

No. _____

In the
Supreme Court of the United States

JOSEPH MONTANO,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. It grants a criminal defendant a right to have his “trial completed by the first jury empaneled to try him.” *Oregon v. Kennedy*, 456 U.S. 667 (1982). One exception to this rule is retrial is permitted if the defendant consented to the mistrial. *Id.* at 674. Additionally, this court as held that a court has discretion to correct “plain errors or defects affecting substantial rights” that were forfeited because not timely raised in the district court, which it should exercise only if the errors “seriously affect the fairness, integrity or public reputation of judicial proceedings.” *United States v. Olano*, 507 U.S. 725 (1993).

The questions presented are:

If the underlying reason for a *sua sponte* declaration of mistrial was in plain error, does *Olano v. United States* override the consent requirement of *Oregon v. Kennedy*? Also, does expressing a desire to continue with the tribunal satisfy the consent requirement of *Oregon v. Kennedy*?

PARTIES TO THE PROCEEDING

The Petitioner, Joseph Montano, and Respondent, the State of Texas, represented by the Harris County District Attorney's Office.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW.....	2
JURISDICTION.....	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	4
A. State Court Trial and Appellate Proceedings	4
B. Federal Habeas Proceedings	4
REASONS FOR GRANTING THE PETITION	5
I. The Fifth Circuit's Decision Conflicts With This Court's Precedent	5
II. The Fifth Circuit Misapplied the Consent Standard for a Mistrial Under <i>Oregon v.</i> <i>Kennedy</i>	6
CONCLUSION.....	7
APPENDIX	
Appendix A Opinion in the United States Court of Appeals for the Fifth Circuit (January 10, 2019)	App. 1

Appendix B Order in the United States District Court for the Southern District of Texas Houston Division (November 21, 2017)	App. 6
Appendix C Opinion in the United States Court of Appeals for the Fifth Circuit (August 11, 2017)	App. 8
Appendix D Opinion in the Court of Appeals for the First District of Texas (November 20, 2014)	App. 22

Cases	
<i>Brown v. United States</i> , 356 U.S. 148 (1958).....	5
<i>Brown v. Walker</i> , 161 U.S. 591 (1896).....	5, 6
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999).....	5
<i>Oregon v. Kennedy</i> , 456 U.S. 667 (1982).....	1, 6
<i>United States v. Dinitz</i> , 424 U.S. 600 (1976).....	6
<i>United States v. Geca</i> , 120 F.3d 1419 (11th Cir. 1997).....	5
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	1, 5
<i>Zicarelli v. New Jersey State Comm'n of Investigation</i> , 406 U.S. 472 (1972).....	6
Constitutional Provisions	
United States Constitution, Amendment V	3
United States Constitution, Amendment XIV	3
Statutes	
28 U.S.C. § 2241	2
28 U.S.C. § 1331	2

PETITION FOR WRIT OF CERTIORARI

This case presents an issue of conflicting constitutional doctrines under *Oregon v. Kennedy*, 456 U.S. 667 (1982), and *United States v. Olano*, 507 U.S. 725 (1993). *Oregon* reinforced the notion that, absent specific exceptions, consent by the defendant to a mistrial would not bar a retrial under double jeopardy grounds. *Olano* laid out the standard of applying plain error review as it pertained to substantial rights. The Fifth Circuit concluded that Petitioner Montano's lack of objection amounted to implied consent to the *sua sponte* mistrial while declining to address the issue of whether the underlying reason for the mistrial was plain error.

Petitioner Jospeh Montano is a pretrial detainee in Texas awaiting trial in the 228th State District Court. Montano was tried in 2013 for a charge of aggregate theft of a nonprofit, but a mistrial was declared *sua sponte* after one of the State's witnesses made incriminatory statements. Montano filed a writ of habeas corpus under double jeopardy grounds to prevent retrial by the State of Texas. The Fifth Circuit ruled that Montano never objected to the mistrial, thereby impliedly consenting to the mistrial and thus allowing the State of Texas to retry Montano.

The reason for the mistrial being granted was that one of the State's witnesses, under cross-examination from Montano, offered incriminatory statements. The trial judge stopped the trial and allowed the witness to plead the fifth without retaking the stand. When Montano expressed a desire to continue with the cross-examination the trial judge *sua sponte* declared a mistrial.

The Fifth Circuit never addressed the issue of plain error, as once the witness began testifying and made statements of an incriminatory nature, it was improper to allow the witness to then stand upon the Fifth Amendment. The Fifth Circuit held that consent was implied, but never addressed whether the reason for the mistrial fell under the doctrine of plain error. The witness should not have been able to stop testifying, and at the very least should have had to plead the fifth to any questions asked by Montano in front of the jury. Additionally, a mistrial was an extreme measure that deprived Montano of his right to continue with the tribunal. The right to continue a tribunal and not be subjected to multiple prosecutions is a substantial right that was unfairly affected by the plain error of both allowing the witness to stop testifying and to declare a mistrial.

