STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, Supreme Court No.: 165764

v.

Devante Jennings,
Defendant-Appellant.

Court of Appeals No.: 359837
16th Circuit Court No.: 19-1800-FH

PLAINTIFF-APPELLEE'S SUPPLEMENTAL ANSWER IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF JURISDICTION

The People do not dispute that this Court possesses appellate jurisdiction pursuant to Michigan Court Rule (MCR) 7.303(B)(1)

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

Absent a prosecutor's intention to goad a defendant into a mistrial motion, retrial following the grant of the mistrial motion will not be barred by the Federal or Michigan Double Jeopardy Clauses. Here, the trial court found that the trial prosecutor's error resulting in a mistrial and retrial was not intended to prompt Defendant's mistrial motion. Without a showing of prosecutor error for the purpose of obtaining a mistrial, should Defendant's retrial have been barred by Double Jeopardy?

The Circuit Court said: **No**

The Court of Appeals said: **No**

The People say: **No**

Defendant says: **Yes**

COUNTERSTATEMENT OF FACTS

These facts are taken from the November, 2019 jury trial transcript which – it appears – provided the basis for Defendant's instant claim and was the focus of the Court of Appeals analysis.

Defendant was tried before a Macomb County Jury over two days – November 13, 2019, and November 15, 2019 – before the Hon. Michael Servitto. In total, the prosecutor called 6 witnesses – 5 police and 1 civilian – to meet its burden of proof in this carrying a concealed weapon[1] and altering the identification marks of a firearm.[2]

To begin, the prosecutor called Clinton Township Police Department (CTPD) officer Thomas Hill, who responded to a shots-fired call at 16720 Washington, the Washington Square Apartments on April 30, 2019.[3] *En route*, Hill stated that he began looking for a white Dodge Charger with a black racing stripe associated with a black male, in a black hooded sweatshirt with white lettering; both were seen leaving the scene.[4] Approximately 1 minute to 1.5 minutes after the initial call for service,[5] Hill found the vehicle traveling at high speed on Groesbeck Ave. at 14 Mile road.[6] He caught up to the vehicle and observed the driver lower his window; the driver was Defendant[7] and he was wearing a black hooded sweatshirt with writing on the back.[8]

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[1] Contrary to MCL 750.227
[2] Contrary to MCL 750.230
[3] *People v. Devante Jennings*, Jury Trial – November 13, 2019, pages 115-116
[4] *Id.,* 116
[5] *Id.,* 126-127
[6] *Id.,* 116-117
[7] *Id.,* 119
[8] *Id.*

Hill executed what he termed a "felony stop."[9] When the prosecutor also used this term, the Court interrupted to give a curative instruction to the jury directing them not to consider any characterization of the stop and admonish both the prosecutor and witness from using the term again.[10]

Resuming his testimony, Hill testified that the stop occurred and the three occupants – Defendant and two passengers, one in the front seat and one in the backseat – were ordered out of the Charger at gunpoint, cuffed, and searched.[11] While no weapons were found on the individuals, a .45 Glock semiautomatic pistol with an obliterated serial number was found in the Charger's glovebox.[12] Photos of the weapon, when found, were admitted – as well as the weapon itself. On cross-examination, Hill noted that the writing on Defendant's sweatshirt was in red font while the dispatched description said the suspect wore a black hoodie with white lettering.[13] Hill further testified that Defendant complied with the commands during the traffic stop and that along with the firearm, the glovebox contained prescription pills "registered" to the front seat passenger – a man named Johnson who was not Defendant.[14]

After a brief redirect examination discussing the tactical term "cover down," Officer Hill was excused.[15] The People next called Alexandra McCorkle.[16]

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[9] *People v. Devante Jennings*, Jury Trial – November 13, 2019, page 118
[10] *Id.*
[11] *Id.,* 119, 123-124
[12] *Id.,* 123-124, 126
[13] *Id.,* 127-128
[14] *Id.,* 128-131
[15] *Id.,* 132-136
[16] *Id.,* 136

McCorkle lived at the Washington Square Apartment complex on April 30, 2019, and was the 911 caller who prompted the police response.[17] McCorkle stated that she – with her fiance' – saw 5 men and 1 woman outside "doing their thing" until violence erupted.[18] The prosecutor did not seek clarification on what this meant, however, McCorkle testified that the group moved from the apartment doors to the parking lot where there was yelling and screaming.[19] One man in a black sweatshirt with white writing across the front with "short fro hair" (sic) tried to get the others attention, she said, by pulling a firearm and firing it into the air three times.[20] The group scattered, some going to the two nearby vehicles – a sports utility vehicle (SUV) and a white car, like a Charger, with a black stripe down the side.[21] The color of the SUV was either white or black; this varied on direct and cross and McCorkle said that the event happened some time before and she did not remember.[22] She remembered, however, that the white car drove south on Garfield and that she gave statements to responding police.[23]

The final witness for the first day of trial was CTPD Officer Todd Pennick.[24] Pennick was dispatched to the Washington Square Apartments and made the scene to speak with 911 caller Alexandra McCorkle and take statements from her.[25] Throughout his testimony, Pennick referred to his "two man" car and his

[17] *People v. Devante Jennings*, Jury Trial – November 13, 2019, pages 136-137, 140
[18] *Id.,* 137
[19] *Id.,* 138
[20] *Id.*
[21] *Id.,* 138-139
[22] *Id.,* 139-140, 141-142
[23] *Id.,* 140
[24] *Id.,* 144
[25] *Id.*

partner, but the prosecutor made no effort to clarify this.[26] The prosecutor also elicited hearsay testimony from Pennick in the form of his unidentified partner's discovery of spent shell casings in the parking lot.[27] Ultimately, this was of no matter since the hearsay was offered to explain how and why Pennick went to examine the four spent casings for himself.[28] The casings, he noted, were made of brass and "silver" metal; with "Federal 45 auto and Hornady 45 auto" headstamps.[29] No evidence technicians were available, so Pennick did the best possible" to document the casings' recovery locations.[30]

On cross-examination, counsel first highlighted Pennicks' interaction with McCorkle, noting that she was confident and forthcoming.[31] Testimony concluded with Pennick saying that he did not know if prints were lifted from the recovered casings.[32]

The second day of trial – November 15, 2019 – brought testimony from CTPD Officer Gino Bolone.[33] Bolone was Officer Thomas Hill's partner the night of April 30, 2019 and assisted in the traffic stop of the suspect vehicle that – to him – matched the description of the Charger put out by dispatch.[34] He

[26] See *People v. Devante Jennings*, Jury Trial – November 13, 2019, page 145, for example
[27] *People v. Devante Jennings*, Jury Trial – November 13, 2019, page 146
[28] *Id.,* 146-148
[29] *Id.,* 147-148
[30] *Id.,* 148
[31] *Id.,* 149
[32] *Id.,* 151
[33] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 4
[34] *Id.,* 4-6

considered this a "high risk stop" and he "covered" the car.[35] The police cruiser's lights illuminated the car's interior; he saw no movements.[36]

During Bolone's cross-examination, he testified regarding the difference between the description of the shooter – black hoodie with white lettering – and Defendant driver's black hoodie with red lettering.[37] Bolone also stated that he did not remember if the backseat passenger's black hoodie had writing on it.[38]

Next came CTPD Sgt. Michael Marker, who assisted Hill and Bolone in the traffic stop after a shots-fired call.[39] Despite the prior admonishment about the term "felony stop," Marker used this term and – as before – the Court offered a curative instruction.[40]

Marker continued his testimony, saying that he made the scene and was alerted to the presence of a firearm. Since there was no evidence technician available, he recovered it with gloves and made it safe, removing the loaded magazine and a live cartridge from the pistol's firing chamber.[41] After making the weapon safe, Marker testified about his observations of the recovered ammunition – there were 6 live rounds made of brass and silver, some of which were branded "Federal."[42] After discussing the functional anatomy of a firearm, Marker's testimony concluded.

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[35] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 6-7
[36] *Id.,* 8
[37] *Id.,* 8-9
[38] *Id.,* 10
[39] *Id.,* 10-12
[40] *Id.,* 12
[41] *Id.,* 13-14
[42] *Id.,* 15-17

During cross-examination, Marker stated that he swabbed the pistol for DNA, but did not know if it was analyzed. Similarly, he said that prints could be obtained from casings and bullets.[43]

The prosecution's final witness was Det. Carl Simon, Officer in Charge (OIC), who conducted follow-up investigation.[44] Simon learned that the Charger was registered and co-owned by Defendant and his father, neither of whom had a pistol license or firearm to their names. The other occupants of the vehicle did not have pistol licenses, either. Similarly, the firearm returned no results in the Law Enforcement Information Network (LEIN).[45] Next, Simon detailed his contact with Defendant in the booking area, specifically the administration of and Defendant's waiver of his *Miranda* Rights.[46]

Following Defendant's waiver, he made some admissions – namely that he drove to the apartment complex at Garfield and 15 Mile Road, used GPS to get there, his front seat passenger exited the vehicle and went to the apartments, that he co-owned the vehicle with his father, and was present at the apartment for an altercation.[47] Then came the colloquy that forms part of Defendant's instant challenge:

> Q. And did he say that he was present for the disturbance?
>
> A. He did.
>
> Q. How did the interview end?

