No. _____

In the
SUPREME COURT
Of The State of Illinois

	) Petition for Appeal as a Matter of Right or
	) in the Alternative for Leave to Appeal
JOHN DOE	)
Petitioner-Appellant-Defendant	) On Appeal from Appellate Court, Third
	) District, Case No. 1-11-1111
	) There Heard on Appeal from Court
v.	) of the 12th Judicial Circuit
	) of Will County, Illinois
	) No. 11-CM-1111
STATE OF ILLINOIS	) Honorable Victoria M. Kennison,
Respondent-Appellee-Plaintiff	) Judge Presiding
	) Order of Court Nov. 18, 2013
	) Order of Appellate Court July 1, 2015

PETITION FOR APPEAL AS A MATTER OF RIGHT OR IN THE ALTERNATIVE FOR LEAVE TO APPEAL

John Doe
XXXX Street Road #100
Joliet, IL 60411
(111) 111-1111

Petitioner-Appellant-Defendant, Pro Se

ORAL ARGUMENT REQUESTED

PRAYER FOR APPEAL AS A RIGHT OR IN THE ALTERNATIVE FOR LEAVE TO APPEAL

The defendant, John Doe ("John"), was charged by criminal complaint with two misdemeanor counts of domestic battery in violation of 720 ILCS 5/12-3.2(a)(2) (West 2012). On July 18, 2013, in the Circuit Court of Will County ("Court"), a mistrial was declared at John's jury trial (App[1] B) and the Trial Court on Nov. 18, 2013 denied (App B) John's subsequent motion to dismiss based on double jeopardy principles.

Petitioner prays this Hon. Court allows this Appeal as a Right on issues of first impression and Petition for Leave to Appeal on other issues to reverse the Illinois Appellate Court's ("IAC's") order (App A) of DENIAL of John's motion to dismiss the case on double jeopardy principles (App C), finding error in order for mistrial (App B)**.**

Jurisdiction is pursuant to Illinois Supreme Court ("SC") Rules 315 and 317, and also pursuant to Article VI, Section 6, of the Illinois Constitution, and SC Rules 604(f). John appeals some issues as a right and for other issues petitions the SC for Leave to Appeal the order of the IAC of July 1, 2015 affirming declaration of a mistrial and denying motion to dismiss for double jeopardy (App A, B). This motion is timely filed within 35 days of the final order of the IAC.

STATEMENT OF COURT JUDGMENT DATE AND APPELLATE COURT OPINION

Trial orders declared a mistrial on July 18, 2013 and denied a motion to dismiss for double jeopardy on Nov. 18, 2013. (App B) John timely filed an appeal through the State Appellate Defender's office of these orders. The IAC affirmed the Trial Court's

[1] App = Appendix for Supreme Court Petition for Appeal as a Right or in the Alternative for Leave to Appeal

orders in opinion of July 1, 2015 (App A). The IAC affirmed the Trial Court's ruling that the mistrial was needed due to manifest necessity. No rehearing was requested.

POINTS RELIED UPON FOR REVERSAL

A. Whether in the IAC, there was ineffective assistance of appellate counsel regarding State Appellate Defender's failure to write an adequate "Statement of Facts" in the Appellant's Brief, which impeded the defense when arguing that the case was weak and therefore there was no manifest necessity for a mistrial, violating 6th Amendment. [Issue of First Impression]

B. Whether the IAC erred when they failed to conclude that the State's case was so weak that there was no manifest necessity for a mistrial because the Trial Judge ignored evidence in the transcript which impeached the testimony of the State's sole witness. [Issue of First Impression]

C. Whether the IAC erred when they failed to conclude that the alleged insufficient foundation in the testimony of defense witness, Carol Sanders could be cured by recalling the witness in the defense case in chief, concerning character of alleged victim, to provide more detailed foundation for evidence of reputation in the community and more specific details in instances where she witnessed alleged victim's drunkenness and violence and when they affirmed Court's conclusion that the foundation for reputation evidence was insufficient, when it was sufficient.

D. Whether the IAC erred in affirming, when the Trial Judge erred in concluding that defense attorney failed to follow his instructions about questioning a witness causing prejudicial non-curable jury bias, when it was the Court's confusion that dictated and caused the evidence in question to be elicited, as well as because the evidence, though sloppy due to Court instructions, was adequate. [Issue of First Impression]

E. Whether the IAC erred in affirming, when the Trial Judge erred when it denied the defendant's motion to dismiss the criminal complaint on double jeopardy grounds, in violation of the 5th Amendment.

