STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON LEE CORDER,

APPELLANT

APPELLATE CASE NO. 2023-001543

INITIAL REPLY BRIEF OF APPELLANT

W. CHANDLER NORVILLE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

Appellant's re-trial was barred by the Double Jeopardy Clauses of the federal and state Constitutions.

In all but a few rare circumstances, a defendant has a fundamental right to be tried at one trial in front of one jury. Appellant was denied this right because the solicitor prosecuting his case made an argument in closing that was obviously improper. The circumstances surrounding this case – including that the state had just lost its impassioned argument against the trial court charging involuntary manslaughter and that the state used Appellant's re-trial as an opportunity to completely change its trial strategy – demonstrate that the comment was made for the purpose of goading Appellant into a mistrial. But in any event, the protections of the Double Jeopardy Clause are not so limited. The South Carolina Constitution must not be read to give the state a mulligan necessitated by its own intentional conduct.

"You heard the SLED expert say the gun was working just fine, there was no manufacturing malfunction on that gun, so it's not legally an accident it's not a defense *and you'll know that because the Judge is not going to charge you.*" Tr. Mar. 2. 63, ll. 13-19 (emphasis added). By making this argument, the solicitor brought "the judge right into the jury's deliberations and [gave] them the impression that [the trial court] made some ruling" it did not. Tr. Mar. 2. 76, l. 6 – 77, l. 3. The argument was so improper that the trial court found it could not be cured short of a mistrial, a ruling that the state concedes was correct. BOR at 15 ("The awarding of a mistrial was appropriate…."). The solicitor's only excuse for making the improper argument was that she had "never been told that's inappropriate." Tr. Mar. 2. 70, l. 23 – 71, l. 2.[1]

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[1] The state asserts that "[i]t is *clear*, given [the solicitor's] explanation and the reasoning for [the trial court's] ruling" that the trial court's finding, that the solicitor did not goad Appellant into moving for a mistrial, was "based upon the context of the trial and the nature of the error." BOR

That mistrial denied Appellant his "valued right to have [his] trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). As a direct result of the solicitor's actions, Appellant was twice subjected to "the dread, anxiety, and financial cost of enduring the gauntlet of criminal prosecution and punishment...." *State v. Benton*, 443 S.C. 1, 7, 901 S.E.2d 701, 704 (2024). Rather than the right be given the respect it commands, the state was permitted to cause a mistrial and then benefit greatly from its own error, changing its strategy before Appellant's re-trial. If the combination of the solicitor's obviously improper argument, her specious explanation for that argument, and the enormous benefit the state received as a result of the improper argument is not enough to show goading, "then it would seem the only possible way to find that a solicitor intentionally goaded the defense would be for a solicitor to admit he or she took certain actions in an effort to goad the defense." *State v. Parker*, 391 S.C. 606, 613-14, 707 S.E.2d 799, 802 (2011).

In any event, the South Carolina Constitution should not be read to require the *Oregon v. Kennedy*[2] subjective intent standard. The "goading exception" is "justified by the intolerance of intentional manipulation of the defendant's double jeopardy interests." *Kennedy*, 456 U.S. at 690 (Stevens, J., concurring in the judgment). Appellant's fundamental right to have one single trial was violated in this case, and it was violated because of the solicitor's actions. It makes no difference what the solicitor's subjective intent was. *State v. Rogan*, 984 P.2d 1231, 1248 (Hawai'i 1999). Regardless of that intent, when the solicitor commits misconduct, a defense

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at 16. That misses the point. The solicitor's "explanation" was that no one ever told her she was not allowed to make the improper argument she made in this case. It strains credulity to believe that any attorney, much less an experienced solicitor, would believe that they were allowed to suggest to the jury that the judge had an opinion as to the facts of the case. To the extent the trial court relied on this explanation in any fashion, that reliance was error.

[2] 456 U.S. 667 (1982).

attorney must make an often split-second choice to protect *either* his client's due process right to a fair trial or his double jeopardy right to be tried once; he cannot protect both. *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983). In fact, it is a Hobson's choice; the prosecutor's misconduct increases the likelihood that the defendant will be convicted—leaving him with the sole option of appeal, which even if successful will result in a second trial. *See* Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 895-96 (1998). When the basis of double jeopardy is "fundamental fairness," *see State v. Mills*, 281 S.C. 60, 62, 314 S.E.2d 324, 326 (1984), it is illogical that a defendant must surrender double jeopardy rights to vindicate the fairness of his trial.

The state, citing no authority, asserts that the South Carolina Constitution should not provide these slightly broader protections for two reasons. First, the state asserts that Appellant's proposed standard is "almost indistinguishable" from the *Kennedy* standard. BOR at 18. Second, the state asserts that the South Carolina Constitution's double jeopardy language is essentially identical to the federal Constitution's, meaning that there is "no state law distinction that justifies the abandonment of the standard set forth in *Kennedy*." BOR at 18. Neither is availing.

First, Appellant argued that a far more workable standard was that adopted by the Arizona Supreme Court in *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984). BOA at 21. That standard holds that jeopardy attaches when a mistrial is declared under the following conditions:

> (1) Mistrial is granted because of improper conduct or actions by the prosecutor; and
> (2) Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and

(3) The conduct causes prejudice to the defendant which cannot be cured short of a mistrial.

Id. at 271-72 (footnote omitted). *Pool* also makes clear that the test of "intent" is to be an *objective* test, rather than *Kennedy*'s subjective test. *Id.* at 271 n.9. Importantly, the prosecutor's own explanations should only be considered "to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers." *Id.*

There are several key differences between the *Pool* and *Kennedy* standards that highlight why the *Pool* standard is far more workable. *Pool* commands that the "intent" of the prosecutor be measured by objective means, not the subjective means that *Kennedy* requires. *Compare Pool*, 677 P.2d at 271 n.9 *with Kennedy*, 456 U.S. at 679 (Powell, J., concurring). The difference is that *Pool* asks whether the prosecutor knew or should have known their conduct to be improper, while *Kennedy* asks only whether the prosecutor specifically intended to cause a mistrial. To claim that these two standards are "almost indistinguishable" is to claim there is no difference between general and specific intent.

Second, the state asserts that the state Constitution's Double Jeopardy Clause is essentially identical to the federal Constitution's, and therefore there is no basis to depart from the federal rule. BOR at 18. To start, the United States Supreme Court is the final arbiter of the *United States* Constitution; it has no power to decide what the South Carolina Constitution means. The *Kennedy* standard has no bearing on how this Court interprets the South Carolina Constitution. "State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution. [...] This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (internal citations omitted). The state courts that have expanded upon the

Kennedy standard on state law grounds also have double jeopardy provisions that are identical to the federal constitution. *See, e.g., Pool*, 677 P.2d at 271 ("We would ordinary interpret [state constitution]...in conformity to the interpretation given by the United States Supreme Court to the same clause in the federal constitution."); ARIZ. CONST. art. 2, § 10 ("No person shall...be twice put in jeopardy for the same offense."). When the United States Supreme Court interprets the federal constitution to provide the constitutional "floor," it is this Court's prerogative to interpret an identical clause in the state constitution more broadly. There are myriad issues with the *Kennedy* standard that can and should be addressed under the South Carolina Constitution.

For these reasons, the trial court erred in concluding that Appellant's re-trial was not barred by double jeopardy. His convictions and sentences should be reversed.

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellant's principal brief, this Court should reverse Appellant's convictions and sentences.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of June, 2026.