No. 09-____

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

EDDIE CARDINE AND MICHAEL CURRY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

JEANNE ANDERSON*
GREGORY C. FUCHS
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342

TERESA YOUNG
ASSISTANT COMMONWEALTH'S ATTORNEY
514 WEST LIBERTY STREET
LOUISVILLE, KENTUCKY 40202
(502) 595-2300

COUNSEL FOR RESPONDENT
COMMONWEALTH OF KENTUCKY

*COUNSEL OF RECORD

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the retrial of a defendant after the trial court *sua sponte* declares a mistrial absent manifest necessity and the defendant does not object prior to the actual discharge of the jury.

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PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINION BELOW

The Supreme Court of Kentucky's opinion is reported as *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009). Petitioner's Appendix ("App.") 1a–25a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky rendered the judgment from which relief is sought on January 22, 2009. App. at 1a. Petitioner timely filed a petition for rehearing on February 11, 2009, which was denied on June 25, 2009. App. at 26a-27a. Petitioner sought, and was granted, a two week extension in which to file this petition, up to and including October 7, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V.

STATEMENT OF THE CASE

1. The Respondents, Eddie Cardine and Michael Curry, were charged with complicity to murder, two

counts of complicity to attempted murder, complicity to assault in the first degree, and complicity to assault in the second degree. The charges arose from a confrontation between Cardine and Curry and four men. As a result of the confrontation, one man was killed and two others injured.

At the first trial, a jury was selected and sworn. That jury was then excused from the courtroom while the parties argued pretrial motions. It was during these pretrial arguments that the Commonwealth informed the court that it had discovered a new witness. This new witness, Mr. Hebert, had previously been unknown to the Commonwealth and was only discovered after the jury had been sworn. Hebert was important to the Commonwealth, since he was the only disinterested person who could place a gun in Curry's hand. Defense counsel objected to admitting Hebert's testimony, arguments ensued, defense counsel interviewed Hebert, and Hebert was sworn to reappear. The jury, having now been given a lunch break, was not in the courtroom during any of these activities.

After the break, with the knowledge that the issue would require further discussion, the trial court dismissed the jurors for the day and requested they return the next morning. All remaining arguments regarding the course of action in this case took place outside the presence of the jurors, who remained sworn but were not in the courthouse at the time.

Defense counsel eventually requested that the court exclude the new witness or, in the alternative, allow a continuance. The Commonwealth argued that although a continuance might be appropriate, exclusion of the witness was not:

> *Counsel for Curry*: [I]f the court overrules my motion, excluding the witness Mr. Hebert, then I move for a continuance of a new trial date, so that we have time to investigate and ensure that our defense theory, may or may not change, based on the evidence that was – at least the information that came from Mr. Hebert today. So that I move the court for a continuance if the court doesn't grant my motion to exclude Mr. Hebert at this time.
>
> *Counsel for Cardine*: I would object to a, I think I heard some discussion, I don't think it was on record about a short continuance. I would object to that, I would either like to exclude that evidence or continue it for a further trial date with a significant period of time.

In response to the arguments, the judge ruled that the testimony was admissible and not a discovery violation. Nonetheless, the judge ordered a mistrial, explicitly in response to defense counsel's assertion that a short continuance would provide insufficient time to prepare. Defense counsel did not object, but participated fully in setting a new trial date and requesting bond relief. In reference to the period of time necessary to prepare for the newly discovered witness, the parties stated:

> *Judge:* I don't know how much time you are seeking, from the defense standpoint, as far as time you need to get ready. Do you have any idea?

Counsel for Curry: Just next available trial date.

Judge: Well next available trial date is next year, so, and still may be next year, but I don't know, for example, how quickly that you are looking at your schedule to allow.

Following this discussion, there was a conversation regarding everyone's calendars while the court tried to reschedule the case. Defense counsel then requested bond relief:

Counsel for Cardine: Your Honor, in light of the continuance we are now getting it would also be my motion for bond relief on behalf of Eddie Cardine.

After the parties discussed bond relief for both defendants, they went to the judge's office to get a new trial date. The next morning, the jury was called back to court and released from service.

