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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.

_____/

Docket No. 165764
Court of Appeals No. 359837
Trial Court No. 2010-031800-FH

AMICUS CURIAE BRIEF

Submitted by:

Paul A. Dye #173569
Thumb Correctional Facility
3225 John Conley Drive
Lapeer, Michigan 48446

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Statement of Question Presented

I. Should the Court adopt a test under the Michigan Constitution, different from the subjective federal one set in Oregon v. Kennedy, 456 U.S. 667 (1982), for objectively determining whether prosecutorial conduct that includes intentional acts intended to deprive a person of a fair trial, before sworn jurors of choice, bars retrial after a mistrial or appeal.

Amicus Curiae answers: "Yes."

Plaintiff-Appellee answers: "No."

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Statement of Facts

The trial court in this case sua sponte granted a mistrial based on intentional prosecutor conduct that essentially weaponized for the jury defendant's invocation of his right to remain silent during police questioning. Adopting the government's subjective lack of intent argument, the court permitted retrial because the prosecution did not intend to goad defendant into requesting a mistrial. People v. Jennings, 2023 Mich. App. LEXIS 2907, p. 2.

A majority of the Court of Appeals panel affirmed the defendant's conviction. It applied the narrow subjective federal review standard to find that retrial was not barred because the prosecutor claimed he did not intend to provoke a mistrial. 2023 Mich. App. LEXIS 2907, p. 3.

However, the dissenting appellate judge objectively found retrial should be barred because the prosecutor's conduct was intended to cause a mistrial, or took a substantial risk that a mistrial would be granted, in order to introduce prejudicial unconstitutional evidence. The dissent based its opinion on the holding of Michigan appellate court precedent which adopted an expanded test for double jeopardy review instead of the narrower federal one. That expanded standard, based on one adopted in Arizona, bars retrial when intentional prosecutorial conduct known to be improper and prejudicial was pursued with indifference to a resulting mistrial or reversal. 2023 Mich. App. LEXIS 2907, pp. 9-10.

This Court, after conducting additional briefing and oral arguments on the application, granted leave to appeal to decide (1) whether there is compelling reason under the Michigan Constitution to adopt a different test from the one set forth under the federal constitution; (2) if so, whether the Court should adopt a test from another state or develop factors that expound on the bad faith test previously adopted in Michigan; and (3) whether retrial was

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permissible in this case. People v. Jennings, 2025 Mich. LEXIS 672 (April 25, 2025).

Argument:

I. The Court should adopt a test under the Michigan Constitution, different from the subjective federal one set in Oregon v. Kennedy, 456 U.S. 667 (1982), for objectively determining whether prosecutorial conduct that includes intentional acts intended to deprive a person of a fair trial, before sworn jurors of choice, bars retrial after a mistrial or appeal.

The United States Supreme Court set a subjective standard of review under the Double Jeopardy Clause of the United States Constitution in Oregon v. Kennedy, 456 U.S. 667; 102 S.Ct. 2083; 72 L.Ed.2d 416 (1982). That standard bars retrial only where the defendant requests and obtains a mistrial based on prosecutorial conduct that was intended to provoke the defendant into moving for a mistrial. Under Michigan's double jeopardy precedent, a more expanded objective standard of review has been applied.

In People v. Dawson, 154 Mich. App. 260, 272; 397 N.W.2d 277 (1986), aff'd 431 Mich. 234; 427 N.W.2d 886 (1988), the Court of Appeals adopted a test for purposes of the Michigan Constitution double jeopardy standard that was initially formulated in an Arizona case. The Arizona Supreme Court held in Pool v. Superior Court, 139 Ariz. 98; 677 P.2d 261 (1984), that double jeopardy bars retrial when resulting from "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for an improper purpose with indifference to a significant resulting danger of mistrial of reversal." 139 Ariz. 108-109. The Dawson court adopted that Pool test because the federal standard set in Kennedy would not have barred retrial. 145 Mich. App. at 272.

The subsequent post-conviction review in another Michigan case shows the need for full adoption of a broader double jeopardy test than that afforded under federal law. In Dye v. Hofbauer, Docket no. 97-cv-74817-DT, three

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immunized biker witnesses provided the only evidence accusing the defendant of murder. His first trial ended in a hung jury mistrial with 11 jurors voting to acquit of murder; only one voted to convict after hearing the immunized testimony. The prosecutor facilitated the witnesses' absence before retrial and obtained a conviction by using three assistant prosecutors to reenact the transcribed testimony. Dye's conviction was overturned on appeal because the prosecution had failed to produce the three witnesses. Citing People **v.** Dye, 431 Mich. 58; 427 N.W.2d 501 (1988). The state courts denied Dye's double jeopardy claim using the federal test because his case had been reversed on appeal. He was reconvicted after being tried a third time.

