COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

HAMPSHIRE, ss. No. SJC-12925

JOSHUA PERRIER

v.

COMMONWEALTH

BRIEF FOR THE APPELLANT ON APPEAL FROM THE JUDGMENT OF THE SINGLE JUSTICE PURSUANT TO G.L. c. 211, § 3, AND SUPREME JUDICIAL COURT RULE 2:21

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ISSUES PRESENTED

1) Massachusetts common law protects criminal defendants from being subjected to double jeopardy in the form of successive trials for the same offense. Does the common law of Massachusetts provide more protection than the rule articulated by the Supreme Court in Oregon v. Kennedy and reach prosecutorial misconduct that deprives a defendant of a likely acquittal where the Commonwealth knows or reasonably should know that the conduct will necessitate a new trial?
2) Where the record supports the conclusions that the defendant is being subjected to a second trial for the same offense due to the Commonwealth's misconduct, that the misconduct deprived the defendant of a reasonable likelihood of an acquittal in his first trial, and that the Commonwealth knew or reasonably should have known that its conduct would necessitate a new trial, do common law double jeopardy protections bar retrial?

STATEMENT OF THE CASE

The appellant, Joshua Perrier, was charged by complaint number 1845CR001279 in Northampton District Court with one count of operating under the influence of liquor as a second offense, in violation of G.L. c. 90, § 24(1)(a)(1); one count of negligent operation of a motor vehicle, in violation of G.L. c. 90, § 24(2)(a); and two civil motor vehicle infractions.[1] RA:11-12.[2]

Mr. Perrier proceeded to a jury trial the count charging operating under the influence of liquor on July 30, 2019. RA:5, 15. Mr. Perrier filed a motion in limine to exclude any reference to his age due to the probative value of such evidence being substantially outweighed by the danger of unfair prejudice and misleading the jury. RA:13-14, 18-22.

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[1] The counts charging negligent operation of a motor vehicle and the civil motor vehicle infractions were resolved prior to trial. RA:4-5, 9-10. After the jury's verdict was returned, the complaint was amended to reduce the remaining charge to operating under the influence of liquor as a first offense, without objection from the Commonwealth. RA:9, 222.

[2] Citations to the defendant's Record Appendix are identified as RA:[Page]; citations to the transcript of the hearing on the defendant's motion for a new trial are identified as MNT:[Page]; and citations to the transcript of the hearing on the defendant's motion to dismiss are identified as MTD:[Page]. The transcripts of the hearings on the defendant's motions for a new trial and to dismiss are the subject of a motion to correct omissions from the record.

That motion was allowed over the Commonwealth's objection. RA:13, 22. The Commonwealth's case consisted of the testimony of one witness, a Massachusetts State Trooper who arrested Mr. Perrier. RA:99-100, 128. Mr. Perrier moved for a required finding of not guilty at the close of the Commonwealth's case. RA:5, 165.

Mr. Perrier objected during the Commonwealth's closing argument on the basis that the Commonwealth had violated the judge's pretrial ruling excluding any reference to Mr. Perrier's age. RA:187-188. Mr. Perrier moved for a mistrial on that basis. RA: 187-189. The motion for a mistrial was denied. RA:189. Mr. Perrier objected again after the Commonwealth completed its closing argument on the basis that the trial prosecutor had made an improper appeal to the jurors' sympathy. RA:193-194. The judge ruled that he would provide a curative instruction. RA:194. After the judge's charge to the jury, Mr. Perrier requested a specific instruction that the jury disregard any appeal to sympathy. RA:212. The judge provided a specific instruction on appeals to sympathy. RA:212-213.

After beginning their deliberations, the jury indicated that it was deadlocked. RA:216-217. Before the court could address the jurors,

however, the jurors informed a court officer that they would continue to deliberate. RA:217. The jury later returned a verdict of guilty as to the offense of operating under the influence of alcohol. RA:218.