[43] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 19-20
[44] *Id.,* 21-22
[45] *Id.,* 22-25
[46] *Id.,* 25-26
[47] *Id.,* 27-28

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.[48]

and

Q. Now, here, did you ask the defendant for an elimination sample?

A. I did not get a chance to because the interview was abrupted -- abruptly ended.

Q. And by whom was the interview ended?

A. By the defendant.[49]

Simon continued discussing his follow-up with witness McCorkle and discussing the absence of a reference to the shooter's hairstyle in her report.[50] Simon then explained that the recovered DNA swab was not run by the Michigan State Police [Crime Lab] since there was no elimination sample to send with it

[48] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 28
[49] *Id.,* 29-30
[50] *Id.,* 31-34

and that the recovered physical evidence was not processed for fingerprints.[51] Simon concluded by confirming that the recovered pill bottle did not belong to Defendant, Defendant did not admit to possessing a weapon, and nobody specifically identified Defendant as the shooter.[52]

Simon was excused, the prosecution rested,[53] the Defendant was *voir dired* about testifying,[54] and Defendant rested.[55]

During his closing arguments, the prosecutor recapped the substantive testimony and the nights' events leading to Defendant's arrest before talking about the relevant elements of the carrying a concealed weapon charge.[56] The prosecutor, then, stated the following:

> Now, during the officer's questioning, he 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 his right to remain silent at that point in time, but low 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's not good for me. I am going to start making admissions that I know are going to put me in further trouble. Maybe if I keep my mouth shut at this point, I can kind of walk out of this. If you are of that mindset, as I talked about earlier, well, maybe -- maybe the defendant was just kind of driving this other guy and it was his gun, he was the shooter, the defendant is just driving him, well, he -- still having that gun in his car the defendant

[51] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 35
[52] *Id.,* 36-37
[53] *Id.,* 41
[54] *Id.,* 42-43
[55] *Id.,* 53
[56] *Id.,* 54-55

> is -- he still knows the gun is there, he still has the person who is the shooter in the car with him.[57]

In response, the counsel highlighted the fact that Defendant had a right to silence and his post-*Miranda* waiver assertion of silence is no crime and cannot be used as evidence of a crime or guilty conscience.[58] Counsel next discussed the lack of physical evidence and concluded.[59]

The prosecutor's rebuttal did not comment on the silence issue but focused on the balance of the physical and testimonial evidence.[60] The jury was instructed[61] and deliberation began.[62]

Outside the presence of the jury, the Court discussed "a concern" about the prosecution "weapon[izing]" Defendant's invocation of silence as "consciousness of guilt."[63] The Court – itself – was unsure of the propriety of this and wanted to "research[]" it.[64] What research the Court had done – however brief – seemed to suggest "this would be a violation and potentially prosecutorial misconduct."[65] Counsel referred back to a "hallway"/chambers-type discussion off the record before alluding to a visual slide or some other sign the prosecutor used in closing that "put it [the silence, presumably] in red on the board that shows a guilty conscience…."[66] Counsel requested a mistrial.[67]

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[57] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 57-58
[58] *Id.,* 63
[59] *Id.,* 64
[60] *Id.,* 65-66
[61] *Id.,* 67
[62] *Id.,* 80
[63] *Id.*
[64] *Id.,* 80-81
[65] *Id.,* 81
[66] *Id.*
[67] *Id.,* 81-82

Just as the Court needed to research this issue, so too did the prosecutor; he asked "for an opportunity to research the issue" and the Court agreed since it was "a significant" one.[68] In the meantime, the prosecutor suggested that even if he found no supportive case law, the Court could give a curative instruction, but the Court was not so inclined,[69] saying:

> THE COURT: I think that ship has sailed, they are deliberating. I don't know. I think you are going to have to find out whether it is even appropriate to begin with, so let's - - let's find that out first. All right. Thank you.[70]

After a six-minute recess, the prosecution acknowledged there was an error and requested a jury instruction.[71] The Court again declined, citing to the result of his research, calling this a "bright line rule," and granting the mistrial motion.[72]

After a lunch recess, during which the litigants checked their trial schedules, counsel brought up the instant issue – whether retrial was barred by Double Jeopardy where the prosecutor's "misconduct" resulted in a mistrial.[73] Defendant cited to *People v. Tracey*[74] and explained that:

> …most mistrials don't have double jeopardy attached because most of the time we allow the trial to continue again. However, in cases where the People misbehave or there is an error based on the People, double jeopardy may attach, and that rule is in place, it prevents the People from misusing the ability to recreate mistrials in their own closing arguments, so if they don't like the way a trial is going they can't just create error that

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[68] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 82
[69] *Id.,* 82-83
[70] *Id.,* 83
[71] *Id.,* 84
[72] *Id.* 85
[73] *Id.,* 87-88
[74] *People v. Tracey*, 221 Mich. App. 321 (1997)

> forces the defense in a mistrial and then get a second bite at the apple, so to speak.[75]

In response, the prosecutor cited to *People v. Lett*[76], to say that:

> the general rule is that retrial is not barred because they consented to it, and then the exception to that, or the caveat to that is unless the prosecution has engaged in conduct intended to provoke or goad the mistrial request. So the conduct by the People would have to be such that it is so egregious that it is clear that we are intending to get the defense to say I'd like a mistrial. Judge, that certainly wasn't the circumstance here. There's nothing to indicate that. I was trying to argue for conviction to get the jury to find him guilty, not for a mistrial.[77]

In rendering its decision on Defendant's oral motion, the Court noted that the litigants agreed on the relevant standard – that the misconduct was intended to intentionally bring about the mistrial.[78] Having presided over the trial and arguments, the Court found nothing in the record to suggest the prosecutor intended to intentionally bring about the mistrial.[79] In fact, the Court noted that he was unsure that a mistrial motion would have been brought if the Court did not highlight the improper argument for counsel.[80] The Court stated that it "thought" the testimony initially elicited was inadmissible, but only stepped in after the argument when it "thought that there was a very real possibility of…reversal…."[81] The Court ultimately reasoned that when the defense did not object, it could "hardly find that the prosecution actually intended to somehow

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[75] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 88
[76] *People v. Lett*, 466 Mich. 206 (2002)
[77] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 88-89
[78] *Id.,* 90
[79] *Id.*
[80] *Id.*
[81] *Id.,* 90-91

elicit this mistrial when the foundation was laid during testimony" without objection. The Court denied the request.[82]

After the ruling, counsel made a record of his strategic decisions to forego objecting during the testimony because he did not find that it rose "to the level of a mistrial," but opted to make the mistrial motion after the improper argument.[83]

Counsel and the Court continued to discuss, but the Court reiterated its finding that the error was not egregious to warrant "a finding of double jeopardy" and denied the motion.[84]

Defendant was retried before a second jury and was convicted of illegally carrying a concealed weapon. The facts of that trial are contained within the People's answer in opposition to Defendant's Application for Leave to Appeal filed with this Court in July 2023.

[82] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 91
[83] *Id.,* 92
[84] *Id.,* 93-94

ARGUMENT

I.

Absent a prosecutor's intention to goad a defendant into a mistrial motion, retrial following the grant of the mistrial motion will not be barred by the Federal or Michigan Double Jeopardy Clauses. Here, the trial court found that the trial prosecutor's error resulting in a mistrial and retrial was not intended to prompt Defendant's mistrial motion. Without a showing of prosecutor error for the purpose of obtaining a mistrial, Defendant's retrial was not barred by Double Jeopardy.

Standard of Review

Appellate courts review questions of law –a Double Jeopardy challenge – *de novo*.[85] Trial court findings of prosecutor intent are reviewed for clear error.[86] A finding is clearly erroneous when – though there is evidence to support it – a reviewing court is left with a definite and firm conviction a mistake was made.[87]

Discussion

A. Summary of argument

Neither the State nor Federal Double Jeopardy Clauses bar Defendant's retrial in this case. No compelling reason or other need requires this Court to conclude that the drafters of the Michigan Constitutional Double Jeopardy Clause intended the Michigan Constitution afford greater protections than those afforded by the United States Constitution. Thus, the test to assess the application of the Double Jeopardy bar to successive prosecutions under both

[85] *People v. Herron*, 464 Mich. 593, 599 (2001); see also *People v. Henry*, 248 Mich. App. 313, 318 (2001)
[86] *People v. Dawson*, 431 Mich. 234, 258 (1988)
[87] *People v. Mullen*, 282 Mich. App. 14, 22 (2008)

constitutions is *Oregon v. Kennedy*.[88] *Kennedy*'s narrow test preserves the balance between a defendant's Double Jeopardy protection and society's interest in law enforcement in a reliably repeatable manner that gives courts and litigants clear direction on its use.

