No.___

In The

Supreme Court of the United States

ANTHONY JAMES SCOTT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of
the State of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held, "[T]he suppression by the prosecution of evidence favorable to an accused up on request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Further, this Court has held that the double jeopardy clause of the Fifth Amendment to the United States Constitution does not ordinarily bar a retrial of a criminal defendant, even if there is prosecutorial error, unless the error was intended to provoke the request for a mistrial, or the error was because of bad faith or to harass or prejudice the defendant. *Oregon v. Kennedy*, 456 U.S. 667, 670 (1982). In this case, the Carroll County Superior Court and the Court of Appeals of the State of Georgia erred when they erroneously applied this Court's foregoing precedents and held that the State of Georgia could retry the Petitioner on his criminal charges, notwithstanding prosecutorial misconduct by the Carroll County District Attorney's Office that intentionally goaded the Petitioner, by and through his counsel of record, to request a mistrial.

The Question Presented is: Did the Carroll County Superior Court and the Court of Appeals of the State of Georgia err when they held that the Carroll County District Attorney's Office's conduct did not rise to the level of intentionally goading the Petitioner into requesting a mistrial?

RELATED PROCEEDINGS

State of Georgia v. Anthony "AJ" Scott, Superior Court of Carroll County, Georgia, Case No. 17CR775

Anthony James Scott v. The State, Court of Appeals of Georgia, Case No. A22A0989

Anthony James Scott v. The State, Supreme Court of Georgia, Case No. S23C0126

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OPINION OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

The Decision of the Court of Appeals of the State of Georgia denying the Petitioner's appeal from the denial of his Plea in Bar is published and was issued on August 26, 2022. (Attached as Appendix A). On April 18, 2023, the Supreme Court of the State of Georgia denied the Petitioner's Petition for Writ of Certiorari. (Attached as Appendix D).

JURISDICTION

The Court of Appeals denied relief on August 26, 2022, and the Supreme Court of the State of Georgia denied the Petitioner's timely filed Petition for Writ of Certiorari on April 18, 2023. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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 offense 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.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> 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.

Art. I, § I, ¶ I, of the Constitution of the State of Georgia provides:

> No person shall be deprived of life, liberty, or property except by due process of law.

Art. I, § I, ¶ XVIII of the Constitution of the State of Georgia provides:

> No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial.

STATEMENT OF THE CASE

On or about August 31, 2017, the Petitioner was indicted in the Carroll County Superior Court on two counts of Serious Injury by Vehicle, one count of Violation of Oath by Public Officer, two counts of Homicide by Vehicle in the Second Degree, Speeding, and Reckless Driving. Prior to the trial, the count of Violation of Oath by Public Officer was nolle prossed.

On or about May 13-17 and 20-22, 2019, the Petitioner had a trial. During jury deliberations, the Petitioner's counsel of record discovered evidence underlying this appeal was not presented to the Petitioner pre-trial, so the Petitioner's counsel filed a motion for mistrial. On or about May 22, 2019, Judge John Simpson ("Judge Simpson") held a hearing on the Petitioner's motion for mistrial. On or about May 24, 2019, Judge Simpson issued and read his Order granting the Petitioner's motion for mistrial in open court.

Judge Simpson later recused himself from continuing to preside over the case, and Carroll County Superior Court Judge William Hamrick ("Judge Hamrick") was appointed as the new presiding judge on the case. The Coweta Judicial Circuit District Attorney's Office was recused from the case. On or about September 24, 2019, the Dekalb County District Attorney's Office was appointed as the new prosecuting attorney's office in the case.

On or about May 12, 2021, the Petitioner's counsel filed the Plea in Bar for Violation of *Brady v. Maryland* ("Plea in Bar"), which underlies this appeal. On or about June 24, 2021, the Dekalb County District Attorney's Office filed its Response in

Opposition to Defendant's Plea in Bar for Violation of *Brady v. Maryland*. On or about January 13, 2022, Judge Hamrick held a virtual hearing via Zoom, during which the Petitioner's counsel and Jason Rea, a Senior Assistant District Attorney for the Dekalb County District Attorney's Office, presented their arguments. At the end of the hearing, Judge Hamrick issued his oral decision denying the Petitioner's Plea in Bar. On or about February 4, 2022, Judge Hamrick issued his written Order.

