless “made further inquiry,” ultimately concluding that there was good cause for the juror’s discharge. *Id.* at 487-88. The Supreme Judicial Court expressly stated that “the judge properly held a hearing to question the juror . . . to find out why the juror would not continue to deliberate and to determine whether removal of the juror was warranted,” while ultimately disagreeing with the decision to discharge the juror. *Id.* at 490. Importantly, the trial court was correct in holding a hearing notwithstanding its initial

impression that the issue was not a personal one that would provide a permissible reason for discharge. This is because it is impossible to be assured that any such impression is correct absent inquiry.

The Court's reluctance to inquire further [REDACTED] [REDACTED] was, respectfully, no basis to forgo its responsibility to investigate the alleged juror misconduct. Sept. 3, 2026 Tr. 17. Courts can and have specifically inquired of deliberating jurors regarding their ability to follow particular instructions, including instructions regarding reasonable doubt, without impermissibly invading deliberations.

Commonwealth v. Olavarria, 71 Mass. App. Ct. 612 (2008), provides a helpful analogue. There, the jury expressly reported a "deadlock[] at 11 to one." *Id.* at 615. The Court recessed for the night and, the next morning, gave a *Tuey-Rodriguez* charge. Shortly after the jury resumed deliberations, the court received a note reporting that "a juror looked up in 3 law dictionaries the definition of 'reasonable doubt' & 'moral certainty' & brought it into the room. Whether as a result or not she is in complete disagreement with the other eleven jurors." *Id.* The defense moved for a mistrial, but the court decided to question the juror. "When questioned, the juror explained that as she was the widow of a lawyer, she had access to law books" and used them to look up the terms. *Id.* at 616. During a second round of questioning, the court stated to the juror, "I have told you that what you have brought into the jury room is incorrect, not the law of the Commonwealth" and asked her if she "would be able to disregard what [she] brought with [her] today and decide the case based on the law" as reflected in the court's instructions. *Id.* at 616 n.8. After a relatively extensive back-and-forth, the juror responded, "[a]ll I can assure you is that I would make every effort to do so, but I don't know that I can answer for other things that

might be in my head. I would make every sincere effort to do so, but I cannot say that I could guarantee that. I don't know how" *Id.*

Ultimately, "[t]he errant juror was excused, an alternate was chosen, and the judge reinstructed the new jury." *Id.* at 618. The court told the reconvened jury "that the reasons for replacing the juror were 'entirely personal to the excused juror and ha[d] nothing to do with her views of the case or her relationship with other jurors and you must not speculate or consider for any purpose the reasons why that juror ha[d] been excused.'" *Id.* at 621. The Appeals Court affirmed that action. There was "nothing in the record to suggest that the reason for the dismissal was the juror's hold-out status. To the contrary, as the judge noted, there were here two problems, the extraneous matter the juror brought to the jury room, as well as the hold-out situation, and it was the former that triggered the juror's dismissal." *Id.* at 620.

The present case is closely analogous. Here, as in *Olavarria*, after the jury had begun deliberations, reported a deadlock, and received a *Tuey-Rodriguez* charge, the Court received a note indicating that one juror was not complying with the Court's instructions regarding reasonable doubt. In both cases, the jury was split 11 to 1, though (unlike in *Olavarria*) the jury in this case did not expressly volunteer its numerical division. Respectfully, the *Olavarria* court conducted just the inquiry that this Court believed was prohibited – it confronted the non-compliant juror regarding her ability to follow the court's instructions on reasonable doubt specifically and in detail, ultimately concluding that the juror had not provided sufficient assurance that she would comply. By pressing the non-compliant juror regarding the necessity of following its instructions, the court did not take "one side or the other of the deliberations," as this Court mistakenly feared. Sept. 3, 2026 Tr. 24. Rather, it impartially fulfilled its Constitutional obligation to ensure that both parties received a fair trial.

