

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE §
PETITION OF ALONZO MORRIS §
FOR A WRIT OF PROHIBITION. § No. 513, 2002
 §

Submitted: October 28, 2002

Decided: November 4, 2002

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 4th day of November 2002, upon consideration of the petition of Alonzo Morris for a writ of prohibition, the State of Delaware's answer and motion to dismiss, the Superior Court's October 16, 2002 memorandum opinion, and the parties' supplemental memoranda dated October 28, 2002, it appears to the Court that:

(1) Morris seeks a writ of prohibition to prevent the Superior Court from retrying him on charges of Assault in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony.¹ Morris claims that the double jeopardy clauses of the United States and Delaware Constitutions bar his retrial, even in the absence of a defense request for a mistrial, because the

¹This Court reversed Morris' original convictions on the ground that the trial court erred by failing to cure the effect of improper closing remarks by the prosecutor. *Morris v.*

prosecution's improper opening and closing statements to the jury exhibited a pattern of bad faith that deprived him of a fair trial. Morris asks this Court to stay his retrial² pending its review of the Superior Court's denial of his motion to dismiss on double jeopardy grounds.³ The State of Delaware, as the real party in interest, filed a response and a motion to dismiss Morris' petition. Following the issuance of the Superior Court's October 16, 2002 memorandum opinion, the parties filed supplemental memoranda on October 28, 2002. After careful consideration of the parties' positions, we have determined that the State's motion to dismiss must be granted.

State, 795 A.2d 653, 655-56 (Del. 2002).

²On September 6, 2002, the Superior Court denied Morris' motion to stay his retrial, which is scheduled for November 12, 2002.

³The Superior Court issued its oral ruling denying Morris' motion to dismiss on September 6, 2002 and its written decision on October 16, 2002.

(2) In a writ of prohibition proceeding, the petitioner has the burden of demonstrating to this Court, by clear and convincing evidence, that the contemplated action of the trial court exceeds its jurisdiction.⁴ A writ of prohibition will not be issued if the petitioner has another adequate and complete remedy.⁵ The right to appeal is generally considered to be such an adequate and complete remedy.⁶ This Court has acknowledged, however, that the remedy of appeal in a criminal case may be inadequate when the lack of jurisdiction of the trial court is clear and unmistakable.⁷

(3) It is well established that double jeopardy bars a retrial when the prosecution intentionally goads the defense into requesting a mistrial.⁸ Morris argues that, even in the absence of a request for a mistrial, the rationale of *Oregon v. Kennedy* can be logically extended to bar his retrial. According to Morris, the prosecutorial misconduct that caused the reversal of his prior conviction was

⁴*In re Hovey*, 545 A.2d 626, 629 (Del. 1988).

⁵*Id.* at 628.

⁶*Id.*

⁷*Id.* at 629.

⁸*Sudler v. State*, 611 A.2d 945, 948-49 (Del. 1992); *Bailey v. State*, 521 A.2d 1069, 1078 (Del. 1987) (citing *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982)).

intentional because the improper closing argument was contrary to the standards established by this Court approximately sixteen years ago.⁹

(4) The lack of jurisdiction alleged by Morris is not so “clear and unmistakable” that the remedy of appeal may be inadequate. As the Superior Court correctly noted, Morris’ situation is distinguishable from that presented in *Oregon v. Kennedy* because Morris did not move for a mistrial during his first trial. Accordingly, Morris has not sustained his burden of demonstrating, by clear and convincing evidence, that his scheduled retrial exceeds the jurisdiction of the Superior Court.

(5) Our denial of relief through a writ of prohibition in this case does not preclude the assertion of a claim by Morris that his second trial was barred by double jeopardy in the event of a direct appeal following any subsequent conviction.

NOW, THEREFORE, IT IS ORDERED that the State’s motion to dismiss is GRANTED. Morris’ petition for a writ of prohibition is DISMISSED.

BY THE COURT:

/s/ Randy J. Holland

⁹*Fensterer v. State*, 509 A.2d 1106, 1112 (Del. 1986).

Justice