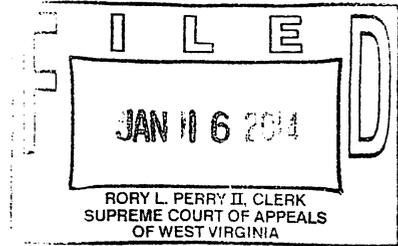

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1111



DOUGLAS LIBERT,

Petitioner,

v.

JOSEPH KUHL, Magistrate,

Respondent.

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1111

DOUGLAS LIBERT,

Petitioner,

v.

JOSEPH KUHL, Magistrate,

Respondent.

RESPONDENT'S BRIEF

I.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE PETITIONER'S PETITION FOR A WRIT OF PROHIBITION WHERE THE MAGISTRATE GRANTED A MISTRIAL IN THE UNDERLYING PROCEEDING WITHOUT A MANIFEST NECESSITY TO DO SO, AFTER JEOPARDY HAD ATTACHED AND THEN INTENDED TO RE-TRY THE PETITIONER ON THE CHARGE.

II.

STATEMENT OF THE CASE

The Petitioner was charged with misdemeanor battery under West Virginia Code § 61-2-9 for allegedly spitting onto the victim's face. App. 17. The Magistrate court issued an order *in limine* finding a videotape inadmissible because the Magistrate did not "believe [the videotape] accurately depicts the incident that happened. The videotape comes afterward and does not show any evidence of what occurred at that time only what happened afterward." App. 21. During opening statements at trial, the Petitioner's counsel told the jury "Mr. Libert has a video camera in his hand to record the incident with Tyler McCune, the neighbor next door, and he video tapes some of this. That video

you will not be seeing due to the court's ruling." App. 54. The State objected but apparently did not seek a mistrial. App. 41. The Magistrate issued the following instruction to the jury, "At this point, I want the jury to disregard the mention of the video tape." App. 54.

Upon return from lunch it appears the State moved for a mistrial, but there is no record of this proceeding because, according to the Petitioner, the Magistrate overlooked turning on the taping system. The Petitioner in this Court concedes the State sought a mistrial, that he objected, and that the Magistrate heard both his objections and the State's motion and arguments before the Magistrate ruled. Pet'r's Br. at 3.

The Petitioner then sought a Writ of Prohibition in the Circuit Court of Wood County to prohibit a second trial, App. 3-11, which refused to issue the Writ. App. 1, 2.¹

III.

SUMMARY OF ARGUMENT

While the Magistrate did not initially grant a mistrial and the state did not initially ask for one, when the Petitioner's counsel made his improper opening statement, the Magistrate's ruling was interlocutory. In West Virginia, as in the Federal system, a trial judge has the authority to revisit any interlocutory ruling. "Interlocutory orders . . . are left to the plenary power of the court that rendered

¹While originally brought as a prohibition in circuit court, the writ of prohibition was not a procedurally proper avenue of review. Prohibition does not do the office of an appeal, Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). Rather, the procedurally proper route was to file an interlocutory appeal under the collateral order doctrine. *E.g.*, *Will v. Hallock*, 546 U.S. 345, 350 (2006) ("a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy"). While this Court has in the past considered the matter under prohibition, these cases cannot be considered binding. "This Court, like many others including the United States Supreme Court, adheres to the well-settled premise that 'the exercise of jurisdiction in a case is not precedent for the existence of jurisdiction.'" *Kanawha County Pub. Lib. Bd. v. Board of Ed.*, 745 S.E.2d 424, 434 (W. Va. 2013) (citations omitted).

them to afford such relief from them as justice requires.” *Caldwell v. Caldwell*, 177 W. Va. 61, 63, 350 S.E.2d 688, 690 (1986) (citations omitted). Since “[j]ustice, though due to the accused, is due to the accuser also[.]” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)), the Magistrate had the authority to revisit his order dealing with the improper opening statement.

Further, the Magistrate did not abuse its broad discretion in finding manifest necessity for a mistrial, a finding which this Court owes “special respect.” *Arizona v. Washington*, 434 U.S. 497, 511 (1978). Counsel here injected into his opening inadmissible evidence and did so in a manner that that prejudiced the jury against the State and the Magistrate by pointing out that the Magistrate excluded the evidence. As the United States has explained, “[a]n improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted.” *Arizona v. Washington*, 434 U.S. 497, 512-13 (1978) (footnote omitted).

