No. 22-

In the United States Supreme Court

JOSEPH STANLEY,

Petitioner,

v.

MARTIN BITER,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner
JOSEPH STANLEY

QUESTION PRESENTED

On federal habeas review, a divided panel of the Ninth Circuit rejected Joseph Stanley's double jeopardy challenge to his retrial, holding that by failing to object to comments by the state trial judge leading up to an unnecessary mistrial, Stanley's lawyer had "implied consent" to it. In doing so, the panel held it irrelevant that state law at the time told judges and attorneys alike that "no consent … may … be implied" even from an express declaration of a mistrial. *People v. Compton*, 6 Cal.3d 55, 63 (1971). Did the majority's decision to ignore the Catch-22 depart so far from judicial norms as to call for an exercise of this Court's discretion?

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit
Stanley v. Biter, No. 21-55371 (March 17, 2023)

U.S. District Court for the Central District of California
Stanley v. Baca, No. CV 12-9569 (April 15, 2021)

California Supreme Court
People v. Stanley, No. S239407 (March 1, 2017)

California Court of Appeal
People v. Stanley, No. B252979 (Dec. 8, 2016)

U.S. Court of Appeals for the Ninth Circuit
Stanley v. Baca, No. 13-56172 (Feb. 19, 2014)

California Supreme Court
Stanley v. S.C. (People), No. S203673 (Sept. 12, 2012)

California Court of Appeal
Stanley v. Super. Ct. L.A. Cnty. (People), No. B238486 (May 22, 2012)

CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Constitutional Provisions and Statutes

PETITION FOR WRIT OF CERTIORARI

When state law categorically tells judges and lawyers that a failure to object to a judicial ruling will *never* waive a related constitutional defense—when state law renders lawyers constitutionally *obligated* not to raise the objection—can a court then turn around and treat the absence of an objection as evidence of "implied consent" to the ruling?

That's what the state court here did when it rejected petitioner Joseph Stanley's defense of once in jeopardy. And that's what a divided panel of the Ninth Circuit on federal habeas review declined even to consider. Given the panel majority's decision to turn a blind eye not only to the impossible dilemma Stanley's lawyer faced in this situation, but to the state court's own use of a disguised, novel procedural rule to frustrate Stanley's constitutional rights, this Court should grant certiorari, vacate the panel's decision, and remand for proper consideration of the matter.

OPINIONS BELOW

The Ninth Circuit's 2014 initial, unpublished memorandum decision is reported at 555 F. App'x 707 and reproduced in the appendix at Pet. App. 197a. The California Court of Appeal's 2012 opinion is reported at 206 Cal.App.4th 265 and reproduced in the appendix at Pet. App. 208a. The remaining opinions and orders, none of them reported, are reproduced in the appendix as indicated in the table of contents.

JURISDICTION

The Ninth Circuit issued its memorandum disposition on March 2, 2023 (Pet. App. 2a), and denied Stanley's petition for panel rehearing on March 17, 2023 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides:

> No person shall … be subject for the same offence to be twice put in jeopardy of life or limb.

The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

When the jury was selected in Stanley's first trial, California imposed "no duty to object" to a mistrial to preserve a double jeopardy claim—not even when a trial court expressly "propose[d] to discharge [the] jury;" *Curry v. Superior Ct.*, 2 Cal. 3d 707, 713 (1970); not even when the trial court *asked* counsel beforehand whether the defendant would object, *People v. Compton*, 6 Cal. 3d 55, 63 (1971), *abrogation on other grounds recognized by People v. Fuiava*, 53 Cal. 4th 622, 711 (2012). It was against this legal landscape in late 2011 that Stanley's trial attorney, Michael Pentz, would navigate the rapidly changing circumstances after the jury at Stanley's first trial was sworn.

A. Jury selection, mistrial, and motion to dismiss on double jeopardy grounds.

The trial was to begin just before the holidays, so Pentz had asked that four alternates be seated as a buffer, a request presiding Los Angeles Superior Court Judge Bob Bowers granted. Selection was complete and the jury by Friday afternoon.

