No. 24-6338

In the Supreme Court of the United States

HAKEEM-ALI SHOMO,

Petitioner,

v.

STATE OF OHIO, ET AL.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule its decision in *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982), holding that double jeopardy will not bar retrial of a criminal defendant where a mistrial was declared at the defendant's request unless it is shown that the prosecutor or the judge "intended to provoke the defendant into moving for a mistrial."

LIST OF PARTIES

Petitioner is Hakeem-Ali Shomo. Respondents are the State of Ohio, Co-Defendants Anthony Bryant and Brittany Smith, and Intervenor-Appellees Judge John J. Russo and Kathleen Dunham.

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JURISDICTION

Petitioner is seeking review, pursuant to 28 U.S.C. § 1257(a), of the Supreme Court of Ohio's decision not to accept an appeal from the decision of an Ohio intermediate appellate court to affirm the denial of a pre-trial motion to dismiss a pending criminal case.

STATEMENT OF THE CASE

In 2022, six criminal defendants, including Petitioner Hakeem-Ali Shomo, and codefendants Anthony Bryant and Brittany Smith, were indicted with numerous serious charges including aggravated murder and kidnapping. App. at 2a. They remain accused of kidnapping a woman named Alishah Pointer in an attempt to locate her boyfriend, and then torturing and eventually murdering her. App. at 13a-14a. "As part of a plea agreement, the other three defendants pled guilty and agreed to truthfully testify against" Petitioner, Bryant, and Smith. App. at 2a.

Before trial, the parties litigated "the issue of the State calling the other three codefendants to testify without having first presented independent proof of the conspiracy and [Petitioner, Bryant, or Smith's] involvement with the crime." App. at 2a. Ohio law provides that a statement is not hearsay where it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Ohio Evid. R. 801(D)(2). "In accordance with the trial court's stated procedure, the State made an oral record of an extensive proffer of the evidence it intended to produce at trial that would satisfy the

requirement of independent proof of the conspiracy and" Petitioner's involvement. App. at 3a.

Petitioner and his co-defendants blamed "Collin Funches" for the "unsolved murder of Aminjas Shomo." App. at 3a. They kidnapped Funches' girlfriend, Alishah Pointer, to learn about Funches' whereabouts. App. at 3a. Petitioner and his co-defendants kidnapped Turquoise Jackson and Tashara Harris at gunpoint, who informed them of Pointer's location. App. at 3a. Then they "kidnapped Pointer at gunpoint, took a photo of Pointer with a gun in her mouth, and posted it on Instagram to lure Funches out of hiding." App. at 3a. Smith's fingerprint was located on a piece of tape used to cover Pointer's face. Bryant's DNA was found on spent casings. Petitioner texted the location that Pointer was being held at to Bryant. "After the State's proffer of evidence, trial began as scheduled" and "six witnesses testified." App. at 4a.

During an afternoon break from trial, the trial court judge's bailiff "privately approached the prosecutor" and "asked whether the State was planning on calling any witnesses to establish independent proof of the conspiracy prior to the codefendants testifying." App. at 4a. The prosecutor responded that he was unsure. App. at 4a. The next day, before trial resumed, the bailiff repeated the same question, but the prosecutor did not respond. App. at 4a. At the end of the day, the prosecutors on the case received a text message from the bailiff, stating "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." App. at 4a.

The prosecutor responded to the bailiff by saying that he could not "answer that over text" and directing the judge to "ask us in court with the other lawyers there." App. at 4a-5a. The prosecutor then emailed trial counsel for Petitioner, including a screenshot of the text message he received from the bailiff. App. at 5a.

Petitioner, Bryant, and Smith moved for a mistrial based on the ex parte communication between the trial court judge and the prosecutors. The trial court judge held a hearing and stated, "that the communication sent by his bailiff to the prosecutors was meant to go to all the parties." App. at 5a. He further conveyed that he "was devastated by the situation," granted their motion for a mistrial, and recused from the case. App. at 5a.

