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# Stuck in Ohio's Legal Limbo, How Many Mistrials are Too Many Mistrials?: Exploring New Factors That Help a Trial Judge in Ohio Know Whether to Exercise Her Authority to Dismiss an Indictment with Prejudice, Especially Following Repeated Hung Juries

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# **STUCK IN OHIO’S LEGAL LIMBO, HOW MANY MISTRIALS ARE TOO MANY MISTRIALS?: EXPLORING NEW FACTORS THAT HELP A TRIAL JUDGE IN OHIO KNOW WHETHER TO EXERCISE HER AUTHORITY TO DISMISS AN INDICTMENT WITH PREJUDICE, ESPECIALLY FOLLOWING REPEATED HUNG JURIES**

SAMANTHA M. CIRA\*

## **ABSTRACT**

Multiple mistrials following validly prosecuted trials are becoming an increasingly harsh reality in today’s criminal justice system. Currently, the Ohio Supreme Court has not provided any guidelines to help its trial judges know when to make the crucial decision to dismiss an indictment with prejudice following a string of properly declared mistrials, especially due to repeated hung juries. Despite multiple mistrials that continue to result in no conviction, criminal defendants often languish behind bars, suffering detrimental psychological harm and a loss of personal freedom as they remain in “legal limbo” waiting to retry their case. Furthermore, continuously retrying defendants cuts against fundamental fairness and substantial justice highlighted in the “Ohio Due Course of Law” clause. This Note argues that Ohio trial judges need to apply a list of factors to avoid allegations of misconduct, to breathe life back into the defendant’s presumed innocence until proven guilty, and to guarantee prompt administration of justice. These factors include: (1) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) whether the defendant is or has been incarcerated awaiting trial, and the length of such incarceration; (5) the severity of the offense charged; (6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney; and (7) the trial court’s own evaluation of the relative case strength. Weighing these factors will promote stability, uniformity, and predictability among courts. Implementing factors will also help ensure that defendants are not pushed into taking unfair plea deals; it will aid appellate courts reviewing trial judges’ decisions whether or not to dismiss. Also, it will give legitimacy to the trial judges’ decisions. Overall, these factors will explore a fair balance between the prosecution’s right to seek a conviction and the rights of the accused, the victim, and the community at large.

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## I. INTRODUCTION: AN OHIO DEFENDANT SUFFERS THROUGH MULTIPLE MISTRIALS

Ohio native Christopher Anderson has been incarcerated in the Mahoning County Jail for approximately 5,318 days without a lasting conviction.<sup>1</sup> Fourteen years later, following four mistrials and a guilty verdict overturned and remanded on appeal, the State of Ohio intends to try Anderson again.<sup>2</sup> Many defendants like Anderson, whom the law presumes innocent,<sup>3</sup> find themselves in jail as they await trial and a possible conviction. “Collectively, today’s cohort of 3.3 million pretrial detainees will spend some 660 million days in pretrial detention.”<sup>4</sup> Here in Ohio, Anderson is in jail awaiting his sixth trial with no concrete resolution.<sup>5</sup> Are his constitutional rights violated by retrying him? Is fundamental fairness served here? At what point does a court in Ohio have to say stop and declare that enough is enough?<sup>6</sup> How many mistrials are too many mistrials?

On September 14, 2016, the Ohio Supreme Court held that no constitutional violation exists when the State seeks to retry Anderson after a string of properly declared mistrials.<sup>7</sup> Based on this holding, Anderson will continue to sit in jail while both parties prepare for another trial, one where the State plans to introduce no new evidence and one that may likely end in another deadlocked jury.<sup>8</sup> Anderson’s

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<sup>1</sup> Marianna Brown Bettman, *What Happened on Remand: Christopher Anderson Is Out of Jail*. *State v. Anderson*, LEGALLY SPEAKING OHIO (Mar. 20, 2017), <http://www.legallyspeakingohio.com/2017/03/what-happened-on-remand-christopher-anderson-is-out-of-jail-state-v-anderson/> [hereinafter Bettman, *What Happened on Remand*].

<sup>2</sup> Marianna Brown Bettman, *What’s on Their Minds: How Many Times Can a Criminal Defendant Be Re-Tried?* *State of Ohio v. Christopher L. Anderson*, LEGALLY SPEAKING OHIO (June 7, 2016), <http://www.legallyspeakingohio.com/2016/06/whats-on-their-minds-how-many-times-can-a-criminal-defendant-be-re-tried-state-of-ohio-v-christopher-l-anderson/> (summarizing the parties’ positions during oral arguments before the Supreme Court of Ohio on May 31, 2016).

<sup>3</sup> Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 149 (2010).

<sup>4</sup> MARTIN SCHÖNTEICH, OPEN SOC. FOUND., PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION 1, 7 (2014) (exploring pretrial detention, which is “a terrible waste of human potential that comes at a considerable cost to states, taxpayers, families, and communities.”).

<sup>5</sup> *State v. Anderson*, 68 N.E.3d 790 (Ohio 2016).

<sup>6</sup> Oral Argument at 20:11, *State v. Anderson*, 68 N.E.3d 790 (Ohio 2016) (No. 2015-1107), <https://ohiochannel.org/video/case-no-2015-1107-state-v-anderson> (noting that the Court is being asked to give an answer to that question). This Note looks for an answer to this question, exploring, in particular, the two mistrials during Anderson’s case that led to deadlocked juries.

<sup>7</sup> *Anderson*, 68 N.E.3d at 792. The Court reached its conclusion without giving proper weight to the fact that two of the trials resulted in hung juries because the prosecutor could not convince the jurors “beyond a reasonable doubt.” Instead, it focused solely on a double jeopardy analysis.

<sup>8</sup> *Id.*; see *Renico v. Lett*, 559 U.S. 766, 788 (2010) (explaining that a jury is deadlocked when they cannot agree upon a verdict and are unable to reach the required unanimity); *Arizona v. Washington*, 434 U.S. 497, 509–10 (1978) (explaining what a deadlocked jury is); Ramon Arce et al., *In Search of Causes of Hung Juries*, 6 EXPERT EVIDENCE 243, 244 (Kluwer Academic Publishers ed., 1999) (discussing Kalven and Zeisel’s 1966 prominent archival study about hung juries, which “revealed that the requirement of a unanimous verdict led to a hung

unrelenting imprisonment is puzzling, but his situation is not extraordinary. Although courts in Ohio have the inherent authority to dismiss a criminal case with prejudice,<sup>9</sup> Ohio trial courts need factors to help exercise that authority to avoid this detrimental “legal limbo.”<sup>10</sup> Trying Anderson for a sixth time following multiple mistrials is a miscarriage of justice, encouraging a dangerous precedent that cuts against Anderson’s constitutional rights and the rights of many other detainees sitting in “legal limbo” who are entitled to a presumption of innocence.<sup>11</sup>

Ohio should adopt factors to help trial judges exercise their inherent authority to dismiss and to help judges rethink what they consider to be punishment. These factors will ensure more predictability and consistency across cases confronting multiple mistrials, guaranteeing that similar cases receive the same treatment. Furthermore, the Ohio Supreme Court reached its decision in *Anderson* despite the clear language spelled out in the Ohio Constitution.<sup>12</sup> The language in the Ohio Constitution affords more protection than the federal floor, allowing defendants like Anderson to hold due

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jury in 5.6% of cases, this percentage fell to 3.1% when a 2/3 majority decision rule was required”).

<sup>9</sup> See Ohio Crim. R. 48; RONALD B. ADRINE & ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW § 5:3 (2016).

<sup>10</sup> Many individuals sit locked in prison for astonishing amounts of time waiting for a conviction that might not even come. See, e.g., Dana Sauchelli & Rebecca Rosenberg, *Man Arrested as Teen Has Waited 7 Years in Rikers for Trial*, N.Y. POST (June 15, 2015), <http://nypost.com/2015/06/15/kid-arrested-at-17-has-been-at-rikers-awaiting-trial-for-7-years> (noting that in 2015, Manhattan detainee Carlos Montero spent his seventh year locked up in jail waiting for his very first trial). Montero’s incarceration demonstrates that “legal limbo” comes in all different forms. Some defendants sit in limbo waiting for their very first trial while others experience the detriments of limbo waiting for multiple trials, languishing behind bars while their attorneys prepare for their trials.

Other defendants experience psychological harms from incarceration. Kalief Browder’s incarceration demonstrates the devastating effect of psychological harm that follows a defendant even after they leave this “legal limbo.” See Michael Schwirtz & Michael Winerip, *Man Held at Rikers Jail for 3 Years Without Trial Commits Suicide at 22*, N.Y. TIMES, June 9, 2015, at A20; Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014, at 26 (noting that the State accused Browder of taking a backpack, and the courts took three years of his life).

Case law also highlights this danger. See, e.g., *State v. Fitzpatrick*, 772 A.2d 1093, 1097–98 (Vt. 2001). For instance, Vermont resident Paul Fitzpatrick was tried before two juries, both of which became deadlocked. *Id.* at 1098 (“[T]he number of hung juries is not determinative, but it is an important factor.”). Similarly, in Summit County, Ohio, Michael Roper’s trials ended in three hung juries before a jury convicted him in 2002. *State v. Roper*, No. 20836, 2002 Ohio App. LEXIS 7191, 2002 WL 31890116, at ¶¶ 73–74 (Ohio Ct. App. Dec. 31, 2002) (“[T]here is a point at which repeated mistrials will violate an accused’s right to due process, and he [Appellant] contends that the point was reached in the present case after the third mistrial.”).

<sup>11</sup> See SCHÖNTEICH, *supra* note 4 (noting that on an average day “3.3 million people are in pretrial detention . . . although they should be presumed innocent, pretrial detainees are often held in conditions worse than those of sentenced prisoners”).

<sup>12</sup> E.g., OHIO CONST. art. I, §§ 1–2, 10, 16. For instance, “[n]o person shall be twice put in jeopardy for the same offense.” *Id.* § 10. And “every person . . . shall have justice administered without denial or delay.” *Id.* § 16.

process rights to “justice administered without denial or delay.”<sup>13</sup> Based on these words, defendants, their victims, and the community at large are entitled to the prompt administration of justice.<sup>14</sup> If trial judges do not take steps to consider when enough is enough to promptly administer justice, their failure to act could be attacked as judicial misconduct. Accordingly, Ohio trial courts need to establish guidelines to avoid these accusations. Moreover, while many of these detainees continue to sit in jail, they face challenges that amount to and may cause lasting psychological harm and the disintegration of the presumption of innocence.<sup>15</sup> To avoid these detrimental problems, implementing factors will also ensure that defendants do not feel forced to take plea deals, will aid appellate courts reviewing the trial judge’s decisions, and, therefore, will give legitimacy to the trial judges’ decisions.

Part II of this Note provides background on *Anderson*, including a synthesis of the law in Ohio and other states regarding a trial court’s discretion to dismiss an indictment with prejudice following multiple mistrials, especially after hung juries. This part also explores resulting harms from pretrial incarceration and post-trial incarceration. Finally, this section explores Ohio’s Due Course of Law Clause<sup>16</sup> in relation to the Federal Due Process Clause<sup>17</sup> and provides a short history of a defendant’s right to be presumed innocent.

Part III will confront the law and analyze it, arguing that the Ohio Constitution can afford to give greater protections than the United States Constitution to a detainee’s due process rights. Additionally, this part will explore the possibility that multiple mistrials slowly erode the defendants’ right to be presumed innocent, resulting in lasting harm.

Part IV will suggest new factors—that stem from strong precedent in other states—for Ohio to apply when addressing this issue in the future.<sup>18</sup> These factors will include:

- 1) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known;
- 2) the character of prior trials in terms of length, complexity, and similarity of evidence presented;
- 3) the likelihood of any substantial difference in a subsequent trial, if allowed;
- 4) whether the defendant is or has been incarcerated awaiting trial, and the length of such incarceration;

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<sup>13</sup> *Id.* § 16. Many other states use similar language. *E.g.*, PA. CONST. art. I, § 11 (“[H]ave remedy by due course of law, and right and justice administered without sale, denial or delay.”). My proposed factors for Ohio trial courts will account for a defendant’s due process rights and will ultimately serve all case parties’ interests.

<sup>14</sup> OHIO CONST. art. I, § 16; *see* *State v. Witt*, 572 S.W.2d 913 (Tenn. 1978).

<sup>15</sup> *See, e.g.*, David Post, Opinion, *Guilty Until Innocent, in Colorado*, WASH. POST (Nov. 21, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/21/guilty-until-proven-innocent-in-colorado/?utm\\_term=.b825e7212c35](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/21/guilty-until-proven-innocent-in-colorado/?utm_term=.b825e7212c35) (noting that “all people brought before a tribunal ‘are taken, prima facie, i.e., in the absence of evidence to the contrary, to be good, honest, and free from blame . . . .’”).

<sup>16</sup> OHIO CONST. art. I, § 16.

<sup>17</sup> U.S. CONST. amend. XIV, § 1.

<sup>18</sup> *See* Part IV *infra*.

