

No. _____

23-5090

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUN 27 2023

OFFICE OF THE CLERK

Brown, Travis J. — PETITIONER
(Your Name)

vs.

Cisneros, Teresa — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

CALIFORNIA COURT OF APPEALS 4TH DISTRICT, DIV. 3
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Travis J. Brown ^{CDCT#} AS-9709
(Your Name)

P.O. Box 2199 (ISP)
(Address)

Blythe, Ca. 92226
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

I. WHEN A JURY SUBMITS A SUCCESSION OF VERDICTS - BOTH GUILTY AND NOT GUILTY - ON THE SAME COUNT, AGAINST THE SAME DEFENDANT, AND IN THE SAME TRIAL AND THE TRIAL COURT UNILATERALLY SELECTS THE GUILTY VERDICT AS THE JURY'S TRUE VERDICT WITHOUT CONSULTING THE DEFENSE ABOUT ANY ACTION THAT SHOULD BE TAKEN. SHOULD PRINCIPLES OF DOUBLE JEOPARDY PROTECT A DEFENDANT FROM SUCCESSIVE PROSECUTIONS, OR DOES POWELL'S ANALYSIS ON INCONSISTENT VERDICTS CONTROL?

II. THE UNITED STATES SUPREME COURT HAS EXPANDED DOUBLE JEOPARDY PROTECTIONS UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION TO THE MOST SEVERE INSTANCES OF GOVERNMENTAL CONDUCT THAT 'GOADS A DEFENDANT INTO MOVING FOR A MISTRIAL'; DOES THE APPREHENSION OF AN ACQUITTAL BY A TRIAL JUDGE AMOUNT TO THE LEVEL OF MISCONDUCT NEED TO TRIGGER THE KENNEDY PROTECTION?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Presently NONE, HABEAS WILL BE FILED.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-8
REASONS FOR GRANTING THE WRIT	9-21
CONCLUSION.....	22

INDEX TO APPENDICES

APPENDIX A - Opinion of The California Court of Appeals...
APPENDIX B - Ruling of Superior Court of California for...
APPENDIX C - Denial of review by California Supreme...
APPENDIX D - Opinion of The California Court of Appeals...
APPENDIX E
APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
-------	-------------

<u>Oregon v. Kennedy</u> - - - - - 456 U.S. 667 (1982)	17-20
<u>United States v. Powell</u> - - - - - 469 U.S. 57 (1984)	13
<u>United States v. Pierce</u> - - - - - 940 F.3d 817 (2nd Cir. 2019)	14
<u>United States v. RANDOLPH</u> - - - - - 794 F.3d 602 (6th Cir. 2015)	14
<u>United States v. Shippley</u> - - - - - 690 F.3d 1192 (10th Cir. 2012)	14
<u>People v. Carbajal</u> - - - - - 56 Cal. 4th 521 (2013)	14

STATUTES AND RULES

Cal. Penal Code sec. 1016 , 1161 - - - - -	10,12
Cal. PENAL CODE SEC. 186.22 (a) & (b); 187 ; 190.2(a)(22) - -	4
Cal. PENAL CODE SEC. 12022.53(d); 12022.5(a); 12022.53 (d)(e)(1) - - - - -	4

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the CALIFORNIA APPEALS court appears at Appendix A to the petition and is

☒ reported at PEOPLE V. BROWN, 247 Cal.App.4TH 211; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 6-21-23.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's rights were violated under the Fifth and Fourteenth Amendments to the United States Constitution. The Fourteenth Amendment provides that no State shall "deny to any person within its Jurisdiction the equal protection of the laws." The Fifth Amendment to the United State 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 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

STATEMENT OF THE CASE

The Following Summary is Taken in part From The opinions of the California Courts of Appeals For the Fourth District, Division Three.

The amended Information in this matter charged defendant Travis Jordan Brown with one Count of murder (Penal Code sec. 187(a); Count one)^① and Gang Participation (Cal. Penal Code 186.22(a); Count Two). IT alleged a gang enhancement (186.22(b)) and a gang killing Special Circumstance (190.2(a)(22)). Lastly, IT alleged several firearm enhancements for personal liability (12022.53(d); 12022.5(a)). And one gun enhancement for vicarious liability (12022.53(d), (e)(1)). The charged incident was alleged to have occurred on July 11, 2008. The trial took place in December 2013.