To apply the Double Jeopardy Bar, *Kennedy* requires a reviewing court to find that a prosecutor's error – which caused a defendant's mistrial motion to be made and granted – to have been purposefully intended to force the defendant into making the mistrial motion. Upon reviewing the trial that he sat in judgment upon, the instant trial court did not find evidence to support a showing of the prosecutor's intention to cause a mistrial and, so, did not err in denying Defendant's Double Jeopardy motion. Likewise, the majority Michigan Court of Appeals opinion in this matter did not err in applying *Kennedy* and concluding as the trial court did. Accordingly, under *Kennedy*, retrial was permissible in this case. Defendant's conviction sentence at retrial should be affirmed.

B. Double Jeopardy

Our Court of Appeals' identified the protections afforded by Double Jeopardy under the U.S. and Michigan Constitutions:

> Under both the Double Jeopardy Clause of the Michigan Constitution and its federal counterpart, an accused may not be 'twice put in jeopardy for the same offense.' The constitutional prohibition against multiple prosecutions arises from the concern that the prosecution should not be permitted repeated opportunities to obtain a conviction.[89]

[88] *Oregon v. Kennedy*, 456 U.S. 667 (1982)

[89] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), page 2, citing to the Fifth Amendment of the U.S. Constitution and

This Court in *People v. Dawson* – this Court's first opportunity to discuss the relevant substantive analysis for determining the application of a Double Jeopardy bar to retrial after a prosecutorial error causing mistrial – also discussed the principle, noting that the same basic protection between the federal and state constitutions[90] is a long-held one, "deeply ingrained in at least the Anglo-American system of jurisprudence" whereby the prosecution "should not be allowed to make repeated attempts to convict an individual for an alleged offense…"[91] under certain circumstances.

In examining the exact nature of the Double Jeopardy clause, this Court identified three "related protections" the provision seeks to guard against:

(1) a second prosecution for the same offense after acquittal;

(2) a second prosecution for the same offense after conviction; and

(3) multiple punishments for the same offense.[92]

As with most rules, however, there are exceptions to the retrial bar.

The U.S. Supreme Court has held that a retrial may occur in the event of a mistrial by hung jury.[93] Similarly, mistrial because of defense counsel error – "misconduct" as used in the opinion – will not bar retrial.[94] Moreover – and most relevant here – this Court in *Dawson* observed that the Double Jeopardy Clause does not bar retrial "where the prosecutor or judge made an innocent error or

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Article 1, Section 15 of the Michigan Constitution, and this Court in *People v. Lett*, 466 Mich. 206, 214, 215 (2002)

[90] *People v. Dawson*, 431 Mich. 234, 250 (1988)

[91] *Id.,* 251

[92] *People v. Nutt*, 469 Mich. 565 (2004)

[93] *Dawson*, supra at 252 citing to *People v. Thompson*, 424 Mich. 118 (1985)

[94] *People v. Anderson*, 409 Mich. 474, 485 (1980)

where the cause prompting the mistrial was outside their control."[95] The bar to retrial, however, occurs when a mistrial motion "is prompted by intentional prosecutorial conduct."[96] The prosecutor's intention, the Court of Appeals in this matter noted, is of "central focus."[97]

The *Dawson* Court briefly discussed this premise as articulated in the U.S. Supreme Court's plurality decision in *Oregon v. Kennedy,* noting the criticisms of concurring Justice Powell and the competing analyses appearing in *State v. Kennedy* and *Pool v. Superior Court.*[98] Although the *Dawson* panel of the Michigan Court of Appeals rejected the federal *Kennedy* test in favor of *Pool*, a concession under the *Kennedy* standard by the prosecution kept this Court from opining definitively on the appropriate inquiry.[99] Although Michigan has not officially adopted the *Kennedy* test – as will be discussed below- it has not been repudiated by the U.S. Supreme Court and has been reliably utilized by federal courts, and adopted by the highest courts of seven states.[100] Moreover, the courts of this state have accepted and applied the test when discussing this issue.[101]

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[95] *Dawson*, supra at 252, external citations omitted
[96] *Id.,* 253
[97] *Jennings*, supra, page 2
[98] *Dawson*, supra at 253-25, citing to *Oregon v. Kennedy*, 456 U.S. 667 (1982), *State v. Kennedy*, 295 Or. 260 (1983), and *Pool v. Superior Court*, 139 Ariz. 98 (1984)
[99] *Id.,* 256-257
[100] *State v. Williams*, 268 Kan. 1 (1999); *State of Maine v. Chapman*, 496 A.2d 297 (Me. 1983); *State of North Carolina v. White*, 322 N.C. 506 (1988); *State of Rhode Island v. Diaz*, 521 A.2d 129 (RI. 1987); *State v. Duhamel* 128 N.H. 199 (1986); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982), cert. denied, 459 U.S. 120 (1983); *Stamps v. Commonwealth of Kentucky*, 648 S.W.2d 869 (Ky. 1983)
[101] See *People v. Tyson*, 423 Mich. 357, 372-373 (1985); *People v. Dawson*, 431 Mich. 234 (1988), where the People conceded the trial prosecutor's conduct was intended to goad defendant into a mistrial motion and the issue was examined solely under the federal constitution; and over 30 unpublished cases arising in the Court of Appeals

C. The United States Constitution's Double Jeopardy Clause does not bar retrial where the trial prosecutor's error resulted in a mistrial absent the prosecutor's intent to subvert the defendant's Double Jeopardy protections

Double Jeopardy analysis under the U.S. Constitution is set forth by *Oregon v. Kennedy*.[102]

1. *Oregon v. Kennedy* removed ill-defined and amorphous language from the inquiry into whether Double Jeopardy barred retrial following a mistrial caused by prosecutor error and created an intent-based inquiry which balanced the defendant's Double Jeopardy protections with the prosecution's need to enforce society's laws

Oregon v. Kennedy of 1982 remains the most recent and relevant opinion addressing a retrial's bar under the Double Jeopardy clause following prosecutor error. While it has not been followed on state-related grounds, it has not been replaced by the U.S. Supreme Court and has been affirmatively referenced and applied in federal courts.[103]

On redirect examination of a rug value expert for rehabilitative purposes "the prosecutor sought to elicit reasons why the [expert] witness had filed a complaint against" defendant. In doing so, the prosecutor asked whether the expert had "done business" with defendant; the expert answered in the negative. As a follow-up, the prosecutor asked if that was because he [defendant] was "a crook." This resulted in a granted motion for mistrial.[104]

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[102] *Oregon v. Kennedy*, 456 U.S. 667 (1982)
[103] See *United States v. Lewis*, 368 F.3d 1102 (9th Circ. 2004), cert. denied. 543 U.S. 1053 (2005); *United States v. Wharton*, 320 F.3d 526 (5th Cir.), cert. denied 539 U.S. 916 (2003); *United States v. Strickland*, 245 F.3d 368 (4th Cir. 2001), cert. denied 534 U.S. 930 (2001); *Phillips v. Court of Common Pleas, Hamilton Co. Ohio*, 668 F.3d 804 (6th Cir. 2012); *United States v. Foster*, 945 F.3d 470 (6th Cir. 2019)
[104] *Kennedy*, supra at 669

Defendant claimed Double Jeopardy protection when the prosecution sought a retrial. During subsequent argument, the prosecutor testified – and the trial 'court found – that "it was not the intention of the prosecutor in this case to cause a retrial."[105] On appeal, the Oregon Court of Appeals found for Defendant, concluding that the "general rule" is that the Double Jeopardy clause does not bar subsequent prosecution "where circumstances develop not attributable to prosecutorial or judicial overreaching, …even if defendant's motion is necessitated by a prosecutorial error."[106] The court noted, however, that retrial was barred where the error was intended to provoke a mistrial or was motivated by bad faith or is undertaken to harass or prejudice defendant.[107]

Thus, the Oregon Court of Appeals found that the Double Jeopardy Clause bars retrial where (1) it is the intention of the prosecutor to provoke the retrial or (2) the prosecutor's conduct is an "overreach" whose motivation – while not to provoke the mistrial – is of "bad faith" or is done to harass or prejudice. In applying the test, Oregon viewed the attempted rehabilitation as a "personal attack" on defendant's character[108] and barred retrial.

