No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LONNIE JAMES PEBLEY — PETITIONER
(Your Name)

vs.

PEOPLE OF THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Court of Appeals, cert. denied by Colorado Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lonnie James Pebley (D.O.C.#68627)
(Your Name)

Fremont County Correctional Facility
(Address)

FCF-Box 999 Canon City, CO 81215
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER THE STATE TRIAL COURT AND APPELLATE COURT ERRONEOUSLY DETERMINED THAT THE FEDERAL DOUBLE JEOPARDY PROTECTION BARRING REPROSECTION AS A RESULT OF PROSECUTORIAL MISCONDUCT INTENDED TO PROVOKE A MISTRIAL WAS NOT SHOWN.

II. WHETHER THE PROSECUTORIAL INTENT FACTOR OUTLINED IN Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed. 2d 416 (1982), IS TOO ONEROUS AND UNTENABLE TO SATISFY EVEN IN THE MOST EGREGIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT AS ESTABLISHED IN THIS CASE, THUS GIVING RISE TO A COMPELLING REASON TO INVOKE THIS COURT'S JURISDICTION TO EXERCISE ITS SUPERVISORY AUTHORITY.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was July 30, 2018. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment

Fifth Amendment: "No person shall be ... subject for the same offence to twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

In the town of Cstle Rock, Colorado on the night of July 4, 2012 and early morning hours of July 5,2012 I experienced Medically induced psychosis from ingesting 2 prescription medications; Prednisone and Plaquenil. During this time I was alleged to have fired at Officer's, Sheriff's, and my older brother Steven outside my ranch. I was arrested and charged with 15 counts of attempted 1st degree murder after deliberation (specific intent), 17 counts of attempted 1st degree murder with extreme indifference (general intent), 15 counts of 1st degree assault of a peace officer, 17 counts of reckless endangerment, 1 count of criminal mischief, and 1 count of prohibited use of a weapon. Noone was shot or physically injured as a result of this incident.

A jury trial was held May 12-27, 2014 which resulted in a mistrial because the prosecution improperly elicited testimony that I had a criminal record from a 1991 conviction for forgery. The defense objected, where the prosecution argued that we had inadvertently opened the door to such evidence. The district court ruled that the door was not opened. The prosecution again attempted to elicit testimony from a witness concerning the 24 year old criminal record. The district court expressed serious concern that allowing such admission at trial would possibly result in an appelate reversal. The prosecution then withdrew this request. However, on the final day of trial we called a defense toxicology expert, where the prosecution argued that such testimony would open the door to my prior criminal history. The district court ruled that the expert was not permitted to testify regarding anything she learned exclusively from me, and thus the result of this ruling was that evidence of my prior criminal history was still not permitted to be heard by the jury.

Nevertheless, the prosecutions intent was to introduce this criminal record by arguing that I fled the police because of that, hence a motive (which is not a required element to any of the charges). The expert was cross-examined by prosecution and asked whether she had been provided information regarding a possible motive.

The prosecution then suggested the idea that drinking and driving with a gun were possible motivations. The prosecution persisted by asking the expert if she was provided with information regarding other possible motives for the shooting: "were you given any other information about the defendant, perhaps reasons why he would not want to be stopped or interviewed by the police with regard to him having a gun or drinking at that point?" The expert then revealed to the jury that I had a criminal history, and this could be a motive for not wanting to be contacted by police.

The defense then requested a mistrial, and the district court declared a mistrial, stating that, " clearly it appears you were trying to surface the criminal history," contrary to the previous ruling. The prosecution was unapologetic, admitting "thats a place where I wanted to go. I wanted to talk about these things." As a basis for arguing that there was intentional prosecutorial misconduct resulting from the improper overreach to elicit my criminal history the district court stated that " there has clearly been an effort by the prosecution to elicit this information" by asking not only one question but two questions in attempting to elicit such. The court also stated "it is clear to the court that the prosecution was intending to elicit the criminal record of the defendant." The district court further stated, "if there ever was a case of overreaching this is it! The prosecution was told by this court twice with respect to the issues of eliciting information and evidence about the defendant's prior criminal history." The district court repeated that "it's clear to the court this is overreaching," and "the court finds clearly that there was an overreaching by the prosecution," the "set of facts goes to the strength of the overreaching that occured in this case," and " so the court finds it was overreaching." The court also stated" I have limited the people and been direct about not getting into the defendants criminal record on more than one occassion." However, the district court did not address the issue of gross negligence on the part of the prosecution, nor the examples supporting "BAD FAITH".