IV.

STATEMENT REGARDING ORAL ARGUMENT

There is no need for oral argument. This case is suitable for memorandum decision.

V.

ARGUMENT

- A. The Magistrate enjoyed the authority to readdress the opening statement issue since it was an interlocutory order and courts have the inherent authority and the common law power to reconsider interlocutory orders.**

The Petitioner claims the State’s motion for a mistrial was untimely. This is not entirely correct. Because a trial court can revisit any interlocutory ruling, including one relating to misconduct in opening statements, the State’s request was not untimely.

Because “[w]isdom too often never comes . . . one ought not to reject it merely because it comes late[.]” *Cherrington v. Erie Ins. Prop. and Cas. Co.*, 745 S.E.2d 508, 520 (W. Va. 2013) (quoting *520 Henslee v. Union Planters Nat’l Bank & Trust*, 335 U.S. 595, 600 (1949) (per curiam) (Frankfurter, J., dissenting)), “[e]very order short of a final decree is subject to reopening at the discretion of the [trial] judge.” *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 (1983). As this Court has held, “[i]n an ongoing action, in which no final order has been entered, a trial judge has the authority to reconsider his or her previous rulings” Syl. Pt. 1, in part, *Taylor v. Elkins Home Show*, 210 W. Va. 612, 558 S.E.2d 611 (2001). See also *Coleman v. Sopher*, 201 W. Va. 588, 605, 499 S.E.2d 592, 609 (1997) (“[a trial] court has plenary power to reconsider, revise, alter, or amend an interlocutory order[.]”).

This power, which exists in civil cases as well as criminal cases, *Myers v. Frazier*, 173 W. Va. 658, 675, 319 S.E.2d 782, 800 (1984) (recognizing “the authority of a trial court to reconsider and rescind previously announced oral or interlocutory orders”) (citing, *inter alia*, *United States v. LoRusso*, 695 F.2d 45, 52 (2d Cir.1982) (citation omitted) (“whether the case subjudice be civil or criminal[.] so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so.”)), extends to allowing a judge to revisit mistrial matters.

In a case practically indistinguishable from that at bar, the Maryland Supreme Court found a trial court enjoyed the discretion to grant a mistrial due to an impermissible defense opening statement when the State did not initially seek a mistrial and made its motion for a mistrial two days into the trial. *Simmons v. State*, ___ A.3d ___, ___, 2013 WL 6637416, 11 (Md. 2013). Recognizing the same rule followed in West Virginia, that “[g]enerally trial judges have the

discretion to revisit and reverse or modify their own previously entered interlocutory orders prior to the entry of final judgment[,]" *Id.* at ___ n.3, 2013 WL 6637416, at *11 n.3, the Court held it within "the trial court's discretion to revisit the propriety and effectiveness of his earlier curative instruction. Just as the trial judge has the discretion to make a ruling on issuing a curative instruction, he or she has the discretion to revisit that ruling and reverse or modify it, before the termination of the proceedings, upon a determination that the prejudice to the jury outweighs the curative effect of the instruction."

In fact, not only does a trial court have "the inherent authority to reconsider its interlocutory orders," it has the duty "not . . . to perpetuate error when it realizes it has mistakenly ruled." *Dellinger v. Pediatrix Med. Grp.*, ___ W. Va. ___, ___ n.8, ___ S.E.2d ___, ___ n.8 (2013) (per curiam) (citations omitted) (citation before publication 2013 WL 5814173). Indeed, given that "[c]itizens who are the victims of crime are entitled to have the State, through its prosecuting attorneys, vindicate their constitutional level claims to protection from criminal invaders[,]" *Moore v. Starcher*, 167 W. Va. 848, 853, 280 S.E.2d 693, 696 (1981), it is of particular consequence that "[t]his Court has recognized the desirability of circuit courts revisiting issues of substantial importance when fundamental rights are at stake: 'We welcome the efforts of trial courts to correct errors they perceive before judgment is entered and while the adverse affects can be mitigated or abrogated.'" *State ex rel. Crafton v. Burnside*, 207 W. Va. 74, 77-78 n.3, 528 S.E.2d 768, 771-72 n.3 (2000) (quoting *State v. Jarvis*, 199 W. Va. 38, 45, 483 S.E.2d 38, 45 (1996)). Thus, merely because the taking of evidence had commenced, the Magistrate was not disabled from revisiting whether his original ruling was sufficient to protect the interest of the State. *See Arizona v. Washington*, 434 U.S. 497, 500 (1978). Indeed, the Magistrate did not even need the State to make