After the jury returned its verdict, the judge announced the sentence he would impose. RA:222-224. At this time, Mr. Perrier renewed his motion for a mistrial. RA:224-226. The judge invited Mr. Perrier to file a motion in writing and indicated that he would stay the sentence until the issue had been resolved. RA:226, 227.

Mr. Perrier subsequently filed a motion to reconsider the denial of the motion for mistrial with prejudice or, in the alternative, for a new trial. RA:282-304. The court held a hearing on the motion on September 16, 2019. RA:6. On October 4, 2019, the judge, in a written decision, allowed the motion insofar as it requested a new trial but denied the request for a mistrial with prejudice. RA:336-338.

On November 1, 2019, Mr. Perrier filed a motion to dismiss on the grounds of double jeopardy. RA:339-352. The court held a hearing on the motion on December 17, 2019. RA:7. On January 2, 2020, the judge issued a written decision denying the motion to dismiss. RA:358-359.

On January 16, 2020, Mr. Perrier filed a notice of appeal from the judge's decision. RA:360-361.

On February 28, 2020, Mr. Perrier filed a petition for relief with the single justice of the Supreme Judicial Court pursuant to G.L. c. 211, § 3, on the ground that double jeopardy protections barred retrial in his case. RA:362, 363-384. On March 11, 2020, the single justice denied the petition. RA:362. On March 16, 2020, Mr. Perrier filed a notice of appeal from the judgment of the single justice. RA:362, 396.

On March 17, 2020, Mr. Perrier's case entered in this Court pursuant to S.J.C. Rule 2:21. On May 27, 2020, the Court concluded that the petition raised a double jeopardy claim of substantial merit and ordered the appeal from the judgment of the single justice to proceed in the normal course, with full briefing.

STATEMENT OF FACTS

I. The Motion in Limine

Mr. Perrier was charged with operating under the influence of an intoxicating liquor. RA:11. The Commonwealth proceeded under the theory that Mr. Perrier was impaired by an intoxicating liquor and did not present evidence on a "per se" theory arising from blood alcohol content. RA:89-94.

Prior to trial, Mr. Perrier moved in limine to preclude any reference to Mr. Perrier's age on the basis that the probative value of such evidence would be substantially outweighed by the risk of unfair prejudice and misleading the jury. RA:13-14, 18-22. Specifically, defense counsel argued that it was common knowledge from driver's education classes that drivers under the legal drinking age of twenty-one were subject to a suspension of their driver's license upon any chemical test showing a blood alcohol percentage of greater than .02. RA:18-19. Consequently, defense counsel argued that evidence of Mr. Perrier's age might cause the jury to apply a lower burden of proof of impairment to him. RA:19. The Commonwealth objected to the motion, with the trial prosecutor asserting that she

> certainly want[ed] to be in the position where [she] can argue to the jury one of the reasons he may have [denied that he had been drinking] -- and that may not be credible -- is that he's 19 years old, and that he's not allowed to have a drink – he's not allowed to be drinking.

RA:18. The court acknowledged "the argument [the prosecutor] . . . wish[ed] to make to the jury" but ruled that he would allow the motion because the relevance of Mr. Perrier's age was minimal and the risk of unfair prejudice would overcome any relevancy. RA:20-21. The Commonwealth sought to convince the judge to reconsider his ruling, arguing that, given limited evidence that Mr. Perrier had been drinking and his statement to the officer that he had not had anything to drink, the Commonwealth was "really being deprived of a piece of evidence that . . . is not unduly prejudicial." RA:21. The Commonwealth also argued that the prejudice from such evidence could be remedied by a limiting instruction. RA:21. The court reiterated that the relevance was outweighed by the prejudicial effect of such evidence and reaffirmed that he was allowing the motion. RA:22. The judge noted the Commonwealth's objection. RA:22.

