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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVANTE KYRAN JENNINGS,

Defendant-Appellant.

Supreme Court No. 165764

Court of Appeals No. 359837

Macomb Circuit Court No. 2019-001800-FH

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

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RECEIVED by MSC 3/2/2026 2:22:39 PM

TABLE OF CONTENTS

Page

Index of Authorities iii

Statement of Questions Presented vii

Constitutional Provisions Involved viii

Statement of Interest of Amicus Curiae 1

Introduction 2

Argument 3

I. Text, ratification context, and precedent concerning Michigan's double jeopardy protection all confirm that the state and federal protections are coextensive. Therefore, the federal *Oregon v Kennedy* standard is required. 3

A. The Michigan and U.S. Supreme Courts have shaped the content and scope of the double jeopardy protections. 4

B. There is no good reason, let alone a compelling one, to interpret Michigan's double jeopardy clause differently than the federal clause. 5

1. The constitutional text is identical in all relevant respects. 6

2. The explicit intent behind the 1963 adoption of the federal provision was to codify this Court's conclusion that the state and federal provisions provide the same protections. 8

3. Michigan legal history and precedent confirm that the Michigan Double Jeopardy Clause provides the same protections as the federal clause. 10

C. U.S. Supreme Court precedent developed a narrow carveout—requiring prosecutorial bad faith—to the general rule that a defendant's consent to a mistrial cannot bar retrial. 11

D. The *Kennedy* standard applies in Michigan and focuses on the prosecutor's intent to goad the defendant into seeking a mistrial. 15

E. To change the meaning of this slice of the Double Jeopardy Clause would breed constitutional inconsistency. 17

II. This Court should not purport to adopt any test as it would be dicta. 18

A. This Court has repeatedly declined to issue dicta on matters that are not necessary to the disposition of a case, including when confronted with this same double jeopardy question. 19

B. This Court should disclaim the "germaneness" standard for dicta 22

III. Retrial was permissible under any proposed standard. 23

Conclusion and Relief Requested 29

Word Count Statement 1

RECEIVED by MSC 3/2/2026 2:22:39 PM

RECEIVED by MSC 3/2/2026 2:22:39 PM

INDEX OF AUTHORITIES

Cases

Arizona v Washington,
434 US 497 (1978) 5

Belobradich v Sarnsethsiri,
131 Mich App 241 (1983) 21

City of Cincinnati v Discovery Network, Inc,
507 US 410 (1993) 21

City of Detroit v Public Utilities Commission,
288 Mich 267 (1939) 22

Coal of State Emp Unions v State,
498 Mich 312 (2015) 8

Donajkowski v Alpena Power Co,
460 Mich 243 (1999) 19

Estate of Pearce v Eaton Co Rd Comm'n,
507 Mich 183 (2021) 20

Fieger v Cox,
274 Mich App 449 (2007) 1

Fitzgerald v First E Seventh St Tenants Corp,
221 F3d 362 (CA 2, 2000) 21

Green v United States,
355 US 184 (1957) 5, 11

Hett v Duffy,
346 Mich 456 (1956) 19

Lee v United States,
432 US 23 (1977) 13

Matter of Estate of Edgar,
425 Mich 364 (1986) 19

Mothering Justice v Attorney Gen,
515 Mich 328, opinion clarified 515 Mich 920 (2024) 6, 8, 9

Oregon v Kennedy,
456 US 667 (1982) ..... vii, 15, 16

Paquin v City of St Ignace,
504 Mich 124 (2019) 7

People v Anderson,
409 Mich 474 (1980) 14

People v Beck,
510 Mich 1 (2022) 10, 14

People v Bigge,
297 Mich 58 (1941) 9

People v Bullock,
440 Mich 15 (1992) 6

People v Carson,
___ Mich ___ (issued July 31, 2025) (Docket No. 166923), 2025 WL 2177501 22

People v Case,
220 Mich 379 (1922) 19

People v Dawson,
431 Mich 234 (1988) 16, 21, 22, 26, 27

People v Foster,
377 Mich 233 (1966) 1

People v Goecke,
457 Mich 442 (1998) 20, 21

People v Harding,
53 Mich 481 (1884) 5

People v Lett,
466 Mich 206 (2002) 4

People v Nash,
418 Mich 196 (1983) 4

People v Nutt,
469 Mich 565 (2004) 4, 7, 9, 11, 18

People v Pickens,
446 Mich 298 (1994) 6

RECEIVED by MSC 3/2/2026 2:22:39 PM

People v Ream,
481 Mich 223 (2008) 18

People v Robideau,
419 Mich 458 (1984) 18

People v Schepps,
231 Mich 260 (1925) 9

People v Smith,
478 Mich 292 (2007) 10

People v Taylor,
510 Mich 112 (2022) 20

People v Tyson,
423 Mich 357 (1985) 19, 21, 22

People v White,
390 Mich 245 (1973) 17

People v Wilder,
411 Mich 328 (1981) 17

Pool v Superior Court in and for Pima County,
677 P2d 261 (1984) 24

Rayford v Am House Roseville I, LLC,
___ Mich ___ (issued July 31, 2025) (Docket No. 163989), 2025 WL 2177754 22

