No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HAKEEM-ALI SHOMO, PETITIONER,

V.

THE STATE OF OHIO, *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the fundamental protection against double jeopardy, preserved in the Fifth Amendment to the United States Constitution, bar retrial when judicial misconduct leads to a defense request for a mistrial? Does that rule bar retrial even if a trial judge did not specifically intend to cause a defense mistrial motion? On these questions, this Court's past decisions are in noted conflict. To resolve it, should *Oregon v. Kennedy*, 456 U.S. 667 (1982), be limited to apply only in cases of prosecutorial misconduct? These questions are important, but they have not been answered in a case with facts that truly raise them. *Sup. Ct. R. 10(c).*

This Court had earlier warned against "a judge" who "exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori v. United States*, 367 U.S. 364, 369 (1961). In such decisions, intentional judicial misconduct was itself described as serious enough to bar retrial after a defendant's inevitable mistrial motion. *United States v. Dinitz*, 424 U.S. 600, 611 (1976); *see United States v. Jorn*, 400 U.S. 470, 485 n.12 (1971). Yet in *Kennedy*, this Court narrowed the retrial bar to those cases in which the objective facts and circumstances indicate that someone in government specifically "intended to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 679. While this Court only tacitly extended the *Kennedy* rule to judicial misconduct cases, the lower courts have consistently done so.

But *Kennedy* was a case about prosecutorial acts, not misconduct behind the bench, and its logic flows from the inherent role of prosecutors in the adversarial

system. With these earlier decisions suggesting that judicial misconduct could itself trigger the retrial bar, this Court should consider whether the narrower *Kennedy* rule makes any sense at all as applied to judicial conduct that precipitated a defense request to terminate trial. That question was beyond the scope of the disputed issues in *Kennedy*. And this appeal presents the perfect vehicle because there can be no doubt that the Honorable Judge John J. Russo ("Judge Russo") initiated an ex parte communication with prosecutors through his bailiff, Kathleen Dunham ("Bailiff Dunham") on the most contested legal issue of substance, even if lower courts ruled that he had not specifically intended to draw Petitioner Shomo's demand for a mistrial. Whatever his motivations were, Judge Russo's misconduct placed Shomo in the impossible position of choosing between submitting the dispute to a particular jury or seeking a new proceeding before a truly impartial jurist, which would itself "subvert the protections afforded by the Double Jeopardy Clause." *Kennedy* at 676.

PARTIES TO THE PROCEEDINGS

Petitioner is Hakeem-Ali Shomo, a citizen of the United States of America. Respondents are the State of Ohio, co-defendants Anthony Bryant and Brittany Smith, and intervenor-appellees the Honorable Judge John J. Russo and Kathleen Dunham.

DIRECTLY RELATED PROCEEDINGS

State v. Smith, et al., No. 2024-1118, Supreme Court of Ohio. Judgment denying discretionary review entered October 15, 2024.

State v. Shomo, No. CA-23-112908, Court of Appeals of Ohio for the Eighth Judicial District. Judgment entered June 20, 2024.

State v. Shomo, No. CR-22-670878-E, Court of Common Pleas for Cuyahoga County, Ohio. Judgment entered May 31, 2023.

State v. Smith, et al., No. 2024-1115, Supreme Court of Ohio, initiated by co-defendant Anthony Bryant. Judgment denying discretionary review entered October 15, 2024.

State v. Bryant, No. CA-23-112910, Court of Appeals of Ohio for the Eighth Judicial District. Judgment entered June 20, 2024.

State v. Bryant, No. CR-22-670878-C, Court of Common Pleas for Cuyahoga County, Ohio. Judgment entered May 31, 2023.

State v. Smith, et al., No. 2024-1342, Supreme Court of Ohio, initiated by co-defendant Brittany Smith. Judgment denying discretionary review entered November 12, 2024.

State v. Smith, No. CA-23-112882, Court of Appeals of Ohio for the Eighth Judicial District. Judgment entered June 20, 2024.

State v. Smith, No. CR-22-670878-D, Court of Common Pleas for Cuyahoga County, Ohio. Judgment entered May 31, 2023.

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The Supreme Court of Ohio did not issue a written decision in case no. 2024-1118. It issued a judgment denying discretionary review on October 15, 2024, and its announcement is published in a table. *State v. Smith*, 175 Ohio St.3d 1486, 2024-Ohio-4919, 243 N.E.3d 1278.

The Ohio Court of Appeals for the Eighth Judicial District issued its opinion in case no. CA-23-112908 on June 20, 2024, and it is unpublished. *State v. Smith*, 2024-Ohio-2358, 2024 WL 3064522.

