Prosecutorial Misconduct and the Double Jeopardy Clause: An Attempt to Find a Universally Acceptable Standard

In 1993, a court of the State of New Mexico convicted Foster James Breit of aggravated assault and first-degree murder. The trial court then granted Breit a new trial because the prosecutor had engaged in egregious misconduct. This trial was out of control. The prosecutor’s misconduct began ‘barely into his opening statement’ . . . when he attempted to inflame the jury with allegations that were irrelevant, matters that could not permissibly be presented as evidence, and exaggerated claims that no evidence could ever support. When objections were raised and sustained, he expressed sarcasm and scorn toward opposing counsel and the court. During the questioning of witnesses he engaged in improper arguments with witnesses. On cross-examination, even after direct admonition from the court, he attempted to solicit irrelevant comments from the defendant . . . . He directed belligerent remarks at opposing counsel . . . [including] utter[ing] an implied threat without provocation: ‘You wave that at me one more time sweetheart’ . . . both his tone of voice and nonverbal conduct were highly prejudicial. He displayed ‘sarcasm, sneering, rolling of eyes and exaggerated expressions.’ This misconduct continued through the closing . . . [when he] made direct appeals to the sympathies and prejudices of the jury . . . [and] belittled the defendant’s fundamental right to remain silent . . . . He suggested that opposing counsel had engaged in perjury, lying, and collaborating with the defendant to fabricate a defense.” Regardless of this egregious misconduct, the federal standard would not bar a retrial. This court, however, expanded the federal standard to include such egregious misconduct because it clearly stripped the defendant of his right to a fair trial.

I. INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment embodies a historic

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3. Id. at 805 (detailing prosecutorial misconduct from trial record).
4. Id. at 795 (reasoning Breit’s retrial not barred under Kennedy standard).
5. Id. at 803 (expanding standard to include prejudicial misconduct committed with willful disregard resulting in reversed conviction).
constitutional protection for criminal defendants that provides finality to criminal proceedings. The Clause provides in pertinent part: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” Controversy arises when the court must determine whether the Clause applies only to mistrials or also to successful reversals of conviction, specifically those caused by prosecutorial misconduct. For the past twenty years, the United States Supreme Court and state courts have disagreed on the applicable standard to apply to such Double Jeopardy claims regarding prosecutorial misconduct. As a result, although several state courts embrace the federal standard, many have constructed their own standards when determining the protections provided by their own constitutions.

There are several important considerations for interpreting the purpose of the Double Jeopardy Clause. Courts continually emphasize that the Clause provides protection to the criminal defendant but is not a sanction against prosecutors despite any inappropriate or egregious conduct. As a general

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9. See Vega, supra note 1, at 156 (noting rejection by several states of Supreme Court’s narrow Kennedy standard); supra note 8 and accompanying text (examining other contrary cases). Compare Kennedy, 456 U.S. at 676 (Rehnquist, J., plurality) (limiting retrial to when prosecution intends misconduct to goad defendant into requesting mistrial), with State v. Kennedy, 666 P.2d 1316, 1318, 1326 (Or. 1983) (disagreeing with Court’s ruling in Kennedy and using expanded standard on remand).


11. See Rogan, 984 P.2d at 1242-43 (indicating need to balance defendant’s interests with society’s interest); see also Ware v. State, 759 A.2d 764, 796 (Md. 2000) (rejecting defendant’s argument to use Double Jeopardy Clause to sanction prosecutorial misconduct).

principle, when a defendant requests a mistrial and the judge grants it, there is no restriction on reprosecution under the Double Jeopardy Clause. Alternatively, when a prosecutor’s misconduct becomes so egregious that it subverts the defendant’s right to a fair trial, the prosecutor has given the defendant a hollow choice: whether to continue with the first tainted trial or request a mistrial, thereby implicating the Double Jeopardy Clause. Courts, therefore, have the difficult task of balancing the defendant’s interest in having his fate decided by a single proceeding and society’s interest in convicting the guilty.

In 1982, in *Oregon v. Kennedy*, the United States Supreme Court effectively limited a defendant’s constitutional protection by focusing on prosecutorial intent, contrary to well-established precedent that also weighed prosecutorial “overreaching” and “harassment” in determining whether misconduct should bar reprosecution. On remand, however, the Oregon Supreme Court chose to interpret its state constitution more broadly than the Supreme Court, expanding the constitutional protection afforded to criminal defendants under the Double Jeopardy Clause. Following the decision handed down in *Kennedy* and the subsequent refusal by the Oregon Supreme Court to adopt the federal standard, other states have split as to what standard to apply when construing their own state constitutions.
Kennedy focused solely on the standard for prosecutorial misconduct where the defendant moved for a mistrial, but the decision has also influenced defendants’ rights when seeking to reverse their convictions. The general rule does not bar reprosecution when a defendant successfully reverses his conviction except for insufficiency of the evidence, because the defendant exercised his fundamental right to a jury in the first trial. After reevaluating their standards for mistrials, several state courts have afforded the same protection to the defendant with a reversed conviction as with a mistrial, and barred retrial.

This Note traces the development of case law over the past twenty years relating to the effect of prosecutorial misconduct on mistrials and reversed convictions under the Double Jeopardy Clause. This Note further examines the nature of protection provided by the Double Jeopardy Clause and the importance of balancing defendants’ rights against the public interest. This Note also highlights the reasoning that underlies the controversy between the United States Supreme Court and state courts pertaining to application of the Clause. Finally, this Note analyzes recommendations by other commentators as to the best standard available to the courts, and then offers an additional approach to this difficult question.
II. HISTORY

A. The Origins and Purpose of the Double Jeopardy Clause

The Fifth Amendment’s Double Jeopardy Clause provides that a defendant should not be tried twice or punished twice for the same offense. Lord Coke described double jeopardy protection in the 17th century as consisting of three related common-law pleas: autrefois acquit, autrefois convict, and pardon. Later, Blackstone declared that double jeopardy protection included only the first two common-law pleas. During the ratification process for the Bill of Rights, James Madison added a ban against double jeopardy at the request of several states. The House of Representatives questioned the wording of Madison’s double jeopardy provision but it survived the House vote only for the Senate to reject it in favor of more traditional language. Courts’ interpretation of the final form of the Double Jeopardy Clause’s language initiated the question of how far to extend Double Jeopardy protection.

26. Supra note 7 and accompanying text (promulgating definition of Double Jeopardy and its application to states).

27. United States v. Wilson, 420 U.S. 332, 340 (1975) (discussing history of double jeopardy protection). Black’s Law Dictionary defines “autrefois acquit,” or former acquittal, as “a plea in bar of arraignment that the defendant has been acquitted of the offense.” Black’s Law Dictionary defines “autrefois convict” as “a plea in bar of arraignment that the defendant has been convicted of the offense.” Id. Black’s Law Dictionary defines a “plea in bar” as “a plea that seeks to defeat the plaintiff’s or prosecutor’s action completely and permanently.” Id. at 1174. Black’s defines a “pardon” as “the act or an instance of officially nullifying punishment or other legal consequences of a crime.” Id. at 1137. The defendant could utilize these three common law pleas to bar retrial if the retrial consisted of the same offense and the defendant had already been convicted, acquitted, or pardoned for the offense. Wilson, 420 U.S. at 340 (describing use of common law pleas to bar second trial). The English Law recognized the principle underlying double jeopardy at the time of the Year Books and the English courts used it as early as the 15th century. Id. at 340 n.6 (noting time double jeopardy principle first recognized and used in English courts). The English Year Books are the source of legal doctrines developed between 1268 and 1535. David J. Seipp, Boston University School of Law, Legal History: The Year Books, Medieval English Legal History (Apr. 8, 2003), available at http://www.bu.edu/law/seipp/.