STATEMENT OF FACTS

The complaint alleged that on Dec. 2, 2012, John made physical contact of an insulting or provoking nature with Sot, his brother-in-law, by both pushing him about his body and striking him about his head (App H). Jury Trial began on July 15, 2013.

The 1st witness, Sot the alleged victim, a long-haul trucker from Georgia, testified that he visited the house of his in-laws, Ruby and Joe Doe ("Ruby" and "Joe"), on Dec. 2,

2012, where John also lived, with his wife Carol Sot ("Carol") John's sister, that he is a two-pack a day smoker, (R[2]271), and that he was watching a Bears football game with his father-in-law Joe (R271), while consuming two alcoholic drinks just prior to the alleged battery (R272).

Due to his heavy smoking habit, Sot testified that he had to go outside to smoke frequently, as his mother-in-law, Ruby, uses oxygen, that therefore, he is not allowed to smoke in the house or near the front door (R273), and that he always follows these rules (R273). He stated that the house where the Does live has a side door and when you enter the side door you go past several rooms, then come into the kitchen, off of which is the living room (R274). Sot testified that he does not get along with John, but that they were pretty good friends until one and a half years ago, when the elderly Doe parents became ill. (R275). Joe has dementia and Ruby has respiratory disease. (R276)

Sot testified that at the end of the game, at around 4:00 pm, he called a friend on his cell phone (R278) and went outside the side door where he sat on the steps to make the call (R279). He testified that he did not even know John was home, but that John pushed the screened side door against his back and said: "you can't smoke out here," at which time he stated he was not smoking, holding up his hands to show him (R279).

Sot then testified as to what he did next was walk into the kitchen on his way to the living room (R280) when John said: "Oh, look, he's harassing me," and "[y]ou are going to live by my rules in this house," to which Sot said: "John, I am walking across the kitchen." He said he was headed to the living room (R281) He testified that he told John "Well, if your dad says that's the rule . . . So let's go ask him." (R282)

[2] R = Record on Appeal

Sot testified that, while passing through the kitchen, John hit him with a closed fist "on the side of my face, my jaw, my head", then "basically I hit the floor and then . . . John started kicking at me", at which time Joe yelled, "[k]nock it off and get out of the house". (R283-284) Sot testified that he never hit or attempted to hit John during the altercation (R293). Sot testified that then John had gone "somewhere down the road" to call the police, wait for them and talk to them (R292). Sot testified that the police came (R284) and interviewed him. (R285) He testified that they both had called the police (R285). Sot testified that after the incident he felt "woozy, out of sorts" (R290), that he did not need an ambulance, but later went to the hospital and got stitches (R291).

On cross-examination, Sot testified that he denied telling the police that he had only one drink. (R294). He admitted that he told the hospital staff that he had two to three drinks." Sot testified that he was hit in the "cheek". (R298) The Defense Attorney asked Sot if he considered himself a drunk and he said "YES" (R299). Sot testified that he told the hospital staff that he injured himself when his head hit a counter top (R299-300). On re-cross examination by Defense Attorney, Sot testified that he did not think he had eight or nine drinks, but he did not know how much he had to drink. (R304)

Deputy Sheriff J. Mutt ("D/S Mutt) testified that at around 4 pm on Dec. 2, 2012, he was informed to meet John, who called 911. He testified that he met him near the house, that John seemed "stressed" and was limping, but had no obvious bruises, and that John said that his attorney had advised him to call the police to seek an order of protection and to make a report, that he had been living with his parents for about two years, that Carol and Sot were from out of state and frequently dropped by unannounced, that there was a verbal altercation in the kitchen, that the two made contact with some

wrestling, that he had some injuries, but he did not need medical care, and that he had been "pushed,"(R312-313) while he was making dinner and acted in self-defense (R319).

D/S Mutt testified then that he went and talked with Sot who had visible blood on his face (R314) and refused an ambulance, that Sot said he had been outside on the steps by the side door speaking on a cell phone, that while sitting there John opened the door and struck him with the door, advising him not to smoke there, that he was not smoking, but was just using a cell phone and was drinking. (R315)

D/S Mutt testified that John did not claim any injuries (R318), but that Sot' injury was a two-inch laceration on the temple. (R319). He testified that no one else but Sot and Joe were present at the house (R316-317) and that he determined that domestic battery had occurred with Sot as a victim, who agreed to sign a criminal complaint. Therefore, he arrested John. He then advised Sot to obtain an order of protection and D/S testified that that it did not make a difference to him whether or not Sot was intoxicated. (R318)

On cross examination D/S Mutt admitted that he was not there during the incident (R320) and that he could not point to where in the police report he stated that John kicked Sot because his police report made no mention of John kicking Sot, although the police report was supposed to be a complete and accurate accounting of the incident (R320).