a mistrial motion to have the Magistrate address the issue, for the Magistrate had the authority to *sua sponte* bring the matter up, *United States v. Scott*, 437 U.S. 82, 92 (1978), subject, of course, to manifest necessity review. *United States v. Sanford*, 429 U.S. 14, 15 (1976).

The Magistrate court was well within its discretion to readdress the opening statement issue and there is no bar to this Court's review.

B. The Magistrate did not abuse his discretion in granting a mistrial due to the Petitioner's counsel's conduct in intentionally referring to evidence that counsel knew the Magistrate had excluded from trial which statement prejudiced the State.

"Citizens who are the victims of crime are entitled to have the State, through its prosecuting attorneys, vindicate their constitutional level claims to protection from criminal invaders." *Moore v. Starcher*, 167 W. Va. 848, 853, 280 S.E.2d 693, 696 (1981). It is, therefore, settled that while a defendant has a right a fair trial, "the State has an equal right to a fair trial[.]" *State v. Kanney*, 169 W. Va. 764, 766, 289 S.E.2d 485, 487 (1982) (citation omitted) and that "[j]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

Therefore, the "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). This Court has held, while "[m]istrial discharge of a jury at the behest of the prosecution and over the objection of a defendant is generally not favored[.]" Syl. Pt. 1, *Porter v. Ferguson*, 174 W. Va. 253, 324 S.E.2d 397 (1984), "[i]mproper conduct of defense counsel which prejudices the State's case may give rise to manifest necessity to order a mistrial over the defendant's objection." Syl. Pt. 4, *id.*

While the standard for granting a state requested mistrial is manifest necessity, “[i]t is clear that manifest necessity is not synonymous with absolute necessity, but that a ‘high degree’ of necessity must exist before a mistrial may properly be declared.” *United States v. Cameron*, 953 F.2d 240, 244 (6th Cir. 1992) (quoting *Washington*, 434 U.S. at 506). “It is also clear that ‘[the United States Supreme court] has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served[.]’” *Gori v. United States*, 367 U.S. 364, 368 (1961) (citation omitted). The Supreme Court has also, therefore, “consistently declined to scrutinize with sharp surveillance the exercise of that discretion.” *Id.* Thus, “[t]he determination of whether ‘manifest necessity’ that will justify ordering a mistrial over a defendant’s objection exists is a matter within the discretion of the trial court, to be exercised according to the particular circumstances of each case[.]” Syl. Pt. 3, *Porter v. Ferguson*, 174 W. Va. 253, 324 S.E.2d 397 (1984), and where, as here, the mistrial deals with defense counsel’s impermissible opening, the appellate court owes the trial court decision a “special respect[.]” *Arizona v. Washington*, 434 U.S. 497, 511 (1978), that is, “the highest degree of respect to the trial judge’s evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.” *Id.* at 512.

Where a prosecutor claims that the defense has by its actions prejudiced the jury, he is entitled to obtain a mistrial, without double jeopardy barring a retrial, if it can be shown: (1) that the conduct complained of was improper and prejudicial to the prosecution, and (2) that the record demonstrates the trial court did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial.

Syl. Pt. 5, *Keller v. Ferguson*, 177 W. Va. 616, 355 S.E.2d 405 (1987).

The Magistrate did not abuse his broad discretion in this case and the special respect this Court owes to the Magistrate’s decision counsel that the Magistrate be affirmed.