28. Wilson, 420 U.S. at 340 (characterizing principle as including common law pleas of autrefois acquit and autrefois convict). Blackstone believed that the jeopardy principle was a “universal maxim of the common law of England [writing] that no man is to be brought into jeopardy of his life more than once for the same offense.” Id. (quoting 4 William Blackstone, Commentaries *335-36) (noting Blackstone’s commentaries on jeopardy principle).

29. Id. at 340-41 (detailing ratification process of Double Jeopardy Clause). The provision provided in pertinent part: “No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.” Id. at 341 (quoting 1 Annals of Cong. 434 (1789)) (citing Madison’s proposed Double Jeopardy provision).

30. Wilson, 420 U.S. at 341 (describing challenge to Madison’s provision made by House of Representatives). Several members in the House of Representatives expressed concern that other representatives would misinterpret the provision to prevent the defendant from appealing for a new trial after conviction. Id. The supporters of the provision felt, however, that the protection afforded the defendant in appealing for a new trial was implicit in the language and the proposed amendment would only serve to ratify the current law. Id.

31. See supra notes 8-10, 18-21 and accompanying text (highlighting numerous cases supporting and
The Double Jeopardy Clause indisputably affords protection from multiple prosecutions for the same offense after acquittal and after conviction, as well as against multiple punishments for the same offense.\textsuperscript{32} The policy reasons underlying the Clause include preserving the finality of judgments and protecting a defendant from the hardship of multiple trials for the same offense.\textsuperscript{33} Additionally, it protects defendants from the attempts of overzealous prosecutors to re-litigate despite prior acquittal or to increase punishment after a conviction.\textsuperscript{34} The Double Jeopardy Clause also strives to balance the enormous power of the government and the comparatively de minimis influence of the defendant.\textsuperscript{35} The purpose of the Double Jeopardy Clause is to protect a defendant’s rights while not using that protection as a venue for punishing prosecutors.\textsuperscript{36}

A defendant has many reasons for seeking the protection of the Double Jeopardy Clause.\textsuperscript{37} The defendant may want to avoid successive prosecutions disagreeing with Kennedy’s interpretation of Double Jeopardy protection).
because a trial inherently disrupts one’s life and provides the government an avenue for harassment.\textsuperscript{38} Successive prosecutions also increase the likelihood for conviction of innocent defendants.\textsuperscript{39} The finality of judgments allows the defendant to return to a normal life once the trial ends, without fear of readjudication by society.\textsuperscript{40}

The defendant also has a strong interest in completing the trial in front of the first jury or judge.\textsuperscript{41} The defendant must receive protection from manipulation intended to preclude the first jury or judge from determining his fate.\textsuperscript{42} Retrial gives to the prosecution the advantage of reevaluating the strengths and weaknesses of its case, thereby giving prosecutors an opportunity to litigate a stronger case on a second attempt.\textsuperscript{43}

The government has important interests to weigh against a defendant’s rights, in establishing a fair and just balancing of the double jeopardy protections.\textsuperscript{44} Society has an interest in effective law enforcement to deter others from committing crimes and to protect the public when guilty defendants escape imprisonment through attorney misconduct.\textsuperscript{45} The government should

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  \item note 36, at 798-99 (recognizing incentive for defendant to seek Double Jeopardy protection); Bierschbach, supra note 33, at 1348-49 (discussing defendant’s Double Jeopardy interests).
  \item State v. Rogan, 984 P.2d 1231, 1242 (Haw. 1999) (proffering explanation for protecting defendant from multiple prosecutions). Multiple prosecutions may cause the defendant extensive emotional and financial burdens. See Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (noting increase of defendant’s emotional and financial burdens); Rathbun, 600 P.2d at 397 (acknowledging repeated prosecutions subject defendant to embarrassment, expense, and constant state of anxiety).
  \item United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (noting government gains opportunity to learn from strengths of previous case and resolve its weaknesses); Rogan, 984 P.2d at 1242 (cautioning repeated prosecutions increase possibility of convicting innocent defendants); People v. Dawson, 397 N.W.2d 277, 284 (Mich. Ct. App. 1986) (observing mistrial provided prosecutor with chance to strengthen case for retrial); Bierschbach, supra note 33, at 1349 (suggesting retrials increase risk of convicting innocent defendants).
  \item Rogan, 984 P.2d at 1242 (quoting United States v. Jorn, 400 U.S. 470, 486 (1971)) (reiterating defendant’s interest in “conclud[ing] his confrontation with society”); Rudstein, supra note 33, at 610-11 (detailing policy considerations including preservation of final judgments).
  \item See Oregon v. Kennedy, 456 U.S. 667, 671-72 (1982) (Rehnquist, J., plurality) (pointing to defendant’s valued right in completing trial in front of first tribunal); accord United States v. Scott, 437 U.S. 82, 99-100 (1978); United States v. Dinitz, 424 U.S. 600, 606 (1976); Jorn, 400 U.S. at 484; Bierschbach, supra note 33, at 1351 (discussing defendant’s interest regarding completing first trial). The defendant has the right to have his guilt or innocence decided by the first trier of fact because otherwise the government could terminate the proceedings if it felt the jury would acquit. Bierschbach, supra note 33, at 1351.
  \item Rogan, 984 P.2d at 1243 (asserting protection from possible manipulation by government to prevent verdict).
  \item Scott, 437 U.S. at 105 n.4 (Brennan, J., dissenting) (observing mistrial provided prosecutor with chance to strengthen case for retrial); see also supra note 39 and accompanying text (demonstrating support for notion that reprosecution affords government opportunity to strengthen case). The prosecutor’s witnesses may even be coached between trials, subtly changing their testimony to strengthen prosecution’s case. See Scott, 437 U.S. at 105 n.4 (Brennan, J., dissenting).
  \item infra notes 45-46 and accompanying text (describing government’s interests).
  \item See Rogan, 984 P.2d at 1243 (recognizing balance between defendant’s rights and public’s interest in enforcing laws); State v. Torres, 744 A.2d 699, 703-04 (N.J. Super. Ct. App. Div. 2000) (addressing society’s concern for fair and vigilant enforcement of laws); Bierschbach, supra note 33, at 1352 (summarizing society’s
be given one meaningful opportunity to present its entire case when attempting to secure a conviction. The prosecutor represents the government and works to achieve the interests of both society and the government. In doing so, the prosecutor must remember that the mission to seek justice involves both an exercise of good judgment and avoiding the temptation to exercise an unfair advantage over the defendant.

B. General Double Jeopardy Principles and Applicable Federal Standards

Several well-established principles provide guidance for dealing with mistrials and reversed convictions in the context of the Double Jeopardy Clause. When a court grants a mistrial at the defendant’s request or with his consent, and no prosecutorial misconduct has occurred, the Double Jeopardy Clause does not apply and the government can re-try the defendant. The Double Jeopardy Clause provides no protection to a defendant who successfully reverses his conviction because of a defect in the proceedings, absent prosecutorial misconduct. A reversed conviction based on insufficient interests including interest of effective law enforcement).

46. Oregon v. Kennedy, 456 U.S. 667, 692 (1982) (Stevens, J., concurring) (balancing defendant’s interest and society’s interest in allowing prosecutor opportunity to present facts to jury); Rogan, 984 P.2d at 1243 (realizing Court’s emphasis on allowing prosecutor chance to present evidence to trier of fact). When the judge denies the prosecution this opportunity, it is well established that a defendant’s interest in completing his first trial may be subordinate to society’s interest in effective law enforcement. United States v. Jorn, 400 U.S. 470, 480 (1971) (noting in some instances public’s interest outweighs defendant’s interests).


