

**DOCKET NO. CR09-0635038 : SUPERIOR COURT**  
**STATE OF CONNECTICUT : JUDICIAL DISTRICT OF HARTFORD**  
**VS. : AT HARTFORD**  
**EDDIE A. PEREZ : December 30, 2016**

**STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

The defendant, whose convictions in the above-captioned case were overturned on appeal after the Supreme Court found that the trial court erred in failing to sever this case for trial, now seeks to prevent the trial court from giving him the very relief he requested, a new trial. Specifically, the defendant contends that a retrial is barred by principles of double jeopardy because the Supreme Court found that his right to testify in the companion case, Docket Number CR09-0628569, was infringed by the joint trial of the two cases. As the defendant acknowledges in his memorandum, however, no court has held that a retrial is barred simply because the defendant's right to testify, much less his right to testify in a companion case, was impacted by an error at the original trial. To the contrary, the law is clear that in appealing his conviction, the defendant waived any double jeopardy objection to a retrial. Finally, the court should reject the defendant's attempt to equate this case to one in which a court held that a retrial was barred because of prosecutorial misconduct. The defendant did not assert a claim of prosecutorial misconduct at the original trial or on appeal and he does not assert one now (nor does he have any basis for doing so). Accordingly, the defendant's motion to dismiss should be denied.

**Procedural Background**

The defendant was charged by information in the above-captioned case with Conspiracy to Commit Larceny in the First Degree by Extortion in violation of General Statutes §§§ 53a-48, 53a-122(a)(1), and 53a-119(5)(H) and Attempt to Commit Larceny in the First Degree by

Extortion in violation of General Statutes 53a-49(a)(2), 53a-122(a)(1), and 53a-199(5)(H) The case was joined with docket number CR09-0628569 for purposes of trial. After a trial to a jury of six, the defendant was convicted of Attempt and Conspiracy to commit Larceny by Extortion in this case and Bribe Receiving, Fabricating Physical Evidence as an accessory, and Conspiring to Fabricate Physical Evidence in the other file.

In the midst of the trial, the defendant twice moved to sever the two cases claiming that he wanted to testify in the bribery case but not this case. The defendant's motions were denied but, upon finding that the defendant made a sufficient showing to warrant relief with the second motion, the court indicated it would allow the defendant to testify in the bribery case without having to face cross examination about the facts relating to the extortion case. The defendant elected not to testify in either case.

The Appellate Court reversed the convictions in both cases finding that the trial court erred in joining the cases and failing to sever them after the defendant indicated he wanted to testify in the bribery case but not the extortion case. The state's petition for certification to appeal was granted by the Supreme Court. Upon review, the Supreme Court held that the trial court erred in failing to sever the cases and remanded the cases for separate retrials.

### **Argument**

The double jeopardy clause of the fifth amendment to the United States constitution, which is made applicable to the states through the fourteenth amendment, *State v. Ferguson*, 260 Conn. 339, 360 (2002); protects a criminal defendant from being placed in jeopardy twice for the same offense. Similar protection is afforded under the due process clause, article first, § 9, of the Connecticut constitution. *State v. Boyd*, 221 Conn. 685, 689-90 (1992); see *State v. Ferguson*,

260 Conn. 339, 360 (2002)(“The Connecticut constitution provides coextensive protection, with the federal constitution, against double jeopardy.”).

The prohibition against placing a person twice in jeopardy has been interpreted to mean that persons are protected: 1) against a second prosecution for the same offense after acquittal; 2) against prosecution for the same offense after conviction; and 3) against the imposition of multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S 711, 717 (1969); *State v. Boyd*, 221 Conn. 685, 690 (1992). As a general matter, however, the principles of double jeopardy do not prevent a state from retrying an individual who has been awarded a retrial after a successful appeal. *State v. Boyd*, 221 Conn. 685, 690-91 (1992). As our Supreme Court has noted:

A defendant cannot himself request that his convictions be set aside and then rely on that overturned conviction to bar a new trial. . . . Two overlapping theories advanced in support of this rule are, first, that the defendant, by successfully appealing his conviction, waives any double jeopardy objection to a retrial . . . and, second, that jeopardy continues through the appeal and into the subsequent retrial.

*State v. Boyd*, 221 Conn. 685, 691-92 (1992)(internal citations omitted).

The concept of waiver is particularly apropos in the case as, on appeal, the defendant specifically requested that he be given a retrial. Consistent with the defendant’s request, the case was remanded specifically for the purpose of affording the defendant a new trial. *State v. Perez*, 147 Conn. App. 53, 124 (2013), *aff’d*, *State v. Perez*, 322 Conn. 118 (2016).

