

State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Devante Kyran Jennings

Defendant-Appellant.

MSC No. 165764

COA No. 359837

Macomb County Circuit Court

Case No. 19-1800 FH

**Devante Kyran Jennings’
Supplemental Brief**

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Date: November 25, 2024

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Statement of the Questions Presented

First Question

Whether retrial is barred by double jeopardy where the prosecution engaged in intentional misconduct designed to prejudice Mr. Jennings and did so with intent provoke a mistrial or indifference to the danger of mistrial or reversal?

Mr. Jennings answers: Yes.

The Court of Appeals answered: No.

The trial court answered: No.

Second Question

Retrial is barred because the prosecution's conduct made the issue Mr. Jennings' constitutional right to remain silent so central that a mistrial or reversal would be the likely result. Should his conviction be vacated?

Mr. Jennings answers: Yes.

The Court of Appeals answered: No.

The trial court answered: No.

Statement of Facts

Background

After two trials, Devante Jennings was convicted of carrying a concealed weapon. The charges stemmed from allegations related to a shooting in an apartment complex in April 2019. A witness to the shooting called police and provided descriptions of the vehicles involved in the shooting. Mr. Jennings was the driver of a car resembling the description of one of the vehicles.

Mr. Jennings was later pulled over and interviewed by the police. Mr. Jennings told police he drove two people to an apartment complex and left with them from that apartment complex the evening he was pulled over. 11/15/19 TT, 28. He then declined to answer any further questions or to provide an elimination sample of DNA. 11/15/19 TT, 28. In contrast, the other occupants in the vehicle did not invoke their *Miranda* rights. 11/15/19 TT, 28. Ultimately, Mr. Jennings was charged with carrying a concealed weapon in a vehicle and altering the identification marks on a firearm.

The prosecution elicited testimony regarding Mr. Jennings' invocation of his right to remain silent and argued it demonstrated evidence of his guilt in closing argument.

Mr. Jennings went to trial on both charges in November 2019. At trial, the prosecutor asked the officer-in-charge, Detective Carl Simon, how his interview with Mr. Jennings concluded. Detective Carl Simon testified that Mr. Jennings "did not wish to speak to us anymore." 11/15/19 TT, 28. When asked about interviewing the other occupants from Mr. Jennings' vehicle, Detective Simon testified that they agreed to speak to the police and did not end their interviews prematurely. 11/15/19 TT, 28. Rather than ending his questioning about the conversation, the prosecutor pressed on to bring out defendant's reliance on his right to remain silent and to contrast it with the behavior of the other individuals in the car:

Q. How did the interview end?

A. He did not wish to speak to us anymore.

Q. Did you also speak to the other occupants in the vehicle?

A. Yes, they were both interviewed. As typical and routine, we separate them, they were all separated and interviewed separately.

Q. Did they agree to speak to you?

A. They did.

Q. Did they end their interviews prematurely?

A. No.

Q. So they provided a full statement?

A. They did.

11/15/19 TT, 28.

During closing argument, the prosecutor referenced that portion of Mr. Jennings' interview: "He agreed to waive his *Miranda* rights, he said he understood everything...but low and behold, after answering a few questions he says, no, I don't want to talk anymore." 11/15/19 TT, 58. That, the prosecutor argued to the jury, was evidence of Mr. Jennings' "guilty conscience":

Now, during the officer's questioning, [defendant] admits that he was present for this disturbance and he had agreed to speak to the officers, he knew what it was about. He agreed to waive his *Miranda* rights, he said he understood everything, he didn't want an attorney, he—he was waving [sic] his right to remain silent at that point in time, but low [sic] and behold, after answering a few questions he says, no, I don't want to talk anymore. Why would he do that? Well, *that shows a guilty conscience*, like well okay, if I start

going down this road further I am going to get into some territory that is not good for me. I am going to start making admissions that I know are going to push me in further trouble. Maybe if I keep my mouth shut at this point, I can kind of walk out of this. [11/15/19 TT, 58].