II. The Evidence at Trial

The Commonwealth's case at trial consisted of the testimony of the State Trooper who arrested Mr. Perrier. RA:99-164. The Trooper testified that, at approximately 1:25 a.m. on Sunday, October 14, 2018, he saw a car that he determined to be speeding. RA:104-106, 108. He made a U-turn to follow the car and activated his lights once behind the car. RA:109, 111. The car pulled over "maybe a quarter mile" from where the Trooper activated his lights. RA:112. Despite observing the car taking a corner at a high rate of speed, the Trooper testified that throughout his observations the car maintained its lane without swerving or coming close to hitting any objects. RA:138, 139-140.

After approaching the car, the Trooper recognized the smell of alcohol coming from the car and observed two occupants: Mr. Perrier and a passenger. RA:114. The passenger was drunk and "obnoxious," in the Trooper's opinion. RA:114-115. The Trooper asked Mr. Perrier if he had been drinking, and Mr. Perrier responded that he had not. RA:115. Mr. Perrier had no difficulty retrieving his license and registration upon request. RA:143-144. The Trooper then asked Mr. Perrier to recite the alphabet from the letter "C" to the letter "M." RA:116. He also asked

Mr. Perrier to count from 55 to 67. RA:116. The Trooper testified that Mr. Perrier did not complete those tasks to his satisfaction, and he asked Mr. Perrier to perform field sobriety tests. RA:116-118. Mr. Perrier did not have any difficulty exiting his car, and his balance did not appear to be impaired after he got out of the car. RA:145-147.

The Trooper testified that he instructed Mr. Perrier to perform the "one-leg stand" test. RA:118. During this test, the Trooper testified that Mr. Perrier put his other foot down after "probably" fifteen seconds and raised his hands from his side, contrary to his instructions. RA:120-123. On cross-examination, the Trooper conceded that Mr. Perrier stood for fifteen seconds on one leg "without swaying or being unsteady on his feet whatsoever." RA:149. He also testified that he instructed Mr. Perrier to perform the "nine-step walk and turn" test. RA:124. He testified that Mr. Perrier "[s]tepped offline, missed heel-to-toe, stopped during the exam, used his arm for balance and [made] a[n] improper turn" contrary to his instructions. RA:127. On cross-examination, the Trooper conceded that he made the nine steps to return to the starting position without stepping offline. RA:153. He also conceded that he omitted from his police report certain factors that he had testified to as

indicia of impairment. RA:126-127, 131, 153. After Mr. Perrier had completed the field sobriety tests, the Trooper instructed Mr. Perrier to return to the driver's seat of the car, where the keys to the car were in the ignition, and to wait there. RA:153-154. Sometime after Mr. Perrier returned to the car, the Trooper made the decision to arrest him. RA:153-154.

The Trooper testified that after the arrest, Mr. Perrier was "pretty critical of [his] driving skills" and argued that the Trooper's radar must have been "broken." RA:128. Mr. Perrier was polite and cooperative during the booking process. RA:154, 156. At 4:30 a.m., while walking by the cell Mr. Perrier was held in, the Trooper smelled alcohol coming from the cell. RA:129-130.

Consistent with the judge's ruling, no party elicited testimony of Mr. Perrier's age.

III. Closing Arguments

In its closing argument, the Commonwealth made two references to Mr. Perrier's age. First, the Commonwealth argued that the jury could find impairment even though Mr. Perrier did not drive erratically. RA:185-186. "You can have reduced judgment at the same time that you have the reflexes -- especially someone who's young, who's reflexes might be at their peak -- to drive the car." RA:186. On the next transcript page, the Commonwealth addressed Mr. Perrier's denial to the Trooper that he had been drinking, stating: "Why do you think he might've said no while he was driving that car? I mean, I don't know if -- you know, probably -- maybe he's young -- maybe he was too young." RA:187.

Defense counsel objected at this point. RA:188. At sidebar, the trial prosecutor acknowledged that she did not elicit evidence of Mr. Perrier's age but suggested that she "can draw an inference from the appearance of the Defendant." RA:188. The judge responded, "[n]o, no. We had the -- we, we discussed earlier and I was -- I said that . . . it's gonna be prejudicial." RA:188. Defense counsel moved for a mistrial, which the judge denied. RA:188-189.