The defense was that defendant was not the shooter. The person defendant contends was the shooter, Kevin Martinez, was the only witness to say defendant was the shooter. Martinez, who was interrogated by the police about the shooting, pled guilty to a lesser crime in exchange for a six-year sentence and his agreement to testify against defendant, after following a police officer's lead to say he was not the the shooter and did not know there was going to be a shooting. There was evidence the shooter was left-handed, Martinez is left-handed, defendant is right-handed, and Martinez matched the general description of the shooter.

4.

^①All undesignated Statutes are to Penal Code

On January 2, 2014 at 4:15 p.m. that afternoon, The Jury informed the bailiff it had a verdict, but would prefer to return to court the next day to render its verdict. The bailiff retrieved the verdicts forms for the Court to review and the matter was continued to the next day. The Court reviewed the verdict forms and saw the signed and dated not guilty verdict form on the murder count had "withdrawal" and "void" written across it in large letters. The Court did not notify Counsel of the irregularity. The next day when the case reconvened, without discussing the matter with Counsel, the Court sent a note to the Jury stating: "The 'not Guilty' form for Murder in the First Degree had 'withdrawal void' handwritten across it. The Court has taken out that form and replaced it with a clean copy. As to Count 2, under tab #2, please date and sign the appropriate form for the verdict you have reached or indicate to the court by a question that you are unable to reach a verdict on Count 2 and therefore deadlocked." Approximately 10 minutes later, the Jury notified the Court it was ready with its verdicts.

The Clerk read the verdicts, Guilty, for First degree murder and gang participation. All enhancements and the Special Circumstance

were found true. The clerk polled each juror as follows: "is this your true and correct verdicts and findings as to all counts . . . "

only after the jury had been excused did the court explain what had occurred the day before regarding the prior not guilty form. Then, in what must have been a surprise to counsel, the court stated it reviewed the verdict forms from that day, January 3, 2014, just prior to reading the verdicts in court, and saw the blank not guilty form the court had supplied to replace the previous not guilty form was also signed and dated. In other words, in submitting its verdicts that day, the guilty and not guilty verdicts on count one, first degree murder, had both been signed and dated. The court unilaterally, and without notifying counsel beforehand and without inquiring of the jury, determined the second not guilty verdict form was "another mistake" and the correct verdict was guilty.

The court sentenced the defendant to life in prison without the possibility of parole and imposed a second consecutive 25-to-life sentence for one gun enhancement.

The court & Appeals in the defendant's first appeal found: 1) The jury was instructed on the natural and probable consequences theory

Liability for First degree murder and reversed the JUDGEMENT on that issue and defendant was granted a new Trial. without reversing on separate grounds Challenging the handling of the verdicts The court found: 2) The Court took a defective Signed not guilty form the afternoon before a verdict was taken, without informing Counsel; 3) The Court gave a blank not guilty Verdict form to the Jury to replace the defective one, without notifying Counsel; 4) The Court Communicating ex parte with the Jury, instructed them regarding their verdict Outside the presence of Counsel and only let Counsel know of the circumstances until the guilty verdict was accepted and the Jury was excused; and 5) upon reviewing the verdict forms just prior to announcing the guilty verdict, which forms included a guilty and not guilty both signed and dated, for Murder, the Court only had the guilty Verdict read aloud, without informing Counsel about the not guilty verdict.

On remand the defendant filed a motion Seeking Jury contact information to investigate the extent of the Judicial overreach, the motion was denied. Conviction occurred a Second time and the defendant appealed

The trial courts denial of Juror Contact Information. The defendants Conviction was affirmed On April 22, 2021

The defendant the litigated the present issue in habeas Corpus proceedings in the state court with denials on every level. The California Supreme Court issued a summary denial on

REASONS FOR GRANTING THE PETITION

INTRODUCTION AND OVERVIEW

The opinion of The California Court of appeals Relying on United States v. Powell, 469 U.S. 57 (1984) ANALYSIS Regarding inconsistent verdict was incorrect and at odds with several Federal Circuit Courts of appeals deciding identical issues in their courts. Allowing retrial violated Petitioner's rights, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

Alternatively, The inconsistency was created By the trial court as a result of several instances of misconduct violating Petitioner's rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution. A Grant of Certiorari is necessary to address the important constitutional questions presented and to bring uniformity to the adjudication of these issues across the country.