- 5) the severity of the offense charged;
- 6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney; and
- 7) the trial court's own evaluation of the relative case strength.<sup>19</sup>

These factors will benefit all parties in a case and will help to avoid allegations of judicial misconduct. This guidance will also encourage Ohio trial courts to guarantee that juries are provided with the proper tools they need to reach a fair conclusion, ensuring the prompt administration of justice and uniformity across cases.

Part V concludes by arguing that Ohio trial courts need to adopt these new factors so that judges know when to properly exercise their inherent authority to dismiss a case or to permit prosecutors to continue to pursue a conviction after multiple mistrials.

## II. BACKGROUND

### *A. The Ohio Supreme Court Mistakenly Declines to Follow Other Case Law Discussing Retrials, Especially After Deadlocked Juries*

#### 1. Facts of *Anderson*

On June 3, 2002, police found Amber Zurcher dead in her apartment in Austintown Township in Mahoning County, Ohio.<sup>20</sup> The police arrested Christopher Anderson two months after the murder; the Mahoning County Grand Jury indicted him for Amber's murder.<sup>21</sup> Before his first trial on May 27, 2003, the prosecution attempted to enter into evidence testimony "regarding a prior incident in which Anderson allegedly had bitten and choked another woman" named Donna Dripps.<sup>22</sup> However, the trial judge sustained a pretrial defense motion to exclude her testimony as prejudicial.<sup>23</sup> Despite this ruling, while on the stand, Amber's friend, Nichole Ripple, "blurted out . . . Dripps's claim under the guise of a statement made by Amber."<sup>24</sup> The news media drew their undivided attention to this statement; the following day, the trial judge declared a mistrial.<sup>25</sup> The trial court convicted Anderson at his second trial, but the

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<sup>19</sup> *State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982); *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa Ct. App. 1980).

<sup>20</sup> *State v. Anderson*, 68 N.E.3d 790, 792–93 (Ohio 2016). The police could find no signs of forced entry into Amber's apartment. The night before her murder, Amber invited several friends, including Anderson, to her apartment for an "after hours" party. At the apartment, the group drank, smoked marijuana, and tried to "score" cocaine. Although Anderson was among the last to leave the party, it is undisputed that John Orosz ensured that he locked the door when he left with Anderson. Both Anderson and his mother informed the police that Anderson had come home after the party. Anderson has remained set in his belief that he is not guilty. *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Merit Br. of Appellant Christopher L. Anderson, at \*2–3, *State v. Anderson*, 68 N.E.3d 790 (Ohio 2016) (2015-1107) (Feb. 22, 2016) [hereinafter Merit Br.]. Ms. Dripps claimed that more than a year before Amber's murder, Anderson had choked Dripps and bitten her breast. *Id.*

<sup>23</sup> *Anderson*, 68 N.E.3d at 793.

<sup>24</sup> *Id.*; Merit Br., *supra* note 22, at \*3.

<sup>25</sup> *Anderson*, 68 N.E.3d at 793. It can be noted that many of these cases ending in mistrials due to hung juries include celebrated, high profile cases. Michael A. Berch & Rebecca White

Seventh Circuit Court of Appeals reversed and remanded the case to the trial court because of erroneous evidentiary rulings.<sup>26</sup> In December 2008, at Anderson's third trial, the judge declared a mistrial because the jury could not reach a fair decision.<sup>27</sup> The State's fourth effort to convict Anderson in April 2010 also resulted in a mistrial based on attorney and juror misconduct.<sup>28</sup> Finally, the State's fifth attempt to convict Anderson resulted in a second hopelessly deadlocked jury and ended in another mistrial.<sup>29</sup>

In early 2016, the State announced its decision to prosecute Anderson for a sixth time.<sup>30</sup> Consequently, Anderson filed a motion to dismiss the indictment.<sup>31</sup> On September 14, 2016, the Ohio Supreme Court concluded that the State's sixth attempt at prosecution did not violate any of Anderson's constitutional rights or the rights of similar detainees.<sup>32</sup> Thus, the prosecution may proceed in the indictment despite five previous prosecutions spanning almost fourteen years.

## 2. Case Law Holds That the Trial Court May Dismiss Indictments with Prejudice Following Deadlocked Juries

Unlike the Ohio Supreme Court's ruling in *Anderson*, courts in surrounding jurisdictions have held that various factors can help a trial court exercise its authority to dismiss an indictment with prejudice following mistrials caused by hung juries,

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Berch, *The Power of the Judiciary to Dismiss Criminal Charges After Several Hung Juries: A Proposed Rule to Control Judicial Discretion*, 30 LOY. L.A. L. REV. 535, 536 n.13 (1997) (proposing a rule for the federal legislature to apply).

<sup>26</sup> Merit Br., *supra* note 22, at \*5–6. At Anderson's second trial, the State presented inconclusive DNA evidence and testimony that proved ineffective from all the party's attendees. The trial judge also reversed its previous ruling and allowed Ms. Dripps to testify. The Court of Appeals concluded that Ms. Dripps's testimony was "by and large irrelevant," giving the appearance that Anderson "was being tried for attacking Donna Dripps in addition to being tried for the murder of Amber Zurcher." The trial judge also allowed Anderson's probation officer to testify about Anderson's probation violations. The Court of Appeals also labeled this evidence as "extensive, largely irrelevant, and highly prejudicial." *Id.*

<sup>27</sup> *Id.* at \*7; see Karen Pelletier O'Sullivan, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167 (1985) (explaining that juries have three alternatives when a unanimous verdict is required: a guilty verdict, a not guilty verdict, or no verdict for lack of unanimity (citing *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969))).

<sup>28</sup> Merit Br., *supra* note 22, at \*5–7. The judge declared a mistrial when one of the jurors spoke out after he observed Anderson's co-counsel asleep during voir dire. *Id.*

<sup>29</sup> *Id.* Here, it is important to note that the State offered no new evidence at trial. *Id.*

<sup>30</sup> *Id.* at \*8.

<sup>31</sup> *Id.* at \*8–10. The trial judge overruled the motion to dismiss on February 15, 2011, and Anderson appealed. The Ohio Supreme Court eventually rejected the trial judge's decision, which had said that Anderson's appeal of the judge's overruling of a motion to dismiss was not a final appealable order. On remand, the Seventh Circuit affirmed the trial court's overruling of the motion to dismiss. The Ohio Supreme Court again accepted jurisdiction after Anderson appealed. Clearly, some of the delay during Anderson's case occurred as this motion moved through the hierarchy of courts. *Id.* Yet, it seems to be no surprise that Anderson would have filed a motion to dismiss at this point.

<sup>32</sup> *State v. Anderson*, 68 N.E.3d 790, 799 (Ohio 2016).



especially after finding that further prosecution would infringe on a defendant's right to fundamental fairness and substantial justice.<sup>33</sup> Examples in *State v. Witt* and *United States v. Ingram* strongly suggest ending a prosecution if it appears that substantially the same evidence will be presented at future trials and if there is a great probability of continued hung juries.<sup>34</sup> The bounds of duly exercised discretion limit this authority;<sup>35</sup> the trial court must balance "two basic rights: a defendant's right to a fair trial and the State's right to seek a verdict on validly prosecuted charges."<sup>36</sup> However, "[t]his right of the State to retry a defendant when the jury could not agree could not be abused."<sup>37</sup> Overall, these cases suggest that using factors can guide a trial judge's decision on whether to dismiss indictments with prejudice, especially after a hung jury.<sup>38</sup>

### 3. Ohio Recognizes No Factors to Apply When Trial Courts Confront This Issue

Although no courts have been able to identify a specific number of hung juries that would warrant dismissal,<sup>39</sup> many state courts have held that the trial court is in the best position to weigh relevant factors to determine if dismissing an indictment with prejudice is possible.<sup>40</sup> Yet, Ohio courts recognize no factors of their own to consult for guidance when deciding whether to exercise their inherent authority to dismiss;<sup>41</sup> the Ohio Supreme Court in *Anderson* did not adopt any factors for Ohio courts to consistently apply in the future.<sup>42</sup>

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<sup>33</sup> See, e.g., *Sivels v. State*, 741 N.E.2d 1197, 1198 (Ind. 2001) (stating that the grand jury indicted Sivels for murder, felony murder, and robbery); *State v. Abbati*, 493 A.2d 513, 518 (N.J. 1985) ("Fundamental fairness can be viewed as an integral part of the right to due process."); *but see State v. Sauve*, 666 A.2d 1164, 1168–69 (Vt. 1995) (holding that courts ordinarily must defer to the prosecutor's decision to retry the case in the absence of a violation of fundamental fairness).

<sup>34</sup> *State v. Witt*, 572 S.W.2d 913, 914 (Tenn. 1978); see *United States v. Ingram*, 412 F. Supp. 384, 385 (1976) (reasoning that prosecutors cannot keep pressing in hopes that conviction eventually will result when they had no new proof).

<sup>35</sup> See, e.g., *State v. Moriwake*, 647 P.2d 705, 711 (Haw. 1982) ("[T]rial courts have the power to dismiss . . .").

<sup>36</sup> *State v. Cordova*, 993 P.2d 104, 108 (N.M. Ct. App. 1999) (noting the opposing side's argument).

<sup>37</sup> *Preston v. Blackledge*, 332 F. Supp. 681, 685–86 (E.D.N.C. 1971) (noting that the right of the State to retry a defendant is one which must be weighed in the surrounding circumstances of the particular situation involved).

<sup>38</sup> Approximately sixteen states permit trial judges to consider factors when determining whether or not to dismiss an indictment with prejudice. It is my goal to suggest that Ohio needs to follow in these courts' footsteps and confront this issue head on.

<sup>39</sup> See *Witt*, 572 S.W.2d at 917 ("This opinion is not to be construed as fixing the permissible or impermissible number of mistrials caused by deadlocked juries.").

<sup>40</sup> See, e.g., *State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982) (providing a list of six factors for courts to balance).

<sup>41</sup> See *State v. Anderson*, 68 N.E.3d 790, 796 (Ohio 2016) ("We categorically reject the . . . factors that that court applied in this case . . .").

<sup>42</sup> Though the Seventh Circuit Court of Appeals attempted to analyze factors, the Ohio Supreme Court did not support their analysis, and they refused to recognize any factors. *Id.*;

Back in 2002, Ohio's Ninth Circuit in *State v. Roper* grappled with a case where the jury convicted a defendant of aggravated murder after three mistrials; however, the court had to look to other states for direction in the analysis.<sup>43</sup> Most importantly, the court reviewed case law from Hawaii and Iowa.<sup>44</sup> Hawaii's factors when deciding whether to dismiss an indictment with prejudice include:

- 1) the severity of the offense charged;
- 2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known;
- 3) the character of prior trials in terms of length, complexity and similarity of evidence presented;
- 4) the likelihood of any substantial difference in a subsequent trial, if allowed;
- 5) the trial court's own evaluation of the relative case strength; and
- 6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.<sup>45</sup>

Similarly, Iowa's factors laid out in an Iowa Court of Appeals include:

- 1) weight of the evidence of guilt or innocence;
- 2) nature of the crime involved;
- 3) whether defendant is or has been incarcerated awaiting trial;
- 4) whether defendant has been sentenced in a related or similar case;
- 5) length of such incarceration;
- 6) possibility of harassment;
- 7) likelihood of new or additional evidence at trial;
- 8) effect on the protection to society in case the defendant should actually be guilty;
- 9) probability of greater incarceration upon conviction of another offense;
- 10) defendant's prior record;
- 11) the purpose and effect of further punishment; and
- 12) any prejudice resulting to defendant by the passage of time.<sup>46</sup>

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State v. Anderson, No. 11 MA 43, 2015 Ohio App. LEXIS 1956, 2015 WL 3409047, at ¶ 22 (Ohio Ct. App. May 20, 2015).

<sup>43</sup> State v. Roper, No. 20836, 2002 Ohio App. LEXIS 7191, 2002 WL 31890116, at ¶ 87 (Ohio Ct. App. Dec. 31, 2002).

<sup>44</sup> *Id.* at ¶ 84 (noting that both parties asked the court to consider factors while making its decision).

<sup>45</sup> State v. Moriwake, 647 P.2d 705, 712 (Haw. 1982).

