

No. 23-

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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**EX PARTE JAMES FLOYD**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

- 1) Does a goading-style Double Jeopardy violation bar further retrial even where the trial court had granted a mistrial on an independent ground?
- 2) Is Petitioner entitled to an evidentiary hearing when he presents a colorable goading-style Double Jeopardy claim?

## **PARTIES**

Petitioner: James Floyd

Respondent: State of Texas

## **RELATED PROCEEDINGS**

*In re Floyd*, No. 02-22-00094-CV, 2022 Tex. App. LEXIS 2002 (Tex. App.—Fort Worth, 2022) (mem. op.) (not designated for publication).

*Floyd v. State*, No. 02-22-00082-CR (Tex. App.—Fort Worth) (pending)

## TABLE OF CONTENTS

	PAGE
Questions Presented .....	ii
Parties. ....	iii
Related Proceedings.....	iii
Table of Contents .....	iv
Index to Appendices.....	v
Table of Authorities .....	vi
Opinion Below .....	1
Jurisdictional Statement.....	1
Statute and Guideline Involved. ....	2
Statement of the Case .....	3
Reasons for Granting the Petition.....	7
I.     The State should be barred from retrial when it commits a goading-style Double Jeopardy violation, irrespective of whether a mistrial was granted on an independent ground .....	7
II.    Petitioner should have received an evidentiary hearing because he raised a colorable goading-style Double Jeopardy claim which warranted further factual development.....	9
Conclusion .....	12
Appendix	

## **INDEX TO APPENDICES**

Appendix A: Judgment and Opinion of the Court of Appeals for the Second District of Texas at Fort Worth

Appendix B: Order from the Texas Court of Criminal Appeals Denying a Petition for Discretionary Review

Appendix C: Trial court order denying Pretrial Petition for Habeas Corpus

## TABLE OF AUTHORITIES

	PAGE
<b>CASES</b>	
<b>FEDERAL</b>	
<i>Benton v. Maryland</i> , 395 U.S. 794 (1969) .....	7
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....	4, 8, 10, 11
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995) .....	4
<i>Oregon v. Kennedy</i> , 456 U.S. 667 (1982) .....	7, 8, 11
<i>United States v. Dinitz</i> , 424 U.S. 600 (1976) .....	7
<i>United States v. Oseni</i> , 996 F.2d 186 (7th Cir. 1993) .....	11
<i>United States v. Wentz</i> , 800 F.2d 1325 (4th Cir. 1986) .....	11
<i>Wade v. Hunter</i> , 336 U.S. 684 (1949) .....	7
<b>TEXAS</b>	
<i>Ex Parte Floyd</i> , PD-0408-22, 2022 Tex. Crim. App. LEXIS 825 (Tex. Crim. App. Nov. 16, 2022) .....	1, 7
<i>Ex Parte Floyd</i> , No. 02-22-00004-CR, 2022 Tex. App. LEXIS 4847 (Tex. App.—Fort Worth July 14, 2022) .....	<i>passim</i>
<i>Ex Parte Martinez</i> , 560 S.W.3d 681 (Tex. App.— San Antonio 2018) .....	8
<i>Ex Parte Masonheimer</i> , 220 S.W.3d 494 (Tex. Crim. App. 2007) .....	8
<i>In re Floyd</i> , No. 02-22-00094-CV, 2022 Tex. App. LEXIS 2002 (Tex. App.—Fort Worth, 2022) .....	iii, 3

## **STATUTES**

28 U.S.C. § 1257(1).....	1
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## **RULES**

Sup. Ct. R. 10(c) .....	9
-------------------------	---

Sup. Ct. R. 13.1.....	1
-----------------------	---

## **CONSTITUTIONAL PROVISIONS**

U. S. Const. amend. V .....	2, 7
-----------------------------	------

U. S. Const. amend. XIV .....	7
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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner James Floyd respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second District of Texas at Fort Worth. The Texas Court of Criminal Appeals, the court of last resort in the state of Texas, denied a petition for discretionary review. *See Ex Parte Floyd*, PD-0408-22, 2022 Tex. Crim. App. LEXIS 825 (Tex. Crim. App. Nov. 16, 2022).

### **OPINION BELOW**

The unpublished opinion of the Second Court of Appeals is captioned as *Ex Parte Floyd*, No. 02-22-00004-CR, 2022 Tex. App. LEXIS 4847 (Tex. App.—Fort Worth July 14, 2022, pet. ref'd) (mem. op., not designated for publication). A copy of the judgment and opinion is provided in Appendix A. In Appendix B, Counsel has provided a copy of the order from the Texas Court of Criminal Appeals denying a petition for discretionary review. Appendix C contains the trial court order denying the pretrial petition for habeas corpus.

