No. _____

In The
Supreme Court of the United States

MARK P. HOWERTON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Fourth Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that a mistrial declared in the face of manifest necessity does not generally prohibit a retrial under the Fifth Amendment. While it has recognized that a defense-requested mistrial caused by prosecutorial goading can raise an exception to this general rule, it has limited the availability of this remedy to those cases in which the record shows that it was the prosecutor's specific intent to force the mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). This rule fails to reach significant acts of prosecutorial misconduct that impair the ability of the defendant to fairly pursue an acquittal. Should the Court's holding in *Oregon v. Kennedy* be extended to prohibit a wider range of prosecutorial intent?

STATEMENT OF RELATED CASES

State of Texas v. Mark P. Howerton, No. 2019-CR-2399, 144th District Court, Bexar County, Texas. Mistrial declared December 12, 2019.

Ex Parte Mark Howerton, No. 04-21-00409-CR, Fourth Court of Appeals, San Antonio, Texas. Judgment entered June 15, 2022.

Ex Parte Mark Howerton, PD-0437-22, Court of Criminal Appeals of Texas. Petition refused October 26, 2022.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

REFERENCE TO OPINIONS IN THE CASE

The opinion of the Court of Appeals for the Fourth District of Texas, unpublished, *Ex parte Mark Howerton*, 04-21-00409-CR, 2022 Tex. App. LEXIS 4057 (Tex. App.—San Antonio 2022, pet. ref'd) appears at page 1 of the appendix hereto. The order of the Fourth Court of Appeals denying rehearing appears at page 25 of the appendix hereto. The order of the Court of Criminal Appeals refusing Howerton's Petition for Discretionary Review appears at page 26 of the appendix hereto.

JURISDICTION

The date on which the Texas Court of Criminal Appeals refused the Petitioner's case was October 26, 2022. A copy of that court's refusal of discretionary review appears at page 26 of the appendix hereto. The Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION 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.

STATEMENT OF THE CASE

Mark Howerton was tried for murder on December 2, 2019. [CR Vol. 10 at 65]. After the jury was empaneled and sworn, all testimony was received, and the jury was charged and sent out for deliberation, a mistrial was declared on December 12, 2019 following representations from the Jury Foreman that a verdict could not be reached. [RR Vol. 11 at 13]. After the State announced its intention to retry Mr. Howerton, he filed a Petition for a pretrial writ of habeas corpus seeking relief from double jeopardy. [CR Vols. 2-7]. The Petition alleged that the State of Texas, knowing that a key witness in its case had lied previously on a sworn police

report and under oath to the grand jury, had elicited false testimony from its witness at the trial of the case. The Petition maintained that the State's misconduct had squandered its "one full and fair opportunity" to convict Mr. Howerton, and that a retrial would be barred on State and federal double jeopardy grounds. [CR Vol. 1 at 14]. He further requested an evidentiary hearing. [*Id* at 24]. The trial court denied Mr. Howerton's request for an evidentiary hearing and denied all relief. [CR Vol. 10 at 33]. The trial court certified Petitioner's right to appeal [CR Vol. 10 at 57] and issued a stay of trial proceedings. [CR Vol. 10 at 63].

The Fourth Court of Appeals recognized the trial court's conclusion that the State's witness had been "thoroughly discredited." [Appendix at 4]. But because Howerton's Petition asserted the case for a prosecution team motivated to "win at any price," rather than a prosecution motivated by a specific intent to force a mistrial, the Court held that the Double Jeopardy Clause offered no relief. [Appendix at 8]. Howerton timely filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals, which was refused on October 26, 2022.

REASONS FOR GRANTING THE PETITION

A. Overview

The State of Texas sponsored and relied upon false testimony in its efforts to convict Mark Howerton. But a mistrial was declared because the Jury was unable

to reach a unanimous verdict. Because prosecutorial misconduct of the variety detailed in Howerton's petition could *never* justify a jeopardy bar in the face of a defense acquiesced mistrial, the Fourth Court reasoned, it affirmed the trial court's denial of Howerton's habeas corpus petition. *Id.* This Petition raises a novel question of constitutional significance: when the State intentionally sponsors false testimony at the trial, and the trial is aborted due to a hung jury, does the manifest necessity rule shield the State's misconduct from any sanction or remedy? Despite having the same sort of constitutional injury as that contemplated by *Kennedy*, the causal nexus and the prosecutorial *mens rea* are vastly more complex than anything the Court deciding *Kennedy* could have imagined. The Fourth Court has erroneously interpreted *Kennedy's* narrowed scope as a basis to deny relief. This Court should grant review to better clarify the standard in cases presenting with significantly more egregious and pervasive misconduct than normally attends the "goaded mistrial" exception. *Oregon v. Kennedy*, 456 U.S. 667 (1982) should either be overruled, or its holding extended to prevent prosecutorial misconduct bent on precluding an acquittal from going unchecked simply because the prosecutor's intent was not to goad a mistrial.

