

No. _____

23-7083

ORIGINAL

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ORLANDO KIM FERGUSON II — PETITIONER
(Your Name)

vs.

STATE OF MISSOURI — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Missouri Court of Appeals Eastern District (Division Four)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Orlando Kim Ferguson II
(Your Name)

8200 No More Victims Rd
(Address)

Jefferson City, MO 65101
(City, State, Zip Code)

314-387-3776
(Phone Number)

QUESTION(S) PRESENTED

1. Is the Missouri Constitution Article I; Section 19; limiting Double Jeopardy rights on retrial following intentional prosecutorial misconduct under *Oregon v. Kennedy*?

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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:

Garrick Aplin

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Crist v. Bretz</i> , 437 U.S. 28, 35 (1978).....	6
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STATUTES AND RULES

Missouri Constitution Art. I section 19

Rule 4-3.8

OTHER

Article: Prosecutor Misconduct, Convictions, and Double Jeopardy:

Case Studies in an Emerging Jurisprudence, 71 Temp L. Rev. 887

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☐ is unpublished.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☐ is unpublished.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 A to the petition and is

- ☒ reported at State v. Ferguson, 679 S.W. 3d 60; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ 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.

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 9/26/2023.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: 12/19/2023, and a copy of the order denying rehearing appears at Appendix D.

☐ 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

U.S. Const., Amend. V

U.S. Const., Amend. VI

U.S. Const., Amend. XIV

Mo. Const., Art. I, Sec. 10

Mo. Const., Art. I Sec. 19

STATEMENT OF THE CASE

The state charged Orlando Ferguson II, with two counts of statutory sodomy in the first degree, and one count of child molestation in the first degree of his stepdaughter, A.R. , after A.R. made disclosures in 4th grade about certain acts she remembered from when she was two or three years old. The information alleged that Mr. Ferguson committed these crimes against A.R. on or between January 21, 2008 and January 20, 2013.

Mr. Ferguson was first tried on these charges in 2017. See *State v. Ferguson*, 568 S.W. 3d 533, 537 (Mo. App. E.D. 2019). In case number ED105903, the Eastern District Court of Appeals in Missouri, reversed Mr. Ferguson's convictions. *Id.* at 546. The Eastern District determined that two of the State's witnesses, a school counselor and a forensic interview, "commented on the believability and reliability of a very young victim in a highly disputed case without physical evidence [.]" *Id.* The Court stated that "the State is prohibited from prosecuting charges in such a way that usurps the role of the jury and violates a defendant's right to a fair trial." *Id.*

Upon remand, counsel for Mr. Ferguson filed a motion to dismiss the indictment under the Fifth Amendment to the United States Constitution. Counsel argued that a retrial would violate Mr. Ferguson's right against double jeopardy in

that " the prosecuting attorney engaged in a pattern of conduct that goaded Defendant's counsel into moving for a mistrial and had no proper motive other than to prevent acquittal on a case of questionable merit [.]"

A hearing was held, and counsel repeated his argument that "Double Jeopardy bars successive prosecution and that retrial may be barred if the prosecutorial misconduct was committed for the exclusive purpose of avoiding an acquittal." Following the hearing, the court entered an order denying the motion to dismiss the indictment.

During the second trial, the State elicited the same bolstering evidence from the same witness, and no objection was had by trial counsel. Mr. Ferguson was found guilty by a jury of the same crimes. On appeal, Mr. Ferguson asserted three points of error. First, Ferguson argued the trial court plainly erred when it denied his motion to dismiss based on the Double Jeopardy Clause. Second, Mr. Ferguson claimed the trial court plainly erred in failing to *sua sponte* exclude from the evidence the statement to A.R. by the counselor, that A.R.'s mother "would believe her because the testimony invaded the province of the jury as an improper comment on the credibility of another witness. Third, Mr. Ferguson claimed, and the State conceded, the trial court plainly erred in ordering Fergusons two statutory sodomy sentences to run consecutively based on its erroneous belief that the law required so. The Eastern District Court of Appeals agreed and reversed for re-

sentencing for the limited purpose to decide whether to run the statutory sodomy charges consecutively or concurrently on September 26, 2023. The application for transfer was filed in the Court of Appeals on October 11, 2023. The Court of Appeals ruled on the transfer application on October 30, 2023. Mr. Ferguson's appellant counsel electronically filed two issues to the Supreme Court of Missouri on November 9, 2023. The Supreme Court of Missouri denied the transfer and issued its mandate on December 19th, 2023.

