Circuit Court for Charles County
Case No. 08-K-17-000083

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1572

September Term, 2023

MIGUEL ANGEL SANTANA

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Shaw,

JJ.

Opinion by Shaw, J.
Concurring Opinion by Nazarian, J.

Filed: February 25, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Miguel Angel Santana, was indicted in the Circuit Court for Charles County on six counts in connection with the shooting death of Lydell Wood. A jury found Appellant guilty of conspiracy to commit first-degree murder and illegal possession of a firearm by a disqualified person. The jury did not reach a verdict on the remaining four counts. Appellant was sentenced to life in prison plus 1,017 days.

The State elected to proceed with a second trial on the remaining charges. During the second trial, a State's witness testified about unrelated illegal firearms and marijuana seized from Appellant's residence during the execution of a search warrant. Appellant requested a mistrial, which the court granted.

The State then elected to proceed with a third trial and Appellant filed a pretrial motion to dismiss the charges. He argued that a third trial would violate his common law double jeopardy rights because of the State's "recklessly deficient preparation and reckless questioning of Corporal Cartwright" in the previous trial. The court denied Appellant's motion, finding that the State's conduct was neither intentional nor reckless. Appellant noted this timely appeal. He presents two questions for our review:

1. Should this Court recognize that Maryland's double jeopardy common law bars retrial after a mistrial requested by the defendant where the mistrial was caused by the State's reckless conduct?

2. Did the circuit court err in finding that the State's conduct that caused the mistrial of Mr. Santana was not reckless?

For the reasons that follow, we affirm the judgments of the circuit court. We decline to adopt a common law double jeopardy reckless conduct standard. As for the second question, we hold that the court did not err in denying Appellant's motion to dismiss.

BACKGROUND

Appellant, Miguel Angel Santana, has been tried twice for his involvement in the shooting death of Lydell Wood. In 2019, the State brought six charges against Appellant, including Murder – First Degree; Firearm Use/Felony/Violent Crime; Conspiracy Murder First Degree; Regulated Firearm: Illegal Possession; Wear, Carry And Transport Handgun Upon Their Person; and Handgun: Wear/Carry & Transport In Vehicle/Public Roads, Etc. A jury convicted Appellant of conspiracy to commit first-degree murder and illegal possession of a firearm by a disqualified person. The jury did not reach a verdict on the remaining four charges. Appellant was sentenced to life in prison for the conspiracy charge and 1,017 days for the illegal firearm charge.

The State retried Appellant on the remaining charges in April 2023. Prior to trial, the State and Appellant agreed that the State would instruct its witnesses to refrain from discussing certain items, such as firearms and marijuana, found in Appellant's home while executing a search warrant in 2016. The firearms and marijuana seized were unrelated to the murder charges against Appellant.

Corporal Stephen Cartwright of the Forensic Science Unit in the Charles County Sheriff's Office testified at the second trial. During his testimony, the State refreshed his recollection by allowing him to review a copy of a police report which included statements about the confiscation of marijuana and firearms from Appellant's home during the 2016 search warrant execution. The State then instructed him to put the report away. The State's

questioning continued and the State asked Corporal Cartwright about photographs taken during the execution of the search warrant and items in the photographs.

> **SAO ATTORNEY** []: Okay, and what is that?
>
> **CORPORAL CARTWRIGHT**: It is a coat. It was a closet that we found inside the door that immediately inside the door there was a coat closet to the left, and this was what was inside, obviously, clothing, a skateboard, shoes.
>
> **SAO ATTORNEY** []: Okay. Is there anything significant to the investigation in that photograph?
>
> **[DEFENSE COUNSEL]**: Objection, leading.
>
> **JUDGE WEST**: Well, it is clothes. It's overruled, it's clothes, though.
>
> **CORPORAL CARTWRIGHT**: I can tell you I collected the jacket that is in the picture.
>
> **SAO ATTORNEY** []: Okay, and it is not a really great picture of the jacket. Could you describe what you saw with your own eyes?
>
> **CORPORAL CARTWRIGHT**: It had a furry hood, it was black, it was a heavier winter coat. And I was asked to collect it. It is right there on the bottom of the picture.
>
> **SAO ATTORNEY** []: And when you say, a furry hood, what do you mean?
>
> **CORPORAL CARTWRIGHT**: It's got fur on it.
>
> **SAO ATTORNEY** []: Yeah, thanks. Do you recall what color the fur was?
>
> **CORPORAL CARTWRIGHT:** It's a brown . . . a brownish tan.
>
> **SAO ATTORNEY** []: Okay, okay. Can we now go to 176?
>
> **CORPORAL CARTWRIGHT:** This was the master bedroom of that residence.

SAO ATTORNEY []: Okay, did you collect anything in that room?

CORPORAL CARTWRIGHT: Yes.

SAO ATTORNEY []: Okay, what did you collect?

CORPORAL CARTWRIGHT: I believe we collected firearms and marijuana, as well as-

[DEFENSE COUNSEL]: Objection, objection.

A bench conference immediately followed the objection, and Appellant requested a mistrial based on the testimony relating to the firearms and marijuana. The jury exited the courtroom and the court inquired about the State's preparation of Corporal Cartwright.

JUDGE WEST: Did you say, "Listen, don't mention the firearms"?

SAO ATTORNEY [1]: He was prepared. I don't recall asking him specifically about that line of questions.

JUDGE WEST: Okay, she is saying yes.

SAO ATTORNEY [2]: No, I am saying he was prepped.

JUDGE WEST: Yeah.

SAO ATTORNEY [2]: I didn't specifically say that.

JUDGE WEST: Okay, alright

SAO ATTORNEY [2]: That's true.

JUDGE WEST: So both can be true, he can be prepped and—

SAO ATTORNEY [2]: And when—

SAO ATTORNEY [1]: We talked to him about what we want, what we were talking about, where we are going.

JUDGE WEST: Right, I gotcha.

> **SAO ATTORNEY [1]**: Specifically, obviously, everything we have already talked about. And then we need to get to the search warrant, and it was the cell phones and the . . . the jacket.

The court granted Appellant's motion for a mistrial the following day, stating "we are going to declare a mistrial, and we will make the appropriate finding of the manifest necessity."

A third trial was scheduled for February 2024. On June 30, 2023, Appellant filed a pretrial motion to dismiss the charges, asserting that the State was reckless in its preparation and questioning of Corporal Cartwright and that another trial would violate his common law double jeopardy rights. During a hearing on September 7, 2023, the court heard arguments from both the State and Appellant's counsel.[1] The judge listened to an audio recording of Corporal Cartwright's testimony after the arguments of counsel and took the matter under advisement.

On October 12, 2023, the court denied Appellant's motion, finding that the State's mishandling of Corporal Cartwright's testimony was not intentional or reckless. The court stated:

> Now I could not find, and I worked through the briefs – through the Motion, I could not find a Maryland Court that directly mentioned recklessness. I think intent is really what, really what drives it in Maryland.
>
> So to me, you know, after listening to it, having my memory jogged, listening to the arguments, I don't think the State intentionally caused a mistrial. I don't think they were doing this for any sort of advantage, gain, to gain the upper hand on Mr. Santana or to deprive him of any sort of right or to introduce, and when I say the State, I mean the lawyers, or to introduce things into his trial purposefully that would prejudice him.

[1] The same trial judge presided over both Appellant's second trial and the motion to dismiss hearing.

> And, in fact, when it happened, I don't even think there was much of an argument or a discussion about the mistrial from the State. So, that's number one.
>
> Number two, I don't know at the end of the day if I should be applying sort of a recklessness standard to this or not, but I will say that as I observed it, I think the question and the unfortunate answer is the type of thing that, to use the word again, unfortunately happens from time to time in a case.
>
> And I do note that the State was, or had attempted to lead the witness and I don't know if they were trying to lead the witness to avoid this issue, I'm not saying that, but I do think and I think I know where this case goes, but I do think we had a question that produced a – the, an undesired answer, there was a request for a mistrial and we worked through that and I think that was appropriate.
>
> And I think everything that happened, I don't think any of it was intentional to gain any sort of advantage, to prejudice the Defendant. I don't even think it would meet the definition of reckless. Unfortunate, for sure.
>
> So I'm going to deny the Defendant's Motion.

Appellant timely noted this appeal. Further proceedings in the circuit court have been stayed.