1. **The Magistrate was within his broad discretion in granting a mistrial where the conduct complained of was improper and prejudicial to the prosecution.**

a. **Defense counsel's referencing the existence of a videotape and telling the jury they could not view it because of the Judge's ruling was improper.**

"Counsel are required to confine their arguments to the evidence and must not touch upon matters withdrawn from the consideration of the jury." *Fisher v. Pace*, 336 U.S. 155, 161-62 (1949). In the instant case, the Petitioner's counsel referenced evidence he knew was inadmissible, as opposed to evidence about which he had good faith and reasonable grounds to believe was admissible. Compare, e.g., *People v. Wrest*, 839 P.2d 1020, 1029 (Cal. 1992) (citations omitted) ("remarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor 'was "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.""). The transcript below and the Petitioner's brief in this Court are both strongly indicative that reference to the tape in opening statement was not accidental. First, the Petitioner not only mentioned the tape in his opening but told the jury that they could not see it because of the Magistrate's ruling. Second, the Petitioner's heated dissatisfaction with the Magistrate's ruling comes through in his appellate brief, where he: (1) describes the issue as "[t]he most egregious factor in this scenario," (2) asserts it was the State's fault for his opening, (3) characterizes the State's Motion in Limine as "frivolous," and (3) concludes the order in limine was erroneous. Pet'r's Br. at 9.²

²The admissibility of the tape, of course, is beside the point and not properly at issue in this collateral appeal. Cf. *Abney v. United States*, 431 U.S. 651, 659-60 (1977) (the only issue in a collateral appeal of a double jeopardy claim is the authority to retry the defendant). Thus, what is at issue is the Petitioner's counsel's reference to inadmissible evidence in his opening statement and whether such conduct constituted manifest necessity for a mistrial.

The Magistrate had the authority to conclude counsel's referencing the videotape—a videotape the Petitioner's counsel knew was inadmissible because of the in limine ruling—³ was violative of ethical, evidentiary, and professional norms.⁴

For example, a lawyer cannot ignore a court order, W. Va. R. Prof. Cond. 3.4(c), nor may a lawyer allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. W. Va. R. Prof. Cond. 3.4(e). Reverencing evidence a court has ordered excluded violates both of these rules for an order in limine is binding of everyone involved in the trial, except the trial judge. *Tennant v. Marion County Health Care Fund.*, 194 W. Va. 97, 113, 459 S.E.2d 374, 390 (1995). As long as a court has the jurisdiction to rule (and a trial court has the jurisdiction to make evidentiary rulings, even if assertedly wrong, *Fisher*, 336 U.S. at 162), no participant may unilaterally ignore the order with impunity. The remedy is to appeal any adverse verdict, not to subvert the trial court's order in limine. "An attorney may not . . . resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Gentile v. State Bar*, 501 U.S. 1030, 1071 (1991).

Additionally, West Virginia Rule of Evidence 103(c) provides that jury proceedings should be conducted in a way, if possible, to keep inadmissible evidence from being "suggested to the jury by any means, such as making statements . . . in the hearing of the jury." An opening statement referencing inadmissible evidence is obviously made "in the hearing of the jury."

³At least until the Magistrate either changed his mind or this Court, upon appeal from any conviction, found it to be admissible.

⁴The State makes it clear that it is not accusing the Petitioner's counsel of misconduct. It is simply identifying that in exercising his authority, the Magistrate had the authority to find the reference to the inadmissible evidence unprofessional. Such a recognition falls far short of that required to trigger Rule Professional Conduct 8.3(a) in that it otherwise does not reflect adversely on counsel's "honesty, trustworthiness or fitness as a lawyer in other respects."

Likewise, Standard 4-7.4 of the American Bar Association's *Standards for Criminal Justice, The Defense Function* (3d ed. 1993), prohibits defense counsel from alluding "to any evidence unless there is a good-faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence." In other words, "Defense counsel is no more entitled than the prosecutor to assert as fact that which has not been introduced in evidence. The rules of evidence cannot be subverted by putting to the jury, in argument or opening statements, matters not in the record." ABA *Stds. for Criminal Justice, The Def. Function*, Std. 4-7.7 cmt. (3d ed.1993). In short, "[t]o make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct." *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Berger, C.J., concurring).

