NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL MARTINEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
To the Court Of Appeals for the Fourth Court of Appeals District Of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Oregon v. Kennedy* that the only time a defendant who successfully moves for a mistrial may later bar retrial is when he can prove that the prosecution intended to goad him into moving for the mistrial. *Kennedy's* test for determining prosecutorial intent is manageable. "It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." 456 U.S. 667, 674-75 (1982).

Subsequently, the Texas Court of Criminal Appeals created its own test to "assist" the determination of prosecutorial intent. This test, which relies upon what have come to be known as the *"Wheeler* factors," is now regularly used in Texas whenever the courts are called upon to decide if the prosecution intended to provoke a mistrial in violation of the Double Jeopardy Clause and the principles set out in *Kennedy*.

In this case, the prosecution waited until after the jury was selected to disclose to the defense information about its star witness. When the defense complained to the trial court about this untimely disclosure, the prosecutor was the first to suggest a mistrial, told the court he would pick a better jury and be more prepared for trial, and then agreed with the defense when it moved for the mistrial. Using the *Wheeler* factors, the Texas Court of Appeals

held that the Double Jeopardy Clause did not prevent the retrial of Miguel Martinez.

The question presented is:

Whether, contrary to *Oregon v. Kennedy*, Texas courts have replaced the manageable and effective "objective facts and circumstances" test recognized in that case, with the so-called *Wheeler* factors, which prevent the accurate determination of the prosecutor's intent to goad the defense into moving for a mistrial.

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No. _____

In the Supreme Court of the United States

October Term, 2018

MIGUEL MARTINEZ, Petitioner,

V.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS

Petitioner, Miguel Martinez, asks that a writ of certiorari issue to review the opinion and judgment entered by the Court of Appeals For The Fourth Court of Appeals District of Texas.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

OPINIONS AND ORDERS BELOW

The Findings of Fact And Conclusions Of Law On Pretrial Writ Of Habeas Corpus in *Ex parte Miguel Martinez*, No. 2015-CR-4203-W1 (437th Judicial District Court, Bexar County Texas, April 5, 2017) were unpublished, and are attached as Appendix A.

The majority and dissenting opinions of the Fourth Court of Appeals of Texas are found at 560 S.W.3d 681 (Tex. App.–San Antonio 2018, pet. ref'd), and attached as Appendix B. That Court denied Martinez's Motion For En Banc Reconsideration on September 27, 2018. Appendix C.

The order of the Texas Court of Criminal Appeals refusing discretionary review is unreported. and is attached as Appendix D.

JURISDICTION

The Court of Appeals for the Fourth Court of Appeals District of Texas affirmed the trial court's decision on July 30, 2018. This petition is filed within 90 days after December 5, 2018, the date the Texas Court of Criminal Appeals refused Martinez's petition for discretionary review and is timely filed. SUP. CT. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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 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 shall private property be taken for public use, without just compensation.

Amendment XIV

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. How the federal question was raised in the trial and habeas courts.

Miguel Martinez is charged with murder. [CR6] After the jury was selected, Jason Goss, the assistant district attorney in charge of the prosecution, disclosed, first to the trial court, then to the defense, information that he had known for two years: a colleague who early on had briefly assisted with this prosecution of Martinez had several years before that had a sexual encounter with Gregory Dalton, the State's star witness. After this relationship was fully disclosed, Nicholas LaHood, the elected District Attorney, confronted Martinez's defense lawyers and asked if they wanted a mistrial. When Martinez's lead lawyer advised that he would first have to investigate the possibility of prosecutorial misconduct, the District Attorney became enraged and threatened to "shut down" the practices of the defense lawyers. He told the court that he would be more prepared and would pick a better jury the next time. App. A, finding 14. Trial was recessed to give the defense time to investigate the relationship, and within days the defense moved for a mistrial, the State agreed, and the mistrial was granted. [5App5-6]

Trial was rescheduled, but before that could happen, the defense filed a pretrial application for writ of habeas corpus, arguing that the prosecutors's

untimely disclosure of the relationship information had been done with the intent to provoke a mistrial and that, under *Oregon v. Kennedy*, retrial was barred by the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution. [2CR.Supp.3-53] An evidentiary hearing was held, and the habeas court denied relief, finding that "neither the intent nor the effect of [the prosecutor's] behavior was to force the defense to move for mistrial." App. A, finding 38.