D/S Jeff, the next witness for the State testified that he was aware that John had left the scene and was waiting for them away from the scene, was very cooperative, and was very compliant when he was told he was under arrest. (R333)

John called Lisa Green, a physician's assistant ("P/A") at St. Joe's Hospital in Joliet as a witness (R334-335), who treated Sot when he arrived at St. Joe's Hospital on Dec. 2, 2012 (R335-36). She testified that she treated Sot laceration to the scalp, pain in his hands, and pain in his jaw (R336-337). She stated that the laceration was L-shaped

and two centimeters long. P/A Green testified that Sot said he received the injury when he was hit with a cell phone, or possibly his head hit the counter (R338-339), that there was no visible injury to the jaw and that there was a dislocation to the last joint of Sot' fifth finger. (R339) P/A Green stated that Sot had told her that he had three alcoholic drinks prior to coming to the hospital but did not know (R339-340). She confirmed that all this information was in her medical report (R340).

The next witness was Ruby, who testified that John, who is her son, lived with her and her husband (R344) and Sot and Carol would sometimes visit from out of town and stay at her house (R344). Ruby was not present to witness the altercation between her son and Sot on Dec. 2, 2012 (R346). Ruby testified that Sot had been told at different times when he tried to smoke in the house that he was not welcome to stay there (R345), as she was afflicted with several poor-breathing conditions (R345). Ruby testified upon clarification of questioning by the Court that she previously had asked Sot to leave their house because he was smoking (R347). She became more specific about Sot smoking in the bedroom, but her answer was stricken when an objection was made by State (R348).

Ruby testified that prior to the incident she had gone to the mall with a daughter. (R346), that Joe and Sot were drinking Bloody Marys prior to her leaving for the mall (R346), that when she returned from the mall she noted that there were about four or five beer cans in the garbage (R349), that she was told there had been an altercation (R346), and in addition she saw that there was a little blood on the dishwasher. (R353). Ruby testified that she was 100% sure John has not drank alcohol for years (R352-3). Ruby testified that Sot' reputation in the family was that some of the family liked him and some did not like him (R348), that Joe was suffering from Alzheimer's disease and was taking medication for this (R350), and that she loves both John and Sot' wife Carol. (R351)

The next defense witness Carol Sanders ("Sanders"), testified that she has known Sot for around 18 years (R357) and eight years ago she lived with Sot and Carol for one year in Georgia (R358). Defense counsel asked the witness if she was aware of Sot's reputation in the community (R357). After Sanders said she was and counsel asked her to express what Sot' reputation was, Sanders replied "he likes to drink and he, you know, likes to fight" (R357). The State objected and the court conducted a sidebar (R357).

The Defense Attorney again asked if, while living with Sot in Georgia, she came to know the community in which Sot lived. Sanders answered "Pretty good, yes." (R358)

Defense counsel asked Sanders if she knew of any specific instances where Sot had been violent (R358), to which Sanders answered that Sot had "all the time" fought with his wife (Sanders's sister Carol) and the State again objected, but the court overruled the objection (R358). Defense counsel followed up with a question to clarify her answer and Sanders answered "all the time". (R358) At this point, the State objected and the court conducted another sidebar (R358-59). During that sidebar, the State complained that counsel was "not pointing to any specific incident," and suggested that counsel was "fishing" (R359). In response, the Trial Judge indicated that counsel's examination could start with general questions, but that he would need to "get specific" (R359).

Following the sidebar, defense counsel asked Sanders if she could recall "any specific instances of violence by Sot" (R359). Sanders described Carol and Sot "fighting in the living room", to which counsel asked for a more specific description of what the word "fighting" meant (R358-59). Sanders responded by stating that Sot would "try to punch her," illustrating by balling up her fist and moving it forward (R359-360). The Defense Attorney asked if Sanders ever saw Sot make actual contact (R360). The State's objection to the question was sustained before Sanders answered. Defense counsel then

asked Sanders whether she had witnessed Sot become violent with anyone else and that question was met with an objection by the State, which was sustained by the court (R360). The Defense Attorney then asked Sanders "When was the last time you saw Sot being violent." Sanders responded with: "Right before I went into a battered women's shelter because I couldn't stand being around them fighting all the time. So I moved out of their house and went to a battered women's shelter." (R361)

After Sanders was excused and the court dismissed the jury for the day, the Trial Judge stated that she was "not happy with the last witness" (R366). The Trial Judge indicated she was "seriously considering" striking all of Sanders's testimony, and she wanted the attorneys to submit authority on the issue the next day (R366).