Petitioner, Bryant, and Smith then moved to dismiss on double jeopardy grounds, arguing that "the trial court engaged in deliberate ex parte communication to ensure that the State would meet the elements of its case." App. at 5a. The original trial court judge and bailiff successfully moved to quash subpoenas issued. App. at 6a. The successor trial court judge held a hearing at which the prosecutor testified about the in-person and text message communications between him and the original trial court judge's bailiff. App. at 6a. Ultimately, the successor trial court judge denied the motions to dismiss, finding that the original trial court judge "did not provoke a mistrial or intend to cause one and that [Petitioner, Bryant, and Smith] voluntarily requested mistrial even though [the original trial court judge] willingly recused." App. at 13a. The successor trial court judge's finding was specific:

> In essence, the motions to dismiss ask this Court to find [the original trial court judge] wanted a mistrial so badly he would risk

> embarrassment, professional criticism, and a disciplinary complaint to obtain one. It is difficult to believe that a trial court judge would choose blatant, ethical violations to effectuate a mistrial.

App. at 18a. The successor judge also noted that Petitioner, Bryant, and Smith "were acting strategically in moving for a mistrial" and that the jury was not tainted by the original judge's conduct. App. at 21a.

Petitioner took an interlocutory appeal with respect to the double jeopardy ruling. The Ohio Eighth District Court of Appeals unanimously affirmed the denial of Petitioner's motion to dismiss. App. at 8a. It held that Petitioner had not "demonstrated that the judicial misconduct was intended to elicit [Petitioner] to seek a mistrial." App. at 8a. The Ohio appellate court also held that Petitioner "failed to demonstrate that judicial misconduct afforded the prosecution a more favorable opportunity to convict" him. App. at 8a. The Supreme Court of Ohio declined to accept Petitioner's appeal on October 15, 2024. App. at 29a.

REASONS FOR DENYING THE WRIT

Aside from failing to preserve his arguments below, failing to identify any issue of national significance, and failing to identify any meaningful conflicts among the courts, Petitioner's Double Jeopardy claim is without merit. The lower court correctly applied existing precedent and review is unnecessary.

"The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). "Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the

'manifest necessity' standard." *Id.*, at 672. "But in the case of a mistrial declared at the behest of the defendant . . . the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." *Id.* "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.*, at 676.

This Court rejected the "more generalized standard of 'bad faith conduct' or 'harassment' on the part of the judge or the prosecutor" as offering "virtually no standards for their application." *Id.*, at 674. For that reason, the trial court's finding below that the original trial judge "did not provoke a mistrial or intend to cause one" doomed Petitioner's double jeopardy claim. *See* App. at 13a; App. at 8a ("[A]ppellants have not demonstrated that the judicial misconduct was intended to elicit the defendants to seek a mistrial.")

Petitioner asks this Court to "apply the broader rule" it rejected in *Kennedy*, Pet. at 14, and to hold that retrial is barred when judicial misconduct of any kind results in a mistrial, Pet. at 21. He appears to offer two reasons for this request. First, Petitioner claims that "this Court's past decisions are in noted conflict." Pet. at i; *see also* Pet. at 23. Second, Petitioner asks this Court to overrule *Kennedy* with respect to cases involving judicial mistakes. This Court should reject Petitioner's request because he has failed to preserve the issue he now presents, because no conflict of law exists in the lower courts, and because there is no good reason to overrule *Kennedy*.

I. Petitioner failed to preserve the issue presented in his petition.

"Where issues are neither raised before nor considered by" earlier appellate courts, this Court "will not ordinarily consider them." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (citation omitted). Instead, short of "unusual circumstances," this Court "will not entertain arguments not made below." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015). Arguments that a litigant fails to present first to the trial court are "forfeited" arguments. *Id.* at 37. And this Court "normally decline[s] to entertain such forfeited arguments." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016).

Petitioner did not advocate in the trial court, or the state intermediate appellate court, for a non-intent based test for determining whether double jeopardy precludes retrial after the defense requests a mistrial. In his merit brief filed in the state intermediate appellate court, Petitioner acknowledged that caselaw required that he establish that the original trial judge have intended to goad a mistrial. Merit Br. at 23. The Ohio Court of Appeals applied that standard and rejected his claim. Therefore, he did not preserve the legal test that he now asks this Court to adopt.