### **JURISDICTIONAL STATEMENT**

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(1). *See also* Sup. Ct. R. 13.1. The Texas Court of Criminal Appeals, the state court of last resort, denied discretionary review on November 16, 2022. *See Ex Parte Floyd*, 2022 Tex. Crim. App. LEXIS 825 (Tex. Crim. App. Nov. 16, 2022).

## **CONSTITUTIONAL AND PROVISION INVOLVED**

The Double Jeopardy Clause of the Fifth Amendment provides, in relevant part, that:

[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .

U.S. Const. amend. V.

## STATEMENT OF THE CASE

### Procedural Overview

This case arises on appeal following the denial of a pretrial petition for habeas corpus. Petitioner is under indictment for capital murder and the State had initially sought the death penalty.<sup>1</sup> In March 2020, a death-penalty qualified jury was impaneled and sworn. In August 2020, the trial court granted a mistrial on manifest necessity grounds and discharged the jury. *See Ex Parte Floyd*, 2022 Tex. App. LEXIS 4847 at \*1-2.

Subsequently Petitioner filed a petition for habeas corpus wherein he requested that the State be barred from further prosecution on double jeopardy grounds. His retrial was halted so this writ could be resolved.<sup>2</sup> *See In re Floyd*, 2022 Tex. App. LEXIS 2002 at \*6-7 (Tex. App.—Fort Worth, 2022) (mem. op., not designated for publication).

### Basis for Double Jeopardy Pretrial Writ

Two days before the initial trial was set to commence, on July 27, 2020, the State disclosed that employees in the Fort Worth Crime Lab had concerns regarding the lab's handling of DNA evidence. (CR 315-331.) At Petitioner's request the court

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<sup>1</sup> The State waived death on January 21, 2022. *See In re Floyd*, 2022 Tex. App. LEXIS 2002 at \*3 (Tex. App.—Fort Worth, 2022) (mem. op., not designated for publication).

<sup>2</sup> Petitioner was subsequently tried and convicted of aggravated robbery in a related case. The case is currently pending on direct appeal before the Second Court of Appeals in Cause No. 02-22-00082-CR.

continued the trial until August 10th. (13 RR 22-23.) The trial was continued again continued to August 17th. (17 RR 7.)

Petitioner, proceeding *pro se*, filed a Motion to Suppress Evidence Illegally Obtained, wherein he requested that DNA evidence tested at the crime lab be suppressed. (CR 409-421.) The disclosures led to a flurry of hearings, subpoenas and the production of voluminous exhibits. The focus of the hearings centered on 1) the nature and circumstances of internal investigations into alleged malfeasance in the Fort Worth Crime Lab; 2) how if any such malfeasance effected this case in particular; and 3) the chronology of when employees in the District Attorney's office acquired knowledge that the Fort Worth Crime lab had been under investigation.

The trial court ultimately found that the information connected to investigations of the Fort Worth Crime Lab "under *Brady* and *Kyles*<sup>3</sup>. . . should have long ago been provided to the defense." (CR 474.) It was inconsequential when the assigned prosecutors actually learned of this information. "Police and police department-owned crime lab personnel are," the trial court reasoned, "members of the prosecution team for purposes of *Brady*." (CR 472.) Thus the court concluded that the State unlawfully possessed "favorable material evidence" even assuming such evidence was "known only to police investigators and not the prosecutor." (CR 472.)

The court also found that the District Attorney's office did have knowledge of these events. The court found that "members of the Tarrant County District Attorney

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<sup>3</sup> *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995)

staff" had in fact "possessed knowledge of general concerns in 2018," and "at least as early as May 19, 2020." (CR 466.) The court also appeared to find it puzzling if not suspicious that the trial team had never even met with someone at the crime lab until days before testimony:

It is unknown why the trial team had not met with a FWPDCL witness prior to the week of July 20, 2020 in a case in which they had announced their decision to seek the death penalty three years earlier, and in which they were partially relying on DNA evidence to convict. The jury was selected and sworn on March 6, 2020, and testimony was originally scheduled to begin on March 23, 2020.

(CR 466.)

**Trial court denies mistrial on *Brady* grounds but grants mistrial due to manifest necessity.**

Following this series of hearings, Petitioner moved for a mistrial "with prejudice" due in part to the belated disclosures regarding the Fort Worth Crime Lab. (CR 435-440); (22 RR 36, 129.) On August 17, 2020, the trial court denied Petitioner's motion for mistrial with prejudice. (22 RR 39.) However, on this very same day the court conducted a hearing wherein jurors were questioned regarding their continued ability to serve. The court found three jurors were disabled and ordered a mistrial on the basis of manifest necessity. (22 RR 108.)

