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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

R.E.D.)

(Limestone Circuit Court, CC-15-1002;
Court of Criminal Appeals, CR-17-0984)

MENDHEIM, Justice.

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The State of Alabama petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decision granting, by an order of that court, a petition for a writ of mandamus filed by R.E.D. R.E.D. had asked the Court of Criminal Appeals to vacate the Limestone Circuit Court's order denying his request for a jury trial on the issue whether the State intentionally committed misconduct during R.E.D.'s first trial so as to goad R.E.D. into requesting a mistrial and to enter an order granting his jury-trial request. See Ex parte R.E.D. (No. CR-17-0984, September 26, 2018). We granted certiorari review to determine whether the Court of Criminal Appeals' order vacating the trial court's ruling is in conflict with Ex parte Adams, 669 So. 2d 128 (Ala. 1995), and/or Pettibone v. State, 91 So. 3d 94 (Ala. Crim. App. 2011). We conclude that the Court of Criminal Appeals' decision is in conflict with both Ex parte Adams and Pettibone, and, thus, we reverse the Court of Criminal Appeals' order.

Facts and Procedural History

R.E.D. was indicted for 106 counts of various sexual crimes including rape, sexual abuse, sodomy, and incest. The

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alleged victim in this case is R.E.D.'s adopted daughter ("the victim"). During the trial, which was held on May 2, 2018, the victim testified regarding numerous instances of rape and other sexual crimes allegedly committed by R.E.D. against her. The issue before this Court concerns the victim's use of her handwritten notes during her testimony at trial.

During the victim's testimony at trial, the State sought to use two different sets of notes that had been created by the victim to refresh her recollection while she testified. The first set of notes that the State sought to use to refresh the victim's recollection were notes the victim had created in preparation for her testimony before the grand jury concerning the crimes R.E.D. allegedly had committed against the victim ("the grand-jury notes"). The grand-jury notes were provided to R.E.D. Although R.E.D. objected to any mention of the grand-jury proceedings, R.E.D. did not object to the victim's using the grand-jury notes to refresh her recollection while she testified at the trial. Ultimately, the trial court ruled that the victim could review the grand-jury notes to refresh her recollection but that "she may not read [the grand-jury

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notes] aloud and [they] will not be introduced into evidence and the jury will not receive [them]."

The second set of notes the State sought to use to refresh the victim's recollection were notes the victim had created in preparation for trial ("the trial notes"). It is undisputed that the State was aware that the victim was planning to use the trial notes to refresh her recollection during the trial and that it did not inform R.E.D. or the trial court of this fact. In fact, R.E.D. only became aware of the victim's use of the trial notes during the trial when R.E.D.'s trial counsel happened to notice that the victim was referencing the trial notes during her testimony. Based on the victim's use of the trial notes, R.E.D. requested that the trial court declare a mistrial. The State made extensive argument as to why a mistrial was not necessary. Over the State's objection, the trial court ultimately granted R.E.D.'s request and declared a mistrial.

On May 25, 2018, R.E.D. filed a motion to dismiss the charges against him. R.E.D. argued that a retrial would violate his right to be free from double jeopardy. In Kinard

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v. State, 495 So. 2d 705, 707 (Ala. Crim. App. 1986), the Court of Criminal Appeals stated:

"The standard to be applied in the determination of a claim of a Fifth Amendment double jeopardy bar following a defendant's motion for mistrial was enunciated in Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982):

''[T]he circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial.'

"(Emphasis added.) 456 U.S. at 679, 102 S. Ct. at 2091."

R.E.D. argued that, although "a retrial is not barred by the prohibition against double jeopardy ..., an exception to the rule is when the [State's] actions were intended to goad the defendant into moving for a mistrial." Specifically, R.E.D. argued:

"[T]he actions of the [State] in allowing the alleged victim to take the stand with notes that were not provided to defense counsel, nor made known to the court, knowing that such activity is a direct violation of the rules of discovery, evidence and trial conduct, was done in an effort to goad [R.E.D.] into requesting a mistrial."

R.E.D. requested that the trial court dismiss the charges against him or, in the alternative, set the matter for a jury

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trial "to allow a jury to make a determination of the factual issue of whether the [State's] conduct in the first trial was intentionally designated to provoke a mistrial." R.E.D. did not submit any evidence in support of his motion. On May 29, 2018, the trial court denied R.E.D.'s motion.

