STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVANTE KYRAN JENNINGS,

Defendant-Appellant.

Supreme Court No. 165764

Court of Appeals No. 359837

Macomb Circuit Court No. 2019-001800-FH

BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL DANA NESSEL AND THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

Prosecuting Attorneys
Association of Michigan

J. Dee Brooks
Midland County Prosecutor
President

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Christopher M. Allen (P75329)
Assistant Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
Allenc28@michigan.gov

Reem Albudoor
Student Intern

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STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should endorse a standard for possible retrial under Michigan's Double Jeopardy Clause where the competing standards would not yield a different result in this case, and the choice of either standard would constitute non-binding dicta.

   Appellant's answer: Did not answer.

   Appellee's answer: Did not answer.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

   Amici's answer: No.

2. Whether the standard from *Oregon v Kennedy*, providing that retrial is not barred unless a prosecutor intends to goad the defendant into a mistrial motion, should continue to apply to Michigan's Double Jeopardy Clause.

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Did not answer.

   Amici's answer: In the alternative, Yes.

INTEREST OF AMICUS CURIAE

Michigan Attorney General Dana Nessel is the State's elected top law enforcement official. The Attorney General is the chief law enforcement officer of the State of Michigan, see *Fieger v Cox,* 274 Mich App 449, 451 (2007), and supervises and advises all the prosecutors in the State of Michigan under MCL 14.30. See *People v Foster*, 377 Mich 233, 234–235 (1966). The Michigan Department of Attorney General is a governmental agency committed to protecting and serving the people and interests of Michigan, and it prosecutes crimes that are of the utmost importance to the State of Michigan.

The Prosecuting Attorneys Association of Michigan (PAAM) is an association of the 83 county prosecutors of this State, along with the Attorney General and the U.S. Attorneys sitting in Michigan. PAAM has a statutory duty to "keep the prosecuting attorneys of the state informed of all changes in legislation, law and matters pertaining to their office." MCL 49.62.

INTRODUCTION

This case is a poor vehicle to consider whether to change the standard for the Michigan Constitution's bar for retrials in the wake of a Double Jeopardy violation engendered by a prosecutor's error. Defendant Jennings would not be entitled to relief despite the prosecutor's use of his post-invocation silence in closing argument under either *Oregon v Kennedy* or *Pool v Superior Court*, so any comment from this Court on which standard is appropriate would be dicta. Both standards set a meaningful hurdle for barring retrial after a defendant consents to a mistrial, and the facts do not support a finding under either standard.

First, the prosecutor's error in closing argument was preceded by a strong case by the People (thus zero incentive to knowingly engage in egregious misconduct). Second, defense counsel *did not even object* to the prosecutor's problematic statement, and when the trial court sua sponte raised the issue, it sought and permitted additional research on whether the prosecutor's conduct constituted an error at all (showing the error was not immediately obvious). Finally, the court found that the prosecutor did not act intentionally to introduce improper evidence of Jennings' silence (which is not reversible absent clear error).

Given these facts, there is no basis on which to revisit *People v Dawson*'s adoption of the *Kennedy* standard—because any such ruling would be mere non-binding dicta. Jennings is not entitled to relief no matter which standard is applied. Thus, the question of which standard the Court should adopt is not essential to whether Jennings is entitled to relief. This Court has repeatedly refused to engage in this kind of academic exercise; it should decline to do so here.

In the alternative, this Court should confirm that the *Kennedy* standard applies to Michigan's protection. *Kennedy*'s subjective intent standard correctly considers whether the prosecutor intentionally attempted to curb the defendant's Double Jeopardy rights by goading the defendant into a mistrial. The *Pool* standard, by contrast, merely requires proof that the prosecutor knew the action was improper and that there was a significant risk of a mistrial. The Court should reject this broad and generalized rule.