On appeal, the U.S. Supreme Court rejected Oregon's bad faith/harassing conduct analysis as "somewhat amorphous"[109] and focused its analysis on the prosecutor's intent to force a mistrial motion.[110]

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[105] *Oregon v. Kennedy*, 456 US 667, 669 (1982)
[106] *Id.*, 670 external citations omitted
[107] *Id.*
[108] *Id.*
[109] *Id.*, 677
[110] *Id.*, 674

Though appearing in Justice Stevens' critical concurrence, the Double Jeopardy Clause represents a "constitutional policy of finality for the defendant's benefit in criminal proceedings."[111] This, and the interest of having his or her guilt determined in one proceeding, this must necessarily be balanced against "society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury"[112] and enforce society's laws. The Supreme Court's rulings on this had accommodated these legitimate interests.[113]

Preferring the "intent" analysis, the plurality *Kennedy* Court held:

> that the 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 a mistrial was intended to provoke the defendant into moving for a mistrial.[114]

Kennedy's holding excised the more nebulous "bad faith" inquiry from the two-prong "intent" and "bad faith" inquiry that seemingly stemmed from an opinion appearing before *Kennedy*, *U.S. v. Dinitz.*[115]

Dinitz, based the "bad faith" inquiry from *U.S. v. Jorn.*[116] *Jorn* – it is relevant to note – cited to *U.S. v. Tateo* for the "bad faith" premise, however, that term never appears in in the *Tateo* opinion.

In *Tateo*, the Court examined the application of Double Jeopardy to a case where retrial was not precluded where a conviction was set-aside due to an error

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[111] *Oregon v. Kennedy*, 456 US 667, 682 (1982)
[112] *Id.*
[113] *Id.,*
[114] *Id.,* 679
[115] *Id.,* 673-674, citing to *United States v. Dinitz*, 424 U.S. 600, 611 (1976)
[116] *U.S. v. Jorn*, 400 U.S. 470, 482-483 (1971)

in the proceedings and there was no allegation of improper conduct.[117] *Jorn* cited to a footnote in *Tateo* which states that the Double Jeopardy analysis would be different if the existence of prosecutor or judicial impropriety that prompted a mistrial "from a fear that the jury was likely to acquit…;"[118] that it was the intention of the prosecutor or a judge to intentionally cause the mistrial. Accordingly, *Jorn* uses "bad faith" as a term of art as opposed to an actual legal inquiry and inaccurately creates the notion that a separate inquiry into "bad faith" is part of the federal analysis. Arguably, this constituted some of the confusion and lack of "precise phrasing of the circumstances" that would allow a Double Jeopardy bar *Kennedy* complained of.[119] Instead of an amorphous bad faith/overreaching inquiry subject to the whims and varying definition of a presiding judge, *Kennedy* embraced the "intent" analysis.

Excising the ill-defined "bad faith" inquiry from *Dinitz* and adopting its "intent" inquiry offered far more practical guidance to the practitioner.[120] In turn, *Dinitz*'s intent inquiry into the mistrial-inciting actions of the prosecutor or judge stemmed from a long line of Supreme Court opinions identifying the need to learn the intent behind the offending conduct to appropriately determine its impact and offering insight to making the determination.[121]

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[117] *U.S. v. Tateo*, 377 U.S. 463, 467-468 (1964)
[118] *Id.,* 468 n 3
[119] *Oregon v. Kennedy*, 456 U.S. 667, 674 (1982)
[120] *Id.,* 677 (1982), citing to *United States v. Dinitz*, 424 U.S. 600, 611 (1976)
[121] See *Downrum v. United States*, 372 U.S. 734, 736 (1963); *Gori v. United States*, 367 U.S. 364, 369 (1961); *United States v. Jorn*, 400 U.S. 470, 489 (1971) (Stewart, J. dissenting); and *Wade v. Hunter*, 336 U.S. 684, 692 (1949)

Although concurring in the majority's opinion, Justice Powell highlighted a perceived weakness in the *Kennedy* analysis and suggested a solution. Since the key to the test was determining the prosecutor's intent – a subjective evaluation – a reviewing court "should rely primarily on the objective facts and circumstances of the…case."[122]

Similar to Justice Powell, but more damning, Justice Stevens' concurrence criticized the plurality for failing to include overreach and harassment within the Double Jeopardy Exception.[123] Stevens reasoned that the narrow test would place too heavy a burden on a defendant to prove a specific intent to provoke a mistrial instead of a simple intent to prejudice the defendant.[124] Such a strict requirement, he reasoned, would render a defendant's choice to continue an error-tainted trial or end it unmeaningful.[125] Thus, the plurality's test impliedly requires both the finding of an intentional prosecutorial misconduct *and* the finding that the error "virtually eliminated, or at least substantially reduced, the probability of acquittal in a proceeding that was going badly for the government."[126]

General standards that go beyond the intent inquiry, however, are difficult to apply since "they offer virtually no standards for their application,"[127] the Court opined in opposition to Justice Stevens.

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[122] *Oregon v. Kennedy*, 456 U.S. 679-680 (1982)
[123] *Id.*, 688 (Stevens, J., concurring)
[124] *Id.*
[125] *Id.*, 689
[126] *Id.*,
[127] *Id.*, 674

The plurality noted that to adopt Stevens' broad "overreaching" standard applied by Oregon would expand the possibilities for a defendant to benefit from trial error by creating a new "classification of [fatal] prosecutorial error" without providing "any standard by which to assess that error."[128] Not only would this shift the careful balance between a defendant's Double Jeopardy Rights and the prosecution's interest in a fair trial which seeks the enforcement of society's laws in favor of Defendant, but could harm defendants on the whole:

> Knowing that the granting of the defendant's motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might will be more loath to grant a defendant's motion for mistrial.[129]

If Stevens' test were applied, the Court was concerned with trial courts failing to assess the issue before it by rejecting a defense motion simply to avoid a mistrial, thus erroneously favoring the prosecution, Denial of a meritorious mistrial motion could be remedied through the direct appeal process, the Court reasoned, however such a path would rob defendant of "some of the advantages secured to [him] by the Double Jeopardy Clause – like the freedom from extended anxiety, and the necessity to confront the government's case only once."[130]

To adopt an examination of the offending prosecutor's intent – while it was not perfect, "free from practical difficulties," and did not provide a bright line rule, it was "a manageable standard to apply"[131] in order to maintain the balance

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[128] *Oregon v. Kennedy*, 456 US 667, 675 (1982)
[129] *Id.*, 676-677
[130] *Id.*
[131] *Id.*, 675

between the competing interest, given any factual situation presented to a reviewing Court. It was manageable in that the standard clearly called for the reviewing court to "make a finding of fact…[i]nferring the existence or nonexistence of intent from objective facts and circumstances"[132] – presumably – arising from the prosecutor's conduct during the course of the trial.

Thus, the *Kennedy* Court offered a strictly-defined standard which offered clear guidance to determine the applicability of Double Jeopardy after prosecutor error-inducing causing mistrial and ensured the balance between Defendant's and the prosecutor's competing interests. A shift to a test based – in whole or in part upon Stevens' criticism – would necessarily shift the balance in favor of a defendant with an analysis based on overly broad and ill-defined "bad faith"-style standards.

2. The majority of the Michigan Court of Appeals did not err in applying the federal *Kennedy* analysis to *People v. Jennings*

The Michigan Court of Appeals analyzed Defendant's case in light of *Oregon v. Kennedy* and did not err in doing so.[133] Judges Letica and Rick accurately summarized the *Kennedy* holding and synthesized the relevant and most important inquiry:

> …when determining whether double jeopardy attaches, the central focus is on the intent of the prosecutor.[134]

[132] *Oregon v. Kennedy*, 456 US 667, 675 (1982)
[133] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837)
[134] *Id.*, page 2

In making this determination, the Court necessarily relied "in large part on the trial court's assessment of the behavior"[135] and the objective facts presented.[136]

In both *Kennedy* and the Court of Appeals' application of the *Kennedy* test, both looked to the trial court's failure to find that the prosecutor's inappropriate intention existed.[137] Neither trial judge noted that the respective prosecutor's case was progressing poorly such that the objectionable comment was intended to obtain a mistrial motion from Defendant. True, there were discrepancies regarding the description of the shooter in this case – as well as the existence of bias with the witness in *Kennedy* - but these instances, alone, were not and are insufficient to conclude that a case proceeds poorly; especially where juries are instructed to be the sole arbiter of witness credibility and free to believe all, none, or part of a witness' testimony.[138] The respective opinions – and the lower court record of this matter – provide neither direct nor inferential fact to support any conclusion but the exclusion of the Double Jeopardy bar.

The trial prosecutor – like the prosecutor in *Kennedy* – made a purposeful, albeit erroneous, assertion. *Kennedy*'s prosecutor sought to elicit testimony that explained a witness's bias against Defendant by seeking the application of a pejorative classification – crook.[139] The instant prosecutor obtained testimony regarding Defendant's invocation of silence and then used it in argument as

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[135] Although the Court's analysis was largely done as a juxtaposition against *Dawson* the Court's review and reasoning was appropriate despite dissenting Judge Shapiro's alternative conclusion.
[136] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), page 3
[137] *Oregon v. Kennedy*, 456 US 667, 670 (1982); *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 91, 93-94
[138] See MCrim JI 2.8 – Judging Credibility and Weight of Evidence, for example
[139] *Kennedy*, supra 669

evidence of a guilty conscience.[140] Likewise both prosecutors denied possessing the intention to cause a mistrial.[141]

While the facts for analysis are limited in quantity, such minimalism belies their quality. Justice Powell's observation in *Kennedy* that "there was no sequence of overreaching prior to the single prejudicial question"[142] is insightful. Just as the single improper question was evidence of a mistake – albeit it a large one – the single instance of eliciting testimony and using it in argument, without complementary improper questions, arguments, or comments suggest the existence of a gap in knowledge – negligent ignorance at worst. Stated differently, though the comments carried sufficient weight for the mistrial, their scarcity failed to evidence inappropriate prosecutor intent. Reasonably, had there been more examples of erroneous prosecutor activity, the appropriate intent to trigger the Double Jeopardy bar would have been found.

