

IN THE SUPREME COURT OF THE UNITED STATES

ALFONSO SANCHEZ,	:	NO. 19-5660
PETITIONER	:	
	:	
V.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
RESPONDENT	:	ATTORNEY I.D. NO. 69706

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT**

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

- I. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE ACCEPTED WHERE IT WAS NOT TIMELY FILED WITHIN 90 DAYS OF ENTRY OF THE ORDER OF THE PENNSYLVANIA SUPREME COURT DENYING DISCRETIONARY REVIEW AND WHERE PETITIONER FAILED TO FOLLOW THE RULES OF THIS HONORABLE COURT FOR SEEKING AN EXTENSION OF TIME TO FILE HIS PETITION?
- II. WHETHER PETITIONER FAILED TO SET FORTH A JURISDICTIONAL BASIS ON WHICH THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER WHERE THE STATE COURT'S RULING RESTED ON STATE LAW GROUNDS AND WHERE THERE WAS NO INTENTIONAL PROSECUTORIAL MISCONDUCT IMPLICATING A FEDERAL DOUBLE JEOPARDY CLAIM?

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the decision by the Pennsylvania Superior Court, entered June 28, 2018, affirming the order of the trial court, which denied Petitioner's motion to dismiss this capital murder case on Double Jeopardy grounds. In particular, the Superior Court held as follows:

We [] are unpersuaded by Appellant's claim of intentional prosecutorial misconduct. In sum, the trial court found that there was no intent to deprive Appellant of a fair trial, and because that finding is supported by the record and our *de novo* review, we affirm the trial court's denial of Appellant's motion to dismiss on double jeopardy grounds.

Commonwealth v. Sanchez, 3368 EDA 2017, slip op. pp. 17-18.

Petitioner now seeks review of this decision by filing an untimely petition which relies on a misstatement of the facts of this case as determined by the state courts which reviewed it, and a misapprehension that the state court's ruling implicates a federal Double Jeopardy claim.

COUNTER-STATEMENT OF CASE

A. PROCEDURAL HISTORY

On September 30, 2008, Petitioner was found guilty by a jury of two counts of First Degree Murder and related charges in the shooting deaths of Lisa Diaz and Mendez Thomas. On October 22, 2008, Respondent was sentenced to death for the murder of Lisa Diaz and to a consecutive life sentence for the murder of Mr. Thomas.

On December 17, 2013, the Pennsylvania Supreme Court affirmed the judgment of sentence. This Honorable Court denied certiorari on October 6, 2014.

On January 30, 2015, Petitioner filed a *pro se* petition pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa. C.S. 9541, *et seq.*, seeking an emergency stay of execution. The Honorable Alan M. Rubenstein of the Bucks County Court of Common Pleas granted the stay by Order dated February 3, 2015.

On November 23, 2015, the Federal Community Defender Organization (“FCDO”) entered its appearance on Petitioner’s behalf and on March 7, 2016 filed an amended counseled PCRA petition.

As detailed, *infra*, during the course of the subsequent PCRA proceedings, the Commonwealth became aware of two laboratory reports generated in 2008 that appeared not to have been disclosed to defense counsel pretrial through inadvertence and oversight. As a result of this discovery, the Commonwealth concluded that Petitioner was entitled to a new trial and, on January 26, 2017, requested the PCRA court to vacate the prior judgment of sentence and order a new trial, which the court did by order entered January 27, 2017.

On February 21, 2017, Respondent filed a *pro se* motion to dismiss the charges against him based on Double Jeopardy arguing that the Commonwealth had intentionally withheld exculpatory DNA evidence from him.

In April, 2017, new counsel was appointed to represent Appellant for purposes of retrial.¹ Trial was scheduled to begin on October 10, 2017.

On the morning of October 10, 2017, prior to the start of jury selection, counsel advanced Petitioner’s previously filed *pro se* motion to dismiss on Double Jeopardy

¹ At the January 26, 2017 proceeding, the FCDO indicated that it would not represent Appellant at the new trial. N.T. 1/26/17, p. 8.

grounds. An evidentiary hearing was conducted on this motion on October 10 and October 11, 2017. At the conclusion of the hearing, the trial court denied Petitioner's motion. However, because the trial court did not determine the motion to be frivolous, Petitioner informed the court of his intention to file an interlocutory appeal pursuant to Pennsylvania Rule of Criminal Procedure 587. A continuance of trial was granted for that purpose.

Petitioner timely filed an interlocutory appeal to the Pennsylvania Superior Court, which, on June 28, 2018, affirmed the trial court's order denying dismissal on Double Jeopardy grounds.

By order entered February 26, 2019, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Petitioner sought reconsideration of that denial, which the Supreme Court denied by order entered May 8, 2019.