In *Commonwealth v. Torres*, 453 Mass. 722, 725 (2009), approximately 45 minutes after the beginning of deliberations, the foreperson sent a note stating, “[o]n this jury there is an individual unable to deliberate in a coherent and logical manner on this issue.” The court questioned the foreperson individually, who disclosed that the juror was “of the mind, because of past experience with police, that all police are bad, so it doesn’t matter what they say” *Id.* The Court “brought the jury back into the court room, read them the foreperson’s note, and reinstructed them on their duties—urging them to give the case their full and fair consideration, and to listen to each other’s opinions.” *Id.* at 726. Just over an hour later, the foreperson sent another note saying, “we have a juror who feels the criminal justice system is corrupt. The juror cannot comprehend the evidence before them. . . .” *Id.* at 727. The court, “acknowledging the perils of interviewing the juror,” nonetheless questioned him individually. *Id.* at 728. Among other things, the court stated, “I asked you at the outset of the case whether you would believe or disbelieve police officers just because they are police officers.” *Id.* The juror responded, “I don’t believe the true or the false. I decide it for myself, because there is good and bad in every profession.” *Id.* at 728-29. The court ultimately rejected the prosecution’s request to dismiss the juror.

Importantly, the Supreme Judicial Court rejected the defense argument on appeal that the trial court abused its discretion in denying a motion for mistrial while strongly supporting the procedure followed by the court. The foreperson’s “report raised the genuine possibility of a problem unique to the juror that might have constituted good cause for her discharge.” *Id.* at 733. Absent a hearing like that conducted in *Torres*, any ruling as to whether or not good cause exists can be nothing more than guesswork.

Commonwealth v. Chambers is another example. There, “[a]fter the judge completed his instructions . . . , but before deliberations began, [a] juror . . . sent a note . . . stating, ‘I believe I may know information that would affect my ability to judge the case based solely on the information received in the trial.’” *Chambers*, 93 Mass. App. Ct. at 814. The court questioned the juror, who referenced the concept of jury nullification. The court explained that jury nullification was not permitted. The juror opined “that he did not believe it should be unlawful to possess a small knife,” but the court explained that he had to follow the law as instructed with the juror ultimately indicating that he was able to do so. *Id.* The Court “then painstakingly went through his other ‘major’ jury instructions to ascertain whether the juror had any problem applying those instructions, and juror said he had no problem.” *Id.* at 815. At the end of the discussion, the juror “thanked the judge for speaking with him,” and the “judge thanked the juror and shared his appreciation for the juror having the courage to speak up and resolve his concerns.” *Id.* The Appeals Court specifically rejected a defense argument that this colloquy was in any way “coercive” or constituted an “interrogation.” *Id.* at 815 n.10.⁶ “Rather, the judge never dropped his proper neutral role, and went to great lengths to resolve the juror’s concerns and misconceptions.” *Id.* Respectfully, nothing prevented this experienced Court from engaging in similar questioning in the present case.⁷

⁶ The frequency with which courts have approved similar inquiries of deliberating jurors, even when deadlocked, refutes any suggestion that such inquiries are inherently coercive. *Cf. Read*, 495 Mass. at 323 (identifying risk of coercion “when a judge inquires about the possibility of a partial verdict following a deadlock,” which “cannot avoid communicating to the jury the judge’s desire to salvage something from the trial” (quoting *Commonwealth v. Roth*, 437 Mass. 777 (2002))).

⁷ Of course, a judge’s questioning of jurors must have limits and cannot go too far. For example, in *Commonwealth v. Hebert*, 379 Mass. 752, 754 (1980), after a jury poll revealed that one juror’s “verdict was qualified,” the court “engaged in a three minute dialogue,” explaining “that,

What is uniform is that whether or not a juror was discharged, and whether or not that decision was upheld on appeal, each case required and relied upon a meaningful judicial inquiry to determine whether the juror that was the subject of a foreperson's notes was following the law, was deliberating, and was fit to continue juror service.