2. In the second trial, Respondents were both found guilty and sentenced to thirty years. Although neither one raised the issue in the trial court, on appeal Cardine argued that the second trial had violated his double jeopardy rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Commonwealth responded that the defendant had consented to the court's *sua sponte* order by his actions both before and after the judge announced her intent to declare a mistrial. Curry did not raise the double jeopardy claim on appeal, but the Kentucky Supreme

Court nevertheless treated the two defendants alike for purposes of the double jeopardy claim.

By a 4-2 vote, the Kentucky Supreme Court reversed the convictions on the ground that they violated the federal Double Jeopardy Clause. The court first found no manifest necessity justified the mistrial declaration because there had been no violation of discovery rules and Hebert's testimony was merely cumulative and therefore not necessary. After finding no manifest necessity, the court turned its attention to whether the defendants consented to a mistrial.

The Commonwealth had argued that the defendants' failure to object, both before and after the lower court announced its intention to declare a mistrial, was proof of the defendants' consent thereto. The court, however, flatly stated that "the defense does not have to object to a mistrial." App. 19a. The court reasoned that a party does not need to object when it has no opportunity to do so, but it did not take into account that the defense actively participated in scheduling a new trial and sought bond relief before the jury was discharged. Indeed, as soon the word mistrial was spoken by the judge, the Kentucky Supreme Court decided "the time for argument was over and the Appellant simply could not have waived his opportunity to object when he was never given such an opportunity." App. 20a (quoting *Radford v. Lovelace*, 212 S.W.3d 72, 77 (Ky. 2006)) (internal quotation marks and brackets omitted).

The court also explained:

> [I]t simply does not make sense to require a criminal defendant to object to a mistrial. If the

> trial judge improperly grants a mistrial, as in this case, such a rule would require the defense attorney to risk forgoing a win for his client if the objection was sustained. Forcing the defense to risk snatching defeat from certain victory is impermissible in light of the adversarial nature of our justice system and the ethical requirements of zealous competent advocacy.

The court concluded that "[i]t is the Commonwealth whose interests are harmed by an improper, *sua sponte* mistrial."and therefore the Commonwealth's duty to object. App. 21a.

The Commonwealth sought rehearing of the Kentucky Supreme Court's opinion, which was denied on June 25, 2009. App. 26-27.

REASONS FOR GRANTING THE WRIT

This Court has long held that a defendant's right not to be placed twice in jeopardy is not violated when he is retried following a mistrial based on manifest necessity. *United States v. Perez*, 22 U.S. 579, 580 (1824). When a mistrial is declared absent manifest necessity, the general rule is that the Double Jeopardy Clause bars a retrial of the defendant. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). A major exception to that rule, however, is when a defendant consents to the court's declaration of a mistrial. If a defendant so consents, he may be retried regardless of whether there was manifest necessity for the mistrial. *United States v. Dinitz*, 424 U.S. 600, 607-610 (1976).

At issue in this case is whether a defendant consents to a mistrial by failing to object after the trial court *sua sponte* declares one. Most courts have held that a defendant has the opportunity to object until the jury is discharged, and his failure to do so constitutes consent. The Kentucky Supreme Court, by contrast, held that a defendant, as a matter of law, has no opportunity to object following a *sua sponte* mistrial, and that failure to object before the jury is discharged may not be deemed consent. Indeed, the Kentucky Supreme Court went further and reasoned that it is defense counsel's responsibility to a client — *not* to object, thereby "preserving" the violation of the defendant's constitutional right. Certiorari should be granted to resolve this conflict among the courts and because the Kentucky Supreme Court's decision cannot be reconciled with this Court's decisions regarding the nature of double jeopardy rights and the obligation of defendants to assert contemporaneous objections to trial court decisions that violate their constitutional rights.

A. The Kentucky Supreme Court's Decision Conflicts With Decisions Of Numerous Federal Courts Of Appeal And State Supreme Courts

In *Gori v. United States*, 367 U.S. 364, 365 n.6 (1961), this Court expressly left open the question whether a defendant's failure to object to a mistrial may bar a later claim of double jeopardy. *Id.* at 365, n.6. In the absence of a ruling by this Court, the lower courts have reached conflicting results on the question

presented. This absence has allowed for divergent outcomes, depending upon the jurisdiction in which the case is heard. Only this Court can establish a uniform rule on these constitutional issues.

