

No. 17-7407

IN THE
Supreme Court of the United States

JEFFREY RICHARD MARTINSON,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Arizona**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In an effort to forestall review, the State resorts to waiver, claiming Mr. Martinson waived any constitutional claim by failing to make it in the proceedings below. But this objection fixates on the wrong stage of proceedings and fails to account for when the constitutional harm inured. Moreover, while the State invokes the sanctity of state law in an effort to insulate the decision below from this Court's review, it pays mere lip service to the principles of supremacy that prohibit states from erecting barriers to constitutional relief that exceed those of the federal Constitution.

Peppered throughout the State's Opposition is its insistence that Mr. Martinson's case is not a proper vehicle for the Court to re-visit and clarify the scope of its holding in *Oregon v. Kennedy*. The State doth protest too much. In fact, Mr. Martinson's case uniquely lends itself to this Court's review. Here, the trial court made factual findings that would warrant constitutional relief under *Kennedy*, but were not afforded such treatment under Arizona's state law. Notwithstanding the State's claim that its test (an objective one) would allow its courts to *consider* more double-jeopardy claims, the importation of a due process element impermissibly raises the minimal requirements for constitutional *relief*.

Arizona is not an outlier in this respect. Its approach to double jeopardy is akin to deviations from *Kennedy* adopted by numerous other states. The risk that double jeopardy rights are being compromised under a due process rubric is thus not only real, it is also widespread and deserving of this Court's attention.

**I. MR. MARTINSON PROPERLY RAISED HIS
FEDERAL CLAIM AND THE COURT HAS
DISCRETION TO REVIEW QUESTIONS OF
LAW**

**A. Mr. Martinson raised his federal claim
at the appropriate interval.**

The State's waiver argument rests on a selective review of the briefs that does not comport with the whole of the proceedings. Brief in Opposition at 14-15 ("Opp'n"). It was the Court of Appeals' decision that gave rise to Mr. Martinson's federal double-jeopardy claim, when it impermissibly raised the bar beyond what the federal Constitution requires.

Following that decision, Mr. Martinson's petition for review by the Arizona Supreme Court expressly criticized the Court of Appeals' double jeopardy analysis on federal grounds. He specifically cited *Kennedy* for the proposition that "[t]he Double Jeopardy Clause hinges upon the prosecutor's *purpose* underlying her misconduct [and] bars retrial where misconduct is designed to cause mistrial," and noted that the Court of Appeals ignored this inquiry entirely. Petition for Review of a Published Appellate Decision Following Appeal by the State at 8, *Arizona v. Martinson*, No. CR-16-0429-PR (Ariz. Oct. 31, 2016) (emphasis in original); see also *id.* at 13. Mr. Martinson further observed that the prosecutor's purpose in committing the misconduct "was to avoid acquittal, convict through prejudice, or *force mistrial to secure a new indictment*," but this too was ignored by the Court of Appeals. *Id.* at 16 (emphasis added). Mr. Martinson reiterated both points in his reply brief, explaining that the State had "goad[ed] him into bringing multiple mistrial motions," and that the Court of Appeals' decision should be "reversed and vacated" because the trial court's original dismissal

was “required under federal and state constitutions.” Martinson’s Reply re: Petition for Review at 5, 12, *Arizona v. Martinson*, No. CR-16-0429-PR (Ariz. Dec. 26, 2016). The State disregarded all of this.

B. The Court has discretion to hear a pure question of law.

In any event, the State’s argument regarding waiver is overstated. Appellate courts retain “broad discretion” to consider legal arguments not raised below. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (“The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals to be exercised on the facts of individual cases.”). Discretion is particularly appropriate when, as here, an argument presents a pure question of law. *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005) (“[t]his Court ‘may rule on issues not raised in the district court ... when the issues are solely legal ones not requiring additional factfinding’”).

Reviewing the constitutional propriety of the Court of Appeals’ analysis requires no additional fact finding. In “assuming without deciding” that the State had engaged in misconduct, the Court of Appeals effectively discarded the question of intent as irrelevant to the double jeopardy analysis. Accepting the trial court’s finding of specific prosecutorial intent as true, the Court of Appeals rested its decision solely on Mr. Martinson’s inability to clear an additional, extra-constitutional hurdle of “prejudice.” Petition Appendix at 11a-12a (“Pet. App.”). The path charted by the Court of Appeals is flatly at odds with *Kennedy* and raises the constitutional bar for double jeopardy relief.