The federal District Court in Dye objectively found that had the trial court ruled correctly on the missing witness issue, there would have been insufficient evidence to convict or the jury would more likely have been discharged. (Exhibit A, excerpt pp. 1, 21-24.) Despite this objective finding, the federal court denied double jeopardy relief under the federal standard simply because Dye's case had been reversed on appeal rather than declared a mistrial. (Exhibit B, excerpt pp. 1, 8-9). Under the broader double jeopardy test adopted in People **v** Dawson, supra, objective review in this case, and those such as Dye, will prevent the miscarriage of justice which occurs through reliance on the narrow subjective federal double jeopardy test.

During the 39 year since Dawson was decided, several other states have adopted the same or similar double jeopardy tests in prosecutorial misconduct cases. In State v. McClaugherty, 144 N.M. 483, 502; 491 P.2d 1234 (2003), the New Mexico Supreme Court reversed the defendant's homicide conviction and barred his retrial on double jeopardy grounds because the prosecutor had performed improper acts with full knowledge of their impropriety and disregard for the resulting mistrial, retrial, or reversal on appeal.

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In State v. Rogan, 91 Haw. 405, 423-424; 984 P.2d 1231 (1999), the Hawaii Supreme Court held the state's constitution barred the defendant's retrial after a mistrial or reversal on appeal where the prosecutor's conduct was so egregious that, from an objective standpoint, it clearly denied him a fair trial.

In Commonwealth v. Smith, 532 Pa. 177, 186; 615 A.2d 321 (1992), Pennsylvania's Supreme Court expanded double jeopardy protections under the state's constitution to include barring retrial after a reversal when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.

The common theme in these ceses, as well as Michigan's Dawson holding, is the compelling need for broader double jeopardy protection from prosecutorial conduct designed to deny a defendant as fair trial. Unlike the federal law, they seek to provide the necessary deterrence against increasingly evolving purposeful prosecutorial conduct that invites a mistrial or reversal. The issue presented by this case, Dye, and Dawson demonstrate the need in Michigan for this Court to adopt broader double jeopardy protections under the State's Constitution.

The objective standard of review employed by other states, and adopted in Dawson, would provide the broader double jeopardy protection needed in Michigan. The previously applied "bad faith" test of People v. Anderson, 409 Mich. 474, 485; 295 N.W.2d 482 (1980), is simply another way of rewording the insufficient federal subjective intent test.

* * *

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Relief Requested

Wherefore, as amicus curiae, I respectfully urge the Court to (1) adopt under the Michigan Constitution a different test for double jeopardy claims from the one set forth in Oregon v. Kennedy, (2) adopt an objective test similar to that applied in People v. Dawson and by other states, and under the newly adopted test find that retrial in this case was not permissible.

Respectfully submitted,

Paul A. Dye #173569
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Date: May 5, 2025

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL ALLEN DYE,

Petitioner,

v.

GERALD HOFBAUER,

Respondent.
_____/

CASE NO. 97-CV-74817-DT
JUDGE AVERN COHN
MAGISTRATE JUDGE PAUL J. KOMIVES

REPORT AND RECOMMENDATION

RECOMMENDATION

The Court should deny petitioner's application for the writ of habeas corpus.

REPORT

I. BACKGROUND

A. *Procedural Background*

1. Petitioner Paul Allen Dye is a state prisoner, currently confined at the State Prison of Southern Michigan in Jackson, Michigan. Petitioner is incarcerated by virtue of his convictions following a jury trial in Detroit Recorder's Court for one count each of first degree murder, MICH. COMP. LAWS § 750.316; second degree murder, MICH. COMP. LAWS § 750.317, and use of a firearm in the commission of a felony, MICH. COMP. LAWS § 750.227b. Petitioner was sentenced to a mandatory prison term of nonparolable life for the first degree murder conviction, a term of 23-40 years imprisonment for the second degree murder conviction, and a mandatory consecutive 2 year prison term for the felony firearm conviction.

Exhibit A

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As the Sixth Circuit explained in *Quinn*, *supra*, the *Lockhart* Court "was careful to emphasize that '[n]othing in the record suggests any misconduct in the prosecutor's submission of the evidence.'" *Quinn*, 901 F.2d at 531 (quoting *Lockhart*, 488 U.S. at 34) (alteration in original). Thus, the *Quinn* court suggested that in a case in which the evidence was erroneously admitted due to some prosecutorial misconduct it may be appropriate to consider only the properly admitted evidence in determining whether the evidence at the first trial was sufficient for double jeopardy purposes. *See id.* (suggesting this approach but concluding that the prosecutor's actions, while in some matter blameworthy, were not sufficient to constitute the "misconduct" referred to in *Lockhart*).