Federal courts have conducted similar juror inquiries where, as here, they received a note indicating a juror's failure to follow the law. *See, e.g., United States v. Godwin*, 765 F.3d 1306, 1318 (11th Cir. 2014) (after jury "submitted two notes . . . , both of which stated that one juror did not agree with the court's instructions on the law," court questioned all jurors with 11 indicating that non-compliant juror "refused to follow the court's instructions or to apply those instructions to the evidence presented at trial"); *United States v. Fattah*, 914 F.3d 112, 140-43 (3d Cir. 2019) (after receiving note from foreperson stating that juror "refuse[d] to vote by the letter of the law," court questioned several jurors); *United States v. Abbell*, 271 F.3d 1286, 1290 (11th Cir. 2001) (where "court received word that one of the jurors was behaving improperly and refusing to obey the law or to obey the court's jury instructions," followed by additional complaints, court "talked with the juror in question and with each member of the jury in an attempt to ascertain whether the juror's conduct warranted her dismissal"); *United States v. Gutierrez*, No. 23-CR-00197, 2025 WL 506694, at *5-6 (C.D. Cal. Feb. 11, 2025) (after receiving note regarding "Juror who [wa]s basing his reasoning on [whether] the defendant testified or not," court "questioned the foreperson," then "separately questioned" juror, including

in his opinion, the evidence was clear that the defendant had possession of a rifle on [the charged date], and did not have a firearms identification card." The Supreme Judicial Court held that "[t]he judge's statements that, in his view, the evidence was clear and that he could see no problem with the case [we]re themselves improper" and the "inquiry whether the juror agreed that certain facts were proved beyond a reasonable doubt was likely to be coercive because it intruded into the jury's function." *Id.* at 755. The limited inquiry requested by Ms. Clancy here did not come remotely close to posing similar concerns.

specifically asking “whether he had heard the instruction that jurors could not take into account [defendant’s] decision not to testify”).

B. The Court’s Failure to Conduct Further Juror Inquiry Extinguished the Court’s Ability to Adequately Consider Whether to Discharge the Juror, Which Precludes a Finding of Manifest Necessity

Ms. Clancy contends that, for all the reasons set forth *supra*, the foreperson’s notes in this case required the Court to inquire further regarding the alleged misconduct. But the Court need not rule on that issue to grant the instant Motion. That is because whether or not a juror inquiry similar to those conducted in the foregoing cases was invariably required, counsel respectfully submits that where, as here, a mistrial is declared over Ms. Clancy’s objection, inquiry must be conducted for the Court to adequately consider removal of a non-complaint juror as a viable alternative to a mistrial.

Indeed, a mistrial was the inexorable result of the Court’s decision not to conduct the further inquiry requested by Ms. Clancy. *See* Sept. 3, 2026 Tr. 5 (counsel arguing [REDACTED]). Even assuming *arguendo* and contrary to the foregoing caselaw that juror inquiry may, sometimes, be discretionary, here the prospect of a second trial, carrying the catastrophic risk of increasing the chance that an innocent person might be convicted of murder, *see supra* page 3-4 (citing cases), demanded more. As the First Circuit Court of Appeals has observed, “concern for the sanctity of jury deliberations may not be elevated above the defendant’s right to have h[er] fate decided by the first jury empaneled in h[er] case.” *United States v. Lara-Ramirez*, 519 F.3d 76, 87 (1st Cir. 2008).

The Court’s failure to recognize its obligation to conduct the inquiry requested by Ms. Clancy precludes any finding of manifest necessity. *See Nicoll*, 452 Mass. at 817 (finding no manifest necessity where judge and parties mistakenly believed that trial could not go forward

with five jurors); *Lara-Ramirez*, 519 F.3d at 87 (finding no manifest necessity where “two misconceptions of the law” contributed to mistrial); *United States v. Ramirez*, 884 F.2d 1524, 1530 (1st Cir. 1989) (finding no manifest necessity where court acted out of mistaken belief that there had been a “substantial violation of the Jury Act”); *United States v. Dixon*, 913 F.2d 1305, 1314 (8th Cir. 1990) (finding no manifest necessity where court failed to poll jurors regarding exposure to potentially prejudicial publicity).