While the defendant acknowledges that the principles of double jeopardy do not usually prevent the retrial of a person who successfully appealed his conviction he argues that a retrial should be barred in this case because the error at trial infringed on his right to testify. Trial court errors infringing on a person’s right to testify, however, have never been held to have such preclusive effect. See *Rock v. Arkansas*, 483 U.S. 44 (1987) (Court did not dismiss case but,

rather, remanded it for further proceedings despite finding that a state statute excluding all hypnotically refreshed testimony impermissibly infringed on a criminal defendant's right to testify on his own behalf); *United States v. Hung Thien Ly*, 646 F.3d 1307 (11<sup>th</sup> Cir. 2011)(Case remanded even though Circuit Court found that trial court erred in failing to correct defendant's misunderstanding about right to testify); *Jordan v. Hargett*, 34 F.3d 310 (5<sup>th</sup> Cir. 1994)(Court remanded case for further proceedings after finding that the defendant had not waived right to testify). The defendant has failed to cite, and the state was unable to find, a single case where a retrial was barred simply because of an error implicating the defendant's right to testify.

Even if there were some support for the proposition that a retrial should be barred when the defendant's right to testify was implicated by the trial court's error it would not be applicable in this case. Both at trial and on appeal, the defendant asserted that he did not wish to testify in this case. Having made that representation, the defendant cannot now claim that his right to testify in this case was implicated in any way.

The defendant asks the court to rely on the rationale of the Pennsylvania Supreme Court in *Commonwealth v. Smith*, 532 Pa. 177 (1992). *Smith*, however, is completely inapposite. The case against *Smith* was dismissed, after appeal, because of egregious prosecutorial misconduct -- the state withheld potentially exculpatory physical evidence and knowingly denied the existence of an agreement with a witness wherein the witness was promised favorable treatment in exchange for testifying. *Id.* at 180. The court held that the prosecutor intentionally engaged in the misconduct to "prejudice the defendant to the point of the denial of a fair trial." *Id.* at 186.

The state would note that the standard adopted by the Pennsylvania Supreme Court is inconsistent with the standard in Connecticut. In Connecticut,

The mere allegation of judicial or governmental overreaching, harassment, bad faith or other misconduct is not enough [to bar a retrial], however, for '[p]rosecutorial conduct

that might be viewed as harassment or overreaching, even if sufficient to justify mistrial . . . does not bar retrial absent *intent* on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause . . . 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. . . .

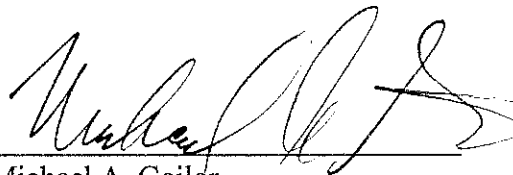
*State v. Butler*, 262 Conn. 167, 176-77 (2002)(internal citations omitted, emphasis in original);  
*see also Couture v. Commissioner of Correction*, 160 Conn.App. 757, 763-65 (2015).

Regardless of which standard is used, however, the defendant is not entitled to relief. He does not allege, nor does he have any basis for doing so, that the state committed any misconduct in this case. Further, there is no indication that either the prosecutors or the trial judge intentionally engaged in misconduct with the purpose of causing a mistrial or denying the defendant a fair trial.

Accordingly, the defendant's motion to dismiss should be denied.

Respectfully Submitted,  
The State of Connecticut

By:



Michael A. Gailor  
Executive Assistant State's Attorney  
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(860) 258-5800  
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**CERTIFICATION**

I hereby certify that a true copy of the foregoing was mailed, first class, postage prepaid, to counsel of record, Hubert J. Santos, 51 Russ Street, Hartford, CT 06106-1566, this 30<sup>th</sup> day of December, 2016.

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Michael A. Gailor  
Commissioner of the Superior Court

DOCKET NO. CR09-0628569 : SUPERIOR COURT  
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**Procedural Background**

The defendant was charged by information in the above-captioned case with Bribe Receiving in violation of General Statutes § 53a-148(a), Fabricating Physical Evidence as both a principal and accessory in violation of General Statutes §§ 53a-8 and 53a-155(a)(2), and

Conspiring to Fabricate Physical Evidence in violation of General Statutes §§ 53a-48 and 53a-155(a)(2). The case was joined with docket number CR09-0635038 for purposes of trial. After a trial to a jury of six, the defendant was convicted of Bribe Receiving, Fabricating Physical Evidence as an accessory, and Conspiring to Fabricate Physical Evidence in this case and Attempt and Conspiracy to commit Larceny by Extortion in the other file.

In the midst of the trial, the defendant twice moved to sever the two cases claiming that he wanted to testify in this case (the bribery case) but not the other. The defendant's motions were denied but, upon finding that the defendant made a sufficient showing to warrant relief with the second motion, the court indicated it would allow the defendant to testify in this case without having to face cross examination about the facts relating to the extortion case. The defendant elected not to testify in either case.

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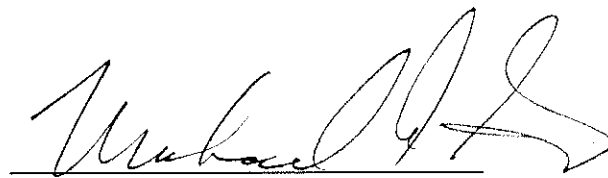
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\_\_\_\_\_  
Michael A. Gailor  
Commissioner of the Superior Court