The Commonwealth continued its closing argument, concluding with

> do you think that this Defendant would've had the ability to respond quickly if an animal had come out in the road, or if a car had pulled out unexpectedly? Do you think he would've been able to respond safely? Because what's the opposite? If you can't operate safely, you're dangerous.

RA:193. The Commonwealth suggested that the answers to its rhetorical questions were "no" and urged the jury to find Mr. Perrier guilty. RA:193. Mr. Perrier objected again after the Commonwealth's closing on the basis that the Commonwealth had made an improper appeal to sympathy and requested a curative instruction. RA:194. The judge agreed that the argument was improper and stated that he would provide a curative instruction. RA:194-196.

During his instructions to the jury, the judge provided an instruction that jurors should not permit sympathy to affect their verdict. RA:202. At the close of the judge's instructions, defense counsel requested a specific instruction on disregarding any appeal to sympathy. RA:212. The judge agreed and instructed the jury that "any references or any appeals to sympathy that might be produced and set

forth during the course of a closing argument should be disregarded." RA:212-213.

The jury then began deliberating. RA:216. During its deliberations, the jury indicated that it was deadlocked. RA:216-217. While the judge was addressing this issue with the parties and before the jury was brought into the courtroom, the judge was informed that the jury had told a court officer that they intended to continue their deliberations. RA:217. Thereafter, the jury returned a guilty verdict. RA:218.

At that, time the judge heard from the parties as to sentencing and announced the sentence he would impose. RA:221-224. At this point, defense counsel again raised the issue of the Commonwealth's references in its closing argument to Mr. Perrier's age. RA:224-226. The judge requested that defense counsel file a motion in writing regarding any relief he was requesting. RA:226.

IV. Post-Trial Proceedings

Mr. Perrier thereafter filed a motion to reconsider the denial of the motion for mistrial or, in the alternative, for a new trial. RA:282-304. The Commonwealth opposed the motion in writing, attaching an

affidavit which included the trial prosecutor's copy of the motion in limine, on which she inscribed, "allowed, as to eliciting testimony of the defendant's age of 19." RA:321-335. During a hearing on the motion, the trial prosecutor proffered that she understood the judge's ruling to apply only to exclude testimony that Mr. Perrier was nineteen years old. MNT:24. Because she did not do that but only asked the jury to infer Mr. Perrier's young age from his appearance in the courtroom, she suggested that the violation the judge's order was the product of a mistaken understanding. MNT:25-26.

After a hearing, the court, in a written decision, denied the motion for a mistrial with prejudice, but allowed the motion for a new trial, finding that the trial prosecutor had been instructed not to refer to Mr. Perrier's age and nonetheless referenced his age in her closing argument. RA:336-338. The judge also referenced the appeal to the juror's emotions in the Commonwealth's closing arguments. RA:337. The judge concluded that the improper remarks of the prosecutor went to the heart of the case and that a new trial was required. RA:337. The judge denied the motion for a mistrial with prejudice finding that the statements did not "constitute deliberate, intentional, and/or egregious

misconduct sufficient to give rise to presumptive prejudice" pursuant to Commonwealth v. Cronk, 396 Mass. 194 (1985). RA:337.

Mr. Perrier subsequently filed a motion to dismiss on the ground of double jeopardy. RA:339-352. He argued that his double jeopardy rights under the United States Constitution and Massachusetts common law were violated when prosecutorial misconduct tainted his first trial and required him to stand trial a second time. RA:343-351. During the hearing on the motion, the Commonwealth conceded that the trial prosecutor had "surely" been negligent in her argument. MTD:19. The judge "certainly" agreed that the prosecutor had been negligent and noted that there was more than one impropriety in the Commonwealth's closing argument. MTD:21.