Three days later, on August 20, 2017, the court issued findings of fact and conclusions of law in connection with the motion to suppress. (CR 446-477.) The trial court requested trial briefs from the parties and noted that it might consider reopening evidence after due consideration. (CR 474.)

## **Pretrial Writ of Habeas Corpus**

In early 2021, Petitioner made several *pro se* filings requesting that the case be dismissed on double jeopardy grounds. (CR 489-539.) On September 29, 2021, the trial court ordered that “double jeopardy briefs” be submitted “regarding alleged *Brady* violations and the defendant’s motion to suppress” (CR 540.) Counsel submitted a brief on Petitioner’s behalf and the State responded in several filings. (CR 541-762.)

A hearing was held on October 12, 2021. (25 RR 1-48.) The court orally denied Petitioner’s double-jeopardy motions. (25 RR 39.) In a subsequent hearing, Counsel noted that Petitioner’s pretrial double jeopardy request should have been presented as a separate pretrial writ with its own cause number in the trial court. (26 RR 18.)

Counsel subsequently filed the instant writ application on Petitioner’s behalf on December 8, 2021. (CR 763-765.) He incorporated by reference the arguments set forth in his brief filed on September 29, 2021, as well as those arguments made at the hearing on October 12, 2021. (CR 763-767.) Petitioner and the State jointly moved for inclusion of certain designated items from the Clerk’s and Reporter’s Record from the criminal trial court number into the instant writ record. (CR 769-801.) The parties also requested the trial court take judicial notice of all proceedings which took place in the trial court, as well as any exhibits admitted into the record.

Ultimately the trial court denied the petition for habeas corpus “after considering all of the foregoing matters and the arguments of counsel.” (CR 768.) The Second Court of Appeals affirmed the judgment of the trial court. *See Ex Parte Floyd*,

2022 Tex. App. LEXIS 4847 at \*10-11. The Court of Criminal Appeals refused a petition for discretionary review. *See Ex Parte Floyd*, 2022 Tex. Crim. App. LEXIS 825.

## REASONS FOR GRANTING THE PETITION

### I. The State should be barred from retrial when it commits a goading-style Double Jeopardy violation, irrespective of whether a mistrial was granted on an independent ground.

The Double Jeopardy Clause of the federal constitution provides that “no person shall . . . be twice put in jeopardy of life or limb.” U.S. Const. amend. V. It “protects a criminal defendant from repeated prosecutions for the same offense.” *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) (citing *United States v. Dinitz*, 424 U.S. 600, 606 (1976)). The prohibition against double jeopardy is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 794 (1969).

The Double Jeopardy Clause exists in part to “afford the defendant the right to have his trial completed by a *particular tribunal*.” *Dinitz*, 424 U.S. 600, 606 (1976) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (emphasis added)). Generally, double jeopardy does not preclude a mistrial of a criminal defendant if the defendant requested the mistrial. *Kennedy*, 456 U.S. 667, 672 (1982). However, there is an exception to this rule in cases involving prosecutorial misconduct, where the prosecutor engaged in conduct that was ‘intended to provoke the defendant into moving for a mistrial.’” *Kennedy*, 456 U.S. at 679.

In Texas, the Court of Criminal Appeals has found that a State’s failure to

disclose *Brady* during trial falls within the ambit of this exception. *See Ex Parte Masonheimer*, 220 S.W. 3d 494, 505 (Tex. Crim. App. 2007) (*Brady* violation barred retrial because State had acted with the intent of avoiding the possibility of acquittal). Thus, in Texas, double jeopardy bars a subsequent prosecution with either proof of 1) “gloating;” or 2) prosecutorial misconduct designed to avoid the possibility of an acquittal. *See Ex Parte Martinez*, 560 S.W. 3d 681, 697 (Tex. App.—San Antonio 2018, pet. ref’d.) (citing *inter alia Masonheimer*) (some internal citations omitted).

The court of appeals below held that Petitioner’s Double Jeopardy claim “failed as a matter of law” because the trial court had granted a mistrial on the separate ground of manifest necessity. *Ex Parte Floyd*, 2022 Tex. App. LEXIS 4847 at \*8. It concluded that there is no bar to a retrial where “the actual mistrial had nothing to do with prosecutorial misconduct.” *Id.* at \*8. The court of appeals relied on language from this Court’s decision in *Kennedy*, where the Court stated that Double-Jeopardy gloating claims was “limited to those cases in which the conduct giving rise to the *successful* motion for a mistrial was intended to provoke the defendant into moving for a mistrial.” *Kennedy*, 456 U.S. at 679s; *see Ex Parte Floyd*, 2022 Tex. App. LEXIS 4847 at \*8 (emphasis in *Ex Parte Floyd*).