When the parties appeared before the court on July 18, 2013, the State requested a mistrial by oral motion, claiming much of Sanders's testimony was elicited with no foundation and the complainant's character was tainted "in ways that cannot be remedied by simply just striking her testimony" (R370-72). The Trial Judge initially offered an alternative remedy that the State call a witness in rebuttal or recall Sot (R374). The State told the court that the only person the State could call to refute Sanders's testimony would be the complainant's wife Carol; however, that witness had been in the courtroom observing all of the trial testimony (R374).

The Defense Attorney apologized for not being able to elicit more specific testimony from Sanders (R376), but nevertheless maintained that he did lay proper foundation when questioning Sanders (R375-80). The Defense Attorney argued that a mistrial would be inappropriate and he did not believe Sanders's testimony should be stricken (R378-79).

After taking a recess, the Trial Judge indicated that she had listened to the audio recording of Sanders's testimony and found that the Defense Attorney failed to lay a proper foundation (R382). The judge stated:

> THE COURT: There really is no way to cure this other than I could attempt to strike the entire testimony, which is honestly where I was at this morning. I was thinking I was going to strike the entire testimony and tell the jury to disregard it altogether…but I just don't know how we can unring that bell. ***

Ultimately, the court granted the State's motion for a mistrial over the defendant's objection (R384-85). The Defense Attorney asked the judge if she was declaring a mistrial solely due to the testimony of the witness who was called "for reputation evidence," to which the trial judge replied, "[i]t is based on counsel's failure to follow the Court's directions to lay the proper foundation" (R389).

On Aug. 15, 2013, John filed a motion to dismiss the criminal complaint for violation of the prohibition against double jeopardy (App C). On Oct. 7, 2013, the State filed its response motion to John's motion, arguing that Sanders's testimony was "highly prejudicial" and that there was "no other way to cure the errors" short of granting the mistrial (App D). On October 21, 2013, John filed a reply to the State's response (App E). The defendant claimed that there was no precedent in Illinois for the proposition that "not laying a perfect foundation is in and of itself, so prejudicial that a mistrial is proper" justifying the concept of manifest necessity (App C, p 8).

On Nov. 18, 2013, John's motion to dismiss for violation of double jeopardy was denied (R410). In voicing her reasons for denying the motion, the trial judge stated:

> THE COURT: The Court thought about it a great deal, tried to consider different ways to alleviate the prejudice. There was no way that the Court could reasonably address the prejudice to the parties. There was no reasonable alternative offered and so the mistrial was declared. I do believe there was manifest necessity. So the motion is denied (R410).

On Nov. 18, 2013, the Office of the Appellate Defender was appointed (R411). The IAC affirmed the Court's ruling of a mistrial based on their opinion of July 1, 2015 (App A), that the defense had failed to present foundation for testimony by Sanders about Sot' reputation in the community and failed to provide specific factual details as to specific acts of violent witnessed by Sanders when she lived with the Sot in Georgia as to Sot' acts of violence and drinking. The IAC agreed that this testimony about Sot' propensity for violence had prejudiced the jury and that there was no possible remedy for this prejudice, short of a mistrial. (App A).

In the IAC opinion, there was a factual error where the Court stated in their opinion that Sot' injury was a "two-inch laceration", but the transcript of P/A Green's testimony stated that the injury was a "two centimeter laceration". (App A p 2). The IAC ruled that the mistrial was needed due to manifest necessity. The IAC found that "This is not a situation in which the State sought a mistrial in order to achieve a new chance to present a stronger case." (App A p 6). In their opinion, the IAC stated that the only remedy of giving a limiting instruction would not be sufficient to correct the error of lack of foundation in Sanders's testimony. (App A p 7). The IAC did not consider a remedy of recalling witness Sanders to elicit more specifics about violent acts witnessed or to obtain more foundation for reputation in the community testimony, or calling Sot' wife, who, although she sat in the Court Room during the trial could have, none the less been legally called as a witness in rebuttal, another legal point of which the Court was unaware.

ARGUMENT

Points A, B, and D are questions under the Constitution of the United States or of this state which arise for the first time in and as a result of the action of the Appellate Court, as there are no previous opinions published on these points from this Hon. Court.