Counsel's opening statement referred to the videotape, which counsel knew had been ruled inadmissible and, worse, told the jury that they were being denied the ability to view because of the judge. This was an improper opening statement.

- b. Defense counsel's improper referencing of the inadmissible videotape and telling the jury they could not view it because of the Judge's ruling unquestionably tended to frustrate the public interest in having a just judgment reached by an impartial tribunal and created a risk that the entire panel may have been tainted.**

The opening statement was prejudicial to the State's case. "[I]t is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." *Dinitz*, 424 U.S. at 612 (Berger, C.J., concurring). As the United States Supreme Court has identified, "[a]n improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements

create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted.” *Arizona v. Washington*, 434 U.S. 497, 512-13 (1978) (footnote omitted).

The Petitioner, though, claims he did not suggest who the videotape favored or who was the proponent of the evidence so prejudice is speculative. Pet’r’s Br. at 6. But this Court is not addressing this issue *de novo*. It was the Magistrate who saw “and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more ‘conversant with the factors relevant to the determination’ than any reviewing court can possibly be.” *Washington*, 434 U.S. at 514 (citation omitted). Thus, this Court should defer to the Magistrate’s rational decision that the Petitioner’s claims are not sufficient to avoid a mistrial.

Indeed, here, in an opening statement laying out the evidence of his side of the case, the Petitioner referenced a videotape he told the jurors they could not see “due to the court’s ruling.” It strains credulity to think a juror would consider this a gratuitous statement offered for no purpose and carrying no meaning on the Petitioner’s behalf, especially since the Petitioner’s counsel told the jury that it was the Petitioner who was doing the taping. Even lay people, unversed in the subtleties, intricacies, and nuances of the trial process probably realize that parties at trial want to win. The jurors most likely recognized the opening statement was meant to advance the Petitioner’s case.

But even if a defense counsel wishes to advance his or her client’s case, counsel cannot do so by making an opening statement that poisons the jurors’ mindd or by impugning (directly or inferentially) the integrity, impartiality, or competency of the opposing lawyer or judge. *See Washington*, 434 U.S. at 499 (defense counsel’s opening statement was improper (even though true)

when it told the jury that the case was on retrial because of the prosecution's misconduct in hiding evidence from the defendant resulted in the first conviction being reversed).

Thus, the opening statement in the instant case could have left the jury with the impression that not all of the evidence in the case was before them because of "legal shenanigans[,]" *Delgado v. Rice*, 67 F. Supp.2d 1148, 1163 (C.D. Cal.1999) ("The jury's question itself hints at the jurors' perception that information was kept from them because of legal shenanigans"), with the corresponding problem that the jury could therefore turn against the State since "jurors are quick to resent what they conceive to be an attempt to deceive them." J. Alexander Tanford, *The Trial Process: Law, Practice, and Ethics* 148 (2002). See also Michael D. Crow, *Courtroom Strategies: Leading Lawyers on Preparing for a Case, Arguing Before a Jury, and Questioning Witnesses*, 2008 WL 5940385 ("Jurors do not like to feel attorneys are forcing them to think a certain way. Jurors want to reach their own conclusions, not feel manipulated."). Thus, mistrials have been upheld where defendants have claimed the State is hiding facts from the jury. See *State ex rel. Wark v. Freerksen*, 733 P.2d 100, 101 (Or. Ct. App. 1987) (manifest necessity for State's mistrial motion when defense lawyer said in front of jury during cross-examination of state's witness, "[T]he prosecution is hiding all the facts from the jury * * * and I'm trying to bring out the truth and nothing but the truth.").

Moreover, the jury could easily have been left with the even more damaging view that *the Magistrate* was trying to hide evidence from the jury. In such circumstances, curative instructions would not have helped, they would compound the problem by making it appear the Magistrate was either aiding the State or protecting himself at the Petitioner's expense. No matter what the Magistrate did, the jury was corrupted by the potential the trial was being managed by an

untrustworthy judge. Where a jury doubts the integrity or impartiality of a judge, prejudice is surely likely to follow because the trial process is irrevocably corrupted. *Cf. State v. Leep*, 212 W. Va. 57, 70-71, 569 S.E.2d 133, 146-47 (2002) (“Because of their influential position, trial court judges must be especially careful not to reveal even the slightest indication of their assessment of the evidence.”).