As a basis for the district court's statements and rulings concerning the evidence of my 24 year prior criminal history prohibited from being presented to the jury; the intentional aggra-

egregiousness of the prosecution's misconduct must evince bad faith, or atleast gross misconduct, by defying the district cour'ts explicit order prohibiting such evidence, with its repeated attempts to inform the jury of this 24 year old non-violent conviction for forgery.

Nevertheless, a mistrial was ordered and I was subsequently retried on all counts of specific intend combined with general intent, and an appeal followed contesting this retrial on double jeopardy grounds. Notwithstanding, a 736 year prison sentence was ordered.

The Direct-Appeal

On appeal, my court appointed appellate attorney argued that the retrial was barred by the Double Jeopardy Clause, and that the prosecution "should not be allowed to make repeated attempts to convict," **United States v. Dinitz**, 424 U.S. 600, 613 (1976), and that the "valued right to have [my] trial completed by a particular tribunal," id., should be embraced. With ample citation to applicable federal caselaw, the issue hinged on this Court's ruling in **Oregon v. Kennedy**, 456 U.S. 667 (1982), which sets forth the standard for a double jeopardy analysis of this sort. That is, to bar retrial on whether the prosecutorial misconduct was intended to provoke a mistrial, the record must support a finding that the misconduct "giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." **Kennedy**, 456 U.S. at 679.

As part of appellate counsel's argument ~~in~~ support of MY ~~appealing~~ double jeopardy protections, she distinguished **Dinitz**, supra, as the standard incorporating misconduct intended in bad faith or to harass or prejudice, **Dinitz**, 424 U.S. at 611, and the inclusion of "prosecutorial overreaching," **United States v. Jorn**, 400 U.S. 470, 485 (1976), as a basis for according the double jeopardy protection. This reasoning, coupled with the fact that the so-called "Kennedy Standard" this Court adopted, which effectively limited this constitutional protection by focusing on prosecutorial intent, contrary to well-established precedent that also weighed prosecutorial "overreaching" and "harassment" in determining whether misconduct should bar reprosecution.[1] See, **Dinitz**, supra, and **Jorn**, supra.

In other words, the rationale largely elucidated in **Kennedy**, as the sine qua non standard for assessing the prosecutorial misconduct of this order, is too onerous and narrow to meet.[2]

---

[1] In **Oregon v. Kennedy**, a four justice plurality issued the Opinion, with two concurring Opinions, one by Justice Stevens joined by three other justices and the other by Justice Powell.

[2] It should be noted that the Oregon Supreme Court on remand from this Court rejected the standard for the same reasons, by expanding the state's constitutional double jeopardy protections. See **State v. Kennedy**, 666 P.2d 1316, 1322-1323 (Ore. 1983).

In a lengthy unpublished opinion, the Colorado Court of Appeals disagreed with my contention that the district court should have dismissed the case on double jeopardy grounds due to prosecutorial misconduct that caused the mistrial in the first trial. See APPENDIX B, at p.3.

Assessing the facts, the appellate court followed the record as it pertained to the three instances of prosecutorial misconduct, the latter of which triggered the mistrial. Id. at p.4. With respect to the request that the retrial be barred on double jeopardy grounds, the appellate court, speculating that the prosecution anticipated this by having asked the district court to determine whether he had elicited the criminal history evidence in "bad faith," was simply unpersuaded. See id., at pp.6-8.