A. **Whether there was ineffective assistance of appellate counsel regarding State Appellate Defender's failure to write an adequate "Statement of Facts" in the Appellant's Brief, which impeded the defense in arguing that the case was weak and therefore there was no manifest necessity for a mistrial, violating 6th Amendment. [Issue of First Impression]**

The standard of review is *de novo* because the question involves the application of Constitutional and Illinois law to undisputed facts. See *In re D.G.*, 144 Ill.2d 404, 408-409, 581 N.E.2d 648 (1991). Claims of ineffective assistance of counsel are judged pursuant to the standards established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The State Appellate Defender written "Statement of Facts" (App F) violates SC Rule 341(h)(6), which mandates the statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." The State Appellate Defender written "Statement of Facts" failed to provide the testimony of the officers involved in the investigation and arrest, the testimony of the physician's assistant who treated Sot, or the complete testimony of Ruby, all which impeach the complainant, Sot, the State's only witness to the incident.

Without a complete and accurate statement of facts[3] relating to testimony in the trial, John was impeded in arguing that the standard for declaring a mistrial due to manifest necessity under *People v. LaFond*, 343 Ill. App. 3d 981, 985 (3d Dist. 2003), was not met: (A) due to the Court being implicated in causing the alleged prejudicial

[3] One division of the Appellate Court noted, in **dicta**, that when an appeal attorney fails to present accurate information in the Statement of Facts, this negligence prejudices their client's case. *People v. Walker*, 256 Ill.App.3d 466, 628 N.E.2d 207, 209 (1st Dist. 1993)

insufficient testimony, (B) where the testimony was not actually insufficient, (C) because the State during trial realized their case was falling apart due to reputation and prior violence of victim evidence, in the face of a history of the victim being a drunk and therefore, apparently wished to represent a better case, (D) because the Court did not consider some other alternatives, and (E) because the State's case was weak, under the holdings in *LaFond*, (*supra*) [specifically factor number 1-5, and 9] (App G)

The State's case was extraordinarily weak. First Sot stated he was punched in the cheek by John, yet he had no visible injury to the cheek, but had a small cut on his temple (R298). In addition, Ruby testified that she saw a little bit of blood on the dishwasher and P/A Green testified that Sot told her the method by which he received the cut was a fall against a table or counter (R338-339). The evidence does not comport with the statements of Sot to the officers and court that he was punched by John in the cheek (R298, 283-284) and fell onto the floor. He self-impeached.

Of NOTE: D/S Mutt stated that it did not matter to him if Sot was drunk in determining who should be arrested (R318) – despite the following facts: (1) Ruby testified with "100% certainty" that John did not drink (R352-353), (2) Sot was an admitted drunk (R299) claiming anywhere from taking one to at least three drinks (R R272, 294-5, R305, 339-340), therefore, it appeared that Sot had consumed at least three alcoholic beverages and likely more, which suggests he likely was impaired, and although the P/A said he was lucid in the emergency room, this was six hours later at 10 pm (R342) versus the time of the incident at 4 pm (R312), which would diminish his intoxication, (3) Sot' injury of a dislocated joint in a finger (R339) [judicial notice is given that it is common knowledge that an injury to a hand is common in people who punch others with their hands and drunks are often known to be out of control and

violent], (4) the contradictory statements by D/S Mutt, P/A Green, Ruby and Sot about how much Sot had drunk (R272, 294-5, 304, 339-340, (5) the blood on the dishwasher per Ruby's testimony (R353), while the charge alleges John caused the cut by punching Sot, yet Sot told the P/A Green the injury was caused by a fall onto a table or counter (R338-339), (6) the small 2 cm cut on Sot' forehead that Sot said he received from John punching him in the cheek (R 298, 283-284), (7) John's self-defense statement to D/S Mutt stating there was pushing and they fell (R319), and (8) Boy's testimony that he follows rules not to smoke in the Doe home (R273), while Ruby testified that he did not and was asked to leave the house several times (R347-348).

The above combined, even excluding Sanders's' adequate testimony about general reputation of Sot as drunk and violent, strongly impeaches Sot and makes Sot' testimony not credible. John's 911 call and his cooperativeness, both bolstered John's credibility. Therefore, the failure of the State Appellate Defender to provide above sufficient statement of the facts prejudiced John's appeal and would be reason for direct appeal if convicted. Without Sot' credibility this John versus Sot story favors John.

B. Whether the IAC erred when they failed to conclude that the State's case was so weak that there was no manifest necessity for a mistrial because the Trial Judge ignored evidence in the transcript which impeached the testimony of the State's sole witness. [Issue of First Impression]

John incorporates section A as if part of this section. The trial judge's determination of whether a manifest necessity to declare a mistrial existed is reviewed for an abuse of discretion. *People v. Edwards*, 388 Ill. App. 3d 615, 624 (1st Dist. 2009).