On or about February 7, 2022, the Petitioner's counsel filed his Notice of Appeal. On or about February 14, 2022, the appeal was docketed with the Court of Appeals of the State of Georgia. After briefing by the parties, the Court of Appeals of the State of Georgia issued its Opinion on August 26, 2022. Also on August 26, 2022, the Petitioner filed a Notice of Intention to Petition for Writ of Certiorari with the Court of Appeals of the State of Georgia.

The Petitioner then filed a Petition for Writ of Certiorari with the Supreme Court of the State of Georgia, which was denied on April 18, 2023.

REASONS TO GRANT THE WRIT

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held, "[T]he suppression by the prosecution of evidence favorable to an accused up on request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Further, this Court has held that the double jeopardy clause of the Fifth Amendment to the United States Constitution does not ordinarily bar a retrial of a criminal defendant, even if there is prosecutorial error, unless

the error was intended to provoke the request for a mistrial, or the error was because of bad faith or to harass or prejudice the defendant. *Oregon v. Kennedy*, 456 U.S. 667, 670 (1982). In this case, the Carroll County Superior Court and the Court of Appeals of the State of Georgia erred when they erroneously applied this Court's foregoing precedents and held that the State of Georgia could retry the Petitioner on his criminal charges, notwithstanding prosecutorial misconduct by the Carroll County District Attorney's Office. Consequently, under S.Ct. Rule 10 (c), this Court should grant the writ.

I. The Carroll County Superior Court and the Court of Appeals of the State of Georgia erred when they held that the Carroll County District Attorney's Office's conduct did not rise to the level of intentionally goading the Petitioner into requesting a mistrial.

Pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, and Art. 1, Sec. 1, ¶ 1, of the Georgia Constitution, the Petitioner is entitled to due process of law. Pursuant to the Fifth Amendment to the U.S. Constitution, Art. 1, Sec. 1, ¶ XVIII of the Georgia Constitution, and O.C.G.A. §§ 16-1-7 and 16-1-8, the Petitioner is protected from multiple prosecutions by the government for identical and related offenses arising from the same set of facts.

This Court, in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

A defendant may raise the defense of double jeopardy to a retrial if the prosecutor's misconduct was engaged in with the intent to undermine the language of the Double Jeopardy Clause. *Oregon*, 456 U.S. at 674.

This Court, in *United States v. Bagley*, 473 U.S. 667, 675 (1985), stated the following about the "*Brady* rule":

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but [is required] to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

In *Brady*, supra, this Court stated,

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. … A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial

> that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.

373 U.S. at 87-88.

The Georgia Supreme Court, in *Schofield v. Palmer*, 279 Ga. 848, 852 (2005), stated that it does not matter that a law enforcement agency may have possessed the evidence favorable to the defense without knowledge of the prosecutor; the onus and burden ultimately lies upon the prosecutor for failing to disclose the favorable evidence to the defense if one or more members of the prosecution team possessed and suppressed the evidence.

In *Berger v. United States*, 295 U.S. 78, 88 (1935), this Court stated:

> The [government] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [the prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

To establish a violation of *Brady*, supra, a defendant must show: (1) the State possessed the favorable evidence; (2) the defendant did not possess

the evidence, nor could they obtain it on their own with reasonable diligence; (3) the State suppressed the evidence; and (4) if the evidence had been disclosed to the defendant, "a reasonable probability exists that the outcome of the trial would have been different." *Schofield*, 279 Ga. at 852.

The fourth element, referred to as the "materiality" element, requires a finding that the suppression of evidence favorable to the defendant undermined confidence in the outcome of the trial. *Schofield*, 279 Ga. at 852-853. However, the defendant is not required to show that with the suppressed evidence the defendant would be more likely than not to have received a different verdict. *McClendon v. State*, 347 Ga. App. 542, 547 (2018).

In *Harridge v. State*, 243 Ga. App. 658 (2000), the defendant was involved in a two-vehicle collision on a highway, and the collision caused the death of one of the occupants of the other vehicle. After the defendant was convicted after a jury trial, he filed a motion for new trial on the basis that the State did not disclose, pre-trial, preliminary Georgia Bureau of Investigation ("GBI") test results of the deceased victim's urine, which showed the presence of cocaine and marijuana. *Harridge*, 243 Ga. App. at 659. Pre-trial, the county medical examiner spoke with the prosecutor and informed them about the preliminary test results, but he stated the results were not complete as the autopsy was not finalized at that time. *Harridge,* 243 Ga. App. at 660. When the defendant's attorney, also pre-trial, raised the issue of not having received the test results at that time, the prosecutor did not inform the judge about what the urine test disclosed, and the prosecutor attempted to

place the onus of performing a test on the victim's blood on the defendant. *Harridge*, 243 Ga. App. at 660.

