STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION February 5, 2009
v	No. 279017 Wayne Circuit Court
ALEXANDER ACEVAL, Defendant-Appellant.	LC No. 05-003228-01 Advance Sheets Version

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

MURPHY, P.J. (*concurring*).

I concur in the majority opinion affirming defendant's conviction. I write separately to set forth some analysis and reasoning with respect to footnote 5 of the majority opinion and to voice my view regarding why it is critical to include the footnote in the opinion. I additionally write to note that, to the extent that the majority opinion builds a wall separating due process analysis from double jeopardy analysis or compartmentalizes the two concepts so that the two never meet, I disagree because the right to due process includes, in part, immunity from double jeopardy.

Footnote 5 of the majority opinion is found in the discussion regarding the issue, as framed by our Supreme Court, "of whether the prosecution's acquiescence in the presentation of perjured testimony amounts to misconduct that deprived the defendant of due process such that retrial should be barred." *People v Aceval*, 480 Mich 1108 (2008). Without the footnote, the opinion would effectively shut the door on a double jeopardy remedy that would bar retrial on any and all due process challenges, no matter how egregious the violation, arising from prosecutorial misconduct. The majority concludes that the granting of a new trial in this case would have been the proper remedy for the due process violation predicated on prosecutorial misconduct; therefore, because the first trial resulted in a mistrial, given the hung jury, and because a new trial was scheduled, defendant already effectively received the remedy available to him for prosecutorial misconduct. Limited to the facts of this case, I can agree with that ruling. I can, however, conceive of situations, the present case excepted, in which a due process violation involving prosecutorial misconduct is so egregious and prejudicial that retrial should be barred. Indeed, in the context of some mistrials not involving a deadlocked jury, retrial is barred under existing Michigan and federal precedent.

The Fourteenth Amendment of the United States Constitution provides that no state in our union can "deprive any person of life, liberty, or property, without due process of law . . . ."[1] The Fifth Amendment affords individuals protection against double jeopardy with respect to criminal prosecutions pursued by the federal government. US Const, Am V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). The Double Jeopardy Clause of the Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Albright v Oliver*, 510 US 266, 273; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969) ("we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment"); *People v Wilson*, 454 Mich 421, 427; 563 NW2d 44 (1997); *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). "A citizen's right to due process in state court, guaranteed by the Fourteenth Amendment to the United States Constitution, includes the immunity from double jeopardy guaranteed by the Fifth Amendment." *Ex parte Thomas*, 828 So 2d 952, 954 (Ala, 2001). In *People v Sierb*, 456 Mich 519, 525 n 13; 581 NW2d 219 (1998), our Supreme Court noted that ordering the retrial of a defendant "is not a violation of due process unless it also places the defendant in double jeopardy." Thus, it can be stated that, with respect to state prosecutions, an attribute of the right to due process under the United States Constitution includes the protection against double jeopardy.

Further, prosecutorial misconduct consisting of the knowing use of false evidence or perjured testimony violates a defendant's due process rights guaranteed by the Fourteenth Amendment. *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935). Our Supreme Court has even stated that "[i]t is inconsistent with due process when the prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, even when the false testimony goes only to the credibility of the witness." *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986). The United States Supreme Court in *Mooney, supra* at 112-113, observed:

> [The due process] requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a State, whether

[1] At its core, "[d]ue process requires fundamental fairness . . . ." *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

> through its legislature, through its courts, or through its executive or administrative officers. [Citation and quotation marks omitted.]

In *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976), the Supreme Court stated that it had "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." The principle that the perjured testimony must affect the jury verdict, i.e., prejudice, was further explored in *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982), wherein the Court reasoned:

> Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. In *Brady v. Maryland*, 373 U.S. 83 [83 S Ct 1194; 10 L Ed 2d 215] (1963), for example, the prosecutor failed to disclose an admission by a participant in the murder which corroborated the defendant's version of the crime. The Court held that a prosecutor's suppression of requested evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Applying this standard, the Court found the undisclosed admission to be relevant to punishment and thus ordered that the defendant be resentenced. Since the admission was not material to guilt, however, the Court concluded that the trial itself complied with the requirements of due process despite the prosecutor's wrongful suppression. The Court thus recognized that the aim of due process "is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." [Citations omitted.]