STANDARD OF REVIEW

"[W]e review the granting or denial of a motion to dismiss *de novo*." *State v. Fabien*, 259 Md. App. 1, 12–13 (2023). This court examines "without deference a trial court's conclusion as to whether the prohibition on double jeopardy applies." *Scott v. State*, 454 Md. 146, 167 (2017). Whether the State intentionally caused a mistrial is a factual finding. *Fields v. State*, 96 Md. App. 722, 742 (1993). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

DISCUSSION

I. Maryland's common law double jeopardy doctrine does not recognize reckless conduct by the State as a bar to retrial.

Appellant argues that the circuit court erred in denying his motion to dismiss on double jeopardy grounds. Appellant concedes that when a mistrial occurs in Maryland, its double jeopardy common law bars a retrial when there is intentional misconduct by the State. He asks this Court to expand Maryland's common law to include mistrials caused by the reckless conduct of the State. He asserts that such an expansion would more adequately protect defendants' rights and has been applied in other jurisdictions. Appellant contends that this Court is empowered to adopt the reckless conduct standard because the line of cases in Maryland utilizing the intentional conduct standard are Fifth Amendment double jeopardy cases, not common law cases.

The State argues that Maryland's common law double jeopardy doctrine does not attach until a verdict is rendered. While there are several exceptions to this rule, Appellant's case does not fall within those exceptions because no factual issues pertaining to the elements of his charges have been decided. The State agrees that intentional prosecutorial conduct resulting in a mistrial invokes a Fifth Amendment double jeopardy analysis and not an analysis under the common law. The State contends that this Court cannot disturb well-established common law doctrines recognized by the Maryland Supreme Court. Further, if this Court could modify the intentional conduct standard, it should decline to do so because Appellant has not provided adequate justifications for such a modification.

The Fifth Amendment's prohibition against double jeopardy is applicable to the states through the Fourteenth Amendment. U.S. CONST. amend. V. The Double Jeopardy Clause protects a defendant from "'a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.'" *State v. Frazier*, 469 Md. 627, 640–41 (2020) (quoting *State v. Jones*, 340 Md. 235, 242 (1995). "Although there is no guarantee against double jeopardy in the Maryland Constitution or Declaration of Rights, 'Maryland common law provides well-established protections for individuals against being twice put in jeopardy.'" *Scott v. State*, 230 Md. App. 411, 430–31 (2016), *aff'd*, 454 Md. 146 (2017) (quoting *State v. Long*, 405 Md. 527, 536 (2008)).

Maryland common law double jeopardy rights are "not coextensive with the Fifth Amendment Double Jeopardy Clause in every way[.]" *Id.* at 436. We discussed a notable distinction between Maryland common law double jeopardy rights and Fifth Amendment double jeopardy rights in *Fields v. State* by highlighting the different points at which these rights attach during a trial. 96 Md. App. at 729. Under Maryland common law, double jeopardy rights attach upon the rendering of a verdict. *Id.* 728. In contrast, the Fifth Amendment's prohibition against double jeopardy attaches once a jury is sworn in. *Id.* at 729. We explained that when the United States Supreme Court decided that mistrials and retrials implicated Fifth Amendment double jeopardy protections in *Wade v. Hunter*, 336 U.S. 684 (1949), "it became logically compelling to disengage the attachment of jeopardy from the rendering of a verdict and to move it back in time to the beginning of the trial."

Id. However, this Court recognized that "that mistrial/retrial law, albeit now a part of the federal constitutional law of double jeopardy under the Fifth Amendment, has never been included within the coverage of the Maryland common law of double jeopardy." *Id.* at 728. Because "[t]he declaration of a mistrial . . . occurs before the jury has rendered its verdict . . . such a mistrial could not (and still cannot) trigger a double jeopardy issue" under Maryland's common law. *Giddins v. State*, 163 Md. App. 322, 329–30 (2006) (describing the attachment of double jeopardy rights prior to a verdict as "a federal phenomenon alone and [having] nothing to do with Maryland law"). Where a prosecutor or trial judge insist on a mistrial over a defendant's objection, a subsequent prosecution will generally be barred. *Id.* at 334 (collecting cases). A defendant's request for a mistrial will typically waive the prohibition. *Thanos v. State*, 330 Md. 576, 587–88 (1993).

The Maryland Supreme Court has recognized that the common law double jeopardy rights of criminal defendants may attach prior to a jury's rendering of a verdict in limited circumstances. In *Kendall v. State*, the trial court denied a defendant's motion for judgment of acquittal and "terminated the prosecution of those charges for a purely procedural reason—noncompliance with the rule on service of process[.]" 429 Md. 476, 480 (2012). In examining whether the defendant's double jeopardy rights had attached as a result of the denial of his motion for judgment of acquittal, the Supreme Court adopted the following standard for determining whether a court's action functions as the equivalent of a verdict, stating:

> The prohibition against double jeopardy, an important protection provided by the federal Constitution and our common law, precludes further

> prosecution of a defendant on a charge following an acquittal on that charge. That protection is triggered not only by a properly-labeled "acquittal" but also by a "ruling of the judge, whatever its label, [that] **actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged**."

Id. at 479 (emphasis added) (quoting *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977)). The Supreme Court further noted its holding from *Taylor v. State*, 371 Md. 617 (2002), that a "'dismissal' of charges was in substance an acquittal that triggered the protection against double jeopardy." *Id.* at 480. In *Kendall*, the Supreme Court concluded that a "dismissal of charges for a purely procedural reason unrelated to guilt or innocence does not trigger the protection against double jeopardy." *Id.* A retrial was not barred. *Id.*

In *State v. Smith*, this Court examined whether Smith's double jeopardy common law rights were violated. 244 Md. App. 354, 365 (2020). There, although the trial court had entered on its docket "the grant of a motion for judgment of acquittal," the substance of the order was not an acquittal. *Id.* at 396. We explained that the court's action did "not implicate Maryland's common law protections against double jeopardy . . . because the circuit court had no evidence before it to consider, the substance of the court's action was a dismissal, not the grant of judgments of acquittal[.]" *Id.* We applied the rule delineated in *Kendall* stating that there must be "'a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 396–97 (first quoting *Kendall*, 429 Md. at 479; then quoting *Martin Linen Supply Co.,* 430 U.S. at 571).

In *State v. Hallihan*, Hallihan was charged with several assault offenses. 224 Md. App. 590, 592 (2015). Prior to trial, he moved to dismiss the charges, arguing that the State "failed 'to state an offense.'" *Id.* at 597. The State alleged that Hallihan's use of a sleeper hold during his assault on the victim constituted an intent "to cause serious injury or death[.]" *Id.* at 595. The issue at the motions hearing was the extent to which placing a victim in a sleeper hold posed a safety risk to the person. *Id.* at 597–98. The trial court ultimately dismissed the charges, and the State filed an appeal. *Id.* at 599. Hallihan challenged the State's right to an appeal, arguing that his common law double jeopardy rights were violated as a result. *Id.* This Court held that double jeopardy did not attach "because at the hearing on the motion to dismiss, all the judge heard was oral argument. Appellant, therefore, was never in jeopardy at any point. Unlike the cases decided in *Taylor*, the motions judge could not have weighed the sufficiency of the evidence because no evidence was before him." *Id.* at 607.

In sum, Maryland case law makes clear that double jeopardy rights attach only when a court's action amounts to an acquittal or conviction. We view Appellant's argument that Maryland's common law prohibition against double jeopardy should be expanded as a contravention of well-established appellate precedent. We decline to disturb the Supreme Court's holding that a factual finding pertaining to the elements of the criminal charge must exist in order to invoke common law double jeopardy. In the case at bar, the court did not resolve any factual findings pertaining to the elements of Appellant's charges. The trial court's only factual finding pertained to prosecutorial conduct for purposes of determining

the procedural issue. Accordingly, Appellant's common law double jeopardy rights have yet to attach.