The judgment entry and decision of the Court of Common Pleas for Cuyahoga County, Ohio, was entered on May 31, 2023, and it is not published.

STATEMENT OF JURISDICTION

This Court's jurisdiction is drawn from 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL AUTHORITY INVOLVED

The Fifth Amendment to the United States Constitution states:

> 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 offence 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.

Ohio Evid. R. 801(D)(2)(e) states:

> A statement is not hearsay if:
>
> . . .
>
> (2) Admission by party-opponent
>
> The statement is offered against a party and is . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

STATEMENT OF THE CASE

This criminal action was initiated on May 31, 2022, with the filing of a twenty-count indictment against Petitioner Shomo and five co-defendants, including Portria Williams ("Williams"), Destiny Henderson ("Henderson"), Nathaniel Poke Jr. ("Poke"), Anthony Bryant ("Bryant"), and Brittany Smith ("Smith"). *T.d. 2, Indictment filed May 31, 2022 ("Indictment").* The State charged Shomo with aggravated murder, murder, felonious assault, kidnapping, conspiracy, and having weapons under disability. *Indictment, p. 1-12, 18-19.* It generally alleged that Shomo was involved in a conspiracy to kidnap Alishah Pointer ("Pointer") and two others to use them "as ransom" to "cause another individual," Collin Funches ("Funches"), "to reveal his location in order for the conspirators to exact revenge upon that individual, who they believed to have been involved in the homicide of Aminjas Shomo on 11-2-21." *Id., p. 18.* Shomo entered a not-guilty plea on June 6, 2022, and he has been held on a $2,000,000.00 bond. *T.d. 3.*

I. Judge Russo privately reached out to prosecutors with a question going to the primary disputed evidentiary issue—co-conspirator hearsay.

The "issue of separate trials and potential *Bruton* issues"[1] became apparent from the inception of the case. *T.d. 8.* After briefing from the parties and a hearing, the trial court ruled "that each defendant" would "be tried separately." *T.d. 16.* But in November and December of 2022, Williams, Poke, and Henderson entered guilty pleas and began cooperating with the State as witnesses. *Transcript of Post-Trial Proceedings*[2] *filed August 8, 2023 ("Post-Tr."), p. 68-69.* Following this development, the trial court reversed its prior ruling and permitted the State to proceed against Defendants Shomo, Bryant, and Smith in a single proceeding over their "requests for severance." *T.d. 34*; *Post-Tr., p. 68-69.* On March 6, 2023, Shomo, Bryant, and Smith all rejected the State's plea offers and elected to go to trial before a jury. *Transcript of Trial Proceedings filed August 8, 2023 ("Tr."), p. 4-13.* They each renewed their requests for separate trials, albeit unsuccessfully. *Tr., p. 6, 9, 12.*

Presciently, counsel for Defendant Bryant reflected at the beginning of trial that there was: "going to be a problem" with admission of potential co-conspirator hearsay statements under Evid.R. 801(D)(2)(e). *Tr., p. 9.* In the middle of *voir dire* that day, the trial court directed the parties to prepare to address "the conspirator

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[1] In *Bruton v. United States*, 391 U.S. 123 (1968), this Court held that " 'in a joint trial of two defendants, a confession of one co-defendant who did not testify could not be admitted into evidence even with a limiting instruction that the confession could only be used against the confessing defendant.' " *State v. Moritz*, 63 Ohio St.2d 150, 153 (1980), quoting *United States v. Fleming*, 594 F.2d 598, 602 (7th Cir. 1979).

[2] The pagination of the transcript in this matter restarts for the post-trial hearings occurring on May 1 and 2, 2023.

theory and testimony of coconspirators." *Id., p. 164.* And after excusing the venire for the night, the court offered the parties a sense of how the issue could be handled based upon its reading of the rulings in *State v. Jalowiec*, 91 Ohio St.3d 220 (2001), and *State v. Brunson*, 2020-Ohio-5078 (8th Dist.). *Id., p. 281-82.* The court was not inclined to "wait until the case is actually going on" due to the possibility of "objections being made" if the State "put coconspirator statements on before the prima facie case is shown," and instead observed:

> You know, there's no law that says how it should be done. And so I thought maybe I just ask the state outside the view of the jury tell me what the case is, tell me how you are going to present it, why you think it's there, and let me make a ruling over everybody's objection if they want to object and then we've set the record, could be continuing objections, noted objections, when a witness comes up to hold your place for the Court of Appeals.