But immediately after, one juror told Judge Bowers that he would not be able to serve due to bias, and was dismissed without objection. (2 ER 295–99.)[1]

By Monday morning, three more jurors were asking to be excused: Juror 4, who said that his fiancée had broken her ankle and required his constant attention (2 ER 278), and whom Judge Bowers asked to wait out in the hallway (*id.*); Juror 32, an alternate who revealed a previously undisclosed childcare obligation, and was excused at Pentz's request (2 ER 283); and Juror 6, who asserted that he'd come down with a communicable disease and under doctor's orders couldn't start trial for another two days (2 ER 282–83).

At sidebar, Pentz, Judge Bowers, and deputy district attorney Emily Street discussed these developments, and Bowers told the other two what "if" they were down to "no alternates," he planned to tell the jury about the possible scheduling problems and find out whether there were any who could not serve; if not, "we are done." (2 ER 283–84.)

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[1] "ER" refers to the excerpts of record filed in the Ninth Circuit case at ECF No. 12. The number preceding these citations is the volume number.

Pentz replied that he only wanted to make sure his expert would be able to testify—a problem Street resolved by agreeing to take the expert out of order so that they could "wait for [Juror 6]" and ensure they had "at least one alternate." (2 ER 284.) No further rulings regarding Juror 4 or Juror 6 were ever made.

Yet once the jury returned, Bowers immediately told them that they had lost three of their number, and that the only remaining alternate would need an extra two days before they could start. Stating that the trial might extend through the Thanksgiving holiday, he then said, "Because we are so short of jurors, I'm not even going to start this if somebody tells me you can't do it." (2 ER 286.)

Juror 2 raised his hand and stated that he didn't "think" he could participate because he "had a heart attack." (2 ER 286–87.) Bowers inquired no further, and at sidebar told the attorneys, "I believe they win" (2 ER 287), inviting no response. He then took back up with the jury, expressing at length his frustrations about those who begged off, thanked the rest, and directed all jurors to leave the courtroom—then left with them. (2 ER 287–88; Pet. App. 54a & n. 15.) It's undisputed that once the jurors left, Bowers had no authority to recall them. (Pet. App. 14a (dissent), 51a n.13 (USDC report and recommendation).)

It was only when proceedings resumed about 15 to 20 minutes later—after the jury had been formally released from service (Pet. App. 51a n.13)—that Judge Bowers returned and declared a mistrial. (Pet. App. 51a n.13, 54a & n.15.) Explaining his decision, he said, "We simply do not have qualified jurors who can serve," and that as

"agreed," the trial would "start over" if they "had only 12 jurors," adding that Juror 2 made it "fairly clear" that "in all probability" they would "not have even one alternate." (2 ER 288.)

Five days later, Stanley moved to bar retrial on double jeopardy grounds. (2 ER 270–75.) In his attached declaration, Pentz recalled that leading up to the mistrial, he'd thought the only way they could wind up with "no alternates" was if Bowers dismissed Juror 6—but that if Bowers did that, there'd be no need to delay the proceedings, hence no reason to raise concerns about delay to the remaining jurors. (2 ER 271.) On the other hand, if Bowers opted to delay the trial for two days so they could keep Juror 6, there'd still be at least on alternate juror available. (*Id*.) The DA's office filed opposition papers, with an attached declaration by Street, who contested none of these points. (2 ER 257.)

At the motion hearing, Judge Bowers said that he had "clearly … left options open" before he declared a mistrial, that if there'd been a problem, he "would have expected to have some opposition," and that it was "reasonable to conclude" that there was "no objection to the court's perceived manner in handling the case." (2 ER 262–63.) Pentz had thus "implied consent" to the mistrial. (2 ER 263.)