Roberts v Auto-Owners Insurance Company,
422 Mich 594 (1985) 20

Sitz v Dept of State Police,
443 Mich 744 (1993) 5

United States v Dinitz,
424 US 600 (1976) 5, 13

United States v Jorn,
400 US 470 (1971) 12, 13

United States v Tateo,
377 US 463 (1964) 12, 13

Wold Architects & Engineers v Strat,
474 Mich 223 (2006) 19

RECEIVED by MSC 3/2/2026 2:22:39 PM

RECEIVED by MSC 3/2/2026 2:22:39 PM

Statutes

MCL 14.30 1

MCL 49.62 1

Other Authorities

1 Cooley,
Constitutional Limitations (6th ed.) 7

1 Official Record,
Constitutional Convention 1961 ..... 7, 10

2 Official Record,
Constitutional Convention 1961 9

Double Jeopardy: The Reprosecution Problem,
77 Harv L Rev 1272 (1964) 12

Judith M. Stinson,
Why Dicta Becomes Holding and Why it Matters, 76 Brook L Rev 219
(2010) 23

Constitutional Provisions

Const 1908, art II, § 14 8

Const 1963, art I, §15 ..... viii, 7

US Const, Am V ..... viii, 7

RECEIVED by MSC 3/2/2026 2:22:39 PM

STATEMENT OF QUESTIONS PRESENTED

1. Whether there is a "compelling reason" under the Michigan Constitution to adopt a different test from the one set forth in *Oregon v Kennedy*, 456 US 667 (1982), to determine whether prosecutorial misconduct bars retrial.

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

   Amici answer: No.

2. Whether this Court should adopt a test from another state or develop factors that expound on the "bad faith" test previously adopted in Michigan where doing so would constitute non-binding dicta.

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

   Amici answer: No.

3. Whether retrial was permissible in this case.

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Amici answer: Yes.

RECEIVED by MSC 3/2/2026 2:22:39 PM

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Michigan Constitution, contained in Article I, Section 15, provides:

> No person shall be subject for the same offense to be twice put in jeopardy.

The Double Jeopardy Clause of the United States Constitution, contained in the Fifth Amendment, provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

RECEIVED by MSC 3/2/2026 2:22:39 PM

STATEMENT OF INTEREST OF AMICUS CURIAE

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

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

RECEIVED by MSC 3/2/2026 2:22:39 PM

INTRODUCTION

The central question in this case is whether Michigan should abandon the well-established federal standard for double jeopardy in favor some other standard. The answer, demanded by our state's constitutional history and the principles of judicial restraint, is a clear "no."

First, there is no "compelling reason" to divorce Michigan's double jeopardy clause from its federal counterpart. Quite the opposite. In line with this Court's historical view of Michigan's double jeopardy protection, the people of Michigan chose language that mirrored the federal provision when they ratified the 1963 Constitution. The Address to the People and the constitutional convention debates confirm that the framers intended for Michigan's double jeopardy clause to be coextensive with the federal provision. While this Court took a brief detour from this alignment in the intervening years, it has since returned to the proper understanding that our state and federal protections are identical in scope. Changing course now would not only ignore the ratifiers' intent but would also breed unnecessary constitutional inconsistency.

Second, this Court should decline the invitation to purport to adopt a new legal test because doing so would constitute dicta. Under any of the proposed standards—whether the federal intent-to-goad test from *Oregon v Kennedy* or the broader "overreaching" standard from Arizona's *Pool* case—the result for Jennings is the same: retrial is permitted. Because the choice of standard would not affect the outcome of this case, announcing a new rule would be a non-binding academic exercise. This Court has a long history of judicial restraint, repeatedly declining to

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resolve legal questions that are not essential to the final determination of the matter at hand.

Third, the facts of this case do not support a double jeopardy bar under any theory. The prosecutor's error during closing arguments was due to legal error or negligence, not a calculated attempt to tank the case or provoke a mistrial. The prosecution's case was strong, and the error was such that the defense did not even seek a mistrial until the trial court sua sponte raised the error.

Consistent with the text and history of the Michigan Constitution, as well as this Court's precedent, this Court should affirm that retrial was permissible.

ARGUMENT

I. Text, ratification context, and precedent concerning Michigan's double jeopardy protection all confirm that the state and federal protections are coextensive. Therefore, the federal *Oregon v Kennedy* standard is required.

There is no compelling reason to divorce Michigan's protection against double jeopardy from the identical federal provision. The Framers of the 1963 Michigan Constitution changed the wording of the Clause from its 1908 form to mirror the federal constitution. The constitutional convention notes and the Address to the People confirm their clear intent: the Michigan Double Jeopardy Clause is coextensive with the U.S. Double Jeopardy Clause. Indeed, the framers' intent was to bring the Constitution's language in line with this Court's precedent at the time, which reflected the same understanding as the federal constitution.