48. Rogan, 984 P.2d at 1244 (advocating prosecution’s goal of seeking justice and avoidance of any appearance of an unfair advantage over defendant) (quoting State v. Quitog, 938 P.2d 559, 567 n.19 (Haw. 1997)); Vega, supra note 1, at 154 (defining tasks of prosecutor as including protection of defendant’s rights). But see Rosenthal, supra note 47, at 945-51 (detailing government’s practically unlimited power and cases where prosecution unfairly utilized this power).

49. See infra notes 50-54 and accompanying text (outlining general rules for mistrials and reversed convictions). A mistrial occurs when a judge terminates a trial before the jury deliberates because of procedural error or serious misconduct or when a jury is unable to reach a verdict. See BLACK’S LAW DICTIONARY 1018 (7th ed. 1999). A reversed conviction occurs when a judge or jury finds a defendant guilty and the defendant subsequently persuades the appellate court to reverse his conviction. See id. at 335.

50. See e.g., United States v. Scott, 437 U.S. 82, 93 (1978) (noting Double Jeopardy not implicated for mistrials granted at defendants’ request); United States v. Jorn, 400 U.S. 470, 485 (1971) (asserting general rule stating defendant’s request for mistrial removes barrier to retrial); United States v. Larouche Campaign, 866 F.2d 512, 514 (1st Cir. 1989) (commenting on appellant’s recognition of general rule providing no protection when defendant requests mistrial); United States v. Kessler, 530 F.2d 1246, 1255 (5th Cir. 1976) (pointing to Court’s decisions exemplifying notion that defendant’s request for mistrial removes constitutional protection).

51. United States v. Wallach, 979 F.2d 912, 915 (2d Cir. 1992) (observing rule providing no protection when defendant secures reversal of conviction due to procedural defect); Hagez v. State, 749 A.2d 206, 217 (Md. Ct. Spec. App. 2000) (stating protections afforded by Double Jeopardy Clause not applicable when defendant successfully appeals conviction). The new trial becomes the first trial in which the defendant was placed in jeopardy because the original trial was ultimately nullified. See Hagez, 749 A.2d at 218 (indicating
evidence provides the only undisputed exception to the general principle that Double Jeopardy protection does not apply to successful appeals. The law considers a reversed conviction based on insufficient evidence equivalent to an acquittal and, therefore, subject to Double Jeopardy protection.

When the prosecution successfully requests a mistrial or the judge sua sponte orders a mistrial, the appellate court applies the “manifest necessity” standard to determine whether to bar retrial. The disparity between federal and state courts arises, however, when the court determines the effect of prosecutorial misconduct on the defendant’s double jeopardy rights after the defendant successfully requests a mistrial or reversed a conviction.

1. The Pre-Kennedy Double Jeopardy Standard

Under the pre-Kennedy standard, misconduct by the judge or the prosecution barred retrial when it forced the defendant into requesting a mistrial. Additionally, any misconduct motivated by bad faith, or misconduct that harassed or prejudiced the defendant, barred retrial. The pre-Kennedy reversed conviction means “slate wiped clean” and reprosecution allowed.

52. Scott, 437 U.S. at 90-91 (examining bar to retrial when defendant secures reversed conviction because of insufficient evidence). This exception bars reprosecution because the government had a full and fair opportunity to present its case and did not persuade the court that enough evidence existed for a conviction. See Burks v. United States, 437 U.S. 1, 16 (1978) (expounding reasons for barring retrial including prosecution’s full opportunity to present case); Bierschbach, supra note 33, at 1356-57 (summarizing holding in Burks regarding reversed convictions).

53. Jacob v. Clarke, 52 F.3d 178, 180 (8th Cir. 1995) (noting reversed conviction results in same protection as acquittal when reversed because of insufficient evidence); see Burks, 437 U.S. at 11 (describing reversed conviction based on insufficient evidence functional equivalent of acquittal).

54. Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (Rehnquist, J., plurality) (reiterating “manifest necessity” standard as classical test when trial terminated over objection of defendant). The manifest necessity standard provides that a judge has the authority, taking all the circumstances into consideration, to discharge a jury if there is a manifest necessity to do so or continuing the trial would defeat the ends of public justice. United States v. Perez, 22 U.S. 579, 580 (1824). Manifest necessity most commonly involves a mistrial due to a hung jury. Kennedy, 456 U.S. at 672 (Rehnquist, J., plurality).

55. Kennedy, 456 U.S. at 672 (Rehnquist, J., plurality) (noting different principles apply when mistrial granted at defendant’s request); id. at 673-74 (Rehnquist, J., plurality) (noting ambiguity in previous decisions regarding applicable double jeopardy protection when defendant requests mistrial or reverses conviction); see supra notes 8-10, 17-19 and accompanying text (presenting differing cases on applicable standard when defendant requests mistrial or successfully reverses conviction).

56. United States v. Dinitz, 424 U.S. 600, 611 (1976) (advocating protection when prosecutorial or judicial misconduct intends to provoke defendant into requesting mistrial). The pre-Kennedy standard bars retrial when the prosecution intended the error to provoke a mistrial, if the prosecution made the error in bad faith, or it meant to harass or prejudice the defendant. Kennedy, 456 U.S. at 670 (Rehnquist, J., plurality) (quoting Dinitz, 424 U.S. at 611) (articulating pre-Kennedy standard applicable to cases where defendant requests mistrial). Although not initially specified, the pre-Kennedy standard includes prosecutorial or judicial overreaching because many courts used this language to support their decisions. See Kennedy, 456 U.S. at 683 (Stevens, J., concurring) (utilizing terminology of “overreaching” when discussing pre-Kennedy standard); United States v. Jorn, 400 U.S. 470, 485 (1971) (describing double jeopardy protection as including “prosecutorial or judicial overreaching”); see also United States v. Kessler, 530 F.2d 1246, 1255 (1976) (reiterating terminology used in Jorn).

57. Dinitz, 424 U.S. at 611 (setting forth pre-Kennedy standard). In Kessler, the court defined
standard expanded the protection to cases of egregious prosecutorial misconduct, regardless of the prosecutor’s intent. The *Kennedy* decision limited this standard, sparking the debate over the extension of the Double Jeopardy Clause protection.

2. The Double Jeopardy Standard Announced in *Kennedy*

In *Kennedy*, the United States Supreme Court held that prosecutorial misconduct bars retrial only when the prosecution performed the misconduct to effectuate the defendant’s forced request for a mistrial. A plurality of justices determined that the prosecution’s misconduct did not satisfy this standard, and therefore, the Double Jeopardy Clause offered no protection to the defendant. The Court declared that the previous exception offered virtually no standard to aid courts in determining whether prosecutorial misconduct barred retrial after a defendant’s request for a mistrial.

Prosecutorial overreaching as occurring when “gross negligence or intentional misconduct” on the part of the government produces aggravating circumstances that seriously prejudice the defendant so as to reasonably convince said defendant that the tainted proceeding will result in conviction. *Kessler*, 530 F.2d at 1256 (quoting *Dinitz*, 424 U.S. at 608 and United States v. Beasley, 479 F.2d 1124, 1126 (5th Cir. 1973)), cert. denied, 414 U.S. 924 (1973), reh. denied, 414 U.S. 1052 (1973) (defining elements needed to find prosecutorial overreaching). This definition suggests that the effect of the prosecutor’s actions should determine the defendant’s fate, rather than the subjective intent of the prosecution. *Id.*

58. *Kessler*, 530 F.2d at 1256.

59. Oregon v. *Kennedy*, 456 U.S. 667, 687 (1982) (Stevens, J., concurring) (clarifying plurality’s holding in *Kennedy*, remarking on Court’s decision to limit previous standard of overreaching); see supra notes 8-10, 17-19 and accompanying text (presenting cases in disagreement as to what standard to apply when defendant requests mistrial).

