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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 BRIEF ON APPEAL

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COUNTERSTATEMENT OF JURISDICTION

The People do not dispute that this Court's appellate jurisdiction.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

A compelling reason to interpret the Michigan Constitution differently than the United States Constitution exists if the issue is of local interest and the respective constitutional provisions are textually, substantively, historically, or structurally distinct. Here, Michigan's double jeopardy provision mirrors the Federal double jeopardy clause, was so intended by the framers of Michigan's Constitution, and presents no deep-seated historical differences unique to Michigan. Does a compelling reason exist to justify differentiation between Michigan's Constitution and the United States Constitution such that rejection of *Oregon v. Kennedy* is required?

The Circuit Court was not presented with this question.

The Court of Appeals was not presented with this question.

The People say: **No**

Defendant says: **Yes**

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II.

If there is a compelling reason to interpret the Michigan Constitution differently than that of the United States, then the Michigan Constitution should be interpreted with an eye toward the state's historical legal traditions – as exemplified in prior statutes, constitutions, and jurisprudence – to determine the law the people have made. Though no compelling reason to interpret Michigan's Double Jeopardy Clause differently than its federal counterpart exists, if there were, and this Court looks to the law the people of Michigan have made, the test presented in presented in *United States v. Dinitz* to determine whether retrial following a prosecutor error-causing mistrial is barred by Double Jeopardy. If this Court finds a compelling reason to interpret the Double Jeopardy Clause in Michigan's Constitution differently than the United States' Constitution, should this Court adopt the test presented in *United States v. Dinitz*?

The Circuit Court was not presented with this question.

The Court of Appeals was not presented with this question.

The People say: **Yes**

Defendant says: **No**

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III.

Double jeopardy bars retrial following a mistrial where that mistrial was prompted by inappropriate prosecutor action. Here, under the competing *Kennedy*, *Dinitz*, and *Pool* tests, the instant prosecutor's error – however obviously egregious – was not intended to goad Defendant into making a mistrial motion, harass the Defendant, or pursued for an improper or prejudice purposes; the record shows that it was legal error, negligence, and mistake. Was Defendant's retrial barred under *Kennedy*, *Dinitz*, or *Pool*?

The Circuit Court was not presented with this question.

The Court of Appeals would say "No" as applied to *Kennedy* and *Pool*, but the question as applied not *Dinitz* was not presented.

The People say: **No**

Defendant says: **Yes**

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COUNTERSTATEMENT OF FACT

The People rely on the Counterstatement of Facts previously provided to this Court in its Answer to Defendant's Application for Leave to Appeal dated February 10, 2026. Additional facts have been provided throughout the body of this supplemental brief.

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ARGUMENT

I.

A compelling reason to interpret the Michigan Constitution differently than the United States Constitution exists if the issue is of local interest and the respective constitutional provisions are textually, substantively, historically, or structurally distinct. Here, Michigan's double jeopardy provision mirrors the Federal double jeopardy clause, was so intended by the framers of Michigan's Constitution, and presents no deep-seated historical differences unique to Michigan. No compelling reason, therefore, exists to differentiate Michigan's Constitution from the United States Constitution such that rejection of *Oregon v. Kennedy* is required.

Standard of Review

Issues of constitutional interpretation are reviewed *de novo*.[1] The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers at the time of the ratification, accepting the words employed in a constitutional provision in the sense most obvious to the common understanding of the words employed.[2] Moreover, this Court engages in independent constitutional interpretation using a structured analytical framework without a presumption favoring the federal or state constitution. While there might be an informal presumption of interpretational parity between constitutions,[3] this Court is obligated to interpret Michigan's Constitution to determine what law "the people have made."[4]

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[1] *People v. Beck*, 504 Mich. 605, 618 (2019), citation omitted
[2] *People v. Tanner*, 496 Mich. 199, 224 (2014)
[3] *Id.* at 222 n16
[4] *Id.* at 222, external citations omitted

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Discussion

No compelling reason exists to differentiate Michigan's Constitution from the United States Constitution such that rejection of the federal test put forth in *Oregon v. Kennedy* is required.

An analysis of the respective state and federal constitutional provisions, state constitutional and common-law histories, state law preexisting the constitutional provisions, a determination of structural – substantive – differences in the provisions, and identification of whether the issue is of state interest should occur when determining the existence of a compelling reason interpret Michigan's Constitution differently from the federal constitution.

While this issue has become one of import since it resolves a long-standing question of law, this alone, is insufficient to warrant a compelling reason to differentiate. Unlike other instances in Michigan's legal history – as in the case of *Bullock* with the cruel and unusual/ cruel or unusual punishment clauses – Michigan's history with double jeopardy has been linked to the same clause in the United States Constitution. The text of the respective provisions are nearly identical and the differences that do exist were categorized as "editorial" and not substantive by the constitutional framers. Moreover, Michigan's clause has followed that of the federal constitution in practice. The similarities outweigh the differences and interpretation of the Michigan Constitution should follow that afforded to the United States Constitution. Accordingly, rejection of *Oregon v. Kennedy*'s test is not required. Instead, the test should be adopted.

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A. The "Compelling Reason" Analysis

Where – as here – the language of the U.S. Constitution and Michigan Constitution are nearly identical, a "compelling reason" must justify the latter granting greater rights than the former.[5] This Court has held – and adopted the premise – that it "should not find that the Michigan Constitution grants greater protection than the federal constitution with regard to identically worded provisions unless there is a compelling reason found in history and the intentions of the document to do so."[6] Michigan's judiciary is not free to "simply engraft" onto the Michigan Constitution "more 'enlightened' rights than the framers intended. By the same token, [the judiciary] may not disregard the guarantees that our constitution confers on Michigan citizens merely because ethe United States Supreme Court has withdrawn or not extended such protection."[7] The compelling reason rule requires neither acceptance of federal interpretation nor its rejection, but requires a search to discover what law "the people have made."[8]

This Court possesses the authority to interpret Michigan's constitution more expansively than that of the federal constitution and the power to employ or refrain from employing that authority.[9] When interpreting parallel state and federal constitutional provisions, this Court has explained that:

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[5] *People v. Reichenbach*, 459 Mich. 109, 118-119 (1998)
[6] *People v. Pickens*, 446 Mich. 298, 326 (1994), citing to *People v. Nash*, 418 Mich. 196, 214 (1983)
[7] *Reichenbach*, supra at 119, external citation omitted; *Pickens*, supra at 316 (1994), citing to *Sitz v. Dept. of State Police*, 443 Mich. 744, 759 (1993)
[8] *Reichenbach*, supra at 119 (1998)
[9] *People v. Bullock*, 440 Mich. 15, 28-29 (1992), external citation omitted

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> …compelling reason for an independent state construction might be found if there were significant textual differences between parallel provisions of the state and federal constitutions to believe that those who framed and adopted the state provision had a different purpose in mind.[10]

Determining what constitutes a "compelling reason," is paramount since "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 [this Court] must."[11]

The factors that should be considered in determining whether the Michigan Constitution provides protections separate from the United States Constitutions are:

> (1) [T]he textual language of the state constitution, (2) significant textual differences in parallel provisions of the federal and state constitutions, (3) state constitutional and common-law history, (4) state law preexisting the constitutional provision, (5) structural differences between the federal and state constitutions, and (6) matters of particular state interest or local concern.[12]

The analysis of these factors – both individually and collectively – supports the conclusion that "the ultimate task facing this court in cases requiring interpretation of particular Michigan constitutional provisions is to respectfully consider federal interpretations of identical or similar constitutional provisions,

[10] *People v. Collins*, 438 Mich. 8, 32 (1991)
[11] *People v. Pickens*, 446 Mich. 298, 315 (1994)
[12] *Mahaffey v Attorney General*, 222 Mich. App. 325, 335 (1997) (quoting *People v Catania*, 427 Mich 447, 466 n. 12 (1986))

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but then to undertake by traditional interpretative methods to independently ascertain the meaning of the Michigan Constitution."[13]

In *Bullock* this Court examined these factors and conducted this analysis within the context of a Federal Eighth Amendment "cruel and unusual" vs. Michigan's "cruel or unusual" constitutional provisions.[14] The Court concluded that the existence of three of the five substantive considerations[15] warranted the existence of a "compelling reason" to find that Michigan's constitution affords greater protection than the federal constitution.

First, this Court found that the fundamental difference between the federal constitution's "cruel and unusual punishment" and the state constitution's "cruel or unusual punishment" was neither "accidental nor inadvertent".[16] *Bullock* noted that Michigan's pre-statehood laws first adopted language similar to that federal provision using the language "cruel and unjust" before adopting the Michigan-specific "cruel or unusual" verbiage in 1850 and retaining it through the 1908 and current 1963 constitutions.[17] Thus, the adoption of Michigan-specific language separate from the that used by the federal constitution warranted the existence of a compelling reason.

