

The Burger Court Opinion Writing Database

Oregon v. Kennedy

456 U.S. 667 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

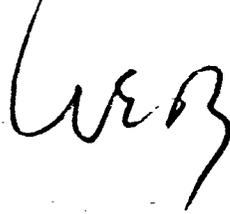
May 19, 1982

Re: 80-1991 Oregon v. Kennedy

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written over the typed name 'Justice Rehnquist'.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 15, 1982

RE: No. 80-1991 Oregon v. Kennedy

Dear Bill:

In due course I'll be circulating a dissent
in the above.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1982

RE: No. 80-1991 Oregon v. Kennedy

Dear John:

I voted to reverse in this case and I confess I am still troubled about the Krivda point. But you've written a very persuasive opinion and I am happy to join. I may, however, add a few words suggesting that it is still open to the Oregon Supreme Court to reinstate its judgment on state law grounds. You may recall that is what the state court did in the Oppenheimer case.

Sincerely,



Justice Stevens

cc: The Conference

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Brennan

Circulated: 5-20-82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER *v.* BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[May —, 1982]

By JUSTICE BRENNAN.

I concur in the judgment and join in the opinion of JUSTICE STEVENS. However, it should be noted that nothing in the holding of the Court today prevents the state courts, on remand, from concluding that respondent's retrial would violate the provision of the Oregon Constitution that prohibits double jeopardy, Ore. Const., Art. I, § 12, as that provision has been interpreted by the state courts, *State v. Rathbun*, 287 Or. 421, 600 P. 2d 329 (1979). See *South Dakota v. Opperman*, 428 U.S. 364, 396 (1976) (MARSHALL, J., dissenting), *on remand*, *State v. Opperman*, 247 N. W. 2d 673 (1976) (original state supreme court judgment adhered to as a matter of state constitutional law); *Oregon v. Hass*, 420 U.S. 714, 726 (1975) (MARSHALL, J., dissenting).

.85 NOV 50 63 AM

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 17, 1982

Re: 80-1991 - Oregon v. Kennedy

Dear Bill,

Please join me in your third draft.

Sincerely yours,

Byron

Justice Rehnquist

Copies to the Conference

cpm

.85 4/11/82

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 15, 1982

Re: No. 80-1991 - Oregon v. Kennedy

Dear Bill:

I await the dissent.

Sincerely,

T.M.

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 12, 1982

Re: No. 80-1991 - Oregon v. Kennedy

Dear John:

Please join me in your opinion.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 21, 1982

Re: No. 80-1991 - Oregon v. Kennedy

Dear Bill:

Please join me.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 3, 1982

Re: No. 80-1991 - Oregon v. Kennedy

Dear Bill:

At conference, I expressed general agreement with the Second Circuit approach, not with that of subjective intent of the prosecutor. I am still of that view. I therefore shall await John's writing.

Sincerely,

H.A.B.

Justice Rehnquist

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 10, 1982

Re: No. 80-1991 - Oregon v. Kennedy

Dear John:

With the minor change to be made in footnote 1 we discussed by telephone, I am glad to join your opinion concurring in the judgment.

Sincerely,



Justice Stevens

cc: The Conference

April 21, 1982

80-1991 Oregon v. Kennedy

Dear Bill:

I agree that it is desirable to recognize the ambiguity of our prior decisions, and to hold explicitly that unless the prosecutor intended to bring about a mistrial there would be no bar to retrial.

It does seem to me that the last full sentence on page 7 goes a bit too far - particularly the "even egregious misconduct" language. Would you consider revising that sentence generally along the following lines:

"Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, need not bar retrial. The test is whether the prosecutor intended to subvert the protections afforded by the double jeopardy clause, and this must be ascertained in light of the relevant facts and circumstances."

If you are willing to make a change along the foregoing lines, I will be happy to join your opinion. I may also add a paragraph or two in a brief concurrence.

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 23, 1982

80-1991 Oregon v. Kennedy

Dear Bill:

Please join me in your opinion, second draft
circulated April 22.