If this Court were to adopt the *Pool* standard, it would encompass a wide range of innocuous conduct on the part of the prosecutor. The U.S. Supreme Court in *Kennedy* cautioned against such a broad standard, highlighting the complexity of legal rules and recognized that it would be rare in a trial of any complexity that an attorney's conduct will not be found objectionable to some degree. Dismissing the conviction of a defendant who has been found guilty due to the prior negligence of a prosecutor would not serve the interests of the public at large. To ensure that the innocent, though mistaken, conduct of prosecutors is not swept into such an analysis, this Court should deny leave or in the alternative, confirm *Kennedy*'s applicability to Michigan's Double Jeopardy Clause.

ARGUMENT

I. Where the same result would occur under either proposed standard for whether prosecutorial misconduct bars retrial under the Michigan Constitution, this Court should deny leave.

In this case, under either the *Oregon v Kennedy* standard or *Pool v Superior Court* standard, the Michigan Double Jeopardy Clause does not bar retrial. The strength of the prosecutor's case and the isolated nature of the error, the lack of any objection by defense counsel, and the trial court's factual findings—reversible only where clearly erroneous—mean that no matter which standard is applied, affirmance is required. The court below rightly recognized that "there is little evidence to support the conclusion that defendant could meet the *Kennedy* or *Pool* standards." Unpub op at 4 n 2.

Thus, any decision by this Court purporting to decide which standard to now adopt would be a mere "academic exercise"—non-binding dicta. The Court would be opining on a matter that does not affect the outcome of the case and would not bind any court going forward. That is a dispositive vehicle problem; this Court should deny leave and await a case where choosing a standard would actually make a difference in the outcome and would bind the bench going forward.

A. Under either standard under consideration via this Court's order, retrial was proper.

The Double Jeopardy Clause of the Michigan Constitution and the U.S. Constitution both provide that "an accused may not be 'twice put in jeopardy' for the same offense." *People v Lett*, 466 Mich 206, 213 (2002). The rationale behind the

protections is to ensure that the government does not repeatedly attempt to convict an individual for an offense. *Green v United States*, 355 US 184, 187–188 (1957). But the double jeopardy principle is not without limits. Retrial is not barred generally when a defendant moves for or consents to a mistrial, *United States v Dinitz*, 424 US 600, 607 (1976), or when a mistrial is occasioned by "manifest necessity[,]" *Arizona v Washington*, 434 US 497, 505 (1978). In other words, the general rule is that retrial is not barred when a defendant consents to a mistrial because "by making or consenting to the motion the defendant waives a double jeopardy claim." *People v Dawson*, 431 Mich 234, 253 (1988), citing *Oregon v Kennedy*, 456 US 667, 676 (1982).

1. The exception to the rule that retrial is permitted where the defense moves for or consents to a mistrial is typically governed by one of two competing standards.

An exception to this rule applies in narrow circumstances and is premised on the nature of the prosecutor's conduct that led to the defendant's consent to a mistrial. For the federal constitution, the U.S. Supreme Court has enumerated a federal standard as to whether double jeopardy bars retrials for prosecutorial misconduct. *Kennedy*, 456 US at 676. Under *Kennedy*, "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial[,]" a defendant may "raise the bar of Double Jeopardy to a second trial[.]" 456 US at 676. Consistent with *People v Beck*, in which this Court again recently confirmed that "our analysis is the same under" the state and federal Double Jeopardy

clauses, 510 Mich 1, 12 n 1 (2022), this Court adopted the federal *Kennedy* standard in *Dawson*, 431 Mich at 236.

Some states have adopted their own formulations under their state constitutions. See *Pool v Superior Court*, 677 P2d 261, 271–272 (Ariz, 1984); *State v Kennedy*, 295 Or 260, 273 (1983). The most prevalent standard adopted by states besides the federal standard is the *Pool* standard, which requires proof that the prosecutor knew the action was improper and that there was a significant risk of a mistrial. 677 P2d at 271–272.

