CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFONSO SANCHEZ,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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Dated: August 19, 2019

CAPITAL CASE

QUESTION PRESENTED

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), this Court held that when a prosecutor intentionally commits misconduct to provoke a defense request for mistrial and thereby to ensure a second chance to prosecute a defendant, the Double Jeopardy Clause of the Fifth Amendment bars retrial. *Kennedy* did not determine when, if ever, prosecutorial misconduct that does not result in a mistrial but nonetheless results in the reversal of the defendant's conviction might also implicate double jeopardy protections. The Circuits are split over a possible extension of *Kennedy* in situations where misconduct during trial is not discovered until after trial, making a mistrial request based on this misconduct impossible. The question presented is:

Does the Double Jeopardy Clause bar retrial when a prosecutor's misconduct, committed for the purposes of diminishing a defendant's chance of acquittal is not discovered until after the jury has rendered a guilty verdict?

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On February 14, 2017, Petitioner filed a Motion to Dismiss on double jeopardy grounds with the trial court. A hearing was conducted based on the double jeopardy motion on October 10 and 11, 2017. The motion was denied. A timely appeal to the Pennsylvania Superior Court followed and the lower court's decision was affirmed on June 28, 2018. (Appendix A). Rehearing was denied on August 15, 2018. The Pennsylvania Supreme Court denied a Petition for Allowance of Appeal on February 26, 2019. (Appendix B). The Pennsylvania Supreme Court denied a Motion for Reconsideration on May 8, 2019.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V, provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived or life, liberty, or property, without due process of law...".

Constitution of the United States, Amendment XIV, provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, and property without due process of law...".

INTRODUCTION

Petitioner Alfonso Sanchez was convicted on September 30, 2008, and sentenced to death on October 22, 2008, for the murders of Lisa Diaz and Mendez Thomas. Petitioner maintains that he was not the shooter and that Steven Miranda, one of his co-defendants, was the actual shooter. After trial and sentencing concluded, in state collateral proceedings, DNA evidence produced by the Commonwealth showed that co-defendant Miranda's DNA was under decedent Lisa Diaz's fingernails. The Commonwealth presented false testimony at trial that no DNA evidence had been preserved for testing. The Commonwealth had likewise concealed that DNA testing occurred and that the results had implicated Steven Miranda, not Petitioner. Petitioner's death sentence was vacated based on the discovery of this DNA evidence during post-conviction proceedings.

The Commonwealth of Pennsylvania seeks to try Petitioner for capital murder a second time. Petitioner filed to bar retrial on double jeopardy and prosecutorial misconduct grounds. The United States Circuit of Appeal Courts disagree regarding the extent of *Kennedy*'s application in situations similar to Petitioner's. Misconduct by a prosecutor that "goads" a defendant into moving for a mistrial would bar retrial, while a rule governing conduct not discovered until after trial, as is the case here, has not been established by this Court.

The Court should grant certiorari to establish *Kennedy*'s reach in situations congruent to Petitioner's.

STATEMENT OF THE CASE

A. Procedural History

After a capital trial, Petitioner was sentenced to death in October 22, 2008. The Pennsylvania Supreme Court affirmed his convictions and sentences. *Commonwealth v. Sanchez*, 82 A.3d 943 (Pa. 2013).

On March 7, 2016, Petitioner filed a Petition for Post-Conviction Relief with the trial court alleging, among other things, that the Commonwealth withheld exculpatory evidence. Petitioner filed an amended petition on April 19, 2016. Pursuant to Petitioner's discovery request, the Commonwealth provided exculpatory evidence that had not previously been given to Petitioner or his counsel.

On January 26, 2017, the sentencing court, with the agreement of the Commonwealth, entered an order vacating Petitioner's sentence. On February 14, 2017, petitioner filed a Motion to Dismiss on double jeopardy grounds. A hearing was conducted based on the double jeopardy motion on October 10 and 11, 2017. The motion was denied. A timely appeal to the Pennsylvania Superior Court followed and was denied. The Pennsylvania Supreme Court declined to exercise discretionary review of the case.