On June 1, 2018, R.E.D. filed a motion requesting that the trial court reconsider its ruling. Citing Ex parte Adams, 669 So. 2d 128 (Ala. 1995), R.E.D. again requested that he be granted a jury trial "to determine the factual issue of whether the [State's] conduct was intentionally designated to provoke a mistrial." Once again, R.E.D. did not submit any evidence in support of his motion. On June 6, 2018, the trial court denied R.E.D.'s motion.

On July 10, 2018, R.E.D. filed a petition for a writ of mandamus in the Court of Criminal Appeals, requesting that that court vacate the trial court's denial of his motion for a jury trial and order the trial court to conduct a jury trial "to determine the factual issue of whether the [State's] conduct, which caused a mistrial in the first trial, was intentional thereby invoking the defense of double jeopardy."

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On September 26, 2018, the Court of Criminal Appeals issued an order granting R.E.D.'s mandamus petition and ordering that the trial court "afford R.E.D. a trial by jury pursuant to Rule 15.4(b), Ala. R. Crim. P., on the question of whether the [State] intentionally and improperly acted so as to provoke a mistrial." Ex parte R.E.D. (No. CR-17-0984, September 26, 2018). The State filed an application for rehearing, which was ultimately denied on May 10, 2019.

On May 17, 2019, the State filed a petition for certiorari review with this Court, which we granted on August 8, 2019, to determine whether the Court of Criminal Appeals' decision is in conflict with Ex parte Adams, 669 So. 2d 128 (Ala. 1995), or Pettibone v. State, 91 So. 3d 94 (Ala. Crim. App. 2011).

Discussion

The State argues that the Court of Criminal Appeals' decision is in conflict with Ex parte Adams and Pettibone. We find the State's argument convincing, and we reverse the Court of Criminal Appeals' judgment.

In Pettibone, after his first trial ended in a mistrial, Bryan Pettibone was convicted in a second trial of numerous

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counts of enticing a child for immoral purposes, second-degree sexual abuse, and attempted second-degree sexual abuse. During the course of Pettibone's first trial, one of the victim's of Pettibone's criminal conduct offered testimony that Pettibone was unaware would be presented. After the victim testified and was cross-examined, Pettibone filed a motion for a mistrial, arguing that he had no notice that the victim would offer the particular testimony she offered and arguing that the testimony was highly prejudicial. The prosecutor stated that the victim informed him the day of the trial that she was going to offer the disputed testimony, but the prosecutor failed to inform Pettibone of this fact before trial. Upon questioning by the trial court, the victim confirmed that she did, in fact, notify the prosecutor on the day of trial about the testimony she would offer. The trial court granted Pettibone's motion for a mistrial.

Before the start of the second trial, Pettibone filed a pretrial motion to dismiss the charges against him, arguing that the Double Jeopardy Clause barred the prosecutor from trying Pettibone for the same offenses a second time. In support of his double-jeopardy argument, Pettibone argued that

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"the statements that [the victims of Pettibone's criminal conduct] submitted to law enforcement after the first trial ... contained additional allegations of which the prosecution was aware during the first trial, and the prosecution wanted the first trial to end in a mistrial so that the prosecution could begin a new trial using these additional allegations."

Pettibone, 91 So. 3d at 101-02. Essentially, Pettibone argued that the prosecutor's "conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667, 679 (1982). Pettibone also "requested that the trial court empanel a jury to determine if the prosecution in Pettibone's first trial did, in fact, goad the defense into moving for a mistrial." Pettibone, 91 So. 3d at 102. The trial court did not grant Pettibone's request for a jury trial on the prosecutorial-intent issue but did conduct a pretrial hearing on Pettibone's motion. The trial court denied Pettibone's motion to dismiss, and the matter proceeded to a second trial on the indictment against Pettibone. Pettibone was convicted of all counts.