Assuming *arguendo,* that Appellant's double jeopardy rights did attach as a result of the mistrial, we would still decline to adopt a reckless conduct standard for analysis under the Fifth Amendment. Maryland's case law has unequivocally recognized an intentional conduct standard in such cases. The earliest instance is *Tabbs v. State*, where we held that the proper standard for assessing mistrials was whether the State acted with intent and not whether the State's conduct was grossly negligent. 43 Md. App. 20, 49 (1979). We explained that "it is not the law of Maryland which we are expounding but the Constitution of the United States" meaning the intentional conduct standard refers to Fifth Amendment double jeopardy, not Maryland's common law double jeopardy. *Id.* In that same year, the Maryland Supreme Court noted the holding in *Tabbs* when it decided *Bell v. State*, 286 Md. 193 (1979). It held that a mistrial requested by a defendant will not raise the bar of double jeopardy unless:

> [E]rror or misconduct . . . was committed by either the prosecution or the court with the intention of (1) forcing the defendant to move for or consent to a mistrial, or (2) prejudicing his prospects for an acquittal if the trial continued to a verdict. It is "bad faith conduct by judge or prosecutor" with such intent that prohibits retrials. [Footnote omitted.]
>
> The keystone of the test formulated and consistently followed by the Supreme Court is the requirement of "intent." And intent is implicit in "bad faith."

Id. at 204–05. There, Bell was invoking her Fifth Amendment double jeopardy rights. *Id.* at 194.

The U.S. Supreme Court decided *Oregon v. Kennedy*, 456 U.S. 667 (1982) and held that a defendant may raise the issue of Fifth Amendment double jeopardy rights where a prosecutor "intended to provoke the defendant into moving for a mistrial." *Id.* at 679. In *Kennedy*, the respondent "was charged with the theft of an oriental rug." *Id.* at 669. During cross-examination of an expert witness who was to testify about the value and identity of the rug, the defense counsel asked about the expert's criminal complaint against the respondent to establish bias. *Id.* On redirect, the prosecution attempted to establish why the complaint had been filed, and, in the course of questioning, called the respondent a "crook[.]" *Id.* The trial court granted a mistrial, and the prosecution sought to retry the case. *Id.* The respondent argued that his retrial should be dismissed on Fifth Amendment jeopardy grounds because the prosecution's conduct was intentional. *Id.* The U.S. Supreme Court disagreed and held that a retrial was not barred because the prosecution's "crook" comment was not intended to cause a mistrial. *Id.* at 679.

Following the *Kennedy* decision, Maryland courts have continued to apply the intentional conduct standard to Fifth Amendment cases. In *West v. State*, the appellant was convicted of rape and appealed his conviction on the grounds that a retrial was barred under his Fifth Amendment double jeopardy rights following a mistrial. 52 Md. App. 624 (1982). During the first trial, the prosecution informed the jury in its opening statement that a particular witness was unavailable to testify. *Id.* at 629. During the prosecution's examination of a police officer, the officer testified that the unavailable witness "implicated the appellant in the rape." *Id.* The police officer also testified that he did not know the

witness was not going to testify. *Id.* Appellant's request for a mistrial was granted. *Id.* at 630. This Court acknowledged *Kennedy*, and stated what constitutes intentional conduct:

> [K]nowing 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. at 634. We held that the prosecutor did not attempt "to goad or provoke" the appellant into requesting a mistrial because the prejudicial testimony was likely the result of a "recklessly assertive witness." *Id.* at 638. We further noted that the witness likely had no ulterior motive either, and even if he did, it would not be attributed to the prosecution. *Id.*

In *Thanos v. State*, the petitioner received two convictions for capital murder. 330 Md. at 580. In his sentencing hearing, the petitioner sought to introduce mitigating evidence of his reduced capacity to understand the criminality of his acts. *Id.* at 582–83. The State introduced the testimony of an expert witness who stated that he relied upon records that the parties agreed were inadmissible. *Id.* Thanos requested a mistrial which the trial court granted. *Id.* at 583. Thanos sought to avoid retrial based on his Fifth Amendment double jeopardy rights. *Id.* at 587. The Supreme Court "afford[ed] great deference" to the trial judge's finding and held that the State "did not intend to abort the first proceeding." *Id.* at 590. The expert had received the records in advance of the first proceeding, and thus, the Supreme Court noted that such acts would rarely constitute misconduct because a prosecutor could not be held to attempt to avoid the outcome of a trial that had not yet begun. *Id.*

In *Fields v. State*, the appellant and his codefendant were tried for armed robbery and other related offenses. 96 Md. App. at 725. The court granted a mistrial requested by the appellant after an acrimonious dispute between a prosecutor and a judge took place in front of the jury. *Id.* at 734, 748–53. The State sought to retry the charges, and the appellant argued that a retrial would violate his Fifth Amendment double jeopardy rights. *Id.* at 725. We applied the intentional conduct standard, stating:

> It is the deliberate commission of error for the specific purpose of sabotaging a trial that is going badly for the State so that the State may have another opportunity to do better. It interferes with a defendant's right to keep his tribunal, once empaneled, together to the sweet or bitter end by goading him or provoking him into asking for the declaration of mistrial in the expectation that his agreement to the mistrial will then estop any future double jeopardy claim.

Id. at 746. The intentional conduct standard was not satisfied in this instance because the argument between prosecutor and judge was not the sole responsibility of the prosecutor, there was no motivation for the prosecutor to sabotage the trial, the argument did not prejudice the appellant, and the judge and prosecutor's disagreement was not directed at the appellant. *Id.* at 755–57.

In *Giddins v. State*, the appellant was charged with possession of cocaine with the intent to distribute. 163 Md. App. at 324. The prosecutor caused the appellant to seek a mistrial after he engaged in an improper line of questioning regarding the target of a drug investigation. *Id.* at 349–50. In evaluating whether the prosecutor acted with intentional conduct in causing the mistrial, we reiterated the intentional conduct standard for Fifth Amendment double jeopardy cases citing *West*, *Thanos*, *Fields*, *Tabbs*, and *Bell*. *Id.* at

340–41. We held that the appellant did not prove that the prosecutor acted with the intention of causing the mistrial. *Id.* at 361–62. It was too early in the trial to determine that the prosecutor sought to sabotage it, and the prosecutor opposed the motion for a mistrial, attempting to continue with the case. *Id.*

In sum, we reiterate that, in Maryland, the intentional conduct standard is the standard to be utilized in analyzing Fifth Amendment double jeopardy. We decline to expand such analysis and to apply the reckless conduct standard proposed by Appellant.

II. The court did not err in denying the motion to dismiss.

Appellant does not challenge the trial court's factual finding that the State did not intentionally cause a mistrial. As such, under Md. Rule 8-504(a)(3), this court need not address arguments related to this issue because Appellant has failed to set them "forth in the 'Questions Presented' section" of his brief. *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 62 (2018) (quoting *Green v. N. Arundel Hosp. Ass'n*, 126 Md. App. 394, 426 (1999)). Appellant argues that the circuit court erred in failing to find that the State acted recklessly when it did not properly prepare Corporal Cartwright. According to Appellant, the State undertook a line of questions that the State either knew or should have known would have resulted in improper testimony.

We conclude that the reckless conduct standard proposed by Appellant is not Maryland law and we, therefore, affirm the court's denial of Appellant's motion to dismiss.

As an aside, we observe that the court's denial of Appellant's motion to dismiss was based on clearly delineated factual findings that the prosecutor's conduct was neither intentional nor reckless.

> I don't think they were doing this for any sort of advantage, gain, to gain the upper hand on Mr. Santana or to deprive him of any sort of right or to introduce, and when I say the State, I mean the lawyers, or to introduce things into his trial purposefully that would prejudice him.
>
> And, in fact, when it happened, I don't even think there was much of an argument or a discussion about the mistrial from the State. . . .
>
> And I do note that the State was, or had attempted to lead the witness and I don't know if they were trying to lead the witness to avoid this issue, I'm not saying that, but I do think and I think I know where this case goes, but I do think we had a question that produced a – the, an undesired answer, there was a request for a mistrial and we worked through that and I think that was appropriate.
>
> And I think everything that happened, I don't think any of it was intentional to gain any sort of advantage, to prejudice the Defendant. I don't even think it would meet the definition of reckless.

We also note that pretrial conduct is generally not a basis for a finding of intentional conduct. *Thanos*, 330 Md. at 590.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Circuit Court for Charles County
Case No. 08-K-17-000083

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1572

September Term, 2023

MIGUEL ANGEL SANTANA

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Shaw,

JJ.

Concurring Opinion by Nazarian, J.