Id., p. 282-83.

The following morning, March 7, 2023, the trial court asked the State, "are you prepared to present that independent proof of conspiracy to the court?" *Tr., p. 294.* The State decided to "proffer some evidence at this point to show that, acknowledging that the case law does also suggest that it can be proven throughout the trial as well." *Id., p. 295.* The State launched into an extended description of the evidence that it believed it would be able to admit later during trial, relying in significant part upon numerous out-of-court statements by the alleged co-conspirators. *Id., p. 295-308.* In general, the State was planning to rely on *both* testimony *and* out-of-court statements from the alleged co-conspirators as the "independent proof" of the conspiracy mandated by Ohio Evid.R. 801(D)(2)(e). *Id., p. 306-07.* Despite the evident problem

with accepting an attorney's proffer based partly upon co-conspirator hearsay as a proper foundation for the admission of other co-conspirator hearsay, Judge Russo ruled the statements admissible:

> I'm going to -- base on the proffer that's been offered here this morning by the State of Ohio I'm going to find that the state has made a prima facie case today based on what I heard that there is an existence of a conspiracy and that's by independent proof. I'll note the objection of all parties and of course throughout the trial will allow objections to be made so that you protect your clients.

Tr., p. 308-09 (emphasis added). Defendants Shomo, Bryant, and Smith objected. *Id., p. 310-15.* Judge Russo responded that *State v. Carter*, 72 Ohio St.3d 545 (1995), demonstrated that any error in the sequence of evidence would be "rendered harmless" so long as "independent proof of the conspiracy was admitted into evidence before the case was submitted to the jury." *Tr., p. 312.* The court again directed it would "allow the evidence." *Id., p. 314-15.*

On the afternoon of March 8, 2023, jury selection concluded, and the venire was sworn. *Tr., p. 606-08.* The objections to co-conspirator hearsay were renewed with respect to the possibility that the State would reference them in opening statements. *Id., p. 610-12.* The trial court agreed with the State that it had "already made a preliminary finding . . . [b]ased on the proffers." *Id., p. 611.*

After several days of testimony marked by admission of co-conspirator hearsay over objection, Bailiff Dunham approached Assistant Cuyahoga County Prosecutor Sean Kilbane ("Attorney Kilbane") during a break in the proceedings on the afternoon of March 9, 2023. *Post-Tr., p. 7-9.* She asked him "to step outside into the hallway"

because she "needed to ask [him] something." *Id., p. 9.* She inquired whether "the state was planning on calling any witnesses to establish independent proof of the conspiracy prior to any of the coconspirators testifying," and she relayed that Judge Russo "told her that it was okay for her to be asking [Kilbane] that question." *Id., p. 9-10*. Attorney Kilbane "told her, half facetiously, half truthfully, that to be honest, we didn't know who we were calling the next day." *Id., p. 10*. He reported the ex parte to his co-counsel for the State, and he "thought that communication should have been put on the record in front of all of the defense attorneys in open court." *Id., p. 11-13.* Lead prosecutor Kevin Filiatraut ("Attorney Filiatraut") was "visibly upset" to hear of this, and he told Kilbane "to ignore it and that we don't engage in that bullshit." *Id., p. 34.*

Around 8:00 a.m. on the morning of March 10, 2023, Bailiff Dunham again asked Attorney Kilbane about the State's plans: "Kathleen came up to the trial table and asked me if there was any follow-up from our conversation yesterday." *Post-Tr., p. 13-14.* Kilbane again thought this issue "should have been addressed in open court with all of the parties present" and reported it to his co-counsel. *Id., p. 14-15.*

After court adjourned for the weekend on Friday, March 10, 2023, Bailiff Dunham sent a text message to Attorney Kilbane and the other prosecutors who had been handling the case. *Post-Tr., p. 16-17.* She did not include any defense attorneys. *Id.* She wrote:

> Sorry to bother you but Judge wanted me to text you and see if any of the witnesses prior to Williams will tie in Smith to the conspiracy. He wants to make a good record. Thanks.

Tr., p. 1,148; Defense Exhibit A. At that point, Attorney Kilbane began to believe that Judge Russo may have "changed his mind" with respect to the admissibility of co-conspirator statements based merely upon a proffer by the State's counsel. *Post-Tr., p. 30.* Attorney Filiatraut immediately responded by text:

> We can't answer that over text. If he wants anything from us he needs to ask us in court with the other lawyers there. That's all we can say without them also on this text.

