

State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

MSC No. 165764

v.

COA No. 359837

Devante Kyran Jennings

Macomb County Circuit Court

Defendant-Appellant.

Case No. 19-1800 FH

**Devante Kyran Jennings's
Supplemental Brief**

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Table of Contents

Index of Authorities	3
Statement of the Questions Presented.....	6
Statement of Facts	7
Arguments.....	12
I. There are several “compelling reasons” under the Michigan Constitution to adopt a different test from the one set forth in <i>Oregon v Kennedy</i> , 456 US 667, 675-676 (1982), to determine whether prosecutorial misconduct bars retrial. The adoption of an objective standard ensures the right against double jeopardy is protected, deters prosecutorial misconduct, and is consistent with the intent of the framers of the Michigan Constitution in 1963.....	12
II. This Court should apply the “bad faith” standard expressed in <i>People v Anderson</i> . Due to the limited discussion of the standard in <i>Anderson</i> , however, this Court should look to the factors applied by other states to provide guidance to lower courts and further define the bad faith standard.....	26
III. Retrial is impermissible because the prosecution’s conduct made the issue of Mr. Jennings’ constitutional right to remain silent so central that a mistrial or reversal would be the likely result. His conviction must be vacated.	30
Conclusion and Relief Requested	34
Certificate of Compliance.....	35

Index of Authorities

	Page(s)
Cases	
<i>Arizona v Washington</i> , 434 US 497 (1978)	16, 26
<i>Bauserman v Unemployment Insurance Agency</i> , 509 Mich 673 (2022)	14
<i>Commonwealth v Johnson</i> , 659 Pa 277 (2020)	passim
<i>Commonwealth v Smith</i> , 532 Pa 177 (1992)	11, 21, 23
<i>Commonwealth v Starks</i> , 490 Pa at 341	25
<i>Dickerson v United States</i> , 530 US 428 (2000)	32
<i>Downum v United States</i> , 372 US 734 (1963)	16, 25
<i>Doyle v Ohio</i> , 426 US 610 (1976)	9
<i>Green v United States</i> , 355 US 184 (1957)	16, 26
<i>Hawk v Berkemer</i> , 610 F2d 445 (6th Cir. 1979)	25
<i>Lee v United States</i> , 432 US 23 (1977)	16, 17, 24, 28
<i>Mitchell v Smith</i> , 633 F2d 1009 (2d Cir. 1980)	24
<i>Oregon v Kennedy</i> , 456 US 667 (1982)	passim
<i>People v Anderson</i> , 409 Mich 474 (1980)	11, 16, 17, 28
<i>People v Batts</i> , 30 Cal 4th 660 (Cal 2003)	11, 22
<i>People v Biggs</i> , 288 Mich 417 (1939)	30
<i>People v Bullock</i> , 440 Mich 15 (1992)	11, 13
<i>People v Collins</i> , 438 Mich 8, 31 n 39 (1991)	13
<i>People v Dawson</i> , 154 Mich App 260 (1986)	17, 18

<i>People v Dawson</i> , 431 Mich 234 (1988)	passim
<i>People v Goldston</i> , 470 Mich 523 (2004)	12
<i>People v Harding</i> , 53 Mich 481 (1884)	13
<i>People v Jennings</i> , 513 Mich 977 (2024)	11
<i>People v Lett</i> , 466 Mich 206 (2002)	10
<i>People v McReavy</i> , 436 Mich 197, 219 n 23 (1990)	9
<i>People v Nash</i> , 418 Mich 196 (1983)	12, 13
<i>People v Nutt</i> , 469 Mich 565 (2004)	11
<i>People v Pagano</i> , 507 Mich 26, 38-39 n 3 (2021)	13
<i>People v Shafier</i> , 483 Mich 205 (2009)	30, 31
<i>People v Tanner</i> , 496 Mich 199, 222 n 16 (2014)	12, 13
<i>People v Tracey</i> , 221 Mich App 321, 329 n 4 (1997).....	9
<i>People v Tyson</i> , 423 Mich 357 (1985)	11
<i>Pool v Superior Court</i> , 139 Ariz 98 (1984).....	passim
<i>Sitz v Dept of State Police</i> , 443 Mich 744 (1993)	12, 13, 14
<i>State v Kennedy</i> , 295 Or 260, 276 (1983)	19, 20
<i>State v Lensegrav</i> , 572 P3d 924 (2025)	23
<i>State v McClaugherty</i> , 144 NM 483 (2008)	11, 22, 23, 27
<i>State v Rogan</i> , 91 Hawaii 405 (1999).....	passim
<i>Thomas v Eighth Judicial District Court</i> , 133 Nev 468 (2017)	22, 24
<i>United States v DiFrancesco</i> , 449 US 117 (1980)	16, 26
<i>United States v Dinitz</i> , 424 US 600 (1976)	11, 16, 17

United States v Jorn,
400 US 470 (1971)16, 17, 24, 28

United States v Phillips,
600 F2d 186 (9th Cir. 1979) 25

Wade v Hunter,
336 US 684 (1949) 16

Statutes

Article I, Section 12 of the Oregon Constitution..... 19

Article I, Section 10 of the Pennsylvania Constitution 27, 29

Mich Const. 1963, art. 1 § 15 21

Statement of the Questions Presented

First Question

Is there a “compelling reason” under the Michigan Constitution to adopt a different test from the one set forth in *Oregon v Kennedy*, 456 US 667, 675-676 (1982), to determine whether prosecutorial misconduct bars retrial?

Mr. Jennings answers: Yes.

The trial court answered: No.

Second Question

Should this Court develop factors that expound on the “bad faith” test previously adopted in Michigan?

Mr. Jennings answers: Yes.

The trial court answered: No.

Third Question

Is retrial permissible?

Mr. Jennings answers: No.

The trial court answered: Yes.

Statement of Facts

Background

After two trials, Devante Jennings was convicted of carrying a concealed weapon. The charges stemmed from allegations related to a shooting in an apartment complex in April 2019. A witness called police and provided descriptions of the vehicles involved in the shooting. Mr. Jennings drove a car resembling the description of one of the vehicles.