B. How the federal question was decided on appeal.

Martinez appealed the order to the Court of Appeals for the Fourth Court of Appeals District of Texas, and the panel majority affirmed, holding that "the habeas court was within its discretion in concluding Martinez failed to establish by a preponderance of the evidence that prosecutors intended to goad him into moving for a mistrial." *Ex parte Martinez*, 561 S.W. 3d 681, 705 (Tex. App.–San Antonio 2018, pet. ref'd), App. B. Justice Rebeca Martinez dissented, "conclud[ing] that the preponderance of the evidence establishes the State acted with the intent to goad or force the defense into moving for a mistrial to subvert Martinez's double jeopardy protections. *Id.* at 725. App. B. Martinez's Motion For En Banc Reconsideration was denied by the Court of Appeals on September 27, 2018. App. C. The Texas Court of Criminal Appeals refused Martinez's petition for discretionary review on December 5,

2018. App. D.

REASON FOR GRANTING THE WRIT

A. Certiorari should be granted because Texas has created a test for determining prosecutorial intent which does nothing to reveal "objective facts and circumstances" and, as a result, offers no assistance whatsoever in determining intent, contrary to this Court's decision in *Oregon v. Kennedy*.

Until 1982, the standards for determining when retrial would be jeopardy-barred following a successful defense motion for mistrial had been "stated with less than crystal clarity." But that year, in *Oregon v. Kennedy*, the law was clarified. We now know that the sole question is prosecutorial intent, and the Court found a "manageable" test for determining intent. "It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." 456 U.S. 667, 674-75 (1982). Concurring, Justice Powell agreed that courts must rely on objective facts and circumstances because subjective intent is often unknowable. *Id*. at 679-80 (Powell, J., concurring).

The objective facts and circumstances in Miguel Martinez's case lead to only one fair conclusion: the prosecutors goaded his lawyers into moving for a mistrial, and retrial is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The dissent below agreed that

Martinez's double jeopardy rights had been violated, but the majority found otherwise, relying on cases from the Texas Court of Criminal Appeals and the so-called *Wheeler* factors.[1]

To be sure, the court of appeals below *mentioned Kennedy*, but just barely.[2] It did not discuss *Kennedy*'s "objective facts and circumstances," nor did it rely on objective facts and circumstances from the case to determine prosecutorial intent, as *Kennedy* mandates. Instead the court used the six *Wheeler* factors[3] – plus the District Attorney's threat to shut down the practices of the defense if they dared allege prosecutorial misconduct – to hold that Martinez failed to prove the prosecutors intended to goad him into moving for a mistrial. Unlike the court of appeals, neither the habeas court, nor the State, nor Martinez, so much as mentioned *Wheeler*, and with good reason. When it comes to intent, the *Wheeler* factors, at best, provide no insight at all; at worst they encourage the courts to focus on the subjective beliefs of the prosecutors, and are antithetical to *Kennedy's* objective facts and circumstances test. By basing its decision on the *Wheeler* factors, the court of

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1 *Ex parte Wheeler*, 203 S.W.3d 317 (Tex. Crim. App. 2006).

2 *Ex parte Martinez*, 560 S.W. 3d at 21, n.5; 22; 23; 24.

3 *See Ex parte Wheeler*, 203 S.W.3d at 323-24. These factors were first set forth earlier in *Ex parte Peterson*, 117 S.W.3d. 804, 818-19 (Tex. Crim. App. 2003).

appeals has decided an important federal question in a way that conflicts with *Oregon v. Kennedy*. *See* SUP. CT. R. 10(c).

B. The *Wheeler* factors reveal nothing about prosecutorial intent.

According to the court of criminal appeals, the *Wheeler* factors were intended as "a list of non-exclusive objective factors to assist trial and reviewing courts in assessing the prosecutor's state of mind." *Ex parte Wheeler*, 203 S.W. 3d at 323-24. These factors ask the following:

1. "Was the misconduct a reaction to abort a trial that was 'going badly for the State?' In other words, at the time that the prosecutor acted, did it reasonably appear that the defendant would likely obtain an acquittal?"
2. "Was the misconduct repeated despite admonitions from the trial court?"
3. "Did the prosecutor provide a reasonable, 'good faith' explanation for the conduct? "
4. "Was the conduct 'clearly erroneous'?"
5. ""Was there a legally or factually plausible basis for the conduct, despite its ultimate impropriety?"
6. ""Were the prosecutor's actions leading up to the mistrial consistent with inadvertence, lack of judgment, or negligence, or were they consistent with intentional or reckless misconduct?"