Filed: February 25, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

I agree that the Maryland common law of double jeopardy in its current state compels us to affirm the Circuit Court for Charles County's denial of Mr. Santana's motion to dismiss. In my view, though, the circuit court erred in finding that the prosecutor hadn't acted *at least* recklessly in preparing and presenting Corporal Cartwright's testimony. And that joins fully the question of whether common law double jeopardy principles *should* preclude a re-trial. My colleagues are correct that it isn't our role to flout existing precedent. But our Supreme Court has never *rejected* the argument that prosecutorial recklessness should bar a re-trial (or in this case, a re-re-trial) after mistrial, and I agree with Mr. Santana that this case presents an appropriate opportunity to consider that question. Accordingly, I concur in the judgment.

I.

Double jeopardy doesn't bar a re-trial after mistrial unless the prosecutor intentionally (to trigger current law) or recklessly (to tee up the question Mr. Santana raises) caused the mistrial. Here, the circuit court found as a factual matter that the State hadn't acted intentionally or recklessly, and my colleagues' decision to affirm that finding ends the analysis. I see this threshold factual issue differently, and before descending into the double jeopardy doctrine, I would hold that the court erred in finding the prosecutor's actions here weren't at least reckless.

Mr. Santana already has been tried twice. The first trial ended in a mixed verdict—a conviction (and life sentence) on two counts but a hung jury on four others—and the State decided to try Mr. Santana again; one of the prosecutors in the first trial also prosecuted

the second. The particular witness the State called—Corporal Cartwright—was retired and no longer a corporal by the time of the second trial.

The mistrial at issue occurred after an agreement limiting the scope of the testimony of Corporal Cartwright was breached during his direct testimony in the second trial. The parties didn't write the agreement in a stand-alone document or summarize it up front on the record. But as the parties discussed it on the record during the second trial, everybody understood that the State had agreed to prepare its witnesses not to talk about anything recovered from Mr. Santana's house in connection with other investigations, specifically firearms and marijuana:

> [DEFENSE COUNSEL]: Well, my understanding was that the witnesses [had] been instructed by the State not to talk about anything that was recovered in relation to the other cases.
> And here, again, the question[] was asked, the question was asked, "What did you recover?"
> And the witness, very understandably, answered what he recovered because it was elicited.
> [THE COURT]: Right.
> [DEFENSE COUNSEL]: So—
> [THE COURT]: Okay. Now, [Prosecutor], you were in those other cases?
> [THE STATE]: Correct.
> [THE COURT]: Alright, and the other cases that really, I mean, this case is the first that—
>
> [THE STATE]: Well not, to be fair, not in the gun case.
>
> [THE COURT]: No, no, but I meant this case's sort of first iteration?
>
> [THE STATE]: Yes, sir.
>
> [THE COURT]: Was that basically an agreement, or—
>
> [THE STATE]: Yeah, and that was our understanding, too. We weren't anticipating that Corporal Cartwright was going to talk about marijuana and guns, to be honest with you. That was sort

> of out of left field.
>
> [THE COURT]: What did you think he was going to talk about?
>
> [THE STATE]: Cell phones.
>
> [THE COURT]: Cell phones?
>
> [THE STATE]: Because that is what we are talking about and getting into with Detective Elliott and everything else. But he is obviously focusing on everything he recovered, because he is answering the question with the report.

This wasn't an issue of invited error or a completeness response to testimony brought out by the defense. And indeed, during the first trial, the State performed the agreement. The prosecutor asked Corporal Cartwright's colleague, Detective Elliott, several questions about photographs from Mr. Santana's home, one of which depicted a cell phone that officers recovered:

> [THE STATE]: Okay. And what are those photographs of?
>
> [DETECTIVE ELLIOT]: These are photographs I took during a search warrant on July 20th, 2016, at 2639 Rooks Head.
>
> [THE STATE]: Okay. [Defense's technician], if you could turn that back on, thank you. Okay. Now looking at 175, what is that?
>
> [DETECTIVE ELLIOT]: If you look at this, this is the first floor, I guess you would call it the hallway coat closet. This is the hallway, you're looking inside, it's a very small closet, and on the bottom here is a black jacket with the fur hood.
>
> [THE STATE]: Okay. And what about 176?
>
> [DETECTIVE ELLIOT]: This is the second floor master bedroom.
>
> [THE STATE]: Okay. What about 177?
>
> [DETECTIVE ELLIOT]: This is a dresser within that same master bedroom.
>
> [THE STATE]: Okay. And 178?

> [DETECTIVE ELLIOT]: *It's a photograph of a cell phone that was located on the floor adjacent to the bed in the master bedroom between the wall and the bed.*
>
> [THE STATE]: *Okay. And did you recover that cell phone?*
>
> [DETECTIVE ELLIOT]: I did.

(Emphasis added). The corporal had testified earlier in that trial and relayed the same information that Detective Elliot identified in the photographs—a closet, the master bedroom, and a cell phone:

> [THE STATE]: [Defense's technician]? Okay. Now, looking at 175, can you describe what we are looking at there?
>
> [CORPORAL CARTWRIGHT]: That is a view of the closet inside the home. We collected this jacket right here.
>
> [THE STATE]: Okay.
>
> [CORPORAL CARTWRIGHT]: It's in the downstairs closet. As soon as you enter the door, it was to the left.
>
> [THE STATE]: Okay, so in . . . is this the townhome at Rooks Head Place?
>
> [CORPORAL CARTWRIGHT]: Yes, ma'am.
>
> [THE STATE]: Okay, so you entered the home, and where is this closet?
>
> [CORPORAL CARTWRIGHT]: As soon as you go in the door, there was a living room to the left, then there were stairs to the right and a kitchen towards the back. It was right at the base of the stairs, just inside the front door of the home.
>
> [THE STATE]: Okay, and looking at 176, what is that?
>
> [CORPORAL CARTWRIGHT]: That's a view of the master bedroom upstairs.
>
> [THE STATE]: And What about 177?
>
> [CORPORAL CARTWRIGHT]: That's another view of the master bedroom, looking at a . . . sorry, the dresser that was just inside the door.
>
> [THE STATE]: And what about 178?

> [CORPORAL CARTWRIGHT]: It's a view of the area of the bed that we saw in the first picture, just the inside of it.
>
> [THE STATE]: *Okay, and is there a phone on the floor in 178?*
>
> [CORPORAL CARTWRIGHT]: *Yes, ma'am, there's a phone right there.*

(Emphasis added). Had that testimony repeated itself in the second trial, we wouldn't be here (on this issue, anyway).

Unfortunately, the State breached the agreement in the second trial. While examining the corporal using the photographs and, importantly, the officers' report of the search, the State elicited testimony about firearms and marijuana (and not a cell phone):

> [THE STATE]: Okay, okay. Can we now go to 176?
>
> [CORPORAL CARTWRIGHT]: This was the master bedroom of that residence.
>
> [THE STATE]: Okay, did you collect anything in that room?
>
> [CORPORAL CARTWRIGHT]: Yes.
>
> [THE STATE]: *Okay, what did you collect?*
>
> [CORPORAL CARTWRIGHT]: *I believe we collected firearms and marijuana*, as well as—
>
> [DEFENSE COUNSEL]: Objection, objection.

(Emphasis added).

This testimony was a function of two errors. The *first* was the State's deficient preparation of the corporal and the *second* was the way the State elicited the ultimately improper testimony. As to the *first* error, when the court asked whether the State had told the corporal not to mention firearms, the State responded that, "He was prepared. I don't recall asking him specifically about that line of questions." But that response didn't really answer the court's question, especially in the context of the State's agreement not to elicit

testimony about the firearms and marijuana. The warrant was executed in 2016 and the second trial took place in 2023 (almost six years later), so the witness would need to be prepared. But all he had to do was testify again the same way he testified the first time.

That's not what happened. Although the State claimed the corporal was prepared, the prosecutor couldn't "recall asking him specifically about that line of questions." And once the corporal got to the stand, the State committed the *second* error: by the State's reckoning, the corporal answered as he did because he was "obviously focusing on everything he recovered, because he [was] answering the question with the report." The report the State provided him to support his testimony doesn't mention a cell phone but *does* mention (among other things) detailed descriptions of the firearms, each firearm's attendant ammunition, and marijuana. So not only did the State fail to prepare the corporal on the appropriate (and agreed upon) scope of his testimony, but they gave him a supporting document guaranteed to guide him outside the boundaries of the agreement—or else they prepped him with a document that didn't comply with the agreement (and his testimony from the first trial). And this was all preventable. After all, the State had elicited the cell phone testimony from Detective Elliot and Corporal Cartwright in the first trial without error.