B. Writ review, retrial, and other state and federal review proceedings.

On review for a writ of prohibition, the state court of appeal held that Judge Bowers' ruling was supported by sufficient evidence. (Pet. App. 212a.) Though bound by *Curry*, *supra*, the court held that an

"uncritical application" of *Curry*'s "language" could result in a "substantial injustice" when defense counsel had "participated in a discussion" that "led the trial court to reasonably believe" counsel "consented" to a mistrial. (Pet. App. 241a–42a.) And it held that that's what happened here. (*Id.*) The state supreme court summarily denied review. (Pet. App. 207a.)

About two months later, Stanley filed a 28 U.S.C. § 2241 petition in federal district court raising the double jeopardy claim (USDC ECF No. 1), and two months after that, in January 2013, moved to stay the state court retrial (USDC ECF No. 10). But the district court denied the request three months later, erroneously applying the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). (*See* Pet. App. 198–99 (Ninth Circuit order).) It also denied a certificate of appealability. (USDC ECF No. 40.)

Stanley sought a COA in the Ninth Circuit, requesting both expedited briefing and a stay of the still-pending retrial. (*Stanley v. Baca*, No. 13-56172, ECF Nos. 3–5.) The state opposed the stay. (*Id.*, ECF No. 6.) The Court granted the COA and expedited briefing, but denied the stay. (*Id.*, ECF No. 8.)

Stanley's retrial started the next day. (2 ER 254.) Though cell phone records and other testimony were presented to support the prosecution's theory that Stanley was at or near the scene when the two victims were shot, the prosecution's case that Stanley had committed the shootings largely turned on the testimony of two eyewitnesses—one who implicated Stanley while in custody himself on

suspicion of murder (Pet. App. 117a–18a), and who gave contradictory and confusing testimony at Stanley's trial (Pet. App. 119a (majority), 145a (dissent)); the other who couldn't identify Stanley until a year and a half after the shooting, in court, with Stanley handcuffed to a chair, wearing a blue jumpsuit, the only black man in the room (Pet. App. 134–35 & n.22). The jury nonetheless convicted him on the murder charges, and in November 2013 he was sentenced to life without parole. (2 ER 252–53.)

C. The Ninth Circuit's remand order and further federal habeas proceedings.

Two months later, the Ninth Circuit heard argument in Stanley's initial federal appeal, and two weeks after that vacated the district court's dismissal of his § 2241 petition. Concluding that the existing record left it "unable to determine whether mistrial was supported by implied consent," the panel remanded for an evidentiary hearing. (Pet. App. 197a–200a.)

But on remand, the state moved to depart from the Ninth Circuit's mandate, urging that by dint of Stanley's conviction and sentence, his federal case now had to proceed under 28 U.S.C. § 2254 rather than § 2241. (Pet. App. 23a–24a.) Stanley opposed, but lost, and so returned to state court to complete direct review. (Pet. App. 23a–25a)

D. Direct review in state court and Stanley's final return to federal court.

On direct appeal, Stanley reraised his double jeopardy claim and also challenged the constitutional sufficiency of the evidence to support his convictions.

In a split decision, the court of appeal affirmed, rejecting his sufficiency challenge, and summarily holding that the prior panel's double jeopardy ruling was law of the case. (Pet. App. 108a.) The dissenting justice argued that treating the prior ruling as law of the case was manifestly unjust because it departed from settled law and improperly applied new standards of implied consent, on a record raising "real concerns about actual innocence." (Pet. App. 139a n.1, 163a–72a, 181a–94a.) The California Supreme Court summarily denied review. (Pet. App. 106a.)

Returning to federal district court in April 2017, Stanley amended his petition to add the sufficiency claim, and after full briefing the matter remained pending for three years—until Stanley wrote to the Ninth Circuit pro se to complain that the district court had not yet held an evidentiary hearing. (Pet. App. 25a.) Construing the letter as a petition for a writ of mandamus, the Ninth Circuit denied it without prejudice to filing a new petition "if the district court has not conducted an evidentiary hearing within 90 days." (Pet. App. 25a–26a; *In re Stanley*, No. 20-71628 (9th Cir.), ECF No. 4.)