ARGUMENT

1. PETITIONER BROWN WAS DEPRIVED OF DUE PROCESS AND WAS PLACED IN JEOPARDY FOR A SECOND TIME FOLLOWING A REVIEWING COURTS ERRONEOUS RELIANCE ON POWELL'S ANALYSIS ON INCONSISTENT VERDICTS TO ALLOW RETRIAL AFTER A JURY SUBMITTED MULTIPLE NOT GUILTY VERDICTS AND ONE GUILTY VERDICT SIMULTANEOUSLY ON THE SAME COUNT IN THE SAME PROCEEDING

A. Summary of Facts

Petitioner Brown's first appeal dealt with the question of whether a Judge could instruct a jury to reconsider an acquittal under California Penal Code sec. 1161. In light of the tumultuous jury deliberations which took place in Brown's first trial between January 2, 2014 and January 3, 2014⁽²⁾. It was Brown's position that the Judges actions resulted in an impermissible instruction to the jury to reconsider an acquittal in light of a not guilty verdict submitted on January 3, 2014 at approximately 1:40 p.m. People v. Brown, Slip Opinion, pp. 22-23. (HEREINAFTER REFERRED TO AS BROWN 1).

To illustrate the several attempts the jury made to end deliberations in Brown's first trial, the following occurred: (1) on January 2, 2014 the jury indicated to the court it was deadlocked, but soon thereafter the jury withdrew its notification and continued deliberating. Brown 1, p. 3; (2) AT 4:15 p.m. That same day the jury notified the court it had reached a verdict but preferred to return the next day to record the verdict. Brown 1, p. 3; (3) on that day the jury submitted both a signed and dated guilty verdict on the count for murder and a defective not guilty

⁽²⁾ ALL FACTS ARE TAKEN FROM Appx. A AND D, THE SLIP OPINIONS ISSUED REGARDING THE PRESENT ISSUES IN THIS PETITION. THE OPINION IN Appx. A WILL BE REFERRED TO AS BROWN 1, WHILE Appx. D WILL BE REFERRED TO AS BROWN 2.

verdict on the same count. Brown 1, P. 24;
(4) The next day on January 3, 2014 the trial court notified the jury that it had replaced the Defective Not Guilty form with a clean copy of the verdict form. In an apparent attempt to continue deliberations the jury then resubmitted a properly signed and dated Not Guilty verdict on the Murder count. Brown 1, P. 25. The trial court dismissed this attempt at acquittal as a 'mistake' and entered the guilty verdict on the record. Counsel for the defense was not notified of any of the verdicts for not guilty until the jury was excused. Brown 1, P. 21-30.

The Court of appeals Denied Brown's argument that the trial court's actions in handling the verdicts by unilaterally selecting a Guilty verdict over a later submitted Not Guilty verdict warranted reversal and dismissal of the charges. Because, "Defendant has not attempted to explain why a jury that intended to Acquit would Defile the verdict form in that manner." Brown 1, P. 24. And concluded that the defective verdict of acquittal "Did not 'Manifest [the jury's] intention to acquit' such that retrial would be prohibited under double Jeopardy." Brown 1, P. 25.

Regarding the later submitted and properly rendered Not Guilty verdict which was signed and dated, The court again denied relief, stating, "When a jury submits Guilty and

Not Guilty verdicts on the same count, it cannot be said that act is equivalent of a verdict of acquittal." Brown 1, P. 30.

on remand Brown attempted to develop a record in order to enter a plea of once in double jeopardy. Cal. Penal Code sec. 1016. Brown moved the court seeking juror contact information to determine whether each juror voted for Not Guilty, their method of voting, and if any more instances of judicial overreach occurred. As this all pertains to the January 3, 2014 Not Guilty verdict. This is allowed under California Law.

The Defense's petition was denied.
Brown 2, PP. 11-17.