The singular instance of erroneous conduct, without any supplemental findings from the record, supports the prosecutor's denial of improper intent and the trial court's finding. At most, as the Court of Appeals noted, the "error was the result of recklessness, negligence, or a lack of skill," not an intentional effort to manipulate Defendant into a mistrial. Accordingly, the application of the federal *Kennedy* standard to the instant matter does not bar retrial, as

[140] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 57-58
[141] *Oregon v. Kennedy*, 456 US 667, 670 (1982); *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 88-89
[142] *Kennedy*, supra 680

demonstrated by the majority Michigan Court of Appeals opinion. The dissent, however, should not be countenanced.

3. Michigan Court of Appeals Judge Shapiro's dissent in *People v. Jennings* is erroneous and should not be countenanced

Judge Shapiro's dissent has more to do with the state constitutional analysis than the federal one. Nonetheless, it should not be countenanced regarding its application of the federal *Kennedy* standard for four reasons.

First, Judge Shapiro's dissent is founded upon the premise that the trial prosecutor's error constituted a violation of a universally recognized axiom intended to manipulate the defense's mistrial motion.[143] The record does not support his conclusion.

The trial prosecutor either did not know – or forgot – this principle. Though he did not offer any explanation for this ignorance, when the trial court addressed the issue after jury instruction, he asked "to research the issue."[144] After doing the research, he learned – or relearned – the point and acknowledged the error.[145] The need to research suggests – in light of the fact that the erroneous conduct volitionally occurred in order to convict Defendant[146] – that he was simply ignorant on the point and did not do it to seek a mistrial. Similarly unaware, it seemed, was the trial court – at least at first.

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[143] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), pages 7-9
[144] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 82
[145] *Id.*, 84
[146] *Id.*, 88-89

At the conclusion of jury instructions, the trial court expressed *concern* about the weaponization of Defendant's silence and wanted to *research* the propriety of the prosecutor's actions.[147] Only after a brief recess for research did the Court return to the record to affirmatively say the prosecutor violated a "bright line rule."[148] Later, the trial court told counsel he *thought* the prosecutor's questioning was inadmissible and the later argument based upon it constituted a "very real *possibility* of…reversal."[149]

Like Judge Shaprio, *Blackstone* considered Double Jeopardy a universal maxim of the common law of England. Universal maxims may exist, but this does not guarantee they are universally known. Had this been a universally known principle amongst attorneys, the trial judge would not have emphasized only the possible erroneous nature or needed to conduct confirmatory research before concluding error existed. In fact, the only attorney who knew – partially – the universal axiom was defense counsel.

The record shows that counsel did not necessarily grasp the impropriety of all the prosecutor's conduct. The prosecutor's questions about Defendant's silence were not objected-to.[150] A review of the November 15th trial transcript confirms counsel's silence.[151] Later, counsel stated he did not see the testimony that Defendant terminated the statement rising to the level of a mistrial.[152] For

[147] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 80-81
[148] *Id.*, 85
[149] *Id.*, 90, 91
[150] *Id.*, 91-92
[151] *Id.*, 28
[152] *Id.*, 92

counsel, the error did not occur until he recognized its use in the prosecutor's closing argument and used it as the basis for his mistrial motion.[153]

In sum, the attorneys in this case – prosecutor included – were not sure of this premise's existence until outside research had been done. This argument is not intended to deflect blame or suggest error parity, but only shows that while a defendant's silence is protected, and that protection is enshrined in case law, it is not always known by attorneys in a court room. It should be, but it is not. The record shows this universal axiom was not entirely known in the instant matter. This reality cuts against the logic of Judge Shapiro's wide-swathed inference that (1) every attorney knows not to comment on a defendant's silence and (2) indifference to this axiom is evidence of improper intent that bars retrial.

The People agree with Judge Shapiro's assertion that the trial "prosecutor's questions and closing argument were not minor foot faults."[154] This was error. The trial prosecutor acknowledged it[155] and the People acknowledge it, here. The record, however, does not support Judge Shapiro's contention that it is self-evident proof of improper intent. Instead, the record supports the majority's observation that the "error was the result of recklessness, negligence, or a lack of skill" and not an intentional effort to manipulate Defendant into a mistrial. The record supports the existence of error that warranted only a retrial.

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[153] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 81
[154] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), page 9
[155] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 84

Second, Judge Shapiro's reliance upon *Dawson*'s adoption of *Pool* is misplaced. This Court observed that the Court of Appeals in *Dawson* rejected the *Kennedy* test and adopted the test set forth in *Pool v. Superior Court.*[156]

In *Pool,* Defendant and two co-defendants were accused of stealing jewelry from a mutual acquaintance's home.[157] At trial, the trial prosecutor became angry and "sought to ventilate his feelings to the court."[158] The opinion, identified several issues with the prosecution's case which placed his feelings into context:

- Defendant took the stand to deny knowledge of the theft and blamed non-testifying co-defendant who claimed 5th Amendment protection.
- An error in the indictment which referred to the stolen and recovered gold jewelry as silver.
- A difference in the value of the stolen and recovered jewelry which – ostensibly – affected the charge.
- A lack of direct proof that Defendant stole the jewelry.[159]

The opinion further observed that the prosecutor's cross-examination moved from proper to arguably proper to "irrelevant and rather prejudicial" to egregiously improper.[160]

Pool complained about the questions and the prosecution's demeanor, moving for a mistrial. The trial court denied it[161] (although the opinion

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[156] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), page 9
[157] *Pool v. Superior Court*, 139 Ariz 98, 100 (1984)
[158] *Id.*
[159] *Id.,* 100-101
[160] *Id.,* 101
[161] *Id.*

previously indicated that the motion was granted).[162] Subsequently amended indictments were dismissed and accepted. The prosecution resumed and defendant moved to bar retrial under Double Jeopardy, saying the prosecution intentionally pursued a course of conduct designed to "mis-try" the case and extricate the State from the position in which its own errors had placed it.[163]

After discussing *Kennedy*'s test, *Pool* noted that while Arizona Constitutional Double Jeopardy provision would normally be interpreted in conformity with the federal constitutional clause,[164] adopting *Kennedy* would not be in keeping with Arizona law which recognized both the Double Jeopardy bar on prosecutorial overreaching (the amorphous concept *Kennedy* rejected) and the *Kennedy*-style prosecutor intent analysis.[165] *Pool* found *Kennedy* too narrow for Arizona.[166] *Pool* found that Arizona's Constitution afforded more protection than the U.S. Constitution and laid out a test which would trigger Arizona's Double Jeopardy and bar retrial in the event of defendant's mistrial motion if:

1. The mistrial is granted because of improper conduct or actions of 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 retrial.[167]

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[162] *Pool v. Superior Court*, 139 Ariz 98, 100 (1984)
[163] *Id.,* 102
[164] *Id.,* 108
[165] *Id.,* 105 (1984), citing to *State v. Marquez*, 113 Ariz. 540, 542 (1977) and *State v. Wilson*, 134 Ariz. 551, 554 (App. 1982) respectively
[166] *Id.,* 108
[167] *Id.,* 109

When *Dawson* rejected *Kennedy* and adopted *Pool,* it also adopted much of its general legal reasoning. As in *Pool*, *Dawson* identified the general Double Jeopardy rights.[168] Also, like *Pool*, it noted relevant general federal authority.[169] Like *Pool*, *Dawson* criticized *Kennedy* in the same way Justice Stevens did, concluding that the federal Double Jeopardy Clause must protect against a prosecutor's willing and conscious engagement in conduct he [or she] knows is prejudicial as much as it protects against the improper goading of a defendant into a mistrial motion.[170] From this and the suppositional extrapolative dicta that a defendant forced to choose from either possible situation does so not because he or she truly wishes to, the *Dawson* Panel found that Michigan's Double Jeopardy clause would bar retrial, implying that the Michigan Constitution provides more protection than the U.S. Constitution.[171] This implication, however, is where *Dawson* diverges from *Pool*.

Though like *Pool* in many respects, *Dawson* neither had the prior state-specific jurisprudence nor the discussion about the state constitution that formed that Pool's reason to stray from *Kennedy*. *Dawson*'s failure to examine the relevant provision of the Michigan Constitution and attendant case law – as *Pool* did in Arizona – is the greatest flaw in *Dawson*'s analysis. Similarly, in adopting *Dawson*, Judge Shapiro inherited its insufficiently simplified rationale, further negating the persuasiveness weight of his position.