Tr., p. 1,148-49; Defense Exhibit A. A few hours later that evening, and after the State's attorneys discussed the matter between themselves and with their supervising counsel, Attorney Filiatraut sent a screenshot of the text message by email to counsel for Defendants Shomo, Bryant, and Smith, disclosing briefly without any detail that there had been earlier in-person attempts to communicate. *Post-Tr., p. 20-22, 26.* Filiatraut emailed again on March 11, 2023, indicating that he would "fully expect" defense counsel to "share this information" with their clients. *Id., p. 27.*

II. After the ex parte was disclosed, Judge Russo declared a mistrial *before* recusing.

On Monday, March 13, 2023, court convened on the record to discuss the "communication that took place between the court and the prosecution's office only." *Tr., p. 1,143.* Despite the repeated efforts Bailiff Dunham had undertaken to communicate with the State directly on his behalf and at his request, Judge Russo merely addressed the text message she had sent, casting it as an innocent error: "[S]he didn't hit the button where all of the lawyers were included on it. . . . I've said from the very beginning I'm here to make a good record and so here we are making a

good record unfortunately about a text, damn technology that we have today." *Id., p. 1,145-46*. He even denied advance knowledge of any impropriety: "I've never been on those texts or those e-mails for all of you so I would not have been aware that it didn't go to everyone until you all walked in my chambers this morning to tell me. *Id., p. 1,147-48* (emphasis added). Notably, Judge Russo prevented the parties from asking Bailiff Dunham any questions by keeping her out of court that day: "I asked my bailiff not to come in because she's a wreck." *Id., p. 1,144*.

Judge Russo was not surprised that a motion for mistrial followed the State's disclosure: "Mr. Filiatraut and the state, as they should, shared that with the defense and the defense have all come to me now asking for a mistrial." *Tr., p. 1,145-46*. And he accepted that any such communication placed the validity of the trial proceedings into serious question: "I think the parties would find that the appearance of impropriety possibly or the fact that the clients may believe they're not getting a fair trial from me creates a Court of Appeals argument . . . Although I do believe as I think Mr. McNair said, or others said, the law might be on my side to stay on the case but I really create a Court of Appeals argument for Miss Smith and Mr. Shomo and Mr. Bryant." *Id., p. 1,146-47*. Defendants Shomo, Bryant, and Smith each joined in the motions to declare a mistrial and for Judge Russo to recuse. *Id., p. 1,150-52*.

Thereafter, Judge Russo declared a mistrial, surprisingly concluding that Bailiff Dunham "had sent a procedural communication to the parties, which was inadvertently sent only to the prosecutors," all before recusing. *R. 63, Journal Entry filed March 13, 2023, p. 1; Tr., p. 1,151*. Judge Russo never offered his own

explanation or justification for Bailiff Dunham's first two face-to-face ex parte interactions with the prosecutors, which certainly could not be attributed to any technological glitches.

III. Shomo's requests for dismissal with prejudice under the Fifth Amendment Double Jeopardy Clause were rejected.

Before a new judge, Defendants Shomo, Bryant, and Smith each asked for the trial court to dismiss the indictments against them based upon the fundamental protections preserved through the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *T.d. 66 and 67, p. 1*; *T.d. 71, p. 1* (Shomo's "motion to join co-defendant' motion to dismiss is granted"); *State v. Smith*, C.P. Cuyahoga No. CR-22-670878-D, *Defendant Brittany Smith's Motion to Dismiss on Grounds of Double Jeopardy filed March 27, 2023 ("Smith Mtn."), p. 1*; *State v. Bryant*, C.P. Cuyahoga No. CR-22-670878-C, *Defendant Anthony Bryant's Motion to Dismiss on Double Jeopardy Grounds filed March 20, 2023 ("Bryant Motion"), p. 1.* They argued that the "conduct of the trial Court was done with the expectation that if disclosed, it would goad and require the Defendant to request a mistrial," which would "improperly give the state of Ohio an opportunity to re-evaluate how to introduce this evidence to allow it a better opportunity to obtain a conviction." *Smith Mtn. Dismiss, p. 1-2.* They also asked for dismissal under *Dinitz*, arguing that Judge Russo, "to aid in the prosecution or otherwise, engaged in a knowingly prejudicial and forbidden *ex parte* communication and immediately thereafter dismissed the jury which was selected by Defendant." *Smith Mtn. Dismiss, p. 3-5; Bryant Motion, p. 5-6.*

The trial court held a two-day hearing on these motions over May 1 and 2, 2023. *Post-Tr., p. 2-167*. On the first day of the hearing, the Defendants learned for the first time from Attorney Kilbane of the substance and scope of the in-person ex parte communications initiated by Bailiff Dunham. *Id., p. 7-55*. Although Judge Russo and Bailiff Dunham had been issued subpoenas to appear and give testimony, the trial court granted their motions to quash on the morning of May 2, 2023, curiously ruling that "the motivations of the subpoenaed actors are not relevant to the issues raised by the motions." *T.d. 81 ("Quash Order"), p. 1*; *Post-Tr., p. 101*.