A petition for certiorari from that order was due no later than August 6, 2019.

On August 19, 2019, Petitioner filed the instant Petition for Certiorari with this Honorable Court along with a "Motion to Direct the Clerk to File Petitioner's Petition for Writ of Certiorari to the Pennsylvania Superior Court Out of Time" (hereinafter "Motion to File Out of Time"). The petition and motion were docketed with this Court on August 21, 2019.

The Commonwealth's Brief in Opposition to Petition for Writ of Certiorari now follows.

B. FACTUAL HISTORY

Shortly before midnight on October 16, 2007, Petitioner, Alfonso Sanchez, shot to death Mendez Thomas and Lisa Diaz inside a small basement-level apartment in Warminster, Bucks County, Pennsylvania. Sanchez also shot and wounded Jessica

Carmona. Carmona and Thomas' two young children were present during the shooting.

At trial, it was established that Petitioner had entered the apartment with co-defendants, Steven Miranda and Alex Martinez, under the pretext that Thomas would sell them marijuana. In fact, the purchase of marijuana was a ruse for Petitioner and his co-defendants to make entry into the Carmona/Thomas apartment so that Miranda could fight Thomas or assault him. When it appeared that Miranda would not go through with the altercation, Petitioner took out his gun and started firing, while Miranda and Martinez fled.

Co-defendant Martinez cooperated with the prosecution and testified against Miranda and Petitioner at trial. He identified Petitioner as the shooter. In addition, Carmona – the surviving victim – testified that Petitioner shot and killed the father of her children, Mendez Thomas, her sister, Lisa Diaz, and also attempted to kill her while she covered her son's body to protect him. Her testimony at trial was corroborated by her frantic call to 911 immediately after the shootings, during which she identified Petitioner as the shooter.

Petitioner's defense at trial was that Miranda shot and killed the victims. The jury rejected this defense and convicted Petitioner of murdering Thomas and Diaz, for which he was thereafter sentenced to death.

Although reports produced in discovery to defense counsel prior to trial revealed that items had been transported to the lab for testing, neither the prosecution team nor defense counsel believed at the time that DNA testing had been done. In fact, at trial, the prosecutor specifically asked one of the lead investigators, Detective Sean Harold, whether the gun had been tested for DNA and he testified that it not been submitted. No questions were asked by either side about whether the scrapings from the victim's fingernails had

been submitted for testing.

In 2016, during the post-conviction collateral proceedings, the Commonwealth discovered that a DNA lab report dated October 23, 2008 – several weeks after the jury returned the verdict of death and a day after Petitioner was sentenced – had been generated by the Pennsylvania State Police (“PSP”) DNA lab. That report indicated that no DNA was found on the murder weapon, and also revealed that DNA testing had been done on victim Lisa Diaz’s fingernail clippings and that a DNA profile consistent with that co-defendant, Steven Miranda, had been identified from those clippings. Notably, Miranda and Diaz had been dating prior to her murder, and there was no evidence that the shooter had physical contact with Diaz at the time of her murder.

Further investigation uncovered another report by the PSP serology lab, dated August 18, 2008 – several weeks prior to trial. This report indicated that specimens, including Ms. Diaz’s fingernail clippings and swabs from the gun, were being submitted to the PSP lab in Greensburg for DNA testing – a fact which the lead investigators and the prosecutor in the case were not aware.

Although the Commonwealth does not believe that the DNA results exculpate Petitioner as the shooter, the Commonwealth acknowledges that Petitioner was entitled to use of the lab during trial in order to further his defense, and that through inadvertence and miscommunication, it had not been provided pretrial. Accordingly, the Commonwealth agreed Petitioner was entitled to PCRA relief by way of a new trial, and requested that relief from the PCRA court in January 2017.

Prior to the start of Petitioner’s retrial in October 2017, counsel advanced a motion for dismissal of the case on Double Jeopardy grounds, alleging intentional prosecutorial

misconduct. An evidentiary hearing was thereafter conducted at which the Commonwealth called the former prosecutor who tried the case in 2008, the two lead investigators assigned to the case, and two other members of the Warminster Police Department who had been involved in some aspects of the investigation. Petitioner called his former trial counsel as a witness.

The credible evidence at that hearing established that the lead investigators and the prosecutor in the case were not aware that Lisa Diaz's fingernail scrapings, or any other evidence for that matter, had been submitted to the lab for testing. They did not believe that any DNA evidence would be of import in the case, especially given that the gun had been found days later in a car with an open sunroof, exposed to the elements. Rather, another detective in the police department, who was primarily responsible for transporting evidence, had submitted evidence to the lab, was the main contact for the lab, and entered reports received from the lab into a central computer system without notifying the lead investigators of the results, assuming, incorrectly, that they would discover them on their own. All the officers and the prosecutor denied intentionally withholding the evidence.