B. Facts

Petitioner Alfonso Sanchez's death sentence and conviction were vacated based on the discovery of DNA evidence — DNA evidence collected during the course of the Commonwealth's investigation but produced only after Petitioner's trial. Petitioner, along with two co-defendants, was charged with burglary and the murders of Lisa Diaz and Mendez Thomas. From the start of this case, Petitioner

maintained that Steven Miranda shot and killed the victims. At trial, the prosecution presented testimony that no DNA evidence had been preserved for testing. The day after Petitioner was sentenced to death, the Pennsylvania State Police (PSP) produced a report revealing Miranda's DNA under the fingernails of Lisa Diaz. NT 10/10/17 p. 79. The report was not produced to Petitoner or his counsel. The report, dated October 23, 2008, was received by defense counsel in 2016. After Petitioner's conviction was vacated, Petitioner moved to bar retrial based on double jeopardy protections.

At Petitioner's trial, a witness for the prosecution testified that DNA evidence was not preserved or tested. The Commonwealth presented Police Officer Sean Harold as a witness. He testified that he recovered the gun allegedly used in the shooting. NT 9/24/08, 54-55. The prosecutor asked him about the recovered gun, "And did you choose not to submit it for DNA analysis?" to which he responded, "Yes." *Id.* at 58. Officer Harold then proceeded to lay out several reasons why he chose not to submit it for DNA analysis. *Id.* On cross-examination, Officer Harold said that he "spoke to crime lab personnel from the Pennsylvania State Police," but said that they were not coming to testify. *Id.* at 62-63. Defense counsel asked, "[Y]ou did not take that for scientific forensic analysis. Is that fair to say?" Harold answered, "Correct." *Id.* at 65. On re-direct examination, the prosecutor again asked Officer Harold's opinion for why the gun would have been "contaminated" and therefore not submitted for DNA analysis. *Id.* at 65.

Officer Harold lied. Long after trial, on March 21, 2016, and March 31, 2016,[1] the Commonwealth provided defense counsel with a report entitled "DNA Analysis," dated October 23, 2008. The report indicates the following:

- On November 28, 2007, Detective John Bonargo of the Warminster Township Police Department delivered to the Pennsylvania State Police, Bethlehem Crime Lab, for analysis: (1) eight swabs taken from the barrel, grip, slide, and magazine of the firearm; (2) two hair fragments recovered from the crime scene; (3) three hair fragments recovered on or about the alleged murder weapon; and (4) left and right-hand fingernail clippings from decedent Lisa Diaz;

- On January 18, 2008, Detective Bonargo, accompanied by Detective John Schlotter, retrieved vials of each of the decedents' blood from the National Medical Services and transported them to the Bethlehem Crime Law;[2]

- On August 18, 2008, the Greensburg DNA Laboratory of the Pennsylvania State Police received the physical evidence, which had been sent to it by the United Parcel Service by Keri Harkleroad of the Bethlehem Crime Lab;

- On September 4, 2008, the Friday before jury selection began in Mr. Sanchez's trial, Detective Bonargo retrieved all of the physical evidence from the State Police Crime Lab (it is unclear whether he retrieved it from Bethlehem or directly from Greensburg);

- On October 23, 2008, one day after the trial court imposed Mr. Sanchez's sentence, the Greensburg Crime Lab produced and dated its DNA report; copies were to be sent to the Chief of Police and John Bonargo.

As to the swabs taken from the alleged murder weapon and the hair fragments recovered on or around the gun and at the crime scene, the report

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[1] The report was provided over two dates because the last three pages of the report passed on March 21, 2016 were illegible. On request, the Commonwealth obtained and passed legible copies of the remaining pages on March 31, 2016.

[2] This fact was contained in the trial discovery, and is included here because it is important to the timeline of the DNA analysis that occurred.

concluded that no DNA profile could be developed due to an insufficient amount of DNA.

