No. 24-6338

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

RULES

ARGUMENT

Respondent, the State of Ohio ("State"), largely dodged the issues raised by Petitioner Hakeem-Ali Shomo ("Shomo"). *Brief in Opposition of Respondent State of Ohio docketed February 14, 2025 ("Opp. Brief"), p. 7-9.* It made little effort to explain the logic behind applying the intent-based test from *Oregon v. Kennedy*, 456 U.S. 667 (1982), when judicial conduct leads to a defense motion for mistrial rather than limiting that decision to apply strictly to the prosecutorial activities actually examined by the Court. *Id.* The State claims instead that there is a consistent line of authority in this area notwithstanding this Court's own awareness of the "less than crystal clarity" of prior decisions, which "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." *Kennedy*, 456 U.S. at 674; compare *Opp. Brief, p. 9.* The double jeopardy principles that apply to judicial misconduct are hardly clear, and this Court should take the opportunity to hear issues that have "not been, but should be, settled by this Court." *Sup. Ct. R. 10(c).*

Otherwise, the State criticized Shomo for "failing to preserve his arguments below." *Opp. Brief, p. 4.* It is wrong on that point too. So, for the following reasons, certiorari should be granted over the State's opposition.

I. The law in this area is far less settled than the State of Ohio asserts.

In a moment of great irony, the State criticized the assertion that "reprosecution might well be barred" if "a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal," *United States v. Jorn*, 400 U.S. 470, 485 n.12 (1971), as merely belonging to a "plurality" opinion.

Opp. Brief, p. 7. Never mind, apparently, that the three dissenting Justices in *Jorn* relied upon the example given in *Gori v. United States*, 367 U.S. 364 (1961), saying outright that double jeopardy principles would "bar a future prosecution" after a mistrial where 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.'" *Jorn* at 489 (Stewart, J., dissenting) (quoting *Gori* at 369). A majority of the Court therefore supported the view that a mistrial caused by judicial misconduct designed to help prosecutors might trigger the retrial bar even if there was no majority supporting any particular opinion.

It should not be lost that the plurality opinion Justice Harlan II wrote for *Jorn* was joined by Chief Justice Burger and Justices Douglas and Marshall. Historically, and very famously, four votes cast together like that would be enough for this Court to grant certiorari. And the significantly broad spectrum of judicial perspectives held by that collection of Justices shows that the standards for applying the double jeopardy retrial bar to this kind of case were far from settled even in 1971.

When *Kennedy* was issued in 1982, the Court simply set out a logical basis for applying a stricter double jeopardy standard when a prosecutor causes a mistrial. *Kennedy*, 456 U.S. at 673-77. While the majority did hold that "the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial," *Id.* at 679, this passage is just as lacking in clarity as the prior

decisions the opinion simultaneously criticized. Whose conduct? Whose intentions? Did this rule apply to judicially instigated mistrials as well? While the logic of the opinion addresses the adversarial role of prosecutors, its central holding is phrased in the passive voice, implying at most without directly stating that this more limited standard applies to judicial conduct as well. *See Id*. at 679.

If there were any questions about the scope of the issues considered in *Kennedy*, the discussion at oral argument answers them. The Court's narrow focus was the double-jeopardy standard that should apply after prosecutors cause mistrials. *Transcript of Oral Argument*, 3-53, *Kennedy*, 456 U.S. 667 (No. 80-1991). Concerns about judicial overreaching, gross negligence by a judge, or a judge's bad faith and intentional misconduct were only mentioned in passing by the United States arguing as Amicus Curiae, drawing no questions from the Court about whether such standards were also "too vague to provide any real guidance to courts or litigants" when applied to judicial conduct. *Id.*, 19-20. Even then, these arguments were framed in terms of "prosecutorial or judicial error," "negligence on the part of a prosecutor or a judge," and conduct "that the prosecutor or judge knows is wrong or improper." *Id.* Judges were included in this part of the argument as an afterthought at most. If there had been some reason to apply the same rule to judges and prosecutors, despite their categorically different roles within our justice system, it was never expressed by anyone at argument or in the opinion that followed.

II. The lower courts have followed this Court's lead, not just its express words, in matters so serious as applying the double jeopardy retrial bar.

The State makes too much of the fact that lower courts have somewhat consistently extended *Kennedy* to cases in which judicial actions led to a mistrial. *Opp. Brief, p. 9-10*. Conflict among the lower courts is, of course, a sufficient condition for granting certiorari. *Sup. Ct. R. 10(a) and (b)*. But it is not necessary condition if the questions raised have never been conclusively answered. *See Sup. Ct. R. 10(c)*.