Reason For Granting The Petition

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, "protects a criminal defendant from repeated prosecutions for the same offense." *State v. Willers*, 785 S.E. 2d 88, 90 (Mo. App. S.D. 1990) citing *Oregon v. Kennedy*, 456 U.S. 677,671 (1982). Jeopardy attaches when "the jury is impaneled and sworn." *Id.* (citing *Crist v. Bretz*, 437 U.S. 28, 35 (1978)). "Following the attachment of jeopardy, if a mistrial is declared and the jury is discharged, defendant may be retried in one of two circumstance." *Id.* (citing *State v. Fitzpatrick*, 676 S.W. 2d. 831, 834 (Mo. banc 1984)). One of these circumstance is where: the defendant request or consents to the mistrial." *Id.* (citation omitted); accord *Kennedy*, 456 U.S. at 676; *State v. Abdelmalik*,

273 S.W. 3d 61, 67 (Mo. App. W.D. 2008) (citing *State v. Barton*, 240 S.W. 3d 693, 701 (Mo banc. 2007)).

Additionally, the Missouri Supreme Court has considered an extension of Kennedy barring retrial, in the absence of a mistrial, when prosecution misconduct is committed for the purpose of avoiding on acquittal. *Barton*, 250 S.W. 3d at 701-702; see also *State v. Simon*, 524 S.W.3d 163, 169(Mo. Ct. App. 2017).

In *Oregon v. Kennedy*, intent was the deciding factor of prosecutorial misconduct goading a defendant into mistrial. For several reason, the case was remarkably ill- suited to this role, and did a fundamental disservice by obscuring and diverting attention from the very real concerns that prosecutorial misconduct pose vis-à-vis the core principles of double jeopardy.

First, the facts in *Kennedy* did not present a significant, or arguably even colorable, instance of misconduct in the first place, and as a result, the Court was not called upon to grapple with or resolve meaningful double jeopardy issues. The alleged misconduct in *Kennedy* consisted of a single question by the prosecutor on redirect examination of a government witness- arguably an invited response to defense cross examination of the witness.

Thus, nor surprisingly, the trial judge, the State supreme court judges, nor any of the United States Supreme Court Justices - who reviewed the facts of *Kennedy* (including the four justices declining to join in the lead opinion), found the prosecutor's misconduct sufficient to constitute a double jeopardy violation under any standard.

Second, the meaning an means of satisfying the intent standard- whether it entailed objective intent bases on what a reasonable prosecutor would have known and should have done under the circumstances, or subjective intent requiring actual malice on the part of the individual lawyer involved - was left unclear by the Supreme Court of the United States in *Kennedy*. Confusing matters further, virtually no meaningful case law followed in the wake of *Kennedy* because the focus in *Kennedy* was on circumstances that rarely, if ever, arise as a practical matter.

The question *Kennedy* set out to answer was indisputably important: where is the line between prosecutor misconduct subversive of a defendant's double jeopardy rights and misconduct which does not warrant interference with the prosecutions discretionary right to prosecute? A satisfactory framework for drawing that line is the prerequisite to workable double jeopardy misconduct jurisprudence. The best indication of this reality is the vacuum created by the short comings of the *Kennedy* formulation, and the absence of meaningful lower court case law in this area for a full forty years thereafter. The issue thus swept under the constitutional rug- the wholesale elimination of the one limit on prosecutor abuse of power in the wrongful conviction cases in which it was most needed- did not eliminate the real world problem in the least. On the contrary, it arguably aggravated it. *Article: Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 Temp L. Rev. 887*

In the Missouri Constitution Art. I section 19, nowhere does it state the intent of a prosecutor's misconduct and the ties of the double jeopardy clause. By *Kennedy* being

left unclear in its application, cases like *State v. Ferguson*, 568 S.W. 3d. 533, 537 (Mo. App E.D. 2019) are left unchecked and gives the state to the run of the gauntlet twice.

In *United States v. Wallach*, 979 F. 2d 912 (2nd cir 1992) Judge Posner cautioned that the prosecutor must have intent of subverting double jeopardy protection: For it is clear that a defendant who wants the district court (or this court on appeal from an adverse ruling by the district court) to block a retrial on the basis of prosecutorial error must show that the prosecutor committed the error because he thought that otherwise the jury would acquit and he would therefore be batted from retrying the defendant. It is not enough that there was an error; it is not enough that it was committed or procured by the prosecutor; it is not enough that it was deliberate prosecutorial misconduct; it must in addition have been committed for the purpose of avoiding an acquittal that, even if there was enough evidence to convict, was likely if the prosecutor refrained from misconduct. Any greater extension of *Kennedy* must be left to the Supreme Court, in view of the danger of adding a double jeopardy tail to every appellate- reversal dog.