RECEIVED by MSC 3/2/2026 2:22:39 PM

This Court has, "on occasion, construed the Michigan Constitution in a manner which results in greater rights than those given by the federal constitution . . . and where there is compelling reason, we will undoubtedly do so again." *People v Nash*, 418 Mich 196, 214–215 (1983) (cleaned up; ellipses added). This, however, is not such an occasion. While the Michigan Constitution is sometimes more protective of individual rights than the federal constitution's guarantees, our own constitutional text, history, and precedent show that this is not one of those provisions. For that reason, the only standard eligible in Michigan is the *Kennedy* standard from the U.S. Supreme Court.

A. The Michigan and U.S. Supreme Courts have shaped the content and scope of the double jeopardy protections.

The Double Jeopardy Clause of the Michigan Constitution and the U.S. Constitution both provide that "an accused may not be 'twice put in jeopardy' for the same offense." *People v Lett*, 466 Mich 206, 213 (2002). As discussed in depth below, other than a brief detour, this Court consistently interpreted the protections of Michigan's Double Jeopardy Clause identically to the federal protections, even under earlier versions of the Michigan Constitution. Both state and federal guarantees include three overarching protections:

> (1) protection against a second prosecution for the same offense after acquittal,
>
> (2) protection against a second prosecution for the same offense after conviction, and
>
> (3) protection against multiple punishments for the same offense.
>
> [*People v Nutt*, 469 Mich 565, 574 (2004).]

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The rationale behind the successive prosecution protections at issue in this case is to ensure that the government does not repeatedly attempt to convict an individual for an offense. *Green v United States*, 355 US 184, 187–188 (1957). But the double jeopardy clause is not without limits. Retrial is generally not barred when a mistrial is occasioned by "manifest necessity[,]" *Arizona v Washington*, 434 US 497, 505 (1978), or, relevant here, when a defendant moves for or consents to a mistrial, *United States v Dinitz*, 424 US 600, 607 (1976).

B. There is no good reason, let alone a compelling one, to interpret Michigan's double jeopardy clause differently than the federal clause.

The first question posed is whether there is a "compelling reason" to interpret the state protection differently from the federal protection. There is not. Of course, the Michigan Constitution need not necessarily be interpreted as conferring "the identical right" as the federal constitution prescribes. *Sitz v Dept of State Police*, 443 Mich 744, 760 (1993). "[B]ecause the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Sitz*, 443 Mich at 762. "In each instance, what is required of this Court is a searching examination to discover what law 'the people have made.' " *Sitz*, 443 Mich at 759 (1993), quoting *People v Harding,* 53 Mich 481, 485 (1884).

Reflecting on its judicial role of interpretation, rather than legislation, this Court was clear in *Sitz* that "[t]he judiciary of this state is not free to simply engraft onto [a state constitutional provision] more 'enlightened' rights than the framers intended." *Sitz*, 443 Mich at 759. And this Court has expressed its "reluctan[ce] to

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find greater protections of individual rights in identically phrased state constitutional provisions without a compelling reason." *People v Pickens*, 446 Mich 298, 316 (1994).

To evaluate whether corollary constitutional provisions provide different scopes, this Court has asked whether there is a "compelling reason" to understand Michigan's provision differently from the federal complement. *People v Bullock*, 440 Mich 15, 29 (1992). *Bullock* surveyed the differing text, relevant history, and longstanding Michigan precedent surrounding the two provisions. *Id.* at 29–37 (concluding that Michigan's protection against cruel *or* unusual punishments was more protective than its federal counterpart).

Applying the *Bullock* rubric to Michigan's protection against double jeopardy can yield only one conclusion—it is coextensive with the federal right. That conclusion flows from their functionally identical text, the stated intentions of the framers of our 1963 Constitution as expressed both in their debates and in the Address to the People, and the historical understanding of the clause that this Court applied leading up to the adoption of the 1963 Constitution.

1. The constitutional text is identical in all relevant respects.

First, our constitutional text mirrors the federal constitutional text. When interpreting the Constitution, the objective is "to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Mothering Justice v Attorney Gen*, 515 Mich 328, 346, opinion clarified 515 Mich 920 (2024). The

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primary rule of determining original meaning is that of "common understanding," as Justice Cooley explained:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."
>
> [*Paquin v City of St Ignace*, 504 Mich 124, 130 (2019), quoting 1 Cooley, Constitutional Limitations (6th ed.), p 81 (citations omitted).]

As explained further below, the 1963 Constitution changed the double jeopardy provision to adopt the federal language. Article I, Section 15 of the 1963 Michigan Constitution provides, in relevant part: "No person shall be subject for the same offense to be twice put in jeopardy." The federal counterpart in the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V.[1] Unsurprisingly, this Court has recognized that "our Double Jeopardy Clause is essentially identical to its federal counterpart." *Nutt*, 469 Mich at 575.

[1] The convention discussions show that the omission of the phrase "of life or limb" was because those words are "obsolete." 1 Official Record, Constitutional Convention 1961, p 468. There is no substantive change portended by that omission.

RECEIVED by MSC 3/2/2026 2:22:39 PM

2. The explicit intent behind the 1963 adoption of the federal provision was to codify this Court's conclusion that the state and federal provisions provide the same protections.