Brown's convictions following a second trial were affirmed on appeal. Brown 2, P. 18.

Brown subsequently filed an habeas corpus raising the raised here.

B. The Trial Courts Erroneous Reliance on Powell's analysis on inconsistent verdicts To Allow retrial.

This Court has not addressed the Constitutional standard for what a trial court should do when inconsistent verdicts arise in the form of both Guilty and Not Guilty verdicts submitted on the same count, against the same defendant, and during the same trial. This Court has decided similar

Constitutional Standards involving inconsistent verdicts, most notably in *United State v. Powell*, 469 U.S. 57 (1984).

Powell has been the authority for courts when dealing with any inconsistency in verdicts since its advent. From this ruling it can be said that as a rule inconsistent verdicts are allowed stand, "...But with few exceptions, [citations], once a jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgement. Courts have always resisted inquiry into a jury's thought processes, [citations]; Through this deference the jury brings to the criminal process, in addition to the collective judgement of the community, an element of needed finality." POWELL, supra, 469 U.S. 57.

But this principle can not govern a situation where there exists a guilty and not guilty verdict on the same count and against the same defendant. Especially when the inconsistency is caused by the trial court acting surreptitiously while depriving a defendant of several constitutional rights through judicial overreach, like the case is here.

Several Federal Circuit Courts of appeals have made clear that Powell does not

Control the analysis here. SEE: United States v. Pierce, 940 F.3d 817 (2nd Cir. 2019); United States v. Randolph, 794 F.3d 602 (6th Cir. 2015); United States v. Shippley, 690 F.3d 1192 (10th Cir. 2012).

These Courts have reached conclusions incompatible with that of the California Court of appeals in this case. As well as the California Supreme Court in, People v. Carbajal, 56 Cal. 4th 521 (2013).

Furthermore, Both the Randolph and Pierce Courts determined that retrial was barred in circumstances such as these. The 6th Circuit in Randolph concluded that principles of Double Jeopardy protect a defendant from retrial. Randolph, 794 F.3d at p. 612.

The 2nd Circuit upheld a district court's dismissal on similar grounds due in part to the fact a jury was not asked to reconsider and the government was unhelpful in the proceedings. Pierce, 940 F.3d at p. 824.

The 10th Circuit in Shippely did not consider questions emanating from the Double Jeopardy clause.

Conversely, the trial court in Brown's first trial didn't even make the defense

aware of the existence of the Not Guilty verdicts in this case until after the jury was excused. Brown I, pp. 21-30.

For these reasons, Brown requests that this Court grant Certiorari and set the Constitutional Standard for analyzing what a trial court should do when both guilty and Not Guilty Verdicts are submitted in the same count, against the same Defendant, and in the same trial.

II. THE TRIAL COURT'S MISCONDUCT IN HANDLING THE NOT GUILTY VERDICTS IMPLICATED BROWN'S RIGHTS AFFORDED BY THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION WHICH PROTECT CRIMINAL DEFENDANTS FROM BEING SUBJECTED TO DOUBLE JEOPARDY

A. SUMMARY OF FACTS

The Facts from argument one are relevant here and are hereby incorporated by reference.

In deciding Brown's case on appeal in 2016 the reviewing court made multiple findings regarding the trial judges conduct with the way it handled the verdicts in Brown's first trial. The Court found:

(1) The Court took a defective Verdict Form for not guilty out of the record, without informing counsel;

(2) The Court replaced the defective Verdict Form with a clean copy, without informing Counsel;

(3) The Court communicated ex parte with the jury and instructed the jury concerning their verdict without informing Counsel of these circumstances until after a guilty verdict was accepted on the record and the jury was excused;

(4) upon reviewing the verdict forms prior to announcing the guilty verdict, the Court noticed the jury submitted a signed and dated verdict form for Not Guilty on the murder count, the Court unilaterally selected the guilty verdict as the jury's true verdict and discarded the Not guilty verdict as 'a mistake', without informing Counsel about the Not Guilty verdicts. Brown I, pp. 21-30.

Brown attempted to develop a record on remand in order to find out what happened when the trial Court communicated ex parte with the jury. SEE: Summary of Facts for argument 1, ante.