The State was prejudiced by the opening statement.

2. The Magistrate did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice.

In Syllabus Point 5 of *Keller v. Ferguson*, 177 W. Va. 616, 355 S.E.2d 405 (1987), this Court held, in part, “[w]here a prosecutor claims that the defense has by its actions prejudiced the jury, he is entitled to obtain a mistrial, without double jeopardy barring a retrial, if it can be shown . . . the record demonstrates the trial court did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial.” To the extent that *Keller* considered these factors as constitutionally required predicates to manifest necessity, the United States Supreme Court explained in *Renico v. Lett*, 559 U.S. 766, 779 (2010), that *Arizona v. Washington* did not establish such factors as necessary to a finding of manifest necessity. “[N]o particular factor or set of factors—even those it itself identified in prior [Supreme Court] decisions—is constitutionally significant.” *Najawicz v. People*, 58 V.I. 315 (2013). Thus, this Court should eschew a “rigid” or “mechanical” application of these factors and consider them only in the context of a more general broadly deferential abuse of discretion review. *Renico*, 559 U.S. at 775.

The Petitioner’s brief acknowledges the Magistrate allowed both sides to make argument to the Court before ruling. Pet’r’s Br. at 3. Because a trial court need not make “an explicit finding of

‘manifest necessity’” or state that it “had considered alternative solutions and concluded that none would be adequate[.]” *Washington*, 534 U.S. at 501, in ruling, and because the Magistrate “gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial . . . the [Magistrate] acted responsibly and deliberately, and accorded careful consideration to respondent’s interest in having the trial concluded in a single proceeding.” *Id.* at 515-16.

Admittedly, other judges might have concluded jury instructions would have sufficed to remedy any prejudice (or disciplining counsel or having counsel removed from the case would equally obviate the problem), but these are non-sequiturs in support of the Petitioner. “Those actions . . . will not necessarily remove the risk of bias that may be created by improper argument.” *Id.* at 513. “[S]imply because a different judge might have proceeded to verdict. . . does not mean the requisite degree of necessity was lacking.” *Moussa Gouleed v. Wengler*, 589 F.3d 976, 984 (8th Cir. 2009). *See also United States v. Bauman*, 887 F.2d 546, 552 (5th Cir. 1989) (“We recognize that other judges may have dispensed differently with the problems presented at trial in the instant case. Nevertheless, we conclude that the trial judge did not abuse his discretion in declaring a mistrial over the objection of two defendants here.”). Thus “[u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases.” *Porter*, 174 W. Va. at 257, 324 S.E.2d at 401 (quoting *Washington*, 434 U.S. at 514).

Here, the Magistrate was well within his great discretion to ultimately consider instructions insufficient to remedy the Petitioner’s counsel’s improper opening statement. The jury could have easily construed the instructions as evidencing partiality on behalf of the court, either on behalf of the State or to the court’s own benefit. *See supra*.

For this very same reason, the State could not have “cured any improper remark by Counsel for the Defendant.” Pet’r’s Br. at 9. The problem was not the evidence *per se*, but the jury’s reaction

and perception upon learning that the Magistrate had suppressed evidence, which defense counsel (“with the standing and prestige inherent in being an officer of the court,” *Dinitz*, 424 U.S. at 612 (Berger, C.J., concurring)), found necessary to bring to the jury’s attention in his opening statement. Once the jury was exposed to the fact that the Magistrate had precluded them from hearing the evidence, it was irrelevant as to what the evidence was. Knowing a ruling was made outside the jury’s presence, and being made so aware by defense counsel in opening statement, should have led the jury to feeling it was being manipulated by the State or the Magistrate and was being “scammed or deceived” by them. Such feelings could not help but rebound against the State and in favor of the Petitioner. Ann M. Roan, *Building the Persuasive Case for Innocence*, 35 *Champion* 18, 19 (2011) (“Jurors value fairness. Jurors value integrity. They do not want to feel scammed or deceived.”).