The context and history only reinforce that the state and federal provisions are coextensive. In addition to the constitutional text, this Court "*must consider* the circumstances leading to the adoption of the provision and the purpose sought to be accomplished." *Mothering Justice*, 515 Mich at 346 (emphasis added). "[T]his Court has observed that constitutional convention debates and the address to the people, though not controlling, are relevant" to determining the common understanding. *Id.*

The Address to the People makes clear that the 1963 Constitution was intended to confirm the Michigan and federal double jeopardy protections were coextensive. Because it "was distributed to Michigan citizens in advance of the ratification vote and[] explained in everyday language what each provision of the proposed new Constitution was intended to accomplish," *Coal of State Emp Unions v State*, 498 Mich 312, 323–324 (2015), the Address to the People is particularly probative of the ratifiers' understanding.

Adoption of the 1963 Constitution brought Michigan's double jeopardy protection in line with the federal one. The 1908 Constitution provided that, "No person, after acquittal upon the merits, shall be tried for the same offense," Const 1908, art II, § 14. The Address explained the change in constitutional language from 1908 was to bring the Clause in line with the federal clause, which was "more consistent with the actual practice of the courts in Michigan":

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> Sec. 15. *No person shall be subject for the same offense to be twice put in jeopardy.* All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great.
>
> 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, Constitutional Convention 1961, p 3364 (italics in original; bolded emphasis added).]

That "actual practice" in the courts was to interpret the state and federal protections as coextensive, even under the distinct 1908 language. See, e.g., *People v Schepps,* 231 Mich 260, 265 (1925) ("[T]his court is now committed to the views [regarding Michigan's double jeopardy protection] adopted by the Federal courts under the United States Constitution"); *People v Bigge,* 297 Mich 58, 64 (1941) (same); *Nutt*, 469 Mich at 581–582. Thus, the framers wished to embed the federal text in the Michigan Constitution to reflect this Court's understanding of Michigan's protection as one shared by the federal judiciary.

To further explore and confirm this meaning, the constitutional convention debates can be "illuminating" and may serve to "support" the common understanding of the ratifiers. *Mothering Justice*, 515 Mich at 354. Looking under the hood of the constitution at the debates here further confirms that the state and federal double jeopardy clauses have identical protections. That is reflected by the comment as revised by "the committee on declaration of rights, suffrage, and elections" that explains the change:

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> The foregoing change in section 14 involves the substitution of the double jeopardy provision from the Constitution of the United States (except for the deletion of the obsolete words of "life or limb") in place of the original provision which merely prohibits retrial after "acquittal upon the merits." The former language, the committee points out, has been consistently construed by the Michigan supreme court to mean something quite different than the words on the surface appear to connote. Taken literally, the words appear to say that there is no double jeopardy until a trial has run its course complete to acquittal. **In fact, however, the Michigan courts have followed the federal rule on double jeopardy. The new language thus appears to be consistent with the actual practice of the courts in Michigan.**
>
> [1 Official Record, Constitutional Convention 1961, p 468.]

This Court has already noted this, concluding in *People v Smith*, "[I]n adopting Const 1963, art 1, § 15, the ratifiers of our constitution intended that our double jeopardy provision be construed consistently with then-existing Michigan caselaw and with the interpretation given to the Fifth Amendment by federal courts at the time of ratification." 478 Mich 292, 315 (2007).

3. Michigan legal history and precedent confirm that the Michigan Double Jeopardy Clause provides the same protections as the federal clause.

In addition to the plain text and the stated intent of the framers as communicated to the People, this Court's precedent shows that, but for a brief lapse, Michigan has understood its Double Jeopardy Clause to provide the same protections as the preexisting federal counterpart. The framers of the Constitution recognized this—that the "actual practice" of this Court in its consistent and then-unbroken understanding of the state and federal protections as coterminous. And this Court confirmed as much just *three years ago*. *People v Beck*, 510 Mich 1, 12 n 1 (2022) (because "we have been persuaded in the past that interpretations of the

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Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15," and "our analysis is the same under each").

This interpretation endures despite this Court's freedom to interpret Michigan's Constitution differently, should it be called for. But it has never been called for, even from this State's inception and even though Michigan's clause was differently worded in the 1850 and 1908 Constitutions. See *Nutt*, 469 Mich at 582 n 20. At all times, "[t]his Court . . . applied the double jeopardy clauses of the constitutions of 1850 and 1908 in the same manner as the Fifth Amendment was traditionally understood to apply." *Id.*

C. U.S. Supreme Court precedent developed a narrow carveout—requiring prosecutorial bad faith—to the general rule that a defendant's consent to a mistrial cannot bar retrial.

Tracing the development of the federal provision illuminates the matter. Before the 1963 Constitution was ratified, the U.S. Supreme Court had already made clear that a defendant may not be retried where a jury is empaneled and the defendant does not consent to a mistrial. See *Green v United States*, 355 US 184, 188 (1957). "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Id.* But it was not until after ratification of the 1963 Constitution that the U.S. Supreme Court began to develop the rule that a prosecutor's intentional bad-faith conduct to engender a mistrial could bar retrial. Then, the Court consistently contemplated *intentional* conduct on the part of the prosecutor to bypass the defendant's waiver.