Courts have found a lack of manifest necessity where the trial judge failed to adequately inquire regarding the events precipitating a mistrial. See *Barton v. Commonwealth*, 385 Mass. 517, 518-19 (1982) (where juror observed spectator “speaking with the codefendant” at counsel table, “[a] reasoned decision on the Commonwealth’s motion for a mistrial *required* the judge at least to make a general inquiry of the twelve jurors who had not been excused in an effort to determine their knowledge of the incident and its effect on their ability to render an impartial verdict” (emphasis added)); *Lara-Ramirez*, 519 F.3d at 86 (where Bible was found in jury room, questioning court reporter and foreperson was insufficient because it provided “no basis upon which to assess the potential efficacy of the alternatives to a mistrial, such as further questioning of individual jurors . . .”). Here, without meaningfully probing the reported misconduct, the Court lacked a sufficient basis to ascertain whether or not the jury was “genuinely deadlocked,” and whether a mistrial was, therefore, required. *United States v. Candelario-Santana*, 977 F.3d 146, 158 (1st Cir. 2020).

In some ways, this case presents the antithesis of *Read*. There, the defense contended that there was no manifest necessity for a mistrial because the trial court failed to inquire regarding the existence of potential partial verdicts, evidence of which came to light only after the jury had been discharged. In rejecting this claim, the Supreme Judicial Court found it

“particularly striking that the jury notes provided no inkling of agreement on any of the charges.” 495 Mass. at 321 n.11 (internal quotation marks omitted). None of the notes “suggested the jury had reached, or could reach, consensus” *Id.* In essence, there was no hint of the circumstance undermining manifest necessity at the time the mistrial was declared. In addition, there was no defense request for a *voir dire* of any juror.

Here, by contrast, we have a jury that was calling out for help, not once but twice informing the Court that its deliberations were being hijacked by a juror’s disregard of the Court’s instructions. “Confronted with this information,” the Court “needed to take steps to understand what the foreperson meant in order to determine whether further inquiry was required to assess whether the jury’s impartiality had been affected.” *Ralph R.*, 490 Mass. at 782. The jury did not state that it had reached an intractable impasse until *after* the Court declined to pursue this readily available alternative of juror inquiry regarding the reported misconduct. Additionally, in the matter *sub judice* counsel for the defendant repeatedly asked the Court, pre-verdict, for the remedies that the defense contends were Constitutionally required.

The Court’s “close reading” of the second September 3 juror note, in isolation, to be consistent with its instructions on reasonable doubt was error. The Court was obligated “to investigate the meaning of” the foreperson’s “statement.” *Ralph R.*, 490 Mass. at 779. In *Ralph R.*, the Court received during deliberations (which had reached a deadlock) “a report of ‘discriminating comments’ in the jury room.” *Id.* at 782. On appeal, the Supreme Judicial Court rejected the Commonwealth’s argument “that the foreperson’s use of the term ‘discriminating,’ as opposed to ‘discriminatory,’ was insufficient to signify potential discrimination of some nature during deliberations.” *Id.* It was “a reasonable inference from the context in which the statement was made that the foreperson likely meant ‘discriminatory.’” *Id.* at 782-83. And there

was no basis for the trial court's conclusion to the contrary. *"Although judges are entitled to make credibility determinations regarding juror inquiry, . . . a judge must do so fully equipped with the information necessary to make such a determination."* *Id.* at 783 (emphasis added).

A similar analysis applies here. While the foreperson's second note referred to the juror's acknowledgement of "doubt," the Court's analysis of the issue overlooked important context: earlier that same day the foreperson had sent a note unequivocally stating that the juror was not abiding by the law regarding *reasonable* doubt. *"Any uncertainty by the judge about the credibility of the reported information or its content" was required to be "resolved in favor of conducting a preliminary inquiry of the juror who made the allegations."* *Id.* at 784 (emphasis added). Federal Double Jeopardy law is in accord. *See Downum*, 372 U.S. at 738 ("We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." (citation omitted)); *Candelario-Santana*, 977 F.3d at 161 ("[A]mbiguous verdicts . . . must be construed in favor of the defendant."). The Court erroneously failed to give Ms. Clancy the benefit of any uncertainty regarding the jury notes.