Petitioner suggests that such misconduct occurred here, arguing that at the second trial "the witnesses were not simply missing, the prosecution had actually relocated them out-of-state, rendering them unavailable for trial, and failed to return them when necessary." Br. in Supp. of Pet. for Writ of Habeas Corpus, at 42 [hereinafter Pet'r's Br.]. In support of this argument, petitioner submits copies of Wayne County Board of Auditors Service Vouchers, which approve payment for travel fees in connection with the first (1983) trial for Seidel, Stever, and Dawson, each of whom are described in the vouchers as an "Out-of-Town witness" and "resident of protective custody." *See* Pet'r's Br., Ex. 21. Indeed, the Michigan Supreme Court explicitly found the following: (1) Seidel, Stever, and Dawson had been hard to locate for the first trial; (2) the officer in charge knew that the three would be going out of state, and thus be difficult to locate; (3) during the two month period between the first mistrial and the setting of a date for the second trial to commence, the prosecution made absolutely no effort to relocate the three witnesses, despite knowing that they "were needed, they had expressed an intention to leave the state, and

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had incentives to go into hiding"; and (4) the prosecution's efforts to produce the witnesses at the second trial after it learned of the new trial date were both "tardy and incomplete." *See Dye*, 431 Mich. at 67-68, 427 N.W.2d at 506. Whether these facts are sufficient to constitute the type of "misconduct" to which the *Lockhart* court referred blends, in this case, with the second factor complicating the ordinarily straightforward *Lockhart* analysis–the Supreme Court's decision in *Downum v. United States*, 372 U.S. 734 (1963).

The facts of *Downum* are significantly similar to those in this case. In *Downum*, the case against the defendant was called for trial and both sides announced that they were ready to proceed to trial. The jury was selected and sworn, released for lunch, and instructed to return in the afternoon. When the jury returned, the prosecution asked that the jury be discharged because its key witness with respect to two of the counts against the defendant was unavailable. It was learned that the subpoena for the witness was never served by the marshal's office. The marshal had checked with the witness's wife, who told the marshal's office that she would inform them of her husband's whereabouts if she found out. She never contacted the marshal's office, and no follow up was made. *See Downum*, 372 U.S. at 735. Importantly, "[t]he prosecution allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found." *Id.* After the witness was located, a new jury was impaneled and sworn, and the defendant was convicted. The Supreme Court reversed the conviction on the ground that the second trial violated the Double Jeopardy Clause. The Court adopted the reasoning of the Ninth Circuit, concluding that "'[t]he fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.'" *Downum*, 372 U.S. at 737 (quoting *Cornero v. United States*, 48 F.2d 69, 71 (9th Cir. 1931)).

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It is true that there is a significant distinction between this case and *Downum*: here, the jury was not discharged, but rather the conviction was overturned on appeal. This distinction seems to push petitioner's claim into the *Lockhart* analysis. However, there appears to be a more important similarity which may trump this distinction. As noted above, the *Downum* holding rested upon the fact that "[t]he prosecution allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found," *Downum*, 372 U.S. at 735, and thus when the prosecutor proceeded he "took a chance" that he would not be able to secure the witnesses' testimony, and thus would have to ask for a mistrial. The prosecutor took the same chance here: at the start of the second trial, he knew that the three witnesses were missing. Further, at the time the jury was sworn, *see* Second Trial Tr., Vol. I, dated 8/22/83, at 131 (clerk swearing in the jury),[5] the trial court had not yet made its due diligence ruling, *see id.* at 162 (court finding that prosecutor had used due diligence and allowing prosecutor to use the previous testimonies of the witnesses). Thus, at the time the prosecutor indicated his readiness to proceed and the jury was sworn, the prosecutor "took a chance" that the witnesses would not be available to testify. In other words, had the trial court made the correct ruling, the prosecutor either (a) would have had insufficient evidence to convict, or, more likely (b) would have had to ask to discharge the jury so that he could locate the witnesses. In either event, petitioner would not now be in jail: either he never would have been convicted under scenario (a), or he would not have been able to have been tried a third time under scenario (b).

This, however, does not end the inquiry. The above discussion shows only that, if the

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[5]As used in this report, "Trial Tr." refers to the transcript of the third trial. Where necessary, citations to the transcripts of the first and second trials are referred to as "First Trial Tr." and "Second Trial Tr.," respectively.