Although these factors were intended to assist the determination of

intent, careful analysis of the decision below, and the way in which that court utilized the *Wheeler* factors, reveals that, far from assisting the determination of prosecutorial intent, these factors actually obstruct that goal.

1. Factors 2, 3, 4, 5, and 6 reveal nothing about intent to provoke a mistrial.

The second *Wheeler* factor asks whether the misconduct that provoked the mistrial was "repeated despite admonitions from the trial court." But, as Martinez's case clearly demonstrates, repetition says nothing about prosecutorial intent. Here, the prosecutor failed to disclose impeachment material until ordered to do so by the court. The trial court had no knowledge of the relationship until the *ex parte* disclosure the day after jury selection. *Immediately* thereafter the court strongly advised partial disclosure, and shortly after that, it ordered full disclosure. The majority opinion below actually credited the prosecutor for not "continu[ing] to withhold information after being ordered to disclose it." *Ex parte Martinez*, 560 S.W. 3d at 700. But what prosecutor, no matter how much he wanted a mistrial, would refuse to disclose specific information after a direct order to do so? This, then, is an excellent illustration of the problem with *Wheeler*: It identifies factors that say nothing about prosecutorial intent, then allows the reviewing court to use these immaterial factors to rule against the defendant.

The third, fourth and fifth factors ask whether the prosecutor provided a reasonable, good faith explanation for his conduct, whether his conduct was "clearly erroneous," and whether, albeit improper, was the prosecutorial misconduct legally or factually plausible. Although these factors are separated into three different questions, in fact they all concern a single subject: the flagrancy of the prosecutor's misconduct. Flagrancy – or lack thereof – though, says nothing at all about whether the prosecutor intended to provoke a mistrial. Indeed, whether the prosecutor committed any legal error, flagrant or otherwise, is immaterial. The only question is whether the prosecutor did something he knew would force the defense to move for a mistrial. Whether that "something" is one thing, or many things does not matter. In Martinez's case, evidence of prosecutorial intent was abundant. What choice did the defense have but to move for a mistrial when the prosecutors waited until after the jury was selected to disclose the relationship information? Nothing but a mistrial, and the opportunity to select and start over before a new jury, could have cured this untimely disclosure.[4] As

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[4] Interestingly, the majority below *expressly* recognized that"the habeas court should not have concerned itself with the propriety of the trial court's *Brady* determination. . . . [because the] granting of the mistrial cured any due process violation based upon *Brady*." *Ex parte Martinez*, 560 S.W. 3d at 697, n.7 It is paradoxical, then, that fully three out of the six *Wheeler* factors focus on the *degree* of prosecutorial misconduct, which should be entirely irrelevant to the question of prosecutorial intent to provoke a mistrial.

Kennedy made clear, the only question is whether the prosecution intended to goad the defense into moving for a mistrial. Once the mistrial is granted the reason for that is entirely immaterial.

Finally, the sixth factor asks whether the prosecutor's conduct that caused the mistrial was intentional, as opposed to reckless or inadvertent. There can be no question but that the prosecutors's decisions not to disclose the relationship was as intentional as could possibly be. Goss knew of the relationship for almost two years, and decided on his own that disclosure was unnecessary. When he finally told others in the office, they apparently agreed, and they also sat on the evidence for a full week before disclosing it — not to the defense, but to the court, and only then after the jury had been selected. And Goss candidly admitted that his motivation was to protect the reputation of his colleague. And whatever motivated this failure to disclose, there can be no question that it was done intentionally, and was in no way inadvertent.

2. The first *Wheeler* factor encourages the courts to focus on the subjective beliefs of the prosecutors, and not on objective facts and circumstances.