In this case, the jury was not present when the trial court declared a mistrial, and would not return until the following morning. Defense counsel therefore had ample opportunity to object to the court's declaration. The Kentucky Supreme Court nonetheless reasoned that counsel had no obligation or opportunity to object to preserve a later double jeopardy claim. The New Hampshire Supreme Court and the Florida Court of Appeals have likewise held that a defendant's failure to object following the *sua sponte* declaration of a mistrial does not amount to consent. See *State v. Bertrand*, 587 A.2d 1219, 1225 (N.H. 1991) ("a defendant generally cannot consent to a mistrial by silence"); *Joseph v. State*, 988 So. 2d 133, 135 (Fl. App. Ct. 2008) ("A defendant's silence or failure to object to an illegal discharge of a jury does not constitute consent to a declaration of mistrial and it does not waive a defendant's constitutional protection against double jeopardy"). By contrast, numerous federal courts of appeal and state supreme courts have reached the opposite conclusion.

1. The First and Seventh Circuits have held that a defendant does have the opportunity to object following a court's *sua sponte* mistrial declaration and that failure to object constitutes consent. For example, in *United States v. DiPietro*, 936 F.2d 6 (1st Cir. 1991), the defendant requested a curative instruction in response to statements made in the government's closing argument. The trial court agreed to give the curative

instruction, but later became concerned about the nature of the objectionable statements. As a result, the court *sua sponte* declared a mistrial and excused the jury. In finding the defendant consented to the mistrial, the First Circuit reasoned that even if defense counsel had not expected the mistrial, there was ample opportunity to object when the mistrial was declared:

> For several minutes after the decision was announced, she and the government counsel and the trial judge remained in the courtroom. She listened to the court's record explanation of the reason for a mistrial and did not object. She formulated and stated a motion for judgment of acquittal and did not object to the mistrial. Finally, she consulted her calendar and discussed with the court and government counsel acceptable dates for a new trial, and scheduled the trial.

Id. at 11. Although the jury had been released, the First Circuit reasoned that upon defense counsel's immediate objection, the jury could have been asked to remain while the judge reconsidered his order. The court of appeals found defense counsel's actions to be tantamount to consent.

The Seventh Circuit applied the same approach in *Camden v. Circuit Court of Second Judicial Circuit, Crawford County, Ill.*, 892 F.2d 610 (7th Cir. 1989), *cert. denied*, 495 U.S. 921 (1990). In that case, the trial court *sua sponte* declared a mistrial in the presence of the jury. Before discharging the jury, the court made clear that there would be a second trial. The Seventh

Circuit held that the defendant impliedly consented to the mistrial by failing to object to the mistrial or retrial, and instead remained silent. The court of appeals reached that conclusion even though (in contrast to the instant case) the defendant had a very limited opportunity to object.

> Here, the opportunity to salvage Camden's trial by objecting to the mistrial declaration terminated upon the dismissal of the jury. Nonetheless, defense counsel's active assistance in arranging Camden's retrial and his failure to object on the record even after the mistrial declaration and dispersal of the jury provide strong evidence that his silence during the mistrial declaration constituted agreement that a mistrial was necessary.

Id. at 616, n.7.

Although not directly addressing the timing of the objection, the Fourth and Eleventh Circuits apply a similarly strict standard: if the opportunity to object exists in any manner, and a defendant fails to do so, he or she is deemed to have consented. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995), *cert. denied*, 516 U.S. 986 (1995); *United States v. Puelo*, 817 F.2d 702 (11th Cir. 1987), *cert. denied*, 484 U.S. 978 (1987). Massachusetts also applies this strict standard. See, e.g., *Pellegrine v. Commonwealth*, 844 N.E.2d 608 (Mass. 2006).

Another group of courts, the Second, Fifth, and Sixth Circuits, apply a "totality of the circumstances" test to determine whether a defendant consented when

he failed to object following a *sua sponte* mistrial. *See* Maula *v. Freckleton*, 972 F.2d 27 (2nd Cir. 1992), *cert. denied*, 507 U.S. 910 (1993) (totality of the circumstances); *United States v. Nichols*, 977 F.2d 972 (5th Cir. 1992) *cert. denied,* 510 U.S. 833 (1993), (implied consent by failing to object and scheduling new trial date); *United States v. Gantley*, 172 F.3d 422 (6th Cir. 1999) (failure to object following *sua sponte* mistrial declaration was positive indication of implied consent to the mistrial where counsel had the opportunity to speak to the judge before the jury returned to be discharged). Missouri follows this approach. See *State v. Tolliver*, 839 S.W.2d 296 (Mo. 1992) (no objection during bench conference before judge went back on record to dismiss the jury).