B. The Factual Basis

Without any personal knowledge to reasonably support that Cayley Mandadi was in danger, on the evening of October 29, 2017, Jett Birchum and a cadre of Mandadi's college sorority sisters began insisting to

any authority who would listen that she had been kidnapped by Mark Howerton. Unbeknownst to the sorority sisters and the police, this claim was based on a lie crafted by Jett Birchum. He deceived Mandadi's sorority sisters into assuming that Howerton had kidnapped Cayley. His lies caused the Texas Rangers to consider Howerton's version of events that evening with a jaundiced eye. Most concerning of all, it placed undue emphasis on the possibility of dating violence in the mind of the medical examiner who deemed Mandadi's injuries to be the product of blunt force trauma to the head. For a time, it deceived the prosecutors, who relied upon Birchum's grand jury testimony—in 2018 already beginning to shift in its particulars—to obtain an indictment against Howerton and to pursue those allegations to trial.

Prior to the trial, it became clear upon review of the historic cell-site location data and GPS data obtained from Howerton and Mandadi's cell phones that Birchum's account was false. For one, Birchum's sworn police report was directly contradicted by his testimony before the Grand Jury. More importantly, by November 4, 2019, a month prior to trial, the State was put on notice that Birchum's central claim—that he had seen Howerton forcefully grab Mandadi and escort her away from the music festival, was false. Birchum pinpointed his testimony regarding this observation to a telephone call he'd placed to Mandadi's phone at approximately 7:15pm. [RR Vol. 7 at 18; Vol. 9 at 95]. He testified that Mark Howerton answered this phone call. [RR Vol. 7 at 18, 37]. Unfortunately for Birchum,

Cayley Mandadi was ten miles (10) away from the music festival when this call took place. [RR Vol. 9 at 107; 114; RR Vol. 8 at 88]. That Birchum lied about seeing Mark and Cayley at that time is further supported by the GPS data retrieved from Birchum, Howerton, or Mandadi's cell phones, which does not show Howerton or Mandadi inside the festival grounds that day, and never shows the three of them co-located in any location that afternoon. [RR Vol. 2 at 15]. In short, the *only* person who testified to any kind of physical disturbance between Howerton and Mandadi on October 29, 2017 was patently making it up.

No matter what excuse the State offers for this—and it has attempted many such excuses over the course of this appeal—it can never dispute the fact that the GPS and cell-site location data *it produced* in discovery flatly contradicts the testimony of its star fact witness. The State of Texas (1) knew Jett Birchum's account of events was at least partially if not entirely false; (2) called Birchum to testify at trial anyway; and (3) continued to encourage the jury to accept Birchum's version of events as true, despite the trial court's earlier admonishment. [RR Vol. 10 at 99-103] (Prosecution's closing argument making use of Birchum's timeline of events; the trial court overruled counsel's objections to this recitation of Birchum's testimony), [RR Vol. 10 at 45-46] ("You're Officers of the Court, and you know better. Ridiculous.").

The Defense attempted to cure this issue multiple times prior to charging the jury. First, the Defense raised these concerns in a Motion to Dismiss

predicated on Birchum's prior false testimony before the 2018 Grand Jury that returned the original indictment against Mark Howerton. [RR Vol. 2]. Next, during the trial itself, the Defense moved to dismiss on the basis that the false testimony previously complained of had been reiterated by the witness before the petit jury. [RR Vol. 9 at 143]. The Defense sought to specifically obtain a directed verdict of acquittal on the subparagraphs of the indictment predicating the murder on kidnapping, as the only evidence of kidnapping was Birchum's testimony. [RR Vol. 10 at 48-49]. Howerton further objected to Birchum's testimony being used in the record at all. [RR Vol. 10 at 62-63]. It was at this juncture that the trial court clearly recognized that Birchum was not telling the truth, but nevertheless denied any relief. [RR Vol. 10 at 61-63] ("No one's going to believe Jett Birchum, not about anything. About anything."). The Court denied all avenues of relief, including a curative instruction. *Id.*