In *Pool*, the Arizona Supreme Court enumerated its own standard, holding that under the Arizona Constitution, double jeopardy bars retrial when the prosecutor knew that their conduct was improper and that there was a significant risk of a mistrial. 677 P2d at 271. Specifically, the court provided that retrial is barred in the following circumstances:

> 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. [*Id.* at 271–272.]

The parties agree that the *Pool* standard is a lower hurdle than the *Kennedy* standard.

2. The prosecutor's error did not meet either the *Kennedy* or *Pool* standards.

Under either standard, Jennings was eligible for retrial—and it is not a close call. The prosecutor's use in closing argument of Jennings' silence after he had invoked his right to remain silent was an error, yes, but an error (even a serious one) does not equate to an intentional act known to be improper and pursued for an improper purpose. In all, the conduct of the prosecutor, as well as that of the judge and the defense attorney, along with the trial proceedings up to that point, does not show that the prosecutor engaged in egregious conduct barring retrial.

As described above, the *Pool* standard is easier for a defendant to meet. At issue here would be the second element: to show that the prosecutor's "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." *Pool*, 677 P2d at 271.

The *Pool* standard is met only where, considering all the circumstances, the prosecutor engaged in "intentional conduct" that the prosecutor "*knows* to be improper and prejudicial" and is motivated by "any improper purpose" with "indifference" to the risks of mistrial or reversal. The record and the judge's factual findings do not permit the conclusion that the prosecutor knew it to be improper and prejudicial, or that he was motivated by "any improper purpose." This case did not even approach the line, let alone cross it. There are at least three reasons:

First, while it is fair to say that the prosecutor's act of referencing Jennings' post-invocation silence against him was intentional in that he intended to refer to it, it was plainly the product of "legal error, negligence, or mistake." The prosecutor appears to have referenced Jennings' post-invocation silence in a visual presentation for the jury (11/15/19 Trial Tr at 81)—the reference was not an accident, but the prosecutor's failure to realize the legal import of doing so was no more than a "legal error, negligence, or mistake."

This fact is buttressed by defense counsel's failure to object to the closing argument. The error occurred during closing arguments, but the issue of the prosecutor's reference to Jennings' post-invocation silence was not raised by defense counsel. One can reasonably assume that defense counsel did not recognize the reference to his client's silence as so severe that it warranted a mistrial—defense counsel followed up this reference not with an objection or a motion to declare a mistrial, but with a rebuttal in his own closing argument and a reliance on standard jury instructions. (11/15/19 Trial Tr at 61–62.)

Only after the trial court instructed the jury and sent it for deliberation did the court on the record express "a concern," which it had apparently raised in a sidebar conference immediately after the defense's closing argument. (*Id.* at 64–65, 80.) The court then stated, "the Court is researching that," strongly suggesting that it was not plain to the prosecutor, defense counsel, or the trial judge that the prosecutor's misstep was immediately obvious. (*Id.* at 80–81.) As the judge put it, "it seems to the Court looking at the case law that I have researched so far that this

would be a violation and potentially prosecutorial misconduct." (*Id.* at 81.) The necessity of research to confirm the legal point suggests that, while the prosecutor should have known, it was not *so* clear that one could infer solely from the prosecutor's closing statement itself that the prosecutor *knew* it to be improper and prejudicial or was motivated by any improper purpose.[1] And only upon the trial court's sua sponte raising of the issue did defense counsel move for a mistrial. (*Id.* at 81–82.)

The court declined the prosecutor's request to give a curative instruction at that point in time because the court did not want to give one "if [the prosecutor] elicited proper – proper testimony and it was proper argument." (*Id.* at 83.) At that point, the court permitted the prosecutor to research the issue so as not to misinstruct the jury. (*Id.* at 82–83.) This again confirms that neither the prosecutor nor the judge confidently knew the right answer, further evidencing that

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[1] Relatedly, one should quibble with the Court of Appeals dissenting judge's stated belief that it is "universally known to attorneys . . . that a defendant's decision to remain silent is constitutionally protected and may not be introduced or commented upon at trial." Dissenting op at 1.