In denying Mr. Santana's motion to dismiss, the circuit court found that the State's conduct wasn't intentional or reckless. Although I recognize that we review for clear error a trial court's findings of the prosecutor's intent when a mistrial is granted on a defendant's request or with the defendant's consent, *Giddins v. State*, 163 Md. App. 322, 356 (2005),

aff'd, 393 Md. 1 (2006), that deferential standard isn't satisfied here. At the very least, this record leaves us with no confidence that the corporal was prepared to testify as the parties agreed, and as he had in the first trial. And if he was prepared on these boundaries at all (the prosecutor couldn't remember if he was or not), the State undermined that preparation by eliciting the testimony through the report that mentioned firearms and marijuana but didn't mention cell phones. It is impossible not to see this at least as reckless under the circumstances: the corporal's testimony introduced unrelated weapons and drugs into a murder trial without mentioning or attempting to distinguish the unrelated investigation that uncovered them, leaving Mr. Santana no choice but to seek a mistrial that the court had no choice but to grant. We don't have a record that compels a finding that the State torpedoed this trial intentionally—hence the bigger picture question we'll tackle next—but this wasn't merely an accident or something that just happens. As such, the question Mr. Santana asks us to resolve here is at least joined.

II.

And now for the question itself: do double jeopardy principles bar the State from re-trying Mr. Santana in the wake of this particular mistrial? Based on its finding that the State's conduct wasn't reckless or intentional, the circuit court denied Mr. Santana's motion to dismiss. My colleagues are right, *see* slip op. at 12-16, that for Fifth Amendment double jeopardy to attach in these circumstances, a defendant must prove that the State provoked a mistrial intentionally in order to preclude a re-trial. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). In reviewing whether double jeopardy applies under Maryland

common law, we review the lower court's decision *de novo*. *Giddins v. State*, 393 Md. 1, 15 (2006) ("Whether principles of double jeopardy bar the retrial of [a defendant] is a question of law, and therefore we review the legal conclusion of the trial court *de novo*."). And although we, as an intermediate appellate court, lack the authority to decide this case otherwise, I agree with Mr. Santana that the question deserves a fresh look.

A. The Retrial-After-A-Mistrial Double Jeopardy Exception Requires Specific Intent.

This case involves the retrial-after-a-mistrial form of double jeopardy. Where a mistrial is declared over a defendant's objection, federal constitutional double jeopardy principles bar retrial except where there is a manifest necessity to grant the mistrial. *U.S. v. Jorn*, 400 U.S. 470, 479–81 (1971). An example of manifest necessity is the hung jury that occurred at the end of Mr. Santana's first trial. *See id.* (*citing Logan v. U.S.*, 144 U.S. 263 (1892)). And in general, double jeopardy doesn't bar re-trial when the defendant moves for a mistrial. *Kennedy*, 456 U.S. at 672–73. The defendant's motion acts essentially as a waiver. *Fields v. State*, 96 Md. App. 722, 737 (1993) ("Where the mistrial has actually been requested or agreed to by the defense, the pivotal issue becomes one of waiver.").

An exception, and the one at issue here, is where the prosecution has overreached. In those cases, the prosecutor's conduct presents the defendant with an unfair choice "between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976). And so, as the United States Supreme Court held in *Oregon v. Kennedy*, under the Fifth Amendment to the Constitution of the United States, "[o]nly where the governmental conduct in question

is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." 456 U.S. at 676. This rule recognizes two rights inhering in criminal defendants through the Double Jeopardy Clause: the right to complete their trial before the first empaneled tribunal, and the right to retain primary control over the course to be followed in the event of such prosecutorial error. *Id.* at 673–76; *see also Dinitz*, 424 U.S. at 609. But finding a violation of these rights depends on a finding of the prosecutor's specific intent to thwart them, the Court held, because a lower intent requirement risked leaving "virtually no standards for [its] application." *Kennedy*, 456 U.S. at 674–75. This was especially important given that every act from the prosecutor, by the nature of our adversarial system, is designed to prejudice a defendant (albeit fairly, not unfairly). *Id.* at 674. Attorneys are not perfect, so "it will be a rare trial of any complexity in which some proffered evidence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court." *Id.* at 674–75. And a trial court that knows that a mistrial would bar a second trial may be more reticent to grant an otherwise well-founded mistrial motion. *Id.* at 676. Accordingly, the Court determined that the specific intent standard was more practical. *Id.* All it required was for a trial court to make a factual finding, reasoning that "inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Id.* at 675.

Justice Stevens concurred in the judgment. He noted that although a defendant retains an interest in controlling the proceedings against them, the prosecutor also suffers

costs when a court grants a mistrial, such as "time, trouble, and [the] expense of starting all over with the criminal prosecution." *Kennedy*, 456 U.S. at 685–86, (Stevens, J., concurring). But where the prosecutor purposefully injects prejudicial error, the competing interests fall out of balance and the process skews unfairly in favor of conviction. *Id.* at 686. By requiring specific intent, Justice Stevens explained, the Court highlighted the problems with improper manipulation of the process and denounced it correctly, *id.*, but in his view double jeopardy should bar more than just deliberate errors and should also encompass "prosecutorial overreaching or harassment." *Id.* at 687. This is because, as he put it, it is virtually impossible for a defendant to prove a prosecutor's deliberate conduct to provoke a mistrial instead of simply prejudicing the defendant. *Id.* at 688. Moreover, the Court didn't recognize other instances when a defendant's double jeopardy interests would outweigh society's interest in a conviction. *Id.* at 689. These included situations where prosecutors intend to drag defendants through the "embarrassment, expense, and ordeal" of criminal prosecutions even if a conviction cannot be obtained or where prosecutors attempt to introduce enough unfair prejudice to guarantee a conviction but not a reversal on appeal. *Id*. In either situation, the defendant would have no choice but to request a mistrial, just as where the prosecutor intends to provoke a mistrial. *Id.* A prosecutorial overreaching standard would recognize this broader range of unfair prejudice and would not require trial courts to wrestle with identifying "the exact motivation for the prosecutorial error." *Id.* Put another way, tying double jeopardy to overreach would require a court to find, in effect, that the defendant had no realistic choice but to terminate the

proceeding. *Id.*

In what may well have been foreshadowing, our State's high court had articulated a rule much like *Kennedy*'s three years before, in *Bell v. State*, 286 Md. 193 (1979). In that case, the Court held that under the Fifth Amendment's Double Jeopardy Clause, a defendant's successful mistrial motion may bar a retrial if the prosecutor provoked the defendant to request a mistrial deliberately or prejudiced that defendant's chances of an acquittal:

> Retrial is not barred as violative of the Double Jeopardy Clause of the Fifth Amendment when a mistrial is declared at the behest or with the consent of the defendant unless such error or misconduct, sufficient to justify the declaration of a mistrial, was committed by either the prosecutor or the court with the intention of (1) forcing the defendant to move for or consent to a mistrial, or (2) prejudicing his prospects for an acquittal if the trial continued to a verdict. It is 'bad faith conduct by judge or prosecutor' with such intent that prohibits retrials.

Id. at 204–05.

Our Court followed suit in *West v. State*, 52 Md. App. 624, 637 (1982) ("If the prosecutor wins the game unfairly, we make him replay it. When the prosecutor deliberately causes the game to be cancelled unfairly, we do not permit him to reschedule it."). Like Justice Stevens, we too discussed the competing interests at stake during a criminal prosecution, recognizing the defendant's interest in remaining with the original tribunal and the overall right to a fair trial, free from error. *Id.* at 632. We acknowledged that under *Kennedy* double jeopardy prevents retrial only where there is deliberate goading. 456 U.S. at 675–76. And that mistrial and appellate reversal protect the defendant's rights

short of that. *West*, 52 Md. App. at 633. We highlighted how, even in the face of prosecutorial error, a defendant may opt to remain with the same tribunal and wait to see if there is an acquittal, and still seek appellate reversal if they lose. *Id.* at 633, 637. In this way, we said, there "is a significant defense interest in keeping the trial upon the tracks quite apart from the interest in receiving a fair trial," and through the mistrial and appellate reversal remedies, the defendant retains the control of which *Kennedy* spoke. *Id.* at 637.