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[168] *People v. Dawson*, 154 Mich. App. 260, 268-269 (1986), citing to *People v. Robideau*, 419 Mich. 458,485 (1985)
[169] *Id.,* citing to *Green v. United States*, 355 U.S. 184, 190 (1975)
[170] *Id.,* 269-270
[171] *Id.,* 281-282

Third, under *Pool,* Defendant is not entitled to relief and retrial is not barred. The dissent found that the prosecutor's actions barred retrial because he knew or should have known his questioning and argument concerning Defendant's silence would cause a mistrial.[172] As noted previously, this argument substantively fails because there is no indication that the prosecutor – as *Pool* put it – committed "intentional conduct…know[n] to be improper and prejudice which he [or she] pursues for any improper purpose with indifference…" to a resulting mistrial. Judge Shapiro's position is based upon the supposition that the prosecutor knew that commenting on Defendant's invocation of silence was improper. The record does not support his supposition. Instead, it shows that the prosecutor did not know this principle and the record conduct of the others belie the idea the prosecutor violated a universally-known axiom.

Furthermore, just as the record failed to evidence anything suggesting the prosecutor knew this line of questioning and argument was improper, it similarly failed to support the conclusion that he pursued it for the purpose of obtaining a mistrial. The record shows that the prosecutor did not know of the mistrial possibility until counsel brought it to his attention.[173] Reasonably, if the prosecutor was unaware that commenting on the Defendant's silence was improper, it is highly unlikely that he knew that it could result in a mistrial. Likewise, if he was unaware of a mistrial as a possible outcome, he could not

[172] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), pages 9-10
[173] *People v. Devante Jennings*, Jury Trial – November 15, 2019, page 87-88

have reasonably sought to manipulate Defendant into making the mistrial motion in the first place. Accordingly, the dissent is unhelpful to this Court'

Finally, Judge Shapiro's observation that "the prosecution elected not to file a brief in this appeal" in the Court of Appeals and thereby failed to provide evidence suggesting that the trial prosecutor's actions were not improper is improperly weighted. Judge Shapiro's inference, while sensible, has little resemblance to the actuality.

The Macomb County Prosecutor's Office (MCPO) did not elect to not file a brief. According to MCPO Appeals Division Chief Joshua Abbott, the MCPO Appeals Division did not receive Defendant's brief on appeal and was unaware the matter was pending in the Court of Appeals. The MCPO appellate file is bereft of any brief or other filing suggesting that the matter had been taken-up to the Court of Appeals by Defendant. Had the MCPO Appeals Division had known of the case's pendency, a Court of Appeals brief would have been provided. Any conclusion to the contrary is erroneous.

D. Michigan's Constitutional Double Jeopardy Clause does not offer more protection than the U.S. Constitution; the respective federal and state clauses are to be analyzed similarly

Dawson's failure to substantively address whether Michigan's Constitutional Double Jeopardy provision offers more protection than the U.S. Constitution is its key failing. This is where both the Court of Appeals in *Dawson* and Judge Shapiro's reliance on *Dawson's* rationale for adopting *Pool* fails. Conclusory statements of self-evident proof are insufficient to determine the

extent of Michigan's Double Jeopardy protections compared to that of the U.S. Constitution.

This Court has consistently held that absent a compelling reason to afford greater protection under the Michigan Constitution, the Michigan and federal constitutions will be treated as affording the same protections.[174] Similarly, "the question of state constitutional adjudication, however, is not whether this Court may interpret our constitutional differently than the federal constitution, the issue is whether we must."[175]

Here, there is neither a need nor a compelling reason to interpret the Michigan's constitution differently than that of the United States.

Regarding Double Jeopardy, both the federal and state constitutions, the accused cannot be placed in jeopardy for the same criminal offense.[176]

Both the federal and state constitutional provisions for Double Jeopardy identify three protections:

(1) a second prosecution for the same offense after acquittal;

(2) a second prosecution for the same offense after conviction; and

(3) multiple punishments for the same offense.[177]

This Court has held that federal and state Double Jeopardy clauses be analyzed similarly. More specifically, this Court has held that "[t]he primary goal in

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[174] See *People v. Perlos*, 436 Mich. 395, 313 n.7 (1990); *People v. Smith*, 420 Mich. 1, 20 (1984); *People v. Nash*, 418 Mich. 196, 214 (1983)
[175] *People v. Pickens*, 446 Mich. 298, 315 (1994)
[176] U.S. Const., Am. V; Const. 1963, art 1, section 15; *People v. Beck*, 510 Mich. 1, 11-12 (2022)
[177] *People v. Nutt*, 469 Mich. 565 (2004), citing to *People v. Torres*, 452 Mich. 43, 64 (1996) who quoted *United States v. Wilson*, 420 U.S. 332, 343 (1975)

interpreting a constitutional provision is to determine the text's meaning to the ratifiers…at the time of ratification."[178]

People v. Beck generally discussed appropriate interpretation of the state and federal Double Jeopardy clauses. First, *Beck* noted that the Double Jeopardy Fifth Amendment right is a fundamental constitutional right, applicable to the states through the Fourteenth Amendment, citing to *Benton v. Maryland*.[179] In the same note, this Court next observed that:

> While we are not bound to interpret our Constitution consistently with similar provisions of the United States Constitution, "we have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art. 1, § 15."[180] Therefore, our analysis is the same under each.[181]

People v. Smith[182] the case the *Beck* Court relied upon for the general interpretation of the Double Jeopardy clauses – and the case it relied upon, *People v. Nutt*[183] – both centered their analyses of the clause on its development in the 1963 constitutional convention in terms of the "same offense" language of the respective constitutional provisions. While this focus on the "same offense" language is largely irrelevant, the balance of the historical discussion – is insightful for the question at hand.

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[178] *People v. Smith*, 478 Mich. 292, 298 (2007), citing to *Wayne Co. v. Hathcock*, 471 Mich. 445, 468 (2004)
[179] *People v. Beck*, 510 Mich. 1, 11, note 1 (2022), citing to *Benton v. Maryland*, 395 U.S. 784, 794 (1969)
[180] *Smith*, supra 302 n7
[181] *Beck*, supra 11 n1 (2022)
[182] *Smith*, supra 301-303
[183] *People v. Nutt*, 469 Mich. 565, 588-590 (2004)

The Michigan Constitution of 1963 replaced "the narrower language of the 1850 and 1908 double jeopardy provisions" with language similar to that of the original 1835 state constitution and the U.S. Fifth Amendment. In fact, the clauses are nearly identical:

> No person shall be subject for the same offense to be twice put in jeopardy[184]
>
> and
>
> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.[185]

This shift from the language of 1850 and 1908 – "No person, after acquittal upon the merits, shall be tried for the same offense"[186] to the nearly identical federal language – as noted in *Nutt* – provided some "historical context and persuasive support for this Court to return to the original meaning given to the Fifth Amendment-based double jeopardy language."[187] Moreover, the deletion of the "archaic" phrase "of life or limb" was simply a word-smithing choice, "not a substantive one" since both the judiciary committed "wished simply to bring the text of the double jeopardy provision 'in line with the law as it now stands in the state of Michigan' and 'in line with the federal constitution.'"[188] After discussing the drafters' intent to ensure the state clause conformed to prior decision of the state supreme court, this Court determined that it was the drafters' intent to bring the state constitution into line with that of the federal constitution:

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[184] Const. 1963, art 1, section 15
[185] U.S. Const., Am. V
[186] Const. 1850, art vi, section 29; Const. 1908, art II, section 14
[187] *People v. Nutt*, 469 Mich. 588-589 (2004)
[188] *Id.*, 589

> This is a revision of Sec. 14, Article II, of the present constitution. The new language of the first sentence involves *the substitution of the double jeopardy provision from the U.S. Constitution* in place of the present provision which merely prohibits "acquittal on the merits." This is *more consistent with the actual practice of the courts in Michigan.* [2 Official Record, p. 3364.]
>
> Thus, the ratifiers were advised that (1) the double jeopardy protection conferred by our 1963 Constitution would parallel that of the federal constitution, and (2) that the proposal was meant to bring our double jeopardy provision into conformity with what this Court had already determined it to mean.[189]

Beck's summary conclusion is a reasonable one; that past analyses of the Fifth Amendment's Double Jeopardy clause have conveyed the meaning of Michigan's Double Jeopardy clause and, so, to give full effect to the intent of the 1963 Constitution's drafters, analysis is the same under each.[190]

As noted previously, the federal test is *Oregon v. Kennedy* and this is the test that has been both referenced and applied in both published and unpublished opinions. Prior to the 1982 opinion in *Kennedy*, Michigan used the "bad faith" or intentional harassment or prejudice standard set out by *United States v. Dinitz*.[191][192]

Although occurring after the drafting and ratification of the 1963 Constitution, *Dinitz* provided an accurate summary of federal law concerning the Double Jeopardy Clause after a mistrial brought about by prosecutor or judicial

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[189] *People v. Nutt*, 469 Mich. 565, 590 (2004), citing to Official Record, Constitutional Convention 1961, p. 3355, accompanying Const. 1963, art. 1, § 15
[190] *People v. Beck*, 510 Mich. 1, at 11 n1 (2022)
[191] *United States v. Dinitz*, 424 U.S. 600, 607-609 (1976)
[192] See *People v. Bommarito*, 110 Mich. App. 207 (1981); *People v. Benton*, 402 Mich. 47, 64 n.25 (commenting on *Dinitz*'s "bad faith" inquiry in the context of prosecutor and judicial misconduct)

error. *Dinitz* accurately identified those cases – stretching back to the 1940s – that established the "intent" inquiry[193] as well as the cases that generally interpreted that "intent" inquiry to be a search for "bad faith" on the part of the offending prosecutor or judge.[194] Since the "bad faith" inquiry really was *not* a separate inquiry, but another way to search for the prosecutor's "goading" of the defendant into making a mistrial motion – a search for the prosecutor's intent – the line of cases identifying the search for intent was the state of the law in 1963, in Michigan, when the Constitution was drafted.