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[13] *People v. Tanner*, 496 Mich. 199, 222 n17 (2014)
[14] *People v. Bullock*, 440 Mich. 15 (1991)
[15] Although six considerations are listed in this brief – as well as in *Mahaffey* and *Catania* – only five of them are substantive. The People view the first two considerations – the textual language of the state constitution and the significant differences between the state and federal constitutions – to be read together. While examination of the state constitution's text is both important and reasonable, it – by itself – is unhelpful. Only when the state constitution's text is compared against the parallel federal constitutional text does any true value become apparent.
[16] *Bullock*, supra at 31
[17] *Id.* at 31-32

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A compelling reason was also found regarding what *Bullock* called "historical factors."[18] *Bullock* observed that while the plain language of the Eighth Amendment precluded questions of sentence proportionality, the definitions of "cruel" and "unusual" – in Michigan – had included such a concept in the creation of the 1963 constitution and this Court.[19] Thus, the "historical factors" examined included the state constitutional and common law history and went toward warranting the existence of a compelling reason.

Finally, *Bullock* discussed long-standing Michigan precedent which was more in harmony with federal dissenters rather than the majority on the Eight Amendment issue examined.[20] *Bullock* discussed this and found that relevant Michigan law extended back to 1879, thus providing protection far beyond what federal law provided. Thus, this Court found that preexisting state law required departure from the federal standard and an expansive interpretation of Michigan's Constitution.

When applied to Double Jeopardy and *Oregon v. Kennedy*, it is clear the instant matter does not follow *Bullock*'s overall progression and no compelling reason to interpret Michigan's constitutional double jeopardy provision any differently from that of the federal constitution exists.

[18] *People v. Bullock*, 440 Mich. 15, 32-33 (1992)
[19] *Id.*
[20] *Id.*

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1. The textual language of Michigan's Double Jeopardy provision fails to evidence any significant difference with that of the federal constitution sufficient to evidence the existence of a compelling reason.

The first two considerations – the state constitution's language and the existence of textual differences between it and the federal constitution – are against finding a "compelling reason" for independent constitutional construction.

As explained in the People's previous brief, the Michigan Constitution of 1963 replaced "the narrower language of the 1850 and 1908 double jeopardy provisions" with language like that of the original 1835 state constitution and the U.S. Fifth Amendment. When juxtaposed, the clauses are nearly identical:

> No person shall be subject for the same offense to be twice put in jeopardy[21]
>
> and
>
> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.[22]

In addition to the plain observation of the clause's substantive similarities, this Court in *McKewen* – a case analyzing whether a defendant's convictions for assault with intent to do great bodily harm less than murder and felonious assault within a "multiple punishment" context – unequivocally stated:

> The Fifth Amendment of the United States Constitution is analogous to the prohibition in Article 1, § 15 of Michigan's 1963 Constitution that '[n]o person shall be subject for the same offense to be twice put in jeopardy.'"[23]

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[21] Const. 1963, art 1, section 15
[22] U.S. Const., Am. V
[23] *People v. McKewen*, __ Mich. ___ (2024) (Docket No. 158869), slip op. at 4

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As there are no significant textual differences between the Michigan and federal double jeopardy clauses, support for finding a "compelling reason" to depart from the federal constitution cannot be found here.

2. Michigan's state constitutional history of the Double Jeopardy Clause, in practice, was the same as the federal Double Jeopardy provision and preclude a finding that a compelling reason exists.

Michigan's Constitutions of 1850 and 1908 wrote narrow Double Jeopardy Clauses which stated, "No person, after acquittal upon the merits, shall be tried for the same offense."[24] While this narrow language "may have *intended* to restrict double jeopardy protection to retrial following acquittal on the merits," no Michigan Court or federal court had gone along with this interpretation.[25] Instead – as noted in *Nutt* – the framers correctly concluded that this Court had "virtually held" that the 1908 Double Jeopardy provision, despite the different language, meant the same as the federal Double Jeopardy provision.[26]

A review of *In re Ascher* – for example – evidences parity between the state and federal constitutions, despite the state's narrower language. Following the jury's empanelment and start of trial, extreme juror misconduct came to the Court's attention. Such misconduct included jurors providing liquor to other jurors and the bailiff and improper communicating with people outside the jury and the court. All this was designed to prejudice defendant. The trial court learned of this, declared a mistrial, and scheduled a new trial.[27] Defendant

[24] Const. 1850, Art VI, Section 29; Const. 1908, Art II, Section 14
[25] *People v. Nutt*, 469 Mich. 565, 589 (2004)
[26] *Id.*
[27] *In re Ascher*, 130 Mich. 540, 541-545 (1902)

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moved for discharge, claiming his double jeopardy rights had been violated.[28] This Court reiterated the long-held "doctrine that occasions may arise after the trial is entered upon, making it necessary to stop the trial and discharge the jury, without it necessarily following that [defendant] has been so placed in jeopardy that he cannot be put upon trial"[29] and concluded, based on Michigan and federal jurisprudence, that jeopardy, in this situation, was no bar to retrial.[30]

In examining the claim, this Court recognized the difference in language between the state and federal constitutions, but nonetheless held that "the law of jeopardy is doubtless the same under both provisions."[31] In turn, the Court cited to the 1889 case of *Village of Northville v. Westfall*,[32] which relied upon double jeopardy's roots in common law that predate the Michigan and U.S. constitutions, "[t]he doctrine is older than our constitutions."[33] Although abrogated for other reasons, this Court in *People v.* Harding[34] recognized this ancient axiom and encapsulated its historic use in both the federal and Michigan Constitutions:

> Upon its founding, the people of Michigan also incorporated the ancient common-law prohibition of double jeopardy into their constitution. Const. 1835, art. 1, § 12. See also *People v. Harding,* 53 Mich. 481, 485–487, 19 N.W. 155 (1884); *People v. Fochtman,* 226 Mich. 53, 56, 197 N.W. 166 (1924). Although the language of this protection in our fundamental charters

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[28] *In re Ascher*, 130 Mich. 540, 545 (1902)
[29] *Id.* at 547
[30] *Id.* at 552
[31] *Id.* at 545, citing to *Village of Northville v. Westfall*, 75 Mich. 603, 608-609 (1889)
[32] *Village of Northville v. Westfall*, supra
[33] *Id.*
[34] *People v. Harding*, 443 Mich. 693 (1993), abrogated by *People v. Ream*, 481 Mich. 223 (2008) which rejected the multiple punishment double jeopardy analysis in favor of the federal "required evidence"/same-elements test of *Blockburger*

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> has altered with the passage of time, this Court has uniformly held that the Michigan Constitution was intended by its ratifiers and framers to embody those principles derived from the English common law, and, therefore, is also consistent with the Fifth Amendment of the United States Constitution. See, e.g., *In re Ascher,* 130 Mich. 540, 545, 90 N.W. 418 (1902); *People v. Fochtman, supra,* 226 Mich. at 56, 197 N.W. 166. To clarify its meaning and to ensure its continued protection of the ancient right, the Constitutional Convention of 1961 modified the language of the Double Jeopardy Clause to conform more closely with the language of the historic English common law and the Fifth Amendment, as well as the practice of this Court. Hence, art. 1, § 15 now declares that "[n]o person shall be subject for the same offense to be twice put in jeopardy." In the instant case, therefore, the application of the Michigan and federal constitutions are uniform because both are based upon the ancient English common-law prohibition of double jeopardy.[35]

Thus, it was reasonable that if Michigan was already using the federal constitutional language in practice, then adopting the federal constitutional language formally was appropriate. This, then, was not necessarily a substantive change in practice, but one that brought the "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.'"[36] After discussing the drafters' intent to ensure they were "making no change to the state of the law and that they wished merely to amend the Double Jeopardy Clause to conform to the *prior decisions of this Court*,"[37] this Court in *Nutt* determined the drafters intended to bring the

[35] *People v. Harding,* 443 Mich. 693, 725 (1993)
[36] *People v. Nutt*, 469 Mich. 589 (2004)
[37] *Id.* 589-590, emphasis in the original

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1963 state constitution into line with the federal constitution since Michigan had already – in practice – adopted the federal provision:

> 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.[38]

Accordingly, Michigan's historic treatment of the Double Jeopardy provision – in both jurisprudential and constitutional law – has been fully in concert with that afforded under federal jurisprudential and constitutional law.