Regarding decedent Lisa Diaz's fingernail scrapings, the forensic scientist found that the DNA under her right-hand fingernails contained a mixture of her DNA and that of an unidentified individual. The forensic scientist developed the profile of the unidentified individual and submitted it to the FBI's Combined DNA Index System (CODIS). The DNA under Lisa Diaz's right-hand fingernails matched that of Petitioner's co-defendant, Steven Miranda. The DNA Report purports to be "preliminary;" no "final" report has been passed to Petitioner in discovery, if the Commonwealth prepared one.

Lisa Diaz's fingernails were clipped and preserved as evidence by Dr. Hood during her autopsy. *See* App. Vol. X, Tab 61 at 405 (Bucks County Detectives Autopsy Report). Two Warminster Township Police Officers and six members of the Bucks County District Attorney's Office were present at the autopsy. *Id.* The clipped fingernails were bagged as evidence and turned over to the police officers. *Id.* On November 28, 2007, the fingernail clippings were among the physical evidence that Warminster Township Detective John Bonargo submitted to the Pennsylvania State Police Crime Lab for analysis.

The fact of the ongoing DNA analysis was never disclosed to the defense, nor were the results.

Following Petitioner's post-conviction petition and request for discovery, it was established that—contrary to the evidence passed in discovery and the evidence

that the Commonwealth presented at trial—DNA evidence was preserved, it was tested, and its very existence and results were not disclosed to Petitioner and his counsel. Although the State Police Crime lab could not obtain DNA findings for the swabs or hairs near the alleged murder weapon, Lisa Diaz's fingernail clippings had Miranda's DNA under them.

The fact that Diaz had Miranda's DNA under her fingernails supports the defense theory that Miranda was the shooter. With this evidence, defense counsel could have presented expert testimony regarding the DNA evidence and the meaning of DNA being present under fingernails. Miranda and Diaz had an "on and off" relationship; a letter from Diaz to Miranda purporting to end their relationship was found in the kitchen trash can at the crime scene. That would support a theory that Miranda had a clear motive to kill Diaz. Coupling that motive with eyewitness Carmona's first statement to police that "Steve shot Lisa Diaz several times," the DNA evidence would have powerfully aided Petitioner's defense and raised a reasonable doubt about his guilt.

In addition, the newly discovered report states that Officer Harold misled the court and the jury when he testified that he "chose not to submit [the gun] for DNA analysis." NT 9/24/08, 58. He and his department in fact *did* submit the gun and other evidence for DNA analysis and picked up the evidence from the crime lab prior to the start of trial. If exposed, these untruths could have called into question the integrity of the Commonwealth's entire investigation.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE A SPLIT AMONG THE COURTS OF APPEAL ABOUT WHETHER THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL WHEN A MISTRIAL WAS NOT DECLARED.

A. Supreme Court Precedent

In *Kennedy*, this Court held that double jeopardy protections apply when a prosecutor intentionally goads a defendant into asking for a mistrial, to avoid a possible acquittal. *Oregon v. Kennedy*, 456 U.S. 667 (1982). At least three circuit courts have recognized that double jeopardy protections for defendants likely extend beyond this limited circumstance, such as where the prosecution engages in misconduct to unjustly convict the defendant that is not discovered until after trial, but circuits have not agreed on a clear rule. Direction is needed from this Court to resolve the circuit split and clarify the extent of double jeopardy protections.

The Double Jeopardy Clause of the Fifth Amendment protects a defendant from being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. Under the Double Jeopardy Clause, defendants are protected against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same crime. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *see also United States v. Dinitz*, 424 U.S. 600, 606 (1976). The Fifth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

The Double Jeopardy Clause's prohibition is not simply "against being twice punished; but against being twice put in jeopardy." *Ball v. United States*, 163 U.S. 662, 669 (1896). Defendants have a valued right to a fair first trial completed before

the first jury empaneled. *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *Kennedy*, 456 U.S. at 673, 676.