Mr. Jennings was later pulled over and interviewed by the police. He told police that earlier that evening he drove two people to and from an apartment complex. 11/15/19 TT, 28. He then declined to answer any further questions or to provide a DNA sample. 11/15/19 TT, 28. Ultimately, Mr. Jennings was charged with carrying a concealed weapon in a vehicle and altering the identification marks on a firearm.

The prosecution elicited testimony regarding Mr. Jennings' invocation of his right to remain silent and argued it demonstrated his guilt.

Mr. Jennings went to trial on both charges in November 2019. At trial, the prosecutor asked the officer-in-charge, Detective Carl Simon, how his interview with Mr. Jennings concluded. Detective Simon testified that Mr. Jennings "did not wish to speak to us anymore." 11/15/19 TT, 28. Still, the prosecutor continued to question Detective Simon to underscore Mr. Jennings' reliance on his right to remain silent and to contrast it with the behavior of the other individuals in the car:

Q. How did the interview end?

A. He did not wish to speak to us anymore.

Q. Did you also speak to the other occupants in the vehicle?

A. Yes, they were both interviewed. As typical and routine, we separate them, they were all separated and interviewed separately.

Q. Did they agree to speak to you?

A. They did.

Q. Did they end their interviews prematurely?

A. No.

Q. So they provided a full statement?

A. They did. [11/15/19 TT, 28].

During closing argument, the prosecutor referenced that portion of Mr. Jennings' interview: "He agreed to waive his *Miranda* rights, he said he understood everything...but low and behold, after answering a few questions he says, no, I don't want to talk anymore." 11/15/19 TT, 58. That, the prosecutor argued to the jury, was evidence of Mr. Jennings' "guilty conscience":

Now, during the officer's questioning, [Mr. Jennings] admits that he was present for this disturbance and he had agreed to speak to the officers, he knew what it was about. He agreed to waive his *Miranda* rights, he said he understood everything, he didn't want an attorney, he—he was waving [sic] his right to remain silent at that point in time, but low [sic] and behold, after answering a few questions he says, no, I don't want to talk anymore. Why would he do that? Well, *that shows a guilty conscience*, like well okay, if I start going down this road further I am going to get into some territory that is not good for me. I am going to start making admissions that I know are going to push me in further trouble. Maybe if I keep my mouth shut at this point, I can kind of walk out of this. [11/15/19 TT, 58].

To emphasize this argument further, the prosecutor wrote "guilty conscience" in red on a posterboard and displayed it to the jury. 11/15/19 TT, 81.

The trial court sua sponte raises the question of a mistrial after the prosecution intentionally used evidence of Mr. Jennings' invocation of his right to remain silent as evidence of guilt and grants motion for mistrial.

After the jury was instructed and deliberating, the trial court called the prosecutor and defense counsel together to discuss a "concern."

11/15/19 TT, 80. The court observed that the prosecutor had “elicited testimony as to the fact that the defendant had stopped the interview, invoked his right to silence, and essentially weaponized his invocation as consciousness of guilt.” 11/15/19 TT, 80. Trial counsel added that the prosecutor wrote “guilty conscience” in red on the board that he presented to the jury. 11/15/19 TT, 81. Then, trial counsel moved for a mistrial. 11/15/19 TT, 81-82. The prosecutor requested a curative instruction.

Following a brief recess, the prosecutor acknowledged that his actions were error and again requested a curative instruction. 11/15/19 TT, 84.

The trial court cited a footnote in *People v McReavy* that “if a defendant answered several questions and then invoked his right to remain silent, *Doyle* would prevent the prosecutor from commenting on this silence.” *People v McReavy*, 436 Mich 197, 219 n 23 (1990) (citing *Doyle v Ohio*, 426 US 610 (1976)).¹ The trial court concluded that *McReavy* stood for the fact that if a prosecutor comments on a defendant’s pre-trial silence, “[t]here’s no unringing this bell.” 11/15/19 TT, 85. The trial court granted the mistrial. 11/15/19 TT, 85.

The trial court concluded that the prosecutor did not have the subjective intent to elicit a mistrial and thus retrial was permissible.

When the court began the process of scheduling a new trial, trial counsel argued retrial should be barred. Trial counsel argued that “where a mistrial is declared because of misconduct by the people, double jeopardy may attach.” 11/15/19 TT, 88; *People v Tracey*, 221 Mich App 321, 329 n 4 (1997).

In response, the prosecutor directed the trial court to *People v Lett*, arguing that it holds that where a defendant consents to a mistrial, retrial is not barred “unless the prosecution has engaged in conduct intended to provoke or goad the mistrial request.” 11/15/19 TT, 89;

¹ In *Doyle*, a prosecutor’s use of pre-trial silence to impeach a witness resulted in a finding of error and new trial. *Doyle v Ohio*, 426 US 610, 619-620 (1976).

People v Lett, 466 Mich 206, 215 (2002). The prosecutor asserted that he was “trying to argue for a conviction to get the jury to find him guilty, not for a mistrial.” 11/15/19, 90.

The trial court held that double jeopardy did not attach. It noted that defense counsel did not object during the problematic testimony or during the prosecutor’s closing argument. 11/15/19 TT, 90, 94. The court concluded “when the defense doesn’t even object during the course of the testimony or in argument as to that, I can hardly find that the prosecution actually intended to somehow elicit this mistrial when the foundation was laid during testimony.” 11/15/19 TT, 91. Mr. Jennings was tried again and convicted in a second trial.

Appellate Proceedings

Mr. Jennings appealed, arguing that his retrial was barred by double jeopardy because the prosecutor goaded the mistrial at his first trial, among other claims.

In an unpublished per curiam opinion dated April 20, 2023, a two-judge majority of the Court of Appeals affirmed Mr. Jennings’ convictions and sentence. *People v Devante Kyran Jennings*, unpublished per curiam opinion of the Court of Appeals, dated April 20, 2023 (Docket No. 359837).