<sup>46</sup> State v. Lundeen, 297 N.W.2d 232, 235–36 (Iowa Ct. App. 1980). Though only Hawaii's and Iowa's factors are listed here, many other courts have identified similar factors that a trial court should weigh to form an appropriate basis for determining whether to dismiss a defendant's indictment after multiple prosecutions caused by mistrials. Some of these other courts adopt Hawaii's and Iowa's factors word for word while others have adopted a variation. *See, e.g.*, State v. Sauve, 666 A.2d 1164, 1168 (Vt. 1995) (“[W]here relevant, the trial court should consider such factors, which weigh the respective interests of the defendant, the complainant, and the community at large.”); State v. Abbati, 493 A.2d 513, 522 (N.J. 1985) (“[W]e do not undertake to define all the circumstances in which it would be proper to order a dismissal, just as it is infeasible to suggest which factors would be weightier . . . . The decision

The *Roper* court noted that these considerations should be weighed in furtherance of justice.<sup>47</sup> Furthermore, the Ohio Tenth Circuit applied *Moriwake's* and *Lundeen's* factors in *State v. Whiteside*, a decision to retry a defendant charged with aggravated murder for a third time after two hung juries.<sup>48</sup> Similarly, in *State v. Dickerson* in Ohio's Fourth District, Vincent Dickerson also cited *Moriwake* when arguing for dismissal with prejudice for violating his due process rights after his two aggravated murder trials also ended in hung juries.<sup>49</sup>

*B. The Ohio "Due Course of Law" Clause and the Federal "Due Process" Clause*

Originally drafted in 1851 and amended in 1912, Article I, Section 16 of the Ohio Constitution declares, "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."<sup>50</sup> This clause applies fundamental fairness in a judicial proceeding and protects Ohio's citizens, including detainees like Anderson, against arbitrary actions by the government.<sup>51</sup> Since 1893, the phrase "due course of law" embedded within Section 16 has been viewed as being equivalent to the "due process of law" language in the Fourteenth Amendment of the United States Constitution.<sup>52</sup> Although Ohio's Constitution uses slightly different language when it emphasizes justice to citizens that cannot be denied or delayed, the

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is left to the sound judgment of our trial courts to be exercised in the unique circumstances arising in such cases."); *People v. Verducci*, 196 Cal. Rptr. 3d 909, 916–17 (Cal. Ct. App. 2016).

Generally, the state courts that have considered factors for trial courts to weigh in deciding whether to dismiss an indictment with prejudice in this situation include Alabama, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Louisiana, Michigan, New Jersey, New Mexico, Tennessee, Texas, Vermont, Washington, and West Virginia. *See, e.g., State v. Diaz*, No. CR96-0122715T, 1998 Conn. Super. LEXIS 2297, 1998 WL 525449, at \*2 (Conn. Super. Ct. Aug. 13, 1998); *see generally Moriwake*, 647 P.2d at 708; *Lundeen*, 297 N.W.2d at 235. Though not all 50 states have recognized such factors, the list of states mentioned above makes clear that since 1980 when the *Lundeen* court recognized factors and 1982 when the *Moriwake* court added their own, this list of states will continue to grow over time. Ohio should be added to the list.

<sup>47</sup> *Roper*, No. 20836, at ¶¶ 75, 77 ("Ohio has recognized the authority of a trial judge to dismiss a case in the interest of justice."); *see State v. Busch*, 669 N.E.2d 1125, 1127–28 (Ohio 1996).

<sup>48</sup> *State v. Whiteside*, No. 08AP-602, 2009 Ohio App. LEXIS 1652, 2009 WL 1099435, at ¶¶ 12, 21 (Ohio Ct. App. Apr. 23, 2009) (holding that, after weighing the relevant factors, the prosecution may retry the defendant a third time). Even though the *Whiteside* court chose to retry the defendant, the factors brought stability to the Court's consideration.

<sup>49</sup> *State v. Dickerson*, No. 1277, 1986 Ohio App. LEXIS 8149, 1986 WL 8797, at \*3 (Ohio Ct. App. Aug. 13, 1986).

<sup>50</sup> OHIO CONST. art. I, § 16 (emphasis added).

<sup>51</sup> *State v. Anderson*, 68 N.E.3d 790, 795 (Ohio 2016).

<sup>52</sup> *Direct Plumbing Supply Co. v. City of Dayton*, 38 N.E.2d 70, 72 (Ohio 1941); *see Wilson v. City of Zanesville*, 199 N.E. 187, 189 (Ohio 1935) (stating that the words "due course of law" are equivalent in meaning to "due process of law"), *overruled by City of Cincinnati v. Correll*, 49 N.E.2d 412 (Ohio 1943).

Ohio Supreme Court often still quotes United States Supreme Court decisions on the true meaning of the Ohio Bill of Rights guarantees.<sup>53</sup>

Despite these clauses' similarities, the Ohio Supreme Court held in *Arnold v. Cleveland* that “[a]s long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the Federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.”<sup>54</sup> Thus, the Ohio Supreme Court is free to provide its citizens with greater protections under its own Constitution than afforded to its citizens under the Federal Constitution.<sup>55</sup> The Ohio Supreme Court has been open and receptive to this construction in recent years, holding that the Ohio Constitution provides enhanced protections in various cases.<sup>56</sup> Notably, even if the Ohio Supreme Court previously has discussed provisions in the Federal and Ohio Constitutions jointly, it does not need to “irreversibly tie [itself]” to an old interpretation of the Ohio Constitution’s language because it is consistent with the Federal Constitution’s language.<sup>57</sup> Instead, the Ohio Supreme Court is free to read Article I, Section 16 more broadly than it reads the Federal Constitution to provide defendants like Anderson more constitutional protections.<sup>58</sup>

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<sup>53</sup> *In re Adoption of H.N.R.*, 47 N.E.3d 803, 809 (Ohio 2015) (“The Fourteenth Amendment to the United States Constitution provides that the state shall not deprive any person of life, liberty, or property without due process of law. Though it uses slightly different language, Article I, Section 16 of the Ohio Constitution provides the same guarantee.” (first citing U.S. CONST. amend. XIV; then citing OHIO CONST. art. I, § 16)); see *State v. Aalim*, 83 N.E.3d 862, 883 (Ohio 2016) (quoting *Medina v. California*, 505 U.S. 437, 443 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)) (“[B]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”)).

<sup>54</sup> *Arnold v. Cleveland*, 616 N.E.2d 163, 168–69 (Ohio 1993) (holding that a Cleveland ordinance was a reasonable exercise of police power). *Arnold* distinguishes state protections from federal protections.

<sup>55</sup> *Anderson*, 68 N.E.3d at 799 (Lanzinger, J., concurring) (“[T]he Ohio Constitution can indeed provide due-process protection that exceeds that which is provided by the United States Constitution.”).

<sup>56</sup> See *In re A.G.*, 69 N.E.3d 646, 651 (Ohio 2016) (stating that the Court is open to the idea that Ohio juveniles receive double-jeopardy protections in the Ohio Constitution that go beyond those in the Federal Constitution); see also *Humphrey v. Lane*, 728 N.E.2d 1039, 1044–45 (Ohio 2000) (clarifying that the Ohio Constitution’s Free Exercise Clause grants broader protections to Ohio’s citizens than the Federal Constitution affords).

<sup>57</sup> *State v. Mole*, 74 N.E.3d 368, 375 (Ohio 2016) (quoting *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211–22 (Ohio 1999)); cf. *State v. Farris*, 849 N.E.2d 519 (Ohio 2006) (holding that Article I, Section 10 of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution); *State v. Brown*, 792 N.E.2d 175, 177 (Ohio 2003) (holding that Article I, Section 14 of the Ohio Constitution “provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors”).

<sup>58</sup> *Mole*, 74 N.E.3d at 375. While the opposing side may argue that the federal floor trumps states’ wishes, it appears that other state courts are also increasingly relying more on their own constitutions when examining personal rights and liberties. See *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992) (“With a strongly independent state judiciary, Texas should borrow from well-reasoned and persuasive federal . . . precedent when this is deemed helpful, but should never feel compelled to parrot the federal judiciary.”); *State v. Johnson*, 345 A.2d 66, 67 (N.J.

Despite Ohio's freedom to provide greater due process protection than what stems from the Federal Constitution, the *Anderson* court focused on whether retrying Anderson violated double jeopardy—though double jeopardy does not properly apply to his facts because the court confronted multiple mistrials.<sup>59</sup> Ohio follows the United States Supreme Court; Ohio courts consistently refuse to separately consider substantive due process when they believe a more specific provision of the Constitution applies.<sup>60</sup> Therefore, when a defendant like Anderson asserted that multiple trials offend the Constitution's due process protections, the Ohio Supreme Court determined in *Anderson* that raising a generalized due process claim in defense to multiple mistrials "is nothing more than [the] double-jeopardy claim in different clothing."<sup>61</sup> Thus, "[g]overnment action violates due process only if it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>62</sup> Anderson clearly lost some fundamental principles of justice in the fourteen years that he remained in jail following his five mistrials. Yet, the Ohio Supreme Court remained committed to analyzing its Constitution in connection with the Federal Constitution and believed that Anderson's situation only warranted a discussion on double jeopardy.

### C. Change in the Historical Understanding of the Presumption of Innocence

A concept originally embedded in a defendant's constitutional right to due process says "[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution."<sup>63</sup> Historically in the United States, this age-old adage called the "presumption of innocence" found its roots in due process and English common law, requiring "a legal determination at trial to punish a defendant for a crime."<sup>64</sup> Given that guilt was not

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1975) ("[E]ach state has the power to impose higher standards on searches and seizures under state law than is required under the Federal Constitution."); Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 176 (2009) ("[T]he individual-rights guarantees of the Bill of Rights were based on pre-existing state constitutional guarantees, not the other way around."). Because other states are studying their own constitutions more closely, Ohio can do the same.

<sup>59</sup> *Anderson*, 68 N.E.3d at 795.

<sup>60</sup> See *United States v. Lanier*, 520 U.S. 259, 272 (1997); *Anderson*, 68 N.E.3d at 799 (Lazinger, J., concurring).

<sup>61</sup> *Anderson*, 68 N.E.3d at 796 ("The Double Jeopardy Clause deals specifically with the issue whether a defendant may be retried after a trial court has declared a mistrial."); see *When Defendant Challenges His Retrial, Double Jeopardy Clause Controls over More General Due Process Clause*, 33 Crim. L. News NL (West) No. 21, at 12 (2016) ("When a defendant challenges his or her retrial, the Double Jeopardy Clause controls over the Due Process Clause."). The opposing side supports a double jeopardy analysis. However, the opposing side fails to recognize the important constitutional protections afforded by the due process clause, so *Anderson* can be distinguished from opposing cases.

<sup>62</sup> *Patterson v. New York*, 432 U.S. 197, 202 (1977). The *Anderson* court determined that this standard was not met. Also, they rank due process as an inferior constitutional protection.

<sup>63</sup> OHIO REV. CODE § 2901.05(A) (2017).

<sup>64</sup> Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 727 n.17 (2011) ("The concept of the presumption of innocence is not a modern development, and is common to many ancient legal systems."); see *Coffin v. United States*, 156 U.S. 432, 454

determined until trial, one of the most striking protections that stemmed from the presumption of innocence was the constitutional right to pretrial release through bail.<sup>65</sup> Therefore, the presumption of innocence carried an important meaning.<sup>66</sup>

Starting in the 1960s, courts began to consider new factors before trial, including the weight of the evidence against a defendant and how his release would impact the community's safety.<sup>67</sup> These factors allowed judges to make predictions about defendants' guilt to ensure that criminals remained behind bars.<sup>68</sup> Furthermore, "[o]ver time, courts separated due process from the presumption of innocence."<sup>69</sup> Separating these two concepts helped to mold the courts' current view of the presumption of innocence—a presumption, which all too often, does not apply in the pretrial phase.

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(1895) (tracing the presumption of innocence from Deuteronomy and ancient Greek and Roman law); *see also* Taylor v. Kentucky, 436 U.S. 478, 485–86 (1978) (“Due process clause of Fourteenth Amendment safeguards against dilution of principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”); Wilkerson v. Commonwealth, 76 S.W. 359, 361 (Ky. 1903) (holding that punishment without evidence of guilt should not occur, and in this case the court should have instructed the jury to find the defendant not guilty).

<sup>65</sup> *See* Stack v. Boyle, 342 U.S. 1, 8 (1951) (explaining that a defendant is entitled to pretrial release until proven guilty as the spirit of bail is to “enable [the defendant] to stay out of jail until a trial has found them guilty”); Baradaran, *supra* note 64, at 733 (“Under U.S. law, the purpose of bail was to ensure the appearance of defendant to ‘submit to a trial, and the judgment of the court’ and not for preventing future crimes.”).

<sup>66</sup> Baradaran, *supra* note 64, at 737 n.75 (quoting United States v. Doyle, 130 F.3d 523, 539 (2d Cir. 1997)):

Unless and until the Government meets its burden of proof beyond a reasonable doubt, the presumption of innocence remains with the accused regardless of the fact that he has been charged with the crime, regardless of what is said about him at trial, regardless of whether the jurors believe that he is likely guilty, regardless of whether he is actually guilty. The presumption attaches to those who are actually innocent and to those who are actually guilty alike throughout all stages of the trial and deliberations unless and until that burden is met.

*Id.* This important meaning allowed a defendant to avoid suffering harm in jail while awaiting conviction.

<sup>67</sup> Baradaran, *supra* note 64, at 738 n.83 (citing United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) (holding that preventive detention is authorized under 18 U.S.C. § 3142(f) only if one of the conditions listed in that section is met)). Furthermore, the 1984 Bail Reform Act “allows the judge to conduct an abbreviated mini-trial to determine whether the defendant is guilty and whether she is likely to commit a crime while on release.” *Id.* at 753.

<sup>68</sup> *See* Bell v. Wolfish, 441 U.S. 520 (1979) (paving the way for pretrial detainees to be treated like convicts and discounting the application of the presumption of innocence); *but see* Benjamin Franklin, *Letter to Benjamin Vaughan*, (Mar. 14, 1785), <http://franklinpapers.org/franklin/framedVolumes.jsp?vol=42&page=712> (“That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long . . . approved . . .”).