In case number ED105903, the Eastern Court of Appeals reversed movant's convictions. *Id.* at 546. The appeals court determined that two of the State's witnesses, a school counselor named Dr. Anita Hampton and a forensic interview name Michelle Stille, "commented on the believability and reliability of a very young victim in a highly disputed case without physical evidence[.]" The appeals court stated that "the State is prohibited from prosecuting charges in such a way that usurps the role of the jury and violates a defendant's right to a fair trial." *Id.* Upon remand, counsel filed a motion to

dismiss the indictment at the earliest opportunity under the Fifth Amendment to the United States Constitution.

During a hearing, counsel argued that " the prosecuting attorney engaged in a pattern of conduct that goaded Defendant's counsel into moving for a mistrial and had no proper motive other than to prevent acquittal on a case of questionable merit[.]" The motion stated that during the first trial, "school counselor Dr. Anita Hampton testified, over Defendant's objection, that she had 'no doubt at all' about what Victim had told her or whether 'this had actually happened to her.'"

Specifically, the motion to dismiss the indictment included an intentional statement from the prosecutor admitting that she knew her questions violated the court's previous ruling stating, " I am at fault for that because I am asking questions, *I know* there's been objections[.]" Trial transcript, at 660, lines 16-20 (Emphasis added).

Following the hearing of the motion, the trial court entered an order denying the motion to dismiss the indictment. Missouri rule 4-3.8 speaks on the conduct of the prosecutor during trial. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence. See *State v. Banks*, 215 S.W. 3d 118, 119-20 (Mo. banc 2007)

In the forty years since *Kennedy*, the state of Missouri's lower courts nor the Supreme Court has yet to set a precedent stating that the rules in *Kennedy* apply with any case before them.

State v. Ferguson 568 S.W. 3d. 533, 537 (Mo. App E.D. 2019); See also *State v. Ferguson*, 679 S.W. 3d 60 meets that bar with an intentional statement from the prosecutor stating her faults. Not only does she state her intentional misconduct, but pursued repeated misconduct to subvert an acquittal during trial and closing arguments, which is the most opportune time to prevent an acquittal.

There must be another direction for defendants who won their appeal. It is not constitutional under Double Jeopardy Clause for a free man to undergo the same anxiety or process when a reversal declared that unjust was resulted from the lack of due process to the defendant on the prosecutors account. How many times must a man declare his innocence before he is trampled by the government's regime, which in certain aspects, in more ways than one, designed to prevent the guilty from escaping through the loopholes of justice? Ultimately, they are caught in the same web. If the case has been reviewed objectively by a panel of appeal judges, who supersedes the lower circuit judge, based on principle of democracy, then the reversed decision should direct the course of justice in perpetuity. An American court system that has been in effect for centuries, changes with the era contemporary with the laws and climate of the culture. The integrity, time, and funds of the judicial system cannot afford to persecute and convict the innocence of its citizens just to turn around and admit its' fault. There is no restitution for time lost.

The law has consented with giving a man another "fair" trial by entering the direct appeal process and concluding that the same illegalities should not occur again or another mistrial is due. This gives the idea of an "unlimited error free trial" if error is presented

in a court of law. The double jeopardy clause should expand and include certain situations. One in particular, prosecutorial misconduct.

If the intentions of a court appointed prosecutor sworn in for civil duty, intends and goads a defendant for mistrial, then that action bars another trial. The core of this argument is intent. Finding intent would be difficult for subjective reasons, but when the intent is documented, recorded, and admitted by the prosecutor in a court of law, it is objectively evident what the intentions are.

The indelible misconduct in a trial proceeding relinquishes the integrity of the trial and penetrates the psychological fortitude of a man's conscious to the extent that he feels helpless. The intent of the prosecutor was of a conscious nature and prevented the defendant to uphold his reputation in the community. The only way to restore his name, if fully ever, is to relinquish him of his bondage and allow him to outlive the slander in freedom of society under double jeopardy.

It is the "people" that gives consent to liberality, autonomy, faithfulness and the esteemed virtues of freedom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: March, 19 2024