Judge Douglas Shapiro dissented, concluding that retrial was unconstitutional under the federal standard set forth in *Kennedy*. He further argued that because we are not bound by the federal standard for purposes of determining whether the double jeopardy clause of the Michigan Constitution bars retrial, the more appropriate test for determining whether retrial is permissible following a mistrial caused by prosecutorial misconduct is the *Pool* test², which is “both easier to apply than *Kennedy*’s subjective standard and a more appropriate means of protecting the right against double jeopardy and deterring prosecutorial misconduct.” *Id* at *1 (Shapiro, J., dissenting). Finally, Judge Shapiro observed that no Michigan court since *Dawson* has been required to decide between the *Kennedy* test or the *Pool* test, and he

² *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984).

urged this Court to “finally determine whether the *Pool* standard or some other standard should be adopted rather than the *Kennedy* standard.” *Id* at 4.

This Court ordered oral argument on the application to address:

- (1) what standard the Court should apply to determine whether prosecutorial misconduct bars retrial under Michigan’s Double Jeopardy Clause, see, e.g., *Oregon v Kennedy*, 456 US 667, 676 (1982); *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984); *State v McClaugherty*, 144 NM 483, 491 (2008); *Commonwealth v Smith*, 532 Pa 177, 186 (1992); *People v Batts*, 30 Cal 4th 660, 695-696 (Cal 2003); *State v Rogan*, 91 Hawaii 405, 423-424 (1999); and
- (2) whether retrial was impermissible in this case.

People v Jennings, 513 Mich 977 (2024).

After hearing argument on the application, this Court granted leave to appeal and ordered the parties to address the following issues:

- (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, 675-676 (1982), to determine whether prosecutorial misconduct bars retrial, see *People v Bullock*, 440 Mich 15, 28-35 (1992); but see *People v Nutt*, 469 Mich 565, 590 (2004); (2) if so, whether this Court should adopt a test from another state or develop factors that expound on the “bad faith” test previously adopted in Michigan, see *United States v Dinitz*, 424 US 600, 611 (1976); *People v Anderson*, 409 Mich 474, 485 (1980); *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984); and *People v Tyson*, 423 Mich 357, 371-372 (1985); and (3) whether retrial was permissible in this case.

People v Jennings, order of the Supreme Court, dated April 25, 2025 (Docket No. 165764).

Arguments

- I. There are several “compelling reasons” under the Michigan Constitution to adopt a different test from the one set forth in *Oregon v Kennedy*, 456 US 667, 675-676 (1982), to determine whether prosecutorial misconduct bars retrial. The adoption of an objective standard ensures the right against double jeopardy is protected, deters prosecutorial misconduct, and is consistent with the intent of the framers of the Michigan Constitution in 1963.

Discussion

- A. The Michigan Supreme Court has the sole judicial authority to interpret the Michigan Constitution and has a duty to enforce the rights embodied in it.

In deciding whether to interpret the Michigan Constitution in a manner that deviates from federal precedent, this Court is “not bound by the United States Supreme Court’s interpretation of the United States Constitution, even where the language is identical.” *People v Goldston*, 470 Mich 523, 534 (2004). Where, as here, the United States Supreme Court reduces the protections previously provided by the federal constitution:

[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government.

Sitz v Dept of State Police, 443 Mich 744, 763 (1993). Simply put, this Court does not delegate its duty to interpret our constitution to the United States Supreme Court. *People v Tanner*, 496 Mich 199, 222 n 16 (2014); *Sitz*, 443 Mich at 758-759.

This Court, at times, has asked parties to provide “compelling reasons” to deviate from the United States Supreme Court and provide broader protections than the federal constitution. See *People v Nash*, 418

Mich 196, 214-215 (1983); *People v Bullock*, 440 Mich 15, 28-35 (1992). The compelling reason standard, first articulated in *Nash*, does not establish a conclusive presumption of following United States Supreme Court precedent. *Sitz*, 443 Mich at 758-759. As this Court explained in *Sitz*, “the *Nash* rule compels neither the acceptance of federal interpretation nor its rejection. In each instance, what is required of this Court is a searching examination to discover what law ‘the people have made.’” *Id.*, citing *People v Harding*, 53 Mich 481, 485 (1884).³

This Court has pointed to various factors as relevant in determining whether Michigan’s Constitution supports an interpretation that differs from that of the United States Constitution:

- 1) the textual language of the state constitution,
- 2) significant textual differences between parallel provisions of the two constitutions,
- 3) state constitutional and common-law history,
- 4) state law preexisting adoption of the relevant constitutional provision,
- 5) structural differences between the state and federal constitutions,
- and 6) matters of peculiar state or local interest. [*Tanner*, 496 Mich at 223 n 17, citing *People v Collins*, 438 Mich 8, 31 n 39 (1991)]

³ While the issue was not presented by this Court, Mr. Jennings asserts that the “compelling reason” standard is not the appropriate test to determine whether our constitution provides more rights than the federal constitution. As the Court recognized in *Sitz*, “a literal application of the term would force [this Court] to ignore the jurisprudential history of this Court in favor of the analysis provided by the United States Supreme Court.” *Sitz*, 443 Mich at 758-759. The incompatibility of the compelling reason standard with principles of federalism and the duty to interpret the Michigan Constitution as its own, separate, document has led some former Justices to urge this Court to address whether the standard should be applied. See *People v Pagano*, 507 Mich 26, 38-39 n 3 (2021) (Viviano, J., concurring). Nevertheless, compelling reasons exist to deviate from *Kennedy* in this case.

In addition to these factors, this Court has the duty to enforce the rights guaranteed in our constitution. *Bauserman v Unemployment Insurance Agency*, 509 Mich 673, 686-687, 693 (2022). Consistent with this duty, this Court “may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection.” *Sitz*, 443 Mich at 759.