3. Unlike the strong Michigan tradition of additional protections exemplified by *Bullock*, Michigan jurisprudence does not demonstrate a similar expanse of protections associated with double jeopardy and inappropriate prosecutor action.

A hallmark of this Court's opinion in finding a compelling reason in *Bullock* was Michigan's strong historical tradition of explicitly worded protections against "cruel or unusual" punishments as opposed to the federal "cruel and unusual" prohibitions. While double jeopardy's protections are enshrined immemorially, its extension to inappropriate prosecutor action is not. No similar *Bullock*-like

[38] *People v. Nutt*, 469 Mich. 565, 590 (2004), citing to Official Record, Constitutional Convention 1961, p. 3355, accompanying Const. 1963, art. 1, § 15

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tradition exists in Michigan jurisprudence regarding double jeopardy and inappropriate prosecutor action.

This Court in 1977's *People v. Benton* addressed this issue. Defendant was charged with armed robbery and after the first witness, on the second day of trial, the court – *sua sponte* – declared a mistrial, saying the prosecutor had improperly impeached the witness, the testimony was prejudicial to Benton, and a cautionary instruction would be inappropriate.[39] Defendant objected to the mistrial, but the mistrial was granted anyway.[40] Defendant subsequently moved to bar retrial, but the motion was denied. On appeal, this Court concluded that the improper impeachment would not have required reversal had Defendant been convicted at the first trial.[41] The Court further observed that a less drastic alternative to a mistrial was available – a curative instruction.[42] The trial court erred in granting the mistrial and where the mistrial was ordered over the defendant's objection, double jeopardy barred retrial.

Benton referenced the U.S. Supreme Court in *Dinitz* for the relevant standard, simply stating *Dinitz* "observed a distinction between *sua sponte* mistrials and mistrials granted at the defendant's request, declaring that where the defendant requests the mistrial, retrials may be barred when the judge or prosecutor acted in bad faith."[43] The footnote, here, however explained further:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke

[39] *People v. Benton*, 402 Mich 47, 53-54 (1977)
[40] *Id.* at 55-56
[41] *Id.* at 58-59
[42] *Id.* at 60-62
[43] *Id.* at 64

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> mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad faith conduct by the judge or prosecutor' * * * threatens the '(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." United States v. Dinitz, 424 U.S. 600, 611 (1976).[44]

Ultimately, intent was not the deciding issue in *Benton*. Intent would only become an issue, the Court reasoned, when a defendant moves for a mistrial and consents to it because of prosecutor or judicial "bad faith." As the full language provided suggests – as used – the term "bad faith" was a shorthand term of art whose full value was defined by the rest of the quote. A nebulous "bad faith" standard was not advocated in *Dinitz*, but "bad faith conduct" that threatens a mistrial to afford the prosecution a more favorable opportunity at retrial.

Next, in *People v. Anderson* (1980), this Court briefly referenced the relevant issue. Defendant was tried for first degree murder and after five witnesses, the court entertained a bond reduction-motion and a plea to manslaughter, both over the prosecutor's objection.[45] The court dismissed the remaining charges, and the jury. The trial court may have erred, this Court said, but it constituted a factual resolution of the case with the Defendant's consent, so double jeopardy attached and barred re-prosecution.

In so doing, the Court observed that when a defendant brings about the termination of a trial on a basis unrelated to factual guilt or innocence, retrial is

[44] *People v. Benton*, 402 Mich 47, 64, n 25 (1977)
[45] *People v. Anderson*, 409 Mich. 474, 479-482 (1980)

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generally permitted.[46] An exception to this, the Court said, occurs – and retrial is barred – when "the defendant's motion is induced by bad faith conduct of the prosecutor or judge."[47] That is to say that they are goaded into a mistrial motion based upon the inappropriate intent of the prosecutor or judge. For substantiation, this Court cited to *Lee*[48] and *Jorn*.[49]

In 1985's *People v. Tyson*,[50] defendant argued that his retrial was barred where the prosecutor's question to a witness concerning his demeanor following the arrest "was sure to elicit an improper response" and so constituted either intentional misconduct or gross negligence which precipitated defendant's successful mistrial motion.[51] This Court observed that "[d]ifficulties have arisen…both in attempts to define the type of error required for a double jeopardy bar to retrial and in applying the definition to the facts of a given case[,]" thus there are different federal and state standards.[52]

Tyson observed the federal test in *Kennedy*, holding that:

> [t]he 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.[53]

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[46] *People v. Anderson*, 409 Mich. 474, 485 (1980)
[47] *Id.*
[48] *Lee v. United States*, 432 U.S. 23, 33-34 (1977)
[49] *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion)
[50] *People v. Tyson*, 423 Mich. 357 (1985)
[51] *Id.* at 370
[52] *Id.*
[53] *Id.* at 371 (1985), citing to *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982)

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On the state level, this Court observed that other jurisdictions "relied on language from earlier Supreme Court cases, which had suggested that the standard was not one of subjective intent to cause mistrial," but:

> rather 'prosecutorial … overreaching' (*United States v. Jorn*, 400 U.S. 470, 484 (1971), 'bad-faith conduct by [the] judge or prosecutor,' " intended to provoke a mistrial request by the defendant in order to " 'afford the prosecution a more favorable opportunity to convict' the defendant," (*United States v. Dinitz*, 424 U.S. 600, 611 (1976), [ ] "motivated by bad faith or undertaken to harass or prejudice," (*Lee v. United States*, 432 23, 33 (1977)…[while] some state courts have opted to offer broader-reaching double jeopardy protection under their own constitutions, and have adhered to the pre-*Kennedy* standard.[54]

While *Tyson* itemized these separate and distinct tests, such a listing is somewhat problematic, especially considering the fact it did not examine them in relation to each other. The *Tyson* Court declined to resolve the question of the relevant test since the prosecutor's conduct was not so erroneous to meet either standard. The challenged line of questioning was proper, and the challenged answer was both non-responsive and not reasonably expected by the prosecutor. Moreover, the prosecutor denied any intentional misconduct or that he had provoked the mistrial. Thus, the Court simply recognized the unresolved question of the appropriate analysis and effectively, used both *Kennedy* and the other, more broad tests.[55]

Next came *People v. Dawson* in 1988, where this Court was first presented the opportunity to discuss the relevant test. It began with discussing the double

[54] *People v. Tyson*, 423 Mich. 357, 371 (1985)
[55] *Id.* at 373

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jeopardy provision and noting that the same basic protection between the federal and state constitutions[56] 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…"[57] 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.[58]

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.[59] Similarly, mistrial because of defense counsel error – "misconduct" as used in the opinion – will not bar retrial.[60] 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 where the cause prompting the mistrial was outside their control."[61] The bar to retrial, however, occurs when a mistrial motion "is prompted by intentional

[56] *People v. Dawson*, 431 Mich. 234, 250 (1988)
[57] *Id.* at 251
[58] *People v. Nutt*, 469 Mich. 565 (2004)
[59] *Dawson*, supra at 252 citing to *People v. Thompson*, 424 Mich. 118 (1985)
[60] *People v. Anderson*, 409 Mich. 474, 485 (1980)
[61] *Dawson*, supra at 252, external citations omitted

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prosecutorial conduct."[62] The prosecutor's intention, the Court of Appeals in this matter noted, is of "central focus."[63]

Dawson briefly discussed this premise as articulated in *Oregon v. Kennedy*, noting the comments of Justice Powell and criticisms of Justice Stevens, as well as the competing analyses appearing in *State v. Kennedy* and *Pool v. Superior Court.*[64] The panel did not conduct a compelling interest analysis and, ultimately, adopted *Pool* erroneously.