Manifest necessity has been understood as "a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the

proceedings." *United States v. Jorn*, 400 U.S. 470, 485 (1971). Whether a mistrial rises to the level of a manifest necessity depends on the particular facts of each case. *LaFond,* (*supra*) (App G). However, some of the factors courts have focused on include: whether the difficulty in the trial was the product of events over which the court and the parties had no control; whether the difficulty could have been cured by an alternative that would have preserved the trial's fairness; whether the record would justify an appeal if convicted, and whether the trial judge considered alternatives to a mistrial. *Id*. at 985; *People v. Street*, 316 Ill. App. 3d 205, 211-12 (4th Dist. 2000).

The Trial Court's errors lead to an unreasonable conclusion that there was a strong case justifying claim of manifest necessity. Section A proves that this was an error. The case was extraordinarily weak. The Appellate Court made the same error.

Under the United States Constitution, the Illinois Constitution, and the Criminal Code, a defendant is protected from being placed in jeopardy twice for the same offense. *Arizona v. Washington*, 434 U.S. 497, 503 (1978); U.S. Const., amend V.; Ill. Const. 1970, art. I, §10; 720 ILCS 5/3-4(a)(3) (West 2012). When the Court declares a mistrial over the defendant's objection, the defendant can only be retried if the mistrial was a manifest necessity. *People ex rel. Roberts v. Orenic*, 88 Ill.2d 502, 508 (1981).

The ultimate ruling challenged in this appeal depends on events that led to the trial judge's decision to grant the State's motion for mistrial. The line of questioning that led to the mistrial ruling (R356-64) occurred when during defense counsel's direct examination of Sanders, he elicited Sanders's testimony that she had lived with Sot and Carol in Georgia for a year (R356-57). Counsel asked the witness if she had become aware of Sot' reputation in the community (R357) and Sanders answered in the affirmative. Counsel asked what that reputation was, to which Sanders replied, "he likes

to drink and he, you know, likes to fight" (R357). The State objected to Sanders's response, a sidebar was held[4], and the court sustained the objection (R358). Defense counsel followed up with additional questions about the time Sanders lived in Georgia with her sister and Sot, establishing that Sanders "g[o]t to know the community" in which they lived at that time (R358). Counsel asked Sanders if she knew about "specific instances of his [Sot'] violence" (R358). After Sanders testified that Sot and her sister would "fight all of the time," the State objected again and another sidebar was held (R358-59). During the side bar, the trial judge directed defense counsel "to get to a specific" while informing the State that "he can start with general" (R359). Defense counsel's next two questions after this sidebar used the word "specific" (R359). Eventually, Sanders testified that Sot was physically violent with Carol (R359-60). One of defense counsel's subsequent questions asked about other incidents of violence with "anyone else." To this, the State objected, another (unreported) sidebar was held, and the court sustained the State's objection (R360).

When the parties appeared before the court the next day, the State maintained that much of Sanders's testimony was elicited with no foundation, and the end result of the testimony was that Sot' character was tainted "in ways that cannot be remedied by simply just striking her testimony" (R370-72) so they requested a mistrial order (R370).

The Trial Judge wondered aloud whether the State could call a witness in rebuttal or recall Sot (R374). The State erroneously informed the court that the only person the State could call to respond to Sanders would be Carol; however, that witness had been present in the courtroom observing all of the trial testimony (R374). However, she could

[4] The sidebar was not reported by the court reporter.

have been called in rebuttal and Sanders could have been recalled for clarification of her testimony.

After taking a recess in order to listen to the audio recording of Sanders's testimony from the previous day, The Trial Judge erroneously found without stating specific detail that defense counsel generally ignored the court's instructions and failed to lay a proper foundation for the testimony concerning Sot' reputation (R382). The court therefore granted the State's motion for a mistrial over the defendant's objection (R384-85). John disagrees.

In determining whether a mistrial was a manifest necessity, such that a retrial did not violate double jeopardy, the reviewing court can consider whether the mistrial resulted from the actions of the State, the trial judge, or defense counsel. *Street*, 316 Ill. App. 3d. at 211-12. In the present case, by contrast with *Street*, defense counsel was guilty of no worse than being unable to satisfy the trial judge's questionable interpretation of what type of foundation was required before the defense witness could provide testimony about the complaining witness's general reputation for aggressiveness, irresponsible behavior, and violence. The State however, knowing Defense Attorney was trying to elicit general reputation testimony, kept objecting and insisting that the Trial Court order him to give specific evidence (R372-73).