Consequently, if Michigan's 1963 Constitution and its Double Jeopardy Clause is to be interpreted in accord with the corresponding federal clause and case law, and that clause and case law indicated that a reviewing court was to search for a prosecutor's intent at the time it makes a mistrial-inducing error, then Michigan's test must mirror that federal search for the prosecutor's intent. The Michigan Constitution, then, does not afford greater protections than its federal counterpart and *Dinitz's* intent inquiry, and *Kennedy* – its unrepudiated progeny is the appropriate test for this Court to adopt and to apply.

Similarly applicable is the U.S. Supreme Court's reasoning for adopting a narrow test in applying Double Jeopardy when a mistrial is caused by prosecutor error. A clear inquiry into the intent of the error – once it has been established – is necessary to determine its effect. Broad tests that search for general

[193] See *Downrum v. United States*, 372 U.S. 734, 736 (1963); *Gori v. United States*, 367 U.S. 364, 369 (1961); *United States v. Jorn*, 400 U.S. 470, 489 (1971) (Stewart, J. dissenting); and *Wade v. Hunter*, 336 U.S. 684, 692 (1949)

[194] See *U.S. v. Jorn*, 400 U.S. 470 (1971), citing to *U.S. v. Tateo*, 377 U.S. 463 (1964)

prosecutorial "harassment or overreaching" may be sufficient to warrant a mistrial, but "absent the intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause" retrial under that clause is not barred.[195] The *Kennedy* standard preserves the balance between Defendant rights and societal interests in law enforcement and ensures that the application of Double Jeopardy – the ultimate sanction – is reserved for conduct not as imprecisely defined as "bad faith" or "overreaching." *Kennedy* simply requires a reviewing court to "make a finding of fact" which infers "the existence or nonexistence of intent from objective facts and circumstances," a practice "familiar" to practitioners within the criminal justice system. The applicable test and attendant analysis are – in fact – familiar to lawyers and judges alike and may be reliably applied and reviewed for error while ensuring that a fair trial is afforded to both the People and the Defendant.

E. Since the Michigan Constitution Double Jeopardy Clause is to be interpreted in accordance with its federal counterpart, and its federal counterpart is analyzed under *Oregon v. Kennedy*, when the *Kennedy* test is applied to these facts, the prosecutor's error does not bar retrial

Kennedy's federal-level "intent" inquiry is the appropriate analysis for the state-level inquiry. Michigan Court of Appeals Judges Rick and Letica appropriately applied *Kennedy* to its analysis of the instant trial prosecutor's error in eliciting testimony on Defendant's silence during his police interrogation, then, using it in his closing as "evidence of guilt." This brief has already

[195] *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)

discussed the opinion, the lack of error in Judges Rick and Letica's work, as well as the inherent flaws of the dissent. There is no need to repeat them here.[196]

F. The competing analyses discussed in *Smith, Rogan, McClaugherty* (*Breit*), and *Pool* do not comport with Michigan law and should not be adopted

This Court directed the parties to examine other competing Double Jeopardy tests from across the United States. These tests come from Pennsylvania, Hawaii, New Mexico, Arizona, and California.

Any test that expands a Court's Double Jeopardy analysis from determining whether the prosecutor's error intended to cause a mistrial to identifying overreaching, bad faith, recklessness, gross negligence, knowledge that should have been known, etc. strikes against the stated intention of the drafters of the 1963 Michigan Constitution that the state Double Jeopardy provision mirror that of the federal Double Jeopardy clause. Moreover, it inappropriately skews the fact/case/error-driven analysis that balances societal interest in law enforcement with a Defendant's Double Jeopardy right in favor of Defendant. Allowing the ultimate sanction of Double Jeopardy for something as ill-defined as "bad faith" unfairly lowers the bar for its application and violates the People's right to a trial. Stated differently, any test based upon Justice Stevens' dissent in *Kennedy*, or any test other than *Kennedy*, is inappropriate. Those broader tests - as articulated in *Smith, Rogan*, *McClaugherty* (*Breit*), and *Pool* – should not be adopted in Michigan.

[196] See Argument Section C, above

The analysis offered by Pennsylvania in *Commonwealth v. Smith* bars subsequent prosecution after a mistrial in two instances. First – according to *Kennedy* – when the prosecutor's error is intended to cause a mistrial.[197] Secondly, when the error is "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial."[198]

The first inquiry is not objectionable, as it is derived directly from *Kennedy* and its forebears. The second, however, attempts to quantify the amorphous "bad faith" inquiry *Kennedy* sought to clear and fails. Though the end of the analysis – a determination of prejudice to due process – offers an actual end for a reviewing court to search for – the initial question of a prosecutor's volitional intention to cause prejudice to the defendant is still a question of intent that is adequately covered by the *Kennedy* inquiry.[199] The resumption of a "bad faith" inquiry without more definite direction to courts or litigants offers no real answer to this Court's question about the appropriate standard to adopt. *Smith* should not be adopted since it muddies the analysis, fails to offer clear guidance to improve the practice of law in Michigan, and disrupts *Kennedy*'s balance.

Hawaii in *State v. Rogan* applies Double Jeopardy and bars retrial when the prosecutor's conduct is "so egregious that, from an objective standpoint, it

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[197] *Commonwealth v. Smith*, 532 PA 177, 186 (1992)

[198] *Id.*

[199] Interestingly, *Smith*'s second search for the prosecutor's intention to deny a defendant of his or her fair trial constitutes a subjective search for the prosecutor's intent which has been long part of the criticism of *Oregon v. Kennedy*. See *State v. Rogan*, 91 Hawai'i, 405, 422 (1999) citing to James Ponsoldt, *When Guilt Should be Irrelevant: Government Overreaching as a bar to Reprosecuiton Under the Double Jeopardy Clause after Oregon v. Kennedy*, 69 Cornell L.Rev. 76, 98 (1983)

clearly denied a defendant his or her right to a fair trial."[200] The opinion also found that a prosecutor is to possess certain inherent knowledge – a prosecutor "is charged with knowing that arguments that rely on racial, religious, ethnic, political, economic, or other prejudices of the jurors introduce into the trial elements of irrelevance, irrationality, and unfairness that cannot be tolerated."[201]

Certainly, the racially charged comments the prosecutor made in *Rogan* are a clear example of knowledge that a prosecutor – or any litigant or judge – should know to be inappropriate. The areas of inherent knowledge charged to a prosecutor are reasonable, however, the standard – as noted in California's *People v. Batts*[202] – inappropriately blurs the line between "'normal' species of prejudicial prosecutorial misconduct that violates a defendant's due process rights" and "the exceptional form of prosecutorial misconduct" that warrants a mistrial, dismissal, and bar to subsequent prosecution.[203] *Rogan* makes no differentiation between "innocent" prosecutor error – comparable to a judge's error or a trial counsel's objectively unreasonable error – that only warrants a retrial and the malicious misconduct that would violate *Kennedy* or otherwise demonstrate a violation of ethical rules. To allow this blurring would be to hold a prosecutor to an unreasonably high standard, requiring a prosecutor to ensure a perfect trial, to avoid the higher penalty of a Double Jeopardy bar to retrial. Perfection, while an admirable goal every prosecutor – as well as every judge and

[200] *State v. Rogan*, 91 Hawai'i, 405, 423-424 (1999)
[201] *Id.*, 424
[202] *People v. Batts*, 30 Cal. 4th 660 (2003)
[203] *Id.*, 690; this is an also an observation *Batts* makes of *Commonwealth v. Smith.*

defense counsel – should strive for, it is impossible to attain. Any test that could considers any deviation supply "bad faith" or other ill-defined standard sufficient to apply double jeopardy's bar to retrial is one that should not be adopted.