Despite misgivings about whether it had the authority to hold such a hearing before ruling that Stanley had cleared AEDPA's[2] bar to relief

[2] The Antiterrorism and Effective Death Penalty Act of 1996.

under § 2254(d), the district court followed the Court's new mandate and held the hearing in September 2020. (Pet. App. 26a–27a) The court ultimately resolved the questions posed in the Ninth Circuit's remand order in Stanley's favor. (Pet. App. 22a, 55a n.16, 75a.) Yet it still denied relief (Pet. App. 15a–18a) and, as before, a certificate of appealability (USDC ECF No. 160).

The Ninth Circuit again granted one. But this time it affirmed, in an unpublished split decision. Setting aside whether AEDPA applied given the case's procedural history (Pet. App. 3a), the majority held that because Pentz had "participat[ed] in multiple sidebar conversations regarding the possibility of a mistrial and [had] multiple opportunities to object," Pentz's "actions" were "sufficient to manifest implied consent" (Pet. App. 7a.) Dissenting, Judge Berzon wrote that any finding of consent on this record was an unreasonable fiction. (Pet. App. 8a–14a.) Panel rehearing was summarily denied. (Pet. App. 1a.)

This petition follows.

REASONS FOR GRANTING THE WRIT

Review should be granted because in rejecting Stanley's double jeopardy challenge, the Ninth Circuit panel majority ignored that state law invited the very omission it treated as evidence of implied consent.

The Double Jeopardy Clause "protect[s] the interest of an accused in retaining a chosen jury," *Crist v. Bretz*, 437 U.S. 28, 35 (1978)—a "valued right" with "roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice," *id.* at 36. The power to declare a mistrial is therefore to be used only "with the

greatest caution, under urgent circumstances, and for very plain and obvious causes," *United States v. Perez*, 22 U.S. 579, 580 (1824)—either (1) when there is a "manifest necessity" for it, *id.*, or (2) when the defendant himself has consented to it, *United States v. Jorn*, 400 U.S. 470, 480 (1971).

That Stanley's mistrial was unnecessary is undisputed. Which leaves consent the only option, and, in particular, whether Stanley's attorney "implied" it. But *consent* under this Court's precedent is measured by whether the defendant's actions reflect a "deliberate[] cho[ice] to seek termination of the proceedings against him," *United States v. Scott*, 437 U.S. 82, 93 (1978), "a deliberate election … to forgo his valued right to have his guilt or innocence determined before the first trier of fact," *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

These standards in mind, the Ninth Circuit panel majority's implied consent ruling makes little sense, even on its own terms. As dissenting Judge Berzon pointed out, what this Court demands in the absence of necessity is not waiver, but "consent." *United States v. Dinitz*, 424 U.S. 600, 606–07 (1976); *cf. id.* at 609 ("[T]raditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial."). Besides which, even if an objection was somehow required, Pentz had no reasonable opportunity to offer one: He faced a "rapidly evolving situation" in which there was "no motion for a mistrial, no discussion of a retrial, no opportunity … to confer with Stanley, nor [even] any invitation to object to or comment on the possibility of a mistrial." (Pet. App. 11a–

12a.) Indeed, the only *ruling* the majority identified is one Bowers made after he dismissed the jury (Pet. App. 6a)—at which point, it's undisputed, an objection "would have made no difference whatsoever." (Pet. App. 14a.)

But what ushers the result here from the merely unreasonable to the downright perverse is the majority's decision to ignore that the very omission it treats as evidence of implied consent was itself invited by state law. Again, California law unequivocally told attorneys and judges that defense counsel in state court had "no duty to object" to preserve a double jeopardy claim. *Curry*, 2 Cal. 3d at 713; *Compton*, 6 Cal. 3d at 63; *People v. Superior Ct. (Marks)*, 1 Cal. 4th 56, 77 (1991). Not even when the trial judge expressly "propose[d] to discharge [the] jury." *Curry*, *supra*. Not even when the trial judge *asked* counsel beforehand whether the defendant would object. *Compton*, *supra*.