Individuals who initially waived their *Miranda* rights and spoke to law enforcement may have their statements used against them, and an interrogee's *refusal* to answer particular questions may have *that silence* used against them. See *People v McReavy*, 436 Mich 197, 219 (1990). Put simply, there is no automatic bar on evidentiary use of the defendant's silence unless and until he invokes the right. See *Berghuis v Thompson*, 560 US 370, 381–382 (2010); *Salinas v Texas*, 133 S Ct 2174, 2179–2180 (2013). These cases stand for the principle that a defendant's right to remain silent must be *expressly asserted* to be effective. Thus, the "when" and the "how" of one's invocation of the right to remain silent or contribute to the nuances of the question whether an interrogee's silence in the face of police questioning may be used against him. While the prosecutor here committed an error, it is not as if this situation lacked the potential for nuance.

the prosecutor did not know that referring to Jennings' post-invocation silence was "improper and prejudicial." *Pool*, 677 P2d at 271.

Second, the trial court found no intention to induce a mistrial. A trial judge's findings as to whether the prosecutor intended to goad the defendant into moving for a mistrial are reviewed under the "clearly erroneous" standard. *Dawson*, 431 Mich at 258. A trial court's finding is clearly erroneous when "the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22 (2008). As the majority of the Court of Appeals below correctly recognized, the judge's determination in this case that the prosecutor did *not* intend to provoke Mr. Jennings into moving for a mistrial was not a clear error. Unpub op, p. 4.

The trial record makes clear that the prosecutor did not intend to pressure Mr. Jennings into moving for a mistrial. The prosecutor's statements as to Mr. Jennings's silence were designed "to get the jury to find him guilty, not for a mistrial." (11/15/19 Trial Tr at 90.) The trial court agreed, finding that "[t]here is nothing in the record to suggest that's the case, and in fact, I'm not even sure that we would have a mistrial motion brought before this Court if this Court did not highlight the fact that the prosecution had overstepped their bounds." (*Id.* at 90.)

Moreover, the trial court properly emphasized the defense's lack of objection in denying the defense's subsequent motion to bar retrial, stating:

> So, when the defense doesn't even object during the course of 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. [*Id.* at 91.]

The court took the defense counsel's lack of objection as indicative of the lack of the egregious nature of the prosecutor's error. (*Id.* at 94 ("I don't find it was so egregious, however, in light of what had transpired during testimony, and the fact that there was no objection, and subsequent to that, that a – a – a finding of double jeopardy is appropriate. The motion is denied.").) The prosecutor's conduct may demonstrate negligence or mistake, but it does not demonstrate the requisite level of intent under either *Pool* or *Kennedy*. Because the trial court evaluated all the facts in the case and assessed the prosecutor's behavior, its factual findings are not clearly erroneous.

Third, the procession of the trial itself strongly suggests that the prosecutor would have no incentive to act egregiously enough to risk a mistrial. As a matter of common sense, one would be hard-pressed to believe that the prosecutor here in any way intended to tank the case; this was not a case in which "[t]he prosecutor's case was going badly." *Dawson*, 431 Mich at 258. Quite the opposite.

As a comparator, in *Dawson*, "[t]he police had not recovered any evidence from the scene," *id.* at 258, the victim "contradicted himself on at least one crucial matter," *id.*, and a corroborating witness testified that the victim "had provided him with a completely different account," *id.* And then, the prosecutor's rebuttal witnesses either left or provided unhelpful testimony. *Id.* The prosecutor appeared to know that acquittal was imminent and unjustly decided to tank the case.