Following the hearings, the trial court denied the requests for dismissal lodged by Defendants Shomo, Bryant, and Smith in a written decision. *T.d. 85 ("Double Jeopardy Ruling"), below at 12a-28a; T.d. 86* (duplicate entry). The court made a factual finding that "Judge John Russo did not provoke a mistrial or intend to cause one and that defendants voluntarily requested mistrial even though Judge Russo willingly recused." *Double Jeopardy Ruling, 13a*. Yet there was no doubt that the communications at issue covered "the most hotly-disputed issue in the trial," that they were "ex parte communications from Judge Russo," and "that the ex parte communications were substantive, not procedural or ministerial, in nature. *Id., 17a*. He had sought "assurance that witnesses before Williams will connect defendant Brittany Smith to the conspiracy." *Id., 28a*.

Despite the earlier Quash Order, the court reflected that it was required to "examine the objective evidence to determine Judge Russo's intent in engaging in the ex parte communications. Did he intend to cause a mistrial? Did his conduct in effect

provoke one?" *Double Jeopardy Ruling, 18a; compare Quash Order, p. 1*. The court concluded "Judge Russo was attempting to obtain relevant information about the order and content of witness testimony but inexplicably doing so by secretly questioning one side of the case through his bailiff," the "objective evidence" did not otherwise "convince the Court of any other motive," and he "did not act with the purpose to cause a mistrial or a request for one." *Double Jeopardy Ruling, 19a-20a.* It was "difficult to believe a trial judge would choose blatant, ethical violations to effectuate a mistrial," and the court doubted that "Judge Russo wanted a mistrial so badly he would risk embarrassment, professional criticism, and a disciplinary complaint." *Id., 18a.*

Each of the defendants appealed, and the three proceedings were consolidated for hearing and decision. *State v. Smith*, 2024-Ohio-2358, ¶ 1 (8th Dist.), *below at 1a-11a*. On Shomo's motion, the court of appeals supplemented the record in his appeal with "the record from his co-defendants' appeals in 112910 and 112882." *Journal Entry filed September 28, 2023*. Each of them assigned as error the rulings denying the motions to dismiss and granting the motions to quash. *Id.* at ¶ 11. And preserving the issue "for later review by higher courts," Shomo argued that the right to be free from double jeopardy "cannot tolerate retrial after a mistrial necessitated by a judge's intentional effort to privately guide the State's case and avoid a possible reversal, even if *that* was the jurist's only subjective motive." *Brief of Defendant-Appellant Hakeem-Ali Shomo filed September 27, 2023, p. 29-30; see T.d. 66 and 67, p. 1*; *Smith Motion, p. 3-5*; *Bryant Motion, p. 5-7*.

Following the rule of *Kennedy*, 456 U.S. 667, the court of appeals ruled:

> [T]he trial court engaged in ex parte conversations with the State, and the State properly reported the communications to the defense. The trial court declared a mistrial, but the appellants have not demonstrated that the judicial misconduct was intended to elicit the defendants to seek a mistrial. In fact, the record supports that the trial court wanted to know if the State was planning on calling any witnesses to establish independent proof of the conspiracy prior to the codefendants testifying. This was demonstrated from both the oral conversation initiated by Judge Russo's bailiff on his behalf and from the text message.

Smith, 2024-Ohio-2358, at ¶ 16. It also affirmed the Quash Order, ruling that it "was unnecessary to have Judge Russo and his bailiff testify at the hearing because the record is clear as to why Judge Russo improperly communicated with the State." *Id.* at ¶ 22. Building "a full record to evaluate whether the motion to dismiss on double jeopardy grounds was rightfully granted or denied," as the defendants sought, was not necessary because "the trial court did not err in denying the appellants' motion to dismiss." *Id*.

Shomo sought discretionary review from the Supreme Court of Ohio on August 5, 2024. While recognizing that only this Court could limit *Kennedy*, Shomo asked Ohio's Court to consider whether the Ohio Constitution's double jeopardy clause would be triggered by judicial misconduct. *Memorandum in Support of Jurisdiction filed August 5, 2024, p. 11-14*. He nonetheless argued, to "preserve the issue," that this Court should "reinterpret the Fifth Amendment's Double Jeopardy Clause and expressly limit *Kennedy*'s scope to cases of prosecutorial conduct." *Id., p. 13*.