The first *Wheeler* factor asks whether the trial was going badly for the prosecution. The majority below held that this factor supported denial of relief, relying almost exclusively on the self-serving testimony of LaHood and Goss, the two prosecutors below, who gave their opinions at the habeas hearing that

their jury was good and that the case was going well,. *Ex parte Martinez*, 560 S.W. 3d at 697-99. But the prosecutors's"beliefs," and their testimonies, were necessarily subjective and self-serving — the very opposite of the "objective facts and circumstances" *Kennedy* requires. What else would one expect from prosecutors intent on protecting their right to retrial — admissions that the trial was going so badly that they had to goad the defense into moving for a mistrial, knowing full well that such admissions would bar their right to another trial?

C. If the court below had properly focused on the objective facts and circumstances, as *Kennedy* requires, the result would have been different.

In contrast to the obvious shortcomings of subjective testimony concerning a barely begun trial, there are several compelling "objective facts and circumstances" that support the inference that the prosecutors wanted the defense to move for mistrial. In marked contrast with the subjective, self-serving testimony of the prosecutors are their actions, and specifically, the *timing* of those actions.

1. Dalton's interview was a crucial event because there the State's star witness "showed himself to be" the person he is.

Although he had led the prosecution for almost two years, Goss claimed it was not until one week before trial commenced, when he and LaHood

interviewed Dalton, that he remembered who he was. Dalton disclosed more details about his involvement in the murder, and also admitted he had asked if he could sexually assault the complainant before she was murdered. What Dalton said during this interview was so "extreme," it caused Goss to remember that his colleague had told him two years before of their sexual relationship. "[F]rankly -- it was hard for me to believe that somebody would have a relationship with him *based on the kind of person that he was or that he showed himself to be*." [2RR181][emphasis supplied] "The statement was so . . . out of left field, it was so crass that it . . . shocked me when he said it. . . . he had directly stated his willingness to participate with the defendant in the sexual assault and the murder of the victim on trial." [2RR182] Adjectives like " extreme," "crass," and "shock[ing]" considerably understate the repulsiveness of the actual words Dalton used to describe his request, words that Goss quoted verbatim in his *Brady* notice. It then occurred to Goss, apparently for the first time, to tell District Attorney LaHood about the relationship between Dalton and their colleague, believing it was something LaHood "deserved to know." Remarkably, Goss felt no corresponding need to inform the defense. [2RR189-90]

2. The prosecutors decided disclosure was unnecessary — until the day after the jury had been selected.

During the ensuing week, at least two other prosecutors were consulted

and, according to Goss, all shared his view that disclosure was not required. So even though Goss immediately disclosed Dalton's shocking plan to the defense, he said nothing about the sexual relationship between Dalton and his former second-chair colleague at that time, or later, when he presented the defense with a Discovery Acknowledgment, or at any time until the day after the jury was selected, after being ordered to do so by the trial court.

3. Timing is everything.

The timing of the partial disclosure to the trial court – after the interview, and after the jury had been selected – is the best evidence of the prosecutors's intent. The obvious question is this: Why did the prosecutors consider for a full week the need to disclose this evidence, then finally disclose it, not before the trial started, but after that, when the jury had been examined and selected? When invited to answer this question at the habeas hearing, Goss claimed the disclosure was made when it was "in an abundance of caution," for the sake of the complainant's family, because "as we all know, Courts can second guess and third guess up the line, and that's a part of our system. And we didn't want that family to have to go through it again." [2RR210] But this answer – that disclosure was made when it was, to prevent the family from having to face multiple trials – is decidedly unconvincing, and indeed, it borders on nonsensical. Had full disclosure been made during the pretrial hearing, before

the jury was selected and sworn and before trial began, the defense could have properly assessed its import and the need to request a continuance to investigate the evidence and law. Given the trial court's stated view that the relationship evidence was impeaching, and its ruling that the defense was entitled to a continuance to investigate it further, there is no doubt that a continuance of appropriate length would have been granted before the jury was selected and before the trial commenced, had the defense been given the opportunity to request it. Had this been done, the case would not be in the posture it is now — on appellate review. Ironically, appellate review is precisely what the prosecutor claimed he wanted to avoid.