By the trial judge's own assessment, defense counsel was not guilty of any egregious behavior. (R372-73) Just because the Trial Court said later that defense counsel did not follow his instructions (R389), does not make it so if, as here, in fact, this statement is false. To the extent that Sanders managed to "slip in" testimony for which an inadequate foundation had been laid, a measure far short of granting the State a mistrial could have been implemented – either recalling Sanders, questioning Carol, or giving

limiting instructions. See *People v. Lovinger*, 130 Ill. App. 3d. 105, 112 (2d Dist. 1985) (if the problem giving rise to the mistrial declaration could have been adequately corrected short of aborting the proceeding, the standard of "manifest necessity" has not been met, and retrial is barred).

Moreover, it should not be lost on this Court that the trial judge and the State did not appear to fully appreciate the difference between the type of general reputation testimony the defendant sought to elicit from Sanders and the "specific instances" of aggressive behavior the court continually insisted counsel needed to elicit.

In *People v. Lynch*, 104 Ill. 2d 194 (1984), the SC declared that there are two ways in which a defendant can show that the victim or complaining witness had a propensity for being violent. The first involved facts the defendant knew, which tend to establish the victim's violent nature. *Id.* At 200. However, a second way the complainant's propensity for violence can be admissible to support the defendant's version of the facts is "the victim's aggressive and violent character ... regardless of when [the defendant] learned of it." *Id.*

The "[p]roper foundation for reputation testimony is established when the witness is shown to have 'adequate knowledge of the person queried about' and the evidence of reputation is 'based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness.' " *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 40, quoting *In re Jessica M.*, 399 Ill. App. 3d 730, 738 (1st Dist. 2010).

The record in the present case shows that the Defense Attorney was seeking to elicit evidence of Sot' propensity for being violent based upon the opinion of people in Sot' community, not evidence that is shown by specific acts. The Trial Judge during a sidebar (R359) conflated the two types of character or reputation evidence that can be

introduced assisting in argument of self-defense. Sanders testified to "pretty good" knowledge of Boyd's reputation.

The State added to the court's confusion, taking the lead by posing objections based on counsel's failure to draw out specific instances of Sot' violence (R373). Defense counsel did his best to attempt to accommodate the court, despite the fact that his witness was no doubt confused by the direction of the follow-up questions. All this is to say that the judge played a significant, if not primary, role in what she later concluded was the "sloppy, . . . poorly elicited direct testimony" (R372-73).

Far from justifying that a mistrial should be granted, the "unsatisfactory" testimony of Sanders could have easily been cured or, at most, stricken from the jury's consideration, with the result that the trial's fairness would have been preserved. For that matter, **because the perceived error was based on poor foundation only** (R389), the court could have given the defendant leave to recall Sanders to the stand, in order to establish the proper foundation. To the extent that the court believed that the State deserved the opportunity to refute Sanders's depiction of Sot' aggressive reputation, the court could have exercised its discretion to allow the State to call Carol (R344-45), in spite of the State's expressing its concern that Mrs. Sot had been present in the courtroom throughout the first day of the trial (R374). That remedy would in no way have injected reversible error into the jury trial such that the court had no curative option short of granting the State's request for a mistrial.

The Trial Judge abused her discretion in granting the State's motion for a mistrial, calling the foundation for Sanders's testimony inadequate and the State's case strong.

C. Whether the IAC erred when they failed to conclude that the alleged insufficient foundation in the testimony of defense witness, Carol Sanders could be cured by recalling the witness in the defense case in chief, concerning character of

alleged victim, to provide more detailed foundation for evidence of reputation in the community and more specific details in instances where she witnessed alleged victim's drunkenness and violence and when they affirmed Court's conclusion that the foundation for reputation evidence was insufficient, when it was sufficient.

Defendant incorporates section B as if part of this section. Therefore, further questioning of Sanders would have clarified foundation for her testimony and been significant in proving that there was no manifest necessity for a mistrial.

D. Whether the IAC erred in affirming, when the Trial Judge erred in concluding that defense attorney failed to follow his instructions about questioning a witness causing prejudicial non-curable jury bias, when it was the Court's confusion that dictated and caused the evidence in question to be elicited, as well as because the evidence, though sloppy due to Court instructions, was adequate. [Issue of First Impression]

Standard of Review is manifest weight of the evidence. *Joel R. v. Board of Education of Mannheim School District*, 292 Ill. App. 3d 607, 613, 686 N.E.2d 659 (1997). The Court did not know the difference between general reputation in the community evidence and the more specific *Lynch* type of reputation evidence, which is typically introduced with a motion before trial. Any reading of the trial transcript clearly shows that the Judge in the Court became confused between the two types of reputation evidence, and proceeded to force the Defense Attorney to ask that inappropriate more specific Lynch material be produced from the witness.