On the strength of the authorities recited above, it is evident that prosecutorial misconduct in the form of knowing use of perjured testimony can violate due process, demand the setting aside of a verdict, and require a new trial to be conducted when prejudice was incurred. This leaves the issue whether there exist situations where the granting of a new trial is not a sufficient remedy for the constitutional deprivation, and where double jeopardy protections should be invoked. Generally speaking, the constitutional protection against double jeopardy does not preclude the retrial of a defendant who successfully had a conviction reversed on appeal. *United States v Ball*, 163 US 662, 671-672; 16 S Ct 1192; 41 L Ed 300 (1896); *People v Watson*, 245 Mich App 572, 599; 629 NW2d 411 (2001). In *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991), this Court stated that "[i]t is well established that the Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceedings leading to conviction other than the insufficiency of the evidence to support the verdict." This principle begs the question whether retrial should be permitted if a prosecutor knowingly used perjured testimony, without which there would have been insufficient evidence to secure a conviction, with the intent to avoid a likely acquittal. I shall return to that thought later in this concurrence.

In the context of a mistrial, double jeopardy is not a bar to a second trial or retrial if there was a "manifest necessity" for declaring the mistrial, and the classic example of a situation in which there exists a manifest necessity is a mistrial declared after a jury has indicated that it was

unable to reach a verdict. *Oregon v Kennedy*, 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Lett*, 466 Mich 206, 215-217; 644 NW2d 743 (2002) (mistrial premised on a hung jury is the classic basis for a proper mistrial and is occasioned by manifest necessity, and a retrial following a jury deadlock does not violate double jeopardy protections under the state and federal constitutions). In the case of a mistrial declared at the behest of a defendant, the "'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." *Kennedy, supra* at 672; see also *Lett, supra* at 215. There is a narrow exception to this rule that arises when the prosecutor acts in a manner intended to goad a defendant into moving for a mistrial, in which case the defendant may raise the bar of double jeopardy to preclude a second prosecution after having proceeded in aborting the first trial on his or her own motion in response to the prosecutor's conduct. *Kennedy, supra* at 673-679; *Lett, supra* at 215. This is an example of prosecutorial misconduct that mandates the double jeopardy remedy of barring retrial.

Here, we are addressing a classic example of a mistrial declared because of manifest necessity, i.e., a deadlocked or hung jury, and the prosecution did not attempt to goad defendant into moving for a mistrial during the proceedings. But the part of the equation that exists here and which is not generally found with mistrials declared because the jury was unable to reach a verdict is the presence of the prosecutor's knowingly presenting perjured testimony.[2] And it would be improper to hold that in all instances under such circumstances the most a defendant can obtain as a remedy is a new trial. This returns me to the question I posed earlier, which is whether retrial should be permitted if a prosecutor knowingly used perjured testimony, without which there would have been insufficient evidence to secure a conviction, with the intent to avoid a likely acquittal. I tend to believe that the language in the Supreme Court remand order suggests that there might be occasions on which retrial would be barred.[3] Some courts across the country have grappled with the issue.

In *United States v Wallach*, 979 F2d 912, 915-916 (CA 2, 1992), the United States Court of Appeals for the Second Circuit engaged in the following extensive and insightful discussion regarding the issue whether double jeopardy protection bars retrial because of prosecutorial misconduct arising out of the use of perjured testimony:[4]

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[2] I would also note that the admission of the perjured testimony was with the full knowledge of the trial court. This is not an instance in which the prosecutor alone can be accused of misconduct.

[3] As indicated above, our Supreme Court directed us to answer the question "whether the prosecution's acquiescence in the presentation of perjured testimony amount[ed] to misconduct that deprived the defendant of due process such that retrial should be barred." *Aceval, supra* at 1108.