The *Harridge* Court noted with regard to the first element of the *Brady* test that a court determines whether "someone is on the prosecution team on a case-by-case basis by reviewing the interaction, cooperation and dependence of the agents working on the case." 243 Ga. App. at 660-661. The Court emphasized that the GBI performed the forensic testing of bodily fluids in the case, and the prosecutor and medical examiner were dependent on the GBI's performance in its testing. Therefore, the Court concluded the State possessed the favorable evidence. *Harridge*, 243 Ga. App. at 661.

Insofar as the fourth element, the *Harridge* Court concluded the test results were material to the defense's position. 243 Ga. App. at 661. The Court stated that while there was some evidence for a jury to decide that the defendant's conduct alone caused the collision, that was an issue for the jury to decide for itself

> after hearing all material evidence, including the conduct and condition of [the victim] at the time of the accident. In a vehicular homicide case, the conduct of the decedent, whether negligent or not, is material to the extent that it bears upon the question of whether under all the circumstances of the case the defendant was negligent, or, if negligent, whether the decedent's negligence was the sole proximate cause

> of the injury, or whether the injury or death resulted from an unavoidable accident.

Harridge, 243 Ga. App. at 661.

In *Walker v. Johnson*, 282 Ga. 168 (2007), the defendant was convicted by a jury of multiple offenses arising from an alleged robbery and related offenses. The issue on appeal concerned the State's failure to produce in pre-trial discovery audio recordings of exculpatory interviews of the alleged victims and the defendant's statement to police. *Walker*, 282 Ga. at 169. Despite the defendant's pre-trial request for discovery from the State, the defendant did not receive recordings nor transcripts of the recordings. *Walker*, 282 Ga at 169. The recordings contained information that, if produced to the defendant in a timely manner, may have created doubt as to whether the defendant was actually guilty through impeachment and/or showing either alleged victim lied. *Walker*, 282 Ga. at 170. The State only produced investigative case notes with a one-paragraph reference to a forty-eight (48) page interview of one of the alleged victims, and the notes did not contain the bulk of potentially exculpatory information that could have been useful to the defense. *Walker*, 282 Ga. at 170-171.

The *Walker* Court concluded, in response to the State's position on appeal,

> Rather than informing the defense of the substantive nature of Mumford's statement, there is a significant likelihood that the State's incomplete and inaccurate response to Johnson's

> discovery and *Brady* motions induced defense counsel to believe either that the taped statements were not in existence or that they contained no information beneficial to the defense.

Walker, 282 Ga. at 171.

> [A]n incomplete response to a specific [*Brady*] request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.
>
> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Walker, 282 Ga. at 171, citing *Bagley*, 473 U.S. at 682-683.

a. Cases where the Supreme Court of the State of Georgia and the Court of Appeals of the State of Georgia have found "goading" existed and granted the defendant's Double Jeopardy plea in bar.

In *State v. Jackson*, 306 Ga. 626, 628 (2019), the district attorney made a comment during his closing argument about what an individual, who was not called as a witness in the trial, may have testified to. The defense attorney objected and requested a mistrial based on prosecutorial misconduct. *Jackson*, 306 Ga. at 628. The trial court granted the mistrial, and after the defense attorney filed a plea in bar based on double jeopardy for such conduct, the trial court granted the plea in bar. *Jackson*, 306 Ga. at 628. The State appealed, and the Supreme Court of the State of Georgia affirmed the trial court. *Jackson*, 306 Ga. at 629, 633.

The *Jackson* Court cited *Gamble v. United States*, __ U.S. __, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting), for the observation,

> '[T]hroughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked.'

306 Ga. at 631.

The *Jackson* Court noted that the trial court found the district attorney made the comment strategically and intentionally after concluding the evidence was not overwhelming; the district attorney knew there was a high probability that an immediate mistrial would be requested; and he "'acted with specific and deliberate intent to subvert the protections afforded by the Double Jeopardy Clause[.]'" 306 Ga. at 632. The Court also noted the trial court focused on the district attorney's lengthy experience as a prosecutor, and that the State complained it was punished for making a mistake it could not have known could result in a mistrial. *Jackson*, 306 Ga. at 632-633.