B. Text and History of Const. 1963, art. 1, § 15

Const. 1963, art. 1, § 15 provides:

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.⁴

The Convention Comment to Const. 1963, art 1, § 15 provides some explanation for the changes from the 1908⁵ constitution. Specifically, the 1963 constitution’s double jeopardy provision removed the language “acquittal on the merits” which was present in all prior versions of this right except the 1835 constitution.⁶ According to the Convention

⁴ This provision was later amended in 1978. The amendment of Const. 1963, art. 1, § 15, did not alter the relevant language in this case. Instead, it was amended to provide specific language regarding bail.

⁵ Const. 1908, art. 2, §14 provides:

No person, after acquittal upon the merits, shall be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great.

⁶ Const. 1835, art. 1, §12 provides:

No person for the same offense shall be twice put in jeopardy of punishment; all persons shall, before conviction, be bailable by sufficient sureties, except for

Comment, this revision was made because it was consistent with the practice of Michigan courts:

This is a revision of Sec. 14, Article II, of the present [1908] 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.

Const. 1963 art. 1, § 15 (Convention Comment).

The revisions to this section of the Bill of Rights make clear that the drafters intended to have this provision applied in a manner that reflected the practice of law in this state and the common understanding of the double jeopardy right at that time. This understanding was not limited to acquittals on the merits, but to apply to other circumstances where the government should be prohibited from subjecting an individual to repeated prosecutions for the same offense. As this Court recognized in *Dawson*, the purpose of the constitutional protection against double jeopardy is “to limit the state to having generally only one attempt at obtaining a conviction. Otherwise, the state could repeatedly prosecute persons for the same crime, transforming the trial process itself into a punishment and effectively punishing the accused without his having been adjudged guilty of an offense meriting punishment.” *People v Dawson*, 431 Mich 234, 250–251 (1988).

C. Prior to *Oregon v Kennedy*, the United States Supreme Court and this Court interpreted the protection against double jeopardy to apply to mistrials caused by prosecutorial or judicial overreaching or acts of bad faith to harass or unfairly prejudice the defendant.

capital offences, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.

Prior to its decision in *Kennedy*, the United States Supreme Court and this Court had considered whether the double jeopardy right protects individuals in cases of prosecutorial misconduct and suggested that retrial of an individual was prohibited in cases where the termination of the first trial was caused by prosecutorial or judicial “overreaching” and “bad faith.” *Wade v Hunter*, 336 US 684, 692 (1949) (acknowledging “bad faith” on the part of trial judge implicates double jeopardy principles); *United States v Jorn*, 400 US 470, 483-484 (1971); *United States v Dinitz*, 424 US 600, 611 (1976); *Lee v United States*, 432 US 23, 33-34 (1977); *People v Anderson*, 409 Mich 474, 485 (1980). The prosecutorial overreaching and bad faith cases were premised upon the principles underlying the prohibition on double jeopardy. That is that:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v United States, 355 US 184, 187-188 (1957). The pre-*Kennedy* Court, emphasized the increased financial and emotional burden on the accused, and prolonged period in which they are “stigmatized by an unresolved accusation of wrongdoing.” *Arizona v Washington*, 434 US 497, 503–504 (1978) The Court also relied upon the concept of prosecutorial or judicial overreaching because reprosecution allows the government to “gain [] advantage from what it learns at the first trial about the strengths of the defense” and its own weaknesses. *United States v DiFrancesco*, 449 US 117, 128 (1980); see also *Downum v United States*, 372 US 734 (1963) (recognizing the lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee).

In *Dinitz*, the United States Supreme Court outlined some of the prohibitions on retrying an individual after mistrial. These limitations included (1) “government actions intended to provoke mistrial,” (2) “bad faith conduct of the judge or prosecutor” which threatens the

“harassment 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,” and (3) “prosecutorial or judicial overreaching” attributable to the prosecutor or trial court. 424 US at 607-608, 611. The second and third categories involving bad faith conduct and overreaching would later be abandoned in *Kennedy*.

Similarly, this Court, in *Anderson*, recognized a bar to retrial when an individual’s request for mistrial is made because of bad faith conduct by the government:

Where the defendant himself brings about the termination of the proceeding on a basis unrelated to factual guilt or innocence, retrial is generally permitted. The defendant, having deliberately chosen to take the case from the jury cannot complain of the loss of the first trier of fact or of prosecutorial harassment through multiple prosecutions; he must live with “the consequences of his voluntary choice.” An exception is made, and retrial barred, when the defendant’s motion is induced by bad faith conduct of the prosecutor or judge.

409 Mich at 485, citing *Lee*, 432 US at 33-34; *Jorn*, 400 US at 485.

Six years later, in *People v Dawson*, 154 Mich App 260 (1986), the Court of Appeals adopted a more lenient standard than *Kennedy* when it comes to determining when the double jeopardy clause of the Michigan State Constitution has been violated—namely the standard the Arizona Supreme Court established in *Pool v Superior Court*, 139 Ariz 98, 109 (1984). *Dawson*, 154 Mich App at 271. Under *Pool*, retrial is barred where

“(1) mistrial is granted because of improper conduct or actions by the prosecutor; and (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant

resulting danger of mistrial or reversal; and (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.” [*Pool*, 139 Ariz at 108-109]

Applying *Pool*, the Court held that retrial violated double jeopardy where “portions of the questioning [we]re so egregiously improper that [the Court was] compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant.” *Pool*, 139 Ariz at 109.

This Court granted leave in *Dawson* but ultimately declined to rule on whether the standard for determining violations of the double jeopardy clause of the Michigan Constitution is lower than the *Kennedy* standard adopted for the double jeopardy clause of the United States Constitution. Instead, this Court concluded that “in light of the prosecutor’s concession [at oral argument] that the trial prosecutor’s conduct was improper under the *Kennedy* standard, there is no need in the instant case to decide whether this Court should go further than the federal standard.” *Dawson*, 431 Mich 234, 257 (1988).