[4] In *Wallach*, the defendant had been convicted of various offenses, and after the trial it was discovered that one of the witnesses had given perjured testimony. The witness was later indicted and convicted of perjury, and the Second Circuit reversed the defendant's conviction on the basis that the federal prosecutor should have known that the witness was providing perjured testimony. On remand for a new trial, the defendant moved to dismiss the case, arguing that double jeopardy barred retrial, and the district court denied the motion. The case then proceeded, once again, to the Second Circuit for resolution of the double jeopardy issue. *Wallach, supra* at 913-914.

Both sides recognize that a defendant who secures a reversal of his conviction because of a defect in the proceedings leading to conviction normally obtains from the Double Jeopardy Clause no insulation against retrial. The principal exception is a reversal for insufficiency of the evidence. Both sides also recognize that a further exception arises in some circumstances involving misconduct by a prosecutor, but they differ sharply on the scope of that further exception. Their differences arise from disagreement as to the teaching of [*Kennedy, supra*].

Kennedy concerned a state court criminal trial that ended when a defendant's motion for a mistrial was granted. The defendant sought the mistrial after the prosecutor had asked a witness a prejudicially improper question. The trial court then denied a motion to preclude retrial on double jeopardy grounds, after finding that the prosecutor had not intended to precipitate the mistrial. The state appellate court reversed, concluding that retrial was barred, regardless of the prosecutor's intent, simply because the prosecutor's misconduct constituted "overreaching."

Reviewing this ruling, the Supreme Court acknowledged that its prior decisions had created some ambiguity as to the standard to be applied in assessing a prosecutor's misconduct for purposes of determining whether, under the Double Jeopardy Clause, a mistrial precipitated by such misconduct precluded a retrial. Resolving the ambiguity, the Court rejected the idea that misconduct alone barred a retrial and ruled instead that the circumstances in which the Clause would bar a retrial "are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."

The Government reads *Kennedy* as limited to its context of a criminal trial that ends with the granting of a defendant's motion for a mistrial. In the Government's view, *Kennedy* affords Wallach no benefit because he did not even move for a mistrial, much less obtain one; indeed, the trial ended, not with a mistrial, but with a conviction. On the other hand, Wallach reads *Kennedy* without the limitation of the mistrial context and extracts from it a rule of more general application: "The Supreme Court's rationale is that the Double Jeopardy Clause bars a second prosecution when the prosecutor engages in serious misconduct with the intention of preventing an acquittal."

We have some doubt that the Supreme Court expected its carefully worded statement of the rule in *Kennedy* to be extended beyond the context of a trial that ends with the granting of a defendant's motion for a mistrial. . . . The decision proceeds from the premise that "the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" Obviously a defendant, like Wallach, whose trial ends with a conviction has suffered no impairment of that valued right.

> Yet there is force to Wallach's argument for some sort of extension. Since *Kennedy* bars a retrial on jeopardy grounds where the prosecutor engages in misconduct for the purpose of goading the defendant into making a successful mistrial motion that denies the defendant the opportunity to win an acquittal, the Supreme Court might think that the Double Jeopardy Clause protects a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal.
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> But an extension of *Kennedy* beyond the mistrial context cannot be as broad as the rule for which Wallach contends. Every action of a prosecutor in the course of a trial is taken "with the intention of preventing an acquittal." . . . If the rationale of *Kennedy* were as broad as claimed by Wallach, the Double Jeopardy Clause would bar retrial of every defendant whose conviction is reversed because of intentional misconduct on the part of a prosecutor. For example, knowing use of perjured testimony that "could have affected the judgment of the jury" would result not only in reversal of a conviction, but also in a bar to retrial on jeopardy grounds. The Supreme Court could not possibly have mandated that result in *Kennedy*. Such a result would obliterate the precise distinction drawn in *Kennedy* between misconduct that merely results in a mistrial and misconduct undertaken for the specific purpose of provoking a mistrial. Only the latter circumstance creates a bar to retrial.
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> If any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct. If jeopardy bars a retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely. The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction. [Citations omitted.]