60. *Kennedy*, 456 U.S. at 676 (Rehnquist, J., plurality) (defining applicable standard for Double Jeopardy protection when defendant requests mistrial because of prosecutorial misconduct). The defendant’s first trial ended in a mistrial granted at the defendant’s request. State v. *Kennedy*, 666 P.2d 1316, 1318 (Or. 1983). Before the retrial, the defendant moved to dismiss the charges arguing that the protection afforded him by the Double Jeopardy Clause barred a subsequent trial. *Kennedy*, 456 U.S. at 669 (Rehnquist, J., plurality). The defendant argued that he requested a mistrial because the prosecution tainted the jury by engaging in misconduct while questioning an expert. *Id.* The trial judge rejected this notion on the ground that the prosecution did not intend to cause a mistrial and therefore did not meet the pre-*Kennedy* standard. *Id.* at 669-70. A jury subsequently convicted the defendant of theft during retrial. *Id.* at 670. The Oregon Court of Appeals reversed, sustaining the Double Jeopardy claim because the prosecution need not intend to cause a mistrial for jeopardy to attach. *Kennedy*, 456 U.S. at 670 (Rehnquist, J., plurality). The Court held that jeopardy had attached because the prosecutorial misconduct “amounted to overreaching.” *Id.* The government then appealed to the United States Supreme Court, which granted certiorari. State v. *Kennedy*, 666 P.2d at 1318. A four judge plurality in favor of reversal issued the opinion of the Court, with two concurring opinions, one by Justice Powell and another by Justice Stevens, joined by three other justices. See State v. *Kennedy*, 666 P.2d at 1319 (observing plurality opinion and four justices disagreeing with plurality).

61. *Kennedy*, 456 U.S. at 679 (Rehnquist, J., plurality) (deciding in favor of government). The incident in question occurred through the prosecution’s questioning of an expert witness. *Id.* at 669. The questioning proceeded as follows: “Prosecutor: Have you ever done business with the Kennedys? Witness: No, I have not. Prosecutor: Is that because he is a crook?” *Id.*

62. *Kennedy*, 456 U.S. at 674 (Rehnquist, J., plurality) (criticizing pre-*Kennedy* rule for lack of guidelines in applying it). But see *id.* at 689-90 (Stevens, J., concurring) (discussing elements Court considers when applying pre-*Kennedy* standard).
The Court reasoned that the prosecution intends all conduct to prejudice the defendant because it wants to successfully convict the defendant. The “overreaching” aspect of the pre-Kennedy standard allows for too many instances where the defendant could successfully bar retrial. The Court preferred its own standard, which focuses on the prosecutor’s intent, based on the belief that it was a “more manageable” standard. Courts could then apply the standard with more ease, resulting in consistent and uniform decisions. The Court also noted that the broader standard, in practice, may not afford defendants any additional protection as compared to the new limited standard.

Although the entire Court agreed that the particular facts of this case did not bar retrial, three justices joined Justice Stevens in a concurring opinion, disagreeing with the plurality’s limited standard. Justice Stevens suggested that the Court should have applied the existing standard instead of making new law in a case that did not contain sufficiently egregious prosecutorial misconduct. In addition, he found the standard introduced by the plurality opinion too onerous on the defendant and not comprehensive enough to cover actual instances of egregious misconduct that should fall within double jeopardy protection. His concurrence stressed that the Court should consider

63. Id. at 674-75 (Rehnquist, J., plurality) (suggesting rarity of trial free from any objectionable evidence).

64. See id.

65. Kennedy, 456 U.S. at 675 (Rehnquist, J., plurality) (approving “more manageable” standard based on prosecutor’s intent over standard based on “overreaching”). Justice Powell enumerated factors a court may consider in determining whether the prosecutor intended to cause a mistrial. Id. at 680 (Powell, J., concurring). A court considers:

(1) whether there was a sequence of overreaching or error prior to the error resulting in the mistrial,
(2) whether the prosecutor resisted the motion for a mistrial, (3) whether the prosecutor testified, and (4) the timing of the error.


66. Young, supra note 6, at 1654-55 (outlining advantages of application of same standard by state and federal courts); supra note 65 and accompanying text (detailing Court’s arguments for finding limited intent standard more manageable); infra note 85 and accompanying text (discussing Justice McCormick’s opinion regarding advantages to Kennedy standard).

67. Kennedy, 456 U.S. at 676 (Rehnquist, J., plurality) (suggesting pre-Kennedy standard would not help defendants as class). A trial judge may be more reluctant to grant a defendant’s motion for mistrial if he believes the defendant will then move to bar a second trial based on Double Jeopardy protection. Id.

68. Id. at 681 (Stevens, J., concurring) (admonishing plurality for removing exception to rule).

69. Id. (Stevens, J., concurring) (concluding creation of new standard unnecessary where prosecutorial error not sufficient to satisfy existing standard); id. at 692-93 (explaining why facts of case insufficient to satisfy existing standard).

70. Kennedy, 456 U.S. at 688 (Stevens, J., concurring) (realizing plurality’s subject intent requirement ultimately eliminates double jeopardy protection when defendant requests mistrial); id. at 689 (discussing situations of misconduct where prior standard offers protection but no protection under limited standard). Justice Stevens provided two examples in which prosecutorial misconduct would bar retrial under the prior standard where the new standard would offer no protection. Id. The first occurs when a prosecutor, attempting to harass a defendant, engages in repeated acts of misconduct with indifference as to whether a mistrial or reversed conviction will result. Id. Secondly, the prosecutor could infuse the trial with enough prejudice to
whether the defendant retained control of the proceedings. Justice Stevens discussed several other factors a court may consider when applying the pre-Kennedy standard and opposed the plurality’s notion that it offers “virtually no standards for its application.”

C. The Debate Between States’ Interpretation of Their Own Constitution’s Double Jeopardy Protection

The split among the justices has fueled a debate among state courts, and between federal and state courts, regarding the proper application of the double jeopardy clauses in state constitutions. The Kennedy decision does not bind state courts engaged in interpreting their own constitutions. Some states have chosen to follow the Kennedy standard while others have applied a variation of the pre-Kennedy standard.

1. States Adopting Kennedy Standard for Mistrials

The states that have incorporated the Kennedy standard for purposes of interpreting their constitutions include Georgia, Illinois, Kentucky, New Jersey, North Carolina, Ohio, and Rhode Island. Although Maryland does not secure a conviction but not enough to risk reversal on appeal. Id.; see Bauder v. State, 921 S.W.2d 696, 701 n.1 (Tex. Crim. App. 1996) (Baird, J., concurring) (asserting independent research failed to uncover case satisfying Kennedy standard); Rosenthal, supra note 47, at 910 (finding only two reported cases where Kennedy standard afforded protection to defendant); Tarlow, supra note 13, at 50 (acknowledging author knows of no cases where defendant satisfied Kennedy standard).

71. See Kennedy, 456 U.S. at 686 (Stevens, J., concurring) (declaring manipulation by prosecutor to indirectly control proceedings unacceptable); id. at 683 (noting which general rule applies depends on whether defendant retains control over proceedings); id. at 685 (explaining reasons for importance of defendant’s retention of control). Justice Stevens notes that when a defendant must choose between a tainted trial likely to end in conviction or a request for a mistrial, the defendant has no true control over the proceedings. Id. at 686. The Court refers to this as a “Hobson’s Choice,” which does not warrant subjecting the defendant to another trial. Id. at 685; supra note 14 (defining “Hobson’s Choice”).