<sup>69</sup> Baradaran, *supra* note 64, at 758 (“From the 1960s on, the determination of guilt by a judge pretrial, before the chance for a fair trial, was not generally found to violate due process.”).

*D. Lasting Harm Results from Extended Detainment Waiting for Trials*

As prosecutors continue to seek convictions, many defendants awaiting multiple trials cannot afford to return to the community; accordingly, an estimated 60.2% of the nation's jail population are detainees awaiting trial.<sup>70</sup> In 2010, the Ohio Department of Rehabilitation and Correction had nearly \$1.27 billion in jail and prison expenditures with an average annual cost per inmate of \$25,814 for inmates awaiting trial.<sup>71</sup> Though many of these inmates have not yet been convicted of any crime, they can be held alongside the ten percent of convicted offenders who are housed in jails rather than prisons, further blurring the lines between these two settings.<sup>72</sup> These detainees also suffer anxiety and exhaustion as their future continually remains uncertain.<sup>73</sup> Some commentators raise a compelling safety argument: remaining in prison hampers an anxiety-ridden defendant's ability to advocate to the court that he can successfully return to the community and prevents easy access to his representation.<sup>74</sup>

Further, negative psychological impacts often serve as a straining side effect of pretrial incarceration, stemming from factors such as a loss of security, distance from family and friends, exposure to deplorable conditions, and threats of violence in jail.<sup>75</sup>

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<sup>70</sup> Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1310 (2012) ("Nationally, taxpayers spend \$9 billion annually to incarcerate defendants held on bail."); *see generally* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1118 ("[Detainees] cannot work during the often considerable time that they spend in jail—leaving any children and other dependents to fend for themselves—and their jobs may not be waiting . . .").

<sup>71</sup> CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 10 (2012). This money is spent while many defendants sit in jail awaiting trial.

<sup>72</sup> Appleman, *supra* note 70, at 1320–21.

<sup>73</sup> *See* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1307 (2000):

One psychiatrist, while cautioning that not all falsely arrested people suffer serious effects, nonetheless concluded that false charges and pre-trial incarceration can lead to dissociative disorders, post-traumatic stress disorders, adjustment disorders, dysthymic disorders, and generalized anxiety disorders. Another professor of psychiatry was more skeptical, concluding that many claims of psychiatric problems following a wrongful arrest are exaggerated. But despite these doubts, the professor acknowledged that many of the former suspects "expressed great anger and resentment, some of which extended to feelings of retribution and revenge" at what had occurred, emotions the psychiatrist found quite reasonable, especially given the "stressful, onerous, unpleasant, costly, and humiliating experience" of being put through the criminal system.

*Id.*

<sup>74</sup> *See* Douglas J. Klein, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 294 (1997) ("Because of overcrowding, prisoners, including pretrial detainees, may be incarcerated in facilities far away from the district in which they are tried. This distance can inhibit a defense attorney from consulting with the pretrial detainee.").

<sup>75</sup> Appleman, *supra* note 70, at 1318–20 (describing the "unquestionable harm" offenders who are incarcerated pretrial suffer).

These factors often compel a defendant to plead guilty immediately and give up her right to trial.<sup>76</sup> Ohio courts need a solution because the aggravating factors associated with pretrial incarceration and—what this Note refers to as “post-trial incarceration”—during multiple mistrials.

### III. ANALYSIS

#### *A. Retrial After Multiple Mistrials Resulting from Hung Juries Violates the Ohio Due Course of Law Clause*

The Ohio Supreme Court should recognize factors for trial courts to consult for guidance in deciding whether a court may dismiss a case with prejudice.<sup>77</sup> These factors would enforce enhanced due process protections contained within Article I, Section 16 of the Ohio Constitution for defendants who have endured multiple mistrials after hung juries.<sup>78</sup> While many courts like *Anderson* argue that sweeping aside the due process claim for a double jeopardy analysis is correct, this section aims to highlight the problems behind multiple mistrials through a due process lens and shine light on a trial judge's crucial role in the process.

##### 1. Breaking Down the Ohio Due Course of Law Clause When the State Is a Sore Loser

A defendant's due process rights are negatively impacted if the State cannot succeed after multiple attempts at prosecution. Ohio courts should re-examine the holding in *Arnold* to give greater due process protections to Ohio's citizens who are, and have been, subject to multiple mistrials with no valid conviction.<sup>79</sup> *Arnold* held that the Ohio Constitution, a document of independent force, can give greater protections to individuals and groups than the Federal Constitution requires.<sup>80</sup> Despite *Arnold's* holding, the *Anderson* court refused to recognize greater due process protections for defendants subject to multiple mistrials; instead, the court only examined double jeopardy implications.<sup>81</sup> However, cases with defendants similar to *Anderson* do not offend double jeopardy, as juries neither convict or acquit such defendants; therefore, *Anderson* mistakenly pushes future courts to keep analyzing double jeopardy without considering the importance of due process protections.<sup>82</sup>

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<sup>76</sup> *Id.* at 1320 (“The prospect of being incarcerated, even for a short time, can look ruinous to poor defendants, as this often means the loss of their livelihood, severe disruptions to their family lives, or both.”).

<sup>77</sup> These factors described in Part IV *infra* will serve as the desperately needed solution I referred to at the end of Part II *supra*.

<sup>78</sup> OHIO CONST. art. I, § 16. I do encourage Ohio trial courts to use the factors in situations beyond hung juries.

<sup>79</sup> *Arnold v. Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (“The recent movement by state courts to rely on their constitutions, rather than on the federal Constitution, has been labeled ‘state constitutionalism’ or ‘new federalism.’ This movement has met with considerable approval.”).

<sup>80</sup> *Id.*

<sup>81</sup> *State v. Anderson*, 68 N.E.3d 790, 795 (Ohio 2016).

<sup>82</sup> *Id.* at 799–800 (Lanzinger, J., concurring).



Critics of a due process analysis erroneously follow the *Anderson* majority's view of multiple mistrials, holding that a defendant's multiple mistrials do not offend notions of justice.<sup>83</sup> Following *Anderson*, these critics continue to believe that courts should hastily push aside a due process challenge in favor of a double jeopardy analysis.<sup>84</sup> Examining double jeopardy will automatically permit a judge to order a new trial after a properly declared mistrial did not result in a conviction, regardless of the circumstances of the case.<sup>85</sup> *Anderson* correctly pointed out that double jeopardy does not attach when the trial court properly declares a mistrial.<sup>86</sup> However, as Justice Lanzinger recognized in her concurrence in *Anderson*, why should the analysis stop there?

The *Anderson* majority failed to consider *Arnold*'s implications and would not move beyond the Double Jeopardy Clause analysis, because the Double Jeopardy Clause is "more specific" than the general Due Process Clause.<sup>87</sup> However, by solely focusing on the Double Jeopardy Clause, a clause that courts have held inapplicable to multiple mistrials,<sup>88</sup> the Court swept *Anderson*'s due process rights away, denying Ohioans "justice administered without denial or delay."<sup>89</sup> These words embedded within the Ohio Due Course of Law Clause highlight protections that go beyond the Fourteenth Amendment because many mistrials delay the administration of justice to

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<sup>83</sup> *Id.*

<sup>84</sup> *State v. Lovejoy*, 683 N.E.2d 1112, 1116–17 (Ohio 1997) (finding that the State may retry a defendant after the trial court declared a mistrial). Thus, it has been proven that multiple mistrials do not offend double jeopardy because no conviction or acquittal resulted; yet, this analysis seems incomplete.

<sup>85</sup> *See Anderson*, 68 N.E.3d at 790; compare *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 (2003); with *Morris Reid Estes, Criminal Law and Procedure—Double Jeopardy—Trial Judge's Discretionary Power to Dismiss in Hung Jury Situations, State v. Witt*, 572 S.W.2d 913 (Tenn. 1978), 47 TENN. L. REV. 198, 198 (1979) ("Determining the point at which the government is prohibited from further inflicting the burden of trial upon an accused who has already undergone successive prosecutions that have ended in deadlocked juries tests the measure of protection afforded by the fifth amendment's double jeopardy clause.").

<sup>86</sup> *Anderson*, 68 N.E.3d at 796–97; see *Double Jeopardy Clause is Not Offended When State Seeks to Retry Defendant After Series of Properly Declared Mistrials*, 33 Crim. L. News NL (West) No. 21, at 13 (2016) ("[W]hile the Supreme Court was deeply troubled that a final resolution in this case had not been reached, there was no prohibition in the federal or state Double Jeopardy Clauses that barred the defendant's retrial after several mistrials had been declared.").

<sup>87</sup> *Anderson*, 68 N.E.3d at 796.

<sup>88</sup> *E.g.*, *United States v. Dinitz*, 424 U.S. 600 (1976); see, e.g., GA. CONST. 1983, art. I, § I, ¶ XVIII. (The Georgia Constitution expressly excepts the grant of mistrials from constituting double jeopardy); see generally *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169 (1977).

<sup>89</sup> OHIO CONST. art. I, §16; *Merit Br.*, *supra* note 22, at \*15–16 ("[W]hile Double Jeopardy may not prevent retrial after retrial . . . the right to have justice administered without denial or delay cannot suffer as a result of such continued attempts to convict."); *but see United States v. Perez*, 22 U.S. 579, 580 (1824) (holding that an accused could be reprosecuted consistently with the double jeopardy provision if the judge determined that it was manifestly necessary to discharge the jury prior to a verdict).

the victims and their families.<sup>90</sup> After these mistrials, courts can rightly assume that another attempt at prosecution would end in more deadlocked juries, lead to an acquittal, or produce juries unable to remain fair and impartial, which can delay the administration of justice indefinitely.<sup>91</sup> Another trial for these defendants is fundamentally unfair, as this indefinite delay places defendants in a position where they struggle to defend their liberty, especially if they remain incarcerated.<sup>92</sup>

Ohio should follow *Ingram* and dismiss cases when appropriate after multiple mistrials to avoid this fundamental unfairness.<sup>93</sup> In *Ingram*, police arrested defendant Edward Ingram for bank robbery.<sup>94</sup> After two mistrials, the government had no new evidence, but simply wished to keep pressing forward in the hopes that continuing would result in a conviction.<sup>95</sup> For defendants, like Anderson and Ingram, stuck in “legal limbo,” the issue is adversarial fairness, which strikes at the heart of the Due Course of Law Clause.<sup>96</sup> Courts fail to recognize that in these cases, the State has had its fair share of chances to convict.<sup>97</sup> Fair play now dictates dismissal.<sup>98</sup> Moreover, the State can only take away a defendant’s liberty upon proof beyond a reasonable doubt.<sup>99</sup> Multiple mistrials increases the likelihood that the State cannot meet this burden; yet, the Ohio Due Course of Law Clause continues to offer defendants little protection against abuse as the Clause becomes “shattered on the rocks of government power.”<sup>100</sup>

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<sup>90</sup> Merit Br., *supra* note 22, at \*14–15.

<sup>91</sup> *Id.*

<sup>92</sup> *Anderson*, 68 N.E.3d at 793.

<sup>93</sup> *United States v. Ingram*, 412 F. Supp. 384 (1976).

<sup>94</sup> *Id.* at 385.

<sup>95</sup> *Id.*; *but see* *Aguilera v. Walsh*, No. 01CIV. 2151(RWS), 2001 U.S. Dist. LEXIS 16711, 2001 WL 1231524 at n.6 (S.D.N.Y. Oct. 17, 2001) (distinguishing *Ingram* after the defendant Aguilera claimed that retrials violated his due process rights).

<sup>96</sup> *Ingram*, 412 F. Supp. at 385.

<sup>97</sup> *Id.*; *see* Merit Br., *supra* note 22, at \*15–16 (“[T]he court dismissed the prosecution as a matter of ‘fair play.’ *Ingram* involved dismissal of an indictment following two hung jury mistrials where no new evidence was anticipated. Like *Ingram*, this case is one where the government has no new proof; it simply wants another chance.”); *see also Ex parte Anderson*, 457 So.2d 446, 451–52 (Ala. 1984) (explaining that hung juries resulted when a defendant was tried three times for capital murder of a police officer). Dissenting opinions have also pointed out the need to recognize fairness:

The test is one of essential, basic fairness. How many times must a defendant in a criminal case be put to trial, with each one ending in a hung jury, before the ‘unfairness’ flag is raised? If three times is not enough, would three more times likewise not be enough?

*Id.* at 452 (Jones, J., dissenting).

<sup>98</sup> *Ingram*, 412 F. Supp. at 384–85.

<sup>99</sup> Merit Br., *supra* note 22, at \*26 (discussing the Winship standard of “proof beyond a reasonable doubt”).

<sup>100</sup> *Id.* at \*17–18 (“To allow this prosecution to go any further violates the fair play that the Constitution says must obtain.”).