The Third Circuit looks to specific factors that illustrate consent. *Love v. Morton*, 112 F.3d 131 (1997) (no opportunity to object, and therefore no consent to mistrial, where judge immediately left the bench after the declaration).

Finally, the Ninth Circuit implies consent to a mistrial "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." *United States v. You*, 382 F.3d 958, 964-65 (9th Cir. 2004), *cert. denied*, 543 U.S. 1076 (2005) (quoting *Weston v. Kernon,* 50 F.3d 633 (9th Cir. 1995), *cert. denied*, 516 U.S. 937 (1995)).

What is consistent among all these courts is that they require a defendant to object to a *sua sponte* mistrial declaration in order to assert a later double jeopardy claim unless circumstances exist which would explain a failure to object. The instant case would have been decided differently in all of those courts.

Moreover, the holdings of those courts reflect a profound disagreement with the Kentucky Supreme Court's assertion that "it simply does not make sense to require a criminal defendant to object to a mistrial." because to object might be to forego a future "win" on double jeopardy grounds. App. 20-21a. In each of the cases cited above, the federal court of appeals held that defense counsel was obligated to object to a mistrial if the judge was present and the jury not yet discharged. These courts did not view such an objection as "snatching defeat from certain victory," but rather as properly attempting to preserve a defendant's right to have his case heard by his first jury.

2. In concluding that defense counsel lacked the opportunity to object to the court's mistrial declaration, the Kentucky Supreme Court confused the trial court's announcement that it intended to declare a mistrial with the mistrial itself, i.e., the actual discharge of the jury. Other courts have specifically recognized that the oral announcement of mistrial is not the mistrial itself, and that the case remains open until the jury has actually been discharged. See, *e.g., United States v. Razmilovic*, 507 F.3d 130, 14142 (2nd Cir. 2007); *Creighton v. Hall*, 310 F.3d 221, 228 (1st Cir. 2002), *cert denied*, 538 U.S. 933 (2003); *Camden v. Circuit Court*, 892 F.2d 610, 616 n.7 (7th Cir.1989), *cert. denied*, 495 U.S. 921 (1990); *United States v. Smith*, 621 F.2d 350, 352 n.2 (9th Cir.1980). And the federal and state appellate decisions discussed above impliedly recognize that the case remains open until the jury has actually been discharged.

Had the Kentucky Supreme Court analyzed this case using any of the standards regarding implied consent applied in the federal circuits, the court would have upheld the convictions. Certainly there was ample time for the defense to express its position on mistrial. The parties were in the courtroom for several minutes after the court declared the mistrial. The jury was not present for the declaration or for any of the discussion regarding the mistrial. Although time was available, and although the judge herself had pointed out that the jury had been sworn, instead of objecting to what the Kentucky Supreme Court called an "abrupt declaration," defense counsel engaged in discussions about a convenient trial date and whether the court would reduce bond before the new trial. Until the appeal of the convictions from the second trial, no Kentucky court was aware of any objection to the trial court's order. The absence of any objection in those circumstances would have been deemed consent in the federal circuits and state supreme courts addressed above.

Whether, and under what circumstances, to imply consent from silence are issues which have not been settled by this Court. The Kentucky Supreme Court's opinion is a prime example of how each jurisdiction has been free to develop its own standard. Whether a right under the Constitution has been waived should not be dependent upon the jurisdiction in which the case is heard. Jurisdiction should not determine application of the Constitution. Free of many of the factual complications apparent in other implied consent cases, the Kentucky opinion represents a case which would permit this Court to provide the simple

pronouncements regarding consent and waiver which are necessary in order to ensure uniform application of the Constitution and orderly administration of justice.

B. The Kentucky Supreme Court's Decision Is Contrary To This Court's Precedent Holding That Double Jeopardy Protection Belongs To The Defendant.