The Supreme Court of Ohio declined further review on October 15, 2024. *Entry, below at 29a.*

REASONS FOR GRANTING THE PETITION

Petitioner Shomo now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted.

I. Introduction.

This Court last considered the circumstances under which double jeopardy principles would bar retrial following a defense request for a mistrial in *Kennedy*, a case about a "prosecutor's conduct" that had been characterized as "overreaching" by the lower courts. *Kennedy*, 456 U.S. at 670. Chief Justice Rehnquist observed for the majority that the text of earlier decisions "would seem to broaden the test from one of *intent* to provoke a motion for a mistrial to a more generalized standard of 'bad faith conduct' or 'harassment' on the part of the judge or prosecutor." *Id.* at 674. In rejecting the "broader rule" suggested in earlier decisions, the Court focused on all the reasons that the rule was misplaced when applied to a prosecutor given the role government lawyers play in seeking criminal convictions. *Id.* at 674-79.

Unlike prosecutors, the job of a judge is not to seek a conviction. A jurist's duty to guide a criminal trial impartially is an essential aspect of the "particular tribunal" to which a defendant is entitled. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978). After all, the "entire conduct of the trial from beginning to end is obviously affected by . . . the presence on the bench of a judge who is not impartial." *Arizona v.*

Fulminante, 499 U.S. 279, 309-10 (1991); *see Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Because of this essential difference, it would be logical and consistent with this Court's numerous prior warnings about judicial misconduct to apply the broader rule in cases such as this, where judicial misconduct striking to the heart of a criminal dispute derails the proceedings and effectively annihilates the defendant's right to the jury he or she selected.

II. The origin and protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution directs that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." This provision was ratified and incorporated into the text of the United States Constitution along with the rest of the Bill of Rights on December 15, 1791. But it has been recognized that the protections preserved by the Double Jeopardy Clause have far older roots in the common law of England, the Judeo-Christian legal tradition, and even the law of the Greco-Roman period. *Benton v. Maryland*, 395 U.S. 784, 795 (1969); David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 Wm. & Mary Bill Rts. J. 193, 196-221 (2005). Protections against being twice put in jeopardy of criminal punishment made their way into the codified laws of some of the British colonies and several of the early state constitutions, which served as a model for the Double Jeopardy Clause of the United States Constitution. Rudstein at 221-26. The right is now regarded as fundamental, and the Double Jeopardy Clause has been

incorporated through the Fourteenth Amendment to the United States Constitution and rendered applicable against the states. *Benton* at 795-96. The constitutional provision finds several applications:

> The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

This Court has explained the longstanding conceptual underpinning of the protections preserved by the Double Jeopardy Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). The rule "represents a constitutional policy of finality for the defendant's benefit." *Jorn*, 400 U.S. at 479. The "heavy personal strain which a criminal trial represents for the individual defendant" has justified defining "jeopardy" with significant breadth: "These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *Id.*

To the end of securing the finality of a prosecution, "courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.'" *Serfass v. United States*, 420 U.S. 377, 388 (1975), quoting *Jorn* at 480. The principle of attachment "is an integral part" of the federal constitutional doctrine that cannot be altered by state laws. *Crist v. Bretz*, 437 U.S. 28, 38 (1978). For a jury trial, jeopardy "attaches when the jury is empaneled and sworn" *Id.* This rule "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Green*, 355 U.S. at 188.

Because "the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal,'" including before the particular jury that had been empaneled, retrial before a new jury may be barred by the Fifth Amendment after a mistrial is declared under certain circumstances. *Kennedy*, 456 U.S. at 672-73 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Typically, the question whether retrial is permitted after a mistrial generally turns on whether "particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Wade* at 690. But when there is "a mistrial declared at the behest of the defendant," then the "'manifest necessity' standard" that would typically apply "has no place in the application of the Double Jeopardy Clause." *Kennedy* at 672. Nor is the mistrial motion itself a "renunciation" or waiver of the right to be free from double jeopardy "for all purposes." *Id.* at 673.

Instead, this Court has recognized that "the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances." *Kennedy*, 456 U.S. at 673. As a result, the "Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *Dinitz*, 424 U.S. at 611. To that end, "governmental conduct" intended to precipitate a successful mistrial motion by a defendant and thereby "subvert the protections afforded by the Double Jeopardy Clause" will bar retrial. *See Kennedy* at 675-79.