Ohio must breathe new life into this Clause, utilizing cases like *Ingram* to give greater protections to citizens facing multiple mistrials. Despite the State's valid efforts and the seriousness of the charges, notions of adversarial fairness are still in play, cutting against the State's sore attempt to wear down defendants with more retrials when no new evidence of guilt exists, and chances for a hung jury increase.<sup>101</sup>

## 2. A Trial Judge's Refusal to Dismiss After Multiple Mistrials Can Lead to Claims Alleging Judicial Misconduct

When the State does not act, the Ohio Due Course of Law Clause demands measures by the judiciary to correct an unfairness that cannot be overlooked.<sup>102</sup> For example, *Witt* permits judges to examine two factors to ensure fairness to defendants:

[T]rial judges have the inherent authority to terminate a prosecution in the exercise of a sound judicial discretion, where . . . repeated trials, free of prejudicial error, have resulted in genuinely deadlocked juries and where it appears that at future trials substantially the same evidence will be presented and that the probability of continued hung juries is great.<sup>103</sup>

This authority must be used with the greatest caution.<sup>104</sup> *Witt*'s two factor analysis demonstrates judges' prudent mindsets aimed at protecting the rights of the defendants, their victims, and their families when exercising this inherent authority.<sup>105</sup> However, if a judge refuses to act when the time comes, claims alleging judicial misconduct could surface.<sup>106</sup> Therefore, utilizing a full set of factors above and beyond the two factor test in *Witt* could help judges evade any of these allegations in Ohio.

"[T]o prevail on a claim of judicial misconduct, [a] petitioner must show that the state trial judge's conduct was so fundamentally unfair as to deprive him of his

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<sup>101</sup> *Id.* at \*13–14. Utilizing factors will also help Ohio avoid these constitutional violations.

<sup>102</sup> *See Moore v. Dempsey*, 261 U.S. 86, 87 (1923) (noting that defendants were deprived due process of law). Because defendants subjected to multiple mistrials have been denied their constitutional protections etched into Ohio's Due Course of Law Clause, the judiciary must step in and right this wrong. Merit Br., *supra* note 22, at \*5–6. If this clause gives greater protections to Ohio's citizens than the Federal Constitution's due process clause, the courts have another reason to step in to enforce these protections.

<sup>103</sup> *State v. Witt*, 572 S.W.2d 913, 917 (1978) (noting the importance of a trial judge's inherent authority to dismiss); *see State v. Kyles*, 706 So.2d 611, 614 (La. Ct. App. 1998) (noting that "a decision [to dismiss] is a matter of sound judicial discretion by the trial court who heard the evidence, polled the juries, and is in the best position to know at what point 'enough is enough'"). In *Kyles*, the State tried defendant Realtor four times after indicting him for first degree murder. *Kyles*, 706 So.2d at 614.

<sup>104</sup> *Witt*, 572 S.W.2d at 917 (nothing that the trial judge can invoke the court's "discretionary right . . . in the interest of justice" as a basis for dismissing the indictments following mistrials due to jury deadlock. In *Witt*, defendants were indicted for first degree murder).

<sup>105</sup> *Id.*

<sup>106</sup> *See, e.g., Brown v. McKinney*, 358 F. Supp. 2d 161, 173 (E.D.N.Y. 2005) (holding that state trial judge questioning defendant during trial does not rise to the level of judicial misconduct).

constitutional right to due process.<sup>107</sup> These claims could arise if prosecutors use their resources to repeatedly try to convince a jury to convict while a defendant remains in a frozen state of fear and exhaustion.<sup>108</sup> A time will come where a judge must step in, order the action that halts this unfairness, and declare that the State's attempts at conviction have run dry.<sup>109</sup> Refusing to recognize that enough is enough is fundamentally unfair, and, as stated above, violates a defendant's due process rights.<sup>110</sup> Though judges possess the inherent power to end a prosecution after multiple mistrials, deciding whether or not dismissal is appropriate is more complicated. To avoid allegations of judicial misconduct when a trial judge allows the State to endlessly seek a conviction, Ohio's trial judges need factors to help them properly exercise their "implicit powers" to terminate a prosecution, especially after hung juries.<sup>111</sup> A list of factors beyond the two discussed in *Witt* will guide a judge in Ohio to better know whether the time has come to make this crucial decision.

*B. Keeping a Defendant in Limbo During Mistrials Causes Lasting Psychological Harm and Augments the Possibility of Conviction*

Besides quieting claims of judicial misconduct, Ohio's new factors will decrease the likelihood that an incarcerated defendant will suffer psychological harm as he sits in jail through multiple mistrials. Defendants need protection "against the trauma and expense of multiple trials."<sup>112</sup> As two scholars note, "[t]he consequences of pre-trial incarceration can be devastating for people already struggling to make ends meet, resulting in lost jobs, homelessness, disrupted mental health, substance abuse and medical treatment . . . ."<sup>113</sup> These conditions could only become much worse while

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<sup>107</sup> *Id.* at 172–73; see *Gayle v. Scully*, 779 F.2d 802, 806 (2d Cir. 1985); see also *Robinson v. Ricks*, No. 00 CV 4526 JG, 2004 U.S. Dist. LEXIS 14023, 2004 WL 1638171 (E.D.N.Y. July 22, 2004).

<sup>108</sup> *State v. Abbati*, 493 A.2d 513, 519 (N.J. 1985).

<sup>109</sup> See, e.g., *id.* at 520–21.

<sup>110</sup> *Id.* at 519. ("The anxiety, vexation, embarrassment, and expense to the defendant of continual reprosecution where no new evidence exists is a proper subject for the application of traditional notions of fundamental fairness and substantial justice.")

<sup>111</sup> *State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982); see *State v. Whiteside*, No. 08AP-602, 2009 Ohio App. LEXIS 1652, 2009 WL 1099435, at ¶ 20 (Ohio Ct. App. Apr. 23, 2009) (stating that on appeal, appellant argues to this court that he was held in jail for over two years enduring the "stress and strain of multiple trials and long periods of uncertainty"). Having a test will also avoid judicial misconduct claims from parties accusing a judge of prematurely discharging the jury. See *Webb v. Court of Common Pleas*, 516 F.2d 1034 (3d Cir. 1975) (providing an example of judicial misconduct claim). The opposing side may argue that hung juries are rare. However, for example, "[s]tate court hung jury rates in 30 large, urban jurisdictions averaged 6.2 percent." PAUL L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 83 (2002). This type of hung jury rate should be a cause for concern.

<sup>112</sup> *Estes*, *supra* note 85, at 199.

<sup>113</sup> Lisa Schreibersdorf & Andrea Nieves, *Pre-Trial Detention and Bail*, in THE STATE OF CRIMINAL JUSTICE 2016, 97 (Mark E. Wojcik ed., 2016) I believe post-trial incarceration augments these problems as well, especially because defendants can experience trouble coping with a longer incarceration period despite no conviction at trial.

defendants wait for a new trial to start after a mistrial. For example, years of isolated incarceration while in “legal limbo” damages a prisoner’s mental stability because “[i]mprisonment can create or exacerbate mental health conditions.”<sup>114</sup> These mental health conditions could push a detainee to attempt suicide or resort to more violence while behind bars.<sup>115</sup> When no resolution is announced after trial, defendants return to jail, piling more of this strain on themselves, their families, and the criminal justice system during post-trial incarceration. With no money for release and no judgment entered, defendants stay behind bars while the State endlessly retries their cases.

Incarceration also augments the possibility of conviction.<sup>116</sup> Incarcerated defendants are much more likely to plead guilty and serve prison time than those released pretrial.<sup>117</sup> In New York City, ninety percent of people detained on bail plead guilty as compared to forty percent of people who are not detained.<sup>118</sup> Multiple retrials after mistrials drain defendants both emotionally and mentally; thus, they could plead guilty simply to end this “Wheel of Misfortune.”<sup>119</sup> Anderson told the trial judge that “[h]e is worn down. His family is worn down. His lawyer is worn down.”<sup>120</sup> Burdens such as limited access to proper representation push defendants like Anderson to accept these plea bargains.<sup>121</sup> Likewise, after the State fails and prepares to try again, the defendant’s return to jail can be devastating.<sup>122</sup> If Ohio adopts factors to consider,

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<sup>114</sup> Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCHOL. 56 (2014) (distinguishing defendants who are incarcerated from those who are not).

<sup>115</sup> *Id.*; see, e.g., Schwirtz & Winerip, *supra* note 10; see also Wiseman, *supra* note 70.

<sup>116</sup> Klein, *supra* note 74, at 294 (“[T]he tendency of pretrial detainees ultimately to be found guilty may reflect juror bias. Jurors may reason that if the defendant was incarcerated, then he must be guilty of the charged offense because the government would not have jailed the defendant in the first place.”).

<sup>117</sup> Appleman, *supra* note 70, at 1320 (“The mere possibility of pretrial imprisonment often compels defendants to plead guilty and give up their right to trial.”); see, e.g., Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 499–556 (2012) (ultimately suggesting to readers that judges could release 25% more defendants); see also SCHÖNTEICH, *supra* note 4, at 1 (“Given that the presumption of innocence is universal, detaining arrestees pending trial should be rare.”). This idea can be distinguished from those who are released before trial.

<sup>118</sup> Schreibersdorf & Nieves, *supra* note 113, at 97.

<sup>119</sup> This can be distinguishable from only pre-trial detention before one trial. See, e.g., Eric M. Johnson, *Washington Teacher Told Not to Use Disciplinary “Wheel of Misfortune,”* REUTERS (Oct. 17, 2014), <http://www.reuters.com/article/us-usa-washington-misfortune-idUSKCN0162GL20141017>. Anderson has been stuck spinning in this wheel for over fourteen years.

<sup>120</sup> Merit Br., *supra* note 22, at \*9. A 2012 report by the New York City Criminal Justice Agency determined that “detention itself creates enough pressure to increase guilty pleas.” Schreibersdorf & Nieves, *supra* note 113, at 98.

<sup>121</sup> F. Andrew Hessick III, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 207 (2002).

<sup>122</sup> See Karl Eters, *Judge Declares Mistrial in Henry Segura Murder Trial*, TALLAHASSEE DEMOCRAT (Aug. 16, 2017), <http://www.tallahassee.com/story/news/2017/08/16/jury-finds-segura-quadruple-murder-charges/571846001/>.

courts will be able to determine when to release these detained defendants and avoid further harm from post-trial incarceration.<sup>123</sup>

Many detainees plead guilty because “in some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences.”<sup>124</sup> Anderson’s case can be distinguished from others not confronting multiple mistrials. In 2017, Anderson will spend his fifteenth year in jail awaiting conviction and already would have been eligible for parole if a jury had convicted him after his first trial.<sup>125</sup> Not all defendants can steadfastly assert their innocence as long as Anderson, especially when juries cannot render an effective decision to acquit or convict. Weighing factors will allow Ohio courts to avoid this fundamentally unfair and lengthy post-trial incarceration, essentially serving a “sentence” without a conviction.

### *C. Does the Presumption of Innocence Become the Presumption of Guilt?*

Allowing prosecutors relentlessly to try to get a conviction from the jury muddles the fundamental right provided to all defendants facing criminal charges: the presumption of innocence. The prosecution’s diligent efforts to convict and a trial court’s refusal to dismiss an indictment following multiple mistrials, especially despite repeated hung juries, demonstrate that these trial court actors may be presuming that a defendant like Anderson did commit the crime.<sup>126</sup> Justice Black describes this danger of searching for guilt where it does not exist in *Green v. United States*:

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<sup>123</sup> Although the State and its supporters may counter this argument by asserting that post-trial incarceration is necessary to avoid flight and ensure the community’s safety, this argument fails and can be distinguished from this situation “because it seems to punish accused offenders before conviction by members of the community, violating the very spirit of our criminal justice system.” See Appleman, *supra* note 70, at 1321.

<sup>124</sup> See Wiseman, *supra* note 70.

Detention also puts the detainee in a disadvantageous position during the plea bargaining process; entails a danger of extracting an unreliable confession from a detainee who is ready to pay a grave price in return for immediate freedom or ending the uncertainty; and many studies indicate a subconscious bias and prejudice against defendants that are held in custody that is reflected in both the verdict and sentence. This result may stem from a variety of circumstances including the damage caused to the defense by the detention.

Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 286 (2002).

<sup>125</sup> State v. Anderson, 68 N.E.3d 790, 800 (Ohio 2016) (Lanzinger, J., concurring). Though not explored in this Note, this excessive “post-trial incarceration” could be considered cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution, especially because these detainees are arguably being punished with no conviction. However, courts have not yet been willing to take such an approach. *E.g.*, Harris v. State, 539 A.2d 637, 644 (Md. 1988) (holding that another capital punishment sentencing hearing would not constitute cruel and unusual punishment despite “unnerving strain” induced by the numerous death penalty hearings).

<sup>126</sup> See Merit Br., *supra* note 22, at \*5–6.