72. Kennedy, 456 U.S. at 674, 689-90 (Stevens, J., concurring) (discussing deliberate misconduct and substantial reduction in probable acquittal as factors essential in analysis). A court must consider whether egregious prosecutorial misconduct exists and whether the misconduct has rendered the defendant’s choice meaningless. Id. at 689. Although the concurring justices recognized they cannot reduce the pre-Kennedy standard to a formula because of its reliance on case-specific circumstances, they reasoned that barring reprosecution requires deliberate misconduct. Id. at 689-91. Additionally, any prosecutorial misconduct that substantially reduces or eliminates the defendant’s chance for acquittal when the case is clearly going badly for the government, satisfies the pre-Kennedy standard. Id. at 690.

73. See supra notes 8-10, 17-19 and accompanying text (presenting cases showing disagreement regarding proper standard when defendant requests mistrial or successfully reverses conviction); see infra notes 76-99 and accompanying text (detailing state decisions and their respective positions on Kennedy standard).


75. Infra note 76 and accompanying text (detailing cases where state courts chose to apply Kennedy standard when interpreting state constitutions); infra note 86 and accompanying text (indicating cases where state courts chose to apply expanded standard when interpreting own constitutions).

explicitly follow the *Kennedy* standard, the Court of Special Appeals of Maryland has argued strongly for its application when analyzing a case under the Constitution of the United States.  

The Maryland court asserts that a mistrial itself sufficiently punishes the prosecution.  

Most of the state courts justify their decisions with the same reasoning as the plurality opinion in *Kennedy*. New Jersey and Ohio utilized the factors enumerated in Justice Powell’s concurring opinion in determining whether prosecutors intended to cause a mistrial. New Jersey also considered the risk to innocent people when releasing a defendant without an inquiry into the defendant’s guilt or reference to the government’s evidence. The New Jersey Superior Court advocated

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77. Hagez v. State, 749 A.2d 206, 217 (Md. Ct. Spec. App. 2000) (noting no constitutional bar to reprosecution in Maryland because failed to satisfy federal standard); *id.* at 228-29 (discussing reasons why *Kennedy* standard more appropriate). The Maryland court reasoned that egregious misconduct requires specific intent and not merely general intent. *Id.* at 228. The court outlined five “special intents which might flow from the same general intent,” noting that only the fifth would bar reprosecution. *Id.* at 228-29. The enumerated “special intents” include:

1. thinking it to be correct; 2. not thinking about whether it is error or not (perhaps lawyerly negligence); 3. being cavalierly indifferent to error under circumstances where one would reasonably be expected to know that there is probably error (perhaps gross negligence); 4. knowing it to be error, but hoping to get away with it, thereby clinching a probable winner (deliberate “overkill” in a case the prosecutor has no desire to abort); 5. knowing it to be error, but desiring to “sabotage” a probable loser either 1) by snatching an unexpected victory from probable defeat if not caught, or 2) by getting caught, thereby provoking the mistrial, averting the probable acquittal and living to fight again another day. (A calculated sabotaging of a perceived “lost cause” in either event; an indifference to whether he is caught or not).

*Id.*

78. Hagez, 749 A.2d at 229 (stressing lost time, money, resources, and opportunity to secure conviction considered sufficient rebuke).

79. *White*, 369 S.E.2d at 815 (approving *Kennedy* standard because easier applicability and broader standard occasions judicial reluctance to grant mistrials); *see Stamps*, 648 S.W.2d at 869 (noting *Kennedy* court’s explanation of difficulty in applying overreaching standard).

80. *Torres*, 744 A.2d at 705 (holding factor analysis reveals no prosecutorial misconduct intended to goad defendant into mistrial); *Girts*, 700 N.E.2d at 404 (determining no intention of prosecutor to goad defendant into requesting mistrial after considering factors).

81. *Torres*, 744 A.2d at 708 (exposing risk to defendant’s potential next victim if defendant set free because of prosecutorial misconduct).
alternate means of punishing prosecutorial misconduct.\textsuperscript{82} Texas chose to adopt an expanded standard, although the \textit{Bauder} dissent proposed several additional reasons for following \textit{Kennedy}.\textsuperscript{83} The dissent agreed with \textit{Kennedy} that the broader standard offered no real guidelines for its application and failed to inform prosecutors as to what conduct will give rise to sanctions.\textsuperscript{84} Additionally, the dissent found it inefficient to require state courts to evaluate the case under federal law using the \textit{Kennedy} standard, and then follow-up by embarking on a separate state law analysis.\textsuperscript{85}

2. \textit{States Creating Own Standard Under Their Respective Constitutions for Mistrials}

Several other state courts, including Pennsylvania, Hawaii, Oregon, Texas, Michigan, Arizona, and New Mexico, have chosen to adopt their own standard instead of following the limited \textit{Kennedy} decision.\textsuperscript{86} Courts, including those in Pennsylvania and Hawaii, have expanded the applicable standard to focus on the prosecutor’s intent to carry out the misconduct rather than to goad the defendant into a mistrial.\textsuperscript{87} These courts examined whether the prosecution intended the misconduct to prejudice the defendant, thus denying the defendant a fair trial.\textsuperscript{88} This expanded standard refines the pre-\textit{Kennedy} standard,\textsuperscript{86} See, e.g., \textit{Pool v. Superior Court}, 677 P.2d 261, 271-72 (Ariz. 1984); State v. \textit{Rogan}, 984 P.2d 1231, 1249 (Haw. 1999); People v. \textit{Dawson}, 397 N.W.2d 277, 284 (Mich. Ct. App. 1986); State v. \textit{Breit}, 930 P.2d 792, 803 (N.M. 1996); State v. \textit{Kennedy}, 666 P.2d 1316, 1326 (Or. 1983); Commonwealth v. \textit{Smith}, 615 A.2d 321, 325 (Pa. 1992); State v. \textit{Cabrera}, 24 S.W.3d 528, 530 (Tex. Ct. App. 2000); \textit{Bauder}, 921 S.W.2d at 699.

87. \textit{Rogan}, 984 P.2d at 1249; \textit{Smith}, 615 A.2d at 325 (identifying standards under respective state constitutions). For example, in \textit{Smith}, the court held that their constitution bars retrial when the prosecutor intends that the misconduct will provoke the defendant into requesting a mistrial and also when the prosecutor intends their conduct to prejudice the defendant to the point of denying the defendant a fair trial. \textit{Smith}, 615 A.2d at 325. This standard parallels \textit{Rogan} where a Hawaii court interpreted its constitution to bar retrial “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.” \textit{Rogan}, 984 P.2d at 1249.

88. \textit{Supra} note 87 and accompanying text (citing expanded standard applied by Pennsylvania and
providing a more specific explanation of prosecutorial “overreaching.”

The Arizona Supreme Court created specific conditions that bar retrial. These conditions afford a defendant additional protection under the Double Jeopardy Clause, while responding to the Kennedy Court’s concerns that the pre-Kennedy rule offers “virtually no standards for its application.” The Texas and New Mexico courts extend double jeopardy protection to situations where the prosecution consciously disregards the risk that his conduct might effectively force the defendant into requesting a mistrial. Texas has interpreted this standard as affording the defendant protection not only when the prosecution intended the misconduct, but also when the prosecution recklessly committed the misconduct.

The New Mexico and Texas courts considered the Kennedy standard overly inclusive and inadequate in protecting the defendant’s rights. Several courts

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89. Supra notes 56-57 and accompanying text (discussing pre-Kennedy standard and Court’s interpretation of “overreaching”). Compare Rogan, 984 P.2d at 1249, and Smith, 615 A.2d at 325 (stating expanded standard applicable when defendant requests mistrial), with Kennedy, 456 U.S. 667, 670 (1982) (Rehnquist, J., plurality) (articulating pre-Kennedy standard applied when defendant requests mistrial).

90. Pool v. Superior Court, 677 P.2d 261, 271-72 (Ariz. 1984) (setting forth three conditions for determining relevant double jeopardy protection under state constitution). The Pool court mandates double jeopardy protection when:

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.