In analyzing the prosecutorial misconduct under the federal and state[3] double jeopardy protections, the appellate court was reliant upon the fact that, "if prosecutorial misconduct is intended to provoke a mistrial, the defendant's motion [to bar retrial] will not result in a waiver of double jeopardy protections." Id., at p.9 (citing **Kennedy**, 456 U.S. at 679; **People v. August**, 2016 COA 63, ¶ 15). Thus, "[t]o bar reprosecution under this standard, the record must support a finding that the prosecutorial misconduct 'giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.'" **August**, ¶ 14 (quoting **Kennedy**, 456 U.S. at 679).

Here, the appellate court found that the district court used the correct legal standard, by which it was my "burden of establishing that the prosecutor acted with the intent to provoke the defense into obtaining a mistrial." See **August**, ¶¶ 19-20 (citing **Earnest v. Dorsey**, 87 F.3d 1123, 1130 (10th Cir. 1996)). Essentially, the appellate court adhered to the decision in **August**, which, in turn, adhered to this Court's decision in **Kennedy**, thereby concluding that there was no finding of "prosecutorial intent." See APPENDIX B, pp.9-11. The Colorado Supreme Court declined to hear the case. See APPENDIX A.

---

[3] I argued that the state constitution should be interpreted more broadly than its federal counterpart in order to bar retrial. However, this was rejected, stating that I did not give any reasons for this to the trial court. See APPENDIX B, at pp. 11-13.

REASONS FOR GRANTING THE PETITION

It is my solemn hope and prayer that this Court assess the viability of this extremely onerous and unduly narrow standard set-forth as the mala fides intent on the part of the prosecution, to not only usurp those "specific guarantees in the Bill of Rights," of which "penumbras, formed by emanations from those guarantees that help give them life and substance." I simply paraphrase these most illuminating words from Justice William O. Douglas, whom evokes the sort of dynamic required here by convincing this Court to revisit the **Kennedy** holding, to perhaps overturn it as an untenable and virtually impossible standard to satisfy.

To evince a "bad faith" on the part of prosecutorial intent, requires a state of mind characterized as negligence, based on a furtive design with motive, self-interest or ill will, to achieve an ulterior purpose. Despite the fact that some states have chosen to follow the federal **Kennedy** standard, citations omitted, there have been many that reject this standard, the latest move was made in 2017, by the Nevada Supreme Court, not to mention the fact that when **Kennedy** was first decided, the remand back before the Oregon Supreme Court resulted in a systematic abrogation of this Court's ratio decidendi, which should serve as an albatross to its continued viability.... My case more than exemplifies this point, and the fact that the **Kennedy** standard has proved to be untenable, not having been met in the most egregious of instances, must serve as reason enough for this Court to grant this petition.

Acknowledging the fact that this Court is chary to overturn itself, except in rarest of circumstances, it is my belief that this case may more than illustrate the sort of conditions by which **Kennedy** should be overturned. And understandably so, it also commands a review by a superlative tribunal such as the United States Supreme Court, to rectify this imprecision of judicial ~~dicial~~ discourse on executive abuses. At the very least, if this Court were to revisit this "prosecutorial intent" or "bad faith" criterion; in order to administer an elucidative approach, meant to vindicate not countenance, those fundamental rights Justice Douglas extolled as a virtue any just nation should exemplify in their prosecutorial authority under the executive arm of civil

government, as mandated by a Great Charter, that embodies rights and protections so revered and sacrosanct, as to garner the attention of this Most Dignified and Inestimable Tribunal, whose inner sanctum is bestowed by the Supreme Being to intervene on my behalf, to rectify the wrongs that have been incurred against me by an unbridled prosecutor whom was furtive at exposing to the jury through ill will, evidence of the wrongs committed by me in my errant youth, to sabotage and vitiate my defense, so as to subvert the double jeopardy protections, in order to get another opportunity to convict. Please protect my fundamental right and interest in having my innocence decided in one proceeding. The prosecutor was motivated by bad faith to prejudice my prospects for acquittal. Therefore, this Court must reassess this subjective intent standard under the current state of affairs amid this prosecutorial landscape.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lonnie James Pebley

Lonnie James Pebley

Date: 9/28/18