Jennings' first trial was light years from the *Dawson* trial. As explained at length in the People's Supplemental Brief, pp 1–8, the evidence at trial—before the

testimony concerning Jennings' silence and the closing argument—was strong. A woman testified that from her window she saw five men and one woman yelling and screaming, and that she saw one of them fire a gun three times into the air prior to three men, including the shooter (a black male wearing a black hooded sweatshirt), getting into a white Dodge Charger with a black stripe on the side. (11/13/19 Trial Tr at 137–140.) She called 911 to relay the information. (*Id.* at 136–137, 140, 144.)

Within only a minute or two of being dispatched because of that report, Officer Hill saw a white Dodge Charger with a black stripe on the side speeding on a nearby road. (*Id.* at 115–127.) After pulling the vehicle over, a black man wearing a black hooded sweatshirt and two other men were ordered out of the car and handcuffed. (*Id.* at 116, 123–124.) A semiautomatic pistol with an obliterated serial number was in the glovebox. (*Id.* at 123–124, 126.) The vehicle was confirmed to be co-owned by Jennings and his father. (11/15/19 Trial Tr at 21–25.)

Given the strength of the evidence in the record prior to the prosecutor's improper statement, it would be extremely surprising to find that the prosecutor intentionally played with fire and purposely committed misconduct.

In the end, even if the lower *Pool* standard was applied, retrial was not barred by Michigan's Double Jeopardy Clause.

B. Choosing between two standards where the outcome would be the same under either would be dicta.

This Court should deny leave because this case is a poor vehicle to adjudicate which standard applies for jeopardy to attach under Michigan's Constitution. Since

the application of either standard would lead to the same result, announcing one as the controlling standard would be dicta.

Over 100 years ago, this Court noted the "well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition *not necessarily involved nor essential to determination of the case* in hand are, however, illuminating, but obiter dicta, and lack the force of an adjudication." *People v Case*, 220 Mich 379, 382–383 (1922) (emphasis added). This Court recently affirmed and applied the principle, recognizing that obiter dicta "are statements that are *unnecessary to determine the case at hand* and, thus, lack the force of an adjudication." *Estate of Pearce v Eaton Co Rd Comm'n*, 507 Mich 183, 197 (2021) (emphasis added).[2] See also Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta,* 81 NYU L Rev 1249, 1256 (2006) ("A dictum is an assertion in a court's opinion of a proposition of law *which does not explain why the court's judgment goes in favor of the winner*.") (emphasis added).

This Court has been judicious in not deciding issues that are unnecessary to the resolution of the case. In *Roberts v Auto-Owners Insurance Company*, for example, this Court concluded that, where a plaintiff failed to even establish a prima facie case of the yet-to-be-adopted tort of intentional infliction of emotional distress, the Court would not reach the issue of whether that tort should be adopted in Michigan:

[2] As Justice Michael Cavanagh put it, "[d]icta is normally reserved to express the views of an individual author on matters that go beyond the facts of a particular case." *People v Puertas*, 462 Mich 885 (2000).

> Since we conclude that plaintiff failed even to meet the threshold requirements of proof to make out a prima facie claim of intentional infliction of emotional distress, we are constrained from reaching the issue as to whether this modern tort should be formally adopted into our jurisprudence by the well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication. [422 Mich 594, 597–98 (1985) (footnote omitted).]

For another example in this exercise in restraint, in *People v Goecke*, this Court declined to adopt an objective, rather than subjective, standard for the third form of malice commonly known as "depraved heart murder." 457 Mich 442, 464 (1998). Where the application of either standard would not have changed the outcome, this Court declined to resolve the open question. *Id.* at 464. Instead, this Court simply and properly stated that "under either a subjective or an objective standard, sufficient proofs were presented to support a bindover on the charge of second-degree murder in *Goecke* and to sustain the defendants' convictions in *Baker* and *Hoskinson*." *Id.* at 464. The Court of Appeals has likewise followed this principle. See *Belobradich v Sarnsethsiri*, 131 Mich App 241, 247 (1983) ("Any endeavor on our part to solve the *Simonelli* riddle would be an academic exercise because we would achieve the same result under either standard.").