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Just after ratification of Michigan's Constitution, in *United States v Tateo*, 377 US 463, 467 (1964), the U.S. Supreme Court affirmed the general rule that where a defendant consents to a mistrial, "the Government would not have been barred from retrying him." But the Court in dicta nodded to a hypothetical complicating factor if the mistrial was consented to by the defendant but was borne of intentional, bad faith conduct on the part of the prosecutor or judge: "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial *resulted from a fear that the jury was likely to acquit the accused*, different considerations would, of course, obtain." *Id.* at 468 n 3 (emphasis added).[2] *Tateo* represents the earliest signal that a prosecutor's "impropriety" driven by "fear" of acquittal might bar retrial; the Court's ruminations are plainly concerned with the prosecutor's *intent*. *Id.* The seeds of this exception to the rule were sown.

After *Tateo*, the Court issued *United States v Jorn*, 400 US 470 (1971). *Jorn* confirmed that prosecutor error is insufficient to bar reprosecution after a defendant moves for a mistrial. "[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, *even if the defendant's motion is necessitated by prosecutorial or judicial error*." *Id.* at 485 (emphasis added). Rather, only "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety *designed to avoid an acquittal*, reprosecution might well

[2] Contemporary scholarship concurs. Where a judge terminates a trial with the consent of the defendant and a verdict could have been obtained, "reprosecution ought to be permitted unless the prosecution *intentionally precipitated* a mistrial." *Double Jeopardy: The Reprosecution Problem*, 77 Harv L Rev 1272, 1281 (1964) (emphasis added).

be barred." 400 US at 485 n 12 (emphasis added), citing *Tateo*, 377 US at 468 n 3. Again, even before the U.S. Supreme Court so held, it consistently suggested that misconduct must be *designed* to procure a governmental advantage to bar retrial.

United States v Dinitz confirms the scope of the Double Jeopardy protections here. In a case where the trial judge (rather than the prosecutor) "overreacted" and committed an error that prejudiced the defendant, 424 US 600, 611 (1976), the Court asserted that the Clause "does protect a defendant against governmental actions *intended to provoke mistrial requests*," *id.* (emphasis added). The Court affirmed the propriety of retrial, highlighting that "the record does not show that the judge's action was motivated by bad faith or undertaken to harass or prejudice the respondent." *Id.* In other words, the judge's action "was not done in bad faith *in order to goad* the respondent into requesting a mistrial." *Id.* (emphasis added).

Lee v United States, 432 US 23 (1977), again confirms this principle. Calling back to *Jorn*, the U.S. Supreme Court reiterated that prosecutor error is insufficient to bar retrial, *id.* at 32–33, and that a motivation to goad a mistrial bars retrial "only if the underlying error was 'motivated by bad faith or undertaken to harass or prejudice,' " *id.* at 33.

Thus, the exception developed with the understanding that intentional, bad-faith conduct on the part of the government was *necessary* to bar retrial where a defendant consents to a mistrial. And because Michigan's Clause is interpreted coextensively with the federal clause, see *supra*, a test requiring scrutiny of the prosecutor's intent or design is required.

RECEIVED by MSC 3/2/2026 2:22:39 PM

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These authorities are not strangers to Michigan law, either. In fact, *Jorn* and *Lee* are of particular import because this Court explicitly relied on those two cases in *People v Anderson*. See 409 Mich 474, 485 n 23 (1980). *Anderson* only offered boilerplate law that "retrial [is] barred when the defendant's motion is induced by bad faith conduct of the prosecutor or judge," *id.* at 45, citing only *Jorn* and *Lee*. As described, *Jorn* and *Lee* landed on a *required showing of an intent or design* to push the defendant toward consenting to a mistrial. Insofar as *Anderson* purported to endorse any kind of test here, it did so consistent with its historical practice in following interpretation of the federal constitutional corollary.

Against this textual and historical backdrop, there is no principled legal or constitutional reason, let alone a "compelling reason," why this Court should carve out one narrow slice of double jeopardy jurisprudence and impose an entirely different standard from its federal counterpart. See *Beck*, 510 Mich at 12 n 1 (because "we have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15," and "our analysis is the same under each").

In sum, text, history, and precedent regarding Michigan's Double Jeopardy Clause all require consistency with the federal standard, barring retrial after a consented-to mistrial only where the prosecutor intended to goad the defendant.

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D. The *Kennedy* standard applies in Michigan and focuses on the prosecutor's intent to goad the defendant into seeking a mistrial.

Because Michigan has modeled its protection after the federal one, the federal standard from *Kennedy* governing impermissible retrial also must govern in Michigan. See *Oregon v Kennedy*, 456 US 667 (1982). In *Kennedy*, the U.S. Supreme Court rejected a broad standard of bad faith or harassment on the part of the prosecutor to a prosecutorial misconduct analysis under the Double Jeopardy Clause, finding that such a standard "would permit a broader exception" that "offer[s] virtually no standards for [its] application." 456 US at 674. The Oregon Court of Appeals had determined that the prosecutor was "overreaching" when he asked a witness whether the defendant was a crook and, therefore, held that double jeopardy barred retrial. *Id.* at 669–670.