In *Pool,* Defendant and two co-defendants were accused of stealing jewelry from a mutual acquaintance's home.[65] At trial, the trial prosecutor became angry and "sought to ventilate his feelings to the court."[66] 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.[67]

The opinion further observed the cross-examination progressed from proper to arguably proper to "irrelevant and rather prejudicial" to egregiously improper.[68]

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[62] *People v. Dawson*, 431 Mich. 234, 253 (1988)
[63] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), slip op. 2
[64] *Dawson*, supra at 235-255, 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)
[65] *Pool v. Superior Court*, 139 Ariz. 98, 100 (1984)
[66] *Id.*
[67] *Id.* at 100-101
[68] *Id.* at 101

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Pool complained about the questions and the prosecution's demeanor, moving for a mistrial. The trial court denied it[69] (although the opinion previously indicated that the motion was granted).[70] 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.[71]

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,[72] 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.[73] *Pool* found *Kennedy* too narrow for Arizona.[74] *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

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[69] *Pool v. Superior Court*, 139 Ariz. 98, 100 (1984)
[70] *Id.*
[71] *Pool v. Superior Court*, 139 Ariz. 98, 102 (1984)
[72] *Id.,* 108
[73] *Id.,* 105 (1984), citing to *State v. Marquez*, 113 Ariz. 540, 542 (1977) and *State v. Wilson*, 134 Ariz. 551, 554 (App. 1982) respectively
[74] *Pool,* supra at 108

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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.[75]

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.[76] Also, like *Pool*, it noted relevant general federal authority.[77] 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.[78] 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.[79] 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 *Pool*'s reason to stray from *Kennedy*. *Dawson*'s failure to examine the

[75] *Id.* at 109
[76] *People v. Dawson*, 154 Mich. App. 260, 268-269 (1986), citing to *People v. Robideau*, 419 Mich. 458, 485 (1985)
[77] *Dawson,* supra at 268-269, citing to *Green v. United States*, 355 U.S. 184, 190 (1975)
[78] *Id.* at 269-270
[79] *Id.* at 281-282

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relevant provision of the Michigan Constitution and attendant case law – as *Pool* did in Arizona – is the greatest flaw in the *Dawson* analysis.

As this Court knows, a concession under the *Kennedy* standard by the prosecution kept this Court form opining definitively on the appropriate standard. That is to say that this Court recognized and adopted the *Kennedy* test but declined to go any further than the federal standard.[80] Although Michigan has not officially adopted the *Kennedy* test, 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.[81]

Dawson was the last time this Court substantively opined on this issue.

The relatively recent emergence of jurisprudence from this Court on this issue, combined with its intermittency stands in stark contrast to the historical legal traditions associated with the substance of *Bullock*. Accordingly, the lack of such state law preexisting the constitutional provision weigh against finding the existence of a compelling reason to depart from the federal test in *Kennedy.*

4. No structural difference exists between the state and federal Double Jeopardy provisions and, so, does not create a factor in favor of the existence of a compelling reason.

In identifying the existence of structural differences as a possible factor for determining the existence of a compelling reason to depart from the federal

[80] *People v. Dawson*, 154 Mich. App. 260, 256-257 (1986)
[81] *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)

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constitution, neither *Mahaffey* nor *Catania* offered examples or insight into what these could be. Michigan jurisprudence, therefore, must offer guidance.

By way of an example, this Court *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*,[82] examined the intersection of voting rights, Michigan Election law, and voter identification[83] within the six-factor "compelling reason" framework.[84] This Court highlighted structural differences "between our constitution and the federal constitution that indicate that the state constitution provides greater protection against infringements on the right to vote."[85] Most relevantly, this Court pointed to the fact that Michigan attaches a greater importance to the right to vote because "the Michigan Constitution dedicates an entire article to elections" while the federal constitution does not.[86]

Identification of such a difference as identified *In re Request for Advisory Opinion…* is not just one of highlighting different language, but different authority and scope of purpose. Another occurs in *In re Brewster Street Housing Site in City of Detroit*[87]

In *Brewster*, this Court examined the propriety of the "necessity for the use of, and compensation to be paid for" private land to be obtained by the City of Detroit for a public housing project pursuant to the National Industrial Recovery Act.[88] This Court examined the propriety of subsequent state

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[82] *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (2007)
[83] *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 106-107 (2007)
[84] *Id.* at 105
[85] *Id.* at 107
[86] *Id.*
[87] *In re Brewster Street Housing Site in City of Detroit*, 291 Mich. 313 (1939)
[88] *Id.* at 321-323

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legislation which established housing commissions, bond drives, and protocols for sales to prospective residents of the project.[89] After the Federal District Court in Detroit, and one in Louisville sustained similar motions to dismiss the condemnation proceedings, this Court was approached to offer insight on the constitutionality of the pending legislation.[90] In so doing, this Court observed that the Michigan Constitution is not a grant of power to the legislature, but a limitation upon its powers while the Constitution of the United States is a delegation of powers to the Federal government.[91] This observation represents a fundamental structural difference in the nature of the respective constitutions; that state governments poses inherent sovereign power limited by their constitution while the federal government possesses the authority delegated it.

A final example deals with cases and controversies. In *Lansing Schools Educ. Ass'n v. Lansing Bd. of Ed.*[92] this Court noted that "[u]nlike the Michigan Constitution…the federal constitution enumerates the cases and controversies to which judicial power extends, and the federal standing doctrine is largely derived from this Article III case-or-controversy requirement.[93] While *Lansing*, *Brewster*, and *Request for Advisory Opinion* are not factually or procedurally similar to these facts, they all examine their relevant constitutions, constitutional authorities, and constitutional provisions for structural

[89] *In re Brewster Street Housing Site in City of Detroit*, 291 Mich. 313, 329-331 (1939)
[90] *In re Brewster Street Housing Site in City of Detroit*, 291 Mich. 313, 325-326 (1939)
[91] *Id.* at 333, citing to *Attorney General v. Preston*, 56 Mich. 177, 179 (1885); *Moore v. Harrison*, 224 Mich. 512, 515 (1923) respectively
[92] *Lansing Schools Educ. Ass'n v. Lansing Bd. of Ed.*, 487 Mich. 349 (2010)
[93] *Id.* at 362

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differences. Once again, the difference is in scope, function, and "structure" of the respective governing documents. Similarly, within the Double Jeopardy context, when the federal and state constitutional provisions are examined for differences in scope, function, and actual structure, no such difference exists.

As noted previously, the relevant Double Jeopardy clauses, when juxtaposed are nearly identical in phraseology:

> No person shall be subject for the same offense to be twice put in jeopardy[94]
>
> and
>
> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.[95]

So too are they similar in scope, purpose, and application. Both the federal and state constitutions, the accused cannot be placed in jeopardy for the same criminal offense.[96] Both the federal and state constitutional provisions for Double Jeopardy identify three basic 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.[97]

The potential substantive difference in the Michigan Constitution's deletion of the phrase "life and limb" from its text was not a functional one, but an editorial one. This phrase reflects the time in which it was written and while historically

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[94] Const. 1963, art 1, section 15
[95] U.S. Const., Am. V
[96] U.S. Const., Am. V; Const. 1963, art 1, section 15; *People v. Beck*, 510 Mich. 1, 11-12 (2022)
[97] *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)

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accurate, considered "archaic" by the Michigan Constitutional convention.[98] The execution of an editorial change does not – by any definition – constitute a substantive alteration that could constitute a structural difference. Aside from this editorial change, no such structural difference between the respective provisions exists. Without any such difference, this factor does not weigh in favor of the existence of a compelling reason for Michigan's Constitution to be interpreted differently than that of the United States.

5. Resolving a pending question of law with statewide significance constitutes an issue of state interest or local concern, but this – alone – does not warrant the existence of a "compelling reason" to differentiate Michigan's Constitution from the United States Constitution.

Matters of particular state interest or local concern constitute the final factor in determining the existence of a "compelling reason" to differentiate the Michigan Constitution from the federal constitution.

The lack of significant constitutional, statutory, and jurisprudential development of this issue suggests weak historical concern over the issue of double jeopardy within the context of prosecutorial error. The framers of the Michigan Constitution, judges, and past benches of the Michigan Supreme Court have been satisfied with maintaining parity with the double jeopardy protections afforded by the federal constitution.

As this Court decided to grant Defendant's application and entertain additional briefing and oral argument – accepting Court of Appeals Judge Shapiro's invitation to address this issue – suggests that *now* is the time to

[98] *People v. Nutt*, 469 Mich. 565, 589 (2004)

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decide the question of proper analysis summarized by *Tyson* and identified by *Dawson*. Answering this question has become one of interest and concern to this Court, not because of a wave of improperly acting prosecutors, but simply to resolve a heretofore question of law with significance to the state. This issue, then, has become one of interest and concern to this Court and qualifies as a reason for this Court to consider the matter. This alone, however, does not qualify as a compelling reason to distinguish the Michigan and U.S. Constitution.