To emphasize this argument further, the prosecutor included “guilty conscience” in red on the board that he presented to the jury. 11/15/19 TT, 81.

The trial court sua sponte raises the question of a mistrial after the prosecution intentionally used evidence of Mr. Jennings’s invocation of his right to remain silent as evidence of guilt and grants motion for mistrial.

After the jury was instructed and deliberating, the trial court called the prosecutor and defense counsel together to discuss a “concern.” 11/15/19 TT, 80. The court observed that the prosecutor had “elicited testimony as to the fact that the defendant had stopped the interview, invoked his right to silence, and essentially weaponized his invocation as consciousness of guilt.” 11/15/19 TT, 80. Trial counsel added that the prosecutor had included “guilty conscience” in red on the board that he presented to the jury. 11/15/19 TT, 81. Then, trial counsel moved for a mistrial. 11/15/19 TT, 81-82. The prosecutor requested a curative instruction.

After a brief recess, the prosecutor acknowledged that his actions were error and again requested a curative instruction. 11/15/19 TT, 84.

The trial court cited a footnote in *People v McReavy* that “if a defendant answered several questions and then invoked his right to remain silent, *Doyle* would prevent the prosecutor from commenting on this silence.” *People v McReavy*, 436 Mich 197, 219 n 23 (1990) (citing *Doyle v Ohio*, 426 US 610 (1976)).¹ The trial court found that *McReavy*

¹ In *Doyle*, a prosecutor’s use of pre-trial silence to impeach a witness resulted in a finding of error and new trial. *Doyle v Ohio*, 426 US 610, 619-620 (1976).

stood for the fact that if a prosecutor comments on a defendant's pre-trial silence, "[t]here's no unringing this bell." 11/15/19 TT, 85. The trial court granted the mistrial. 11/15/19 TT, 85.

The trial court concluded that retrial was permissible where it found that the prosecutor did not have the subjective intent to elicit a mistrial.

The court began the process of scheduling a new trial when trial counsel observed that may not be necessary. Trial counsel argued that "where a mistrial is declared because of misconduct by the people, double jeopardy may attach." 11/15/19 TT, 88; *People v Tracey*, 221 Mich App 321, 329 n 4 (1997).

In response, the prosecutor directed the trial court to *People v Lett*, arguing that it holds that where a defendant consents to a mistrial, retrial is not barred "unless the prosecution has engaged in conduct intended to provoke or goad the mistrial request." 11/15/19 TT, 89; *People v Lett*, 466 Mich 206, 215 (2002). The prosecutor argued that he was "trying to argue for a conviction to get the jury to find him guilty, not for a mistrial." 11/15/19, 90.

The Court held that double jeopardy did not attach. The trial court noted that defense did not object during the problematic testimony or during the prosecutor's closing argument. 11/15/19 TT, 90, 94. The court concluded that "when the defense doesn't even object during the course of the testimony or in argument as to that, I can hardly find that the prosecution actually intended to somehow elicit this mistrial when the foundation was laid during testimony." 11/15/19 TT, 91. Mr. Jennings was tried again and convicted in a second trial.

Appellate Proceedings

Mr. Jennings appealed arguing that the trial court erred in retrying him because his double jeopardy right attached after the prosecutor goaded the mistrial in his first prosecution, among other claims.

In an unpublished per curiam opinion dated April 20, 2023, a two-judge majority of the Court of Appeals affirmed Mr. Jennings' convictions and sentence. *People v Devante Kyran Jennings*, unpublished per curiam opinion of the Court of Appeals, dated April 20, 2023 (Docket No. 359837).

Judge Douglas Shapiro dissented, arguing that Mr. Jennings may not be retried under the federal standard set forth in *Kennedy*, and additionally because we are not bound by the federal standard, that the more appropriate test to be applied is the *Pool* test² which is "both easier to apply than *Kennedy*'s subjective standard and a more appropriate means of protecting the right against double jeopardy and deterring prosecutorial misconduct." *Id* at *1 (Shapiro, J., dissenting). Additionally, Judge Shapiro argued that because no Michigan court since *Dawson* has been required to decide between the *Kennedy* test or the *Pool* test, that this was a case for the Supreme Court to finally determine "whether the *Pool* standard or some other standard should be adopted rather than the *Kennedy* standard." *Id* at 4.