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Court were to review this claim *de novo*, it could, in a logically and legally valid manner conclude that petitioner's third trial violated the Double Jeopardy Clause. However, as discussed in Part II, *supra*, this is not the issue; rather, the issue is whether the opposite conclusion–that is, that *Lockhart* controls and there is no double jeopardy violation–is a reasonable application of the relevant Supreme Court precedents. As the above discussion illustrates, although such a conclusion may not be "correct" in this Court's view, it certainly cannot be said to be "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *O'Brien*, 145 F.3d at 25. The rule that reversal on *any* ground other than insufficient evidence does not bar retrial is long-standing, and has been consistently reaffirmed by the Supreme Court. *See United States v. Ball*, 163 U.S. 662, 672 (1896); *United States v. Tateo*, 337 U.S. 463, 466 (1964); *Burks*, 437 U.S. at 15; *United States v. Scott*, 437 U.S. 82, 90-91 (1978); *Tibbs v. Florida*, 457 U.S. 31, 40-41 (1982); *Montana v. Hall*, 481 U.S. 400, 402 (1987); *Lockhart*, 488 U.S. at 40. Thus, the Michigan courts were not unreasonable in applying this line of precedent, which as a matter of legal reasoning can be said to be controlling, to this case.

While this may seem to be a harsh result, and is certainly unfortunate from petitioner's point of view, it simply follows from the language of § 2254(d), as amended by the AEDPA. And, as the Supreme Court has recognized, "judgments about the proper scope of the writ are normally for Congress to make." *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (internal quotation omitted). Accordingly, the Court should conclude that the decisions of the Michigan courts on petitioner's double jeopardy claim were not contrary to, nor an unreasonable application of, existing Supreme Court precedent, and should deny the writ pursuant to § 2254(d)(1).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL ALLEN DYE,

Petitioner,

v.

CASE NO. 97-CV-74817-DT
JUDGE AVERN COHN
MAGISTRATE JUDGE PAUL J. KOMIVES

GERALD HOFBAUER,

Respondent.
_____/

SUPPLEMENTAL REPORT AND RECOMMENDATION

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Exhibit B

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conviction. In light of this rejection, petitioner in the case at bar could only obtain relief by the pronouncement of a new rule of criminal procedure–*i.e.*, one that substantially modified the holdings in *Burks* and *Lockhart*–which is impermissible in a habeas proceeding. *See Teague v. Lane*, 489 U.S. 288 (1989).

In seeking to apply *Downum*, the following argument is put forward: (1) the prosecution gambled by going to trial without having three essential witnesses actually present to testify and taking the risk that the trial judge would allow the use of their transcribed testimony from the first trial; (2) the trial judge should have denied the prosecution's request to use the transcripts on the ground (later relied upon by the Michigan Supreme Court) that due diligence had not been shown in the attempt to locate these witnesses; and (3) absent their testimony, the prosecution would have lost the case on a defense motion to dismiss for lack of evidence. Before commenting on this argument, I note that the dissent in *Downum* pointed out the alternatives that might have been utilized in that case. A jury had been selected in the morning and was then excused to return at 2:00 p.m. During the noon recess, the prosecutor discovered that a witness whose testimony was essential on two of the six counts in the indictment was not present. The prosecutor stated that "the case would have to go over a couple of days." *Downum*, 372 U.S. at 741 (Clark, J., dissenting). The defense objected and moved to dismiss the two counts involved while going to trial immediately on the remaining four counts. The trial judge denied this motion, discharged the jury, and set the case for trial two days later. The trial proceeded 48 hours after the first jury had been discharged and a second jury selected. The missing witness appeared and testified. The dissent noted that it could "of course visualize other ways of handling the situation. The judge might have held the first jury together, rather than

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discharging them, until [the witness's] attendance could have been obtained." *Id.* at 742.

So too, in the case at bar, a decision by the trial judge not to admit the prior testimony on the ground that due diligence to secure the appearance of these witnesses had not been shown might well have resulted, not in a motion for mistrial by the prosecution or, had one been put forward and not been granted, the abandonment of the case, but a request for a continuance that, if granted, might have resulted in either the locating of these witnesses or the establishment of due diligence necessary to support admission of their prior testimony.

In any event, the "valued right" of petitioner to have the first jury reach a conclusion was not violated. Thus, because his appeal was successful on grounds other than insufficiency of the evidence, his retrial was not barred by any decision of the Supreme Court interpreting the double jeopardy clause. Accordingly, the Court should conclude that petitioner is not entitled to the writ of habeas corpus on his double jeopardy claim even when analyzed under the pre-AEDPA standard of review.

3. *Petitioner's Remaining Claims Under the Pre-AEDPA Standard*

With respect to petitioner's remaining claims, the Court should conclude that these claims would not entitle petitioner to relief even if the pre-AEDPA standard applies to petitioner's application. In my initial Report, I concluded that these claims were either without merit as a factual matter, not a violation of the Constitution, or state law claims not cognizable on habeas review. In particular, with respect to the claims which I concluded did not violate the Constitution, the language of my Report indicates that the conduct of which petitioner claims simply did not violate the Constitution; the Report does not conclude simply that the state court determinations were reasonable. Accordingly, I suggest that the analysis of petitioner's