Judicial caution – if not restraint – in expanding state constitutional rights beyond federal protections has been historically emphasized by this Court. In *People v. Sierb*[99] – where this Court found equivalency between the state and federal constitutions on the issue of substantive due process violations for retrial following a properly declared mistrial – the bench advised restraint, especially given Sierb's arguments. "The contention that the Court should infer a remedy precluding retrial because of 'the anxiety, stress, humiliation, and cost to the defendant of continual reprosecution where no new evidence exists' is a general claim of governmental unfairness."[100] The Court reasoned that if Sierb had been treated "unfairly" when he had been tried three times after properly found mistrials, why not two? The Court supposed that "[i]t could follow that either any retrial after a mistrial is barred as a violation of substantive due process, or that the theory as applied would result in arbitrary assertion of judicial authority."[101] To avoid this and other expansions of arbitrary authority, the

[99] *People v. Sierb*, 456 Mich. 519 (1998)
[100] *Id.* at 530
[101] *Id.* at 530-531

Court stated that "Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the 'unprincipled' creation of constitutional rights that exceed their federal counterparts."[102]

Stated differently, the consideration of this issue constitutes an issue of state interest or local concern and weighs toward finding a "compelling reason," but such a consideration, alone, is insufficient to warrant the existence of a "compelling reason."

[102] *People v. Sierb*, 456 Mich. 519, 523 (1998), citing to *Sitz v. State Police*, 442 Mich. 744, 763 (1993)

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II.

If there is a compelling reason to interpret the Michigan Constitution differently than that of the United States, then the Michigan Constitution should be interpreted with an eye toward the state's historical legal traditions – as exemplified in prior statutes, constitutions, and jurisprudence – to determine the law the people have made. Though no compelling reason to interpret Michigan's Double Jeopardy Clause differently than its federal counterpart exists, if there were, and this Court looks to the law the people of Michigan have made, the test presented in presented in *United States v. Dinitz* to determine whether retrial following a prosecutor error-causing mistrial is barred by Double Jeopardy. If this Court finds a compelling reason to interpret the Double Jeopardy Clause in Michigan's Constitution differently than the United States' Constitution, then the test presented in *United States v. Dinitz* should be adopted.

Discussion

First, there is no compelling reason under the Michigan Constitution to adopt a test other than *Oregon v. Kennedy*, as adequately demonstrated in the foregoing argument – Argument I. This test has not been repudiated by the United States Supreme Court and has been reliably applied in other jurisdictions. *Kennedy*'s test removed superfluous and confusing language, refining the inquiry to the specific instance where a prosecutor has volitionally bastardized a trial to gain a tactical advantage, thus ensuring that Double Jeopardy's ultimate sanction is applied to this ultimate misconduct.

Presuming *arguendo*, however, there were a compelling reason under the Michigan Constitution to adopt a test other than *Oregon v. Kennedy*, then many of the tests from other states are inappropriate for Michigan. Arizona, New

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Mexico, Pennsylvania, California, and Hawaii all have tests that this Court has previously examined. Arizona's test – in *Pool* – has come to the forefront. Choosing *Pool*'s test – just as choosing the tests from New Mexico, Pennsylvania, and Hawaii – would be a mistake. Each were created without an eye toward the historical jurisprudence of the states in which they originated. This not only runs afoul of Michigan's practice to ground its own constitutional interpretation in Michigan-specific sources but ignores this state to look to the law its people have previously made for guidance. The only out-of-state test that comes close to this historical requirement is that of California's *People v. Batts*. While *Batts* is a good test, its facts are substantively different than those presented instantly and, so, becomes less reliable. Without relying on other states' tests, this Court is left to rely on *United States v. Dinitz*.

Dinitz was relied upon – in part and impliedly – by this Court previously in *People v. Anderson* and *People v. Tyson* and is rooted within this state. Moreover, *Dinitz* not only retains a large portion of the *Kennedy* analysis - thus meeting Michigan's historical desire for parity with the federal constitution – but it contains much of the language lost in *Kennedy*'s edits that gave rise to the harshest criticisms of the *Kennedy* test. Adopting that additional language avoids the potential pitfalls highlighted in those criticisms and renders them moot. The only additional consideration would be further adoption of Justice Powell's concurrence from *Kennedy*, which cautions courts to rely upon re objective facts and circumstances of the case. *Dinitz*, with Powell's proviso, both addresses *Kennedy*'s critics and respects Michigan's jurisprudence.

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1. There is no compelling reason under the Michigan Constitution to adopt a test other than *Oregon v. Kennedy*.

As evidenced in the foregoing, there is no compelling reason for Michigan to assign greater double jeopardy protections under the state constitution than under the federal constitution. Without this, the state and federal constitutions are to be interpreted equivalently, and the test set out by *Oregon v. Kennedy* remains appropriate.

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]

In *Kennedy,* during redirect examination of a witness 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 said no. 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]

Defendant claimed Double Jeopardy protection when the prosecution sought retrial. During subsequent argument, the prosecutor testified – and the

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[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] *Oregon v. Kennedy*, 456 U.S. 667, 669 (1982)

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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 barred 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]

Though appearing in Justice Stevens' critical concurrence, the Double Jeopardy Clause represents a "constitutional policy of finality for the defendant's

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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

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benefit in criminal proceedings."[111] This, and the interest of having his or her guilt determined in one proceeding, 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 Oregon's the two-prong "intent" and "bad faith" test that stemmed from an opinion appearing before *Kennedy*, *U.S. v. Dinitz.*[115] Given the nature of the inquiry, such an excision is a reasonable one where lawyers and judges – who were once lawyers – are well-versed in the direct and circumstantial evidence routinely used to demonstrate an actor's intent. Emphasizing the use of these inherent skills and implementing the widely recognized factors associated with intent created a narrowly defined test whose application could be adopted by – literally – everyone in the legal community with little to no specialized guidance. *Kennedy* implemented a simple test that could be reliably applied to a wide range

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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)

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of challenged conduct. That said, the plurality opinion neither created the test from whole cloth, nor did it delete a prong of Oregon's test without cause.

Oregon's two-pronged test stemmed from a prior opinion on this issue, *U.S. v. Dinitz.*[116] *Dinitz* based its "bad faith" inquiry from *U.S. v. Jorn.*[117] *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 barred following the set aside of a conviction due to an error in the proceedings, not an allegation of improper conduct.[118] The relevant portion of *Tateo* – used by *Jorn* – was a footnote that stated the Court's Double Jeopardy analysis would be different if the prosecutorial or judicial impropriety prompted a mistrial "from a fear that the jury was likely to acquit…."[119] Meaning that had it been the intention of the prosecutor or judge to intentionally err to goad Defendant into a mistrial motion, then Double Jeopardy would bar retrial. Accordingly, *Jorn* used the term "bad faith" as a term of art to describe the search for improper intention as opposed to the creation of a separate legal inquiry. Such a position is also supported by a reading of the relevant portion of *Dinitz*.

In *Dinitz*, defendant faced narcotics charges.[120] Concerns over the propriety and qualifications of defendant's counsel prompted the Court to

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[116] *Oregon v. Kennedy*, 456 U.S. 667, 673-674 (1982), citing to *United States v. Dinitz*, 424 U.S. 600, 611 (1976)
[117] *U.S. v. Jorn*, 400 U.S. 470, 482-483 (1971)
[118] *U.S. v. Tateo*, 377 U.S. 463, 467-468 (1964)
[119] *Id.*, 468 n 3
[120] *Dinitz*, supra

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declare a mistrial in the interests of justice; the prosecution did not object.[121] At retrial, defendant objected on double jeopardy grounds.[122] On appeal, the U.S. Supreme Court recognized that the Double Jeopardy Clause protects a defendant against governmental actions "intended to provoke mistrial requests" and bars retrial where "bad-faith conduct" harasses the accused with multiple prosecutions "or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.[123]

Dinitz made it clear that goal of the Double Jeopardy Clause – as applied to this style of situation is to curb "bad faith conduct" that would harass a defendant with multiple trials. Practically, the focus was not to sanction any conduct which could be considered "bad faith," but to bar retrial where the prosecutor's intentionally improper action maneuvered Defendant into a mistrial motion. *Dinitz* neither created nor recognized that *Jorn* identified a second, independent "bad faith" inquiry into the prosecution's challenged conduct, but only recognized it as a type of improper conduct that that inappropriately harasses the defendant in violation of Double Jeopardy. The *Dinitz Court* recognized the singular search for improper "goading" activity in its analysis.

The Court stated that the court's actions with the counsel of dubious qualification were not in "bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects at acquittal" and an examination of the record failed to show the actions were done in "bad faith" or

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[121] *United States v. Dinitz*, 424 U.S. 600, 601-605 (1976)
[122] *Id.* at 605
[123] *Id.* at 607, external citations omitted

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so undertaken to harass the defendant with a retrial.[124] Thus, the "bad faith" inquiry was not a separate prong of the analysis, but a shorthand phrase whose definition – in this circumstance - constituted a determination of whether the prosecutor intended to engineer a defendant's mistrial motion to obtain for an improper purpose.