Multiple rounds of litigation has occurred since Brown I regarding the issue here, But to no avail. SEE: Facts argument 1, ante.

B. The Trial Judge's Misconduct apprehended
a potential acquittal and Brown's
Subsequent trial Violated principles of
DOUBLE JEOPARDY

Oregon v. Kennedy, 456 U.S. 667 (1982)
Created a 'narrow exception' for defendants
who may raise an argument emanating
from the Double Jeopardy Clause where
Governmental Conduct is intended to
"goad" a defendant into moving for a
mistrial. Id at p. 679.

The Kennedy doctrine stands on the
foundation that, "where prosecutorial or
judicial error even of a degree to
warrant a mistrial or reversal has
occurred the important consideration,
for the purposes of the Double Jeopardy
Clause, is that the defendant retain
primary control over the course to be
followed in the event of such an
error," United States v. Dinitz, 424 U.S.
600, 609 (1976).

The Kennedy Court was unanimous in
their judgement but hotly divided in the
standard that should be adopted for

The purpose of evaluating Double Jeopardy Claims Stemming From prosecutorial or Judicial error. See: Oregon v. Kennedy, *Supra*, 456 U.S. at pp. 679-692; Concurring opinions of Justices Powell, Brennan, and Stevens.

One of the differences of opinion That the majority acknowledged and discussed extensively had to do with the concept of misconduct designed to avoid an acquittal. The relevant portion of the majority opinion reads:

"In adopting the position we now do we recognize that language taken from our earlier opinions may well suggest a broader rule... [CITATION OMITTED]:

'Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.'

A footnote attached to this sentence explains, however, that 'where a defendant's mistrial motion is

necessitated by Judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred." Kennedy, *supra*, 456 U.S. at pp. 678-679. [emphasis added].

The Kennedy Court realized that future cases may arise and that a different standard may well be needed to decide one of those cases. Instead, the Court was making, "A choice between two differing lines of authority in our own recent Precedent..." And not simply "lopping off" a part of any rule previously decided. Kennedy, *supra*, at p. 678, fn. 8.

That point was firmly Embedded in The majority opinion when it incorporated the following Language:

"Because of the confusion which these varying statements of the standard in question have occasioned in other Courts, we deem it best to acknowledge the confusion and its justifiability in light of these statements from previous decisions. We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully

Moves for a mistrial, he may not thereafter invoke the bar of Double Jeopardy against a second trial." Kennedy, *supra*, at p. 679.

Brown Presents the exact sort of misconduct that the Kennedy majority recognized as a possible exception to the Rule that they were Laying out, that where "... Judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred." Kennedy, *supra*, at p. 678-679.

As documented throughout the nine years of litigation that Brown has undertaken to argue this issue; The Trial Judge surreptitiously handled two separate Not Guilty while Brown and his Counsel were blind to a potential acquittal. See: Summary of facts arg. 1 & 2.

Brown wasn't even aware of the potential acquittal because the trial judge purposely withheld the two not guilty verdicts until after the jury was excused. Deplorable conduct that was undertaken to subvert Brown's chance of a realistic possibility at an acquittal based on objective facts and

Tangible evidence in the form of two signed and dated Not Guilty verdicts Forms extant within the record of Conviction.

Since Kennedy, This Court has not expanded the "narrow exception", where a defendant may raise a Jeopardy Claim, to include instances of Judicial Impropriety Specifically. Nor has it defined a Standard to evaluate Judicial Intent when Deciding misconduct arguments Stemming from Judicial Impropriety.

This Court should grant Certiorari to resolve the Conflicts between the state Courts of last resort and federal circuit Courts of appeals who have set different Standards governing this important area of Constitutional Law.

SEE: People v. Batts, 30 Cal. 4th 660 (2003); Commonwealth v. Britt, 465 Mass. 87 (2013) Butler v. State, 95 A.3d 21 (2014); United States v. Borromeo, 954 F.2d 245 (4th Cir. 1992); United States v. Mondragon, 741 F.3d 1010 (9th Cir. 2013); Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

T. Brown
TRAVIS J. BROWN, IN PRO SE

Date: 2/24/23