It is clear from the transcript that the Defense Attorney was not trying to procure this evidence from the witness and that the witness was not prepared to elicit this type of evidence. Therefore, it was the trial judge that caused the errors which resulted in the trial judge declaring a mistrial, even though those errors did not reach that of manifest necessity. The IAC, against the weight of the evidence, completely ignored the actions of the Trial Court and erroneously agreed with the Trial Court that defense counsel ignored its instructions.

Further, the IAC ignored case law pointing out that a new trial gives unfair advantage to the State and that therefore deference should be given to the defense in cases such as these where there is any question as to manifest necessity or who caused the mistrial. *Arizona v. Washington*, 434 U.S. 497 (1978) Section A & B are incorporated into this section as if part of it. The Appellate Court ignored the record which showed that the State's case was weak and consisted of nothing more than the word of the complaining witness: a 50 something year old truck driver from Georgia, who, by his own admission, was a drunk who had been drinking and smoking all afternoon.

Therefore, the general reputation evidence was sufficient and there was no manifest necessity for a mistrial. Double jeopardy was violated.

E. Whether the IAC erred in affirming, when the Trial Judge erred when it denied the defendant's motion to dismiss the criminal complaint on double jeopardy grounds, in violation of the 5th Amendment.

Following a mistrial, the denial of defendant's motion to dismiss on double jeopardy grounds is also reviewed under the abuse-of discretion standard. *People v. Burtron*, 376 Ill. App. 3d 856, 861, 863 (5th Dist. 2007). Standard of Review is manifest weight of the evidence. *Joel R. v. Board of Education of Mannheim School District*, 292 Ill. App. 3d 607, 613, 686 N.E.2d 659 (1997). Section A and B are incorporated into this section as if part of this section. The foundation for Sanders's testimony was adequate as to general reputation in the community and the Trial Judge erroneously ruled otherwise, thereby erroneously ordering a mistrial and denying motion to dismiss on double jeopardy grounds.

CONCLUSION AND PROPOSED RULING

As the IAC and Trial Court made errors as noted above, this Honorable Court should agree to an appeal as a matter of right for consideration of issues of first

impression ASAP (points A, B, and D) and grant leave to appeal on the other issues (points C and E).

Dated July 27, 2015.

Respectfully Submitted,

_____

John F. Doe
Petitioner-Appellant-Defendant Pro Se

No. _____

In the
SUPREME COURT
Of The State of Illinois

	) Petition for Appeal as a Matter of Right or
	) in the Alternative for Leave to Appeal
JOHN DOE	)
Petitioner-Appellant-Defendant	) On Appeal from Appellate Court, Third
	) District, Case No. 1-11-1111
	) There Heard on Appeal from Court
v.	) of the 12th Judicial Circuit
	) of Will County, Illinois
	) No. 11-CM-1111
STATE OF ILLINOIS	) Honorable Victoria M. Kennison,
Respondent-Appellee-Plaintiff	) Judge Presiding
	) Order of Court Nov. 18, 2013
	) Order of Appellate Court July 1, 2015

CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT AND FORMAT REQUIREMENTS.

I, John Doe, certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the petition under Rule 315(c) is 20 pages.

Dated: July 27, 2015

_____
John Doe

No. _____

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To: Mr. Terry A Mertel
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State's Attorneys Appellate Prosecutor
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Chicago, IL 60601

County of Will)
) Ss.
State of Illinois)

NOTICE OF FILING OF PETITION, PROOF OF SERVICE AND AFFIDAVIT

PLEASE TAKE NOTICE, that an original and 19 copies of Petition for Leave to Appeal . . . attached was filed by mail delivery with the clerk of the Illinois Supreme Court, at Illinois Supreme Court Building, 200 E. Capital Ave., Springfield IL, 62701 on July 27, 2015.

I, John Doe, affirm that on the 27th day of July, 2015, I served three copies of the foregoing Notice of Filing Petition, and above stated Petition on the above named individual and by U.S. Post Office postage prepaid before 5:00 p.m.

I John Doe affirm that the attached Petition to Appeal as a Right and For Leave to Appeal, Certification of Compliance and this Notice are accurate and true to the best of my knowledge and belief.

_____
Mr. John Doe, Pro Se

SWORN to and AFFIRMED before me this 27rd day of July 2015.

_____
Notary Public

John Doe
XXXX Street Road #100
Joliet, IL 60411
(111) 111-1111
Petitioner-Appellant-Defendant, Pro Se