As applied, the plurality seemingly recognized the opinions leading to *Kennedy* that used both the "bad faith" and "goading-style" whether interchangeably or in conjunction with each other was confusing; that the lack of "precise phrasing of the circumstances" that would allow a Double Jeopardy bar was what the plurality in *Kennedy* complained of.[125] Such condition was evident in *Kennedy* when it appeared before the Court from Oregon. Oregon had used the line of cases – *Tateo*, *Jorn*, and *Dinitz* – to create a two-condition inquiry where only one really existed. Moreover, one of those inquiries – the "bad faith/overreaching" inquiry – was too amorphous to be helpful and subject to the whims and varying definition of the presiding judge. Accordingly, *Kennedy* returned to what *Tateo*, *Jorn,* and *Dinitz* stated and embraced their respective core – the "intent" analysis.

Again, excising the ill-defined "bad faith" inquiry from *Dinitz* and adopting its "intent" inquiry offered far more practical guidance to the practitioner.[126] 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

[124] *United States v. Dinitz*, 424 U.S. 600, 611 (1976)
[125] *Oregon v. Kennedy*, 456 U.S. 667, 674 (1982)
[126] *Id.*, 677 (1982), citing to *Dinitz*, supra at 611

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to learn the intent behind the offending conduct to appropriately determine its impact and offering insight to making the determination.[127]

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."[128] This offered additional guidance to the already simplified test and ensured that it was not impossible for defendants to make their burden under this argument. Powell told practitioners where to get their proofs and reviewing trial courts what to be cognizant of during trials. If the evidence was there, then the Court could act, and Defendant would be successful. If not, then such a motion was unsupported and rightfully denied.

Similar to Justice Powell, but far more critical was Justice Stevens' concurrence; he criticized the plurality for failing to include overreach and harassment within the Double Jeopardy Exception.[129] 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.[130] Such a strict requirement, he reasoned, would render a defendant's choice to continue an error-tainted trial or end it unmeaningful.[131]

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[127] 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)
[128] *Oregon v. Kennedy*, 456 U.S. 679-680 (1982)
[129] *Id.,* 688 (Stevens, J., concurring)
[130] *Id.*
[131] *Id.,* 689

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Thus, the plurality's test impliedly required 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."[132] Justice Powell, however, fell victim to the very confusion the plurality was attempting to avoid.

As noted above, the "harassment" language Justice Stevens missed as not a separate inquiry. It was not a separate inquiry. The portion from *Dinitz* that comprised this passage is clear:

> [The Double Jeopardy Clause] bars retrials where "bad-faith conduct by judge or prosecutor," threatens the "(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.[133]

The "harassment" language stemmed – originally – from *Gori v. United States*,[134] where the Court addressed the proper scope of the Double Jeopardy Clause. The Court began the relevant portion of the opinion with the assertion that:

> Since 1824 it has been settled law in this Court that 'The double-jeopardy provision of the Fifth Amendment does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.[135]

The Court indicated that when a manifest necessity requires it, a mistrial should be granted, but such "power ought to be used with the greatest caution…for very

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[132] *Oregon v. Kennedy*, 456 U.S. 689 (1982)
[133] *United States v. Dinitz*, 424 U.S. 600, 607 (1976), external citations omitted
[134] *Gori v. United States*, 367 U.S. 364 (1961)
[135] *Id.* at 367-368

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plain and obvious causes."[136] The Court cautioned trial courts to "be extremely careful how they interfere" and stopped short of an opinion on Double Jeopardy:

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.[137]

The dicta in *Gori* which established the "harassment" language did not create a specific test. It constituted only the recognition that the Fifth Amendment Double Jeopardy protection would bar situations where a court abused its discretion to improperly subject an accused to multiple prosecutions. When read in context with *Tateo* and *Jorn* the harassment with successive prosecutions – as argued above – becomes the general premise to be avoided by the Double Jeopardy Clause and the retrial for tactical trial advantage becomes the conduct to be avoided. Consequently, the "loss" of the harassment language is not the loss that Justice Stevens suggests. Even so, and more problematic, are inquiries into "harassment" or "bad faith" since "they offer virtually no standards for their application."[138]

The plurality noted that to adopt Oregon's and Stevens' broad "overreaching" standard would expand the possibilities for a defendant to benefit from trial error by creating a new "classification of [fatal] prosecutorial error"

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[136] *Gori v. United States*, 367 U.S. 364, 369 (1961)
[137] *Id.*
[138] *Id.* at 674

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without providing "any standard by which to assess that error."[139] 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.[140]

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."[141]

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 - was "a manageable standard to apply"[142] to maintain the balance between the competing interests, given any factual situation presented to a reviewing Court. It was manageable in that the standard clearly called for the reviewing court to

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[139] *Oregon v. Kennedy*, 456 US 667, 675 (1982)
[140] *Id.*, 676-677
[141] *Id.*
[142] *Id.*, 675

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"make a finding of fact…[i]nferring the existence or nonexistence of intent from objective facts and circumstances"[143] arising from the prosecutor's trial conduct.

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 shift the balance in favor of a defendant with analyses based on overly broad and ill-defined "bad faith"-style standards.

Kennedy's "goading" test is the federal test Michigan has used and was used by the Court of Appeals in this case. As there is no compelling reason to interpret Michigan's Double Jeopardy Clause differently than the United States' Constitution's Double Jeopardy Clause, *Kennedy*'s test is appropriate, here.

2. This Court should not adopt a test from another state – whether it is *Pool* or another test – since those tests were created and derived from facts specific to the individual cases and analyses unique to each state.

Notwithstanding *Kennedy's* propriety in Michigan, adopting a test from another state would not comport this state's legal tradition. This Court in *Pickens* noted that just as other states have their own constitutional authorities and jurisprudential histories that made them unique and distinct, Michigan has its own distinct constitutional history "given content by its own constitutional conventions and ratifications in 1835, 1850, 1908, and 1963 and the adjudications arising from them."[144] Accordingly, in Michigan, state

[143] *Oregon v. Kennedy*, 456 US 667, 675 (1982)
[144] *People v. Pickens*, 446 Mich. 298, 320-321 (1994)

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constitutional interpretation must be grounded in Michigan-specific sources rather than borrowing from other states. This is no more apparent than the instant issue where there is a divide among the states in determining the appropriate test for the intersection of prosecutorial error and double jeopardy. As noted previously by this Court and in the People's Answer to Defendant's Application for Leave for Appeal, Arizona (*Pool*), New Mexico (*McClaughtery*), Pennsylvania (*Smith*), California (*Batts*), and Hawaii (*Rogan*), all have tests separate from the Federally appropriate test under *Oregon v. Kennedy.* While these states criticized *Kennedy*, each relied upon their on individually unique rationales and judicial authority to justify the departure. California was the only state to really rely on its own state's legal traditions and history to ensure the will of the people, as given voice in their law, was respected while Arizona, New Mexico, Pennsylvania, and Hawaii made legal pronouncements without much analytical deference to their state's legal traditions and history.

Central to the *Pool* Court's finding was its examination of Arizona law. It first noted a prior case – *State v. Wilson*[145] – discussed the analytical standard for finding prosecutor's "intent" in a way like that of *Oregon v. Kennedy*.[146] *Pool's* facts, however, were different from *Wilson* and *Kennedy* since the challenged prosecutor conduct was "not so much to provoke a mistrial as to avoid probable acquittal or to harass a defendant."[147] While *Pool* looked to *State v. Marquez*[148]

[145] *Pool v. Superior Court*, 139 Ariz. 98, 105 (1984) citing to *State v. Wilson*, 132 Ariz. 551, 554 (App. 1982)
[146] *Pool*, supra at 106
[147] *Id.*
[148] *Id.* at 105, citing to *State v. Marquez*, 113 Ariz. 540, 542 (1977)

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to find that "simple judicial or prosecutorial error" is insufficient to bar retrial, where record showed that the State "engaged in any intentional misconduct or that the defendant was in any way subjected to harassment or oppression" double jeopardy could prevail.[149]

Unlike what is required in Michigan, Arizona in *Pool* took no steps to analyze its own history or the law its people made, but simply stated that while Arizona would normally conform its constitution to that of the United States,[150] it agreed with Justice Steven's competing opinion in *Kennedy.*[151] Although it is not explicitly stated, the fact Arizona had prior law allowing double jeopardy to attach when a defendant was subjected to harassment or oppression undoubtedly aided in the *Pool*' Court's decision, thus making Arizona's decision to differentiate its constitution from the federal constitution unique to the state.