In *West*, we also thought the *Kennedy* standard was clear. We agreed the specific intent required must be more than a mere general intent to commit error. *West*, 52 Md. App. at 634. It is that where a prosecutor, "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, avert[s] the probable acquittal and liv[es] to fight again another day." *Id.* at 635. Lower culpability, such as negligence, gross negligence, or even deliberate overkill without a desire to abort the trial, is reprehensible but only violates the general right to a trial free from error. *Id.* at 634–35.

Later on, we reiterated that double jeopardy applies to "the deliberate commission of error for the specific purpose of sabotaging a trial that is going badly for the State so that the State may have another opportunity to do better." *Fields*, 96 Md. App. at 746. As a result, "it would seem that prosecutorial conduct occurring pretrial could rarely form the basis for applying the exception to the general rule since the prosecutor would hardly intend to abort a trial before it has even started." *Booth v. State*, 301 Md. 1, 7 (1984); *see Thanos v. State*, 330 Md. 576, 582–83, 590 (1993) (double jeopardy did not attach where State

gave its witness hospital records to examine before a sentencing proceeding in preparation for witness's testimony despite previous court order barring State from using defendant's statements from those same records resulting from defendant's responses to questioning (*citing Booth*, 301 Md. at 7)).

Finally, we noted that where the "appellant was not the intended object of the actions being scrutinized, any merely coincidental impact on him, even assuming some adverse impact, is immaterial." *Fields*, 96 Md. App. at 757–58; *id.* at 755 (reasoning in part that goading that occurred could not be levied solely against prosecutor since judge was also involved in misbehavior and thus shared, at the very least, "dual responsibility").

Today, most states have adopted the *Kennedy* standard. *E.g., State v. White*, 369 S.E.2d 813 (N.C. 1988); *Donovan v. Commonwealth*, 685 N.E.2d 1164 (Mass. 1997); *State v. Michael J.*, 875 A.2d 510 (Conn. 2005); *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

1. The common law approach to retrial-after-a-mistrial double jeopardy has evolved in many states.

Under Maryland common law, jeopardy is "not deemed to attach until a verdict [is] rendered." *Fields*, Md. App. at 728. The Maryland Constitution has no double jeopardy clause, so Maryland courts analyze the retrial-after-a-mistrial double jeopardy exception under the federal Constitution's jurisprudence. *West*, 52 Md. App. at 625, 627 (declining to analyze whether appellant's retrial "unconstitutionally placed him twice in jeopardy" under Maryland common law because "[o]n this subject, independent state grounds is a road leading nowhere"); *Loveless v. State*, 39 Md. App. 563 (1978) (federal grounds);

Jones v. State, 44 Md. App. 417, 419 (1979) (same), *aff'd*, 288 Md. 618 (1980); *Tabbs v. State*, 43 Md. App. 20, 49 (1979) ("[O]ur holding . . . is in keeping with the letter and with the spirit of every [United States] Supreme Court announcement which has been made in this regard."); *Lee v. State*, 47 Md. App. 367, 368 (1980) (explaining *Bell v. State*, which foreshadowed rule from *Kennedy*); *Nicholson v. State*, 157 Md. App. 304 (2004) (analyzing whether *Kennedy* applies to defendant's allegedly forced plea deal withdrawal).

Like Maryland, four other states' constitutions lack an explicit double jeopardy clause: Vermont, North Carolina, Massachusetts, and Connecticut. Vermont spoke first. In *State v. Wood*, 498 A.2d 494 (Vt. 1985), a defendant urged the state Supreme Court to adopt Justice Stevens's concurrence in *Kennedy* as the governing rule in Vermont. *Id*. at 494. Declining to do so, the court highlighted how the conduct giving rise to the defendant's successful mistrial motion was the State's witness referencing evidence during the trial that the court had excluded in a *motion in limine*. *Id.* at 495. But because the court deemed this merely negligent, it held that neither the *Kennedy* standard nor the Stevens standard would bar that conduct. *Id.* Hence, it did "not adopt a Vermont standard at th[at] time," leaving the matter open. *Id.*

Then came North Carolina. In *State v. White*, 354 S.E.2d 324 (N.C. Ct. App. 1987), the state's intermediate appellate court echoed Justice Stevens's concurrence, reasoning that it was difficult to prove a prosecutor's specific intent and that by requiring it the *Kennedy* standard virtually eviscerated the double jeopardy exception. *Id*. at 329. That court embraced the prosecutorial overreaching or harassment standard as it was "better

reasoned . . . ." *Id.* (*citing Kennedy*, 456 U.S. at 689 (Stevens, J., concurring)). North Carolina's Supreme Court disagreed, though, and held that the *Kennedy* standard was the proper test for North Carolina, as it was "fairer and easier to apply than an overreaching or harassment standard." *White*, 369 S.E.2d at 815.

Massachusetts spoke on this matter in *Donavan v. Commonwealth*, 685 N.E.2d 1164 (Mass. 1997). There, the court adopted the *Kennedy* standard, recognizing that in "ruling on such double jeopardy claims based on State grounds, [Massachusetts has] followed the Federal constitutional standard articulated in [*Oregon v. Kennedy*]." *Id.* at 1165. Massachusetts again considered the issue in *Perrier v. Commonwealth*, 179 N.E.3d 567 (Mass. 2022), and declined to adopt a broader standard, "remaining satisfied that unintentional mistakes do not preclude retrial." *Id*. at 573. The court there highlighted how, unlike Massachusetts, the states that had adopted a broader standard all contained an "analogous provision providing an independent protection against double jeopardy." *Id.* at 574 n.6.

Finally, and most recently, Connecticut adopted the *Kennedy* standard in *Michael J.* 875 A.2d at 534–35. In tracing that state's common law, the court noted that the absence of a double jeopardy clause within its constitution indicates generally that the common law mirrors rather than exceeds the federal Constitution's due process clause. *Id.* at 529 (citation omitted). The court also recognized that Connecticut traditionally has "afforded defendants far less protection against double jeopardy than the federal [C]onstitution" because "jeopardy for the defendant continued until a result was attained that was free from

error, even if that required multiple trials." *Id.* So, the court mused, it would seem "outlandish" to conclude that Connecticut's double jeopardy protection at common law was broader than the federal Constitution. *Id.* at 530. In addition, in 1965, the state's delegates considered adding a double jeopardy clause to Connecticut's constitution but did not, for fear of a perceived change from the status quo at common law. *Id.* at 530. Lastly, like Massachusetts, the court noted that the states with standards broader than *Kennedy* have their own double jeopardy clauses, and thus their rationale for adopting a broader standard was unpersuasive. *Id.* at 533.

2. Seven states offer broader protection.

Today, some states—specifically Oregon, Arizona, Nevada, Michigan, New Mexico, Hawai'i, and California—have gone their own way. As I detail next, these states offer criminal defendants broader double jeopardy protection than the *Kennedy* rule does.

On remand from the United States Supreme Court, Oregon rejected *Kennedy* as a matter of state constitutional law. *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983). The Oregon Supreme Court reasoned that under the state's constitution, the rule from *Kennedy* focused too narrowly on prosecutorial misconduct when other court officials, such as bailiffs, could err as well and cause a mistrial. *Id.* at 1325. And yet, as that court reasoned, the double jeopardy bar was not divined to punish prosecutors. *Id.* at 1326 ("[P]unishment of the errant official is not the object of the guarantee against placing the defendant again in jeopardy for the same offense."). According to that court, from a criminal defendant's point of view, when forced "between accepting prejudicial errors or undergoing a second

trial, the precise degree of the official's mens rea is a matter of indifference." *Id.* at 1324. Therefore, the court reasoned, the Oregon constitution barred retrial "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal." *Id.* at 1326.

In *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984), the Arizona Supreme Court echoed Justice Stevens's concurrence in *Kennedy* and disagreed with the rule requiring "so specific an intent [that it] must necessarily involve a subjective inquiry [that] is too difficult to determine." *Id*. at 271. The court pointed out that the *Kennedy* standard did not live up to the double jeopardy clause's purpose to protect the defendant's interest in being tried once in the original tribunal. *Id.* For those reasons, the court held that jeopardy would attach when a mistrial is granted, whether by a defendant's motion or by the court, due to a prosecutor's improper conduct that can only be addressed through granting a mistrial, where that prosecutor knew their conduct was improper but acted indifferently to a potential mistrial or appellate reversal:

> 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. at 271–72 (footnote omitted).