After closing arguments, the jury retired for deliberations. They deliberated over the afternoon of December 11th, and throughout the morning of December 12th. At approximately 2:15pm on December 12, 2019, they sent a note advising that they had "been through the evidence and discussed it sufficiently, [and they] are not able to come to a unanimous decision." [RR Vol. 11 at 10]. The defense moved for mistrial and objected to an *Allen* charge. The trial court overruled the objection and the motion and gave the supplemental instructions. [RR Vol. 11 at 11-12]. At 3:40pm, the foreman sent another note advising that they

remained deadlocked. [RR Vol. 11 at 12-13]. The Defense again moved for mistrial. The State remarked "We do not object." [RR Vol. 11 at 13]. The trial court then declared a mistrial.

ARGUMENT

One of the core protections of the Double Jeopardy Clause is that the Government, vastly better equipped to retool its prosecutorial theories and muster greater resources, cannot be permitted to seek a conviction repeatedly until it is successful. Once jeopardy attaches, the accused enjoys the right to have his guilt or innocence determined by *that* trier of fact. *Crist v. Bretz*, 437 U.S. 28 (1978). The decision to retry a defendant puts at risk the fundamental rights of the accused to avoid the financial and psychological strain of repeated prosecutions and the danger that repeated attempts at prosecution will result in an erroneous conviction. *Arizona v. Washington*, 434 U.S. 497, 503-505 (1978) (Stevens, J.).

Sometimes, however, the original trier of fact becomes incapable of reaching a unanimous decision, and the court must declare a mistrial. In 1824 this Court held in a summary opinion, without any constitutional analysis, that the declaration of a mistrial, in light of a hung jury, presents no bar to a subsequent prosecution for the same offense. *United States v. Perez*, 22 U.S. 579 (1824). As the Court and commentators have repeatedly noted in the interim, this conclusion

was not reached based upon an interpretation of the Double Jeopardy Clause. Instead, *Perez* merely clarified an exception to the general rule that a jury cannot be discharged prior to verdict. The Common law prevented discharge prior to verdict to prevent the Court from assisting the prosecution by aborting the proceedings to allow for more time to marshal evidence against the accused. *Cf. Trial of Ireland*, 7 How. St. Tr. 79 (1678) (Two Jesuit priests had their trial removed from the jury's consideration until the prosecution could develop additional proof against them. The men were ultimately convicted and hanged.). It was because of the need to safeguard against this kind of abuse and the concomitant need to address legitimate reasons why a jury must be discharged that the Court in *Perez* fashioned the "manifest necessity" test. *Perez*, 22 U.S. at 579. In doing so, the Court made no reference to the Fifth Amendment.

At common law, jeopardy did not attach until *after* a final verdict was returned, a long defunct interpretation of the Double Jeopardy Clause. *Crist v. Bretz*, 437 U.S. 28 (1978); *Downum v. United States*, 372 U.S. 734 (1963). It would have been especially peculiar for the Court in *Perez* to conduct a Fifth Amendment jeopardy analysis, since under the state of the law at that time, former jeopardy had not yet attached. But as time progressed, the Court repeatedly cited to *Perez*, without comment or discussion, for the basic proposition that a hung jury does not create a jeopardy bar, even though the Court has since acknowledged the

decision's inapplicability to the Fifth Amendment's protections in dicta:

> In the *Perez* case, the trial judge had discharged a deadlocked jury, and the defendant argued in this Court that the discharge was a bar to a second trial. The case has long been understood as standing for the proposition that jeopardy attached during the first trial, but that despite the former jeopardy a second trial was not barred by the Double Jeopardy Clause because there was a 'manifest necessity' for the discharge of the first jury. In fact, a close reading of the short opinion in that case could support the view that the Court was not purporting to decide a constitutional question, but simply settling a problem arising in the administration of federal criminal justice.

Bretz, 437 U.S. at 35 fn. 10 (internal citations omitted). *See also Wade v. Hunter*, 336 U.S. 684 (1949) ("The Rule announced in the *Perez* case has been the basis for *all later decisions of this Court* on double jeopardy."). The absence of a logical nexus between the "manifest necessity" rule and the propriety of submitting the accused to a second trial is a glaring omission.