C. Even Assuming *Arguendo*, and Contrary to the Foregoing, That the Court Possessed Discretion to Deny Further Inquiry, the Court Failed to Exercise Such Discretion

In addition to Ms. Clancy's contention that the judicial inquiry discussed above was an imperative and the Court lacked discretion to not conduct it, the Court's statement that it had no choice but to declare a mistrial indicates that the Court mistakenly believed it had no discretion to conduct such a *voir dire*, which Ms. Clancy contends constitutes a separate legal error. This error independently forecloses any finding of manifest necessity.

D. The Commonwealth Cannot Satisfy Its Heavy Burden of Establishing Manifest Necessity Where It Repeatedly Opposed Any Juror Inquiry

Notably, the Commonwealth was complicit in the Court's misunderstanding of its discretion here. It opposed juror inquiry at every turn. This is particularly significant because it is the Commonwealth that bears the "heavy" burden of establishing manifest necessity. *Nicoll*, 452 Mass. at 818 (quoting *Washington*, 434 U.S. at 505); *see also, e.g., Commonwealth v. Steward*, 396 Mass. 76, 79 (1985). In order to meet that burden, the Commonwealth could have and should have alerted the Court to precedents such as those cited *supra* where appellate courts have required juror inquiry as a predicate to support the decisions reached below. Instead, the Commonwealth inaccurately portrayed cases stating that judicial inquiry was required (namely *Ralph R.* and *Ronchi*) as supporting the Commonwealth's opposition to any *voir dire* at all. The Commonwealth has requested *voir dire* and/or removal of deliberating jurors in other cases where the situations suggested such questioning would be advantageous to the prosecution. *See Commonwealth v. Cousin*, 449 Mass. 809, 813 & 819 (2007) ("prosecutor requested a *voir dire* of" five deliberating "jurors to determine whether material misrepresentations had been made" regarding their criminal histories "after the jury had acquitted the codefendant and . . . reported that they were deadlocked as to the defendant"); *Commonwealth v. Carnes*, 457 Mass. 812, 828-29 & 833 (2010) (*voir dire* conducted "as a result of . . . information the prosecutor had revealed," with Commonwealth previously (unsuccessfully) seeking "an order from a single justice of" the Supreme Judicial Court "requiring the judge to conduct a *voir dire* of the juror or discharge the juror for good cause"). Respectfully, the Commonwealth's decisions regarding whether to advocate for or oppose *voir dire* following reported juror misconduct should not depend upon a case-by-case strategic evaluation of what result the inquiry is likely to yield.

E. The Strictly Limited Inquiry Conducted by the Court Was Insufficient

The limited questioning conducted by the Court, though well-intentioned, “fell short of the ‘scrupulous exercise of judicial discretion’ required to support the mistrial declaration.” *Lara-Ramirez*, 519 F.3d at 87 (quoting *Jorn*, 400 U.S. at 485). Respectfully, this generic questioning, which did not even mention the concept of reasonable doubt, risked “trivial[izing] the awesome duty of the jury to determine whether the defendant’s guilt was proved” by that weighty standard. *Commonwealth v. Russell*, 470 Mass. 464, 479 (2015) (quoting *Commonwealth v. Ferreira*, 373 Mass. 116, 129 (1977)). The Court should have instead probed the foreperson’s specific complaint in order to make a reasoned decision as to how best to proceed. *See supra* pages 12-23 (citing cases).

The Ninth Circuit Court of Appeals has made clear that a court facing alleged juror misconduct may not rest solely on the juror’s own “assurance that he or she can render a fair and impartial verdict Rather, the proper response . . . is a prompt hearing in which the trial court determines the circumstances of what transpired.” *Christensen*, 828 F.3d at 812 (citations omitted). Indeed, “it makes no sense to let [a] juror’s statements that . . . ‘I can follow the law’ serve as an automatic free pass, if other evidence supports findings to the contrary. Such a limitation on the district court’s freedom to question jurors would be flatly inconsistent with its affirmative duty to forestall or prevent [jury nullification].” *Id.* at 812-13 (citation omitted); *see also Olavarria*, 71 Mass. App. Ct. at 621 (“[A] judge need not accept a juror’s view of whether she can perform her duties.”). Respectfully, the Court’s single question of whether each juror was “able” to comply with the law proved nothing. The non-compliant juror could very well have answered this question affirmatively even if he fully intended to violate the Court’s instructions (notwithstanding his theoretical ability to comply with them). The Court’s

assessment of the juror's "declaration was impaired" by the lack of inquiry regarding the concerns that gave rise to the foreperson's notes. *Vasquez*, 495 Mass. 284 n.9.