II. MR. MARTINSON'S CASE PRESENTS A PROPER VEHICLE TO RE-VISIT AND CLARIFY THE SCOPE OF *KENNEDY*

A. The State of Arizona cannot invoke state law as a shield from this Court's review.

The State makes much ado of the fact that the Court of Appeals' decision rested on state law grounds. Opp'n at 12-13. This is a red herring that misses the thrust of Mr. Martinson's petition: the application of state law violated Mr. Martinson's rights under the federal Constitution. Critically, state law is not adequate to sustain a decision when the claim is that the state law itself violates the Constitution. See, e.g., *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958); *Xerox Corp. v. Cty. of Harris*, 459 U.S. 145, 149 (1982). The State assumes what it should be setting out to prove.

B. The State's opposition fails to identify, let alone rebut, the relevant issues.

Tangential arguments throughout the State's brief continue to focus on the wrong issues and pay no heed to the actual substance of Mr. Martinson's claims. For instance, the State suggests that Mr. Martinson would like the Court to "expand Arizona's Double Jeopardy Clause to mistrials granted post-verdict." Opp'n at 2. Yet Arizona has already construed the prosecutorial-misconduct component of its double jeopardy clause to apply post-verdict. *Arizona v. Minnitt*, 55 P.3d 774, 782 (Ariz. 2002) (en banc); see also *Arizona v. Jorgensen*, 10 P.3d 1177, 1179 (Ariz. 2000) (en banc) (relief may be warranted where it becomes apparent a mistrial motion based on prosecutorial misconduct was erroneously denied). What Mr. Martinson seeks, is a similar extension of *Kenne-*
dy.

The State further distorts the federal support marshalled by Mr. Martinson in support of such an extension. Contrary to the State's assertion, Mr. Martinson does not argue or imply that federal courts have "rejected the first prong of the *Kennedy* test" so as to "create the appearance of a circuit split." Opp'n at 18. Rather, the petition observes that some, but not all, federal courts would likely apply the *Kennedy* exception to a broader range of cases than presented by *Kennedy* if the defendant could meet the requisite intent standard. Petition for a Writ of Certiorari at 11-12 ("Pet."). While not a formal split—and no where does Mr. Martinson refer to it as such—the courts' reasoning as to why they would read *Kennedy* to encompass a wider swath of procedural postures is directly applicable to Mr. Martinson's case and relevant to the Court's consideration of whether to grant his petition. The State's follow-up argument on that point, that "courts have not equivocated on what *Kennedy* requires for the second prong," accompanied by a litany of federal court citations, is also puzzling. Opp'n at 19-20. Nowhere does Mr. Martinson suggest that *federal* courts have departed from the intent standard under the second prong of *Kennedy*.¹

¹ The State's additional suggestion that Mr. Martinson would not benefit from a circuit split even if one were to exist is similarly flawed. It states that, "[t]here is no reason to doubt that the Second and Fifth Circuits would find the same failure to show prosecutorial intent that logically follows from the Arizona Court of Appeals' application of the *Pool* factors," Opp'n at 21, while forgetting that the Court of Appeals never addressed the issue of prosecutorial intent. The State further opines that "[e]ven a relaxed *Kennedy* test would look very similar to the test that Martinson failed to meet below," *id.*, which confuses a procedural expansion with a substantive expansion; Mr. Martinson's petition addresses the former, but not the latter.

The State bizarrely claims that “state courts do not ‘diverge’ on the application of *Kennedy*” while elsewhere admitting that Arizona has “expressly disagreed with the fundamental premise in *Kennedy*” and “rejected an intent-to-elicit-a-mistrial” approach. *Id.* at 11, 21. The State also acknowledges that other state courts have similarly “applied different approaches.” *Id.* at 21; see also *Jorgensen*, 10 P.3d at 1179 (“[S]tates, like Arizona, [] do not follow the plurality rule of *Oregon v. Kennedy*.”); *New Mexico v. Breit*, 930 P.2d 792, 802 (N.M. 1996) (“a growing number of state courts have rejected or expanded upon the *Kennedy* rule when double-jeopardy claims are urged under their own state constitutions”); *Hawaii v. Rogan*, 984 P.2d 1231, 1246 (Haw. 1999) (“a growing number of jurisdictions have rejected the *Kennedy* standard”).