Yet there is a broader problem with arguing that decisions like *United States v. Singer*, 785 F.2d 228 (8th Cir. 1986), *Housley v. Fatkin*, 148 F. App'x 739 (10th Cir. 2005), and *United States v. Rivera*, 802 F.2d 593 (2d Cir. 1986), have "settled" the "[a]pplication of this Court's precedents to instances of judicial misconduct." *Opp. Brief, p. 9*. Since *Kennedy* was not a case with facts raising the double jeopardy standard for judge-made mistrials, extending it to cases like this one would turn it into an advisory opinion. This was fully apparent when *Kennedy* was decided—Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, all concurring in judgment, wrote: "Because we are confronted with prosecutorial error, this opinion will address only that context." *Kennedy*, 456 U.S. at 683 n.12. It goes without saying that this Court does not issue advisory opinions, not only for prudential reasons, but also because of the inherent jurisdictional limitations placed upon every federal court. *E.g., Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 378-80 (2024). Had the standard at issue in this case been raised by a party in *Kennedy*, the obvious question would have been: "What's it to you?" *See A. Scalia, The Doctrine of Standing*

as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983). In that way, the more-broadly stated standards from cases like *Jorn* and *Gori* have never been overruled or limited with respect to cases like this one. The rule that must apply to this case is therefore anything but settled.

A cursory examination of *Singer*, *Housley,* and *Rivera* lays this point bare. To the great credit of the United States Court of Appeals for the Eighth Circuit, it noted in *Singer* the exact problem raised by Petitioner Shomo: "What level of intent must motivate the misconduct to implicate double jeopardy interests, and whether the requisite intent level is the same for both prosecutorial and judicial misconduct, are questions not yet definitively answered." *Singer*, 785 F.2d at 238 n.14. The majority engaged in a frank discussion of the limitations of *Kennedy*, which "did not make clear whether the new standard applies to judicial as well as prosecutorial misconduct." *Id.* at 240. In fashioning a standard from the full array of this Court's decisions, the *Singer* majority framed it in terms of "deliberate . . . judicial misconduct," just as Shomo has, and it explained that allowing "retrial in such a circumstance offends the interests supporting the double jeopardy bar because the misconduct compelled the defendant to forego his right to a fair trial leading to verdict before the first tribunal." *Id.* at 238. But in any case, the precise contours of the applicable standard did not determine the outcome in that case. *Id.* at 240-41.

In *Housley*, the United States Court of Appeals for the Tenth Circuit did nothing helpful for the State of Ohio. It merely followed its prior precedent, *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996), without analyzing the issue any further.

Housley at 743. But in *Earnest*, the Tenth Circuit had abruptly declared in a footnote: "Although in *Kennedy* it was prosecutorial and not judicial conduct that was at issue, this standard is also applied to judicial conduct." *Earnest* at 1130 n.4; *see United States v. Crotwell*, 896 F.2d 437, 439 n.5 (10th Cir. 1990) (similar). As explained above, that is not how a federal court's authority under Article III works.

The United States Court of Appeals for the Second Circuit did a bit more analysis before deciding for itself in *Rivera* that the *Kennedy* standard must also apply to cases like this one. *Rivera* at 598-99. Along the way, it considered an argument just like Shomo has made here; that "a judge should be held to a more exacting standard than a prosecutor, because the judge's function is to ensure a fair trial, while a prosecutor is acting as the defendant's adversary." *Id.* at 598. It rejected this argument, at least in part, because "no Supreme Court authority suggests that a different measure should be employed to test judges' conduct." *Id.* And it harkened back to the earlier decisions like *Jorn*, which suggest "that judges and prosecutors should be similarly treated in evaluating double jeopardy claims following a defendant-requested mistrial." *Id.* It did not reflect on the fact that none of this Court's decisions *expressly* support that view.

Each of these decisions—the best ones the State could muster—truly help establish the glaring reason why certiorari should be granted here. Lower courts have been deploying *Kennedy* as an advisory decision on issues that this Court would never have decided for jurisdictional reasons. That is understandable, given the seriousness with which the double jeopardy bar on retrial should be treated. But it is also a reason

that this Court should revisit the issue and decide once and for all whether "a judge should be held to a more exacting standard than a prosecutor," *Rivera*, 802 F.2d at 598, one that flows from the unique role a jurist plays within the particular forum guaranteed by the Double Jeopardy Clause.