The "line-blurring" criticism of *Smith* is not limited to Pennsylvania or even Hawaii's tests. It extends to *McClaugherty* and *Pool.*

State v. Breit[204] provided the test in *State v. McClaugherty*[205] *and* found retrial barred under the New Mexico Constitution where:

1. Prosecutor error is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for new trial; and

2. If the prosecutor knows the conduct is improper and prejudicial; and

3. If the prosecutor intends to provoke a mistrial or acts in willful disregard of the resulting mistral, retrial, or reversal.[206]

Though seemingly preferred by our Court of Appeals in *Dawson*[207] and Judge Shapiro in his dissenting opinion,[208] *Pool v. Superior Court*'s test offers no improvement upon *Kennedy*. As stated previously, *Pool* set out a three-part test to determine when Double Jeopardy would bar retrial following a mistrial for prosecutor error:

1. Mistrial is granted because of improper conduct or actions of 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

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[204] *State v. Breit*, 122 N.M. 655 (1996)
[205] *State v. McClaugherty*, 144 N.M. 483, 491 (2008)
[206] *Id.*, citing to *State v. Breit*, 122 N.M. 655 (2008)
[207] *People v. Dawson*, 154 Mich. App. 260(1986)
[208] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), (Shapiro, dissenting)

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 retrial.[209]

The prongs that establish the existence of the prosecutor's objectional conduct and the finding that it is incurably fatal to the trial are not objectionable in themselves. The questions, however, that search for imputed knowledge to determine a bad faith or otherwise attempt to classify the inappropriate conduct, without deference between retrial-inducing error and Double Jeopardy-barring misconduct, do not conform to Michigan's Double Jeopardy clause or *Kennedy*. This failure to adequately account for the difference between the two styles of errors and two very different remedies fail to adequately balance a defendant's right and society's right to enforced laws. Further, the failure to provide adequate instruction that meets this goal is exactly what the Supreme Court in *Kennedy* wished to avoid when it said that competing broader tests that move away from a narrow inquiry "offer virtually no standards" to apply the tests.[210]

The Connecticut Supreme Court observed this condition in *State v. Michael J.* when it rejected the leading tests straying from *Kennedy* – *Pool*, *McClaugherty*, *Rogan*, and *Smith* included – interpreted its own constitution to be in accord with the federal constitution, and adopted *Kennedy*.[211] Ultimately, *Pool* and *Breit/McClaugherty* still require an intent analysis, but do so in a way which fails

[209] *Pool v. Superior Court*, 139 Ariz 98, 109 (1984)
[210] *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)
[211] *State v. Michael J.,* 274 Conn. 321 (2005)

to adequately clarify the law's application for lawyers and judges and preserve the balance that *Kennedy* ensures.

G. *People v. Batts* should be adopted if this Court concludes Michigan's Double Jeopardy protections are greater than those of the U.S. Constitution

If Michigan's Double Jeopardy Clause affords no greater protection than its federal counterpart, then California's *People v. Batts* is as inappropriate as the other tests. If this Court finds otherwise, *Batts* should be adopted.

During a second retrial for murder, prosecutors planned to obtain, and did obtain, testimony regarding the absence of a murdered and unavailable witness in violation of a court order to preclude that evidence.[212] A mistrial was declared, a third retrial planned, and a motion to preclude retrial on Double Jeopardy grounds brought. [213] During the Double Jeopardy motion hearing, the Court took testimony from one of the two involved prosecutors who (1) admitted to letting his emotions trump his rational thought on the issue and (2) stated there was no intention to cause a mistrial. The prosecutor did not testify that he believed the case was lost or that an acquittal was likely. The trial court examined the trial record and concluded that "the case was 'overall…going well for the people.'"[214] Applying only the *Kennedy* standard, the trial court found that retrial was not barred.[215] The third trial occurred, and defendant was

[212] *People v. Batts*, 30 Cal 4th 660, 670 (Cal 2003)
[213] *Id.*, 671-672
[214] *Id.*, 673-675
[215] *Id.*, 675

convicted. On appeal, the California Court of Appeals overturned the trial court's finding, and the state supreme court examined the case.

The *Batts* Court first found that the California Constitution afforded greater protections than the U.S. Constitution and created their own test to apply Double Jeopardy following a mistrial due to prosecutor error.[216] California's test drew on federal appeals court decisions to find that Double Jeopardy bars retrial following the grant of a defendant's mistrial motion when:

(1) the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and

(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 to thwart such an acquittal; and

(3) a court, reviewing the circumstances as of the time of the misconduct, objectively determines the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal."[217]

The *Batts* test, the court reasoned:

> …should not be so broad as to lead to the imposition of the double jeopardy bar—with its drastic sanction prohibiting retrial—in circumstances in which such a sanction is unwarranted. What is needed is a standard that sufficiently protects double jeopardy interests, but also retains and enforces a distinction between "normal" prejudicial prosecutorial misconduct that violates a defendant's due process right to a fair trial and warrants reversal and retrial, and the form of prosecutorial misconduct that not only constitutes a due process violation but also a double jeopardy violation, and hence warrants not only reversal but dismissal and a bar to reprosecution.[218]

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[216] *People v. Batts*, 30 Cal 4th 660, 685-692 (Cal 2003)
[217] *Id.*, 695
[218] *Id.*, 692

To meet this substantive goal, the Court drew on the Second Circuit Court of Appeals decision in *U.S. v. Wallach* that assessed Double Jeopardy implications in a case reversed because of prosecutor misconduct at trial as opposed toa mistrial based upon prosecutor misconduct.[219] When *Wallach* discussed Double Jeopardy, it did so in light of *Kennedy* and expanded upon its core inquiry instead of replacing it:

> If any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.[220]

Wallach reasoned that the prosecutor who intentionally goads or manipulates a defendant into a mistrial motion does so "because he [or she] believes that completion of the trial will likely result in an acquittal."[221] Though *Batts* considered this to be the establishment of a right beyond that established by *Kennedy*, the *Batts* test is more akin to a clarification of *Kennedy*'s core inquiry.

Batts first prong adopts *Kennedy* in total. The next prongs offer guidance to the reviewing court in the factors to consider in determining whether Double Jeopardy applies. As *Batts* observed, the latter prongs clearly delineate what a court is to find – whether, as an objective matter, that the prosecutorial error deprived defendant of a reasonable prospect of acquittal is an "appropriate guard against an unwarranted imposition of the double jeopardy bar."[222] Thus, the

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[219] *People v. Batts*, 30 Cal 4th 660, 692 (Cal 2003), citing to *U.S. v. Wallach* 979 F.2d 912 (1992)
[220] *Id.*, 693-694 (Cal 2003), citing to *U.S. v. Wallach* 979 F.2d 912, 916 (1992)
[221] *Id.*
[222] *Batts*, supra 696

prosecutor's error – once it is established – can be judged in view of trial's events and the reviewing court is given a set of criteria it can use to determine whether the error was intended to goad defendant into a mistrial. Moreover, *Batts*' elaboration of *Kennedy* preserves *Kennedy*'s balance between the defendant's and People's competing rights and leaves the decision properly in the hands of the reviewing court reviewing the circumstances against a definite standard.

As applied to this case facts, *Batts* would not bar retrial.

The record clearly shows – and the People have stated – that the trial prosecutor erred by eliciting testimony concerning Defendant's invocation of his right to silence and, then, using it as evidence of guilt during his closing argument. When viewed against the conduct of the trial, there is no indication that the trial prosecutor intended to thwart an acquittal. Instead, it is clear from the record evidence that the trial prosecutor intended to use the evidence – not to thwart an acquittal – but to obtain a conviction. Moreover – at the risk of a *post hoc ergo propter hoc* logical fallacy – the retrial cannot be ignored.

The evidence at the second trial was substantively identical to that admitted at the first. While there was no direct evidence that Defendant possessed the gun, there was sufficient circumstantial and inferential evidence for the second jury to convict beyond a reasonable doubt. With the same evidence, it cannot be said that the quality or quantity of the evidence in the record would have led the reviewing judge to conclude that an acquittal, but for the error, would have occurred in the first. Accordingly, while the lower court could find that the trial prosecutor erred – and reversibly so – it was not done to

deprive Defendant of his reasonable prospect of acquittal and, so, there is no suggestion that the prosecutor intentionally erred to trigger a mistrial. Defendant's retrial was, therefore, appropriate and so too was his conviction and sentence.

RELIEF REQUESTED

Wherefore, the People request this Court to formally adopt the intent test of *Oregon v. Kennedy* as the proper inquiry to determine whether Double Jeopardy bars retrial after a mistrial caused by prosecutor error. If this Court is not so inclined to adopt *Kennedy*, adopting its clarified test as articulated by California's *People v. Batts* would be most appropriate under Michigan Law. Applying either test does not result in a bar to Defendant's retrial and the conviction and sentence arising from his retrial should be affirmed.

Respectfully Submitted,

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Dated: Feb. 10, 2025 By: */s/ Jonathan A. Mycek (dig. Signed)*
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I hereby certify that this document contains 12,713 countable words in 12-point font, Bookman Old Style typeface.