F. The Court Need Not Determine Whether the Non-Compliant Juror Would Ultimately Have Been Excused

Whether or not the inquiry requested by Ms. Clancy would have ultimately resulted in removal of the non-compliant juror is not dispositive of this Motion. Rather, for present purposes, what matters is that the inquiry was an available alternative which the Court repeatedly and erroneously declined. *See Nicoll*, 452 Mass. at 821-22 ("[T]he question is not whether [defendant] executed a valid waiver [of his right to a six-member jury], but whether there was a 'manifest necessity' for declaring a mistrial."); *Lara-Ramirez*, 519 F.3d at 88 (noting that court could not "assume . . . that individual voir dire of the jurors and a curative instruction" would have been ineffective); *State v. Baker*, 453 Md. 32, 59-60 (2017) (finding no manifest necessity where court was "unable to determine, based on th[e] record" whether exclusion of witness's testimony "was a reasonable alternative to a mistrial"). It is impossible to know with certainty what the result of the inquiry would have been. It is possible that the Court may have prevailed upon the juror to apply the law as instructed. *See Chambers*, 93 Mass. App. Ct. at 814-15. It is possible that a proper judicial inquiry would have disclosed personal reasons and/or an inability to follow the law rendering the juror's discharge mandated. Without inquiry, there can only be guesswork, which does not satisfy the high standard of manifest necessity. *See Dixon*, 913 F.2d at 1314 ("[B]ecause the district court refused to allow any inquiry of the jurors, there is no record on this issue and any assessment of the degree of prejudicial taint and the possibility of cure is necessarily speculative.").

G. A Juror's Inability or Unwillingness to Follow the Law May Constitute a Basis for Removal

A juror's inability, or unwillingness, to follow the law as instructed by the Court may constitute a personal problem separate from the issues of the case and the juror's relationship with his peers, and thus a permissible basis for removal, under binding caselaw. *See Torres*, 453 Mass. at 733; *Olavarria*, 71 Mass. App. Ct. at 621. Indeed, the Court acknowledged as much observing, before it asked jurors whether they were able to follow the law, [REDACTED]

[REDACTED] Sept. 3, 2026 Tr. 3. The Court went on to repeat, [REDACTED]
[REDACTED] *Id.* at 5 (citation omitted).

Federal caselaw repeatedly holds a juror's "inability or unwillingness to follow the law" to be a "prototypical instance in which a juror may be permissibly removed" *United States v. Litwin*, 972 F.3d 1155, 1169 (9th Cir. 2020); *see also, e.g., United States v. Kemp*, 500 F.3d 257, 303 (3d Cir. 2007) ("[C]ourts agree that a district court has the authority to dismiss a juror—even during deliberations—if that juror refuses to apply the law or to follow the court's instructions." (citation omitted)); *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) ("[A] juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict."); *United States v. Jones*, No. 25-5207, 2026 WL 690867, at *5 (6th Cir. Mar. 11, 2026) (unpublished) ("We have held that a district court may remove a juror who cannot or will not follow the law." (citing cases)).

Accordingly, there is a substantial possibility that the Court, after inquiry, would have discharged the non-compliant juror. Such possibility, therefore, constitutes a viable alternative to the mistrial, precluding a finding of manifest necessity. In the event the non-compliant juror

was replaced, further deliberation would not have been precluded under Mass. Gen. Laws ch. 234A, § 68C, notwithstanding the reported deadlock after a *Tuey-Rodriguez* charge. In *Olavarria*, the court conducted a juror inquiry, replaced the non-compliant juror, and ordered continued deliberations in materially identical circumstances. As the Appeals Court explained, “[t]he jury as reconstituted were a new jury,” such that the statutory prohibition on further deliberations without consent “no longer applied.” 71 Mass. App. Ct. at 622; *see also Commonwealth v. Jenkins*, 416 Mass. 736, 739-40 (1994) (finding no violation of statute where jury impliedly consented to further deliberations by returning verdict after judge’s request that they “retire and decide whether further deliberations on the next day would be fruitful”).