Since *Dawson*, this Court has not addressed whether the Michigan Constitution’s prohibition against double jeopardy requires a broader standard which would prohibit retrial in circumstances where a defendant moves for mistrial due to governmental overreaching or acts of bad faith by the government. This Court should resolve that issue now by adopting a broader standard under Const. 1963 art. 1, § 15.

D. *Oregon v Kennedy* was a clear departure from the understanding of the double jeopardy right at the time it was decided and represented a retraction of the rights of the citizens of this state that this Court is not obligated to follow.

In *Oregon v Kennedy*, the Supreme Court held that “where a defendant in a criminal trial successfully moves for a mistrial, he may invoke the bar of double jeopardy in a second effort to try him only if the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct intended to provoke the defendant into

moving for a mistrial.” 456 US at 667. The Court explained that the standard for prosecutorial misconduct provoking a mistrial leading to the mistrial being barred under the Double Jeopardy Clause of the United States Constitution is intent because it is a “manageable standard to apply.” *Id.* at 675.

As noted above, *Kennedy* represented a substantial departure from the understanding of the protections provided by the double jeopardy clause and a retraction of the rights this Court previously articulated in *Anderson*. Justice Stevens, in his concurrence, explained that the Court

once again recognizes that the exception properly encompasses the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial. But the Court reaches out to limit the exception to that one situation, rejecting the previous recognition that prosecutorial overreaching or harassment is also within the exception. [*Kennedy*, 456 US at 687 (Stevens, J., concurring)].

Justice Brennan, who joined in Justice Stevens’ concurrence, wrote a separate concurring opinion where he called upon the Oregon Supreme Court to evaluate whether the Oregon Constitution prohibited retrial. *Id.* at 681. (Brennan, J., concurring). And, on remand, the Oregon Supreme Court rejected the new rule established in *Kennedy* and adopted its own standard under the Oregon Constitution.⁷ *State v*

⁷ The Oregon Supreme Court held that “retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal.” *State v Kennedy*, 295 Or at 276. In doing so, it recognized, like the other state courts to deviate from the United States Supreme Court, that “it is clear that the burden of a second trial is not attributable to the defendant's preference for a new trial over completing the trial infected by an error. Rather, it results from the

Kennedy, 295 Or 260, 276 (1983). In rejecting the prosecution’s argument that the state should be in lock-step with federal law, the Oregon Supreme Court acknowledged the United States Supreme Court’s departure from previous precedent, stating, “the federal rule to which [the prosecution] asks us to defer is the rule that the [prosecution] persuaded a bare majority of the Supreme Court to adopt for the first time in this very case.” *State v Kennedy*, 295 Or at 272.⁸ The court also emphasized its duty to enforce the rights provided by the Oregon Constitution:

The point is not that a state’s constitutional guarantees are more or less protective in particular applications, but that they were meant to be and remain genuine guarantees against misuse of the state’s governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law.

State v Kennedy, 295 Or at 271.

In practice, the *Kennedy* standard has proven unworkable and inadequate to protect the principles of double jeopardy. Absent a concession by the prosecution, the requirement of establishing a prosecutor had a subjective intent to goad a defendant into moving for a mistrial places a nearly insurmountable burden on defendants to vindicate their double jeopardy right. See e.g., *Dawson*, 431 Mich at 257 (finding retrial barred where prosecution conceded error under *Kennedy*); *State v Rogan*, 91 Hawai’i 405, 422 (1999) (concluding that “a defendant will seldom be able to prove that the prosecutor had the

state’s readiness, though perhaps not calculated intent, to force the defendant to such a choice.” *Id.*

⁸ For purposes of clarity, appellate counsel is using the long-form citation for the Oregon Supreme Court opinion.

specific intent to goad him or her into moving for a mistrial with the purpose of obtaining a better chance of obtaining a conviction.”).

In addition, the *Kennedy* standard permits the prosecution to engage in egregious misconduct which deprives an individual of a fair trial without losing the ability to retry them. Indeed, because *Kennedy* requires a specific intent to provoke a mistrial, the prosecution can engage in egregious and willful misconduct designed to prejudice a defendant as long as it is not intended to goad a mistrial and still seek retrial.

The *Kennedy* test fails to adequately protect the double jeopardy right as provided in Const. 1963 art. 1 § 15 by permitting the prosecution to seek retrial so long as their misconduct, no matter how egregious or willful, was not *specifically* intended to provoke a mistrial. This can include willful violations of principles of constitutional criminal procedure universally known to attorneys such as:

- Using an individual’s invocation of their right to remain silent against them;
- Intentionally withholding exculpatory evidence that was known to the prosecution in advance of trial; see *Commonwealth v Smith*, 532 Pa 177, 186 (1992), or
- Arguing an individual had a motive to commit a crime because of their race; see *Rogan*, 91 Hawai’i at 423-424.

The specific intent standard also permits the prosecution to engage in multiple instances of willful misconduct designed to prejudice a defendant and deprive them of their right to a fair trial. See e.g. *Pool*, supra (barring retrial where the prosecution engaged in repeated instances of misconduct during cross-examination of the defendant).

Without expanding the scope of misconduct committed by the prosecution beyond conduct intended to provoke a mistrial, the right against double jeopardy fails to provide any meaningful protection to individuals. As Justice Stevens observed in *Kennedy*,

[i]t is almost inconceivable that a defendant could prove that the prosecutor’s deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant. The defendant must shoulder a strong burden to establish a bar to reprosecution when he has consented to the mistrial, but the Court’s subjective intent standard would eviscerate the exception [to the general rule that a retrial after reversal on appeal is not barred by double jeopardy].

Kennedy, 456 US at 688 (Stevens, J., concurring). To protect the right against double jeopardy and deter prosecutorial misconduct, this Court should adopt an objective standard that prohibits retrial when prosecutors engage in willful and prejudicial misconduct.

E. Other state courts have rejected *Oregon v Kennedy* and adopted objective standards to ensure that the principles of double jeopardy are sufficiently safeguarded. This Court should do the same.