The judge, by written decision, denied Mr. Perrier's motion to dismiss, repeating his earlier finding that the conduct did not rise to the level of "deliberate, intentional, and/or egregious prosecutorial misconduct sufficient to give rise to presumptive prejudice" pursuant to Cronk, 396 Mass. at 198-199. RA:358-359. The court noted it did not find that the conduct of the prosecutor "r[ose] to the level of

'prosecutorial misconduct intended to goad or provoke [Mr. Perrier] into moving for the mistrial." RA:359.

SUMMARY OF ARGUMENT

The double jeopardy interests protected by Massachusetts common law extend beyond the rule articulated by the Supreme Court in Oregon v. Kennedy. [25-39] The common law protections must be sufficiently extensive to preclude retrial where the Commonwealth has engaged in misconduct that deprives a defendant of a likely acquittal where the Commonwealth knew of should have known that the conduct would likely result in a mistrial or order for a new trial. [25-47]

The record in this case supports findings that the Commonwealth engaged in misconduct requiring that a new trial be ordered where the defendant had a reasonable likelihood of acquittal and where the Commonwealth knew or should have known that its misconduct would necessitate a mistrial or new trial. [48-61]

ARGUMENT

Mr. Perrier is being subjected to a second trial for the same offense due to the trial prosecutor's violation of an explicit ruling of the trial judge. The judge concluded that this misconduct may have influenced the jury's decision to convict and that a conviction thus tainted could not stand. The Commonwealth argued below that because the judge did not make a finding that the trial prosecutor had the specific intent to goad Mr. Perrier into moving for a mistrial when violating the ruling, double jeopardy protections are inapplicable to his case. RA:385-386, 388-389. Because common law double jeopardy protections are not so limited as to allow a prosecutor to subvert a defendant's double jeopardy rights as long as he or she does not do so with the specific intent to goad the defendant into requesting a mistrial, the Commonwealth's conclusion does not flow from its premise. Rather, the common law protections against double jeopardy in Massachusetts are broader than the rule articulated in Oregon v. Kennedy, 456 U.S. 667 (1982), and preclude retrial in Mr. Perrier's case.

As a threshold matter, Mr. Perrier's double jeopardy claim is properly before this Court, pursuant to G.L. c. 211, § 3, and S.J.C. Rule

2:21. If no final determination is made as to whether double jeopardy protections under federal or state law bar retrial in Mr. Perrier's case, the resulting second trial could constitute an irremediable denial of Mr. Perrier's double jeopardy rights. See Neverson v. Commonwealth, 406 Mass. 174, 175-176 (1989); Costarelli v. Commonwealth, 374 Mass. 677, 680 (1978). Accordingly, a determination by the Court prior to a second trial is required to vindicate Mr. Perrier's double jeopardy rights. See Costarelli, 374 Mass. at 680.

I. THE SCOPE OF COMMON LAW DOUBLE JEOPARDY PROTECTIONS MUST REACH CIRCUMSTANCES WHERE THE COMMONWEALTH DEPRIVES A DEFENDANT OF A LIKELY ACQUITTAL BY ENGAGING IN MISCONDUCT THAT IT KNOWS OR SHOULD KNOW WILL NECESSITATE A NEW TRIAL.

Criminal defendants in Massachusetts are protected against double jeopardy by the Fifth Amendment to the United States Constitution and by the statutory and common law of Massachusetts. Commonwealth v. Woods, 414 Mass. 343, 346 (1993). Whether under federal or state law, the prohibition against double jeopardy consists of multiple protections. Commonwealth v. Sanchez, 485 Mass. 491, 506 (2020). Among them is protection against successive prosecutions for

the same offense. Id. As to successive prosecutions, "[t]he prohibition against double jeopardy 'forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" Commonwealth v. Beal, 474 Mass. 341, 353-354 (2016), quoting Burks v. United States, 437 U.S. 1, 11 (1978). The principle underlying this protection is that

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

Commonwealth v. Gonzalez, 437 Mass. 276, 281 (2002), quoting Serfass v. United States, 420 U.S. 377, 387-388 (1975).