Prosecutors wield enormous power and face few constraints on their authority; the Double Jeopardy Clause is a direct constitutional constraint on a prosecutor's power. Prosecutors enjoy absolute immunity and have broad discretion in who they choose to indict, what charges to pursue, and whether to offer plea bargains. Double jeopardy protections recognize this power imbalance. This Court has long recognized that

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188 (1957).

Under the ABA's standards for prosecutors, the prosecutor has a duty to seek justice and not merely convictions. Standard 3-1.2 (c). *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) (recognizing prosecutor's duty to refrain from improper methods leading to wrongful conviction is equal to duty to procure a just conviction). This Court has connected the immense power of the prosecutorial office with double jeopardy protections for defendants. *Breed v. Jones*, 421 U.S. 519, 530 (1975) ("[A] criminal proceeding 'imposes heavy pressures and burden psychological, physical, and financial on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once for the same offence.").

Once jeopardy attaches, a defendant may not be retried, except in limited situations: when the defendant consents to the mistrial or the declaration of a mistrial was manifestly necessary. *Kennedy*, 456 U.S. at 672-73. This Court has recognized that prosecutorial misconduct in some instances reinstates double jeopardy protection. *Ball v. United States*, 163 U.S. 662, 669 (1896); *Kennedy*, 456 U.S. at 673. When a defendant is faced with continuing with a tainted trial or having to be tried all over again, the defendant faces a hollow choice. *See United States v. Dinitz*, 424 U.S. 600, 608-10 (1976). This Court restricted double jeopardy protections in *Kennedy* by holding that only through proving prosecutorial intent to "goad" the defendant into asking for a mistrial would double jeopardy protections attach. *Kennedy,* 456 U.S. at 675-76. *Kennedy* did not reach the question whether prosecutorial misconduct that is discovered beyond the trial can prevent retrial under the Double Jeopardy Clause.

In the more than thirty years since *Kennedy* was decided, the Circuits have reached conflicting conclusions on this important question, disagreeing over whether double jeopardy protections attach not only when the prosecution goads the defendant into asking for a mistrial, but also where the prosecution engages in misconduct to unjustly convict the defendant. The First, Second, and Sixth Circuits have found that it can. The Tenth Circuit has found that it cannot, and the Seventh and Eighth Circuits have declined to rule on the issue, specifically because they lack guidance from this Court about how to apply existing law.

B. The First, Second, and Sixth Circuits Recognize a Double Jeopardy Bar to Retrial in Cases of Prosecutorial Misconduct Outside the Mistrial Context.

In *United States v. Wallach*, the Second Circuit suggested that because *Kennedy* holds that double jeopardy bars a retrial when the prosecutor provokes the defendant into moving for a mistrial, the same rationale would preclude "retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct." *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), *cert. denied*, 508 U.S. 939 (1993). If double jeopardy precedent is not extended in this way, a prosecutor's misconduct that goads a defendant into moving for a mistrial would act as a bar to retrial, while misconduct that fends off an acquittal and that the defendant is unaware of until after trial would not bar retrial. *Id.* at 916. Without this logical inclusion of double jeopardy protections the purpose of the Double Jeopardy Clause is lost; as the Second Circuit noted, "[t]here is no justification for that distinction." *Id.*

The Second Circuit reiterated its reasoning in *Wallach* in *United States v. Pavloyianis*, 996 F.2d 1467 (2d Cir. 1993), which concerned the prosecutor's failure to disclose the criminal record of a witness who then testified falsely about it. The court ruled that "the Double Jeopardy Clause protects a criminal defendant from multiple successive prosecutions for the same offense that arise from prosecutorial overreaching engaged in with the deliberate intent of depriving him of having his trial completed by a particular tribunal or prejudicing the possibility of an acquittal

that the prosecutor believed likely." *Pavloyianis*, 996 F.2d at 1473. The First Circuit also adopted this holding in *United States v. Gary*, 74 F.3d 304 (1st Cir. 1996).

