No. 18-7879

IN THE

SUPREME COURT OF THE UNITED STATES

CLAYTON DAMAN COLKLEY

vs.

STATE OF MARYLAND

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF SPECIAL APPEALS OF MARYLAND

CLAYTON DAMAN COLKLEY

MTC

954 Forrest Street

Baltimore, Maryland 21202

QUESTION PRESENTED

1. DID THE COURT OF SPECIAL APPEALS OF MARYLAND ERR IN AFFIRMING TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS ON THE GROUND OF DOUBLE JEOPARDY?

LIST OF PARTIES

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

[ ] 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:

1. The Court of Special Appeals of Maryland.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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[ ] is unpublished.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[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix C 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[✓] is unpublished.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 Court of Special Appeals court appears at Appendix C to the petition and is

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[✓] is unpublished.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

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was January 19 2018. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: January 19, 2018, 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).

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

U.S. CONST. AMEND.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 OFFENCE 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 SHALLPRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

STATEMENT OF THE CASE

By charging documents filed in the Circuit Court for Baltimore City, the State charged Petitioner, Clayton Damon Colkley with the first degree murder of James Bowens, attempted first degree murder of Yvette Hollie and William Courts, first degree assault of Ms. Hollie and Mr. Courts, conspiracy to murder Mr. Courts, and related weapons offenses. After a joint trial with a co-defendant, Darnell Fields, in 2005, a jury convicted Mr. Colkley of the second degree murder of Mr. Bowens, attempted first degree murder of Mr. Courts, first degree assault of Mr. Courts, conspiracy to murder Mr. Courts, and related weapons offenses. In an opinion filed on February 2, 2007, the Court of Special Appeals reversed Mr. Colkley's convictions and remanded the matter for a new trial. Fields & Colkley v. State, 172 Md. App. 496, cert. denied, 399 Md. 33 (2007).

Following a joint retrial with Darnell Fields in 2010, a jury acquitted Mr. Colkley of one count of use of a handgun and convicted him of the second degree murder of Mr. Bowens, attempted first degree murder of Mr. Courts, conspiracy to murder Mr. Courts, and the remaining weapons offenses. The Court of Special Appeals affirmed Mr. Colkley's convictions. Fields & Colkley v. State, 204 Md. App. 593 (2012). Mr. Colkley and Mr. Fields then petitioned the Court of Special Appeals, which reversed and remanded for new trials on July 9, 2013. Fields & Colkley v. State, 432 Md. 650 (2013).

On July 10, 2015, Mr. Fields entered a guilty plea to charges of conspiracy to commit murder, second degree assault, and a related weapons offense.

Maryland Judiciary Case Search, Case Information for Baltimore City Circuit Court Case No.(s) 103216077, 79 (last visited February 2, 2018).

Jury selection for Mr. Colkley's third trial took place on September 16, 2015. During the direct examination of the State's first witness on September 21, 2015, the court, the Honorable Edward R. K. Hargadon, presiding, declared a mistrial at the request of the defense. On November 17, 2015, Mr. Colkley, through counsel, filed a motion to dismiss the indictment on grounds of double jeopardy. Following a hearing on December 3, 2015, the court denied the motion.

Mr. Colkley filed a timely interlocutory appeal from the denial of his motion to dismiss. The Court of Special Appeals affirmed the judgment in an opinion filed on May 1, 2017, and Mr. Colkley filed a motion for reconsideration. On January 19, 2018, the Court of Special Appeals denied the motion for reconsideration but withdrew its previous opinion and issued a new opinion, again affirming the judgment of the Circuit Court. Clayton Damon Colkley v. State of Maryland, unreported, Court of Special Appeals, September Term, 2015, No. 2474. The court issued its mandate that same day.

Prior to the proceedings giving rise to this appeal, Mr. Colkley and his former co-defendant, Darnell Fields, were subject to two trials. At both trials, the State presented evidence from which the jury could find that James Bowens was killed and William Courts and Yvette Hollie were wounded during a shootout in the area of Lafayette Avenue and Port Street on May 28, 2003. And, at both trials, the sole witness to identify consistently Mr. Colkley and Mr. Fields

as taking part in the shooting was Jermaine Lee, a friend of Mr. Courts who did not come forward with his allegations until he was arrested and charged with multiple handgun and drug offenses in July 2003. At the time of Mr. Colkley's first trial, the charges against Mr. Lee from his arrest in July 2003 were still pending, and he was facing another charge for bringing drugs into a jail facility as well as a violation of probation for distribution of cocaine.