What possible reasons, then, could there be to treat these controlling procedural dictates as irrelevant to assessing a failure to object to judicial comments *short* of a mistrial declaration? The Ninth Circuit majority offered two—each of them ad hoc and unsupported by authority.

The first was that Pentz himself "did not *claim* [in his state court *declaration*] to be operating under that impression of California law." (Mem. at 5 (emphasis added).) But why would he? He would have been presumed both to know California law and to reasonably rely on it. *People v. Barrett*, 54 Cal.4th 1081, 1105 (2012). He had no duty to alert the trial court to its own misapprehensions. *People v. Overby*, 124 Cal.

App. 4th 1237, 1244 (2004). And the burden of justifying the mistrial wasn't his; it was the prosecutor's. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). So even if Pentz's subjective impressions about California law somehow mattered to an objective inquiry into consent, they were for the prosecutor to elicit in a hearing, not for Pentz to volunteer, unbidden, in a declaration.

The majority's second reason for ignoring the state standard was that the state court of appeal had already held the standard met. (Mem. at 5–6.) But there's no rational justification for thinking the state court's ruling on that question was owed any deference.

It can't be justified by the general rule that a state court's construction of its own law is authoritative, *Ring v. Arizona*, 536 U.S. 584, 603 (2002), because Stanley wasn't challenging the state court's construction of law, but its novel, retroactive application of it to assess conduct *induced* by its prior approach. In this respect, the state court's ruling looks less like a substantive ruling about "consent" than it does a novel application of a *procedural* rule to frustrate Stanley's constitutional claim—the sort of move this Court again just recently had cause to correct. *See Cruz v. Arizona*, 143 S. Ct. 650, 658–60 (2023) (reversing Arizona's novel application of its standard for identifying "significant change in the law").

Nor, absent the application of AEDPA, can it be justified by deference to the state court's underlying findings of fact—deference appropriate only when the state court's facts were "reliably found," *Townsend v. Sain*, 372 U.S. 293, 318 (1963), or "fairly supported by the

record," *id.* at 316. For none of the findings here come close to qualifying: the idea that there was an "agreement" about a possible mistrial (Pet. App. 211a, 218a, 226a n.22, 246a, 248a); that Judge Bowers *kept* to it (*id.*); that his fleeting, elliptical remark after *departing from it* gave Pentz an adequate opportunity, in an instant, without any consultation with his client, to make a deliberate election to give up on the jury he'd manifestly taken pains to buttress against possible mistrial (Pet. App. 250a)—none of these findings or factual determinations can be sustained on the record before the state court record. And even if the panel were to conclude AEDPA applied to these rulings (*but see* Pet. App. 3a (declining to reach the question)), no fairminded jurist could credit them, *Harrington v. Richter*, 562 U.S. 86, 101 (2011), for the reasons explored here and in Judge Berzon's dissent.

Because state law induced Pentz's omission, because the state court applied a disguised procedural rule in a novel way to frustrate Stanley's attempt to vindicate his federal constitutional rights, and because the Ninth Circuit opted to ignore these facts for reasons unjustified and unjustifiable, the Court should grant certiorari and summarily vacate the Ninth Circuit's judgment. *Cf. Terrell v. Morris*, 493 U.S. 1, 2 (1989) (per curiam) (summarily reversing court of appeals because it failed to address "retroactivity issue" with procedural bar it applied).

CONCLUSION

The Court should grant Stanley's petition, vacate the Ninth Circuit's judgment, and remand so that the panel can decide his double jeopardy claim without ignoring that any failure to object to the trial judge's comments or rulings was invited by California law.

Respectfully submitted,
CUAUHTEMOC ORTEGA
Federal Public Defender

June 15, 2023

MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner
JOSEPH STANLEY