After the Oregon Supreme Court rejected the United States Supreme Court’s opinion in *Oregon v Kennedy*, other states followed suit. These states include Nevada⁹, Pennsylvania¹⁰, Arizona¹¹, California¹², Hawaii¹³, and New Mexico¹⁴. Many of these states and their decisions were referenced in the previous order granting argument on the application. In each of these cases, the courts declined to adopt a test

⁹ *Thomas v Eighth Judicial District Court*, 133 Nev 468 (2017) (finding “compelling reasons” to overturn prior precedent applying *Kennedy* and adopting the standard set forth in *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984)).

¹⁰ *Commonwealth v Johnson*, 659 Pa 277, 309 (2020) (expanding double jeopardy protections in Pennsylvania for a second time)

¹¹ *Pool v Superior Court*, 139 Ariz 98, 108-109 (1984)

¹² *People v Batts*, 30 Cal4th 660 (2003)

¹³ *State v Rogan*, 91 Hawai’i 405, 423-424 (1999)

¹⁴ *State v McClagherty*, 144 NM 483, 491 (2008)

that limited the prohibition on retrial to cases where the prosecution specifically intended to provoke a mistrial. Instead, the courts, applying their respective state constitutional provisions protecting against double jeopardy, opted to broaden the circumstances where retrial is prohibited when a prosecutor engages in willful misconduct designed to prejudice a defendant.

By adopting broader standards, these courts prohibited retrial in circumstances that would not have been prohibited by *Kennedy*. These circumstances include:

- Barring retrial where the prosecution engaged in repeated instances of misconduct during cross-examination of the defendant. See *Pool*, 139 Ariz at 108-109;
- Prosecutorial misconduct in failing to disclose material exculpatory physical evidence, intentional suppression of evidence, and attempting to discredit a state trooper who had testified as to existence of the evidence. *Smith*, 532 Pa at 180-183, 186;
- Obtaining a conviction based on the reckless act of presenting false evidence. *Johnson*, 659 Pa at 309-310;
- Presenting inadmissible hearsay in front of the jury by reciting portions of statements allegedly given to the police by two witnesses who were not called to testify. *McClougherty*, 144 NM at 491, 501-502;
- Accusing a defendant of engaging in “witchcraft” by controlling her non-testifying codefendant through the use of her menstrual blood and causing him to kill on her behalf, bringing human remains into the courtroom requiring fumigation of the building, and then arguing the offensive smell required a guilty verdict on all counts. *State v Lensegrav*, 572 P3d 924, 933-935 (2025); and
- An impermissible appeal to racial prejudice in a criminal sexual conduct trial where the prosecutor stated that it is

“every mother's nightmare [to find] ... some black, military guy on top of your daughter”. *Rogan*, 91 Hawai'i at 412.

The results in these cases demonstrate the inability of the *Kennedy* standard to provide meaningful protection to the right against double jeopardy and to deter prosecutorial misconduct. In each of these cases, the prosecution committed willful misconduct in areas of the law that should be universally known to attorneys. The failure to follow these norms cannot be described as a mere mistake or negligence on the part of the prosecutors. However, because the misconduct at issue was not committed for the sole purpose of provoking a mistrial, these individuals would have likely been required to face retrial under *Kennedy*. That result is untenable.

In adopting broader standards, these states recognized the difficulties inherent in the *Kennedy* standard and its failure to adequately safeguard the principles of double jeopardy. In these decisions, the courts emphasized that proving specific intent to provoke mistrial “must necessarily involve a subjective inquiry and is too difficult to determine” and that the *Kennedy* decision “fails to give effect to its own pronouncements regarding the purpose of the double jeopardy clause.” *Pool*, 139 Ariz 98 at 108; see also *Thomas*, 133 Nev at 475-475 (adopting the reasoning in *Pool*). The courts also emphasized the departure from prior precedent that *Kennedy* represented. See e.g. *Commonwealth v Johnson*, 659 Pa 277, 299 (2020). In *Commonwealth v Johnson*, the Supreme Court of Pennsylvania concisely summarized the United Supreme Court’s prior reliance on the overreaching standard:

Prior to the Supreme Court’s decision in *Oregon v Kennedy*, 456 US 667 (1982), the limiting principle was expressed in terms of prosecutorial overreaching – that is, misconduct intended to provoke a defense motion for a mistrial or actions otherwise taken in bad faith to harass or unfairly prejudice the defendant. See *Lee v United States*, 432 US 23, 34 (1977). The concept was applied as a double-jeopardy litmus by federal courts as well as this Court where the first proceeding ended before a verdict was reached, see, e.g., *Jorn*, 400 US at 484; *Mitchell v Smith*, 633 F2d 1009, 1011-12 (2d Cir. 1980), or where it resulted in an

unsustainable conviction. See, e.g., *United States v Phillips*, 600 F.2d 186, 187 (9th Cir. 1979) (per curiam); *Starks*, 490 Pa. at 341; cf. *Hawk v Berkemer*, 610 F.2d 445, 448 n.4 (6th Cir. 1979) (in dicta, stating that, after the reversal of a conviction based on an invalid guilty plea, double jeopardy bars further prosecution where the initial plea was illegal and arose from prosecutorial coercion involving bad faith or overreaching). [*Johnson*, 659 Pa at 299 (2020) (cleaned up)].

In sum, the decisions of these state courts were based on the fundamental failure of *Kennedy* to safeguard the double jeopardy right, and its abrupt departure from prior caselaw applying restrictions on prosecutorial overreaching or actions taken in bad faith to harass or unfairly prejudice the defendant. *Id.* at 299, 308-310.

F. The combination of the history of Const 1963 art. 1., § 15, pre-*Kennedy* caselaw, and the inability of the *Kennedy* standard to safeguard the principles of double jeopardy require the adoption of a broader standard.