Following an application for leave to appeal, this Court ordered oral argument on the application to address:

(1) what standard the Court should apply to determine whether prosecutorial misconduct bars retrial under Michigan's Double Jeopardy Clause, see, e.g., *Oregon v Kennedy*, 456 US 667, 676 (1982); *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984); *State v McClaugherty*, 144 NM 483, 491 (2008); *Commonwealth v Smith*, 532 Pa 177, 186

(1992); *People v Batts*, 30 Cal 4th 660, 695-696 (Cal 2003); *State v Rogan*, 91 Hawaii 405, 423-424 (1999); and
(2) whether retrial was impermissible in this case.

People v Jennings, 513 Mich 977 (2024).

² *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984).

I. The Michigan Constitution requires adoption of an objective standard for determining whether retrial is barred by double jeopardy. An objective standard, which does not require a specific intent to provoke a mistrial, ensures the right against double jeopardy is protected and deters prosecutorial misconduct.

A. The *Kennedy* and *Batts* standards, which require proof that a prosecutor specifically intended to cause a mistrial, insufficiently protect the principles of double jeopardy.

In *Oregon v Kennedy*, 456 US at 667, the Supreme Court held that “where a defendant in a criminal trial successfully moves for a mistrial, he may invoke the bar of double jeopardy in a second effort to try him only if the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial.” The Court explained that the standard for prosecutorial misconduct provoking a mistrial leading to the mistrial being barred under the Double Jeopardy Clause of the United States Constitution is intent because it is a “manageable standard to apply.” *Id.* at 675.

In *Kennedy* the Supreme Court made it clear that “only where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.” *Id.* at 676.

In practice, the *Kennedy* standard has proven itself unworkable and inadequate to protect the principles of double jeopardy. Absent a concession by the prosecution, the requirement of establishing a prosecutor had a subjective intent to goad a defendant into moving for a mistrial places a nearly insurmountable burden on defendants to vindicate their double jeopardy right. See *People v Dawson*, 431 Mich 234, 257 (1988) (finding retrial barred where prosecution conceded error under *Kennedy*); *State v Rogan*, 91 Hawai’i 405, 422 (1999) (concluding

that “a defendant will seldom be able to prove that the prosecutor had the specific intent to goad him or her into moving for a mistrial with the purpose of obtaining a better chance of obtaining a conviction.”).

In addition, it permits the prosecution to engage in egregious misconduct which deprives an individual of a fair trial without losing the ability to retry them. Indeed, because *Kennedy* requires a specific intent to provoke a mistrial, the prosecution can engage in egregious and willful misconduct designed to prejudice a defendant as long as it is not intended to goad a mistrial and still seek retrial.

For similar reasons, the standard set forth in *People v Batts*, 30 Cal 4th 660, 695; 68 P3d 357 (2003) also fails to adequately protect an individual’s double jeopardy right. In *Batts*, the California Supreme Court concluded:

the double jeopardy clause of California Constitution article I, section 15 bars retrial following the grant of a defendant's mistrial motion (1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal.

Batts, 30 Cal 4th at 695.

Although the court deviated from *Kennedy* in some respects, by adopting an objective standard with respect to whether the misconduct deprived an individual from reasonable prospect of acquittal, the *Batts* standard still fails to adequately protect the right against double jeopardy and to deter prosecutorial misconduct. For example, as argued

above, both *Kennedy* and *Batts* permit the prosecution to seek retrial so long as their misconduct, not matter how egregious or willful, was not intended to provoke a mistrial. This can include willful violations of principles of constitutional criminal procedure universally known to attorneys such as:

- Using an individual’s invocation of their right to remain silent against them;
- Intentionally withholding exculpatory evidence that was known to the prosecution in advance of trial; or
- Arguing an individual had a motive to commit a crime because of their race;

The specific intent standard also permits the prosecution to engage in multiple instances of willful misconduct designed to prejudice a defendant and deprive them of their right to a fair trial. See e.g. *Pool v Superior Court* 139 Ariz 98 (1984) (barring retrial where the prosecution engaged in repeated instances of misconduct during cross-examination of the defendant).