Likewise, in *McClaughtery*, New Mexico relied upon prior New Mexico jurisprudence linked to the state constitution. *McClaugherty* applied a prior holding of the New Mexico Supreme Court – *State v. Breit*[152] – which, in relevant part, "diverged from…*Oregon v. Kennedy*" by rejecting the subjectivity it allowed and adopting an "objective standard…based on the prosecutor's conduct as it manifests at the trial, not the motivation for that conduct."[153] *Breit*, in turn, relied upon *State v. Day*,[154] which "concluded that double jeopardy barred retrial

[149] *Pool v. Superior Court*, 139 Ariz. 98,105 (1984), citing to *State v. Wright*, 112 Ariz. 446, 450 (1975)
[150] *Id.* at 108, Arizona state citation omitted
[151] *Id.*
[152] *State v. McClaugherty*, 144 NM 483, 487 (2008) citing to *State v. Breit,* 122 N.M. 655 (1996)
[153] *Id.* at 490-491
[154] *State v. Day* 94 N.M. 753, 756 (1980)

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when "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment of successive trials."[155] This, *Breit* said was an "amalgam of various pronouncements by the United States Supreme Court" which derived from the line of federal cases beginning with *Tateo* that included *Jorn* and *Dinitz* and concluded with *Kennedy*.[156]

Much like *Pool*, New Mexico had some prior jurisprudence explicitly prohibiting prosecutor misconduct for the purpose of gaining a tactically superior position at trial, but did not undertake an in-depth analysis of whether it should depart from the base protections of the United States Constitution, it simply decided to. New Mexico's decision to depart from the *Kennedy* and the federal test was based on the fact its prior use of *Kennedy* was not mandatory[157] and since other states had rejected *Kennedy*, it would as well.[158] Although did not undertake an analysis its own laws when it adopted the "willful disregard" test, the decision stemmed directly from its prior ruling in *Day* since such a test was "implied" in *Day*.[159] Thus, *Breit* – which informed *McClaugherty* – was appropriate for New Mexico according to that state's standards.

Unlike *Pool* and *McClaugherty*, Pennsylvania in *Commonwealth v. Smith*,[160] noted that before *Kennedy*, Pennsylvania had the same style of "bad faith"

[155] *State v. Day* 94 N.M. 753, 664 (1980)
[156] *State v. Breit*, 122 N.M. 655, 664 (1996), citing to *Day*, supra at 757
[157] *Id.* at 664-665
[158] *Id.*
[159] *Id.* at 666
[160] *Commonwealth v. Smith*, 532 PA 178 (1992)

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embodied in *Dinitz*.[161] Citing to *Commonwealth v. Starks*, it highlighted that Pennsylvania not only had the "bad faith" test – also categorized as prosecutorial overreaching - but also the goading analysis of *Kennedy*.[162] Like *Pool* and *McClaugherty*, however, *Smith* simply criticized *Kennedy*, stated it did not afford sufficient protections under Pennsylvania's Constitution, and reverted to its prior standard.[163] Like the other cases, *Smith* took no opportunity to examine its own laws or jurisprudential history to determine what law its people made and the Pennsylvania Court simply made its pronouncement.

California in *People v. Batts* concluded that "cogent reasons…exist" for interpreting its state constitution differently than the federal constitution.[164] This came, primarily from its analysis that *Kennedy* failed to protect the defendant's interests[165] after a comprehensive analysis of *Kennedy* and the competing tests from other states.[166] *Batts* also provided analysis of the relevant double jeopardy provisions and noted that – in California – there was no indication that the drafters "considered the meaning of the double jeopardy guarantee in the context" of a mistrial caused by prosecutor error.[167] This is significantly different from what occurred in the prior cases since only after examining California's jurisprudential history was the way paved for the Court to decide as it did. This approach is certainly more in keeping with Michigan's

[161] *Commonwealth v. Smith*, 532 PA 178, 184 (1992)
[162] *Id.* at 184 (1992), citing to *Commonwealth v. Starks*, 490 PA. 336, 341 (1981)
[163] *Id.* at 186
[164] *People v. Batts*, 30 Cal.4th 660 (1992)
[165] *Id.* at 692
[166] *Id.* at 688-692
[167] *Id.* at 686

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approach to determining whether a "compelling reason" to interpret the federal constitution differently exists, but the situation presented in *Batts* is still markedly different than presented, here. In *Batts*, during a second murder retrial, prosecutors planned to, and did, obtain testimony regarding the absence of a murdered and unavailable witness in violation of a court order to preclude that evidence.[168] The prosecutor willfully violated the court order and changed an innocent error to intentional misconduct. *Batts*' facts are different than those presented instantly, where there was no evidence the prosecutor intentionally engaged in willful misconduct, but made an honest yet egregiously obvious error. While *Batts* presents a thoughtful analysis, rooted in its own states' historical legal traditions, the facts render it somewhat inapplicable to the instant matter.

Hawaii in *State v. Rogan*,[169] began its analysis by finding egregious misconduct where the prosecutor, in a prosecution for multiple counts of criminal sexual conduct, made in appropriate race-based arguments. Highlighting the similarity between the state and federal double jeopardy provisions,[170] the Hawaii Supreme Court balanced the interests between a defendant and society, noting that the double jeopardy clause is a "limit on prosecutorial power."[171] The Court discussed these principles in terms of both in-state and out-of-state jurisprudence, journal articles, and federal precedent, but made no attempt to discuss Hawaii's historical treatment of the issue as

[168] *People v. Batts*, 30 Cal 4th 660, 670 (Cal 2003)
[169] *State v. Rogan*, 91 Hawaii 405 (1999)
[170] *Id.* at 416
[171] *Id.* at 416-418

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support. Instead, *Rogan*'s conclusion to expand the double jeopardy protections of Hawaii's Constitution was based on extensive discussions of legal principles without respect for the people who wrote the law.

This returns the discussion to this Court in *Pickens* when it said that "Michigan has a very distinct constitutional history, given content by its own constitutional conventions and ratifications in 1835, 1850, 1908, and 1963 and the adjudications arising from them."[172] Michigan's Constitution should be interpreted through the lens of Michigan law and legal tradition. This is what gave rise to the "compelling reason" analysis discussed in the foregoing section. It is common sense that what is good for one state may not be good for another. Relying on other states' findings may be persuasive, but it is by no means conclusive, especially since each state is likely to render opinions through the lenses of its own jurisprudential history and authority. Relying on a foreign test would be inappropriate, especially where *Kennedy* remains viable in Michigan.

3. While this Court should not develop factors that expound upon the "bad faith" test previously adopted in Michigan - because no such "bad faith" test was adopted – were it to stray from *Kennedy*, this Court should embrace *Dinitz* and Justice Powell's concurrence in *Kennedy*.

Notwithstanding *Kennedy*'s continued applicability, since there is no compelling reason to interpret the Michigan Constitution differently the United States Constitution, should this Court find otherwise, *Dinitz* and Justice Powell's concurrence in *Kennedy* creates a viable alternative.

[172] *People v. Pickens*, 446 Mich. 298, 320-321 (1994)

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People v. Anderson recognized that a prosecutor's "bad faith" conduct could bar retrial under Double Jeopardy.[173] *Anderson* recognized this inquiry, alone, to be insufficient and so cited to *Jorn* for more guidance. *Jorn* also supported *Dinitz*. Accordingly, a search for "bad faith" – as required by *Anderson* – and informed by *Dinitz* could provide a useful analytical framework.

Provided this Court conclude that *Dinitz* did, in fact, provide two separate and distinct inquiries, a framework that requires a Double Jeopardy bar in instances where intentional "bad faith" conduct that (1) harassed a defendant with multiple trials or (2) goaded the defendant into making a mistrial motion for some tactical trial purpose, could work. Such a test would be in keeping with both Michigan jurisprudential history, Michigan's adoption of relevant federal law, the law the People of Michigan have made – albeit somewhat dated – and maintain a core attribute of *Kennedy* – the goading test. Furthermore, adopting *Dinitz* returns the "missing" harassment language that formed the basis of Justice Stevens' criticism. Returning that language to the test removes his concerns over a Defendant's ability to substantively decide his or her own fate.

The only other factor to include in this analysis would be that of Justice Powell, whose concurrence directed the necessary proofs for the test to be derived from the "the objective facts and circumstances of the…case."[174] Again, such direction provides necessary guidance to ensure the existence of proper records.

[173] *People v Anderson*, 409 Mich. 474, 485 (1980)
[174] *Oregon v. Kennedy*, 456 U.S. 679-680 (1982)

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People v. Tyson[175] fails to provide any real guidance to this Court. As noted in the foregoing section I, the *Tyson* Court itemized the tests competing with *Kennedy*, discussed *Kennedy*, recognized that the question of which test to choose was unresolved, and effectively failed to find any error under *Kennedy* or the other, broader, tests. In other words, *Tyson* didn't adopt any one of the competing tests. Correspondingly, this Court should not adopt *Tyson*.