H. Ms. Clancy Has Requested Additional Information That May Provide Further Evidence That a Probing *Voir Dire* Would Have Shown the Non-Compliant Juror Was Not Willing and/or Able to Follow the Law

After trial, it was reported that the non-compliant juror had “a past charge for domestic violence” and “an active civil restraining order against him for allegedly assaulting his nephew.” *Boston Globe, Holdout juror in Lindsay Clancy trial faced domestic violence allegations, in process of being evicted, records show* (Sept. 15, 2026). While undersigned counsel does not currently have access to the relevant juror questionnaire, the defense filed a motion on September 18, 2026 for production of the questionnaire, among other materials concerning the juror, to counsel under impoundment. The defense expressly reserves the right to supplement this Motion with argument that any incompleteness in the questionnaire, and/or any other materials obtained as a result of the defense motion, enhances the likelihood that *voir dire* of the non-compliant juror would have yielded evidence of dischargeable misconduct, and in particular of the juror’s unwillingness to abide by his legal obligations to be truthful in his questionnaire, in his response to the single-question *voir dire*, and in his ultimate willingness to follow the law as

instructed, a pre-condition for his suitability to remain on the jury. *See Cousin*, 449 Mass. at 814 (“The prosecutor . . . maintained that it was reasonable to assume that falsification of the questionnaire was an indication that the juror could not follow the rule of law in the charge and could not be fair and impartial during deliberations.”).

I. The Court Failed to Adequately Consider Ms. Clancy’s Double Jeopardy Rights

In weighing the existence of manifest necessity to support a mistrial, “a trial judge ‘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 h[er] confrontation with society through the verdict of a tribunal [s]he might believe to be favorably disposed to h[er] fate.’” *Barton*, 385 Mass. at 519 (quoting *Jorn*, 400 U.S. at 486). Appellate deference is owed to the trial court’s determination “only if it is clear from the record that the judge has given careful consideration to the available alternatives and to the defendant’s interest in having the trial concluded in a single proceeding.” *Id.*

Here, the record reflects no express consideration at all of Ms. Clancy’s fundamental Constitutional protection against Double Jeopardy. The responsibility for this omission lies in significant part with the Commonwealth which, it bears repeating, carries the sole and exclusive burden of establishing manifest necessity. Respectfully, this lack of “deliberation and concern for” Ms. Clancy’s “protected interest in completing the trial,” in itself, suggests that re-trial should be prohibited. *Brady v. Samaha*, 667 F.2d 224, 229 (1st Cir. 1981); *see also Baker*, 453 Md. at 54 (finding that absence of phrase “manifest necessity” “anywhere in the trial transcript” was “an additional indication that the circuit court did not ‘accord[] careful consideration to [defendant’s] interest in having the trial concluded in a single proceeding.’” (quoting *Washington*, 434 U.S. at 516)).

Ms. Clancy has lived under the significant strain of this case, often accompanied by frenzied media attention, for three years. She proceeded to trial, at which her guilt or innocence was vigorously contested over the course of approximately seven weeks. At the end of that ordeal, 11 jurors believed that the Commonwealth had not satisfied its burden to prove her guilt beyond a reasonable doubt. The other juror, according to multiple notes by the foreperson (which, as set forth *supra*, were never meaningfully examined), refused to follow the Court's instructions regarding reasonable doubt, a concept of foundational importance in our criminal justice system. In these circumstances, counsel submits that Ms. Clancy should not be "forced to run the gantlet" again, "enhancing the possibility that even though innocent [s]he may be found guilty." *Green*, 355 U.S. at 188 & 190.

III. CONCLUSION

For the foregoing reasons, Ms. Clancy respectfully requests that this Honorable Court issue an Order dismissing Counts 1 through 3 currently pending against her.

Dated: September 21, 2026

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CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that the foregoing filing was served upon the Clerk of Court and the Commonwealth at the following verified email addresses:

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