The *Wallach* court concluded that the defendant could not avail himself under the principles stated in the quoted passage where the record reflected that the prosecution did not apprehend an acquittal, that the evidence of guilt was quite strong, and that the "prosecution had every reason to anticipate a conviction." *Wallach, supra* at 916.

In *United States v Catton*, 130 F3d 805 (CA 7, 1997), the United States Court of Appeals for the Seventh Circuit had previously reversed the defendant's conviction because of various trial errors and had remanded the case for a new trial. Following remand, the defendant moved to dismiss, claiming that a retrial would violate the Double Jeopardy Clause of the Fifth Amendment. The defendant argued that the prosecutor suborned perjury and concealed exculpatory evidence, all in an effort to stave off a certain acquittal. *Id.* at 806. The *Catton* court stated:

> There is an argument for a further extension of *Kennedy* that would bring Catton's case within the range of the double jeopardy clause. Confined to cases in which the defendant is goaded into moving for a mistrial, whether the motion is granted or denied, *Kennedy* would leave a prosecutor with an unimpaired incentive to commit an error that would not be discovered until after the trial and hence could not provide the basis for a motion for a mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial. Suborning perjury would be a good example. It can be argued that if the prosecutor commits a covert error for the same purpose that he might have committed an open error calculated to evoke a motion for a mistrial (before *Kennedy* made this tactic unprofitable)—namely, to prevent an acquittal and so preserve the possibility of retrying the defendant even if the error is sure to be discovered and result in a reversal of the conviction either on direct appeal or on collateral attack—the double jeopardy clause should protect the defendant against being retried. *Wallach* does not hold that the argument is sound, but in a considered dictum concludes that it may well be sound. See also *United States v. Pavloyianis*, 996 F.2d 1467, 1473-75 (2d Cir. 1993); *United States v. Gary*, 74 F.3d 304, 314-15 (1st Cir. 1996); *State v. Colton*, 234 Conn. 683, 663 A.2d 339, 346-48 (1995); contra, *State v. Swartz*, 541 N.W.2d 533, 538-40 (Iowa App. 1995).
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> So at argument we asked the prosecutor whether there was a principled distinction between the open error, which might lead to a mistrial, and the covert error not discovered till after trial. He could not think of any. He could have pointed to language in *Kennedy* and other cases to the effect that, as we put it in *United States v. Oseni*, 996 F.2d 186 (7th Cir. 1993), the only prosecutorial intent that is relevant to double jeopardy is "intent to terminate the trial, not intent to prevail at this trial by impermissible means." *Id.* at 188. "It doesn't even matter that he knows he is acting improperly, provided that his aim is to get a conviction." *Id.* But this language . . . does not have reference to the case in which the prosecutor does not expect to prevail at *this* trial—the case in which he knows that his misconduct is likely to be discovered and that if it is discovered the verdict will be set aside either on direct appeal or, later, in a collateral attack on the conviction—and what he is seeking to obtain by committing a reversible error is the opportunity to retry a defendant who but for the error would be acquitted. In such a case, the prosecutor's ultimate aim is not to obtain a conviction at this trial but to obtain a conviction at a subsequent trial, and that was not a consideration in the cases that we have just been citing.