The Kentucky Supreme Court failed to understand the nature of the right which may be waived and the harm which occurs from twice being placed in jeopardy. The logic of looking to the defendant's actions for consent after a court makes an oral declaration of mistrial flows from the right protected and the time at which the right can no longer be vindicated. The harm is the loss of the first tribunal. As this Court has repeatedly stated, a trial which ends in a mistrial denies a defendant the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Once the jury is released, the ability to get the case resolved by that particular tribunal is forever lost, but it is not lost until then. By holding that a defendant need not and may not object to a *sua sponte* mistrial declaration after it is announced but before the jury is discharged, the Kentucky Supreme Court created an arbitrary and illogical end point to the protection of the right to trial by the first tribunal.

The double jeopardy guarantees of the Fifth Amendment involve personal rights which may be waived by a defendant. As this Court stated in *United*

States v. Dinitz, the important consideration, for purposes of the Double Jeopardy Clause, "is that the defendant retain primary control over the course to be followed." 424 U.S. 600, 607-08. Nothing in the record of this case, or the Kentucky Supreme Court's description of it, remotely suggests that the defendants had lost the ability to control the course to be followed by the court. Nowhere does the record suggest that the judge prevented the defendants from voicing opposition to a mistrial, or that there was insufficient time to do so before the release of the jury.

Rather than place the responsibility upon the defendant to press his right to proceed with the jury, the Kentucky court removed all control from the defendant by stating that "it simply does not make sense to require a criminal defendant to object to a mistrial." Such reasoning encourages defendants to stand silent in the face of improper action by a trial court, even though that action takes away their right to have their case heard by the first tribunal. See *United States v. Jorn*, 400 U.S. 470, 484 (1970) (explaining that a *sua sponte* mistrial deprives the defendant of his option to go to the first jury and perhaps end the dispute then and there with an acquittal); *Arizona v. Washington*, 434 U.S. at 497, 503-04 (1978) (having to stand trial a second time can increase the "financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted").

The Kentucky Supreme Court instead held that defendants should stand silent and await an ultimate

victory after having twice stood trial, been convicted, and had the case reversed on appeal. This Court has long discouraged such gamesmanship on the part of defendants. See, *e.g.*, *New York v. Hill*, 528 U.S. 110, 118 (2000) (a rule that defendants do not waive by silence their right to a trial within the time period required by the Interstate Agreement on Detainers "would enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recanting later on. . . . In light of its potential for abuse and given the harsh remedy of dismissal with prejudice we decline to adopt it."); *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (A party may not engage in "sandbagging" by "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later . . . claim[] that the course followed was reversible error."); *United States v. Tateo*, 377 U.S. 463, 468 fn.4 (1964) ("That any judicial system should encourage litigants to raise objections at the earliest rather than the latest possible time seems self-evident.").

The Kentucky Supreme Court's decision not only relieves defendants of the responsibility of pursuing their rights, but converts the Fifth Amendment protection, intended to shield defendants from successive prosecutions, into a sword which defendants may wield to purposely conceal their position concerning a mistrial. That court compounded its error by stating that "[i]t is the Commonwealth whose interests are harmed by an improper *sua sponte* mistrial." App. __a. This unprecedented approach to waiver and consent places the burden on the

government to object to any trial error that impairs a defendant's rights, because the error may lead to a reversal of a conviction, and a reversal is contrary to the government's interests. Such a "game theory" approach to trials runs contrary to our system of criminal justice, where each side is expected to object at trial to errors that impair their rights.

In the final analysis, the defendant is the only party who knows whether he desires the court's action or prefers to proceed with the initial tribunal. By requiring the Commonwealth to assert the defendant's rights and decide whether to object to a *sua sponte* mistrial, the Kentucky Supreme Court has removed the defendant from this process. That holding is contrary to this Court's precedent which places the defendant in control of his or her own case.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to grant the petition for writ of *certiorari.*

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

JEANNE ANDERSON*
GREGORY C. FUCHS
ASSISTANT ATTORNEYS GENERAL
(COUNSEL OF RECORD)
OFFICE OF CRIMINAL APPEALS
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342

TERESA YOUNG
ASSISTANT COMMONWEALTH'S ATTORNEY
514 WEST LIBERTY STREET
LOUISVILLE, KENTUCKY 40202
(502) 595-2300

*COUNSEL OF RECORD