The underlying goal of Const 1963 art 1., § 15 is “to limit the state to having generally only one attempt at obtaining a conviction.” *Dawson*, 431 Mich at 250-251. These protections are designed to alleviate the numerous burdens placed on individuals facing criminal prosecution. These burdens include prolonged pretrial detention and supervision, the immense financial burden of retaining counsel, the right to a speedy trial, and the public embarrassment from criminal prosecution. See *Downum*, 372 US at 737-738. As the United States Supreme Court recognized in *Green*, the fundamental principle of double jeopardy is that:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 US at 187-188; see also *Washington*, 434 US at 503–504 (noting that a second prosecution “increases the financial and emotional burden on the accused, [and] prolongs the period in which he [or she] is stigmatized by an unresolved accusation of wrongdoing”); see also *DiFrancesco*, 449 US at 128 (noting that re prosecution allows the government to “gain [] advantage from what it learns at the first trial about the strengths of the defense” and its own weaknesses).

The *Kennedy* standard fails to provide an adequate safeguard against these concerns by placing a near insurmountable burden on individuals to establish that a prosecutor had the subjective intent to provoke mistrial. Absent a deviation from the *Kennedy* standard, the government will be able to “repeatedly prosecute persons for the same crime, transforming the trial process itself into a punishment and effectively punishing the accused without his having been adjudged guilty of an offense meriting punishment.” *Dawson*, 431 Mich at 250-251. The combination of the history of Const 1963 art. 1., § 15, pre-*Kennedy* caselaw, and the inability of the *Kennedy* standard to safeguard the principles of double jeopardy require the adoption of a broader standard.

II. This Court should apply the “bad faith” standard expressed in *People v Anderson*. Due to the limited discussion of the standard in *Anderson*, however, this Court should look to the factors applied by other states to provide guidance to lower courts and further define the bad faith standard.

As noted above, seven states rejected the inherently flawed standard created in *Oregon v Kennedy* and, instead, developed their own standards based upon pre-*Kennedy* precedent and their respective duties to enforce their own state constitutions. The tests in each of these cases, while similar, have different factors:

Case	Test applied by other states to determine whether retrial is appropriate
<i>Pool v Superior Court</i>	Retrial barred where “(1) mistrial is granted because of improper conduct or actions by the prosecutor; and (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.” [<i>Pool</i> , 139 Ariz at 108-109]
<i>State v McClaugherty</i>	Retrial barred under double jeopardy principles when “(1) improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial; (2) if the official knows that the conduct is improper and prejudicial; and (3) if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.” [<i>McClaugherty</i> , 144 NM at 491]
<i>Commonwealth v Johnson</i>	“Under Article I, Section 10 of the Pennsylvania Constitution, prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result.” [<i>Johnson</i> , 659 Pa at 309]
<i>State v Rogan</i>	Retrial “barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial. In other words, we hold that reprosecution is barred where, in the face of egregious prosecutorial misconduct, it cannot be said beyond a reasonable doubt that the defendant received a fair trial.” [<i>Rogan</i> , 91 Hawai'i at 423]

Prior to the United States Supreme Court's decision in *Kennedy*, this Court prohibited retrial "when the defendant's motion is induced by bad faith conduct of the prosecutor or judge." *Anderson*, 409 Mich at 485. Outside of citing to *United States v Jorn*, 400 US 470, 483-484 (1971) and *Lee v United States*, 432 US 23, 33-34 (1977), this Court did not provide any guidance on what constitutes bad faith and what is required to establish bad faith on the part of the prosecutor. As a result, if this Court is to adopt the "bad faith" standard from *Anderson*, it will need to provide meaningful guidance to lower courts on how to apply it.

The tests in *Pool* and in *Johnson* provide such guidance. *Pool* provides a multi-factor test courts are accustomed to applying. Under the *Pool* test, retrial is barred where:

- (1) mistrial is granted because of improper conduct or actions by the prosecutor
- (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
- (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial." [*Pool*, 139 Ariz at 108-109.]

Under this standard, conduct "that the prosecutor either knew or should have known" to be improper can result in retrial being barred. *Id.* at 107.

Likewise, *Johnson* gives necessary guidance on the scope of conduct this Court should prohibit. In *Johnson*, the Supreme Court of Pennsylvania addressed whether retrial should be barred when the prosecution obtained a conviction based on false evidence, while not taken with the intent to deny the defendant a fair trial, that nevertheless stemmed from prosecutorial errors that rose substantially

above ordinary negligence. *Johnson*, 659 Pa at 283. The court ultimately concluded it did and held that “[u]nder Article I, Section 10 of the Pennsylvania Constitution, prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result.” *Id.* at 309.

A combination of the *Pool* and *Johnson* standards ensures that this Court adequately protects the principles of double jeopardy by prohibiting retrial when the prosecution engages in bad faith conduct. That conduct should include both intentional conduct by the prosecution that they knew or should have known to be improper and reckless acts by the prosecution that are done with conscious disregard of the substantial risk of denying a defendant a fair trial. Both intentional and reckless acts by the prosecution constitute “bad faith.”

The bad faith formulation described above will not bar retrial in every case where the prosecutor makes a mistake or commits error. The *Pool* standard excludes conduct by the prosecutor or court that is “merely the result of legal error, negligence, mistake, or insignificant impropriety.” *Pool*, 139 Ariz at 108-109. Similarly, the court in *Johnson* explained that mere prosecutorial error will not implicate double jeopardy protections:

In reaching our present holding, we do not suggest that all situations involving serious prosecutorial error implicate double jeopardy under the state Charter. To the contrary, we bear in mind the countervailing societal interests mentioned above regarding the need for effective law enforcement and highlight again that, in accordance with long-established double-jeopardy precepts, retrial is only precluded where there is prosecutorial overreaching – which, in turn, implies some sort of conscious act or omission. [*Johnson*, 659 Pa at 309–10].

For these reasons, Mr. Jennings asks this Court to adopt the bad faith standard articulated in *Anderson* with the additional necessary guidance provided by *Pool* and *Johnson*.