II. This Court's decision in *Kennedy* is not in conflict with other cases.

Petitioner alleges that this Court's decision in *Kennedy* is in "conflict" with this Court's "past decisions" regarding whether judicial misconduct bars retrial where the trial judge did not intend to goad a mistrial. Pet. at i. But the closest he comes to identifying a conflict in this Court's decisions is page 23 of his petition, where he asserts that he "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*." Pet. at 23.

In *Gori v. United States*, 367 U.S. 364, 365 (1961), a trial court judge "on his own motion and with neither approval nor objection by petitioner's counsel, withdrew a juror and declared a mistrial." The defendant was then convicted in a second trial and challenged the conviction on double jeopardy grounds. *Gori*, at 367. This Court affirmed the conviction, stating it was "unwilling" to "bar retrial" where "it clearly appears that a mistrial has been granted in the sole interest of the defendant." *Id.*, at 369. It distinguished the facts of the case from hypothetical facts where "the discretion of the trial judge may be abused," such as where "a judge exercises his authority to help the prosecution." *Id.*

In *United States v. Jorn*, 400 U.S. 470, 472-73 (1971), the trial judge declared a mistrial after learning that the government's witnesses had not been warned of their constitutional rights prior to arriving at the courthouse. The case was then dismissed on double jeopardy grounds and the government appealed. *Jorn*, at 473. This Court acknowledged that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by a defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *Id.*, at 485.

Ultimately, a plurality of the Court determined that the trial judge in *Jorn* "abused his discretion" because it was "apparent from the record" that even if the defendant wanted "to object to the discharge of the jury, there would have been no opportunity to do so." *Id.*, at 487. But a majority was only achieved as to the

judgement of affirming the dismissal – two justices believed that the Court lacked jurisdiction. *Id.*, at 488 (Black and Brennan, JJ, concurring).

In *United States v. Dinitz*, 424 U.S. 600, 602-03 (1976), the trial judge dismissed the defendant's trial counsel during trial due to trial counsel's misbehavior. A mistrial was granted at the defendant's request, the defendant was convicted at a second trial, and he raised the issue of double jeopardy on appeal. *Dinitz*, at 604-05. This Court recognized that the "Double Jeopardy Clause does protect a defendant against governmental actions intended to prove mistrial requests." *Id.*, at 611. But in that case, the Court noted that the dismissal of defendant's trial counsel was "not done in bad faith in order to goad [the defendant] into requesting a mistrial." *Id.*

Finally, in *Kennedy*, 456 U.S. at 669, the defendant moved for, and was granted, a mistrial after the prosecutor's question of a witness was sustained. The defendant then moved to dismiss the indictment on double jeopardy grounds but the trial court found "it was not the intention of the prosecutor in this case to cause a mistrial." *Kennedy*, at 669. The state appellate courts held that retrial was barred because the prosecutor's conduct constituted "overreaching." *Id.*, at 670.

This Court recognized that some language in its prior opinions "would seem to broaden the test from one of *intent* to provoke a mistrial to a more generalized standard of 'bad faith conduct' or 'harassment' on the part of the judge or prosecutor." *Id.*, at 674. But the Court explicitly rejected the more generalized standard because it offered "virtually no standards for" application. *Id.*, at 674. It concluded that the 'intent' standard was "a manageable standard to apply" that "calls for the court to

make a finding of fact" based on the "objective facts and circumstances" of the case. *Id.*, at 675. The Court then reversed the decisions of the state appellate courts to the extent they held retrial was barred where there was no intent to goad the defendant into moving for a mistrial. *Id.*, at 679.