The Sixth Circuit acknowledged *Wallach*'s reasoning as well, although it has not formally adopted *Wallach* as the law of the circuit. In *Walls v. Hemingway*, 27 Fed. App'x 553 (6th Cir. 2001), the court rejected a petitioner's claim under *Kennedy* that judicial and prosecutorial misconduct barred retrial because "the double jeopardy defense does not bar re-prosecution where the defendant has managed through appeal or some other procedure to set aside his conviction." *Id.* at 556.

Each of these opinions acknowledged that the rationale of *Kennedy* applied as strongly to the prosecutor who manages to keep misconduct concealed until after trial as it does to the prosecutor who intentionally provokes a mistrial during trial.

C. The Tenth Circuit Does Not Recognize A Double Jeopardy Bar To Retrial Outside The Mistrial Context.

Unlike the First, Second, and Sixth Circuits, the Tenth Circuit has expressly refused to apply *Kennedy* outside the mistrial context. In *United States v. McAleer*, 138 F.3d 852 (10th Cir. 1998), the court held that *Kennedy* could never apply to a petitioner whose trial (albeit tainted by error) ended in conviction. The *McAleer* court reasoned that, "the *Kennedy* prosecutorial misconduct exception is a narrow one, designed to protect the defendant's right to have his trial completed before the first jury empaneled to try him." *Id.* at 855-56. Because McAleer was convicted by her initial jury, the court found double jeopardy principles satisfied. *Id.*

D. The Seventh and Eighth Circuits Have Sidestepped The Question Whether Double Jeopardy Can Bar Retrial Outside The Mistrial Context Because They Are Unsure How *Kennedy* Should Be Applied.

In *United States v. Catton*, 130 F.3d 805 (7th Cir. 1997), the court recognized strong policy reasons for applying the logic of *Kennedy* outside the mistrial context. The court reasoned, "if retrial is permitted [following reversal], the prosecutor will be better off than if the defendant had been acquitted at the first trial—better off because of prosecutorial misconduct" and stated that "we have left open the question of whether to adopt *Wallach*'s dictum as the law of the circuit." *Catton*, 130 F.3d at 807.

Similarly, the Eighth Circuit has avoided deciding whether *Kennedy* applies in cases of reversal. In *Jacob v. Clarke*, 52 F.3d 178 (8th Cir. 1995), the court observed that "[a] number of circuits have struggled with the question of whether the Supreme Court would extend *Kennedy* to cases involving convictions reversed because of trial error caused by, or at least infected with, prosecutorial misconduct." *Clarke*, 52 F.3d at 181. The court explicitly stated that the application of *Kennedy* "remains an open issue" and left the decision "for another day." *Id.*

E. Direction From This Court Is Needed To Resolve The Circuit Split And Clarify Double Jeopardy Standards.

Alongside questions of prosecutorial misconduct not discovered until after trial, *Kennedy*'s intent standard has proven cumbersome for courts to apply. The Court in *Kennedy* narrowed the previous double jeopardy rule to only focus on the intent of the prosecutor, conceding that the standard was "certainly not entirely free from practical difficulties" and that "[e]very act on the part of a rational prosecutor

during a trial is designed to 'prejudice' the defendant." *Kennedy*, 456 U.S. at 675, 674. Justice Powell, in his concurring opinion joined by three other justices, emphasized the difficulty in determining a prosecutor's subjective intent and stressed that a court "should rely primarily upon the objective facts and circumstances of the particular case." *Id.* at 679-80 (Powell, J.).

No cases have met the stringent *Kennedy* intent standard since it was created. Double Jeopardy Clause protections in the mistrial context have only applied when extended under state constitutions. The *Kennedy* test "misdirects the focus of the double jeopardy protections on the harboring of bad intentions as opposed to the prevention of unacceptable behavior by the prosecution." *State v. Rogan*, 91 Haw. 405, 423 (1999). The Court should adopt a standard that acknowledges the immense power wielded by the prosecution and ensures that defendants' rights to a fair first trial are protected by applying double jeopardy protection when a prosecutor recklessly disregards the unjust results of their actions toward a defendant.

Petitioner's case is a good vehicle for this Court to settle the open questions and splits among the circuits.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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