Id. The Michigan court also uses the three conditions set forth in Pool, holding that intentional misconduct bars retrial when the prosecutor knows it to be so prejudicial that there is no cure for the misconduct short of mistrial. People v. Dawson, 397 N.W.2d 277, 284 (Mich. Ct. App. 1986). In State v. Kennedy, Oregon used a standard almost identical to Michigan, however that court used the term “official” instead of “prosecution” to explicitly include misconduct by bailiffs, judges, and other government officials. State v. Kennedy, 666 P.2d 1316, 1326 (Or. 1983).

91. See supra note 90 and accompanying text (demonstrating Pool conditions include situations where prosecution displays indifference to causing mistrial).

92. State v. Breit, 930 P.2d 792, 803 (N.M. 1996); State v. Cabrera, 24 S.W.3d 528, 530 (Tex. Ct. App. 2000); Bauder v. State, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996) (declaring adopted standard affords additional protection under state’s Double Jeopardy Clause). The Bauder standard bars reprosecution when a prosecutor’s calculated, “objectionable,” conduct brings about a motion for a mistrial, or when the prosecutor consciously disregards the known risk that an “objectional event,” caused by the prosecutor, causes a mistrial on the defendant’s motion. Bauder, 921 S.W.2d at 699. The New Mexico Supreme Court uses slightly different terminology, barring retrial in mistrials and reversed convictions when the official misconduct is so unfairly prejudicial that it necessitates a mistrial or motion for a new trial. Breit, 930 P.2d at 803. The court also bars retrial if an official intends to provoke a mistrial or acts in willful disregard of the resulting mistrial or reversal and the official knows that the conduct is inappropriate and prejudicial. Id.

93. Bauder, 921 S.W.2d at 700 (noting prosecutor likely intended misconduct if egregious enough for court to determine prosecutor crossed line). The New Mexico Supreme Court limits this interpretation by requiring “willful disregard” rather than indifference because the former denotes awareness while the latter can also mean “reckless” or “negligent.” Breit, 930 P.2d at 803.

94. State v. Rogan, 984 P.2d 1231, 1248 (Haw. 1999) (approving reasoning in Breit and Bauder stating
argue that the Double Jeopardy Clause focuses on the malicious intentions of the prosecution as opposed to the protection of a defendant’s rights. Consequently, these states prefer a more objective standard, believing it is more applicable and more practical, rather than forcing the courts to hypothesize about the prosecutor’s subjective intent.

These courts prefer to risk reluctance on the part of trial judges to grant a defendant’s requests for a mistrial, rather than apply a limited standard that ultimately eliminates a defendant’s double jeopardy protection. The Hawaii and Michigan Courts also emphasize the need to protect the defendant’s interests because of the vast resources and discretion the government wields. Among the courts that chose to expand protection for defendants in the mistrial context, a majority have argued for the same expanded protection in the area of reversed convictions.

3. Application of These Principles to Reversed Convictions

Many states, including Florida, Maryland, Georgia, Rhode Island, Texas, and Ohio follow the general rule regarding reversed convictions noted earlier, which limits the Kennedy standard to the mistrial context. Courts often cite objective standard better than subjective intent standard); see Breit, 930 P.2d at 804 (refusing to differentiate between prosecution’s intent to goad defendant and prosecution’s willingness to accept mistrial); Kennedy, 666 P.2d at 1326 (finding Kennedy standard as too burdensome on defendant).

95. Rogan, 984 P.2d at 1248-49 (declaring prosecutor’s intent irrelevant); Breit, 930 P.2d at 800 (supporting protection for defendant irrespective of prosecutor’s intent); see Henning, supra note 36, at 798 (quoting Supreme Court as stating Double Jeopardy is “absolute” where applicable).

96. Rogan, 984 P.2d at 1248 (arguing court’s determination based on subjective intent equivalent to guessing); Bauder v. State, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996) (finding less subjective rule more advantageous). But see Young, supra note 6, at 1656 (suggesting courts ability to determine prosecutorial intent while affording defendants proper protection).

97. See Rogan, 984 P.2d at 1248-49 (rejecting limited standard because burden on defendant unfairly difficult to satisfy); Bauder, 921 S.W.2d at 702 (Baird, J., concurring) (determining protection afforded under Kennedy standard meaningless because impossible to satisfy); see also supra note 70 (highlighting lack of subsequent cases in which defendant met Kennedy standard).


99. E.g., State v. Jorgenson, 10 P.3d 1177, 1179 (Ariz. 2000) (en banc) (applying broader standard applicable in mistrials to reversed convictions); Rogan, 984 P.2d at 1249 (holding retrial barred for egregious prosecutorial misconduct resulting in reversed conviction); State v. Breit, 930 P.2d 792, 803 (N.M. 1996) (including both mistrials and motions for new trials within broader standard); Commonwealth v. Smith, 615 A.2d 321, 322-23 (Pa. 1992) (discharging defendant when prosecutorial misconduct discovered after the first trial, notwithstanding lack of mistrial).

that the defendant retained his valuable right to have the case submitted to the first jury to support applying a different rule to reversed convictions.\textsuperscript{101} In effect, the “slate has been wiped clean” because the defendant’s successful appeal and the retrial is considered the first instance where the defendant is placed in jeopardy.\textsuperscript{102} Even in Texas, where the expanded standards are used in the mistrial context, the courts choose not to expand the protection to reversed convictions and have held that \textit{Bauder} applies only to mistrials.\textsuperscript{103}

Courts in Hawaii, New Mexico, Arizona, and Pennsylvania expanded defendants’ protection when they have successfully appealed a conviction because of prosecutorial misconduct.\textsuperscript{104} These states apply their respective standards for mistrials to reversed convictions.\textsuperscript{105} These courts refuse to draw a distinction between a defendant who unsuccessfully moves for a mistrial because of prosecutorial misconduct, then successfully appeals his conviction on the same basis, and a defendant who successfully requests a mistrial because of the prosecution’s misconduct.\textsuperscript{106} Additionally, a defendant may not uncover the egregious prosecutorial misconduct until after the jury has deliberated, and therefore the defendant may face punishment because of the prosecution’s suppression of the misconduct or because the misconduct went undiscovered.

\begin{footnotesize}
\textsuperscript{101} Ex parte Davis, 957 S.W.2d 9, 14-15 (Tex. Crim. App. 1997) (noting numerous cases citing defendant’s access to original jury as reason for general rule); supra note 20, 100 and accompanying text (listing cases applying same reasoning for general rule).

\textsuperscript{102} United States v. McAleer, 138 F.3d 852, 856 (10th Cir. 1998) (acknowledging general rule for reversed conviction because no termination of original jeopardy).

\textsuperscript{103} Ex parte Davis, 957 S.W.2d 14-15 (refusing to adopt \textit{Bauder} in reversed conviction context); Rosenthal, supra note 47, at 930 (commenting on Texas’ refusal to adopt expanded standard for mistrial notwithstanding \textit{Bauder}).

\textsuperscript{104} Supra note 99 and accompanying text (citing cases where courts defined broader standard as applying to reversed convictions). Although not expanding protection to the same extent as the states, dicta in a federal court decision suggests that an expanded standard may be appropriate for reversed convictions when the prosecutor intends to prevent an acquittal through misconduct because he believes acquittal is likely without his misconduct. United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992).

\textsuperscript{105} E.g., State v. Jorgenson, 10 P.3d 1177, 1180 (Ariz. 2000) (applying \textit{Pool} standard in determining whether defendant afforded same protection after reversed conviction); State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999) (barring retrial after either mistrial or reversed conviction resulting from prosecutorial misconduct); State v. Breit, 930 P.2d 792, 804 (N.M. 1996) (including phrase “disregard of resulting . . . reversal” in standard to show application to reversed convictions).