Pettibone appealed, arguing that the trial court erred in denying his motion to dismiss and in refusing to empanel a jury to consider the double-jeopardy issue. The Court of

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Criminal Appeals concluded that "Pettibone is not entitled to relief upon this claim" "because Pettibone did not present substantial evidence showing that the prosecution goaded the defense into moving for a mistrial." Pettibone, 91 So. 3d at 105. In so concluding, the Court of Criminal Appeals stated:

"Pettibone argues that the prosecution goaded him into moving for a mistrial so that the prosecution could obtain additional statements from the remaining victims ... to support additional allegations of abuse. However, Pettibone has not presented this Court with any portions of the trial transcript from the first trial that contain testimony from these three victims. Therefore, Pettibone has not supplied a sufficient record as to this particular argument. Further, we question whether the statements these victims made after the first trial but before the second trial, which Pettibone presented as evidence during the hearing on this motion, are relevant as to whether the prosecution goaded the defense into making a motion for a mistrial. Pettibone apparently bases this argument on the theory that the first trial was not progressing favorably for the State and that the State presented [the victim's] testimony in an attempt to obtain a mistrial and a chance at a second trial. However, Pettibone did not present arguments or evidence that the first trial was, in fact, going poorly for the State."

91 So. 3d at 105. The Court of Criminal Appeals stated elsewhere in its opinion that "Pettibone has failed to present sufficient evidence or to raise an inference that the prosecution goaded him into making a motion for a mistrial."

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91 So. 3d at 104. In support of that conclusion, the Court of Criminal Appeals noted that the record from the first trial contained no evidence indicating that "the prosecution had engaged in misconduct" and that "the prosecution vigorously opposed the trial court's declaration of a mistrial." Id.

In summary, the Court of Criminal Appeals determined that Pettibone was "not entitled to relief upon this claim" because he failed to "present substantial evidence showing that the prosecution goaded the defense into moving for a mistrial." 91 So. 3d at 105. Pettibone requires a criminal defendant who has been granted a mistrial based on prosecutorial misconduct and who files a motion to bar reprosecution on double-jeopardy grounds to present with his or her motion substantial evidence indicating that the prosecutor acted with intent to goad the defendant into moving for a mistrial in order to have the issue of prosecutorial intent tried before a jury.

Our interpretation of Pettibone is consistent with this Court's holding in Ex parte Adams. In Ex parte Adams, Jason Adams was charged with manslaughter. Adams's first trial ended in a mistrial. The prosecutor "made a particular statement containing a pejorative racial term," and the trial

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court, "on its own motion and without hearing arguments from the defense or the prosecution, declared a mistrial." 669 So. 2d at 129. The State sought to re prosecute Adams on the same charge, and Adams filed a motion to dismiss, arguing that the Double Jeopardy Clause barred the prosecutor from trying Adams a second time because, Adams argued, in the first trial the prosecutor acted with intent to goad Adams into filing a motion for a mistrial; Adams requested a jury trial on the double-jeopardy issue. The trial court denied Adams's motion to dismiss and his request for a jury trial.

Adams's second trial also ended in a mistrial. The case had been "submitted to the jury on December 6, 1994. However, on December 7, 1994, one of the 12 jurors failed to return from an overnight recess. Although Adams agreed to allow the 11 remaining jurors to continue deliberations, the State refused. Therefore, the trial court declared a second mistrial." Ex parte Adams, 669 So. 2d at 129.

Once again, the State sought to re prosecute Adams on the same manslaughter charge. Before the start of the third trial, Adams again filed a motion to dismiss the charge on the

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basis of the Double Jeopardy Clause and again requested a jury trial on the issue. Adams supported his motion to dismiss

"with affidavits from Adams's attorney, the foreman of the second jury, and excerpts from the court reporter's transcript from the second trial. The affidavits indicated that the jury in the second trial had not believed that Adams was guilty of manslaughter, but that the jury had been unable to agree whether it should find Adams guilty of criminally negligent homicide or should find him not guilty. Adams alleges that on the morning of December 7, 1994, in the trial judge's chambers, the prosecutor had agreed to try the case with 11 jurors, but objected to an 11-person jury after entering the courtroom and realizing that the jury was unlikely to convict Adams for manslaughter."

Ex parte Adams, 669 So. 2d at 129. Without conducting a jury trial, the trial court denied Adams's motion to dismiss. Before the commencement of his third trial, Adams petitioned this Court for mandamus review of the trial court's decision.