At Mr. Colkley's and Mr. Fields' second trial, the State, through Mr. Lee and a new witness, Eric Horsey, alleged for the first time that Mr. Colkley and Mr. Fields acted pursuant to a murder-for-hire scheme. Mr. Lee testified that he was part of a group of drug dealers that included Mr. Bowens, Mr. Courts, and Mr. Courts' brother David. Four months before the shootout in May 2003, David Courts shot two other men, one of whom was the brother of Eric Horsey. After the May shooting, Mr. Lee and David Courts attempted unsuccessfully to exact revenge on Mr. Colkley and Mr. Fields. Two days later, David Courts was killed.

Mr. Horsey, a self-described head of a large-scale drug operation in East Baltimore whom this Court deemed in its prior opinion a "leading witness for the State," testified pursuant to an agreement with federal prosecutors that he hired Mr. Colkley to kill the Courts brothers after David Courts shot Mr. Horsey's brother. According to Mr. Horsey, following the shootout in May 2003, Mr. Colkley reported that he had fulfilled his end of the bargain.

Mr. Colkley and Mr. Fields' convictions following their first trial were reversed by the Court of Special Appeals based on a violation of their right to be present during the communications between the court and jury. Their convictions were reversed by the Court of Special Appeals following their second trial because the trial court prevented them from

impeaching law enforcement witnesses with information from their internal investigation files showing that they committed and conspired to commit theft by submitting fraudulent overtime slips.

On July 10, 2015, after the Court of Special Appeals issued its opinion, Mr. Fields entered a guilty plea. Mr. Fields was not called as a witness by the State at Mr. Colkley's third trial, which began on September 16, 2015.

Prior to opening statements at Mr. Colkley's third trial, the parties informed the court of a number of "issues" that could impact the trial. First, the prosecutor advised the court of his concerns about a new article in the Baltimore Sun discussing among other things, the fraudulent submission of overtime slips by the officers in the case. Next, the prosecutor informed the court that Jermaine Lee had just informed him that he testified before a grand jury in 2003 or 2004 in exchange for financial remuneration from the federal government. Finally, the prosecutor indicated that Eric Horsey intended to invoke his Fifth Amendment privilege despite having been granted immunity. Following preliminary instructions to the jury, defense counsel moved to preclude the State from mentioning Mr. Horsey in its opening statement. The court denied that motion but warned that "there are going to be consequenses if you use him in a courtroom statement and he's not here."

The State next gave its opening statement, which ws remarkable both for what it contained and what it did not. Despite the ruling in its favor, the State did not mention Mr. Horsey or its theory that Mr. Colkley was hired to kill William Courts.

Indeed, the State did not say at any point that it would be calling a witness who would identify Mr. Colkley as one of the shooters. Instead, after informing the jury that the case involved a shooting during which James Bowen was killed and William Courts was wounded, the prosecutor revealed his concerns about the State's case to the jury:

> Now, you're going to hear testimony from Jermaine Lee. You're going to hear testimony from Quanta Waddell. That much, you could be fairly certain of and I say that because it's almost comical. I have this lovely trial planned exactly how I want to produce the evidence that I think is going to be most convincing to you and make the most sense. That plan is out the window as soon as you were sworn in. So, you are not going to hear the evidence in a way that even you are going to say, well that makes perfect sense. That's exactly how I would have done it because that's not the way it's going to work. I say that and I want to apologize to you that the State is not trying to trick you, it's just that's the way things work. Right now, I'm not certain who my first witness is going to be because I'm not certain who is actually out there waiting to testify. You know one person, that's not the person that I intended to put on first. Is the person that I intended to put on first out there, hopefully he is and hopefully that's who you'll be hearing from cause that will be affording my client. So as Your Honor said, use your notepads. Things are going to come in in the order that you are going to say makes no sense and the State apologizes for that.
>
> Now, some of the witnesses, they're not going to be cooperative, pure and simple. They are not cooperative witnesses. It will be somewhat amazing if they're even here. One witness you're actually going to watch on television essentially.