Similar to this Court's practice, other courts wisely refrain from issuing decisions that would, on an integral issue in the case, be no more than dicta. See, e.g., *City of Cincinnati v Discovery Network, Inc*, 507 US 410, 416 (1993) ("Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox,* we need not decide whether that policy should be subjected to more exacting review."); *Fitzgerald v First E Seventh St*

Tenants Corp, 221 F3d 362, 364 n 2 (CA 2, 2000) ("We need not decide which standard applies to the *sua sponte* dismissal at issue here, because the District Court's decision easily passes muster under the more rigorous *de novo* review."); *In re Lakeshore Vill Resort, Ltd*, 81 F3d 103, 106 (CA 9, 1996) ("We too have no need to determine whether *Germain* stands for the proposition that the finality standard applied to appeals in bankruptcy proceedings is the same as that applied in other civil appeals because we hold that the district court's decision remanding this case to the bankruptcy court is not final under either standard.").[3]

It is poetic, then, that when confronted with this same merits question in *People v Dawson*, this Court declined to consider the *Pool* standard for similar reasons. 431 Mich 234, 256 (1988). After discussing the two standards at length, the Court credited the People's concession at oral argument that the trial prosecutor had violated the *Kennedy* standard. *Id.* at 256–257. In declining to consider whether to adopt the *Pool* standard, the Court found that "there is no need in the instant case to decide whether this Court should go further than the federal standard." *Id.* at 256.

In *Dawson*, then, the prosecutor's conduct was (concededly) egregious enough to violate *both* standards. Here, on the other end of the spectrum, the prosecutor's conduct would not violate *either* standard. As it did in *Dawson*, this Court should

[3] It is no surprise that when looking back at prior cases, this Court treats dictum for what it is—non-binding rumination. See, e.g., *People v Taylor*, 510 Mich 112, 137 (2022) ("Whether a presumption against LWOP for juvenile offenders exists was irrelevant to the outcome of the case, and so this statement was nonbinding dictum.").

decline to issue dicta because "there is no need in the instant case to decide," *id.* at 257, and because any "adoption" of a standard would be dicta.

Indeed, it appears that an opinion by this Court that nonetheless purports to adopt the *Pool* standard would not supplant *Dawson*'s "adopt[ion]" of *Kennedy* as the governing standard. 431 Mich at 236. Since *Dawson* adopted that standard, and any announcement in this case would be non-binding dicta, *Dawson* would remain the governing precedent both for this Court and for inferior courts. See, e.g., *People v Perry*, unpublished opinion of the Court of Appeals, issued October 3, 2024 (Docket No. 361129), 2024 WL 4403138, p *11 n 9 ("[U]nless and until our Supreme Court decides otherwise, *Dawson* and *Kennedy* remain the law of the land.").

One final point. Even if this Court *could* overrule *Dawson*, it would be incumbent on the Court to evaluate whether stare decisis principles permit it to do so. See generally *Robinson v Detroit*, 462 Mich 439 (2000). This Court has not sought briefing on this important question.

II. If this Court were to issue dicta on the applicable standard, it should endorse the *Oregon v Kennedy* rubric to determine whether prosecutorial misconduct bars retrial under Michigan's Double Jeopardy Clause.

Although this Court should refrain from issuing an opinion that amounts to dicta, in the alternative it should simply reaffirm *Dawson*'s adoption of the federal *Kennedy* standard.