Nevada and Michigan followed Arizona's direction, although Michigan was not as conclusive. Nevada echoed Justice Stevens, stating that while a prosecutor's conduct intended to goad a defendant to request a mistrial triggered the double jeopardy clause, so too did the prosecutor's egregious conduct intended to secure a conviction. *Thomas v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 402 P.3d 619, 626 (Nev. 2017). Michigan added that the principle applied equally to prosecutors who, while indifferent to the possibility of a mistrial, "willingly and consciously engage[] in conduct which [they] know[] is prejudicial, and which cannot be cured by means short of a mistrial . . . ." *See People v. Dawson*, 397 N.W.2d 277, 282 (Mich. Ct. App. 1986), ("[The] purpose of the double jeopardy clause is not to penalize the state, but to protect individuals against prosecutorial harassment."), *aff'd*, 427 N.W.2d 886 (Mich. 1988). In either case, the conduct put the defendant to a choice between continuing a tainted trial or aborting it. *Id.* Both states adopted Arizona's test as the appropriate rule. *Id.* at 284; *Thomas*, 402 P.3d at 626–27. However, in Michigan, when that same case ascended to the state supreme court, that court found no need "to decide whether [that] Court should go further than the federal standard" because counsel for the government conceded at oral argument that the prosecutor's conduct at trial was improper under the *Kennedy* standard. *People v. Dawson*, 427 N.W.2d 886, 897 (Mich. 1988).

New Mexico also rejected the *Kennedy* rule. That state's highest court highlighted how the driving force behind double jeopardy protection isn't punishment but rather the defendant's interest in retaining the first empaneled tribunal. *State v. Breit*, 930 P.2d 792,

800 (N.M. 1996). The court also echoed Justice Stevens's views that proving a prosecutor's intent was nearly impossible and that the *Kennedy* standard left out other flagrant prosecutorial conduct that forced defendants to an untenable choice. *Id.* at 799. Finally, the court reasoned that, although the Supreme Court viewed the *Kennedy* rule as workable, the "succinctness and manageability of a standard of law does not necessarily bespeak its justness or applicability to the problem it is intended to address." *Id.* at 798. The court held that under New Mexico's constitution, double jeopardy attaches when improper official conduct is so unfairly prejudicial to a defendant that only a mistrial or a motion for a new trial can cure it and if "the official knows that the conduct is improper and prejudicial, and . . . either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." *Id.* at 803.

In Hawai'i, when a "trial error deprives society of its right to attempt to prove the defendant's guilt in a single prosecution, the interests of society in vindicating its law generally outweigh the double jeopardy interest of a defendant." *State v. Rogan*, 984 P.2d 1231, 1243 (Haw. 1999). Like all advocates, "the prosecution must serve the truth-seeking and fairness functions of trial and to pursue and present relevant evidence, regardless of which side it benefits." *Id.* at 1244. "[U]nlike any other advocate [however], the prosecutor must always be mindful of his or her primary obligation to seek justice while at the same time fulfilling his or her obligation to seek convictions." *Id.* With this in mind, rather than adopt the *Kennedy* rule, the Hawai'i Supreme Court held that "reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where

the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial." *Id.* at 1249.

Like these other states, California also found the *Kennedy* standard too narrow and that it didn't protect a defendant's double jeopardy interests adequately. *People v. Batts*, 68 P.3d 357, 376 (Ca. 2003). But California found those other states' standards overbroad and not grounded in double jeopardy principles. *Id.* at 378. So in California, a prosecutor's actions that are intended to cause a mistrial trigger the double jeopardy clause. *Id.* at 381. And when the prosecutor thinks that an acquittal is likely and proceeds to sabotage that prospect, double jeopardy bars retrial after mistrial:

> [T]he double jeopardy clause of California Constitution article I, section 15 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 380–81.

3. Two states consider the recklessness standard.

Texas rejected the *Kennedy* standard initially. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996) ("[W]e think it clear that, when a prosecutor's deliberate or *reckless conduct* renders trial before the jury unfair to such a degree that no judicial admonishment can cure it, an ensuing motion for mistrial by the defendant cannot fairly be

described as the result of his free election.") (emphasis added), *overruled by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). That court echoed the Oregon rationale that double jeopardy protections shouldn't turn on proof of the prosecutor's specific intent. *Id.* at 699. The court held that reckless conduct is indistinguishable constitutionally from the same conduct committed deliberately.

In 2007, Texas revisited *Bauder* and pulled back to the *Kennedy* standard, holding that where the right at issue is retaining control of the original tribunal, a prosecutor usurps that control only when the prosecutor intends to provoke a mistrial motion. *Ex parte Lewis*, 219 S.W.3d at 358–59. The court found troubling the state's conflicting precedent since *Bauder*. *Id.* at 360. For example, Texas permitted retrial if the case proceeded to verdict and an appellate court later overturned that verdict for prosecutorial misconduct.[2] *Id.* at 359–60. So, if a reckless prosecutor obtained a conviction and an appellate court overturned that conviction, there would be no double jeopardy bar. *Id.* at 360. But if a defendant won on a mistrial motion at trial and the prosecutor was found to be reckless, double jeopardy attached and barred a second trial. *Id.* at 360, 364. In the eyes of that court, the inconsistency would lead fewer courts to grant meritorious mistrial motions. *Id.* at 360. The court was also concerned with the unknowing prosecutor, who, while overstepping, may not know what conduct an appellate court would hold reckless, *id.* at 363, leading it

[2] *See Ex parte Mitchell*, 977 S.W.2d 575, 581 (Tex. Crim. App. 1997) ("[T]he double jeopardy clause of the Texas Constitution does not bar retrial of an accused whose conviction for the same offense has been reversed on appeal, or as the result of a post-conviction writ of habeas corpus proceeding, due to prosecutorial misconduct.").

to revert to the *Kennedy* standard. *Id.* at 371.

Pennsylvania did the opposite: it re-examined the question in 2020 and decided to reject *Kennedy* and adopted a recklessness standard. In *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), the court had held that "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant . . . when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id*. at 325. But more recently, that same court recognized that the *Kennedy* standard did not protect a defendant's double jeopardy interests adequately. *Commonwealth v. Johnson*, 231 A.3d 807, 825 (Pa. 2020). The court emphasized that a defendant should not be subject to multiple trials for the same offense and that the double jeopardy bar was intended to guard citizens against that form of government power, along with the embarrassment, expense, and ordeal of a second trial and what comes with it—the anxiety, fear, and increasing chance of a conviction. *Id.* In response, Pennsylvania adopted recklessness as the requisite mental state: "prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken *recklessly*, that is, with a conscious disregard for a substantial risk that such will be the result." *Id.* at 826 (emphasis added).

B. Maryland Can And Should Reconsider The Intent Standard.

Mr. Santana asks us to re-examine Maryland's application of these core constitutional principles, something that goes beyond our role as an intermediate appellate court. Even so, it is not beyond our role to recognize that our law may be worth revisiting

by our Supreme Court, which does have that authority in an appropriate case.