I also will write a brief concurrence.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: At N 20 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER, *v.* BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[April —, 1982]

JUSTICE POWELL, concurring.

I join the Court's opinion holding that the *intention* of a prosecutor determines whether his conduct, viewed by the defendant and the court as justifying a mistrial, bars a retrial of the defendant under the Double Jeopardy Clause. Because "subjective" intent often may be unknowable, I emphasize that a court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case. See *ante*, at 7-8 and n. 5.

In the present case the mistrial arose from the prosecutor's conduct in pursuing a line of redirect examination of a key witness. The Oregon Supreme Court identified a single question as constituting "overreaching" so serious as to bar a retrial. Yet, there are few vigorously contested lawsuits—whether criminal or civil—in which improper questions are not asked. Our system *is* adversarial and vigorous advocacy is encouraged.

Nevertheless, this would have been a close case for me if there were any substantial evidence of intent beyond the question itself. Here, however, other relevant facts and circumstances strongly support the view that prosecutorial intent to cause a mistrial was absent. First, there was no sequence of overreaching prior to the single prejudicial question. See *ante*, at 1-2 and n. 1. Moreover, it is evident from a colloquy between counsel and the court, out of

May 19, 1982

PERSONAL

80-1991 Oregon v. Kennedy

Dear Chief:

I am reluctant to withdraw my little concurring opinion, as I am not entirely comfortable with Bill's opinion without it. I have, however, fully joined his opinion so that your join will give him a solid Court.

Sincerely,

The Chief Justice

lfp/ss

P.S. I return herewith your draft as requested.

P. 1

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 20 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER, *v.* BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[May —, 1982]

JUSTICE POWELL, concurring.

I join the Court's opinion holding that the *intention* of a prosecutor determines whether his conduct, viewed by the defendant and the court as justifying a mistrial, bars a retrial of the defendant under the Double Jeopardy Clause. Because "subjective" intent often may be unknowable, I emphasize that a court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case. See *ante*, at 8.

In the present case the mistrial arose from the prosecutor's conduct in pursuing a line of redirect examination of a key witness. The Oregon Supreme Court identified a single question as constituting "overreaching" so serious as to bar a retrial. Yet, there are few vigorously contested lawsuits—whether criminal or civil—in which improper questions are not asked. Our system *is* adversarial and vigorous advocacy is encouraged.

Nevertheless, this would have been a close case for me if there have been substantial factual evidence of intent beyond the question itself. Here, however, other relevant facts and circumstances strongly support the view that prosecutorial intent to cause a mistrial was absent. First, there was no sequence of overreaching prior to the single prejudicial question. See *ante*, at 1—2 and n. 1. Moreover, it is evident from a colloquy between counsel and the court, out of the

pp. 2, 3, 5, 6, 7

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: APR 14 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

~~No. 80-1091~~

80-1990

Casper v. Kenna

~~CASPAR W. WEINBERGER, SECRETARY OF DEFENSE ET AL., PETITIONERS, v. CARLOS ROMERO-BARCELO ET AL~~

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April —, 1982]

JUSTICE REHNQUIST delivered the opinion for the Court.

The Oregon Court of Appeals decided that the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution barred respondent's retrial after his first trial ended in a mistrial granted on his own motion. 49 Or. App. 415, 619 P. 2d 948 (1980). The Court of Appeals concluded that retrial was barred because the prosecutorial misconduct that occasioned the mistrial in the first instance amounted to "overreaching." Because that court took an overly expansive view of the application of the Double Jeopardy Clause following a mistrial resulting from the defendant's own motion, we reverse its judgment.

I

Respondent was charged with the theft of an oriental rug. During his first trial, the State called an expert witness on the subject of Middle Eastern rugs to testify as to the value and the identity of the rug in question. On cross-examination, respondent's attorney apparently attempted to establish bias on the part of the expert witness by asking him whether he had filed a criminal complaint against respondent. The witness eventually acknowledged this fact, but explained that no action had been taken on his complaint. On redirect

Brennan 8/

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pp. 2,3

W...