In the decisions that have followed *Perez*, the Court nevertheless has couched the question in terms of a balancing between the competing interests of the parties. *Green v. United States*, 355 U.S. 184, 187-88 (1957); *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). This formulation pits the defendant's need to avoid the additional strain and hardship of repeated prosecution

(his "repose interests") and the need to avoid the risk of wrongful conviction (collectively, the "valued right" of the accused) against the State's interest in being afforded "one full and fair opportunity to present [its] evidence to an impartial jury." *Washington*, 434 U.S. at 505. Implicit in the Court's belief that the presence of "manifest necessity" is alone sufficient to countermand the "valued right" of the accused to be free from double jeopardy is the assumption that the prosecution participated in the first proceeding in good faith; that the prosecution did not squander its own "full and fair" opportunity by committing prosecutorial misconduct.

Under such narrow and unique circumstances, the courts should be able to evaluate the availability of the jeopardy bar irrespective of how the trial concluded, whether it be an aborted proceeding or a conviction reversed on appeal:

> ***The extreme tactics which constitute prosecutorial overreaching offend the double jeopardy clause at least in part because they unfairly deprive the defendant of possible acquittal,*** by heightening, in a manner condemned by law, the jury's perception of the defendant's guilt. *See Kennedy*, 102 S. Ct. at 2096-97 (Stevens, J., concurring in the judgment). Whether the tactic condemned is successful in its objective of securing a mistrial, or unsuccessful, but causes the return of a verdict of conviction, would seem to be of little significance in development of a law of preclusion designed to protect this interest.

Robinson v. Wade, 686 F. 2d 298, 306-7 (5th Cir. 1982) (emphasis supplied).

The Fourth Court utterly failed to consider Howerton's argument that State's misconduct triggered a jeopardy bar not because it was a goading tactic to abort the proceedings, but rather because it constituted an extreme tactic designed to unfairly deprive Howerton of the possibility of an acquittal. The Court focused on the fact that Howerton moved for a mistrial but failed to acknowledge that this request was in acquiescence to the fact that the jury was hung. Thus, the Court failed to consider whether prosecutorial misconduct that is established on the record prior to the entry of a mistrial might, in limited circumstances, modify the traditional analysis of manifest necessity mistrials. The "goaded mistrial" analysis this Court crafted in *Oregon v. Kennedy* is simply too crude an instrument to properly address misconduct aimed at precluding a defendant from reaching an acquittal.

The gravamen of Howerton's complaint is that the State intentionally used false testimony to try and deprive Mark Howerton of an acquittal. The Fourth Court of Appeals held that this type of overreaching is not sufficient to obtain double jeopardy relief under *Kennedy.* This conclusion leads to gravely inconsistent results:

> I question the validity of the lower court's assumption that the Government in such cases tailors its misconduct to achieve one improper result as opposed to another. It is far more likely that in cases such as this, where the

> prosecution is concerned that the trial may result in an acquittal, that the Government engages in misconduct with the general purpose of prejudicing the defendant. In this case, for example, the Government stood to benefit from Dixon's misconduct, regardless of whether it resulted in a guilty verdict or a mistrial. Moreover, even if such subtle differences in motivation do exist, I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the government's actual motivation.

Green v. United States, 451 U.S. 929, 931 fn. 2 (1981) (Marshall, J., dissenting). Without clarifying or expanding the reach of *Oregon v. Kennedy* by eliminating its emphasis on the specific intent of the prosecutor, this Court's jurisprudence risks perverse results. Cartoonish and petty examples of prosecutorial misconduct, such as violating a motion in limine, stand a greater chance of raising the potential of a jeopardy bar than a deliberate act of withholding *Brady* material or suborning perjury. This is not what the Court intended when *Oregon v. Kennedy* was decided. This Court should grant certiorari to better detail the parameters of this exception to manifest necessity.

CONCLUSION

While double jeopardy was never intended to be an offensive weapon for the defendant, the present state of the law has made mistrial an equally-as-desirable

outcome for prosecutors trying difficult cases. That holds true whether the prosecutor seeks an immediate termination of the proceedings, or that is simply a happy accident of their greater improper objectives. This Court desperately needs to restore the balance between the valued right of the accused to have the jury he's empaneled decide his controversy and the State's one full and fair opportunity to convict. The precedent must establish that the State will forfeit its "full" opportunity to convict when it actively seeks to make that opportunity unfair. To bring this about, the Court must grant discretionary review.

WHEREFORE, PREMISES CONSIDERED, Petitioner Mark Howerton prays this Honorable Court to grant his Petition for Writ of Certiorari. He further prays for any and all other relief this Court deems fit in law or in equity.

Respectfully submitted,

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