The first time that the prosecutor or lead investigator became aware of the DNA report was when it was forwarded to them after Petitioner's sentencing. The prosecutor then reached out to defense counsel's office, spoke with his secretary, and faxed the report over believing that if counsel thought it was of value, counsel would do something with it. Defense counsel said he never received it and only became aware of the lab report during the PCRA proceedings.

After hearing all the evidence, the trial court found that "the Commonwealth did not engage in conduct which was intended to prejudice [Appellant] and deny him a fair

trial.” *Sanchez, supra*, slip op. p. 14. Rather, the trial court concluded that “[s]omeone wasn’t minding the store,” which led to miscommunication between the police, the prosecutor and the defense. *Id.* at p. 17. The Superior Court agreed and concluded that, under prior Pennsylvania precedent, such unintentional miscommunication did not support a Double Jeopardy claim. *Id.* at 17-18.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED AS UNTIMELY WHERE IT WAS FILED MORE THAN 90 DAYS AFTER THE DECISION OF THE STATE SUPREME COURT DENYING DISCRETIONARY REVIEW AND PETITIONER FAILED TO PROPERLY INVOKE AN EXTENSION OF TIME FOR FILING.

Statute provides that “[t]he time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be prescribed by rule of the Supreme Court.” 28 U.S.C. §2101(d). In turn, this Court’s rules require, in relevant part, that “[a] petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.” USSC Rule 13(1). Rule 13 further states that “[t]he Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time.” USSC Rule 13(2).

Here, the Pennsylvania Supreme Court denied discretionary review on February 26, 2019 and denied reconsideration of that denial on May 8, 2019. Accordingly, any petition for certiorari had to be filed with this Court no later than August 6, 2019. It was not, however, filed until August 19, 2019.

Recognizing that said petition is untimely, Petitioner has also filed a motion seeking to file his petition “out of time.” However, this Court’s rules provide for a mechanism by which to seek an extension of time for “good cause” for filing a petition for certiorari. That mechanism requires an application to be filed “at least 10 days before the date petition is due, except in extraordinary circumstances.” USSC Rule 13(5). That did not occur here. Rather, Petitioner filed a motion to file his petition out of time simultaneously with his untimely filed petition, both of which were late.

Nor did Petitioner establish “extraordinary circumstances” justifying an exception to the application process set forth in Rule 13(5). Instead, Petitioner’s counsel avers that he “mistakenly calendared the due date for a later time.” Motion to File Out of Time, ¶3. While the Commonwealth certainly appreciates human error, particularly given the facts of this case, the Commonwealth disagrees that human error is extraordinary or warrants an exception to the established procedure for seeking an extension of time to file the instant petition.

II. PETITIONER HAS SET FORTH NO JURISDICTIONAL GROUNDS FOR WHICH THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER INsofar AS THE STATE COURT’S RULING RESTED ON STATE LAW GROUNDS AND THERE WAS NO INTENTIONAL PROSECUTORIAL MISCONDUCT IMPLICATING A FEDERAL DOUBLE JEOPARDY CLAIM.

Rule 10 of the Rules of this Court sets forth the “Considerations Governing Review on Certiorari” as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

USSC Rule 10.

The instant petition does not involve a decision of a federal court of appeals, a state court of last resort, or a state court opinion that decides an important question of federal law. Indeed, a review of the petition and the underlying Superior Court decision makes plain that the petition raises no question of federal law, let alone an important one. Rather, the petition ignores that the Superior Court's decision rested on state, not federal, constitutional grounds, and it rests on the faulty premise that the prosecution engaged in *intentional* prosecutorial misconduct that implicates federal constitutional concerns.

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), this Court narrowly held that where a prosecutor intentionally goads a defendant into seeking a mistrial, the Double Jeopardy Clause of the Fifth Amendment bars the prosecution from retrying the defendant. *Id.* at 676. The Court distinguished those cases in which a prosecutor's conduct might be viewed as harassment and overreaching, and limited its holding to those cases where there is an

“intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.” *Id.*

As Petitioner notes, federal courts continue to debate whether the federal Double Jeopardy Clause bars not just retrial after a mistrial, but also retrial when a conviction has been obtained, in part, through intentional prosecutorial misconduct. Yet, the Pennsylvania courts have already determined, as a matter of state constitutional law, that Double Jeopardy does bar retrial under such circumstances. *See Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) (holding that the Double Jeopardy Clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of denying him a fair trial). *See also Commonwealth v. Graham*, 109 A.3d 733, 736 (Pa. Super. 2015) (recognizing that Pennsylvania Supreme Court construes state constitutional Double Jeopardy Clause more broadly than its federal counterpart).