Generally, where a trial terminates without a verdict, or where a conviction is reversed, the Commonwealth may retry a defendant without offending double jeopardy protections. Sanchez, 485 Mass. at 506-507. There are exceptions, however, where double jeopardy protections bar a second trial: where the evidence at the first trial was insufficient as a matter of law, Marshall v. Commonwealth, 463 Mass. 529, 538 (2012); where the first trial ends in mistrial over the defendant's objection not due to manifest necessity, id. at 534; and in

certain situations where prosecutorial misconduct necessitates a new trial, Commonwealth v. Murchison, 392 Mass. 273, 276 (1984). This case raises the issue of the scope of double jeopardy protections where prosecutorial misconduct taints a first trial and makes a second trial necessary.

The bar against retrial in certain circumstances of prosecutorial misconduct is necessary to preclude a prosecutor from affirmatively undermining a defendant's double jeopardy rights. An acquittal after trial is final and unreviewable, and any subsequent trial on the acquitted offense is barred by double jeopardy protections. G.L. c. 263, § 7; United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). A defendant whose trial ends in a mistrial or whose conviction is reversed due to prosecutorial misconduct, however, generally can be retried consistent with double jeopardy principles. Donavan v. Commonwealth, 426 Mass. 13, 14-15 (1997). This disparity may be exploited by a prosecutor who desires to ensure a conviction or to harass a criminal defendant. Where an acquittal appears likely, a prosecutor can engage in misconduct either to cause an immediate mistrial or to gain strategic advantage with a jury, knowing that he or she has made

acquittal less likely and, in the event of a mistrial or a reversal, the defendant will be subject to retrial. See United States v. Catton, 130 F.3d 805, 806-807 (7th Cir. 1997). Such conduct would constitute the unilateral abrogation by the Commonwealth of the guarantee against successive prosecutions. The bar against retrial in certain circumstances where a first trial was negated by prosecutorial misconduct is required to eliminate this perverse incentive and, thereby, protect a defendant's double jeopardy rights against successive prosecutions. See id.

A. Double Jeopardy and Prosecutorial Misconduct under Federal Law

The Supreme Court recognized the incentive created by this disparity and articulated a remedy in cases such as United States v. Dinitz, 424 U.S. 600 (1976), and Oregon v. Kennedy, 456 U.S. 667 (1982). In Dinitz, the Court concluded that

> [t]he Double Jeopardy Clause . . . bars retrials where 'bad-faith conduct by judge or prosecutor,' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant.

424 U.S. at 611 (citations omitted).

The Court in Kennedy rejected the language from earlier cases that double jeopardy protections could be implicated by governmental "overreaching" or "harassment" to avoid an acquittal. 456 U.S. at 677-679. Rather, the Court limited the application of the double jeopardy bar to retrial only to those circumstances "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." Id. at 675-676.

The scope of the prosecutorial misconduct exception as limited by Kennedy has been subject to significant criticism in federal and state courts as well as the legal academy. Concurring in Kennedy, Justice Stevens argued that the scope of the exception as articulated in Dinitz and earlier cases, which provided relief where prosecutorial overreaching or harassment subverted double jeopardy interests, should continue to apply. Kennedy, 456 U.S. at 683-684 & n.13, 691-692 (Stevens, J., concurring). He noted that the rule as stated by the Kennedy majority would not reach circumstances where "a prosecutor may be interested in putting the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction . . . [and where] the prosecutor seeks to inject

enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction." Id. at 689 (Stevens, J., concurring). In these circumstances, Justice Stevens argued, double jeopardy interests should prevail over "society's interest in obtaining a judgment on the merits." Id.