III. The effect of judicial misconduct leading to declaration of a mistrial, and the lack of any justification for applying the rule of *Kennedy*.

Courts have applied *Kennedy* when allegations of judicial misconduct led to a defense mistrial request. *E.g., United States v. Rivera*, 802 F.2d 593 (2d Cir.1986). But in doing so, the judicial conduct that will call down the full force of the Double Jeopardy Clause has been described conspicuously:

> Reprosecution after such intentional misconduct the double jeopardy clause will not tolerate, for the system breaks down when a judge intercedes to manipulate the process and deprive a defendant of his right to go before his first trier of the facts. (Emphasis added.)

Rivera at 599. The obvious point, which has not been lost on Petitioner Shomo as he sits in jail facing the possibility of another trial, is that the system breaks down when

a judge intercedes to manipulate the fair trial process whether or not that jurist wants to accomplish a mistrial. If a judge decides to engineer some legal error at trial that eases the State's burden while making sure to build a "good record" proving such error to be "harmless," *Tr., p. 312, 1,148,* and if the chosen means to secure that result is the classic judicial misconduct of an ex parte communication with opposing counsel on a matter of substance, *Double Jeopardy Ruling, 17a-18a*, the criminal defendant has still lost an essential aspect of the "particular tribunal" to which he or she is entitled—the impartial judge. *See Washington*, 434 U.S. at 505.

In such cases, it only makes sense to discharge a defendant from any further trial proceedings. In fact, that is exactly what happened in *Tumey*. In that instance, a defendant was convicted of "unlawful possession of intoxicating liquor" before the mayor's court in College Hill—now a neighborhood of Cincinnati, Ohio. *State v. Tumey*, 4 Ohio Law Abs. 109, 1925 WL 2448, *1 (1st Dist. 1925). On appeal to the Hamilton County Court of Common Pleas, the superior trial court "reversed the mayor's judgment and <u>discharged</u> Tumey denying jurisdiction of the mayor to hear the case on the ground that he was financially interested in that he received costs in the action." *Id.* (emphasis added). Ohio's First District Court of Appeals reversed, determining that a "mayor is not disqualified from discharging his official duties because of the fact that he received fees and costs in the case." *Id.* And the Supreme Court of Ohio agreed summarily, dismissing the appeal "for the reason no debatable constitutional question is involved in said cause." *Tumey v. State*, 115 Ohio St. 701 (1926).

This Court rejected that view, siding with the trial judge:

> No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection, and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.

Tumey, 273 U.S. at 535 (emphasis added). While the Supreme Court of Ohio's decision was reversed and the matter remanded "for further proceedings not inconsistent with this opinion," this Court did not question at all the Common Pleas Court's remedy of total discharge. *Id.* No other reported opinion exists indicating that any of the lower courts altered the Common Pleas Court's remedy of discharge or permitted another trial. And several Ohioans were given the same or similar relief in the wake of the ruling. *See Ex Parte Busch*, 1925 WL 3018 (Ohio Com. Pl. Oct. 13, 1925) (providing additional background in a similar case of discharge); *In re Canfield*, 1927 WL 3167 (Ohio Prob. Mar. 29, 1927) (providing additional background in a similar case, where the remedy was a writ of habeas corpus ordering release); *State ex rel. Burnett v. Neutzenholtzer*, 1927 WL 3168 (Ohio Prob. July 1, 1927) (same).

After *Tumey*, this Court often expressed in general terms that judicial misconduct during a first aborted trial should or would trigger the retrial bar. *E.g., Jorn*, 400 U.S. at 485 n.12 ("where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred."); *Dinitz*, 424 U.S. at 611 (The Double Jeopardy Clause "bars retrials where 'bad-faith conduct by judge or prosecutor,' United States v. Jorn, supra,

400 U.S., at 485, 91 S.Ct., at 557, threatens the '(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. Downum v. United States, 372 U.S. at 736, 83 S.Ct., at 1034, 10 L.Ed.2d, at 102."); *Gori*, 367 U.S. at 369 ("Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which . . . a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.").