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: APR 15 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER, *v.* BRUCE ALAN KENNEDY
ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF OREGON

[April —, 1982]

JUSTICE REHNQUIST delivered the opinion for the Court.

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W...

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 21, 1982

Re: No. 80-1991, Oregon v. Kennedy

Dear Lewis:

I do not object to removing the last full sentence on page 7 as you have suggested. I would prefer, however, to substitute the following language instead of your proposal:

"Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, however, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.[footnote 5]

[5] In determining the existence or nonexistence of such intent, the court may draw inferences from the relevant facts and circumstances."

I have substituted "would not" for your "need not"; I think that your proposed use of the "need not" language may simply continue the ambiguity of our prior decisions that both of us seek to avoid. The shifting of part of your suggested change to a footnote is purely stylistic; I thought the full paragraph sounded cumbersome with the insertion of our entire new sentence.

Please let me know if these slight modifications of your proposed change are acceptable. If they are, I will circulate a new draft of the opinion.

Sincerely,



Justice Powell

pp. 7.8

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: APR 22 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER, *v.* BRUCE ALAN KENNEDY
 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[April —, 1982]

JUSTICE REHNQUIST delivered the opinion for the Court.

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pp. 7-11

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAY 11 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER, *v.* BRUCE ALAN KENNEDY
 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[April —, 1982]

JUSTICE REHNQUIST delivered the opinion for the Court.

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To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAY 19 1982

Pp 7, 8, 12

STYLISTIC CHANGES THROUGHOUT

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER, *v.* BRUCE ALAN KENNEDY
 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[May —, 1982]

JUSTICE REHNQUIST delivered the opinion for the Court.

The Oregon Court of Appeals decided that the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution barred respondent's retrial after his first trial ended in a mistrial granted on his own motion. 49 Or. App. 415, 619 P. 2d 948 (1980). The Court of Appeals concluded that retrial was barred because the prosecutorial misconduct that occasioned the mistrial in the first instance amounted to "overreaching." Because that court took an overly expansive view of the application of the Double Jeopardy Clause following a mistrial resulting from the defendant's own motion, we reverse its judgment.

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HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1982

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 80-1991, Oregon v. Kennedy

1. Giacomino v. United States, No. 81-1233

In this case, the trial court granted petr's motion for a mistrial on the basis of the Government's failure to comply with Brady v. Maryland, 373 U.S. 83 (1963). The Government had failed to disclose the identity of a witness favorable to the defense and to furnish a transcript of that witness's testimony before the grand jury. Petr then moved to dismiss the indictment on double jeopardy grounds. The DC denied the motion and CA7 affirmed. CA7 agreed that the Government's failure to disclose the witness and to turn over the transcript was neither intended to cause a mistrial nor motivated by bad faith or "overreaching." Because the courts below found no intent on the part of the Government to provoke a mistrial, I shall vote to deny certiorari in this case.

2. Hoskins v. Cuyler, No. 81-1414

In this case, petr successfully obtained from the Pennsylvania Supreme Court a reversal of his conviction for murder, conspiracy, and two weapons charges. The Pa. S.Ct. concluded that the trial court should have granted petr's motion for a new trial on the basis of prosecutorial misconduct. Prior to his second trial, petr moved for dismissal on the ground that the Double Jeopardy Clause barred retrial. The trial court denied the motion and the S.Ct. affirmed by an equally divided court. Petr then instituted habeas corpus proceedings seeking relief from a second trial. The DC concluded that the Double Jeopardy Clause did not bar retrial because the prosecutor did not intend by his misconduct to provoke a mistrial request. CA3 affirmed on this basis in accordance with its prior decision

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 15, 1982

Re: 80-1991 - Oregon v. Kennedy

Dear Bill:

Although I agree with your result, I am still reluctant to make the subjective motivation of the prosecutor the sole test. I think I will try my hand at a separate concurrence.