Federal Courts of Appeal, in analyzing whether double jeopardy protections should be extended to circumstances where, unlike Kennedy, prosecutorial misconduct did not result in a mistrial but a reversal on appeal, have also criticized the reach of the rule articulated in Kennedy as being insufficiently protective of double jeopardy interests. See United States v. Catton, 130 F.3d 805, 807 (7th Cir. 1997) (Posner, J.) ("Kennedy would leave a prosecutor with an unimpaired incentive to commit an error that would not be discovered until after the trial and hence could not provide the basis for a motion for a mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial."); United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992) ("Indeed, if Kennedy is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient

visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict.").

In particular, the Second Circuit's decision in United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), has been influential in recognizing that a prosecutor engaging in misconduct to avoid a likely acquittal was equally violative of a defendant's double jeopardy rights as the same conduct intended to precipitate a mistrial. See id.; see also People v. Batts, 30 Cal. 4th 660, 694 n.26 (2003) (collecting jurisdictions that have adopted the analysis from Wallach). For this reason, the Wallach court did not limit its analysis to whether prosecutorial misconduct was successful in goading a defendant into a mistrial. See Wallach, 979 F.2d at 916.

State courts have also criticized the scope of double jeopardy protections as set out in Kennedy and have articulated broader double jeopardy protections under state law. These critiques have been trained at different aspects of the Kennedy rule. Courts have rejected the limitation of double jeopardy protections to only those circumstances where prosecutorial misconduct results in a defense-requested mistrial,

as opposed to an order for a new trial after verdict or a reversal on appeal. See, e.g., State v. Colton, 234 Conn. 683, 698 (1995) ("We can see no principled justification for a distinction between prosecutorial misconduct that is clandestine, and therefore not discoverable until after a verdict or an appeal, and prosecutorial misconduct that is visible, and so can be remedied by a motion for mistrial or on direct appeal."); Gorghan v. DeAngelis, 7 N.Y.3d 470, 474 (2006) (holding that Kennedy rule "is equally applicable to reversals on appeal when a trial court has erroneously denied a defendant's mistrial motion").

State courts have also rejected the limitation of double jeopardy protection to only those circumstances where prosecutorial misconduct is motivated by the specific intent to cause a mistrial. See e.g., Batts, 30 Cal. 4th at 695 (articulating bar to retrial, inter alia, "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"); State v. Breit, 122 N.M. 655, 666 (1996) (articulating double jeopardy bar where "the

official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.")

Similarly, some state courts have been critical of requiring the prosecutorial misconduct to be motivated by any specific intent, noting that requiring such a mental state is insufficient to protect double jeopardy interests. See, e.g., Pool v. Superior Court, 139 Ariz. 98, 108-109 (1984) (formulating double jeopardy test that applies where prosecutor engages in misconduct "for any improper purpose with indifference to a significant resulting danger of mistrial or reversal"); State v. Kennedy, 295 Or. 260, 273 (1983) ("Whether the prosecutor deliberately pursues an improper course of conduct because he means to goad a defendant into demanding a mistrial or because he is willing to accept a mistrial and start over is a distinction without a difference."); Commonwealth v. Johnson, 231 A.3d 807, 826 (Pa. 2020) ("When the government engages in improper actions sufficiently damaging to undercut the fairness of a trial, it matters little to the accused whether such course of conduct was undertaken with an express purpose to have that effect or with a less culpable mental state.").

As a result of these criticisms, a large number of state courts have determined their state law to be more protective than federal law in this area and articulated more expansive double jeopardy protections where a trial is tainted by prosecutorial misconduct. See Pool, 139 Ariz. at 108-109; Batts, 30 Cal. 4th at 695; State v. Rogan, 91 Haw. 405, 423 (1999); People v. Dawson, 154 Mich. App. 260, 273 (1986), aff'd on other grounds, 431 Mich. 234, 256-257 (1988); Thomas v. Eighth Judicial District Court, 402 P.3d 619, 626-627 (Nev. 2017); Breit, 122 N.M. at 666; Johnson, 231 A.3d at 826; Kennedy, 295 Or. at 276; Bauder v. State, 921 S.W.2d 696, 699 (Tex. Ct. Crim. App. 1996), overruled by Ex Parte Lewis, 219 S.W.3d 335, 371 (Tex. Ct. Crim. App. 2007). Still other state courts, while not explicitly holding that more expansive protections exist under state law, have cited the more expansive test articulated by the Second Circuit in Wallach approvingly. See Colton, 234 Conn. at 696; State v. Chase, 754 A.2d 961, 963-964 (Me. 2000); State v. Marti, 147 N.H. 168, 172 (2001); State v. Lettice, 221 Wis. 2d 69, 89 (Wis. Ct. App. 1998).