Similarly, Arizona's *Pool* should not be adopted by this Court. In *Pool,* Defendant and two co-defendants were accused of stealing jewelry from a home.[176] At trial, the prosecutor angrily "ventilate[d] his feelings to the court."[177] Furthermore, the prosecutor's cross-examination moved from proper to arguably proper to "irrelevant and rather prejudicial" to egregiously improper.[178]

Pool complained about the questions and the prosecution's demeanor, moving for a mistrial. The trial court denied it[179] (although the opinion previously indicated that the motion was granted).[180] 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.[181]

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[175] *People v. Tyson*, 423 Mich. 357 (1985)
[176] *Pool v. Superior Court*, 139 Ariz. 98, 100 (1984)
[177] *Id.*
[178] *Id.* at 101
[179] *Id.*
[180] *Id.* at 100
[181] *Id.* at 102

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On appeal, 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,[182] 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.[183] *Pool* found *Kennedy* too narrow for Arizona.[184] *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.[185]

Pool should not be adopted since it offers no improvement upon *Kennedy*. The prongs that establish the existence of incurably fatal prosecutor error are not objectionable. The questions that search for imputed knowledge to determine a bad faith, or otherwise classify the inappropriate conduct without deference between retrial-inducing error and Double Jeopardy-barring

[182] *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984)
[183] *Id.,* 105 (1984), citing to *State v. Marquez*, 113 Ariz. 540, 542 (1977) and *State v. Wilson*, 134 Ariz. 551, 554 (App. 1982) respectively
[184] *Id.,* 108
[185] *Id.,* 109

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 and society's rights. Further, the failure to provide adequate instruction meeting this goal is exactly what the Supreme Court in *Kennedy* wished to avoid when it said that other, broader tests, "offer virtually no standards" to apply the tests.[186]

The Connecticut Supreme Court observed this in *State v. Michael J.* when it rejected *Pool*, interpreted its own constitution according to the federal constitution, and adopted *Kennedy*.[187] Ultimately, *Pool* still requires an intent analysis, but does so in a way which fails to adequately clarify the law's application for lawyers and judges and preserve *Kennedy*'s balance.

Alternatively adopting *Dinitz* – with Justice Powell's proviso – provides adequate instruction, maintains the balance of interests *Kennedy* seeks to preserve, and addresses Justice Stevens' criticisms. Moreover, *Dinitz* and its progeny have been used in Michigan and, so, maintains continuity with the law Michigan has made.

[186] *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)
[187] *State v. Michael J.,* 274 Conn. 321 (2005)

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III.

Double jeopardy bars retrial following a mistrial where that mistrial was prompted by inappropriate prosecutor action. Here, under the competing *Kennedy*, *Dinitz*, and *Pool* tests, the instant prosecutor's error – however obviously egregious – was not intended to goad Defendant into making a mistrial motion, harass the Defendant, or pursued for an improper or prejudice purposes; the record shows that it was legal error, negligence, and mistake. Under *Kennedy*, *Dinitz*, and *Pool*, retrial was not barred and Defendant's conviction stands.

Standard of Review

A constitutional double jeopardy challenge are questions of law this Court reviews *de novo.*[188] Factual findings concerning a prosecutor's intention to goad the defense into a mistrial motion are reviewed for clear error.[189]

Discussion

Regardless of the appropriate test – whether *Kennedy*, *Dinitz*, or *Pool* – Double Jeopardy did not bar Defendant's retrial and the conviction stands.

First, under *Kennedy*, retrial is permissible.

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.

While the People recognize that this Court examines constitutional questions *de novo*, the majority Michigan Court of Appeals judges who addressed

[188] *People v. Lett*, 466 Mich. 206, 212 (2002)
[189] *People v. Dawson*, 431 Mich. 234, 258 (1988); MCR 2.613(C)

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this case below did so appropriately. The Court analyzed Defendant's case considering *Kennedy*, 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.[190]

In making this determination, the Court necessarily relied "in large part on the trial court's assessment of the behavior"[191] and the objective facts presented.[192]

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.[193] 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.[194] 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.

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[190] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), page 2

[191] 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.

[192] *People v. Jennings*, unreported per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No. 359837), page 3

[193] *Oregon v. Kennedy*, 456 US 667, 670 (1982); *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 91, 93-94

[194] See MCrim JI 2.8 – Judging Credibility and Weight of Evidence, for example

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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.[195] The instant prosecutor obtained testimony regarding Defendant's invocation of silence and then used it in argument as evidence of a guilty conscience.[196] Likewise both prosecutors denied possessing the intention to cause a mistrial.[197]

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"[198] 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

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[195] *Oregon v. Kennedy*, 456 US 667, 669 (1982)
[196] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 57-58
[197] *Kennedy*, supra at 670 (1982); *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 88-89
[198] *Kennedy*, supra 680

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

Second, under the modified *Dinitz* two-inquiry test discussed in the foregoing section, retrial of Defendant is appropriate.

Again, while the prosecutor intended his erroneous course of conduct, there is no evidence to suggest that it was pursued to harass Defendant with multiple trials. There is no evidence to support the contention that he sought mistrial and retrial to harass Defendant either with the threat or reality of multiple trials. Accordingly, Double Jeopardy is inapplicable.

Retrial is appropriate for Defendant under the modified *Dinitz*'s second prong since it is effectively an application of the *Kennedy* test. The people rely on the foregoing section for that argument and incorporate it by reference here. Since Defendant does not run afoul of *Kennedy*, he does not run afoul of *Dinitz*'s second inquiry. Double Jeopardy is inapplicable and retrial is appropriate.

Finally, notwithstanding the People's position that *Pool* is inappropriate, even under that test, Defendant may be retried.

Remember, *Pool*'s three inquiries are:

1. The mistrial is granted because of improper conduct or actions of the prosecutor; and

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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.[199]

Here, Defendant demonstrates prongs one and three – that the prosecutor's use of Defendant's silence was both improper and the result of prejudice that could not be cured short of a mistrial and retrial. These showings, however, do not grant Defendant his relief. To bar retrial, he must make a showing on all three prongs, given the "and" between the clauses. Defendant fails to make a sufficient showing on the second prong.

The trial prosecutor's comments, while intentional, were the result of legal error, negligence, and mistake. They were not pursued for a prejudicial purpose with indifference to the potential for a mistrial. The record made in the trial court – both the trial prosecutor's performance and admissions to the Court during the subsequent mistrial and double jeopardy motions - evidence recklessness, negligence, or a lack of skill," not an intentional effort to manipulate Defendant into a mistrial. While the trial prosecutor should have known better than to reference a Defendant's silence, he did not. He admitted as much when he stated this was his error. The fact that the bulk of his comments were made during closing suggests a lack of improper purpose. It would not make sense for a prosecutor wishing to manipulate Defendant into a

[199] *Pool v. Superior Court*, 139 Ariz. 98, 109 (1984)

mistrial to wait until the very end of the trial to make his move. Moreover, the trial court's factual finding that the trial prosecutor's actions were erroneous yet honest[200] remain uncontroverted. Accordingly, Defendant fails to show the second *Pool* inquiry and he is not entitled to relief.

Regardless of the test, retrial was not barred under *Kennedy*, *Dinitz* or *Pool*. Defendant's conviction at that retrial was not precluded by Double Jeopardy and, so, his convictions stand.

[200] *People v. Devante Jennings*, Jury Trial – November 15, 2019, pages 90-91

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RELIEF REQUESTED

WHEREFORE THE FOREGOING, the People respectfully request this Court deny Defendant's requested relief, find that *Oregon v. Kennedy*'s test is appropriate for Michigan or – in the alternative – should this Court determine a compelling reason exists to interpret Michigan's Constitution differently than the federal constitution, adopt the test presented in *People v. Dinitz* – as argued herein – since it respects Michigan's legal traditions and addresses *Kennedy*'s leading critics, and – regardless of the test adopted and applied, whether *Kennedy*, *Dinitz*, or *Pool*, affirm Defendant's conviction and sentence.

Respectfully Submitted,

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JOSHUA ABBOTT (P53528)
Chief Appellate Pros., Macomb County

Dated: February 9, 2026

By: */s/ Jonathan A. Mycek (dig. Signed)*
Jonathan A. Mycek (P74620)
Assistant Prosecuting Attorney

I hereby certify that this document contains 14,156 countable words in 12-point font, Bookman Old Style typeface.