The U.S. Supreme Court reversed and held that there must be actual intent on the prosecutor's part to subvert the Double Jeopardy Clause protections. *Id.* at 676 ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion."). Because the trial court found that the prosecutor did not intend to goad the defendant into a mistrial, the Court held that retrial was not barred. *Id.* at 679.

Kennedy justified the rejection of a broad standard by pointing out that an "overreaching" standard would not necessarily aid criminal defendants as a class. *Id.* at 677. A judge presiding over the first trial would be less likely to grant a defendant's motion for a mistrial if doing so would "inevitably bring with it an

attempt to bar a second trial on grounds of double jeopardy[.]" *Id.* The advantages that the Double Jeopardy Clause affords defendants "would be to a large extent lost in the process of trial to verdict, reversal on appeal, and subsequent retrial." *Id.* However, the intent standard articulated by *Kennedy* would pose a reduced risk of judges' hesitancy to grant a mistrial when a mistrial may otherwise be warranted.

When this Court in *Dawson* evaluated both the *Kennedy* and the *Pool* standards, it held that it was unnecessary to go beyond the federal *Kennedy* standard because counsel for the People conceded that retrial was barred under *Kennedy*. *People v Dawson*, 431 Mich 234, 256 (1988); see also *id.* at 257 ("there is no need in the instant case to decide whether this Court should go further than the federal standard"). But this Court nevertheless endorsed the *Kennedy* standard: it "adopt[ed] the federal standard," *id.* at 236, and rejected the holding of the Court of Appeals adopting the *Pool* standard, *id.* at 250 ("We affirm the Court of Appeals decision, but adopt a different double jeopardy analysis."). This Court then reiterated the *Kennedy* rule, finding, "[w]here a mistrial results from apparently innocent or even negligent prosecutorial error, . . . the public interest in allowing a retrial outweighs the double jeopardy bar[,]" however, "[t]he balance tilts" when "the judge finds, on the basis of the 'objective facts and circumstances of the particular case,' that the prosecutor intended to goad the defendant into moving for a mistrial." *Id.* at 257.

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Ultimately, Michigan has tethered its double jeopardy protection to the federal protection. With that ironclad premise, *Kennedy* is the proper test and the choice of a different standard is forestalled by the Michigan Constitution.

E. To change the meaning of this slice of the Double Jeopardy Clause would breed constitutional inconsistency.

For a time, this Court departed from the ratifiers' intent to treat the federal and state protections as coextensive, only to return to the proper construction. It should not *again* revert to an interpretation at odds with the ratifiers' intent. Beginning with *People v White*, 390 Mich 245 (1973), the Court revised the State's double jeopardy jurisprudence, adopting the "same transaction" test for the successive-prosecution strand of double jeopardy protections, a test derived from a U.S. Supreme Court concurrence. *White*, 390 Mich at 258.

This Court recognized the divergence from the established federal standard. See *People v Wilder*, 411 Mich 328, 349 n 10 (1981) ("Michigan has adopted a distinct constitutional position from the Federal courts as pertains to questions of multiple prosecution."). In *Wilder*, the Court continued to differentiate the state and federal clauses, this time for the multiple-punishments strand, not applying the well-established federal *Blockburger* standard but instead announcing that the "proper focus of double jeopardy inquiry in this area to be the proof of facts adduced at trial rather than the theoretical elements of the offense [i.e., *Blockburger*] alone." *Id.* A few years later, the Court appears to have overruled *Wilder*[3] but still chose

[3] See *Ream*, 481 Mich at 232 (discussing *Robideau*'s effect on *Wilder*).

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not to adopt the *Blockburger* same-elements test. *People v Robideau*, 419 Mich 458, 486 (1984).

It was during this time period that this Court departed from Michigan's constitutional double jeopardy jurisprudence that this Court entertained a different test for prosecutorial misconduct engendering a defendant's consent to mistrial.

But this Court returned to the proper understanding as discussed above. See *Nutt*, 469 Mich 565 and *People v Ream*, 481 Mich 223 (2008). In *Nutt*, the Court overruled *White* and concluded that the *Blockburger* same-elements test for successive prosecution cases was proper since Michigan's clause mirrored the federal clause in text and history. 469 Mich at 568. In *Ream*, the Court overruled *Wilder*, finding the same-elements test also applied for multiple-punishment cases. 481 Mich at 225–226. Thus, all strands of Double Jeopardy jurisprudence appropriately reflect the ratifiers' intent that Michigan and federal protections are co-extensive. This Court should not resurrect an understanding of Double Jeopardy at odds with the Constitution's text, its history, and this Court's precedent.