These decisions are not in conflict. In all three cases that yielded a majority opinion, the Court explicitly used the intent-to-goad standard. In *Gori*, the Court distinguished the trial court's actions in that case from a case where "a judge exercises his authority *to help the prosecution*." *Gori*, 367 U.S. at 369 (emphasis added). In *Dinitz*, this Court stressed that the trial judge's action in that case "was not done in bad faith *in order to goad the respondent in to requesting a mistrial*." *Dinitz*, 424 U.S. at 611 (1976) (emphasis added). Finally, in *Kennedy*, this Court squarely rejected the "more general standards" and explicitly adopted the intent-to-provoke a mistrial test. *Kennedy*, 456 U.S. at 674-75.

Application of this Court's precedents to instances of judicial misconduct is settled among lower courts. *See Housley v. Fatkin*, 148 F. App'x 739, 743 (10th Cir. 2005) (holding that the "defendant bears the burden of demonstrating that the judge acted with the requisite intent"); *United States v. Rivera*, 802 F.2d 593, 598 (2d Cir. 1986) (recognizing that "a long line of cases indicates that judges and prosecutors should be similarly treated in evaluating double jeopardy claims following a defendant-requested mistrial"); *United States v. Singer*, 785 F.2d 228, 241 (8th Cir. 1986) (holding that there is no bar to retrial where judicial conduct was "not driven

by the kind of motive that would allow invocation of the double jeopardy prohibition"). Petitioner does not identify any conflict among the lower courts on this issue.

III. This Court should not overrule *Kennedy*.

In *Kennedy*, this Court confronted the choice between the general test such as 'bad faith conduct' and the specific test of intent-to-goad a mistrial. *Kennedy*, at 674-75. Ultimately, this Court choose to adopt the latter standard as the general standards "offer virtually no standards for their application." *Kennedy*, at 674.

Petitioner argues that *Kennedy*'s intent-to-goad test should not apply in cases involving judicial misconduct. But he is unclear about what test he thinks the Court should adopt in its place. He argues that "ethical codes for trial judges have been adopted in fifty states and by the Judicial Conference of the United States," which should make it easy to determine whether misconduct occurred. Pet. at 21. That said, this test would bar retrial any time that a judge makes an ethical mistake, regardless of the judge's intent. And Petitioner does not account for possible differences in ethical guidelines across the country.

Elsewhere Petitioner appears to present a proposed test that sounds similar to the intent-to-goad a mistrial test adopted in *Kennedy*: "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." Pet. at 21-22. Earlier in the petition, Petitioner argues that double jeopardy should bar prosecution where the judge "decides to engineer some legal error at trial that eases the State's burden." Pet. at 18. Perhaps this is

Petitioner's attempt to propose a middle ground between bad-faith conduct and intent-to-goad. In any case, this proposed test is just as amorphous as the bad-faith test, as there are really no standards for adjudicating which judicial errors undermine a trial's 'basic fairness.' Petitioner also fails to establish how he would prevail under this standard, as the trial court never made any determination that the original trial court judge acted in bad faith in this case, let alone in way that undermined the basic fairness of the trial.

Application of double jeopardy to bar the prosecution of a criminal defendant merely because of errors committed by a trial court judge would be fundamentally unfair. The "law does not require that a defendant receive a perfect trial, only a fair one." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974). Where an error at trial by a prosecutor or a judge impedes the ability of a defendant to have a fair trial, justice is served by commencing a second trial. And where a prosecutor or judge's actions are aimed at "subvert[ing] the protections afforded by the Double Jeopardy Clause," enforcement of that constitutional provision requires enforcement of the bar on retrial. But a defendant guilty of a heinous crime should not escape righteous punishment merely because of mistakes by a judge or prosecutor that are unrelated to an intentional subversion of the constitution.

In the end, the Ohio Court of Appeals agreed that there was no prosecutorial misconduct and found that the record did not demonstrate the trial court intentionally invited a mistrial. See Pet. App. 8a.

CONCLUSION

For all these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

/s/ Daniel T. Van

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PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Daniel T. Van, counsel of record for Respondent, the State of Ohio, and a member of the Bar of this Court, hereby certifies that on February 14, 2025 he served the following by U.S. mail and electronic mail:

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All parties required to be served in this case have been served.

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