In other words, Petitioner justifies his Court’s review in the instant matter by relying on a federal circuit split over whether *Oregon v. Kennedy* can be fairly interpreted to apply more broadly to retrials after conviction. Yet, any such split is wholly irrelevant to this case because Pennsylvania courts have already decided that Double Jeopardy does apply in such circumstances as a matter of Pennsylvania constitutional law. Thus, the Superior Court’s decision applied the more expansive interpretation of Double Jeopardy that Petitioner urges this Court to adopt.

Even under such broader protection, the state courts below nevertheless rejected Petitioner’s Double Jeopardy claim because Pennsylvania courts have drawn the proverbial

line for granting dismissals at intentional prosecutorial misconduct. The Pennsylvania constitution's Double Jeopardy Clause does not support dismissing cases where a conviction was obtained, in part, through inadvertent mistake by the prosecution, miscommunication between the prosecutor and police, or even gross negligence by the prosecutor. *See, e.g., Commonwealth v. Burke*, 781 A.2d 1136, 1146 (Pa. 2001) (holding that dismissal of case not appropriate where the police mishandling of evidence was due to miscommunication and not intentional prosecutorial misconduct); *Commonwealth v. Adams*, 177 A.3d 359, 374 (Pa. Super. 2017) (holding that double jeopardy did not require dismissal of case where prosecutor did not act intentionally in withholding evidence); *Commonwealth v. Kearns*, 70 A.3d 881, 886 (Pa. Super. 2013) (holding gross negligence of prosecutor in withholding discovery until mid-trial did not bar retrial of defendant). Rather, a showing of intentional prosecutorial misconduct must be made to justify dismissal of charges based on Double Jeopardy, just as this Court required in *Kennedy*.

While federal courts have taken varying views on whether *Kennedy's* reasoning extends to those instances of prosecutorial misconduct which result in a conviction rather than a mistrial, all such cases to which Petitioner cites have one significant detail in common: unlike here, they involved *intentional* prosecutorial misconduct. Neither *Kennedy*, nor other precedent of this Court, nor any of the federal courts of appeals cases cited by Petitioner address the situation implicated herein: whether Double Jeopardy bars retrial of a defendant whose conviction is vacated due to conduct by the prosecution that is not intentional or in bad faith.

What Petitioner really seeks is for this Court to use this case to create a new federal constitutional rule: that the federal Double Jeopardy Clause bars retrial of a defendant after

conviction “when a prosecutor recklessly disregards the unjust results of their actions toward a defendant.” Petition for Certiorari, p. 16. The Commonwealth respectfully suggests that this case is not a proper vehicle for this Court to consider such a new rule.

To reach such a holding, this Court would first have to decide whether to expand Double Jeopardy protection beyond mistrials to include cases where a conviction had been obtained. Because the Pennsylvania constitution already provides such protection, this Court would in fact be deciding in this case whether federal constitutional law is in line with the broader protections allowed under Pennsylvania constitutional law. Yet, even if the Court were to answer that question in the affirmative, it would have no bearing on this case since Petitioner already received the benefit of this more expansive Double Jeopardy interpretation under state law.

This Court would also then have to decide whether Double Jeopardy protection extends to cases where the alleged misconduct by the prosecution was unintentional. Petitioner wholly ignores that, here, the state courts found that the prosecution did not act intentionally in withholding the DNA lab. Nor did any court find that the prosecution acted “recklessly” in failing to provide the lab report. As such, were this Court to review this case, it would have to consider not just whether to expand federal Double Jeopardy protection to retrials after conviction, but also whether to expand it to unintentional mistakes by the prosecution. While there may certainly be a case that warrants this Court’s attention to both those questions, Petitioner’s case is undeserving of such review.

Petitioner is not innocent of these murders, and the DNA evidence indicating that victim Lisa Diaz had her boyfriend’s DNA under her fingernails does not make Petitioner innocent. It is for precisely that reason that the prosecution had no reason to intentionally

hide this evidence back in 2008. The Commonwealth nevertheless recognizes that Petitioner was entitled to use this DNA evidence as he deemed fit to advance his defense and, for that reason, the Commonwealth agreed to a new trial upon discovering that the DNA lab existed and had not been disclosed to the defense prior to trial. The Commonwealth has been seeking to make good on that agreement for the past two years. Petitioner's insistence that the prosecution engaged in intentional misconduct precluding retrial is not supported by the credible evidence and has been rejected by every state court to have reviewed it. His efforts to now involve this Honorable Court in this case by manufacturing a federal constitutional claim should, respectfully, be denied.

CONCLUSION

Based on the reasons set forth herein and authorities stated in support thereof, the Commonwealth respectfully requests that this Honorable Court deny this untimely Petition for a Writ of Certiorari.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon the persons
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