The issue before this Court in Ex parte Adams was whether "the trial court erred in denying Adams's request for a jury trial on the question whether the prosecutor intentionally and improperly acted so as to provoke a mistrial in the first trial." 669 So. 2d at 129. As part of its analysis, this Court considered the extensive facts before it concerning the mistrial that was the result of Adams's first trial, including facts that could support a conclusion that the prosecutor

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acted with intent to goad Adams into filing a motion for a mistrial. See Ex parte Adams, 669 So. 2d at 130-32. Adams also identified additional evidence that he could present at a jury trial to further prove that the prosecutor acted with intent to goad him into filing the motion for a mistrial. 669 So. 2d at 132 ("Adams also argues that he could present ... evidence [that] would further support an inference that the prosecutor intentionally posed an improper question to provoke the first mistrial."). This Court stated: "Based on the particular facts before us, we believe Adams presented substantial evidence that the first mistrial was due to the prosecutor's intentional misconduct. These factual questions create the need for a trial by jury on that issue, pursuant to Rule 15[, Ala. R. Crim. P.]." 669 So. 2d at 130. In concluding that Adams was entitled to a jury trial on the issue of prosecutorial intent, this Court stated:

"In light of the circumstances of this case raising a question of fact as to the prosecutor's conduct in the first trial, we hold, pursuant to Ala. R. Crim. P. 15.4, that a jury trial should have been granted to determine the factual issue of whether the prosecutor's conduct in the first trial was intentionally designed to provoke a mistrial."

669 So. 2d at 132.

We conclude that the Court of Criminal Appeals' decision in the present case is in conflict with Ex parte Adams and Pettibone. Before a criminal defendant is entitled to a jury trial on the issue of prosecutorial intent, the criminal defendant must present substantial evidence that could rationally support a conclusion that the State acted intentionally to goad the criminal defendant into filing a motion for a mistrial.¹ Although prosecutorial intent is a

¹Smith v. State, 745 So. 2d 284 (Ala. Crim. App. 1998), a case cited by the State in its brief before this Court, also supports this principle and addresses the same issue that is present in this case. In Smith, criminal defendants filed a motion to dismiss the charges against them after a mistrial was granted in the criminal defendants' initial trial. The criminal defendants argued that a second trial would violate their double-jeopardy rights because, they asserted, during the first trial, the prosecutor committed misconduct with the intent to goad them into requesting a mistrial; the criminal defendants requested a trial on the issue of prosecutorial intent. The trial court denied the criminal defendants' request. On appeal, the Court of Criminal Appeals stated:

"In light of the complete absence of any evidence of intent on the part of the prosecution, and in light of clear evidence that [contested evidence presented during the course of the trial] was produced pursuant to a specific order of the trial court, the judge did not err in determining that a jury trial on the [defendants'] motion was not required in denying the motion."

Smith, 745 So. 2d at 288. Central to the Court of Criminal Appeals' ruling upholding the trial court's decision to deny the criminal defendants' request for a jury trial on the issue

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factual issue, see Ex parte Ryals, 819 So. 2d 114, 116 (Ala. Crim. App. 2001) ("The question of the prosecutor's intent [is] a question of fact, not a question of law."), in this context the criminal defendant must present substantial evidence creating a factual issue to be decided by a jury before he or she is entitled to a jury trial.

To create a question of fact to be decided by the jury, the evidence presented by the criminal defendant in support of a motion for a jury trial on prosecutorial intent must support the conclusion that the State committed misconduct with the intent of goading the defendant into requesting a mistrial. A criminal defendant must do more than allege that the State's actions prejudiced him or her. As the United States Supreme Court noted: "Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of guilt," Kennedy, 456 U.S. at 674; such acts are simply part of the adversarial process. A criminal defendant must also allege more than mere legal or factual error by the State;

of prosecutorial intent was the fact that the criminal defendants had failed to present any evidence to support their allegation that the prosecutor had intentionally committed misconduct to goad the defendants into requesting a mistrial.

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there must be evidence indicating that the State committed such error with the intent to goad the defendant into filing a motion for a mistrial in violation of principles of double jeopardy. See Spears v. State, 647 So. 2d 15, 22 (Ala. Crim. App. 1994) ("The requirement of intent is critical, and easily misunderstood. The fact that the government blunders at trial and the blunder precipitates a successful motion for a mistrial does not bar a retrial. [Oregon v. Kennedy, 456 U.S. 667,] 674-76, 102 S. Ct. [2083,] 2088-90 [(1982)]; Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1972); United States v. Powell, 982 F.2d 1422, 1429 (10th Cir. 1992); United States v. Perez Sanchez, 806 F.2d 7 (1st Cir. 1986).'" (quoting United States v. Oseni, 996 F.2d 186, 188 (7th Cir. 1993))). The criminal defendant must present substantial evidence indicating that the State committed misconduct with the intent to goad the defendant into filing a motion for a mistrial.²