III. The State's arguments going to the merits present no barrier to certiorari.

The State took the opportunity to make arguments going to the merits of Petitioner Shomo's proposed rule under the guise of establishing that he was "unclear about what test he thinks the Court should adopt in its place." *Opp. Brief, p. 10-11.* To be absolutely clear, Shomo will argue that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution should "bar retrial when judicial misconduct leads to a defense request for a mistrial." *Petition for a Writ of Certiorari docketed January 10, 2025 ("Petition"), p. i.* In the process, the State asserted that "the trial court never made any determination that the original trial court judge acted in bad faith in this case." *Opp. Brief, p. 11.* And it decried the variation that might result from "possible differences in ethical guidelines across the country." *Id., p. 10.*

The State is wrong again. In considering Petitioner Shomo's motion to dismiss, the trial court concluded that the Honorable Judge John J. Russo ("Judge Russo") initiated "ex parte communications" that "were intended by Judge Russo and his bailiff for the prosecutors alone," that "his questions involved implementation of Evid. R. 801(D)(2)(e), the most hotly-disputed issue in the trial," and that they "were substantive, not procedural or ministerial, in nature." *Petition, p. 17a*. The court

pulled no punches—it characterized these communications as "blatant, ethical violations." *Id., p. 18a*. If this Court decides to adopt a standard of bad faith judicial misconduct short of specific intent to goad a mistrial motion, that standard will be satisfied by those findings. Or, if a specific finding on bad faith is required, an order of remand for further hearings would be available.

Moreover, potential variation among different ethical codes of judicial conduct would be a feature, not a bug. Because there are other sources of law for determining whether judicial misconduct had been committed in any given case, this Court does not have to create such standards out of whole cloth and apply them to the whole nation. State Supreme Courts have a great deal of experience in regulating the judiciary, and they can be trusted to continue in that work.

In any case, these are issues worthy of considering on the merits in the context of a case like this one, where it has already been determined that a judge did not specifically intend to draw a defense mistrial motion but did engage in specific misconduct leading to one.

IV. The federal questions raised by Petitioner were preserved and argued below.

Finally, the State of Ohio strains credulity by arguing that Petitioner Shomo "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." *Opp. Brief, p. 6.* In reality, Shomo was given leave to join in his co-defendants written motions to dismiss, and he made sure that the

appellate record was supplemented to include both of them. *T.d. 66 and 67, p. 1*; *T.d. 71, p. 1; Eighth District Court of Appeals Journal Entry filed September 28, 2023*. These motions both laid the groundwork in the trial court for the instant proceeding.

Relying on the notably broader standard described in *United States v. Dinitz*, 424 U.S. 600 (1976), Respondent Anthony Bryant argued that "judicial misconduct" in the form of "helping or enabling the prosecution does call for a double jeopardy violation and is bad faith." *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. 7.* He elaborated:

> The violation of the Ohio Code of Judicial Conduct is by its very nature "bad faith". The trial court communicating with the prosecution on a non-administrative issue *ex parte* and creating an appearance of an unfair tribunal and then daring the defendant not to ask for a mistrial creates an impossible situation on the defendant. Should the defendant go forward with the trial knowing there is evidence on the record that challenges the judge's impartiality on an evidentiary issue that affects the defendant or ask for a mistrial and be forced to face jeopardy again and allow the prosecution to gain the advantage of knowing part of the defendant's strategy and allowing time for potential evidentiary mistakes to be corrected? The defendant was clearly forced and goaded into asking for a mistrial and none of it was due to his wrongdoing.

Id., p. 6. Respondent Brittany Smith also sought relief under *Dinitz*, arguing:

> [T]he trial court, engaged in an improper ex parte communication with the prosecuting attorney, elicited by the Court, which it knew would be cause for the Defendant to move for a mistrial and seek recusal. It did this to aid in and give the state of Ohio an additional opportunity to present its case at trial before a new jury or otherwise for other improper means which could include to avoid

> presiding over the lengthy trial in this case. It then dismissed the jury to the prejudice of Defendant. It is not believed that any improper conduct occurred in front of the jury. The possibility of recusal of the initial trial Judge with a curative instruction to the jury was never explored. Instead, the Court, 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.
>
> The trial Court acted in a way that it knew would and did require Defendant to move for a mistrial to Defendant's prejudice and detriment. In such circumstances, Double Jeopardy bars retrial.

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. 5.* Each of these motions expressly invoked the double jeopardy protections of the Fifth Amendment to the United States Constitution. *Smith Mtn., p. 1; Bryant Motion, p. 1.* And having joined in them, Shomo preserved these arguments.