> Yet it would be a great burden on the courts if every reversal traceable to a prosecution-induced error at trial gave rise to a *Kennedy*-style inquest on the prosecutor's motives; and it is possible to read *Kennedy* as merely carving a narrow exception to the rule that by moving for a mistrial a defendant waives his defense of double jeopardy to a retrial. And so we have left open the question whether to adopt *Wallach's* dictum as the law of this circuit, *United States v. Doyle*, 121 F.3d 1078, 1085 (7th Cir. 1997), as has the Eighth Circuit. *Jacob v. Clarke*, 52 F.3d 178, 182 (8th Cir. 1995). We need not bite the bullet in this case either. For it is clear that a defendant who wants the district court (or this court on appeal from an adverse ruling by the district court) to block a retrial on the basis of prosecutorial error must show that the prosecutor committed the error *because* he thought that otherwise the jury would acquit and he would therefore be barred from retrying the defendant. It is not enough that there was an error; it is not enough that it was committed or procured by the prosecutor; it is not enough that it was deliberate prosecutorial misconduct; it must in addition have been committed for the purpose of preventing an acquittal that, even if there was enough evidence to convict, was likely if the prosecutor refrained from misconduct. Any greater extension of *Kennedy* must be left to the Supreme Court, in view of the danger of adding a double jeopardy tail to every appellate-reversal dog. [*Catton, supra* at 807-808 (citations omitted; emphasis in original).]

The *Catton* court rejected the defendant's double jeopardy argument because he had failed to request an evidentiary hearing to probe the motives of the prosecutor, and "without such a hearing all the defense had was suspicion, and suspicion isn't enough to satisfy *Kennedy* or *Wallach*." *Catton, supra* at 808.

In *State v Colton*, 234 Conn 683; 663 A2d 339 (1995), the Connecticut Supreme Court addressed the issue whether "the double jeopardy clause will bar the retrial not only of a criminal defendant whose conviction was reversed for evidentiary insufficiency, but also of a defendant whose conviction in the first trial was secured by prosecutorial misconduct." *Id.* at 687. Citing and quoting *Wallach*, *supra* at 916, the court ruled that "we agree with the Second Circuit Court of Appeals that *Kennedy* logically should be extended to bar a new trial, even in the absence of a mistrial or reversal because of prosecutorial misconduct, if the prosecutor in the first trial engaged in misconduct with the intent 'to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.'" *Colton, supra* at 696.

In *State v Lettice*, 221 Wis 2d 69, 75; 585 NW2d 171 (Wis App, 1998), the Wisconsin Court of Appeals, also relying on *Wallach*, held that "double jeopardy bar[red] retrial because the prosecutor's action was undertaken with the intent to prevent an acquittal or to prejudice the possibility of an acquittal that the prosecutor believed would occur in the absence of his misconduct."

In *People v Batts*, 30 Cal 4th 660, 692; 134 Cal Rptr 2d 67; 68 P3d 357 (2003), the California Supreme Court, analyzing the state constitution's double jeopardy provision, noted the need to carefully contemplate the standard for a remedy with respect to prosecutorial misconduct that went beyond the sanction of a new trial:

> [T]he standard that we adopt should not be so broad as to lead to the imposition of the double jeopardy bar—with its drastic sanction prohibiting retrial—in circumstances in which such a sanction is unwarranted. What is needed is a standard that sufficiently protects double jeopardy interests, but also retains and enforces a distinction between "normal" prejudicial prosecutorial misconduct that violates a defendant's due process right to a fair trial and warrants reversal and retrial, and the form of prosecutorial misconduct that not only constitutes a due process violation but also a double jeopardy violation, and hence warrants not only reversal but dismissal and a bar to reprosecution.

After consideration of various factors and concerns, the California court crafted the following standard:

> [Double jeopardy] bars retrial following the grant of a defendant's mistrial motion (1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal. [*Id.* at 695.]

In *Commonwealth v Smith*, 532 Pa 177, 186; 615 A2d 321 (1992), the Pennsylvania Supreme Court went further than the cases cited above, holding:

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, *but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial*. Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial. [Emphasis added.]

I tend to believe that this holding goes much too far, given that prejudicial prosecutorial misconduct that denies a defendant his due process right to a fair trial typically calls only for a new trial. See *Phillips, supra* at 219.

In *State v Barton*, 240 SW3d 693, 702 (Mo, 2007), the Missouri Supreme Court examined an argument made pursuant to *Wallach* and *Catton*, and it ruled that even if the United States Supreme Court were to adopt an extension of *Kennedy*, the defendant would not meet "the required showing that the prosecutor intended to subvert double jeopardy protection."