In *Kennedy*, the U.S. Supreme Court rejected a broad standard of bad faith or harassment on the part of the prosecutor to a prosecutorial misconduct analysis

under the Double Jeopardy Clause, finding that such a standard "would permit a broader exception" that "offer[s] virtually no standards for [its] application." 456 US at 674. In that case, the Oregon Court of Appeals had determined that the prosecutor was "overreaching" when he asked a witness whether the defendant was a crook and, therefore, held that double jeopardy barred retrial. *Id.* at 669–670. The Court reversed and held that there must be actual intent on the prosecutor's part to subvert the Double Jeopardy Clause protections. *Id.* at 676 ("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."). Because the trial court had found that the prosecutor did not intend to goad the defendant into a mistrial, the Court held that retrial was not barred. *Id.* at 679.

The Court in *Kennedy* justified the rejection of a broad standard by pointing out that an "overreaching" standard would not necessarily aid criminal defendants as a class. *Id.* at 677. A judge presiding over the first trial would be less likely to grant a defendant's motion for a mistrial if doing so would "inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy[.]" *Id.* Thus, the advantages that the Double Jeopardy Clause affords defendants "would be to a large extent lost in the process of trial to verdict, reversal on appeal, and subsequent retrial." *Id.* However, the intent standard articulated by the *Kennedy* courts would pose a lesser risk of judges being hesitant to grant a mistrial when a mistrial may otherwise be warranted.

When the *Dawson* Court had the first opportunity to evaluate both the *Kennedy* and the *Pool* standards, it held that it was not necessary to go beyond the federal *Kennedy* standard because counsel for the people conceded that retrial was barred under *Kennedy*. 431 Mich at 256. But the Court endorsed the *Kennedy* standard: it "adopt[ed] the federal standard," *id.* at 236,[4] and rejected the holding of the Court of Appeals adopting the *Pool* standard, *id.* at 250 ("We affirm the Court of Appeals decision, but adopt a different double jeopardy analysis."). Finally, this Court reiterated the rule in *Kennedy*, finding "[w]here a mistrial results from apparently innocent or even negligent prosecutorial error, . . . the public interest in allowing a retrial outweighs the double jeopardy bar[,]" however, "[t]he balance tilts" when "the judge finds, on the basis of the 'objective facts and circumstances of the particular case,' that the prosecutor intended to goad the defendant into moving for a mistrial." *Id.* at 257. This Court should affirm the rationale in *Dawson* and hold that the subjective intent standard is the appropriate standard under Michigan's Double Jeopardy Clause.

[4] What further underscores the propriety of confirming the *Kennedy* standard in Michigan is that our Michigan's Double Jeopardy Clause affords the same protections as its federal counterpart. Both include three protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574 (2004). Thus, Michigan's Double Jeopardy Clause does not provide broader protections than its federal counterpart. And this Court interprets Michigan's Double Jeopardy Clause in line with how its federal counterpart is interpreted. See *Nutt*, 469 Mich at 575; *Beck*, 510 Mich at 12 n 1 (for the state and federal Double Jeopardy clauses "our analysis is the same under each"). Because the *Kennedy* standard applies to the U.S. Constitution, it applies to Michigan's.

Furthermore, the broad standard in *Pool* is precisely what the Court in *Kennedy* was concerned about—the application of a standard that would swoop in a wide range of conduct on the part of the prosecutor. 456 US at 674–675. Under *Pool*, any action of a prosecutor that may appear to be improper in hindsight may result in a court's finding that double jeopardy attaches and subsequently bar the retrial of a defendant who would otherwise be convicted. *Id.* In *Kennedy*, the Court stated:

> Every act on the part of a rational prosecutor during a trial is designed to "prejudice" the defendant by placing before the judge or jury evidence leading to a finding of his guilt. Given the complexity of the rules of evidence, it will be a rare trial of any complexity in which some proffered evidence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court. [*Id.*]

The Arizona Supreme Court in *Pool* did not recognize these concerns but rather reasoned with generalized principles about the double jeopardy clause that multiple trials may burden defendants. 677 P2d at 272. This Court should reject *Pool*'s broad standard. Such a standard could result in lower courts interpreting a prosecutor's innocuous trial practices or negligence into conduct undertaken for "improper" purposes. For example, as Justice Stevens recognized in *Kennedy*, the prosecutor's question about the defendant being a "crook" was likely reasonable because defense counsel had previously injected information about the defendant's past improprieties into the trial. 456 US at 692–697.