The Court of Appeals of the State of Georgia, in *Anderson v. State*, 285 Ga. App. 166, 167 (2007), reversed the trial court's denial of the defendant's plea in bar when the prosecutor questioned a police officer during the trial about the defendant's assertion of his *Miranda* right to remain silent.

The *Anderson* Court cited *Wilson v. State*, 233 Ga. App. 327, 330 (1998) (physical precedent), for the following observation:

> [W]e find it impossible to believe that an error which is so blatant and so contrary to the most basic rules of prosecutorial procedure and conduct could have been simply a negligent act. To allow this prosecutor's action to be categorized as a mistake would require this Court to assume that this prosecutor was totally lacking the foundational knowledge for prosecutorial conduct in a courtroom… .

> State prosecutors are generally knowledgeable and well trained — too knowledgeable and well trained not to know the consequences of a question such as that asked by the prosecutor in this case.

285 Ga. at 168. The *Anderson* Court also noted the State's case was weak, because the case hinged on questionable eyewitness testimony. *Anderson*, 285 Ga. at 168.

In *State v. Thomas*, 275 Ga. 167 (2002), the Supreme Court of the State of Georgia affirmed the trial court's grant of a mistrial and plea in bar based on an improper question by the prosecutor of a defense expert concerning an alleged admission by the defendant to the expert prior to the trial. The trial court noted that the prosecutor was licensed for nine (9) years and tried many felony cases; the prosecutor provided unconvincing and inconsistent explanations for why the question was asked of the expert; the prosecutor did not request curative instructions; the prosecutor did not request that the trial continue; and the prosecutor benefited from a mistrial, because the expert's testimony favored the defendant. *Thomas*, 275 Ga. at 167-168.

The Court of Appeals of the State of Georgia, in *Wilson,* supra, reversed the trial court's denial of the defendant's plea in bar based on the prosecutor asking the defendant during the trial if the defendant attempted to negotiate a plea deal prior to the trial. 233 Ga. App. at 330.

The Supreme Court of the State of Georgia, in *Beck v. State*, 261 Ga. 826, 827 (1992), reversed the

Court of Appeals of the State of Georgia's reversal of the trial court's grant of the defendant's plea in bar when the prosecutor violated a court order precluding admission of "similar transaction" evidence in a child molestation trial.

United States v. Sterba, 22 F. Supp. 2d 1333 (M.D.Fla., Aug. 13, 1998), provides an excellent example and discussion of the type of conduct that occurred in this case prior to, during, and after the trial. The United States District Court for the Middle District of Florida granted the defendant's request for mistrial and a plea in bar based on the United States Government actively misidentifying a material witness, and thereby violating the defendant's Sixth Amendment right to confrontation of witnesses against him in a case involving solicitation of a minor for unlawful sexual purposes. *Sterba*, 22 F. Supp. 2d 1333.

The Assistant United States Attorney prosecuting the case, Ms. Karen Cox, deliberately misidentified a government witness, Ms. Adria Jackson, as "Gracie Greggs" on a pre-trial witness list. *Sterba*, 22 F. Supp. 2d. at 1334, 1335. The witness also went by the online screen name of "Katie 16140" during the relevant events underlying the case. *Sterba*, 22 F. Supp. 2d. at 1335. The witness presented false and manufactured testimony about her background. *Sterba*, 22 F. Supp. 2d at 1335. "Gracie Greggs" was a "*nom de plume"* issued by a federal law enforcement agency for "internal purposes". *Sterba*, 22 F. Supp. 2d. at 1337.

The United States District Court, in its written decision granting the defendant's motion for a plea in

bar, excoriated the United States Government's conduct, and wrote in substantial detail about "goading" and the analysis presented in *Oregon v. Kennedy*, supra, concerning double jeopardy pleas in bar.