²Relevant to this showing is evidence indicating that the State believes that the trial is not proceeding favorably for the State. For instance, in Ex parte Adams the evidence indicated that the prosecutor believed that the jury was likely to acquit the defendant based on questions the jury asked the trial court during its deliberations. 669 So. 2d at 131. Other potential evidence indicating that the trial is not proceeding favorably for the State may include oral

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In the present case, the Court of Criminal Appeals expressly rejected this standard and did not consider whether R.E.D. presented evidence indicating that the State committed misconduct with the intent to goad him into filing a motion for a mistrial. The Court of Criminal Appeals interpreted Ex parte Adams in a manner inconsistent with this opinion, stating in its unpublished order that this Court, in Ex parte Adams, "merely stated that Adams had presented substantial evidence that the mistrial was due to the prosecutor's intentional misconduct; it did not hold that substantial evidence must be presented in order to warrant such a trial." Based on our interpretation of Pettibone and Ex parte Adams, we hold that that aspect of the Court of Criminal Appeals' order is in error. To be entitled to a jury trial on prosecutorial intent, R.E.D. was required to present substantial evidence in support of his motion that the State committed misconduct with the intent to goad him into filing a motion for a mistrial.

Conclusion

observations of the trial court, rulings of the trial court, a change in testimony by a witness, failure of a witness to appear, and a multitude of other unforeseen issues that can arise in the midst of a trial.

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Based on our conclusion that the Court of Criminal Appeals' order is in conflict with Pettibone and Ex parte Adams, we reverse the Court of Criminal Appeals' judgment and remand the case to that court for proceedings consistent with this opinion. Specifically, as required by Pettibone and Ex parte Adams, the Court of Criminal Appeals is to consider whether the materials before it contain substantial evidence indicating that R.E.D. is entitled to a jury trial on the issue of prosecutorial intent.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, Sellers, Stewart, and Mitchell, JJ., concur.

Shaw and Bryan, JJ., dissent.

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BRYAN, Justice (dissenting).

As the majority notes, we granted the State of Alabama's petition for the writ of certiorari to determine whether the Court of Criminal Appeals' decision in this case, Ex parte R.E.D. (No. CR-17-0984, Sept. 26, 2018), is in conflict with either this Court's decision in Ex parte Adams, 669 So. 2d 128 (Ala. 1995), or with the Court of Criminal Appeals' decision in Pettibone v. State, 91 So. 3d 94 (Ala. Crim. App. 2011). I do not believe that the Court of Criminal Appeals' decision is in conflict with either of those cases. Therefore, I would quash the writ, and I respectfully dissent from the majority's opinion reversing the Court of Criminal Appeals' judgment. In so doing, I make three points.

I. Opportunity to Be Heard

In this case, the Limestone Circuit Court ("the trial court") sua sponte summarily denied R.E.D.'s motion raising the issue of double jeopardy without conducting a hearing. The Court of Criminal Appeals' unpublished order vacated the trial court's order denying R.E.D.'s motion requesting a jury trial on the issue whether the State intentionally committed prosecutorial misconduct to goad R.E.D. into requesting a

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mistrial. In my opinion, the State has failed to demonstrate that the Court of Criminal Appeals' decision is in conflict with Ex parte Adams, Pettibone, or another case the majority cites, Smith v. State, 745 So. 2d 284 (Ala. Crim. App. 1998),³ because, in each of those cases, the defendants received at least an opportunity to be heard regarding the factual allegations related to their claims of double jeopardy. In other words, in none of those cases did this Court or the Court of Criminal Appeals hold that trial courts can do what the trial court did in this case.

In Ex parte Adams, this Court granted mandamus relief and ordered the trial court to conduct a jury trial "on the question whether the prosecutor intentionally and improperly acted so as to provoke the mistrial in the first trial." 669 So. 2d at 133. In Pettibone, the trial court held an evidentiary hearing before denying the defendant's double-jeopardy claim. 91 So. 3d at 102, 105. The trial court in Smith, 745 So. 2d at 288, also conducted a hearing before denying the defendants' motion raising the issue of double jeopardy.

³See ____ So. 3d at ____.