Longstanding principles of federalism certainly permit States to broaden the scope of protections afforded to their own citizens. But the federal constitution establishes baseline protections, beneath which states may not fall. When states conflate due process and double jeopardy there is a significant risk that the resultant product will, as in Mr. Martinson’s case, conflict with the constitutional standard set forth by *Kennedy*.² Arizona’s due process-like analysis may

² That the Court of Appeals decision never used the words “due process” or “balancing” to adjudicate Mr. Martinson’s claim, Opp’n at 22, amounts to semantics. The State itself observed that the Court of Appeals focused on whether the misconduct was intentional and pervasive such that the trial was structurally impaired and whether the conduct was egregious enough as to raise concerns over the fundamental fairness of the trial itself. *Id.* at 12-13. These are the hallmark considerations of due process. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (establishing framework to evaluate “whether the prosecutor’s comments ‘so infected the trial with *unfairness* as to

provide a broader scope of protection for a subset of criminal defendants when it comes to gaining review; however, for defendants who were victimized by prosecutorial misconduct intended to thwart their double jeopardy rights, a test that balances that constitutional harm against any resulting prejudice flies in the face of *Kennedy*, which imports no such analysis.³ See Pet. at 16-17.

C. Mr. Martinson’s case is a proper factual vehicle through which to clarify *Kennedy*.

The State’s argument that this case is not a proper factual vehicle through which to clarify *Kennedy* is both formalistic and misleading. To start, the State’s myopic focus on how the double jeopardy issue was presented to the trial court (*i.e.*, framed by state law) is misplaced. Opp’n at 16. What is significant, is that the trial court’s lengthy exposition into the intentional prosecutorial misconduct collectively, if not expressly, evinces her finding that the State intended to thwart Mr. Martinson’s double jeopardy rights, in part by provoking a mistrial. See Pet. App. at 19a (“[T]he Court benefits from hindsight. Thus, the Court’s failure to ... overrule defense motions during or directly after trial is irrelevant.”); *id.* at 24a (“Defense counsel urged the Court to require the State to steer clear of an intentional murder theory. The Court agreed.”); *id.* (“On August 9, 2011, during open-

make the resulting conviction a denial of due process.”) (emphasis added).

³ For this reason, the correctness of the trial court’s initial evidentiary ruling is irrelevant. The State was bound by the trial court’s ruling at the time it was made and the trial court found that the State intentionally flouted that ruling and engaged in other misconduct motivated by an improper purpose. The intent underlying the State’s misconduct by itself satisfies *Kennedy*.

ing statements, the State marshaled facts in a manner designed to draw the inference of intent-to-kill ... [t]he defense moved for a mistrial.”); *id.* at 29a (“The Prosecutors knew exactly what they were doing.”). Regardless of how the issue was teed up to the trial court, the bottom-line factual findings fit squarely within the realm of *Kennedy*.

Second, the State mischaracterizes the procedural stage at which the trial court’s findings were made. The State’s sweeping declaration that Mr. Martinson “was awarded a mistrial after his conviction,” Opp’n at 16 (emphasis omitted), is both wrong and misleading. In so arguing, the State fails to distinguish between Mr. Martinson’s *motion for a new trial*, filed after the jury hung on the guilt phase and resulting in the setting aside of his initial conviction, and his later *motion to dismiss* on grounds of double jeopardy, prompted by preexisting and continuing prosecutorial misconduct and resulting in the dismissal of his indictment. At the time he filed his motion to dismiss, Mr. Martinson was not attempting “to avoid the consequences of his conviction,” *id.* at 17, because there was no conviction hanging over his head. Rather, the motion to dismiss was made in advance of his re-trial and predicated, in part, on prosecutorial misconduct that occurred *after* his initial conviction had been set aside.

The procedural posture in which Mr. Martinson’s claim arose further demonstrates the Court’s need to re-visit the circumstances to which *Kennedy* would attach. The State of Arizona errantly focuses on the *timing* of the trial court’s finding of specific intent. *Kennedy* recognizes the prosecutorial intent to thwart a defendant’s double jeopardy rights as the constitutional harm deserving of relief. Restricting that relief to a narrow set of procedural circumstances short

shriffs defendants of their full double jeopardy protections because prosecutorial misconduct may not be immediately discoverable or because the misconduct may span the length of a proceeding in a way that cannot be captured in a motion for mistrial prior to the defendant's initial conviction. Moreover, procedural nuances should not dictate the availability of relief where the constitutional injury exists. For example, had Mr. Martinson waited until after the start of his second trial to move for mistrial, his procedural posture would have matched that of *Kennedy*, making him eligible for relief despite there being no difference in the underlying facts. That Mr. Martinson (and the trial court) acted more swiftly and efficiently is a laudable distinction that makes no difference to the double jeopardy analysis. Thus, Mr. Martinson's case provides a proper vehicle with which to revisit and clarify the scope of the *Kennedy*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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