On appeal, Petitioner Shomo again endeavored to preserve his arguments under the "Double Jeopardy Clause of the Fifth Amendment to the United States Constitution" for review by this Court. *Brief of Defendant-Appellant Hakeem-Ali Shomo filed September 27, 2023, p. 20.* At the appellate court, Shomo argued:

> [I]t is important to recognize that if Defendant Shomo is tried again, Judge Russo's actions will have effectively nullified the core protection of the Double Jeopardy Clause—prohibiting "repeated attempts to convict" him "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*, 355 U.S. at 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199. When this Court has discussed the kind of judicial conduct that would necessitate a mistrial and

> bar retrial, it has been by reference to "declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict." *Davis*, 44 Ohio App.2d at 342, 338 N.E.2d 793. The United States Supreme Court 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*, 367 U.S. at 369, 81 S.Ct. 1523, 6 L.Ed.2d 901; accord *Jorn*, 400 U.S. at 485, 91 S.Ct. 547, 27 L.Ed.2d 543, fn. 12. And the United States Court of Appeals for the Second Circuit expressed concern for "the rare judge who, sensing an acquittal, might overstep his authority and seek to provoke a defendant's mistrial motion." *Rivera*, 802 F.2d at 599. If Shomo is tried again, the procedures in this case will have given the State a second and better opportunity to convict him, this time without such significant risks of reversal on appeal, before a second jury. Judge Russo's conduct will have given the State that forbidden second bite at the apple, and there is no reason to doubt he intended to bring about this natural and probable result by inviting ex parte communications with the State.
>
> As a matter of law, the Double Jeopardy Clause 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. Under these circumstances, courts should presume an intention to draw a defense mistrial, particularly given the reticence by courts to compel judicial testimony on the question. While this Court must scrupulously follow the narrower test laid out in *Kennedy*, Defendant Shomo preserves this argument for later review by higher courts.

Id., p. 29-30. He made a more developed argument to the Ohio Supreme Court:

> To preserve the issue, Shomo also asserts that the United States Supreme Court should reinterpret the Fifth Amendment's Double Jeopardy Clause and expressly limit *Kennedy*'s scope to cases of prosecutorial conduct. *Kennedy* was a case about a trial that ended after a prosecutor accused the defendant of being "a crook" in front of jurors, leading to a mistrial. *Kennedy*, 456 U.S. at 669. It was not

> a decision premised upon unethical judicial conduct, which is why a judge's ability to police the proceedings by excluding objectionable evidence, limiting questioning, or fixing other "curable" bad acts by the State weighed strongly against a broader "'overreaching' standard." *Id.* at 674-675. And while the Court criticized many of its earlier authorities for broadly referencing "'judicial overreaching'" and "'impropriety,'" any real change in those rules would have been in the nature of an advisory ruling because there had been no judicial overreaching or impropriety to review. *Id.* at 678-679, quoting *Jorn*, 400 U.S. at 485, fn. 12. In earlier cases, the Court had 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*, 367 U.S. at 369; *accord Jorn* at 485, fn. 12. And it is not clear why that kind of judicial conduct should not still trigger the double jeopardy bar if a mistrial results, as "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." *Contra United States v. Rivera*, 802 F.2d 593, 599 (2d Cir. 1986). A substantive *ex parte* on a merits-issue is not the kind of breakdown that is "curable" by the judge who committed it—it signals instead that the person with judicial authority ceased to fairly and impartially dispense justice. *Kennedy*, 456 U.S. at 675.

Memorandum in Support of Jurisdiction filed August 5, 2024, p. 13-14.

If that is not enough to preserve federal questions like those raised here, it is not clear what would be enough. The State's real complaint is that Petitioner Shomo further developed his arguments once he got to this Court. But there is nothing wrong with progressive argument on purely legal questions like those Shomo has raised. "As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge." *Salve*

Regina Coll. v. Russell, 499 U.S. 225, 232 (1991). This Court serves a distinct and unique role in the Nation's judicial system, and it would not be fair to expect that the kind of arguments required for a proceeding here should spring forth fully formed in a state trial court. After all, the "logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs." *Id.* at 231. And only this Court can expressly limit one of its precedents in the way Shomo has asked.

What truly matters is that this Court's Article III jurisdiction has been established by Shomo's clear invocation of the rights preserved by the Fifth Amendment's Double Jeopardy Clause and his basic expression of the now-pending federal questions at every prior phase of the litigation in state courts. *Sup. Ct. R. 14.1(g)(i).* That was enough to create a proper vehicle for further review.

CONCLUSION

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

Respectfully submitted,

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