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In this case, the trial court denied R.E.D.'s motion raising the issue of double jeopardy without affording R.E.D. an opportunity to be heard regarding his allegations. The Court of Criminal Appeals' decision vacating the trial court's order is in accord with the general rule regarding double-jeopardy claims involving questions of fact, the applicability of which is also reflected in Ex parte Adams, Pettibone, and Smith. In Billups v. City of Birmingham, 367 So. 2d 518, 522 (Ala. Crim. App. 1978), the Court of Criminal Appeals explained:

"It is not for the court to decide in advance that a plea sufficient on its face cannot be established and, if the facts set forth are sufficient in law, it is error for the court to strike or overrule it on motion of the prosecution, or on its own motion, without giving the accused an opportunity to submit his evidence in support thereof."

The foregoing principle was also acknowledged by this Court in Ex parte Adams, 669 So. 2d at 132: "'Ordinarily, a court may not overrule a motion of autrefois convict, or plea of former jeopardy, without allowing the party an opportunity to submit supporting evidence.'" (Quoting Story v. State, 435 So. 2d 1360, 1364 (Ala. Crim. App. 1982), reversed on other grounds, 435 So. 2d 1365 (Ala. 1983).) Notably, the Court of

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Criminal Appeals' decision in this case quoted the same language from Story that this Court quoted in Ex parte Adams.

As the majority explains, R.E.D.'s particular double-jeopardy claim is based on an allegation that the State intentionally provoked him into moving for a mistrial during his first trial. As the majority's explanation of the pertinent standard also illustrates, proving such a claim can be difficult. However, if R.E.D.'s allegation is true, he would be entitled to the relief he seeks. See Oregon v. Kennedy, 456 U.S. 667 (1982). Based on precedent from this Court and the Court of Criminal Appeals, it was not for the trial court to decide that R.E.D.'s allegation was not true without giving R.E.D. at least an opportunity to be heard regarding his claim. See Ex parte Adams, 669 So. 2d at 132; Pettibone, 91 So. 3d at 102, 105; Smith, 745 So. 2d at 288; and Billups, 367 So. 2d at 522.

In light of the foregoing, I believe that the majority opinion effectively creates a new rule in Alabama for the type of double-jeopardy claims authorized by Oregon. Instead of being entitled to at least an opportunity to be heard like other defendants who assert factual allegations in support of

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a claim of double jeopardy, future defendants, starting with R.E.D., who allege that the State intentionally provoked them into moving for a mistrial will be required to "present substantial evidence in support of [their] motion[s]," or else be subject to a sua sponte summary denial of their motion by the trial court. ____ So. 3d at ____.⁴ In other words, the majority's rule creates what appears to me to be a heightened "pleading" requirement for criminal defendants who assert a double-jeopardy claim based on an allegation that the State intentionally provoked them into moving for a mistrial.

Perhaps creating the majority's rule, or something like it, could be justified in another case, but, in my opinion, this case is not the one. As noted above, the ground upon which we granted the State's certiorari petition was an alleged conflict between the Court of Criminal Appeals'

⁴The majority opinion attributes this rule to the holding in Pettibone. However, Pettibone did not hold that a criminal defendant is required to "present with his or her motion substantial evidence indicating that the prosecutor acted with intent to goad the defendant into moving for a mistrial in order to have the issue of prosecutorial intent tried before a jury." ____ So. 3d at _____. Instead, the Court of Criminal Appeals determined that the defendant in Pettibone was not entitled to a jury trial after considering the evidence he presented and failed to present at the trial court's pretrial hearing. 91 So. 3d at 105.

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decision in this case and prior decisions of this Court or of that court. See Rule 39(a)(1)(D), Ala. R. App. P. The State has not alleged that this case presents a material question of first impression requiring decision by this Court. See Rule 39(a)(1)(C), Ala. R. App. P. Put another way, the State has simply not asked us to create a new rule in this case. Therefore, I am unwilling to do so under these circumstances.

As Justice Harwood noted in Ex parte Pankey, 848 So. 2d 963, 968 (Ala. 2002) (Harwood, J., concurring specially), the grounds for review set forth in Rule 39 of the Alabama Rules of Appellate Procedure are explicit, mandatory, and "definitively restrictive," and this Court should endeavor to "constrain [its] appellate review accordingly." I would apply Justice Harwood's suggestion of restraint to the circumstances of this case.