Moreover, the Petitioner also argues that the State “made no request to poll or question the jury to establish any prejudice.” Pet’r’s Br. at 8. Questioning the jury not a required or viable option.

The Petitioner cites *State v. Williams*, 172 W. Va. 295, 306, 305 S.E.2d 251, 262 (1983), to support the proposition that the jurors should have been polled. Pet’r’s Br. at 6-8. However, *Williams* dealt with polling the jury to determine if jurors had been exposed to a newspaper article appearing in the press during the trial. Here, there is no doubt that the jury was exposed to the Petitioner’s counsel’s opening statement.

The Petitioner does not cite to *Porter v. Ferguson*, 174 W. Va. 253, 258, 324 S.E.2d 397, 402 (1984), although even if he did it would not help him. *Porter* provides that court may poll the jurors to determine their reaction to the introduction of inadmissible evidence. That process, though, is discretionary and the Petitioner makes no argument that the Magistrate abused his discretion in not polling the jury.

Porter also does not aid the Petitioner for another reason. *Porter* cited no authority for finding that a jury poll was an option in a mistrial case. And, indeed, *Porter*'s conclusion on this point was *dicta*, unnecessary to the Court's holding and, thus, not binding. And arguably, a poll would have done more harm than good, emphasizing the State and the Magistrate had excluded evidence reinforcing the Magistrate had acted without the jury's knowledge.

Finally, *Washington* makes clear that "the extent of the possible bias cannot be measured[.]" 434 U.S. at 511. The issue is not *actual* bias, it is the *possibility* of bias. "When a mistrial is premised on the prejudicial impact of improper evidence or argument, the trial judge's evaluation of the *possibility* of juror bias is entitled to "great deference.'" *Ross v. Petro*, 515 F.3d 653, 661 (6th Cir. 2008) (emphasis in original) (quoting *Washington*, 534 U.S. at 511). And in making that determination, the United States Supreme Court in *Washington* did not require or even suggest a jury poll would be beneficial much less that it is a constitutional obligation.

There is a further reason that the cases upon which the Petitioner relies give him no solace. None of the cases upon which the Petitioner relies, *State v. Sherrod*, No. 11-1121, 2012 WL 5857302, at *2 (Nov. 16, 2012) (Memorandum Decision); *State v. Creamer*, No. 11-0848, 2012 WL 3079158, at *3 (W. Va. 2012) (Memorandum Decision); *State v. Farmer*, 185 W. Va. 232, 237, 406 S.E.2d 458, 463 (1991) (per curiam); *State v. Catlett*, 207 W. Va. 747, 752-53, 536 S.E.2d 728, 733 -34 (2000) (per curiam); *State ex rel. Dandy v. Thompson*, 148 W. Va. 263, 134 S.E.2d 730 (1964), dealt with counsel's conduct occurring in opening statements.

Because "opening statements can 'have major impacts on juries[.]'" *Simmons v. State*, 57 A.3d 541, 51 (Md. Ct. App. 2012) (citations omitted), setting the stage for everything that follows, "an improper opening statement is often sufficient ground to declare a mistrial." *United States v.*

Millan, 817 F. Supp. 1086, 1088 (S.D.N.Y.1993). While counsel's statement was admittedly isolated, Pet'r's Br. at 5, "the prejudicial comment was 'not unexpectedly presented by a witness,' but rather, it was an assertion by appellant's attorney in the 'powerful setting' of opening statement, where defense counsel had the 'opportunity to introduce into the minds of the jury' his theory of the case." *Simmons v. State*, 57 A.3d 541, 550- 51 (Md. Ct. App. 2012) (citations omitted), *aff'd*, ___ A.3d ___, ___, 2013 WL 6637416, 11 (Md. 2013).

The record supports the Magistrate's ruling.

VI.

CONCLUSION

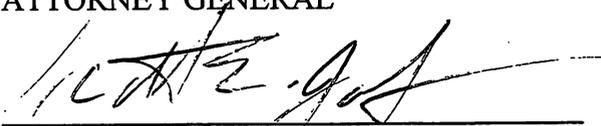
For the above reasons, the Magistrate should be affirmed.

Respectfully submitted,

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By counsel,

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 16th day of January, 2014, addressed as follows:

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