The Constitution presumes that Chris Anderson did not commit this crime. The State is entitled to rebut that presumption with evidence at a trial. It has been unable to do so, despite ample opportunity. So far, those in power have presumed Chris Anderson did

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>127</sup>

Regardless of the presumption of innocence, Justice Black suggests that a court or a jury may find guilt where none exists if the prosecution can infer guilt prematurely while a criminal defendant is forced to endlessly endure multiple mistrials.<sup>128</sup> This premature assumption of guilt essentially erases the presumption of innocence. However, as the trial judge boldly proclaimed in *State v. Abbati*:

The entire question [of when to dismiss an indictment with prejudice following multiple mistrials] must be viewed, considered, analyzed and decided in the shadow of, and against a backdrop of the fundamental and omnipresent proposition that the defendant is innocent until proven guilty and it is the State's burden to prove that guilt. Should the State, having failed to prove guilt, be permitted to indefinitely try the defendant until barred only by a unanimous pronouncement by 12 jurors that it has failed? Given the disabilities, stigma, financial hardship, uncertainty and restrictions that are visited upon a criminal defendant pending trial, it would seem to fly in the face of the national philosophy implicit in these constitutional safeguards to answer that question any way other than, no.<sup>129</sup>

Therefore, Ohio should adopt the trial judge's views in *Abbati*. Ohio trial courts need to view the multiple mistrials question by first considering the presumption of innocence to prevent its disappearance. Perhaps judges could instruct the jury to remember this presumption, or the defense could remind the jury and the judge of its importance before deliberations. These courts should conduct further analysis with this presumption at the forefront.

### 1. Impact on the Victim and Her Family

While prosecutors and other critics supporting the interests of the State argue that justice for victims and Ohio's citizens must be attained through a conviction, in this instance, that argument is weak and distinguishable.<sup>130</sup> When a defendant faces multiple mistrials, "a serious crime is [likely] involved."<sup>131</sup> These serious crimes, such

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commit the crime. It is through those glasses that they have viewed the Ohio and United States Constitutions.

*Id.* Tension now exists between a defendant's right to be presumed innocent unless proven guilty by a unanimous jury during his trial and the prosecution's right to a conviction.

<sup>127</sup> *Green v. United States*, 355 U.S. 184, 187–88 (1957).

<sup>128</sup> *Id.*

<sup>129</sup> *State v. Abbati*, 478 A.2d 1212, 1218 (N.J. Super. Ct. App. Div. 1984); see *State v. Gonzales*, 49 P.3d 681, 686 (N.M. Ct. App. 2002) (adopting *Abbati*'s factors "to be weighed by the trial court in deciding a motion to dismiss after successive trials result in deadlocked juries." Here, father and son were indicted for first-degree murder and two trials resulted in hung juries).

<sup>130</sup> *Merit Br.*, *supra* note 22, at \*25.

<sup>131</sup> *State v. Sauve*, 666 A.2d 1164, 1169 (Vt. 1995).

as robbery, rape, kidnapping, murder, and aggravated murder, are crimes where victims and their families must suffer through these endless trials and must relive their experiences.<sup>132</sup> In *Anderson*, though Amber Zurcher was tragically murdered, her family and friends continue to wait for almost fifteen years for some sense of closure that they rightfully deserve.<sup>133</sup> Furthermore, crime victims have little or no say about how law enforcement conducts investigations, what charges the prosecutor chooses to bring, or whether the prosecutor will offer the defendant a plea bargain.<sup>134</sup> For many of these reasons, victims and their families, like Amber Zurcher's family, are put "in an extraordinary position of dependence and trust."<sup>135</sup> Therefore, critics of dismissal see the trial court's job as one in which it needs to respond to the victim's interests.<sup>136</sup> Such victims clearly want to see the offenders punished. However, incarcerated defendants who sit in limbo during multiple mistrials experience a significant loss of personal freedom while they wait endlessly for a verdict.<sup>137</sup> If a jury cannot render one, victims should rethink what they consider punishment and be open to the idea that while a dismissal may not provide closure, law enforcement can try to gather other suspects for the crime. Additionally, though admittedly quite hard to pursue, perhaps victims should acknowledge the defendant's loss of freedom as punishment enough, consider that the presumption of innocence should prevail, and understand that a dismissal might be warranted.

## 2. The Interests of the Prosecutor and the Community at Large

Critics of dismissal argue the prosecution's valid efforts and the State's strong interest in the public safety compete with the presumption of innocence. Prosecutors see victims suffering from tragedy, commit to getting a conviction, and present all evidence they receive.<sup>138</sup> If prosecutors take valid steps to obtain a conviction and engage in no misconduct, many of them believe that they deserve to seek another trial after a mistrial regardless of hung juries.<sup>139</sup> Moreover, prosecutors are supposed to

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<sup>132</sup> *Id.*

<sup>133</sup> *State v. Anderson*, 68 N.E.3d 790 (Ohio 2016).

<sup>134</sup> See Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1040 (2015) (discussing crime victim and prosecutors' roles in a criminal prosecution).

<sup>135</sup> *Id.*

<sup>136</sup> *Myers v. Frazier*, 319 S.E.2d 782, 786 (W. Va. 1984).

<sup>137</sup> See Marianna Bettman, *How Many Times Can a Criminal Defendant Be Re-Tried?*, AM. ISRAELITE (Dec. 1, 2016), [http://www.americanisraelite.com/legally\\_speaking/article\\_d79673d4-b65f-11e6-9a55-b74b35587492.htm](http://www.americanisraelite.com/legally_speaking/article_d79673d4-b65f-11e6-9a55-b74b35587492.htm).

<sup>138</sup> Bishop & Osler, *supra* note 134, at 1035–36 (noting that the prosecutor's ego is something not to be overlooked).

<sup>139</sup> See *State v. Abbati*, 478 A.2d 1212, 1218 (N.J. Super. Ct. App. 1984) (noting that although prosecutor's discretion to re-prosecute defendant is subject to power of court, trial court must defer to prosecutor's decision when fundamental fairness does not compel dismissal); see also *State v. Sauve*, 666 A.2d 1164, 1169, 1172 (Vt. 1995) ("[T]he trial court's discretion [to dismiss] is itself limited by the deference it must normally give to the prosecutor's decision to retry a case.").



seek justice.<sup>140</sup> If courts release defendants who face serious charges back into the community before a jury convicts them, such a premature release could jeopardize the community's safety.<sup>141</sup> The 1984 Bail Reform Act, a federal statute that states including Ohio have studied for use in its own laws, was predicated on the protection of the community.<sup>142</sup> If an indicted defendant like Anderson did indeed commit the crime, allowing him to return to the community and potentially commit more crimes could put another innocent victim in harm's way.<sup>143</sup> For these reasons, "[t]he State, the victim, and the public at large all have an interest in obtaining a conclusive outcome in a criminal prosecution"; crime victims and the community should feel safe regardless of numerous mistrials resulting in the defendant's loss of freedom.<sup>144</sup>

### 3. The Prompt Administration of Justice and Reviving the Presumption of Innocence

Despite the interests the victim, the prosecutor, and the community have in a conviction, society has a strong interest in the prompt administration of justice.<sup>145</sup> Yet, this prompt administration of justice could very well be a dismissal with prejudice by the trial judge. Looking to *Anderson*, the Court "ignores that the 'ends of justice' [that must be met through a conviction] does not mean repeated attempts to convict a defendant who someone in authority thinks is guilty."<sup>146</sup> A trial court actor, whether the judge or prosecutor, does not have the right to find guilt prematurely just to award the victims justice at the defendant's expense.<sup>147</sup> More mistrials only means "a victim

<sup>140</sup> See *People v. Boyer*, 430 N.Y.S.2d 936, 946 (N.Y. Crim. Ct. 1980) ("The decision to dismiss an information in furtherance of justice should be utilized 'as sparingly as garlic.'"); *Appleman*, *supra* note 70.

<sup>141</sup> *Sauve*, 666 A.2d at 1168 (noting that the court needs to weigh the interest of the community at large); *but see* *Kitai*, *supra* note 124, at 282 ("Preserving the presumption of innocence until the end of the criminal proceedings, despite incriminating evidence, demonstrates that the accused person's status is equal to that of other members of the community; she is entitled to the same spectrum of rights and obligations.")

<sup>142</sup> *Appleman*, *supra* note 70, at 1330.

<sup>143</sup> See *Bishop & Osler*, *supra* note 134.

<sup>144</sup> *Sauve*, 666 A.2d at 1169.

<sup>145</sup> *Id.* ("Repeated trials involving the same offense can frustrate the search for truth and the effective administration of justice by depleting the resources of the parties, by imposing hardships on witnesses, and by fostering the perfunctory presentation of stale testimony, the exaggeration of subtle differences in witnesses' recollections to challenge their credibility, and the tailoring of testimony based on the jury's perceived reaction in prior trials.")

<sup>146</sup> *Merit Br.*, *supra* note 22, at \*25.

<sup>147</sup> It is also important to note that a prosecutor could be wrong, and wrongful conviction is important to avoid at all costs. See *Bishop & Osler*, *supra* note 134, at 1035–36:

Piled on top of the heavy weight of tragedy and judgment for a conscientious prosecutor is the repulsive cost of being wrong. Being a prosecutor is comparable to being a surgeon, whose smallest slip-up can lead to death. For prosecutors, a mistake can lead to that same result (in death penalty states), or to a lesser but still terrible wrong: the lengthy incarceration of an innocent person.

*Id.* at 1034–35. Scholars also argue that pretrial detainment is an example of finding guilt prematurely. See *Appleman*, *supra* note 70, at 1321–22 ("These offenders are considered innocent at this phase of the criminal process . . . . Punishment, in other words, is being imposed

will incur [trauma] by reliving his experience” at more trials with no resolution in sight.<sup>148</sup> Scholars note that the presumption of innocence is a “cloak” that should never come off unless the prosecution proves the defendant is guilty beyond a reasonable doubt.<sup>149</sup> Removing this “cloak” too early has created a new tension between the presumption of innocence and the prosecution’s right to pursue a conviction. But for Anderson, another trial only means more unnecessary reminders of Amber’s tragic death for her family and friends as the prosecution tries to convict Anderson yet again. While the judge should take the interests of prosecutors, crime victims, and the community into consideration before agreeing to dismiss an indictment with prejudice, if the prosecution cannot convince a jury of the defendant’s guilt, then the judge must release the defendant to avoid a greater loss of freedom. A defendant’s release when the appropriate time has come will likely help preserve the presumption of innocence and return this concept to its historical roots.<sup>150</sup>

#### IV. A SOLUTION TO OHIO’S PROBLEM: PROPOSED FACTORS TO TACKLE THIS ISSUE

Although many other states have adopted factors for trial courts to consider when confronted with the issue of multiple mistrials,<sup>151</sup> the Ohio Supreme Court has not yet followed suit in recognizing any factors of its own. Consequently, the court leaves defendants in Ohio without answers even though valid solutions exist. If trial judges can determine whether the situation warrants dismissal by weighing factors, their discretion will be more likely to survive harsh criticism by dissatisfied parties. Recently, when Ohio’s Seventh Circuit Court of Appeals confronted Anderson’s motion to dismiss, the judges examined Hawaii’s and Iowa’s factors because courts

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on those not yet convicted, without the imprimatur of the jury.”). I expand on this notion by arguing that post-trial incarceration without a conviction is another example of finding guilt prematurely. See discussion *infra* Section III.B. Employing factors will help return to the presumption of innocence’s roots, where the presumption disappeared only if guilt was established at trial by proof beyond a reasonable doubt.

<sup>148</sup> See, e.g., *United States v. Mechanik*, 475 U.S. 66, 72 (1986); *United States v. Hasting*, 461 U.S. 499, 507 (1983); Lisa H. Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 *FORDHAM L. REV.* 130, 145 (1987).

<sup>149</sup> See *Pagano v. Allard*, 218 F. Supp. 2d 26, 35 (D. Mass. 2012) (“[W]hen the prosecutor described the presumption as a ‘cloak’ that ‘comes off’ at the ‘end of the trial,’ he diluted the petitioner’s right to be presumed innocent until proven guilty beyond a reasonable doubt.”).

<sup>150</sup> See, e.g., Kitai, *supra* note 124, at 282. (“The presumption of innocence bears a declarative and educational message that as long as a court has not determined the accused’s guilt, she is entitled to a presumption of innocence to the same degree as the policeman that is investigating her, the prosecutor that is putting her on trial, and the judge that is delivering the judgment in her case.”).

<sup>151</sup> Another example not discussed previously is *People v. Kirby*, 460 N.Y.S.2d 572, 573 (N.Y. App. Div. 1983) (choosing to reinstate a murder charge when it was first dismissed by a trial court following three hung juries after the court weighed various factors); see *Sullivan v. State*, 874 S.W.2d 699, 702 (Tex. App. 1994) (holding that a judge has the discretion to consider factors in deciding whether to dismiss an indictment for defendant Sullivan accused of murder after three attempts at conviction ended in mistrials).

like the Ninth District in *Roper*<sup>152</sup> had previously taken the initiative to examine other states' factors.<sup>153</sup> Yet, the Ohio Supreme Court refuses to recognize these factors, leaving Ohio courts without adequate guidance for this exceptionally difficult exercise of discretion.