\textsuperscript{106} See \textit{Breit}, 930 P.2d at 797 (emphasizing importance of finding same result when defendant motions for mistrial or successfully appeals); see also Wallach, 979 F.2d at 916 (advocating no justifiable reason for distinction); Ex parte Davis, 957 S.W.2d at 29 (Baird, J., dissenting) (admonishing majority for affording protection when misconduct results in mistrial but not when conviction reversed).
\end{footnotesize}
until after the trial. Under the expanded protection interpretation, it is immaterial when the misconduct came to light, but rather the focus is on whether the misconduct denied the defendant a fair trial and whether the prosecution knew of its misconduct.

4. Alternatives to the Kennedy Standard

Other alternatives to the Kennedy standard have been suggested to attempt to balance the interests of both defendants and society. The plain error standard poses an alternate solution. This two-part test first considers the level or significance of the misconduct and then considers the availability of alternative remedies. Another possible standard suggests that a court should bar retrial when the exclusion of tainted evidence, intentionally introduced by the prosecution, leaves insufficient evidence to support the defendant's conviction. One author even suggests including all prosecutorial misconduct within double jeopardy protection.

The Kennedy Court may have intended to find a universal standard for mistrials resulting from prosecutorial misconduct, however, no one standard has received universal acceptance. Instead, states are split between the Kennedy standard or creating their own expanded standard. This disagreement among the states over the best standard to apply for mistrials affects cases involving reversed convictions due to prosecutorial misconduct.

107. See Wallach, 979 F.2d at 916 (arguing for barring retrial when prosecution intends to prevent acquittal through misconduct unknown to defendant); Ex parte Davis, 957 S.W.2d at 29 (Baird, J., dissenting) (arguing punishment of defendant wrongful when caused by judge erroneously refusing to grant mistrial); see also Rosenthal, supra note 47, at 938 (advocating standard gives inducement to commit undiscoverable error to prevent acquittal yet not bar retrial).

108. See supra notes 90, 92, 105 and accompanying text (discussing expanded standard).

109. Infra notes 110-12 and accompanying text (detailing alternatives suggested by other authors).

110. Young, supra note 6, at 1663 (describing plain error standard’s two-prong test as better standard than Kennedy).

111. Young, supra note 6, at 1663. Under the two-prong test, any prosecutorial misconduct rising to the level of plain error would prevent reprosecution if no other remedy, short of mistrial, is available. Id.

112. Bierschbach, supra note 33, at 1363-64 (developing alternative standard balancing defendant’s and society’s interest while still finding support in Kennedy). Under this balancing standard, the prosecutor must intend the misconduct, but the court does not investigate the subjective intent of the prosecutor. See id. Rather, it focuses on whether the misconduct really prejudiced the defendant’s double jeopardy rights by testing whether, absent the misconduct, a jury would find the defendant guilty. Id.


114. See supra notes 8-10, 17-19 and accompanying text (presenting cases disagreeing on applicable standard when defendant requests mistrial).

115. See supra notes 8-10, 17-19 and accompanying text; see also supra note 76 and accompanying text (indicating states following Kennedy standard); supra notes 86-87, 90, 92 and accompanying text (listing states adopting own standard and detailing their expanded standards).

116. See supra notes 8-10, 17-19 and accompanying text (providing cases debating applicable standard
Attaining a standard that affords a defendant sufficient protection under the Double Jeopardy Clause, while still assuring the protection of society through conviction of the guilty, remains elusive.

III. ANALYSIS

The *Kennedy* Court correctly recognizes the overbreadth of the “overreaching” standard, but such an extreme measure for rectifying the existing ambiguities is unnecessary. The Court mistakenly presumes that because the prosecution’s every act intends to “prejudice” the defendant by securing his conviction, the “overreaching” standard includes too many instances of negligible misconduct. The Court’s argument for a more manageable standard also contains flaws. A rule that relies on the determination of a prosecutor’s subjective intent results in a judicial guessing game that does not form the basis of an appropriate standard.

Justice Powell’s factors, which attempt to analyze whether the prosecution intended to goad the defendant into requesting a mistrial, fall short of adequately addressing the problem. The first element determines whether the prosecutor intended the misconduct, but does not establish the specific intent of provoking the defendant into requesting a mistrial. The third factor’s unreliability arises because the prosecution will rarely admit to intentional misconduct if it would set the defendant free. The Court’s argument that the broader standard will not afford the defendant any additional protection lacks persuasiveness because the *Kennedy* standard is extremely difficult to satisfy.

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117. Oregon v. Kennedy, 456 U.S. 667, 674 (1982) (Rehnquist, J., plurality) (characterizing “overreaching” as not depending on intent); id. at 681 (Stevens, J., concurring) (criticizing plurality for limiting previous standard).

118. Id. at 674-75 (Rehnquist, J., plurality) (indicating objectionable prosecutorial misconduct present at every trial); State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999) (creating standard based on egregiousness of prosecutorial misconduct).

119. See supra note 65 and accompanying text (describing Court’s argument regarding manageability of *Kennedy* standard).

120. *Kennedy*, 456 U.S. at 688 (Stevens, J., concurring) (arguing subjective intent standard too burdensome for defendant and ultimately removes any bar to retrial); Rosenthal, supra note 47, at 912 (pointing to impracticability of subjective intent standard); supra notes 96-97 and accompanying text (listing cases supporting notion of difficulty in determining subjective intent).

121. Supra note 65 and accompanying text (detailing Powell’s factors).

122. See supra note 65 and accompanying text (describing analysis of prosecution’s misconduct but not explaining its relation to goading defendant).

123. See supra note 65 and accompanying text (demonstrating court relies on prosecution’s own testimony for determining subjective intent); Henning, supra note 36, at 806-07 (acknowledging unlikelihood of prosecutor admitting misconduct).

124. *Kennedy*, 456 U.S. at 675 (Rehnquist, J., plurality) (discussing Court’s opinion regarding broader
Kennedy standard excludes egregious misconduct from which the defendant deserves protection, the factors he suggests still focus unacceptably on the prosecution’s intent.125

States following the Kennedy standard rely on the availability of alternate methods to punish prosecutors or find that a mistrial is sufficient punishment because the prosecution must expend time and money to retry the defendant.126 These arguments relate little to the preservation of a defendant’s rights, suggesting instead that the existing standards focus more on sanctioning the prosecutor than on protecting the defendant’s rights.127 Most of the state court standards opposing Kennedy concentrate more on the defendant’s right to a fair trial than the Kennedy standard, but fail to do so sufficiently because of the state standards’ continuing reliance on determining the general intent of the prosecutor.128

A viable alternative to the Kennedy standard is the “plain error” standard because it addresses the effect of the misconduct on the defendant’s rights.129 Ultimately, this standard fails because it focuses on the availability of alternative methods despite the fact that most cases of egregious prosecutorial misconduct result in mistrial or reversed conviction.130 Additionally, the “plain error” standard differentiates between a defendant who has alternative remedies, but none that will cure the misconduct, and a defendant with no alternative remedies and a bar to reprosecution.131 Another suggestion, based
on excluding the intended misconduct, pertains to reversed convictions and has little applicability to mistrials. The test requires the prosecution’s introduction of tainted evidence and excludes situations when the prosecution intentionally withholds evidence until the conclusion of the trial. Although a court has discretion to reverse a conviction based on insufficient evidence, this standard improperly extends the appellate court’s authority to invade the province of the jury.

