

No.

IN THE

SUPREME COURT OF THE UNITED STATES

CORNELIUS LYNCH,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI

Cornelius Lynch respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio refusing to hear an appeal of the decision of the Ohio Court of Appeals, Eighth Appellate District affirming his conviction.

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QUESTION PRESENTED

May a state, consistent with the protections of the Double Jeopardy Clause, try a defendant a second time when the first trial ended in a mistrial which was not manifestly necessary and that was declared over the specific and personal objection of the defendant?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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OPINIONS BELOW

The decision of the Ohio Court of Appeals, Eighth Appellate District, affirming petitioner's conviction was entered on March 22, 2018. *State v. Lynch*, No. 105122, 2018-Ohio-1078, 2018 Ohio App. LEXIS 1194 (March 22, 2018); it is not print published (Pet. App. 1-3). The Supreme Court of Ohio refused jurisdiction, 153 Ohio St.3d 1434, 2018-Ohio-2639, 101 N.E.3d 465 (2018) (Pet. App. 10).

JURISDICTION

Petitioner seeks review from the July 5, 2018 decision of the Supreme Court of Ohio refusing to hear an appeal from the Ohio Court of Appeals, Eighth Appellate District decision affirming his conviction. *State v. Lynch*, No. 105122, 2018-Ohio-1078, 2018 Ohio App. LEXIS 1194 (March 22, 2018), jurisdiction refused, 153 Ohio St.3d 1434, 2018-Ohio-2639, 101 N.E.3d 465 (2018).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

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

On May 26, 1994, 12-year-old M.H. told her mother Sandra Pickett that Cornelius Lynch, Pickett's fiancé and live-in boyfriend, had sexually assaulted her. They had a "family meeting about it," after which they went to the hospital. At the hospital, "they did a little kit on [her]," and she spoke with doctors, nurses, and police officers. Although M.H. testified that Mr. Lynch performed cunnilingus and then vaginal intercourse, Dr. Keith Lim who examined M.H. at the hospital and who gathered the rape kit on her, checked only the box indicating that she said her assailant performed vaginal intercourse. He did not check the box indicating cunnilingus.

Medical records at the hospital indicate that Ms. Pickett told the doctor that M.H.'s allegations could not be true. Specifically, she said that she and Mr. Lynch were in bed together during the night when M.H. claimed he attacked her. Further, Pickett said that M.H. likely made up the story because she did not want her mother to marry Lynch but wanted her, instead, to get back together with her natural father. She said that the day M.H. made the allegations against Mr. Lynch was the day the wedding invitations arrived.

From the hospital, M.H. went to her grandmother's home where she stayed for about a month. On June 8, two weeks after M.H. told her mother that Mr.

Lynch raped her, and while M.H. was still living at her grandmother's, Sandra Pickett married Cornelius Lynch. What must have been about two weeks later, M.H. recanted. She left her grandmother's and returned to the house where she resumed living with Lynch and her mother.

The rape kit taken by Dr. Lim was transported to the local district police station and from there to the main police property room where it sat for over 18 years. Finally, in August 2012, a detective took the kit from the property room for testing. The testing revealed semen on a vaginal swab from the rape kit, and further testing indicated that DNA from the semen sample was consistent with Mr. Lynch's DNA.

In May 1994, just under 20 years after the alleged rape, Mr. Lynch was charged with the rape and kidnapping of M.H. Less than a month later, Ms. Pickett died. Nevertheless, and with the witness who had previously provided both an alibi and an explanation of why M.H. would have made the allegations now dead, the trial court denied Mr. Lynch's motion to dismiss based on pre-indictment delay.

The case was tried to a jury in early 2016. On March 10, in the midst of jury deliberations and over the specific and personal objection of Mr. Lynch, the court declared a mistrial.

Six months later, and before a new jury, the case was tried again. This time the jury completed its deliberations and returned verdicts finding Mr. Lynch guilty on all counts. He was sentenced to concurrent, indefinite terms of 15 years to life in prison.

In a timely appeal to Ohio’s intermediate appellate court, Mr. Lynch raised several issues including, as relevant here, that his protection against double jeopardy was violated when the trial court granted a mistrial over his specific objection and without manifest necessity.