> Central to this proposition is the issue of prosecutorial intent. Specifically, I have found that the intent of the prosecutor in this case was to succeed in palming off Adria Jackson and her biographical baggage as Gracie Greggs, an operative of law enforcement. The analytical problem is that the prosecutor's intent was to 'get away with it' and remain unencumbered in her efforts. This differs from *Kennedy*-type cases, in which the prosecutor acts contrary to a rule, order, or the like but in a manner certain to be conspicuous -- often in an open, notorious effort to influence the jury. The typical case includes no attempt by the prosecutor to achieve an ill-gotten verdict by furtive means.
>
> The introduction of an element of furtiveness into the prosecutorial plan also presents problems with the word 'goad' as it appears in *Kennedy*. How do you 'intend' to 'goad' someone with something about which you intend them to remain ignorant? Perhaps anticipating this definitional problem with *Kennedy* (if *Kennedy* is the answer to all mistrial/double jeopardy issues), Chief Judge Hatchett offered authority

on the meaning of 'goad' [in *United States v. Fern*, 117 F.3d 1298 (11th Cir 1997)].

> Webster's Third New International Dictionary defines 'goad,' in part as follows: 'to drive, incite, or rouse.' When used as a noun, Webster's indicates that a goad is 'something that urges or stimulates like a goad' SPUR, STIMULUS.' Webster's Third New International Dictionary 972 (3d ed. 1976). In the past, we have suggested that goading may be found where the conduct of the government in bringing about the original mistrial is due to 'gross negligence or intentional misconduct.' *United States v. Serra*, 882 F.2d 471, 473 (11th Cir. 1989).

This post-*Kennedy* observation is both crucial to the instant case and correct. Frankly, after *Kennedy*, 'gross negligence' may have lost the Supreme Court's recognition as a form of 'goading.' But, even after *Kennedy*, intentional misconduct that, if known, is obviously sufficient to provoke a motion for mistrial by the defense constitutes 'goading,' especially if it intrudes into the unfettered exercise of a constitutional guarantee as essential as the right of confrontation. In this case, the

prosecutorial plan was avowedly intentional, obviously adulterated, and irresistibly provocative of a motion for mistrial by the defense -- a series of conclusions that fundamentally implicate the fifth amendment's immunity from double jeopardy.

As a result of the prosecutorial plan in this case, the United States required the defense to present its case, forced the defendant to make his constitutional election whether to testify, secured the right to cross-examine the defendant under oath, and otherwise leveraged the defendant into the position of revealing his strategy, his theories, his evidence, and his cross-examination. All the while, the prosecutor harbored a secret. Viewed one way, the secret was that she had withheld so-called *Giglio* and other information that, if ever known to the defense, might discredit her featured witness. Viewed differently, the secret was that the prosecutor at any time could prompt a defense motion for a mistrial (and thereby accrue another chance at conviction) by revealing to the defense the truth about 'Gracie Greggs.' In either event, the trial was not conducted on equal footing because the prosecutor had the force of a lie at her disposal.

Twenty years ago, in *Lying: Moral Choice in Public and Private*

Life (Vantage Books; New York, 1978), Sissela Bok explained the dynamics of personal dishonesty undertaken in presumed behalf of the public good. She warns of the dangers of lies supposedly motivated by some perception of duty, public good, or the like -- the paternalistic lie grounded in a misguided sense of altruism:

> The excuse of altruism is often grounded in the liar's general belief in his own good will. 'I mean well; therefore my lies will help' is as frequent a leap of the mind as: 'I mean no harm; therefore my lies can't hurt.' The possibilities of error about one's good intentions are immense. But even if these intentions are good, they are obviously no guarantee of a good outcome.

And so it is in this case. There is a bad outcome for the prosecutor. No conviction occurred. Time, effort, and money were wasted. A mistrial was declared. The indictment is under attack on double jeopardy grounds. A confidential informant has been tainted. The *bona fides* of the office of an honorable and effective United States Attorney, Charles R. Wilson, are the subject of public questioning, as are the tactics of all other prosecutors. AUSA Cox is answering ethics questions from

> the Department of Justice and is subject to endangering reference to other authorities. All this because of an *ad hoc* deception.

Sterba, 22 F. Supp. 2d. at 1341-1343 (emphasis in original).

b. Relevant statutes and ethical rules governing the conduct of attorneys generally, and prosecutors in criminal cases.

In addition to the foregoing case law setting forth the constitutional framework governing this appeal, the following statutes and rules of professional conduct governing the ethical obligations of attorneys are applicable to the issues herein.