It's recorded testimony from when he testified previously. Why is that, because since the time he testified and now, he's been killed. So he's not here to testify before you. So you're going to watch his prior testimony. There are other witnesses who may or may not show up. They may or may not be referred to um and you may feel, well why feel like you've been cheated somehow or why didn't the state produce that witness. Well, the State does the best that it can and if the witnesses refuse to cooperate and refuse to come to court, there's only so much we can do.

After counsel finished their opening statements, Mr. Horsey's attorney advised the court that Mr. Horsey had called him from Ohio at 7:30 that morning to report that his truck "broke down" and that he would be there "within a couple hours." The court responded that the State would have to proceed without Mr. Horsey for the time being and that the court would issue a warrant for him if he did not arrive by lunchtime.

Without Mr. Horsey, the State began its case with a lengthy stipulation concerning the firearms evidence recovered from the scene of the shooting. Following a bathroom break, the State called as its first witness Sergeant Kerry Snead, the primary detective in this case and one of the officers the defense sought to impeach at Mr. Colkley's second trial. During a break in the proceedings, the prosecutor went back to his office to take medicine for a recurring migraine and to get evidence that he had forgotten to bring to court. Shortly thereafter, the exchange giving rise to the declaration of a mistrial occurred:

By Mr. Volatile:

Q. Ultimately, did you charge Mr. Fields?

MR. WALSH-LITTLE: Objection.

THE COURT: Counsel, approach.

(Whereupon, counsel approached the bench and the following ensued:)

MR. WALSH-LITTLE: Mr. Fields is not on trial.

THE COURT: Overruled.

(Whereupon, counsel returned to trial tables and the following ensued:)

THE COURT: Detective, you may answer the question.

THE WITNESS: Yes.

By Mr. Volatile:

Q. And was he convicted?

A. Yeah.

Q. Of something related to this case. Was he convicted of something related to this case?

A. Yes, he was.

Citing the above exchange, defense counsel moved for a mistrial, arguing that it was improper to place before the jury information that Mr. Fields was convicted of charges relating to this case. After the court excused the jury to consider the matter, counsel for Mr. Horsey advised the court that Mr. Horsey had arrived. Following that announcement, the State took the position that a mistrial was not necessary and that a curative instruction would suffice. The court disagreed and granted the defense request for a mistrial, explaining that "the question and answer was too prejudicial" and that the court could not "unring this bell."

On November 17, 2015, Mr. Colkley, through defense counsel, filed a motion to dismiss the charges on grounds of double jeopardy. In support, defense counsel pointed to evidence that the trial had not been going well for the State, including: (1) the belated reveleation that Jermaine Lee had been provided a benefit in exchange for his cooperation with federal authorities; (2) Mr. Horsey's unexpected absence on the morning of trial; (3) the State's candid and apologetic opening statement; (4) the recent publication of an article about fraud committed by the State's law enforcement witnesses; (5) the prosecutor's medical issues on the day of trial; (6) the prosecutor's lack of preparation; and (7) the State's protracted presentation of crime scene evidence which may have led to "one of the jurors nodding off."

Over objection, the prosecutor, Assistant State's Attorney Gerard Volatile, testified and presented argument at a hearing on the motion to dismiss. Mr. Volatile testified that he had been a prosecutor for 28 years, including six years as Chief of the District Court Division and eight years in the Homicide Division. During his time as Chief of the District Court Division, he trained young attorneys and supervised other attorney-trainers. He had personally tried over 500 cases, including 30 to 40 murder cases. Nevertheless, he maintained that he did not know it was improper to elicit evidence that Mr. Colkley's former co-defendant had been found guilty. In argument following his testimony, Mr. Volatile urged the court to accept his "direct testimony that it was done through pure and unadulterated ignorance. The court then denied the motion to dismiss, crediting the prosecutor's testimony and finding that "there was no indication...that the State had any intention in terms of what they were doing of trying to tank the case."

On appeal, Mr. Colkley contended that the trial court erred in denying is motion to dismiss and in permitting the prosecutor to act as witness and counsel at the hearing on the motion. With respect to the first argument, the Court of Special Appeals held, in language similar to that used by the trial court, that "there is no indication that the prosecutor acted intentionally in order to provoke a mistrial." In so concluding, the court relied in part on the circuit court's creditiing the prosecutor's testimony that he did not intend to cause a mistrial. The court rejected Mr. Colkley's second argument on the grounds that Rule 19-303.7 (the advocate-witness rule) "only applies to trials" and that any error was harmless because the prosecutor's "testimony t his 'subjective intent' was not 'necessary' to the hearing of the appellant's motion to dismiss."