Respectfully,



Justice Rehnquist

Copies to the Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

Circulated: MMV 7 '82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER *v.* BRUCE ALAN KENNEDY
 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
 OREGON

[May —, 1982]

JUSTICE STEVENS, concurring in the judgment.

Unless the Oregon Court of Appeals based its decision on Oregon law,¹ this is a case in which the state court should have applied the general rule that a defendant's motion for a mistrial removes any double jeopardy bar to retrial. The prosecutor's mistake was not the kind of overreaching or harassment identified in our precedents as an exception to the general rule. Instead of explaining why that conclusion is required by settled law, this Court gratuitously lops off a portion of the previously recognized exception. This exercise in lawmaking is objectionable because it is wholly unnecessary and because it compromises an important protection provided by the Double Jeopardy Clause.

¹ Although I am willing to accept the Court's reading of the Oregon Court of Appeals' opinion as having been based on federal law, I find the question somewhat more difficult than does the Court because the Oregon Supreme Court declined to review the case without explaining its reasons. Since the Oregon Supreme Court seems to have interpreted the state constitutional protection against double jeopardy to be broader than the federal provision, see *State v. Rathbun*, 287 Or. 421, 600 P. 2d 392 (1979), it is entirely possible that that court's refusal to review the Court of Appeals' decision was predicated on its view that the decision was sound as a matter of state law regardless of whether it was compelled by federal precedents. A proper respect for the interest in allowing state courts to administer justice without unnecessary federal interference would certainly have justified a decision by this Court to deny certiorari in this case.

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAY 11 1982

Handwritten notes: "PS" and a large handwritten "X" with a diagonal line.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER *v.* BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

[May —, 1982]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join concurring in the judgment.

Unless the Oregon Court of Appeals based its decision on Oregon law,¹ this is a case in which the state court should have applied the general rule that a defendant's motion for a mistrial removes any double jeopardy bar to retrial. The prosecutor's mistake was not the kind of overreaching or harassment identified in our precedents as an exception to the general rule. Instead of explaining why that conclusion is required by settled law, this Court gratuitously lops off a portion of the previously recognized exception. This exercise in lawmaking is objectionable because it is wholly unnecessary and because it compromises an important protection provided by the Double Jeopardy Clause.

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Handwritten note: "Omission"

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: 4/27 _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1991

OREGON, PETITIONER *v.* BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF OREGON

[May —, 1982]

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

Unless the Oregon Court of Appeals based its decision on Oregon law,¹ this is a case in which the state court should have applied the general rule that a defendant's motion for a mistrial removes any double jeopardy bar to retrial. The prosecutor's mistake was not the kind of overreaching or harassment identified in our precedents as an exception to the general rule. Instead of explaining why that conclusion is required by settled law, this Court gratuitously lops off a portion of the previously recognized exception. This exercise in lawmaking is objectionable because it is wholly unnecessary and because it compromises an important protection provided by the Double Jeopardy Clause.

¹Although I am willing to accept the Court's reading of the Oregon Court of Appeals' opinion as having been based on federal law, I find the question somewhat more difficult than does the Court because the Oregon Supreme Court declined to review the case without explaining its reasons. Since the Oregon Supreme Court seems to have interpreted the state constitutional protection against double jeopardy to be broader than the federal provision, see *State v. Rathbun*, 287 Or. 421, 600 P. 2d 392 (1979), it is entirely possible that that court's refusal to review the Court of Appeals' decision was predicated on its view that the decision was sound as a matter of state law regardless of whether it was compelled by federal precedents.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 26, 1982

Re: 80-1991 Oregon v. Kennedy

Dear Bill,

I will wait for John's separate writing in this case before deciding whether to join your opinion. You have written a strictly limited test, which I generally favor, but I shall defer the decision for the present.

Sincerely,



Justice Rehnquist

Copies to the Conference

.85 1000 810

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 11, 1982

No. 80-1991 Oregon v. Kennedy

Dear Bill,

Please join me in your opinion.

Sincerely,



Justice Rehnquist

Copies to the Conference

.85 PM 11 1982