Underpinning this appeal is O.C.G.A. § 17-16-4, which governs the disclosure and production by the prosecutor and defense counsel in a criminal prosecution of documents, expert reports, and other tangible items of evidence analogous to its civil counterpart, O.C.G.A. § 9-11-34. Specifically, subsection four (4) requires the prosecutor to produce, no later than ten (10) days prior to trial, any reports prepared by experts, if the prosecutor intends to use the information contained therein in their case-in-chief or in rebuttal. Corollaries include O.C.G.A. §§ 17-16-3 (list of witnesses), 17-16-7 (production of statements of witnesses), and 17-16-8 (information about witnesses).

In conjunction, O.C.G.A. § 15-19-4 sets forth six (6) ethical duties for all attorneys to follow. Two of those duties require respect for courts and judicial

officers, and to engage in conduct that is both consistent with truth and not misleading through artifice or false statements of laws.

The Georgia Rules of Professional Conduct ("State Bar Rules") are intertwined with the foregoing statutes and provide additional obligations for attorneys, including prosecutors. In subsection one (1) of the "Preamble", lawyers are encouraged to be "representative[s] of clients", "officer[s] of the legal system", and "citizen[s] having special responsibility for the quality of justice." The "Scope" of the State Bar Rules notes in subsection fourteen (14) that compliance is dependent on voluntary compliance, reinforcement by peers and the public, and through disciplinary proceedings. That subsection continues by stating that the State Bar Rules do not "exhaust the moral and ethical considerations that should inform a lawyer". *See, e.g.,* State Bar Rules 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 3.8 (Special Responsibilities of a Prosecutor), and 8.4 (Misconduct).

The United States Department of Justice's *Justice Manual* includes thorough and lengthy sections governing various topics, including "Title 9: Criminal", which regulates the conduct of United States Attorneys in criminal prosecutions.[1] Section 9-27.001, entitled "Preface", declares that federal prosecutors "should promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the federal criminal

[1] https://www.justice.gov/jm/title-9-criminal (last accessed: January 16, 2022).

laws." Such principles ensure fair and effective prosecutorial discretion and responsibility, in addition to promoting confidence by the public and defendants. *Id.* Further, "the success of [the federal prosecutorial system] must rely ultimately on the character, integrity, sensitivity, and competence of" those people who are hired to represent the federal government in criminal prosecutions. *Id. See also*, *ABA Standards for Criminal Justice: Prosecution Function, 4th ed.* (American Bar Association, 2017), Standards 3-1.2 ("Functions and Duties of the Prosecutor"), 3-1.4 ("The Prosecutor's Heightened Duty of Candor"), 3-5.4 ("Identification and Disclosure of Information and Evidence"), and 3-6.6 ("Presentation of Evidence").[2]

On April 1, 1940, then-United States Attorney General Robert H. Jackson, later a United States Supreme Court Associate Justice, gave a seminal speech entitled, "The Federal Prosecutor", to a gathering of United States Attorneys at the United States Department of Justice Building in Washington, D.C.[3] Attorney General Jackson began by summarizing the broad swath of power that prosecutors have over the lives of the citizenry. *Id.* at 1. Later in the speech, Attorney General Jackson stated,

> Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law

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[2] https://www.americanbar.org/groups/criminal_justice/standards/Prosecution FunctionFourthEdition/ (last accessed: January 16, 2022).

[3] https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf (last accessed: May 4, 2021).

> enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.

Id. at 3.

> He closed his speech with the following:
>
> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Id. at 7.

c. Application of the foregoing law and ethical rules to the facts of this case.

The Petitioner and Respondent agree that the grant of the Petitioner's second Motion for Mistrial is *res judicata*. Therefore, the only issue in this appeal is whether the Respondent's conduct underlying the grant of the Petitioner's Motion for Mistrial is so egregious as to prohibit the Respondent from re-prosecuting the Petitioner in another trial.

The Respondent goaded the Petitioner into successfully requesting a mistrial for the second time, because the Respondent did not legitimately believe it could secure an appeal-proof conviction of the Petitioner with the evidence that was presented to the jury.

The Respondent's conduct that led to the Carroll County Superior Court granting the mistrial is par for the course during the long pendency of this case. After the tragic two-vehicle collision between the Petitioner's patrol car and a private passenger vehicle, widespread, and widely reported on, public outcry against the deaths of two young, attractive females forced the Respondent's hand to find someone to hold responsible. The Petitioner quickly became that "someone", even if he may not have been entirely responsible, if at all. However, no one in the private passenger vehicle was ever prosecuted for causing either of the deaths. It was at that point in time the die was cast, and the Petitioner's fate was sealed.

