

Opinion in Chambers

## DIVANS v. CALIFORNIA

## ON APPLICATION FOR STAY

No. A-233. Decided September 1, 1978

Application to stay, pending the filing of a petition for certiorari, California Superior Court's retrial of applicant for murder is denied. The application contains nothing to contradict the Superior Court's finding that the prosecutor's error that resulted in a mistrial at the first trial was not calculated to force applicant to move for a mistrial, and, accordingly, it is unlikely that this Court would grant certiorari to review applicant's double jeopardy claim.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant's motion to stay the proceedings in the Superior Court of Santa Clara County, Cal., is denied.

In July 1977 applicant filed a similar motion for stay pending review in this Court of his claim that the Double Jeopardy Clause of the United States Constitution prohibits the State of California from retrying him for murder. In denying the stay, I noted the California Superior Court's finding that the error resulting in the court's mistrial declaration was not intentionally committed by the prosecution for the purpose of provoking applicant's mistrial request. *Divans v. California*, 434 U. S. 1303 (1977) (in chambers). During January of last Term, both MR. JUSTICE BRENNAN and I denied applicant's second stay application, in which he alleged that additional facts had come to light which proved that the prosecutor had acted in bad faith at the first trial.

In the instant motion applicant contends that he has acquired still more information demonstrating the prosecutor's bad faith. Applicant presents, however, only his own assertions to this effect, and none of the moving papers before me contain any findings which contradict the Superior Court's finding, referred to in my earlier in-chambers opinion, that

the prosecutor's error was not calculated to force applicant to move for a mistrial. On the contrary, repeated summary rejections of applicant's claim in the California state courts indicate that the Superior Court's original finding stands undisturbed. Accordingly, I remain convinced that this Court would not grant certiorari to review applicant's double jeopardy claim.

Mr. Justice Brennan, Circuit Justice.

Applicant's motion to stay the proceedings in the Superior Court of Santa Clara County, Cal., is denied.

In July 1977 applicant filed a similar motion for stay pending review in this Court of his claim that the Double Jeopardy Clause of the United States Constitution prohibits the State of California from retrying him for murder. In denying the stay, I noted the California Superior Court's finding that the error resulting in the court's mistrial declaration was not intentionally committed by the prosecution for the purpose of procuring applicant's mistrial request. *Dumas v. California*, 432 U.S. 1308 (1977) (in chambers). During January of last Term both Mr. Justice Brennan and I denied applicant's second stay application, in which he alleged that additional facts had come to light which proved that the prosecutor had acted in bad faith at the first trial.

In the instant motion applicant contends that he has acquired still more information demonstrating the prosecutor's bad faith. Applicant presents, however, only his own assertions to this effect, and none of the moving papers before me contain any findings which contradict the Superior Court's finding related to in my earlier in-chambers opinion that