This Court "has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." *Jorn*, 400 U.S. at 480; *Wade*, 336 U.S. at 691 (declining to apply a "rigid formula"). In this context, "bright-line rules" must give way to thoughtful consideration of the "policies underpinning" the Double Jeopardy Clause. *See Jorn* at 486. But if the rule must flow from the impact of specific kinds of judicial conduct on the aspects of a fair trial protected by double jeopardy principles, then *Kennedy* is of no help whatsoever in fashioning a standard for assessing the actions of judges. Indeed, one of the main reasons this Court gave for rejecting "the more general standards which would permit a broader exception than one merely based on intent" was the judge who sits as referee between an accused citizen and the prosecutor:

> Every act on the part of a rational prosecutor during a trial is designed to "prejudice" the defendant by placing before the judge or jury evidence leading to a finding of his guilt. Given the complexity of the rules of evidence, it will be a

> rare trial of any complexity in which some proffered evidence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court. Most such objections are undoubtedly curable by simply refusing to allow the proffered evidence to be admitted, or in the case of a particular line of inquiry taken by counsel with a witness, by an admonition to desist from a particular line of inquiry.

Kennedy, 456 U.S. at 674-75 (emphasis added). Unlike overreaching prosecutors, who can be supervised by judges, the judges of higher courts do not sit in at trial watching over the proceedings to rein in any overreaching or partiality by the judge.

Broadly, the logic of *Kennedy* cannot be divorced from the facts of the dispute it decided, which arose when a prosecutor asked whether the defendant was "a crook" after the trial judge "sustained a series of objections to this line of inquiry." *Kennedy*, 456 U.S. at 669. As applied to a prosecutor's work, the "overreaching" standard "would add another classification of prosecutorial error, one requiring dismissal of the indictment, but without supplying any standard by which to assess that error." *Id.* at 675. Unlike prosecutorial trial strategies, ethical codes for trial judges have been adopted in fifty states and by the Judicial Conference of the United States. These standards are no less easily applied than the "standard that examines the intent of the prosecutor" adopted in *Kennedy*. *Id.* And if such standards become difficult to apply in a specific case, or if there is good reason that some particular form of judicial misconduct should not bar retrial, then that is why bright-line rules and rigid formulas must ultimately give way to judicial wisdom applied to particular kinds of cases. *Compare Jorn* at 486; *Wade*, 336 U.S. at 691; *with Gori*, 367 U.S. at 369. This Court will not have to work very hard to justify a distinction between a

judge's good faith trial error correctible on appeal and bad faith misconduct calling the basic fairness of the tribunal into question.

Another consideration in *Kennedy* was that a "judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial" if doing so "would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy." *Kennedy*, 456 U.S. at 676. This concern warps in on itself when the judge with power to decide the mistrial motion is the same individual whose conduct led to it. It was conspicuous that Judge Russo granted the mistrial *before* recusing, *R. 63, Journal Entry filed March 13, 2023, p. 1; Tr., p. 1,151*, particularly when there was a mechanism under Ohio law for trial to continue after recusal. *Double Jeopardy Ruling, 21a.* While Judge Russo may not have originally intended to cause a defense mistrial request as the trial court found, granting the motion even after admitting the need to recuse permitted him to avoid appellate review of the evidentiary objections lodged by Petitioner Shomo during trial. And it has so far allowed him to send Shomo back to trial without an appellate ruling restricting the manner in which the State can present its co-conspirator testimony, simultaneously avoiding any of the blowback the *Kennedy* majority warned a judge might seek to avoid by denying such a request. *Kennedy* at 676. Meanwhile, Shomo lost the opportunity for an acquittal by the jury he already selected, and no court will determine whether sufficient evidence was admitted during his first trial after striking any inadmissible co-conspirator hearsay. *See Double Jeopardy Ruling, 26a-27a.* So, in these ways too,

the logic of *Kennedy* fails to address the circumstances of this class of cases. Yet the purposes of the double jeopardy protection were nonetheless thwarted.

It is therefore apparent that this Court has commented often on the kinds of judicial conduct that would bar retrial following a defendant's request for mistrial without ever hearing a case that truly raised the question. With the trial court's findings below, left undisturbed by the reviewing courts, we know that Petitioner Shomo could be subject to retrial under the prosecutorial intent test of *Kennedy*, although it appears he would not be under the broader judicial misconduct rule described in *Jorn*, *Dinitz*, and *Gori*. This Court should issue a writ of certiorari, consider the merits, and give the nation an answer about which rule must apply.

IV. This dispute presents a live case and controversy.

The present dispute remains a live one. "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "[T]hose who invoke the power of a federal court" must "demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.*, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). An "actual controversy must be extant at all stages of review." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Petitioner Shomo has been incarcerated in the Cuyahoga County Jail during the pendency of these proceedings, and his prosecution is ongoing. Because Shomo maintains through these proceedings that a second trial is barred by the Double

Jeopardy Clause of the Fifth Amendment to the United States Constitution, there is a live case and controversy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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