Without expanding the scope of misconduct committed by the prosecution beyond conduct intended to provoke a mistrial, the right against double jeopardy fails to provide any meaningful protection to individuals. As Justice Stevens observed in *Kennedy*,

[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant. The defendant must shoulder a strong burden to establish a bar to reprosecution when he has consented to the mistrial, but the Court's subjective intent standard would eviscerate the exception [to the general rule that a retrial after reversal on appeal is not barred by double jeopardy].

Kennedy, 456 U.S. at 688 (Stevens, J., concurring). To protect the right against double jeopardy and deter prosecutorial misconduct, this Court

should adopt an objective standard that prohibits retrial when prosecutors engage in willful and prejudicial misconduct.

B. The objective tests applied in other jurisdictions provide meaningful protection to the principle of double jeopardy and should be adopted by this Court.

In order granting argument on the application, this Court referenced the cases of *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984), *State v McClaugherty*, 144 NM 483, 491 (2008), *Commonwealth v Smith*, 532 Pa 177, 186 (1992) and *State v Rogan*, 91 Hawaii 405, 423-424 (1999). In each of these cases, the courts declined to adopt a test that limited the prohibition on retrial to cases where the prosecution specifically intended to provoke a mistrial. Instead, the courts, applying their respective state constitutional provisions protecting against double jeopardy, opted to broaden the circumstances where retrial is prohibited when a prosecutor engages in willful misconduct designed to prejudice a defendant.

The tests in each of these cases, while similar, have different factors:

Case	Test applied to determine whether retrial is appropriate
<i>Pool v Superior Court</i>	Retrial barred where “(1) mistrial is granted because of improper conduct or actions by the prosecutor; and (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.” [<i>Pool</i> , 139 Ariz at 108-109.]
<i>State v McClaugherty</i>	Bar to retrial under double jeopardy principles when “(1) improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial; (2) if the official knows that the conduct is improper and prejudicial; and (3) if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.” [<i>McClaugherty</i> , 144 NM at 491]
<i>Commonwealth v Smith</i>	Retrial prohibited “when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.” [<i>Smith</i> , 532 Pa at 186]
<i>State v Rogan</i>	Retrial “barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial. In other words, we hold that reprosecution is barred where, in the face of egregious prosecutorial misconduct, it cannot be said beyond a reasonable doubt that the defendant received a fair trial.” [<i>Rogan</i> , 91 Hawai'i at 423].

By adopting these standards, the courts prohibited retrial in circumstances that would not have been prohibited by either *Kennedy* or *Batts*. These circumstances include:

- Barring retrial where the prosecution engaged in repeated instances of misconduct during cross-examination of the defendant. See *Pool*, 139 Ariz at 108-109;
- Prosecutorial misconduct in failing to disclose material exculpatory physical evidence, intentional suppression of evidence, and attempting to discredit state trooper who had testified as to existence of the evidence. *Smith*, 532 Pa at 180-183, 186;
- Presenting inadmissible hearsay in front of the jury by reciting portions of statements allegedly given to the police by two witnesses who were not called to testify. *McClagherty*, 144 NM at 491, 501-502; and
- An impermissible appeal to racial prejudice in a criminal sexual conduct trial where the prosecutor stated that it is “every mother's nightmare [to find] ... some black, military guy on top of your daughter” *Rogan*, 91 Hawai'i at 412.