In the over forty years since *Kennedy* was decided, federal courts have successfully and properly applied the standard to the Double Jeopardy Clause of the U.S. Constitution. See, e.g., *United States v Larouche Campaign*, 866 F2d 512, 515

(CA 1, 1989) (holding that the district court properly determined under *Kennedy* that retrial was not barred); *United States v Pavloyianis*, 996 F2d 1467, 1474 (CA 2, 1993) (same); *Robinson v Wade*, 686 F2d 298, 309 (CA 5, 1982).

In applying a subjective intent standard consistent with *Kennedy*, courts have held that retrials violated the Double Jeopardy Clause and consequently reversed defendants' convictions. See, e.g., *United States v Martinez*, 667 F2d 886, 892 (CA 10, 1981); *Petrucelli v Smith*, 544 F Supp 627, 638 (WD NY, 1982).

Two cases illustrate when a court has found subjective intent on the part of the prosecutor. In *Martinez*, the prosecutors met with the trial judge in a secret ex parte meeting to induce defense counsel to move for a mistrial by representing that certain jurors were unable to continue serving. 667 F2d at 887. The judge and prosecutors conspired together because they believed that there was intimidation in the courtroom caused by spectators who were sympathetic to the defendant. *Id.* Under a subjective standard, the Tenth Circuit dismissed a number of counts against the defendant, finding that "the government misrepresented its grounds for seeking a mistrial." *Id.* at 889.

In *Petrucelli*, the prosecutor exhibited "reprehensible" and "pervasive" misconduct in questioning witnesses, presenting to the jury, and persistently refusing to abide by the trial judge's rulings. 544 F Supp at 628. The court, relying on *Kennedy*, stated, "This is the epitome of a case where an inference of the prosecutor's deliberate attempts to compel defendant to move for a mistrial can be drawn instantly." *Id.* at 638. The court granted the defendant's petition for habeas

corpus and remanded the case to the state court for an evidentiary hearing to further determine intent. *Id.* at 645.

In sum, the *Kennedy* standard is not only workable but lower courts are able to correctly apply the standard by looking at the facts at hand. As the Court stated in *Kennedy*, "[i]nferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." 456 US at 675. Lower courts can readily determine whether a prosecutor truly intended to goad the defendant into moving for a mistrial—any such broader standard would introduce odd results. A broad test that bars retrial when a prosecutor commits an error or is negligent would transform the shield of the Double Jeopardy Clause into a sword that a defendant can assert even when a prosecutor's conduct was not intended to provoke the defendant into a mistrial.

* * *

The *Kennedy* standard advances the protections granted by Michigan's Double Jeopardy Clause. See *People v Torres*, 452 Mich 43, 63 (1996) ("The purpose of the double jeopardy provision is to prevent the state from making repeated attempts at convicting an individual for an alleged crime.") (citation omitted). Any other standard could result in defendants' convictions being overturned—defendants whose convictions are justified—when prosecutors engaged in conduct that could be categorized as erroneous or negligent. If this Court does weigh which standard to apply, it should confirm that the *Kennedy* standard applies in Michigan.

CONCLUSION AND RELIEF REQUESTED

Amici respectfully request this Court deny leave to appeal.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

/s/ Christopher M. Allen

Christopher M. Allen (P75329)
Assistant Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
Allenc28@michigan.gov

Reem Albudoor
Student Intern

Prosecuting Attorneys
Association of Michigan

J. Dee Brooks
Midland County Prosecutor
President

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/s/ Christopher M. Allen

Christopher M. Allen (P75329)
Assistant Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
Allenc28@michigan.gov

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