The suggestion that all prosecutorial misconduct should trigger a defendant’s double jeopardy protection raises equally troublesome issues. If double jeopardy protection exists to preserve defendants’ rights instead of punishing prosecutors, only misconduct that substantially affects those rights should result in the defendant’s release. The standard should instead focus on the double jeopardy protection afforded to a defendant, and disregard the prosecutorial intent to commit the misconduct. Intentional prosecutorial misconduct that denies a defendant a fair trial achieves the same end, from the defendant’s point of view, as inadvertent yet equally serious prosecutorial misconduct. This distinguishes little in most cases, as misconduct egregious enough to deny a defendant a fair trial rarely occurs intentionally. The test should rely solely on whether the egregious prosecutorial misconduct denied the defendant a fair trial.

Looking solely at whether the egregious prosecutorial misconduct denied the

between a defendant who has alternative remedies that won’t cure the misconduct and a defendant that has no alternative remedies available. See id.

132. Bierschbach, supra note 33, at 1363-64 (noting inapplicability to mistrials because second prong requires defendant’s conviction).

133. Bierschbach, supra note 33, at 1363-64 (requiring introduction of tainted evidence at trial and precluding any tainted evidence uncovered after trial).

134. Supra note 52 and accompanying text (explaining established general rule regarding insufficient evidence as one exception to allowing reprosecution); Bierschbach, supra note 33, at 1363-64 (employing appellate court to decide whether excluding tainted evidence can result in insufficient evidence). This standard allows the appellate court to determine what the jury would have decided had the case not involved tainted evidence. See Bierschbach, supra note 33, at 1363-64.

135. Supra note 113 (listing commentators who suggest expanding double jeopardy protection to all prosecutorial misconduct).

136. Guerrieri, supra note 113, at 383-84 (recognizing need to focus on misconduct affecting constitutional rights); Henning, supra note 36, at 830 (describing inadequacy of constitutional remedies to change behavior of prosecutors).


139. Id. (noting prosecutor likely intended misconduct if egregious enough for court to determine prosecutor crossed line); see Tarlow, supra note 13, at 52 (suggesting prosecutorial misconduct not normal course of conduct, therefore most likely intentional when it occurs).

140. See Rogan, 984 P.2d at 1249 (demonstrating support for standard based solely on effect of prosecutorial misconduct); id. (noting retrial burden attributable to prosecution’s misconduct even without specific intent); id. at 1248 (arguing prosecutor’s subjective intent irrelevant when determining protections afforded to defendant).
defendant a fair trial focuses on the wording and purpose of the Double Jeopardy clause by protecting a defendant’s right not to be put in jeopardy twice.\textsuperscript{141} It no longer requires a determination of the prosecutor’s subjective intent.\textsuperscript{142} Instead, courts should determine the egregiousness of the prosecutorial misconduct and whether it made the defendant’s request for a mistrial unavoidable, or his conviction inevitable.\textsuperscript{143} Such a causal relationship should bar the prosecutor from retrying the defendant.\textsuperscript{144} Society has an interest in incarcerating the guilty.\textsuperscript{145} This interest is unaffected by such an approach because the prosecutor’s intent is unrelated to the defendant’s guilt or innocence.\textsuperscript{146} The government has one opportunity to prosecute its case and loses it by securing a conviction after egregious prosecutorial misconduct.\textsuperscript{147} In such cases, prosecutorial misconduct might inequitably compensate for the prosecution’s weak case against the defendant.\textsuperscript{148}

This new approach applies equally to mistrials and reversed convictions.\textsuperscript{149} A defendant’s unsuccessful request for a mistrial and subsequent reversal of conviction should not have a different result than a successfully requested mistrial, because both scenarios may potentially involve the same egregious prosecutorial misconduct.\textsuperscript{150} Applying the same standard to both situations discourages prosecutors from concealing misconduct until after a trial in order to prevent a bar on retrial.\textsuperscript{151} Furthermore, the approach prevents the appellate court from invading the province of the jury because the court analyzes the

\begin{itemize}
  \item[141.] Supra note 7 and accompanying text (citing Fifth Amendment’s Double Jeopardy Clause); Pool v. Superior Court, 677 P.2d 261, 271 (Ariz. 1984) (treating standard as resting on defendant’s constitutional guarantees under Double Jeopardy Clause).
  \item[142.] Rogan, 984 P.2d at 1249 (excluding analysis of prosecutor’s subjective intent).
  \item[143.] See Rogan, 984 P.2d at 1249 (observing standard applies when defendant receives unfair trial because of prosecutorial misconduct).
  \item[144.] Supra note 143 and accompanying text (barring reprosecution when misconduct results in unfair trial).
  \item[145.] Supra note 45 and accompanying text (noting importance of society’s interest in effective law enforcement and in protecting innocent persons).
  \item[147.] Supra note 46 and accompanying text (stressing importance of giving prosecution full and fair opportunity to present case); see Pool v. Superior Court, 677 P.2d 261, 272 (Ariz. 1984) (attributing misconduct causing mistrial to prosecution and suggesting prosecution had opportunity to present case).
  \item[148.] Tarlow, supra note 13, at 52 (presuming prosecution’s engagement in intentional misconduct because it believed defendant otherwise likely to obtain acquittal); see Oregon v. Kennedy, 456 U.S. 667, 689-90 (1982) (Stevens, J., concurring) (determining when pre-\textit{Kennedy} standard applies and noting standard applicable when government’s case unlikely to succeed).
  \item[149.] See supra note 105 and accompanying text (indicating cases where courts applied same standard for both mistrials and reversed convictions).
  \item[150.] State v. Jorgenson, 10 P.3d 1177, 1178-79 (Ariz. 2000) (en banc) (barring reprosecution where court finds misconduct necessitated mistrial but resulted in reversed conviction); \textit{id.} at 1180 (describing importance of applying equal standard as “pragmatic necessity”); see State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999) (attributing burden of new trial to prosecution’s misconduct whether caused by mistrial or reversed conviction).
  \item[151.] United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992) (noting prosecution’s opportunity for retrial if defendant kept unaware of misconduct).
\end{itemize}
objective facts and circumstances of the misconduct rather than determining what the jury would have decided without the tainted evidence. This new standard serves to convict the guilty in a fair trial using untainted evidence and to acquit a defendant when the government resorts to egregious misconduct in order to secure a conviction.

IV. CONCLUSION

Although the Double Jeopardy Clause has a long history in the United States, the applicability of its protection to cases of prosecutorial misconduct remains in dispute. In determining whether to bar retrial, the United States Supreme Court and several state courts focus on the prosecutor’s intent, analyzing whether the prosecution specifically intended to goad the defendant into requesting a mistrial. Several other states suggested that the pre-Kennedy standard better protected the rights of a defendant and created their own expanded standards when determining whether to bar retrial. The courts dispute this issue in both the mistrial and reversed conviction settings.

Courts should focus on balancing the constitutional protection of the defendant with society’s interest in convicting the guilty, but they should err on the side of protecting a defendant’s rights. The Kennedy standard does not provide enough protection for a defendant, while the pre-Kennedy standard provides more protection to the defendant than is necessary. The expanded standards address the overbroad issue criticized by the Kennedy Court while simultaneously providing the defendant with sufficient protection. Although several commentators suggested alternate solutions, the preferred approach completely disregards the prosecutor’s intent under double jeopardy analysis and concentrates solely on whether the egregiousness of the misconduct denied the defendant a fair trial. Additionally, courts should not differentiate between mistrials and reversed convictions because the rights of the defendant should not depend on the time at which the court discovers the inequity of the proceedings. A universal standard will remain elusive until the Court acknowledges the fallacies of its limited standard.

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152. Compare Rogan, 984 P.2d at 1249 (incorporating objective standpoint into standard for determining whether egregious misconduct denied defendant fair trial), with Bierschbach, supra note 33, at 1363-64 (employing appellate court to decide whether excluding tainted evidence would result in insufficient evidence).

153. Supra notes 148, 151 and accompanying text (noting prosecution’s temptation to use tainted evidence or secure conviction through misconduct).