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to address the Double Jeopardy Clause of the Fifth Amendment, by addressing two important issues that have received scant attention in the case law. First, where a defendant moves to dismiss the charges on the ground that the prosecutor intentionally provoked a mistrial, when should the prosecutor be deemed to have knowledge of the relevant law such that his or her claim of ignorance should be accorded little or no weight? Second, may an attorney serve as both witness and counsel at a pretrial motions hearing such as the hearing on the motion to dismiss the case?

The Double Jeopardy Clause of the Fifth Amendment "embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" Arizona v. Washington, 434 U.S. 497, 503 (1977)) (quoting United States v. Jorn, 400 U.S. 470 (1971)). While a defense request for a mistrial is ordinarily treated as a waiver of a double jeopardy claim, West v. State, 52 Md. App. 624, 631 (1982), double jeopardy bars further prosecution where the request was precipitated by "governmental conduct...intended to 'goad' the defendant into moving for mistrial." Oregon v. Kennedy, 456 U.S. 667, 676 (1982); see also Giddins v. State, 393 Md. 1, 17-18 (2006).

Here, the evidence that the State intentionally goaded teh defense into requesting a mistrial is twofold. First, the notion that a co-defendant's conviction is inadmissible at the separate trial of the defendant is so basic and well-settled as to render unbelievable the claim of ignorance by the veteran prosecutor. See Kirby v. United States, 174 U.S. 47, 54 (1899); Clemmons v. State, 352 Md 49, 55 (1998); Gray v. State, 221 Md. 286, 289 (1960); Casey v. State, 124 Md. App. 331, 340 (1999); Howell v. State, 62 Md. App. 278, 289 (1985);

Carr v. State, 50 Md. App. 209, 211 (1981); Boone v. State, 3 Md. App. 11, 31 (1968).

Second, the record demonstrates that trial--Mr. Colkley's third--was going poorly for the State at the time the prosecutor elicited evidence that Mr. Fields had been convicted. As defense counsel argued before the circuit court, the prosecutor was struggling with new evidence that potentially impeached Jermaine Lee, the sole witness to consistently identify Mr. Colkley as one of the shooters; recent, negative publicity about the State's law enforcement witnesses; a medical issue; the possibility that he may have misplaced evidence; a juror who may have been prompted by the State's presentation of its case thus far to fall asleep; and, most critically, the unexpected absense of the State's key witness, Eric Horsey. Under these circumstances, the circuit court clearly erred in crediting the prosecutor's self-serving claim that he elicited Mr. Field's conviction by mistake, and the Court of Special Appeals erred by affirming that finding.

Separately, but relatedly, the circuit court erred by permitting the prosecutor to serve as both witness and counsel at the hearing on Mr. Colkley's motion to dismiss. "The advocate-witness rule is a rule of professional conduct that prevents an attorney from taking the witness stand in a case he or she is litigating." Walker v. State, 373 Md. 360, 397 (2003). The advocate-witness rule is codified in Rule 19-303.7, which states in pertinent part:

(a) An attorney shall not act as advocate at a trial in which the attorney is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the attorney would work substantial hardship on the client.

According to the Court of Special Appeals, Rule 19-303.7 "only applies to trials." However, the term "trial" has been "construed...broadly as 'a judicial examination and determination of issues between parties to an action'" in order to distinguish it from an administrative hearing. Heard v. Foxshire Associates, LLC, 145 Md. App. 695, 706-07 (2002) (quoting Black's Law Dictionary 1348 (5th ed. 1979)); see also Abrishamian v. Washington Med. Grp., P.C., 216 Md. App. 386, 408 (2014).

The Court of Special Appeals likewise erred in deeming any violation of the advocate-witness rule harmless. While this case involves a proceeding before a judge and not a jury, the prosecutor's testimony was central to the State's case at the hearing on the motion to dismiss, and the circuit court made it abundantly clear that he credited the prosecutor's claim that he acted out of ignorance. For this reason as well, the Court should grant cetiorari and hold that it was improper for the same attorney to serve as witness and counsel at the motions hearing, and that the Fifth Amendment prohibition of Double Jeopardy bars a retrial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Clayton Colkley, 1519080

Date: July16, 2018