OPINIONS BELOW

The Fifth Circuit's opinion is unreported but reproduced at App.1-5. The district court's order is unreported but reproduced at App.6-7. The Fifth Circuit previously reported an opinion at 867 F.3d 540 and reproduced at App.8-21. The Court of Appeals for the First District of Texas reported in the Southwest Reporter at 451 S.W.3d 874 and reproduced at App.22-34.

JURISDICTION

The Fifth Circuit issued its opinion on January 10, 2019. Review with this court is de novo jurisdiction is invoked under 28 U.S.C. § 2241(C)(3) and 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

Fifth and Fourteenth Amendments to the Constitution of the United States.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATEMENT OF THE CASE

A. State Court Trial and Appellate Proceedings

Joseph Montano was accused by indictment of aggregate theft from a nonprofit in the 228th State District Court in Harris County, Texas. Jury trial began in September 2013, but the trial court judge stopped the trial after one of the State's witnesses made incriminatory statements. After conferring with counsel, the State's witness indicated to the court he plead the fifth and not answer any more questions. When asking both parties how they wished to proceed, Montano told the court he wished to proceed with cross-examination and the State told the court they would like a recess or a continuance to address to confer with their witness. The trial court judge then *sua sponte* declared a mistrial. Montano filed a motion for writ of habeas corpus, stating that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment. The State argued that Montano did not object, thereby consenting to the mistrial. The trial court denied relief.

Montano then appealed to the Court of Appeals for the First District of Texas, who denied relief. A petition for discretionary review was denied by the Court of Criminal Appeals of Texas.

B. Federal Habeas Proceedings

Montano then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas. The Southern District dismissed the petition, but the Fifth Circuit reversed and remanded the decision on procedural grounds.

Upon remand the District Court conducted a hearing and dismissed the petition. Montano once again appealed to the Fifth Circuit, and the court denied relief. The Fifth Circuit's opinion stated that the lack of objection by Montano amounted to implied consent and therefore retrial was permitted. The Fifth Circuit did not address Montano's claims of plain error.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision Conflicts With This Court's Precedent

United States v. Olano lays out the requirements for reviewing a plain error claim. It is clear from reading the records in Montano's proceedings that the underlying cause of the mistrial was the erroneous decision to allow the witness to stop testifying altogether in the trial. The well-established rule that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details is justified by the fact that a witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the statements' trustworthiness and diminishing the factual inquiry's integrity...The privilege is waived for matters to which the witness testifies, and the waiver's scope is determined by the scope of relevant cross-examination. *Mitchell v. United States*, 526 U.S. 314 (1999) (citing *Brown v. United States*, 356 U.S. 148, 154 (1958)). To assert this privilege against self-incrimination, as an initial matter, a witness' fear of conviction on the basis of his testimony must be reasonable, real, and appreciable. *United States v. Geca*, 120 F.3d 1419 (11th Cir. 1997)(citing *Brown v.*

Walker, 161 U.S. 591 (1896). The witness must face a “real danger” of conviction to invoke the privilege because the privilege does not protect against “remote and speculative possibilities.” *Id.* (citing *Zicarelli v. New Jersey State Comm’n of Investigation*, 406 U.S. 472 (1972)). The witness here was called as a state’s witness and faced no real or appreciable threat of being prosecuted for any admissions during his testimony. This is evidenced by the fact that the State wished for a recess to speak with the witness and his counsel before the judge declared a mistrial. The State subsequently offered the witness immunity for his testimony in the retrial of Montano. The fact that the witness was allowed to stop testifying was clearly erroneous and led to the declaration of mistrial by the judge. Since this mistrial has led to a second trial it has obviously led to a violation of Montano’s substantial right against being put in jeopardy for a second time.

II. The Fifth Circuit Misapplied the Consent Standard for a Mistrial Under *Oregon v. Kennedy*

When a defendant’s first trial is terminated over defense objection, retrial is prohibited absent “manifest necessity.” *Oregon v. Kennedy*, 456 U.S. 667 (1982). The Double Jeopardy Clause affords a criminal defendant a valued right to have his trial completed by a particular tribunal. *Id.* at 671. In the absence of manifest necessity, double jeopardy principles require that a defendant retain primary control over whether or not to abort an ongoing trial. *United States v. Dinitz*, 424 U.S. 600 (1976).

Montano expressed a desire to continue with the tribunal, specifically to continue with cross-

examination of the witness. The State requested more time to confer with the witness. The trial judge was given sufficient notice that both parties did not want a mistrial and instead desired to continue with the tribunal.

No manifest necessity existed for the declaration of mistrial and Montano expressed to the court his desire to continue with the tribunal.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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