The results in these cases demonstrate the inability of the *Kennedy* standard to provide meaningful protection to the right against double jeopardy and to deter prosecutorial misconduct. In each of these cases, the prosecution committed willful misconduct in areas of the law that should be universally known to attorneys. The failure to follow these norms cannot be described as a mere mistake or negligence on the part of the prosecutors. However, because the misconduct at issue was not committed for the sole purpose of provoking a mistrial, these individuals would have likely been required to face retrial under *Kennedy* and *Batts*. That result is untenable.

Justice Stevens recognized this problem in his concurring opinion in *Kennedy*:

A broader objection to the Court's limitation of the exception is that the rationale for the exception extends beyond the situation in which the prosecutor intends to provoke a mistrial. There are other situations in which the defendant's double jeopardy interests outweigh society's

interest in obtaining a judgment on the merits even though the defendant has moved for a mistrial. For example, a prosecutor may be interested in putting the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction. In such a case, with the purpose of harassing the defendant the prosecutor may commit repeated prejudicial errors and be indifferent between a mistrial or mistrials and an unsustainable conviction or convictions. Another example is when the prosecutor seeks to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction. This kind of overreaching would not be covered by the Court's standard because, by hypothesis, the prosecutor's intent is to obtain a conviction, not to provoke a mistrial. Yet the defendant's choice—to continue the tainted proceeding or to abort it and begin anew—can be just as “hollow” in this situation as when the prosecutor intends to provoke a mistrial.

Kennedy, 456 US at 689 (Stevens, J., concurring). The adoption of an objective standard would alleviate these concerns, provides the necessary deterrence against purposeful prosecutorial error or misconduct that invites a mistrial, and ensures that the right against double jeopardy is protected. Absent the adoption of such a standard, individuals like Mr. Jennings will be forced to go through the expense, embarrassment, potential pretrial and post-conviction incarceration, and other stressors related to multiple prosecutions simply because the prosecutor who intentionally violated their constitutional rights did so to seek a conviction and not provoke mistrial.

Further, adopting an objective standard is consistent with this Court's authority and duty to enforce the double jeopardy right. “If the rights guaranteed in our Constitution are to be more than words on paper, then they must be enforceable.” *Bauserman v Unemployment Insurance Agency*, 509 Mich 673, 686-687, 693 (2022). Consequently, courts have the authority and duty to enforce them. *Id.*

In *People v Sammons*, 505 Mich 31, 49 n 13 (2020) the Michigan Supreme Court discussed how Michigan has so far deferred to the federal standard in *Neil v Biggers*, 409 US 188 (1972) for analyzing whether an unnecessarily suggestive identification was nonetheless reliable. *Manson v Brathwaite*, 432 US 98 (1977) was predicated on a prediction that this sort of analysis would sufficiently incentivize police to protect people’s due process rights. But where that prediction proves untrue in Michigan, there is no reason our state protection must remain tethered to the federal rule. See also *People v Johnson*, 506 Mich 969 (2020) (Cavanagh J., concurring); *People v Moore*, 509 Mich 859 (2022) (Cavanagh J., dissenting); *People v Bearden*, 509 Mich 986 (2022) (Cavanagh J., concurring).

Just as *Sammons* concluded Michigan courts are free to depart from the federal path in the context of suggestive identifications, Michigan courts are free to do so with the right to double jeopardy. Indeed, unlike *Sammons*, where this Court acknowledged it had deferred to the federal standard, this Court has never adopted the test from *Kennedy*. As a result, the adoption of a different test here would not represent a departure from a previously adopted the federal standard.

The Michigan constitution provides protection against double jeopardy for the right in Const 1963, art 1, § 15 (“No person shall be subject for the same offense to be twice put in jeopardy.”). If the Michigan Constitution provides a right, defendants must be able to enforce that right. For these reasons, this Court should adopt an objective standard for determining whether prosecutorial misconduct bars retrial under Michigan’s Double Jeopardy Clause.