As an initial premise, Maryland's common law of post-mistrial-retrials need not follow the *Kennedy* rule—we can afford greater double jeopardy protection than *Kennedy*'s baseline requires. To be sure, some jurisdictions that lack explicit double jeopardy clauses, *i.e.*, Connecticut and Massachusetts, have opted to follow *Kennedy*, reasoning in part that the jurisdictions that shifted away from *Kennedy* had individual double jeopardy clauses on which to rely. *E.g., Perrier*, 179 N.E.3d at 574 n.5. But some jurisdictions with double jeopardy clauses in their state constitutions have adopted *Kennedy*, too. *E.g., Ex parte Lewis*, 219 S.W.3d at 371. And yet Maryland's common law double jeopardy protections are, "in some instances, more protective of criminal defendants than the constitutional right." *Antoine v. State*, 245 Md. App. 521, 557 (2020); *compare, e.g.*, *Middleton v. State*, 318 Md. 749, 760 (1990) (double jeopardy barred retrial of first-degree rape charge where jury acquitted on that charge but convicted on second-degree rape charge) *with Ohio v. Johnson*, 467 U.S. 493, 502 (1984) (where jury reaches verdict to one offense but not another—which is greater offense of the two charged in same indictment—Fifth Amendment Double Jeopardy will not bar reprosecution of greater offense). Unlike Connecticut, Maryland doesn't have a history of applying especially narrow double jeopardy standards before *Kennedy*.[3] *Cf. Hoffman v. State*, 20 Md. 425, 434 (1863) ("'At

[3] On the contrary, Maryland was one of the first states that proposed adding a double jeopardy clause to the federal Constitution. 2 Jonathan Elliot, Elliot's Debates on the Federal Constitution 550 (1863). That proposed amendment was: "That there shall be

Continued . . .

common law [double jeopardy] meant nothing more than that where there had been *a final verdict either of acquittal or conviction*, on an adequate indictment, the defendant could not be a second time placed in jeopardy for the particular offence[sic].'" (emphasis added) (citation omitted)). Nor is there any precedent directing that our Constitution's silence requires Maryland to mirror federal Fifth Amendment Double Jeopardy principles directly. We have, under appropriate circumstances, recognized broader protections. And we should do so again.

In shaping a new standard, we should reassess our previous rationale. We, like some of our sister jurisdictions, understood the core purpose of the *Kennedy* rule as punishing the State for the misconduct of the prosecutor. *Nicholson*, 157 Md. App. at 315; *e.g., Dawson*, 397 N.W.2d at 282. But that reading leaves out part of the story. The *Kennedy* decision was rooted in two double jeopardy principles, a defendant's right to have the first empaneled tribunal complete the prosecution, and a defendant's right to control the next steps after a prosecutor injects terminal error. In *Kennedy*, the Supreme Court recognized that the first right would be a "hollow shell" if no double jeopardy remedy existed. 456 U.S. at 673.

In contrast, Maryland cases have analyzed double jeopardy principles primarily in terms of protecting a criminal defendant. If, for example, upon acquittal the State attempts to appeal a verdict, "affirmance on the rulings will not render the verdict-of acquittal more

---

a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed; and that there be no appeal from matter of fact, *or second trial after acquittal* . . . ." *Id.* (emphasis added).

secure to the accused, nor will a reversal of them enable the State to re-try him." *State v. Shields*, 49 Md. 301, 305 (1878). The "verdict must stand as an *effective protection* to the accused, whether [a court] may be of opinion the rulings excepted to by the State's Attorney are correct or not." *Id.* at 304–05 (emphasis added). Applied to the retrial-after-a-mistrial double jeopardy context, those principles protect a defendant from "'successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *Dinitz*, 424 U.S. at 611 (citations omitted). None of this is aimed at punishing an errant prosecutor: the essence of double jeopardy protection is to shield citizens from being put twice in jeopardy.

The second relevant principle is a defendant's right to control the nature of the proceedings after the State commits an unfairly prejudicial error. Our statement that a defendant might wait to abort a trial to see whether there is an acquittal—thereby retaining control—assumed a purely retributive purpose to double jeopardy law. *See West*, 52 Md. App. at 637. But if the State introduces unfairly prejudicial error into a case, even if it does so with less than direct intent to goad a mistrial, the purported choice isn't much of a choice in reality. An error prejudicial enough to justify a mistrial exposes the defendant to a conviction that can be vindicated only by post-trial motion, appeal, or post-conviction relief, none of which is exactly a high-percentage option. Opting, as it were, for a new trial means waiving the right to have the first one (or in this case the second) be fair in the first place. In a world where people are presumed to be not guilty and the State bears the burden of proof beyond a reasonable doubt, it seems to turn those premises on their head to allow

reckless errors of mistrial-caliber dimension to expose the party that committed them only to the risk of a do-over. Indeed, a do-over may be what the prosecutor wants even if the tactic to get one falls short of deliberate sabotage, and a presumed right to a retrial may even incent risky or reckless tactics. *See, e.g.*, *Smith*, 615 A.2d at 322–24 (after commonwealth withheld exculpatory evidence for two years, investigated one of its own witnesses punitively for producing such evidence during that time, tried defendant for first-degree murder and attained a conviction, argued for death penalty on appeal, and lost appeal, defendant was granted a new trial); *Pool*, 677 P.2d 261 (prosecutor there, despite admonishment, repeatedly referenced inadmissible evidence when cross-examining defendant and engaged in abusive and harassing conduct toward defendant and defense counsel). A defendant's choice to stay or remain with the original tribunal in any of these scenarios is no choice at all. And it doesn't matter for these purposes whether the error was committed before the trial or during it. *Cf. Booth*, 301 Md. at 8. This includes failing to prepare a witness, *Thanos*, 330 Md. at 590, attempting to use evidence excluded during a pre-trial motion, *Wood*, 498 A.2d at 494, or even learning of suppressed exculpatory evidence before a new trial. *Smith*, 615 A.2d 321. The proper focus ought to be on the conduct's impact on the trial, not on a rigid notion of when the error occurred.

For all these reasons, it may well be time to consider whether Maryland should adopt the recklessness standard for retrial-after-a-mistrial double jeopardy. The examples in Texas and Pennsylvania are instructive, even though Texas retreated to the *Kennedy* rule after adopting it initially. *First*, Texas intimated that a prosecutor commandeers the

defendant's right to be tried in the initial tribunal when they *intend* to provoke a mistrial. *Ex parte Lewis*, 219 S.W.3d at 358–59. But that isn't always the case—a prosecutor might take a reckless step to try and ensure a conviction. *Compare Kennedy*, 456 U.S. at 689 (Stevens, J., concurring) ("[B]y hypothesis, the prosecutor's intent is to obtain a conviction, not provoke a mistrial."). This is especially relevant insofar as every act a prosecutor undertakes at trial is designed to prejudice the defendant, in the general sense of that term, *id.* at 674–75 (plurality), making it virtually impossible to differentiate between prejudice that's fair and appropriate and prejudice that isn't.

Second, prosecutors are and should be held to higher standards. *See* Maryland Rule 19-303.8, Comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). Whether a prosecutor knows that conduct may be held reckless on appellate posture is irrelevant. The prosecutor is charged with pursuing justice. *See Breit*, 930 P.2d at 803 ("Rare are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing."). And in any case, this form of double jeopardy is not exactly a common situation. *E.g.*, *West*, 52 Md. App. at 625 (calling it "a secluded but exotic corner of the double jeopardy garden").

Third, Texas reversed course back to Kennedy as a function of idiosyncratic Texas law that doesn't affect the analysis here. Under Texas law, double jeopardy attaches to mistrials and not reversals on appeal based on prosecutorial misconduct. *Ex parte Lewis*,

219 S.W.3d at 371. That state's intermediate appellate court reasoned that trial courts might be more reluctant to grant meritorious mistrial motions under the recklessness standard for fear of the double jeopardy bar. *Id.* at 364. But that same court noted that other jurisdictions addressed this by attaching double jeopardy to those appellate reversals. *Id.* And anyway, if the Texas intermediate appellate court's concern is true for recklessness, it would be true for deliberate conduct as well.

Fourth, the recklessness standard is grounded in and consistent with core double jeopardy principles. California's concern with the Texas recklessness standard (while it was still good precedent) was that the case adopting that standard did not articulate which double jeopardy principles were violated. *Batts*, 68 P.3d at 378, n.24. But we know that the rights at issue are (1) a defendant's right to maintain the original tribunal prosecuting that defendant, *Kennedy*, 456 U.S. at 673; and (2) a defendant's right to retain control of the nature of the proceedings once a prosecutor injects error. *Id.* at 676. Those rights aren't protected or vindicated by punishing the State or allowing an automatic re-trial. In appropriate cases, they're protected and vindicated by recognizing that the State had its opportunity to try this defendant and, by conduct, has lost the opportunity to try again.

* * *

I would hold that the circuit court erred in finding that the prosecutor here did not act recklessly in preparing this critical witness and eliciting his testimony about the execution of the search warrant. Although it is not our role to reconsider precedent ourselves, I agree with Mr. Santana that this case presents an appropriate opportunity for our Supreme Court to consider whether the *Kennedy* standard protects a defendant's double

jeopardy rights adequately. And for those reasons, I concur, respectfully, in the judgment reached by my colleagues.