II. This Court should not purport to adopt any test as it would be dicta.

Aside from this well-documented constitutional understanding, there is an independent reason not to announce a different standard from *Kennedy*—doing so would be dicta and would not bind the courts. Because applying any of the candidate tests would result in no bar to re-trial (as discussed more fully in Argument III), this Court should not venture to choose a new standard where that announcement would have no effect on the disposition of the case.

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It bears emphasis that "it is only in the most egregious cases that retrial has been barred on double jeopardy grounds, regardless of whether the higher standard of subjective intent or the more lenient standard of overreaching or bad faith harassment is employed." *People v Tyson*, 423 Mich 357, 371 n 14 (1985). No matter the standard, retrial was permissible here. Thus, any decision by this Court purporting to decide which standard to now adopt would be a mere "academic exercise"—non-binding dicta. This Court should await a case in which the outcome hinges on adoption of the proper standard.

A. This Court has repeatedly declined to issue dicta on matters that are not necessary to the disposition of a case, including when confronted with this same double jeopardy question.

Over 100 years ago, this Court noted the "well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition *not necessarily involved nor essential to determination of the case* in hand are, however, illuminating, but obiter dicta, and lack the force of an adjudication." *People v Case*, 220 Mich 379, 382–383 (1922) (emphasis added). This standard has been announced and applied repeatedly by this Court. See, e.g., *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3 (2006) (same); *Donajkowski v Alpena Power Co*, 460 Mich 243, 261 (1999) (same); *Matter of Estate of Edgar*, 425 Mich 364, 372 (1986) (same); *Hett v Duffy*, 346 Mich 456, 461–462 (1956) (overruled on other grounds) (same).

In the past few years, this Court affirmed and applied this longstanding principle, recognizing that obiter dicta "are statements that are *unnecessary to*

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determine the case at hand and, thus, lack the force of an adjudication." *Estate of Pearce v Eaton Co Rd Comm'n*, 507 Mich 183, 197 (2021) (emphasis added). See also *People v Taylor*, 510 Mich 112, 137 (2022) ("Whether a presumption against LWOP for juvenile offenders exists was *irrelevant to the outcome of the case*, and so this statement was nonbinding dictum.") (emphasis added).

Consistent with this rule, this Court has been judicious in not deciding issues that are unnecessary to the resolution of the case. In *Roberts v Auto-Owners Insurance Company*, for example, this Court concluded that, where a plaintiff failed to even establish a prima facie case of the yet-to-be-adopted tort of intentional infliction of emotional distress, the Court would not reach the issue of whether that tort should be adopted in Michigan. 422 Mich 594, 597–98 (1985) ("[W]e are constrained from reaching the issue as to whether this modern tort should be formally adopted into our jurisprudence by the well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication.") (footnote omitted)

In another example of this restraint, in *People v Goecke*, this Court declined to adopt an objective, rather than subjective, standard for the third form of malice commonly known as "depraved heart murder." 457 Mich 442, 464 (1998). Where the application of either standard would not have changed the outcome, this Court declined to resolve the open question. *Id.* at 464. Instead, the Court simply and properly stated that "under either a subjective or an objective standard, sufficient proofs were presented to support a bindover on the charge of second-degree murder

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in *Goecke* and to sustain the defendants' convictions in *Baker* and *Hoskinson*." *Id.* at 464. The Court of Appeals has likewise followed this principle. See *Belobradich v Sarnsethsiri*, 131 Mich App 241, 247 (1983) ("Any endeavor on our part to solve the *Simonelli* riddle would be an academic exercise because we would achieve the same result under either standard.").[4]

It is revealing, then, that when confronted with this same merits question—twice—this Court declined to decide the proper standard for similar reasons. See *Dawson*, 431 Mich at 256; *Tyson*, 423 Mich at 372. Forty years ago in *Tyson*, this Court declined to create dicta by choosing between the *Kennedy* standard or another standard where the prosecutor's error "was insufficient to meet either standard." 423 Mich at 372. Eight years later, in *Dawson*, after discussing two standards at length, the Court credited the People's concession at oral argument that the trial prosecutor had violated the more demanding *Kennedy* standard. 431 Mich at 256–257. Thus, because choosing between the standards would not change the outcome, this Court found that "there is no need in the instant case to decide whether this Court should go further than the federal standard." *Id.* at 256.

[4] Like this Court's practice, other courts wisely refrain from issuing decisions that would, on an integral issue in the case, be no more than dicta. See, e.g., *City of Cincinnati v Discovery Network, Inc*, 507 US 410, 416 (1993) ("Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox,* we need not decide whether that policy should be subjected to more exacting review."); *Fitzgerald v First E Seventh St Tenants Corp*, 221 F3d 362, 364 n 2 (CA 2, 2000) ("We need not decide which standard applies to the *sua sponte* dismissal at issue here, because the District Court's decision easily passes muster under the more rigorous *de novo* review.").

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In *Dawson*, then, the prosecutor's conduct was (concededly) egregious enough to violate *both* standards; in *Tyson*, the prosecutor's conduct "was insufficient to meet either standard." 423 Mich at 372. Like *Tyson*, the prosecutor's conduct here would not violate *any* applicable standard, as discussed below. As it has twice before, this Court should decline to issue dicta because "there is no need in the instant case to decide," *id.* at 257, and because any "adoption" of a standard would be dicta under prevailing principles of adjudication.