C. This Court previously considered adopting an objective standard in *Dawson*.

In *People v Dawson*, 154 Mich App 260 (1986), the Court of Appeals suggested adopting a more lenient standard than *Kennedy* when it comes to determining instances where the double jeopardy clause of the Michigan State Constitution has been violated. The Court suggested adopting the standard which the Arizona Supreme Court in *Pool v Superior Court*, 139 Ariz 98, 109 (1984). *Dawson*, 154 Mich App at 271.

Under this standard, the *Pool* Court held that “portions of the questioning are so egregiously improper that we are compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant.” *Pool*, 139 Ariz at 109.

When *Dawson* was adjudicated in this Court, the Court declined to make a definitive ruling on the question of whether the standard for determining violations of the double jeopardy clause of the Michigan Constitution is lower than the *Kennedy* standard adopted for the double jeopardy clause of the United States Constitution. This Court concluded that “in light of the prosecutor's concession [at oral argument] that the trial prosecutor's conduct was improper under the *Kennedy* standard, there is no need in the instant case to decide whether this Court should go further than the federal standard.” *Dawson*, 431 Mich 234, 257 (1988).

Here, unlike *Dawson*, the prosecution has not conceded error under any standard. Instead, the prosecution has argued that the prosecution did not have intent to provoke a mistrial for two reasons. First, because Mr. Jennings’ trial attorney did not immediately request a mistrial. And, second, because the trial prosecutor used Mr. Jennings’ constitutionally protected silence against him to try “to get the jury to find him guilty.” 11/15/19 TT, 89-90. As a result, this Court should grant leave to appeal to determine the appropriate standard for evaluating whether retrial is barred and vacate Mr. Jennings’ conviction.

II. Retrial is barred because the prosecution's conduct made the issue Mr. Jennings' constitutional right to remain silent so central that a mistrial or reversal would be the likely result. His conviction must be vacated.

This Court should prohibit retrial in this case under either a subjective or objective standard. While Mr. Jennings' maintains an objective standard is consistent with this Court duty to enforce the prohibition against double jeopardy and is necessary to meaningfully deter prosecutorial misconduct, retrial should be barred no matter what standard this Court chooses to apply.

A. Retrial is prohibited under a subjective standard.

By purposely introducing Mr. Jennings' silence as evidence of his guilt, the prosecutor was intending to goad defense counsel into moving for a mistrial. This intent can be inferred from the direct examination of Detective Simon and more egregiously in the prosecutor's closing argument where the prosecutor equated Mr. Jennings' invocation of a constitutional right as evidence of a guilty mind. As defense counsel also pointed out, the prosecutor had included "guilty conscience" in red on the board that he presented to the jury. 11/15/19 TT, 81. Equating silence to a guilty conscience is, and long has been, prejudicial error. *People v Biggs*, 288 Mich 417, 420 (1939) ("The unanswered allegation by another of the guilt of the defendant is no confession of guilt on the part of a defendant."); *People v Shafier*, 483 Mich 205, 222-223 (2009).

As referenced in Judge Shapiro's dissent:

It is difficult to imagine a principle of constitutional criminal procedure more universally known to attorneys than the rule that a defendant's decision to remain silent is constitutionally protected and may not be introduced or commented upon at trial. And it is difficult to imagine how a prosecutor could be unaware that purposely introducing a defendant's silence as evidence of guilt is grounds not only for reversal, but also for mistrial

Jennings, supra at *1 (Shapiro J., dissenting). Notably, the trial court even stated on the record that the prosecutor had “essentially weaponized [Mr. Jennings’] invocation as consciousness of guilt.” 11/15/19 TT, 80.

However, the prosecutor decided to introduce the testimony from Detective Simon referencing Mr. Jennings’ invocation to his right to remain silent anyway, impacting the jury in such a way that could not be fixed by curative instruction. Furthermore, the trial court emboldened the prosecutor’s actions by concluding that defense counsel’s failure to object during the officer’s testimony established that the prosecution did not intend to cause a mistrial.