#### A. The Proposed Factors

Because Ohio's lower courts—like the *Roper* court, which utilized a two-factor test—are willing to examine factors when deciding whether to dismiss, the Ohio Supreme Court should follow suit. Ohio should follow precedent from other states to ensure that judges do not overlook defendants' constitutional rights, rights to a presumption of innocence, and rights to a release from jail after multiple mistrials. Judges should weigh these factors after considering the presumption of innocence, and the judges should not dismiss the interests of the victim and the community at large when weighing the factors.<sup>154</sup> With these rights in mind, Ohio should adopt the *Moriwake* factors with the addition of one *Lundeen* factor.<sup>155</sup> Ohio courts should utilize the following seven factors in this order:

- 1) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known;
- 2) the character of prior trials in terms of length, complexity, and similarity of evidence presented;
- 3) the likelihood of any substantial difference in a subsequent trial, if allowed;
- 4) whether the defendant is or has been incarcerated awaiting trial, and the length of such incarceration;
- 5) the severity of the offense charged;
- 6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney; and

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<sup>152</sup> *State v. Roper*, No. 20836, 2002 Ohio App. LEXIS 7191, 2002 WL 31890116, at ¶ 87 (Ohio Ct. App. Dec. 31, 2002).

<sup>153</sup> *State v. Moriwake*, 647 P.2d 705, 711–12 (Haw. 1982) (holding that the trial court properly dismissed an indictment with prejudice accusing defendant Gilbert Masaru Moriwake of manslaughter after two hung juries resulted in mistrials); *State v. Anderson*, No. 11 MA 43, 2015 Ohio App. LEXIS 1956, 2015 WL 3409047, at ¶¶ 13–16 (Ohio Ct. App. May 20, 2015); *Roper*, No. 20836, at ¶ 87; *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa Ct. App. 1980) (holding that a remand to the trial court was necessary to weigh factors and decide if charges accusing defendant, Tina Patrice Lundeen, of selling alcoholic beverages to a minor should be dismissed).

<sup>154</sup> *See, e.g., State v. Knapstad*, 706 P.2d 238, 242 (Wash. Ct. App. 1985) (“The decision necessarily involves weighing justice to society and fairness to the defendant and involves consideration of such factors as the availability of evidence of guilt.”).

<sup>155</sup> *See* Annotation, *Propriety of Court's Dismissing Indictment or Prosecution Because of Failure of Jury to Agree After Successive Trials*, 4 A.L.R.4th 1274 (1981) (discussing the outcome in *State v. Moriwake*) (“[T]here was no indication that third trial would proceed any differently than previous two nearly identical trials in which two separate juries were unable to reach verdict despite sound judicial efforts to encourage ‘considered judgment.’”).

7) the trial court's own evaluation of the relative case strength.<sup>156</sup>

The factors applying to a specific defendant's mistrials will depend on the facts and circumstances of the individual case. These proposed factors are more detailed than the two-factor analysis example in *Witt*, but limited enough at seven factors that an Ohio trial court could avoid confusion or an overwhelming decision-making process.<sup>157</sup>

### B. Applying the Factors

A defendant's constitutional right to due process and his right to a presumption of innocence must be protected. Ohio's first three new factors will push the trial judge to seriously look at the trial (or trials) already completed and to consider what a possible new trial would entail. Because some judges will face a decision to dismiss after only one mistrial, and some judges will face this decision after multiple mistrials like in *Anderson*, trial judges need to first look backwards and seriously consider whether the number of mistrials have substantially impacted the defendant's right to due process.<sup>158</sup>

Furthermore, judges can declare mistrials for a variety of reasons.<sup>159</sup> Some mistrials are the result of deadlocked juries while others stem from erroneous evidentiary rulings or misconduct by the jurors, prosecutor, or defense.<sup>160</sup> Though the types of mistrials vary, if the judge examines the reasons each mistrial, she can better understand whether or not a retrial will unfairly prejudice the defendant or unfairly end the prosecution's efforts.<sup>161</sup> Finally, the judge needs to examine the characteristics of the prior trial (or trials). The judge must look at the evidence presented, how long the trials lasted, and how complex the facts, witnesses, and exhibits surrounding the case are to better understand why the trials did not end with a jury verdict. Therefore, the first two factors will ensure that a judge looks backward, closely examines the previous trials, and accounts for the circumstances surrounding the decisions to declare mistrials.

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<sup>156</sup> *Moriwake*, 647 P.2d at 711–12; *Lundeen*, 297 N.W.2d at 236 (hereinafter each individually referred to in successive order as “factor one, factor two, factor three, factor four, factor five, factor six, and factor seven”). All of the factors are derived from *Moriwake* except for factor four, the defendant's incarceration factor, which comes from *Lundeen*. Most cases cited to in this Note reference both *Moriwake* and *Lundeen*.

<sup>157</sup> See, e.g., Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 35 IND. L. REV. 1347, 1364 (2002) (“[T]he test adopted . . . in *Sivels* will likely be easily applied in future cases because, although it includes all the relevant considerations, generally only few will apply in a given case.”).

<sup>158</sup> *Merit Br.*, *supra* note 22, at \*19–20.

<sup>159</sup> DANIEL E. HALL, *CRIMINAL LAW AND PROCEDURE* 292 (7th ed. 2014).

<sup>160</sup> *Id.* In this Note, I have focused on deadlocked juries as a strong reason for dismissal.

<sup>161</sup> *Moriwake*, 647 P.2d at 711–12 (examining in detail two previous mistrials with no new expectations for a third trial); see generally Carrie Leonetti, *When the Emperor Has No Clothes II: A Proposal for a More Serious Look at “The Weight of the Evidence,”* 7 N.Y.U. J. L. & LIBERTY 84, 85, 88 (2013) (exploring situations where “the prosecution charges an offense that it has no chance of proving”). If the prosecution intends to introduce no new evidence at a subsequent trial, Leonetti suggests that the case be considered a “weak” one. *Id.* at 88.

After the trial judge examines the prior mistrials, she can look ahead to the impact of future trials using factor three. Many of these new trials—following validly declared mistrials—are identical to the previous trials, with the same evidence and arguments from both sides.<sup>162</sup> For example, in future trials for Anderson, the prosecutor plans to present his case with the same evidence as used in the previous trials.<sup>163</sup> Trial judges in Ohio need to look forward and attempt to realistically predict if another trial will be any different to ensure that prosecutors are not given endless chances to convict. If the prosecution does not plan to present new evidence at trial and more than just one trial has ended in mistrial, the trial judge may come to the “breaking point” where enough is enough; the judge can use these first three factors to back up her decision to dismiss the indictment.<sup>164</sup>

The fourth factor from *Lundeen* examines the defendant’s incarceration; a judge can use this factor to seriously consider the dangers of continued post-trial incarceration after mistrials.<sup>165</sup> When a trial judge examines the defendant’s incarceration, using Anderson’s unbelievably long incarceration as a prime example, he should examine how long the defendant is locked up awaiting another trial. If the defendant has served as much time in jail as the time he would have received in a sentence following an actual conviction, this factor alone could be enough for a trial judge to dismiss the case.<sup>166</sup> Though Anderson’s time in jail awaiting conviction appears unique, this case is not an outlier.<sup>167</sup> The requirement of unanimous jury convictions and the mounds of evidence that come with cases carrying high charges mean defendants’ time in jail could equal or surpass the time they would have gotten had they been convicted of the crime at the conclusion of the first trial.<sup>168</sup> No error on the prosecution’s part and no double jeopardy problems exist in cases like those discussed in this Note, so courts often overlook such a fact.<sup>169</sup> However, forgetting about such a harsh reality is a miscarriage of justice. If a trial judge uses the defendant’s incarceration as a factor when deciding whether to try a case again, justice would be better served.

Further, if Ohio courts seriously considered the incarceration factor, defendants may no longer feel so desperate to escape jail that they consider a plea agreement their only way out. If an Ohio court kept track of a defendant’s time in jail throughout these mistrials, the court could avoid putting a defendant in an unfair position, feeling he has no choice but to accept the plea. Therefore, especially in a case like Anderson’s,

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<sup>162</sup> See, e.g., *State v. Witt*, 572 S.W.2d 913, 916 (Tenn. 1978).

<sup>163</sup> *State v. Anderson*, 68 N.E.3d 790, 792–93 (Ohio 2016).

<sup>164</sup> *U.S. v. Gunter*, 546 F.2d 861, 866 (10th Cir. 1976).

<sup>165</sup> *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa Ct. App. 1980) (telling the trial court to look closely at Lundeen’s incarceration).

<sup>166</sup> If a defendant like Anderson was forced to endure another trial, if a jury did finally render a conviction, the judge could sentence the defendant to time served, and the defendant would be immediately released because he had sat in jail for so long already, but with a conviction permanently attached to his record. See discussion *supra* Section III.B.

<sup>167</sup> See, e.g., Schwirtz & Winerip, *supra* note 10.

<sup>168</sup> See, e.g., *Anderson*, 68 N.E.3d 790.

<sup>169</sup> See, e.g., *id.*

Ohio's new fourth factor examining a defendant's incarceration could justifiably outweigh the other factors.

Additionally, the State's knowledge that the judge may give deference to the defense after weighing factors one through four can help push the State to spend considerable time gathering and preparing additional evidence if they intend to retry a defendant. This knowledge also may motivate the State to offer a better plea agreement to the defendant. The State, and even the defense, should take time to understand the reasoning behind juries' decisions and should explore what they could change if the trial judge permits another trial. This preparation could help tip the scale in the State's direction and avoid the likelihood of another mistrial.<sup>170</sup> Alternatively, this additional work could help the State prevent a dismissal with prejudice.<sup>171</sup>

After the Ohio trial judge examines the prior trials and the implications of another trial while the defendant remains in jail, the judge should utilize factors five and six to protect the State's rights to obtain a conclusive outcome in a criminal prosecution. The judge's consideration of the severity of the charges against a defendant is important because, as discussed above, cases where the jury has trouble rendering an appropriate verdict are often those that involve very serious crimes.<sup>172</sup> The trial judge should examine the conduct of counsel as well, especially the prosecuting attorney's conduct who works diligently to seek a conviction based on these severe charges.<sup>173</sup> The trial judge should be able to reward the State's hard work and professional conduct. Frequently, the prosecutor engaged in no improper conduct throughout these many trials, but both sides simply cannot sway the jury one way or another in these complex cases. Consequently, these two factors will allow judges to give deference to the prosecution's efforts if the situation permits.<sup>174</sup>

Finally, Ohio's new factors would also account for a trial judge's own discretion.<sup>175</sup> Rather than forcing the trial judge to consider these factors solely on the objective facts and history of the case, the seventh factor would allow judges in Ohio to properly evaluate the strength of a case using their knowledge, expertise, and inherent authority

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<sup>170</sup> *State v. Moriwake*, 647 P.2d 705, 712–13 (Haw. 1982); *Lundeen*, 297 N.W.2d at 236.

<sup>171</sup> *Moriwake*, 647 P.2d at 711–12; *Lundeen*, 297 N.W.2d at 236; see *Estes*, *supra* note 85, at 199 n.4 (“[P]rosecutors often refuse to re prosecute in multiple deadlock jury cases because of the likelihood of further hung juries and the concomitant waste of judicial resources.”); see also *State v. Wong*, 40 P.3d 914, 929 (Haw. 2002) (providing an example of prosecutorial misconduct, violating factor six) (“We are cognizant of the State’s strong interest in prosecuting crime, but we are equally cognizant that the State’s duty is to pursue justice, not convictions, and the prosecutor has a duty to act as a minister of justice to pursue prosecutions by fair means.”).

<sup>172</sup> *Moriwake*, 647 P.2d at 712–13. Multiple juries may have trouble staying fair and impartial if these serious cases are highly publicized, making it even more difficult for them to render an appropriate verdict.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 708 (holding that factor one worked in favor of the defendant because his state of mind was muddled by extreme intoxication); see *Berch & Berch*, *supra* note 25, at 559 (discussing the need for a rule for the legislative branch to impose) (“[T]he vast majority of the cases that have examined whether to bar retrial have involved capital crimes or other serious felonies.”).

<sup>175</sup> *Moriwake*, 647 P.2d at 712; *Lundeen*, 297 N.W.2d at 236.

to dismiss.<sup>176</sup> This factor permits judges to interject their own thoughts of the case into their decision.<sup>177</sup> Trial judges “have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.”<sup>178</sup> Adopting this “judicial judgment” factor allows Ohio trial judges to properly execute this trusted discretion by interposing their valued thoughts.<sup>179</sup>

After weighing the factors that apply in a given case, if the prosecution and defense exercise every opportunity to obtain a proper verdict from the jury and cannot succeed, dismissal with prejudice likely would be in the court’s discretion. If the trial judge believes another trial is fair, then dismissal with prejudice will not be warranted. “[S]ociety . . . has an interest in protecting the integrity of the judicial process,”<sup>180</sup> and with these factors, the decision to dismiss with prejudice is subject to the power and the responsibility of the court.<sup>181</sup> Ultimately, these factors account for all case parties’ interests and can help guide a trial judge’s important decision.

### *C. Advantages of Adopting These Factors*

If Ohio were to adopt these factors, one advantage of doing so stems from the format of these new guidelines—as factors, not elements. Judges could utilize these factors under a balancing test where not all seven pieces must be met and not all must fit neatly together. Allowing a trial judge to consider factors in a manner that would tip the scale either in favor of or in opposition to a dismissal with prejudice would bring more legitimacy to a trial judge’s decision.<sup>182</sup> Like the Rules of Evidence, these factors would allow prosecutors and defense counsel to better plan their cases and increase consistency across them. Using these factors could point a judge to ordering another trial rather than dismissing the indictment.<sup>183</sup> Many courts that have adopted factors of their own have ultimately decided to try the case again.<sup>184</sup> Yet, weighing factors would help judges survive scrutiny from the prosecution and the defense if the outcome is not what either side expected. These factors could make decisions more predictable, increase uniformity across judges, and allow defendants to intelligently decide whether to take a plea deal if another trial is ordered.