III. Retrial is impermissible because the prosecution's conduct made the issue of Mr. Jennings' constitutional right to remain silent so central that a mistrial or reversal would be the likely result. His conviction must be vacated.

This Court should prohibit retrial under either a subjective or objective standard. While Mr. Jennings maintains an objective standard is consistent with this Court's duty to enforce the prohibition against double jeopardy and is necessary to meaningfully deter prosecutorial misconduct, retrial should be barred no matter what standard this Court chooses to apply.

A. Retrial is prohibited under a subjective standard.

By purposely introducing Mr. Jennings' silence as evidence of his guilt, the prosecutor intended to goad defense counsel into moving for a mistrial. This intent can be inferred from the direct examination of Detective Simon and more egregiously in the prosecutor's closing argument where the prosecutor equated Mr. Jennings' invocation of a constitutional right to evidence of a guilty mind. As defense counsel also pointed out, the prosecutor had included "guilty conscience" in red on the board he presented to the jury. 11/15/19 TT, 81. Equating silence to a guilty conscience is, and long has been, prejudicial error. *People v Biggs*, 288 Mich 417, 420 (1939) ("The unanswered allegation by another of the guilt of the defendant is no confession of guilt on the part of a defendant."); *People v Shafier*, 483 Mich 205, 222-223 (2009).

Under the circumstances, the error appears purposeful. As Judge Shapiro stated in dissent:

It is difficult to imagine a principle of constitutional criminal procedure more universally known to attorneys than the rule that a defendant's decision to remain silent is constitutionally protected and may not be introduced or commented upon at trial. And it is difficult to imagine how a prosecutor could be unaware that purposely introducing a defendant's silence as evidence of guilt is grounds not only for reversal, but also for mistrial

Jennings, supra at *1 (Shapiro J., dissenting). Notably, the trial court even stated on the record that the prosecutor had “essentially weaponized [Mr. Jennings’] invocation as consciousness of guilt.” 11/15/19 TT, 80.

The trial court excused the prosecutor’s actions by concluding that defense counsel’s failure to object during the officer’s testimony established that the prosecution did not intend to cause a mistrial. But trial counsel’s failure to object did not make the prosecutor’s error any less intentional and was an improper consideration for the trial court. As Judge Shapiro correctly recognized, “the initial lack of objection is irrelevant to the applicable analysis. Even if it was, the prosecutor’s closing argument demonstrated a determination to make the issue so central that a mistrial would be the likely result.” *Jennings, supra* at *3. Moreover, the “prosecutor’s conduct was not innocent nor was the mistrial caused by “factors beyond the prosecutor’s control.” *Id.* Indeed the prosecutor’s conduct was sufficiently improper and prejudicial for the trial court to sua sponte raise the question of a mistrial. 11/15/19 TT, 80.

Because the prosecutor apparently intended this result by introducing evidence of Mr. Jennings invocation of his right to silence and arguing that it was evidence of his guilt, retrial must be barred. The granting of a new trial is inadequate relief as it fails to protect Mr. Jennings’ double jeopardy interests, as set forth in the federal Constitution. Thus, contrary to the majority opinion of the Court of Appeals, retrial was barred under the *Kennedy* standard.

B. Retrial is prohibited under an objective standard because the prosecution engaged in willful misconduct designed to prejudice Mr. Jennings and deprive him of his right to a fair trial.

For the reasons stated above, retrial is also barred under an objective standard. Like the prosecutors in *Pool, Smith, McClaugherty,* and *Rogan,* the prosecutor’s misconduct here involved well-settled law – use of an individual’s invocation of their right to silence as evidence of guilt. The failure to follow this universally known and unambiguous rule was not the result of mere mistake or negligence on the part of the

prosecutor. It was done with an intent to prejudice Mr. Jennings' regardless of the clear risk of a mistrial.

The record shows that the prosecution engaged in willful misconduct designed to prejudice Mr. Jennings. While the prosecutor denied having an intent to provoke a mistrial, he made clear that he was using Mr. Jennings' invocation of his right to silence "to get the jury to find him guilty." 11/15/19 TT, 89-90. The prosecution committed misconduct in an area of the law that is known to both lawyers and non-lawyers,¹⁵ and it did so with the express purpose of prejudicing Mr. Jennings.

This misconduct would prohibit retrial under *Pool*, *McClagherty*, *Rogan*, and *Johnson*. Each of these standards, while not requiring a specific intent to provoke a mistrial, involved misconduct by the prosecution that was willful and designed to prejudice the defendant. For example, under the *Pool* standard, retrial was barred where:

(1) mistrial is granted because of improper conduct or actions by the prosecutor; and (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial. [*Pool*, 139 Ariz at 108-109.]

The mistrial in Mr. Jennings' case was granted because the prosecution intentionally used Mr. Jennings' invocation of his right to silence as evidence of his guilt. Second, the prosecutor knew that he committed misconduct and admitted error. 11/15/19 TT, 84. This misconduct was not an accident or a result of negligence. Instead, the

¹⁵ See *Dickerson v United States*, 530 US 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

prosecutor's improper use of Mr. Jennings' invocation of his right to silence was a preplanned component of his trial strategy as he emphasized the issue in his case-in-chief, argued it demonstrated guilt in closing argument, and prepared a visual presentation in advance of argument where he included the words "guilty conscience" in red on the board that he presented to the jury. 11/15/19 TT, 81. These facts demonstrate that the prosecution committed willful misconduct and did so with indifference to the danger of mistrial or reversal.

And, finally, the misconduct at issue here could not be and was not cured by means short of a mistrial. Indeed, as Judge Shapiro observed in his dissent, "the prosecution's closing argument demonstrated a determination to make the issue so central that a mistrial would be the likely result." *Jennings*, supra at *3 (Shapiro, J., dissenting). Under these circumstances, retrial is prohibited, and Mr. Jennings' conviction must be vacated.

Conclusion and Relief Requested

For the reasons stated above, Devante Kyran Jennings respectfully requests that this Honorable Court grant the relief requested herein.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this document contains 8,395 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

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