In so doing, I reiterate that the Court of Criminal Appeals' decision vacated the trial court's sua sponte summary denial of R.E.D.'s motion raising the issue of double jeopardy, relying on language from this Court's decision in Ex parte Adams and the Court of Criminal Appeals' decision in Story holding that trial courts should not generally deny a

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double-jeopardy claim without affording the defendant at least an opportunity to be heard regarding that claim. Pettibone is consistent with this principle because the trial court in Pettibone conducted an evidentiary hearing before denying the defendant's double-jeopardy claim.

Thus, in my opinion, the Court of Criminal Appeals' decision in this case is not in conflict with either Ex parte Adams or Pettibone. Therefore, I cannot, in accordance with the limited ground upon which this Court granted review in this case, concur to reverse the Court of Criminal Appeals' judgment. Accordingly, I dissent from the majority's decision to do so and would instead quash the writ.

II. Right to a Jury Trial

Although I believe R.E.D.'s right to an opportunity to be heard regarding his double-jeopardy claim is clear, I acknowledge that a question still remains regarding whether R.E.D.'s opportunity to be heard should come in the form of a jury trial, which is what the Court of Criminal Appeals directed be done in this case. However, I do not believe that the Court of Criminal Appeals' decision is in conflict with either Ex parte Adams or Pettibone regarding that question

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either. In reaching that conclusion, I first note that the Court of Criminal Appeals determined that a jury trial should be conducted by expressly relying on Ex parte Adams.

In Ex parte Adams, 669 So. 2d at 132, this Court articulated the general rule as follows: "'An accused is entitled to a jury trial on the issues of fact raised by the plea and the issue of former jeopardy should be submitted for the jury's determination before submission of the issue of guilt.'" (Quoting Story, 435 So. 2d at 1364 (emphasis added).) It even described a defendant's right to a jury trial regarding questions of fact pertaining to double-jeopardy claims as a "constitutional right" and indicated that jury trials are "constitutionally required" for such claims. 669 So. 2d at 133, 132 (emphasis added). Thus, the Court of Criminal Appeals' decision requiring the trial court to conduct a jury trial regarding R.E.D.'s double-jeopardy claim is not in conflict with Ex parte Adams.

Notably, however, although the defendant in Pettibone received an evidentiary hearing regarding his double-jeopardy claim, he did not receive a jury trial regarding that claim, and the Pettibone court held that the trial court's denial of

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the defendant's request for a jury trial in that case was not reversible error. 91 So. 3d at 104-05. In so doing, the Pettibone court distinguished Ex parte Adams on the ground that the defendant in Ex parte Adams had presented "substantial evidence" in support of his allegation that the State had intentionally provoked a mistrial. 91 So. 3d at 103.

Thus, Pettibone stands for the proposition that a trial court's failure to conduct a jury trial regarding a double-jeopardy claim based on a defendant's allegation that the State intentionally provoked a mistrial does not amount to reversible error if the record demonstrates that the defendant failed to present substantial evidence in support of his or her allegation. That proposition is in accord with other decisions of the Court of Criminal Appeals holding that a criminal defendant bears the burden of presenting substantial evidence in support of the factual allegations underlying his or her double-jeopardy claim in order to have that claim decided by a jury. See, e.g., Washington v. State, 818 So. 2d 411, 420 (Ala. Crim. App. 1998) ("[T]he burden of proving a plea of former jeopardy is on the defendant. ... A directed

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verdict is proper when the party who bears the burden of presenting evidence fails to present substantial evidence in support of its position."); Spears v. State, 647 So. 2d 15, 21 (Ala. Crim. App. 1994) ("Principles of jeopardy did not bar the appellant's second trial because the appellant failed to present evidence at the jury trial on the jeopardy issue that the district attorney intended to cause a mistrial."); Billups, 367 So. 2d at 522 ("[E]ven where the issue is submitted to a jury, the court may charge the jury that the plea is not sustained by the proof when that is a fact, and where the facts are not controverted the court has the authority to direct a verdict for or against the state as the case may require."); and Inman v. State, 39 Ala. App. 496, 497, 104 So. 2d 448, 450 (1958) ("[W]here the evidence introduced shows without contradiction that the plea could not avail even had the issues been submitted to the jury, a defendant is not prejudiced in his substantial rights by the action of a court in denying such plea without submitting it to the jury.").