4. Actions speak louder than words.

Actions speak louder than self-serving words, especially when intent is in dispute. Objectively looking at the actions they took in this case, the logical explanation for the untimely disclosure is that the prosecutors – who knew their case and who had the chance to consider overnight the jurors selected – determined that, despite their later protestations to the contrary, this was not the ideal group of citizens to judge. It requires no leap of faith to conclude that the prosecutors feared that the impaneled jury would be at least as shocked as was Goss when it heard about the State's star witness. Goading the defense into moving for a mistrial would, just as Lahood said, give them a chance to pick a

better jury and be more prepared for trial the next time. But this is exactly what *Oregon v. Kennedy* is meant to prevent. The State may not – consistently with the Constitution – intentionally withhold exculpatory evidence for almost two years, select a jury, begin a trial, and then make an untimely disclosure of the evidence, thereby forcing the defense to move for a mistrial, particularly when the end-result "afford[s] the prosecution a more favorable opportunity to convict." *Cf., Downum v. United States*, 372 U.S. 734, 736 (1963). As was written in *Kennedy*, "[i]f there were *any intimation* in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain." 456 U.S. at 674 n.4 (emphasis supplied). In Martinez's case there is more than mere "intimation." Given that the disclosure was made after Dalton's "extreme" and "crass" request was known to the prosecutors, and after the jury was seated, given that LaHood was the first person to suggest a mistrial, and considering his stated desire to pick a better jury and to be more prepared next time, the reasonable inference is that the prosecutors feared the jury was likely to acquit Martinez, and that they made the untimely disclosure to force a mistrial. Should there be any doubt that this is in fact what happened, the doubt must be resolved "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial

discretion." *Downum v. United States*, 372 U.S. at 738.

D. Other factors proving intent that were mentioned in *Kennedy*, but that are not accounted for by *Wheeler*.

In rejecting the defense's jeopardy argument in *Kennedy*, this Court pointed out evidence that the prosecution was both "surprised by" and "resisted" the defense's mistrial motion. In our case it is undisputed that LaHood was the first person to mention mistrial, when he did so in chambers, on February 9. [2RR65, 147, 305, 2RR14-15] One cannot be surprised by a motion for mistrial he himself makes.

And unlike the prosecutor in *Kennedy*, LaHood did not resist a mistrial. LaHood not only sought the mistrial, he clearly stated his strategic reason for doing so: it would allow him to pick a better jury and be more prepared for the next trial. Our prosecutor's own words are compelling, explicit evidence of his intent to cause a mistrial, and thereby to deprive Miguel Martinez of his "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

E. A proper analysis under *Oregon v. Kennedy* discloses ample proof of prosecutorial intent.

In *Kennedy*, the defense received a mistrial after the prosecutor asked a witness if the defendant was a "crook," and when the state sought to retry him, Kennedy objected that retrial was jeopardy-barred. The Court disagreed,

holding that, when the defense asks for and gets a mistrial, the Double Jeopardy Clause does not bar retrial absent evidence that the prosecutor intended to goad the defense into moving for a mistrial. 456 U.S. at 679.

Although retrial was not barred in *Kennedy*, Martinez's facts are different. Here, unlike in *Kennedy*, the conduct precipitating the motion for mistrial was not a single, poorly-thought out question asked in the heat of trial, but instead comprised an undeniably intentional course of conduct extending for some two years prior to trial, and involved multiple members of the office, including the District Attorney himself, who decided to withhold evidence for reasons having nothing at all to do with the rights of the defendant. Here, unlike in *Kennedy*, there was no evidence that the prosecutor was either "surprised by" or that he "resisted" the defense's motion for mistrial. Far from that, our District Attorney was the first to suggest a mistrial, and he later agreed that the mistrial should be granted. Here, unlike in *Kennedy*, the timing of the action that ultimately caused the motion for mistrial suggested it was done to goad the defense into asking for a mistrial, and the State has yet to give a plausible explanation to rebut that suggestion. And here, unlike in *Kennedy*, our prosecutor said exactly what he should not have said. Just after suggesting the mistrial, he expressed an unconstitutionally strategic reason for doing so: if the mistrial were granted he would pick a better jury and be more prepared the next time. And this is

exactly what the rule in *Oregon v. Kennedy* was intended to prevent.

CONCLUSION

Texas has eviscerated *Oregon v. Kennedy* by replacing that case's "objective facts and circumstances" with factors that either reveal nothing meaningful about prosecutorial intent, or affirmatively distract from that goal. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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