B. This Court should disclaim the "germaneness" standard for dicta.

Deviating from this understanding, last Term, the Court revived and relied on a distinct and rarely applied standard for when judicial language is binding. See *People v Carson*, ___ Mich ___ (issued July 31, 2025) (Docket No. 166923), 2025 WL 2177501, at *5 n 10; *Rayford v Am House Roseville I, LLC*, ___ Mich ___ (issued July 31, 2025) (Docket No. 163989), 2025 WL 2177754, at *12. In both cases, the Court relied on the rarely cited, malleable standard described in *City of Detroit v Public Utilities Commission*, 288 Mich 267, 299–300 (1939), which states that, "when a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Rayford*, slip op at *12, quoting *Public Utilities Comm*, 288 Mich at 299–300 (cleaned up; emphasis in *Rayford*).

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The dangers of this standard are plain. "Germaneness" is a flexible concept that exists in the eye of the beholder. Such a vague standard for dicta is ripe for confusion—confusion about what is and what is not *the law*. See Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 Brook L Rev 219, 230 (2010) ("It is true that counsel can, and often do, spend countless hours debating whether a particular statement is in fact holding or dicta. But the lack of clarity in defining holding in the first place makes the task far more difficult and far more likely to yield illogical and potentially unfair results."). In this way, an imprecise test for what constitutes binding precedent can effectively transform what *was* dicta (under standard, long-understood principles) into law (under a more elastic test like germaneness). The law should not be so pliable, and this Court should not continue to apply this standard.

III. Retrial was permissible under any proposed standard.

The Michigan Double Jeopardy Clause does not bar retrial. The strength of the prosecutor's case and the isolated nature of the error, the lack of any objection by defense counsel, and the trial court's factual findings—reversible only where clearly erroneous—mean that no matter which standard is applied, affirmance is required.

Under either the *Pool* or *Kennedy* standard, Jennings was eligible for retrial—and it is not a close call. The prosecutor's use in closing argument of Jennings' silence after he invoked his right to remain silent *was* an error, but an error (even a serious one) does not suffice to overlook defense counsel's decision not

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to move for a mistrial. In all, the conduct of the prosecutor, as well as that of the judge and the defense attorney, along with the trial proceedings up to that point, does not show that the prosecutor engaged in egregious conduct that bars retrial.

As described above, the *Pool* standard is easier for a defendant to meet. At issue here would be its second element: the defendant's burden to show that the prosecutor's "conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool v Superior Court in and for Pima County*, 677 P2d 261, 271 (1984).

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

First, while the prosecutor's act of referencing Jennings' post-invocation silence against him was intentional in that he intended to refer to it, it was the product of "legal error, negligence, or mistake." The prosecutor appears to have referenced Jennings' post-invocation silence in a visual presentation for the jury

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(11/15/19 Trial Tr at 81)—the reference was not an accident, but the prosecutor's failure to realize the legal import of doing so was no more than a "legal error, negligence, or mistake."

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

Only after the trial court instructed the jury and sent it for deliberation did the court, of its own accord, express "a concern," which it had apparently raised in a sidebar conference immediately after the defense's closing argument. (*Id.* at 64–65, 80.) The court then stated, "the Court is researching that," strongly suggesting that it was not plain to the prosecutor, defense counsel, or the trial judge that the prosecutor's misstep was obvious. (*Id.* at 80–81.) As the judge put it, "it seems to the Court looking at the case law that I have researched so far that this would be a violation and potentially prosecutorial misconduct." (*Id.* at 81.) The necessity of research to confirm the legal point suggests that, while the prosecutor should have known, it was not *so* clear that one could infer solely from the prosecutor's closing statement itself that the prosecutor *knew* it to be improper and prejudicial or was motivated by any improper purpose. And only upon the trial court's sua sponte raising of the issue did defense counsel move for a mistrial. (*Id.* at 81–82.)

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

Second, the trial court found no intention to induce a mistrial. A trial judge's findings as to whether the prosecutor intended to goad the defendant into moving for a mistrial are granted substantial deference and may only be reversed where they are clearly erroneous. *Dawson*, 431 Mich at 258. As the Court of Appeals below correctly recognized, the judge's determination that the prosecutor did *not* intend to provoke Jennings into moving for a mistrial was not a clear error. Unpub op, p 4.

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

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

> So, when the defense doesn't even object during the course of testimony or in argument as to that, I can hardly find that the prosecution

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> actually intended to somehow elicit this mistrial when the foundation was laid during testimony. [*Id.* at 91.]

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

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

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

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

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

Given the strength of the evidence in the record prior to the prosecutor's improper statement, it would be extremely surprising to find that the prosecutor intentionally played with fire and committed misconduct. Retrial was not barred by Michigan's Double Jeopardy Clause.

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CONCLUSION AND RELIEF REQUESTED

This Court should hold that the prosecutor's conduct did not violate Michigan's Double Jeopardy Clause.

Respectfully submitted,

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