In other words, a criminal defendant bears the burden of proving the factual allegations supporting his or her double-

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jeopardy claim. See Washington, 818 So. 2d at 420, and Spears, 647 So. 2d at 21. If, during a jury trial on that claim, the defendant fails to present substantial evidence in support of the allegations, Washington, Spears, Billups, and Inman indicate that the trial court may properly decline to submit the question to the jury and instead direct a verdict for the State on the double-jeopardy claim. Pettibone indicates that a trial court's failure even to conduct a jury trial in the first place may not amount to reversible error if it is clear on appeal that the defendant could not present substantial evidence in support of his or her allegations.⁵

However, as reflected by the portions of the foregoing cases quoted above, the pertinent rules apply when a defendant has at least been afforded an opportunity to be heard regarding the factual allegations underlying his or her double-jeopardy claim, such that an appellate court can adequately ascertain the probable merit of the claim to determine whether the trial court's failure to allow a jury to decide the claim amounted to reversible error. In other words, only after a defendant has been afforded an opportunity

⁵See also Smith, 745 So. 2d at 288.

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to be heard regarding his or her double-jeopardy claim can it be conclusively decided that the defendant's proffered evidence was not substantial and, therefore, that no reversible error occurred in failing to allow a jury to decide the claim.

As explained above, in this case, the trial court sua sponte summarily denied R.E.D.'s motion raising the issue of double jeopardy. Thus, unlike the court in Pettibone, the Court of Criminal Appeals could not have determined in this case that, despite having an opportunity to do so, R.E.D. failed to present substantial evidence in support of his claim and that, therefore, the trial court did not err to reversal by failing to conduct a jury trial regarding that claim. Compare with Pettibone, 91 So. 3d at 105 (considering evidence the defendant presented and failed to present at the trial court's pretrial hearing regarding the defendant's motion raising the issue of double jeopardy). Because R.E.D. did not receive the same opportunity to be heard as did the defendant in Pettibone, i.e., an evidentiary hearing, the Court of Criminal Appeals simply could not evaluate the sufficiency of the evidence R.E.D. might rely upon in support of his

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allegations. Accordingly, in my opinion, the Court of Criminal Appeals' decision to direct the trial court to conduct a jury trial in this case is not in conflict with Pettibone, where, by contrast, the Court of Criminal Appeals could conclusively determine that substantial evidence did not exist to support the defendant's double-jeopardy claim after reviewing the record on appeal, including the evidence presented by the defendant at the trial court's pretrial hearing concerning the defendant's double-jeopardy claim.

As noted above, this Court's decision in Ex parte Adams, 669 So. 2d at 132, indicates that a defendant's opportunity to present evidence in support of his or her allegation that the State intentionally provoked him or her into moving for a mistrial should generally come in the form of a jury trial, which is what the Court of Criminal Appeals directed be done in this case. Pettibone, 91 So. 3d at 103-105, reflects circumstances under which that general rule may not apply to require reversal of the trial court's failure to conduct a jury trial. However, the circumstances of Pettibone are not present here. Because I see no conflict between the Court of Criminal Appeals' decision and Ex parte Adams or Pettibone, I

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would quash the writ and decline to reverse the Court of Criminal Appeals' judgment.

III. Subsequent Trial Court Proceedings

Because I would quash the writ, I would permit the trial court to conduct a jury trial regarding R.E.D.'s double-jeopardy claim, as directed by the Court of Criminal Appeals. However, the fact that the trial court would be required to conduct such a trial should not be viewed, in any way, as an indication that R.E.D.'s allegation that the State intentionally provoked him into moving for a mistrial has any actual merit.

At the jury trial on his double-jeopardy claim, R.E.D. would still bear the burden of proving his claim. See Washington, 818 So. 2d at 420, and Spears, 647 So. 2d at 21. As the majority explains, proving that claim would require R.E.D. to present evidence regarding the specific intent behind certain actions undertaken by the State during R.E.D.'s first trial -- not merely to allege that the State's actions prejudiced him. The likelihood that R.E.D. could prove such a claim under the circumstances of this case may be remote. In accordance with Pettibone, Washington, Spears, Billups, and

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Inman, the trial court would be justified in directing a verdict for the State if R.E.D. failed to present substantial evidence in support of his double-jeopardy claim instead of submitting the claim to the jury. Upon completion of that process, however, it could conclusively be determined, upon challenge by R.E.D., whether his double-jeopardy claim lacked merit.

Shaw, J., concurs.