Here, the purpose of this concurrence, in light of the persuasive authority cited above, is to simply provide some reasoning why I believe it would be legally unsound to render a holding

that suggests or indicates that prosecutorial misconduct can never mandate the double jeopardy remedy of barring retrial, leaving a defendant, no matter how egregious the misconduct, to the sole remedy of a new trial.[5] Considering that retrial is barred under the Double Jeopardy Clause when it is determined that there was insufficient evidence to sustain a conviction, there is logic to permitting that same remedy when a prosecutor is faced with proper evidence that he or she deems insufficient to secure a conviction, but nonetheless proceeds with the trial, intentionally relying on perjured testimony in order to avoid what is believed to be a likely acquittal. In such circumstances, had legally sound evidence alone been presented that was insufficient to sustain a conviction, retrial would not be allowed.[6]

Moreover, it is not necessary, at this time, to consider adopting an extension of *Kennedy*, as discussed in *Wallach, Catton*, and the other cases, because, assuming an extension was recognized, double jeopardy did not bar retrying defendant under the facts of this case. At most, had defendant known the truth regarding the informant's identity and the circumstances regarding the deal the informant had with the police, defendant could have impeached his credibility. Given that the informant testified that he was unaware that the bags at issue contained cocaine, impeaching his credibility would have had limited value. On the existing record, there was evidence of error, i.e., use of perjured testimony, and there was evidence that the prosecutor deliberately and intentionally suborned perjury, but there is no indication whatsoever that the prosecutor committed the misconduct for the purpose of avoiding or

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[5] I recognize that the caselaw that I have cited chiefly addressed situations in which a defendant was actually convicted, as opposed to the situation here where a mistrial was declared on the basis of a deadlocked jury. I see no reason why this distinction calls for a different analysis. Indeed, where a jury is unable to convict or acquit, there would appear to be more compelling reasons to bar retrial if a prosecutor intentionally engaged in misconduct for the purpose of avoiding or preventing an acquittal that the prosecutor believed was likely absent the misconduct; the jury was in fact partly in favor of acquittal.

[6] I note that my analysis does not conflict with our Supreme Court's analysis in *Sierb, supra*. In *Sierb*, the defendant endured two trials that culminated in mistrials because the jurors were unable to agree on a verdict, and the trial court precluded the prosecution from commencing a third trial on the basis of an inferred remedy arising from the substantive Due Process Clause of the constitution. *Id.* at 520-522. No prosecutorial misconduct was at issue; the trial court simply believed that it would be fundamentally unfair to put the defendant through a third trial. *Id.* at 521-522. The Court held that due process guarantees under the state and federal constitutions "do not create a right to preclude retrial *of this defendant in these circumstances*." *Id.* at 521 (emphasis added). The defendant in *Sierb* could not resort to any arguments under the Double Jeopardy Clause, considering that it gave him no protection from retrial in light of the existence of manifest necessity for the mistrials and the absence of misconduct. The defendant thus attempted to extract a double jeopardy type remedy from the Due Process Clause, solely in and of itself, relying on the concept of substantive due process. The Court noted that "[t]he United States Supreme Court has declined to expand substantive due process as an *independent* source of limitation on government." *Id.* at 526 (emphasis added). Rather, as indicated earlier, "the number of trials is not a violation of due process unless it also places the defendant in double jeopardy." *Id.* at 525 n 13. Here, I am merely envisioning circumstances in which retrial might be improper on the basis of prosecutorial misconduct that gives rise to a due process violation that is so egregious that double jeopardy protection must be invoked as implemented under the Double Jeopardy Clause or through the Due Process Clause.

preventing an acquittal, nor can it be said that an acquittal was likely to occur if the prosecutor refrained from the misconduct or that the prosecutor believed such was the case.

I respectfully concur in affirming defendant's conviction.

/s/ William B. Murphy