Extensive pre-trial litigation transpired concerning the validity of the indictments against the Petitioner. Part of that litigation revolved around violations of the Petitioner's constitutional and statutory rights when he was initially questioned without the benefit of warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), in a Georgia Department of Public Safety / Georgia State Patrol internal investigation. Later, during the second Grand Jury presentment of this case, a very experienced and knowledgeable then-Assistant District Attorney, the very experienced and knowledgeable then-Solicitor-General, and a very experienced and knowledgeable Georgia State Patrol

trooper witness repeatedly violated the Petitioner's *Garrity v. New Jersey*, 385 U.S. 493 (1967) / *Kastigar v. United States*, 406 U.S. 441 (1972), right to immunity for his previous, un-*Mirandized* statements by informing the Grand Jury of what the Petitioner said. While the Court of Appeals of the State of Georgia concluded there was sufficient independent evidence presented at that Grand Jury to not taint the indictment, no one really knows the truth.

Then, prior to the jury trial of this case, investigating Georgia State Patrol troopers performed further investigation of the Petitioner's patrol car dash camera video footage. As that investigation is summarized in the Order granting the Petitioner's second Motion for Mistrial, *see*, App. C, and the Order denying the Petitioner's Plea in Bar, *see,* App. B, the details need not be restated herein. However, whether consciously and/or through a systemic failure of the prosecution team to ensure the Petitioner's counsel of record was properly informed of the relevance of the enhanced video footage prior to the trial, the Petitioner's counsel of record was misled into believing there was no relevance to said footage. The Respondent's conduct was the direct cause of the Petitioner's counsel of record not pursuing the matter further until well into the trial and jury deliberations.

In furtherance of the Respondent's mishandling of the Petitioner's legal rights, the Carroll County Superior Court declared in the Order granting the Petitioner's second Motion for Mistrial, *see*, App. C, that the Respondent appeared to not be educated on the law as it concerns vehicular homicide. If the Respondent's very knowledgeable and experienced prosecutors who handled this case at

trial were properly informed of such an important legal element of a vehicular homicide case, hopefully the Petitioner would not have been misled and effectively denied evidence that his very competent counsel could have used to effectively cross-examine certain of the Respondent's witnesses. Such evidence may very well have altered the course of the trial and led to a possible acquittal of the Petitioner.

Despite the admonitions of this Court in *Berger*, supra, and then-United States Attorney General Robert H. Jackson that the primary duty of prosecutors is to ensure that justice be done, the cumulative effect of the Respondent's conduct reflects the opposite of what Sir William Blackstone, a preeminent British legal scholar and jurist in the 1700s, stated in his *Commentaries on the Laws of England* (1893) 358: "[I]t is better that ten guilty persons escape than that one innocent suffer."

The Respondent's egregious conduct, reflective of its willingness to disregard fundamental guarantees embedded in the United States and Georgia Constitutions at every turn, which guarantees were not granted through the benevolence of a governmental entity, but instead are "sacred civil jewels" intended to protect pre-existing rights against undue encroachment by governmental entities, supports a finding that a retrial should be barred on the basis of double jeopardy. *See generally*, *State v. Thornton*, 253 Ga. 524, 529 (1984) (discussing the importance of protecting fundamental constitutional protections).

The mere change in the respective District Attorney's Office that continues to prosecute this case

does not eliminate the taint of harm the Petitioner has already sustained. The Respondent's cumulative conduct shortly before and at trial, notwithstanding its other egregious conduct, was not a minor misstep or miscalculation, or a potentially excusable misreading or misinterpretation of an insignificant legal principle or rule of law. The Respondent's wrongful conduct literally had the potential of sending the Petitioner to prison, possibly for years, for something he may not be legally, and possibly factually, responsible for.

To be clear, the Petitioner respectfully does not request a pronouncement that he is innocent or not guilty of the offenses he has been charged with. Rather, the Petitioner respectfully requests that this Court vindicate his right against double jeopardy when the Respondent has attempted to subvert it.

CONCLUSION

For the above enumerated reasons, this Court should grant the Petitioner's writ for certiorari, vacate the decision below, and remand with direction that any further prosecution of the Petitioner is prohibited.

This 5th day of June, 2023.

Respectfully submitted,

J. MAC C. PILGRIM
Georgia State Bar Number: 141955
Counsel of Record for Anthony James Scott