The court of appeals reads too far into the word “successful.” The issue in *Kennedy* was whether any Double-Jeopardy right existed at all following the grant of a defense-requested mistrial. The Court was not presented with a scenario where, as here, a mistrial was granted on a separate basis, but the gloating claim remained

meritorious. Petitioner’s double jeopardy protections should not be gutted by the tangential fact that a mistrial was granted for an unrelated reason.

The court of appeals decision invites abuses. A trial court can cure any goading-style violation by granting a mistrial on a separate ground. The State would be effectively insulated from any consequence for engaging in goading behavior and defendants like Petitioner would have no remedy. This Court should review whether goading claims automatically fail “as a matter of law” whenever a mistrial is granted for an independent reason. *Ex Parte Floyd*, 2022 Tex. App. LEXIS 4847 at \*10. Petitioner submits this issue was wrongly decided; and it is an “important question of federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c).

**II. Petitioner should have received an evidentiary hearing because he raised a colorable goading-style Double Jeopardy claim which warranted further factual development.**

In *dicta*, the court of appeals concluded that Petitioner’s allegation of misconduct “does not come close to having justified a mistrial in any event.” *Floyd*, 2022 Tex. App. LEXIS 4847 at \*8. The panel acknowledged the trial court’s own finding that “members of the District Attorney’s Office possessed knowledge of general concerns [in the crime lab] in 2018,” two years before trial. *Id.* at \*9 (internal quotations omitted). But the court dismissed this evidence on the basis that it “tells us nothing about whether the prosecutors *intended* to force the declaration of a mistrial.” *Id.* at \*10.

This reasoning is flawed because Petitioner was never granted an opportunity

to explore the prosecutor's intent in an evidentiary hearing. The court of appeals held that Appellant "had the chance to explore this issue during the *Brady* hearings and failed to demonstrate that the prosecutor's intent to provoke the mistrial." *Floyd*, 2022 Tex. App. LEXIS 4847 at \*10. This premise is simply wrong because no so-called *Brady* hearings ever took place in this case.

The hearings on the belated DNA disclosures which took place in August 2020 had been conducted within the context of Petitioner's *suppression* motion. (CR 409-421; 446-477.) After denying the suppression motion, the trial court issued findings of fact and conclusions of law. (CR 446-477.) In its findings, the court invited the parties to prepare trial briefs and noted it might reopen evidence after due consideration. (CR 474.)

In early 2021, Petitioner made several *pro se* filings requesting that the case be dismissed on double jeopardy grounds. (CR 489-539.) On September 29, 2021, the trial court ordered that "double jeopardy briefs" be submitted "regarding alleged Brady violations and the defendant's motion to suppress" (CR 540.) Counsel submitted a brief on Petitioner's behalf. (CR 541-551.) In that brief, Counsel specifically requested that an evidentiary hearing be held on the intent of the state actors for the purposes of the double jeopardy claim. (CR 547.) At a subsequent hearing, Counsel argued that an evidentiary hearing could be used to explore the intent of the state actors. (25 RR 38.) In the pretrial writ, Counsel reiterated his request for an evidentiary hearing. (CR 764.)

Notwithstanding these requests, no judge involved in this case conducted any evidentiary hearing focused on the issues related to Petitioner's *Brady* Double-Jeopardy claim. (CR 489-539, 541-551, 768); (25 RR 39.) The trial court should have granted an evidentiary hearing in order to explore the intent of the state actors involved. (CR 547, 550, 765.) Several circuit courts have found that a Petitioner should be given an evidentiary hearing to develop and resolve goading-style Double-Jeopardy claims. *See United States v. Wentz*, 800 F.2d 1325, 1328 (4th Cir. 1986) (an evidentiary hearing should be held to resolve *Kennedy* double jeopardy claim if there is a genuine question raised); *United States v. Oseni* 996 F.2d 186, 187-88 (7th Cir. 1993) (evidentiary hearing for *Kennedy* double jeopardy claims should be held if "any residual doubts" exist concerning the prosecutor's intentions). Petitioner should receive an evidentiary hearing in this case and he respectfully requests that the Court grant certiorari on this issue.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: February 14, 2023

Respectfully Submitted,

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