On March 22, 2018, the court overruled each of Mr. Lynch’s arguments and affirmed his convictions and sentence. *State v. Lynch*, No. 105122, 2018-Ohio-1078, 2018 Ohio App. LEXIS 1194. Lynch sought a discretionary appeal in the Supreme Court of Ohio, again arguing the double jeopardy issue. Without explanation, the court denied jurisdiction declining to hear the appeal. 153 Ohio St.3d 1434, 2018-Ohio-2639, 101 N.E.3d 465 (2018).

REASONS FOR GRANTING THE PETITION

In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court made clear that the protections of the Fifth Amendment’s Double Jeopardy Clause include “the defendant’s ‘valued right to have his trial completed by a particular tribunal.’” *Id.* at 503 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).¹ Accordingly, and absent “manifest necessity” for a mistrial, a trial court’s determination to declare a mistrial will bar a second trial of the accused on the same charges. And while “necessity” may not be subject to literal interpretation, *id.* at 506, Justice Story’s formulation remains proper: “[T]he power ought

¹ The Fifth Amendment’s protections against double jeopardy are incorporated against the states through the Fourteenth Amendment. See *Benton v. Maryland*, 395 U.S. 784 (1969).

to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.” *United States v. Perez*, 22 U.S. 579, 580 (1824).

In this case, it was not.

When the trial court in Cornelius Lynch’s case declared a mistrial in the midst of jury deliberations, it did so over Mr. Lynch’s personal and explicit objection. The court’s reason was that it determined (1) to dismiss Juror 7 as he “is unable to follow the instructions given by the Court, is unable to live up to his oath as a juror,” and (2) that the alternate juror had apparently been discharged.

Mr. Lynch insists, as he insisted before Ohio’s intermediate appellate court and in his memorandum urging the Supreme Court of Ohio to hear his case, that there was no manifest necessity for the mistrial and that, therefore, the second trial for the same offense violated his right against double jeopardy as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

First, it is simply not the case that Juror 7 was “unable to follow the instructions.” It is true that he insisted he needed a transcript of the testimony for use in deliberations and that the court would not provide one. But nowhere did he say that he would not participate in further deliberations without one. Nor did he say he would not or could not deliberate in good faith. The court’s determination that he had to be removed was an unreasonable determination.

Second, and even if the decision to remove Juror 7 were to be deemed necessary, a mistrial was not. The record does not show that the alternate could not have been brought back despite having been discharged? The court apparently did not investigate the

question beyond, perhaps, determining that the alternate was not hanging around in the courthouse. Moreover, the jury deliberations could have gone forward with 11 jurors rather than 12.

The rule calling for 12-person juries is not grounded in the Constitution, not mandated by the Sixth Amendment. See, *Williams v. Florida*, 399 U.S. 78 (1970); *Ballew v. Georgia*, 435 U.S. 223 (1978). And even where 12-person juries are the rule, the loss of juror does not necessarily a mistrial. Rather, trial may go forward with 11. See *Patton v. United States*, 281 U.S. 276 (1930).²

And, again, Mr. Lynch explicitly, personally, and on the record - albeit in disagreement with his counsel - specifically objected to a mistrial. The intermediate appellate court said that his objection could not be heard because he "was represented by counsel." *Lynch, supra*, at ¶ 55. But as a defendant cannot enter a guilty plea without personally acknowledging that he is waiving his right to a jury trial, see, *e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), so his right to continue a jury trial should be deemed personal and not subject to the whims of court-appointed counsel. As this Court noted last term, the right to counsel "is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel." *McCoy v. Louisiana*, 584 U.S. ___, 200 L.Ed.2d 821 (2018).

Accordingly, there was no manifest necessity for a mistrial and double jeopardy precluded a retrial.

² Article I, Sections 5 and 10 of the Ohio Constitution also provide for the right to a jury, and 12 jurors sit in Ohio felony cases. But in Ohio, too, the loss of a juror need

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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not require a mistrial. See *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 134 N.E. 786 (1921).