Furthermore, balancing these factors would allow an appellate court to decide whether or not the trial court abused its discretion. If the prosecution or defense were

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<sup>176</sup> *Moriwake*, 647 P.2d at 712; *Lundeen*, 297 N.W.2d at 236.

<sup>177</sup> *Moriwake*, 647 P.2d at 712; *Lundeen*, 297 N.W.2d at 236.

<sup>178</sup> *Moriwake*, 647 P.2d at 709 n.5. (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)).

<sup>179</sup> *Id.* at 712 (holding that the interests of society and of criminal defendants “requires that we more fully delineate the parameters within which this discretion [to dismiss] is properly exercised”).

<sup>180</sup> *Id.* (quoting *State v. Braunsdorf*, 297 N.W.2d 808, 817 (Wis. 1980) (Day, J., dissenting)).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (noting the idea of a balancing test).

<sup>183</sup> *See, e.g.*, *U.S. v. Gunter*, 546 F.2d 861, 866 (10th Cir. 1976) (“There indeed may be a breaking point, but we do not believe it was reached in the instant case.”).

<sup>184</sup> *See, e.g., id.*

to appeal the trial judge's decision to either dismiss the case with prejudice or to allow the prosecution to again try to pull a conviction out of the jury, the appellate court could review the factors the judge relied on to understand the thought process behind the judge's decision. Therefore, the appellate court's task would be simpler if the trial judge provided reasons for each factor that supported dismissal or retrial.

While concretely outlining all of the circumstances where dismissal would be appropriate, pointing to a concrete number of mistrials that trigger dismissal or laying down a blanket rule that says a mistrial following a deadlocked jury ultimately warrants dismissal is not possible; these factors would bring stability to Ohio in the future. As courts continue to tackle this issue, they would know what action to take and where to look for guidance. Trial judges should build off the stability demonstrated in states like Hawaii and Iowa that recognize and have been applying factors to these situations successfully since the 1980s and should implement factors of their own.<sup>185</sup>

#### V. CONCLUSION: NEED FOR FACTORS TO PREVENT EXPLOITATION IN THE CRIMINAL JUSTICE SYSTEM

Christopher Anderson continues to sit in jail as the prosecution prepares to take its sixth bite at the apple, even after two of those bites led to deadlocked juries.<sup>186</sup> Throughout all of these mistrials, Anderson remains in jail, having lost his personal freedom.<sup>187</sup> His defense attorney and the prosecutor now prepare to re-examine the evidence and take another stab at convincing a jury of their position, all while Anderson remains in "legal limbo." Anderson is one of many defendants subject to

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<sup>185</sup> *State v. Moriwake*, 647 P.2d 705, 713, n.16 (Haw. 1982) (quoting *Salt Lake City v. Hanson*, 425 P.2d 773, 775 (Utah 1967)) ("[T]here is a sound basis in public policy for requiring the judge who assumes the serious responsibility of dismissing a case to set forth his reasons for doing so in order that all may know what invokes the court's discretion and whether its action is justified."); see *State v. Abbati*, 478 A.2d 1212, 1218 (N.J. Super. Ct. App. 1984) ([T]he only question is how many times may the State have to prove its case. It should be immediately evident that 'how many times' will vary."); see also *State v. Huffman*, 215 P.3d 390, 396 (Ariz. 2009) (mentioning *Abbati's* factors, for example); *State v. Roper*, No. 20836, 2002 Ohio App. LEXIS 7191, 2002 WL 31890116, at ¶ 76 (Ohio Ct. App. Dec. 31, 2002) (noting that some cases have held that two or three mistrials is enough, while others have held that four mistrials "were not considered to be too many"); *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa Ct. App. 1980).

<sup>186</sup> *State v. Witt*, 572 S.W.2d 913, 914 (Tenn. 1978). The prosecution's unwavering desire to force a conviction can be analogized as a modern-day Adam and Eve story. 3 *Genesis 2:7*:

The woman said to the serpent, "We may eat fruit from the trees in the garden, but God did say, You must not eat fruit from the tree that is in the middle of the garden, and you must not touch it, or you will die." "You will not certainly die," the serpent said to the woman . . . . When the woman saw that the fruit of the tree was good for food and pleasing to the eye, and also desirable for gaining wisdom, she took some and ate it. She also gave some to her husband, who was with her, and he ate it.

Early on, we are taught to avoid this trickery. See *Snow White and the Seven Dwarfs Quotes*, IMBD, <http://www.imdb.com/title/tt0029583/quotes> (last visited Nov. 21, 2016) ("A poisoned apple! Sleeping death! Oh ho ho ho. One taste of the poisoned apple and the victim's eyes will close forever . . . in the sleeping death!"). This apple in Anderson's case certainly has become poisonous after five trials, two of which ended in deadlocked juries.

<sup>187</sup> *State v. Anderson*, 68 N.E.3d 790 (Ohio 2016).



enduring multiple mistrials because the jury simply cannot be convinced either way. This miscarriage of justice is summed up in Anderson's Appellate Brief to the Ohio Supreme Court:

How can we say a system is fair when a man who is presumed *not* to have committed this crime languishes in jail, doing life on the installment plan between trials? If we cannot hold up this case as a paragon of the idea of due process, if we cannot hold it up as a paragon of the right to defend liberty or have justice administered without denial or delay, then we have no choice but to order the action that says that enough is enough.<sup>188</sup>

While Ohio may never provide a concrete magic number of mistrials that will force a trial court to say enough is enough, courts need to know when to take the apple away from the prosecution so that defendants like Christopher Anderson do not remain incarcerated indefinitely awaiting conviction.<sup>189</sup> Ohio courts need to apply the suggested factors to a situation where a defendant attempts to dismiss an indictment with prejudice after multiple mistrials, especially following repeated hung juries to rectify this miscarriage of justice.<sup>190</sup> Adopting factors will help ease the tension between the rights of the accused and the public interest,<sup>191</sup> allowing a trial judge to exercise his inherent authority to terminate a prosecution and permitting an appellate court to more clearly understand the trial court's reasoning when deciding whether or not to uphold or reverse that decision.<sup>192</sup> These factors would also increase consistency

<sup>188</sup> Merit Br., *supra* note 22, at \*19–20.

<sup>189</sup> See Pelletier O'Sullivan, *supra* note 27 (noting that one possible alternative option that courts consider to avoid deadlocked juries is an "Allen charge," which is a verdict-urging instruction by the trial judge). However, "a trial judge may not coerce jurors into reaching a verdict." *Id.* (quoting *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969)). This supplemental instruction is beyond the scope of this Note. Yet, I would argue that after multiple mistrials due to deadlocked juries, using this instruction to encourage jurors to reach a verdict cuts against the presumption of innocence and further supports dismissal if, despite such an instruction, jurors could still not reach a fair decision.

As of February 8, 2017, Christopher Anderson remained on the long list of "Active Inmates" in the Mahoning County Jail. While most of the over 500 inmates currently incarcerated in that jail have booking dates listed next to their names that mostly range from the recent years 2015–2017, with one or two incarcerated since 2010 and 2012, Christopher Anderson's booking date is listed as November 21, 2008. He was sitting in maximum security. See *Inmate Information*, MAHONING CTY. SHERIFF'S OFF. (Feb. 8, 2017), <http://mahoningsheriff.com/Inmate/ActiveInmates.pdf>

<sup>190</sup> As the omnipresent backdrop in this Note, a defendant's indictment should be dismissed with prejudice after hung juries, so the defendant does not have to wait in fear for the State to file new charges.

<sup>191</sup> *State v. Witt*, 572 S.W.2d 913, 914 (Tenn. 1978).

<sup>192</sup> *Id.* In 2016, in Cincinnati, Ohio, a trial judge declared a mistrial in former police officer Ray Tensing's trial after a jury could not decide if Tensing was guilty of shooting and killing Samuel Debose. Perhaps, the use of these factors could have helped Judge Megan Shanahan determine whether to dismiss Tensing's indictment for murder and voluntary manslaughter with prejudice. Andy Newman, *Jury Deadlocks in Trial of Ex-Officer in Killing of Unarmed Black Driver in Cincinnati*, N.Y. TIMES, Nov. 13, 2016, at A31; Sharon Coolidge, *Tensing Case Gets New Prosecutors*, CINCINNATI ENQUIRER (Jan. 13, 2017), <http://www.cincinnati.com/story/news/tenzing/2017/01/13/tenzing-case-gets-new->

among judges and ensure more predictability among cases. Even though these trials are very likely to be free of prejudicial error, if the defense can show a few of these factors exist during trials following hung juries, the scale would likely tip in favor of dismissal.<sup>193</sup> Both the defense and the prosecution should have the opportunity to try to color the factors to support either dismissal or another trial and argue that the factors weigh in their favor.

Despite the more specific Double Jeopardy Clause that permits retrials after validly declared mistrials, Ohio courts should not easily overlook the Due Course of Law Clause, a clause that provides fundamental fairness to the accused and can provide more protection to defendants like Anderson.<sup>194</sup> Furthermore, during these multiple trials, defendants in Ohio are likely to be in jail and suffer lasting psychological harms. As defendants sit isolated in post-trial incarceration, they may choose to take unfair plea deals. Ultimately, these considerations could also tip the scale in favor of dismissal.

Therefore, considering the accused's right to be free from "legal limbo" and the prosecution's right to seek convictions, if the factors support dismissal, a trial judge in Ohio has inherent authority to dismiss the indictment with prejudice to breathe life back into a defendant's right to a presumption of innocence. Even if the government is a sore loser, a trial judge needs to respect the integrity of the judicial system and remember to promote the proper and prompt administration of justice. A trial judge may weigh the factors and ultimately decide to order another trial, but the time has come for trial judges in Ohio to more seriously consider when enough is enough following multiple mistrials and to know when to throw out the apple when time has made it rotten to the core.<sup>195</sup>

## VI. UPDATE

After enduring 5,318 days in jail and unable to stomach a sixth trial, Christopher Anderson accepted a plea agreement, pleading guilty to involuntary manslaughter and aggravated burglary.<sup>196</sup> The Mahoning County Court of Common Pleas Judge

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prosecutors/96538840/. Factors like these may end up being helpful for Judge Massi in Mercer County. In early 2017 in Trenton, Isiah Greene's second trial, where the State attempted to prove that he was guilty of murder, ended in a second mistrial because the jury could not come to a conclusion after deliberating for hours. A Mercer County Assistant Prosecutor is leaning toward trying the case again. Sulaiman Abdur-Rahman, *Isiah Greene's Second Murder Trial Ends in Another Hung Jury*, TRENTONIAN (Jan. 31, 2017), <http://trenton.homicidewatch.org/2017/01/31/isiah-greene-second-murder-trial-ends-in-another-hung-jury/>.

<sup>193</sup> *Witt*, 572 S.W.2d at 914 (noting that "the trial judge said that the 'big question' in his opinion was, 'can this court, or any court ever get a jury that will decide this case in view of the past history?"). Finding a fair and impartial jury that can render a verdict in these complex cases, ensuring that witnesses will not be easily impeached by the opposing side because they are able to poke holes in the same testimony they heard many times, and preserving hundreds of important exhibits, for example, become more and more difficult after each trial ends in a mistrial.

<sup>194</sup> *Sivels v. State*, 741 N.E.2d 1197, 1999 (Ind. 2001).

<sup>195</sup> *Merit Br.*, *supra* note 22, at \*19–20.

<sup>196</sup> *Bettman*, *What Happened on Remand*, *supra* note 1.

Anthony D'Apollito sentenced Anderson to time served and five years of post-release control.<sup>197</sup> After over fourteen years in jail “[e]nough it seems, was enough.”<sup>198</sup>

After so many years behind bars, causing him to miss out on a child’s marriage and the birth of a grandchild, Anderson finally had enough. Though he may finally be free from jail, he will now always carry this conviction—on his record for the rest of his life—as his family continues to assert his innocence. The sad ending to Anderson’s story provides a strong example as to why Ohio trial judges desperately need these factors to know whether the time has come to exercise their inherent authority to dismiss an indictment with prejudice after multiple mistrials. Utilizing these factors will help avoid this detrimental “legal limbo” that caused a man who was jailed for almost fifteen years to accept a plea deal simply to avoid enduring yet another trial.

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*; see Derek Steyer, *Mother of Man Accused of Strangling and Killing an Austintown Woman Speaks Out*, WFMJ.COM (Mar. 19, 2017), <http://www.wfmj.com/story/34784793/mother-of-man-accused-of-strangling-and-killing-an-austintown-woman-speaks-out> (“Bogan said her son just wanted to move on with his life. ‘You can’t – you can only take so much,’ she said. Despite the guilty plea, Bogan said the real killer is still out there. ‘I feel sorry for the family that lost their daughter, but my son didn’t do it,’ she said.”).