As correctly acknowledged in Judge Shapiro’s dissent, “the initial lack of objection is irrelevant to the applicable analysis. Even if it was, the prosecutor’s closing argument demonstrated a determination to make the issue so central that a mistrial would be the likely result.” *Jennings*, supra at *3. Moreover, as acknowledged by the dissent, the “prosecutor’s conduct was not innocent nor was the mistrial caused by “factors beyond the prosecutor’s control.” *Id.* Indeed the prosecutor’s conduct was sufficient enough for the trial court to sua sponte raise the question of a mistrial. 11/15/19 TT, 80.

Because the prosecutor intended this result by introducing evidence of Mr. Jennings invocation of his right to silence as evidence of his guilt, the granting of a new trial was inadequate to protect Mr. Jennings double jeopardy interests, as set forth in the federal Constitution. Thus, contrary to the majority opinion of the Court of Appeals, retrial was barred under the *Kennedy* standard.

B. Retrial is prohibited under an objective standard because the prosecution engaged in willful misconduct designed to prejudice Mr. Jennings and deprive him of his right to a fair trial.

For the reasons stated above, retrial is also barred under an objective standard. Like the prosecutors in *Pool*, *Smith*, *McClagherty*, and *Rogan*, the prosecution here committed willful misconduct in areas of

the law that should be universally known to attorneys – use of an individual’s invocation of their right to silence as evidence of guilt. The failure to follow this unambiguous rule was not the result of mere mistake or negligence on the part of the prosecutor. It was done with a intent to prejudice Mr. Jennings’ regardless of the clear risk of a mistrial.

The record shows that the prosecution engaged in willful misconduct designed to prejudice Mr. Jennings. While the prosecutor denied having an intent to provoke a mistrial, the prosecutor made clear that he was using Mr. Jennings’ invocation of his right to silence “to get the jury to find him guilty.” 11/15/19 TT, 89-90. The prosecution committed misconduct in an area of the law that is known to both lawyers and non-lawyers³ and it did so with the express purpose of prejudicing Mr. Jennings.

This misconduct would prohibit retrial under *Pool*, *Smith*, *McClagherty*, and *Rogan*. Each of these standards, while not requiring a specific intent to provoke a mistrial, involved misconduct by the prosecution that is willful and designed to prejudice the defendant. For example, under the *Pool* standard, retrial barred where:

(1) mistrial is granted because of improper conduct or actions by the prosecutor; and (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and (3) the conduct

³ See *Dickerson v United States*, 530 US 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

causes prejudice to the defendant which cannot be cured by means short of a mistrial. [*Pool*, 139 Ariz at 108-109.]

The mistrial in Mr. Jennings' case was granted to do the prosecution intentionally using his invocation of his right to silence as evidence of his guilt. Second, the prosecutor knew that he committed misconduct and admitted error. 11/15/19 TT, 84. This misconduct was not an accident or a result of negligence. Instead, the prosecutor's improper use of Mr. Jennings' invocation of his right to silence was a preplanned component of his trial strategy as he emphasized the issue in his case-in-chief, argued it demonstrated his guilt in closing argument, and prepared a visual presentation in advance of argument where he included the words "guilty conscience" in red on the board that he presented to the jury. 11/15/19 TT, 81. These facts demonstrate that the prosecution committed willful misconduct and did so with indifference to the danger of mistrial or reversal.

And, finally, the misconduct at issue here could not be and was not cured by means short of a mistrial. Indeed, as Judge Shapiro observed in his dissent, "the prosecution's closing argument demonstrated a determination to make the issue so central that a mistrial would be the likely result." *Jennings*, supra at *3 (Shapiro, J., dissenting). Under these circumstances, retrial is prohibited, and Mr. Jennings' conviction must be vacated.

Conclusion and Relief Requested

For the reasons discussed above, Mr. Jennings respectfully requests that this Honorable Court grant leave to appeal and vacate his conviction and sentence.

Respectfully submitted,

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This Brief contains 5,233 countable words.

Date: November 25, 2024