Commentators have also criticized the Kennedy rule along similar lines and argued that the rule is insufficient to protect double jeopardy

interests. See, e.g., Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1426 (1987) ("When a defendant's 'valued right to have his trial completed by a particular tribunal' is threatened by serious prosecutorial misbehavior at trial, Kennedy does much to deny any protection of the right."); Kenneth Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 Temp. L. Rev. 887, 893 (1998) ("Kennedy . . . did a fundamental disservice by obscuring and diverting attention from the very real concerns that prosecutorial misconduct pose vis-a-vis the core principles of double jeopardy."); George C. Thomas III, Solving the Double Jeopardy Mistrial Riddle, 69 S. Cal. L. Rev. 1551, 1563 (1996) ("The [Kennedy] standard (in fact if not in theory) permits prosecutors free rein to introduce prejudicial elements into a trial that is not going well.").

In summary, while Kennedy remains the applicable test under the Fifth Amendment where prosecutorial misconduct results in a defense-requested mistrial, the reach of that test as the totality of double jeopardy protections where a trial is tainted by prosecutorial misconduct has been subject to widespread criticism. That criticism has

caused federal courts to apply more expansive protections outside of the context of a mistrial, see United States v. Pavloyianis, 996 F.2d 1467, 1474 (2d Cir. 1993); and state courts to conclude that state law provides more protection than the Kennedy rule. See, e.g., Batts, 30 Cal. 4th at 665 ("[the] instances in which a prosecutor commits misconduct with the intent to provoke a mistrial do not exhaust the circumstances in which a prosecutor's intentional misconduct improperly may defeat the interest that the double jeopardy clause is intended to safeguard.").

B. Double Jeopardy and Prosecutorial Misconduct under Massachusetts Law

In Massachusetts, double jeopardy protections are a matter of statutory and common law rather than constitutional law. G.L. c. 263, § 7; Woods, 414 Mass. at 346. This Court has held that common law double jeopardy protections provide more protection than the Fifth Amendment in certain circumstances. See Berry v. Commonwealth, 393 Mass. 793, 798 (1985). Specific to the double jeopardy consequences of prosecutorial misconduct, there appears to be some inconsistency in the decisional law as to whether the common law protections under state law are more protective than federal law. To be sure, the Court has

stated that it has "followed the Federal constitutional standard articulated in . . . Kennedy, . . . which requires some form of 'overreaching,' 'harassment,' or other intentional misconduct on the part of the prosecution aimed at provoking a mistrial in order for a retrial to be barred by double jeopardy principles." Donavan, 426 Mass. at 15. See Poretta v. Commonwealth, 409 Mass. 763, 767 (1991) ("the standard for barring retrial on double jeopardy grounds is 'substantially the same' under Federal and Massachusetts law").

The Court, however, has also indicated that protections broader than the limited exception articulated in Kennedy exist under state law. In particular, in Commonwealth v. Murchison, 392 Mass. 273, 276 (1984), the Court articulated that "double jeopardy protections" are implicated by prosecutorial misconduct "(1) [w]here the governmental conduct in question is intended to goad the defendant into moving for a mistrial . . . or (2) [w]here the governmental conduct resulted in such irremediable harm that a fair trial of the complaint or indictment is no longer possible." Thus, the Court in Murchison, writing after Kennedy, concluded that conduct beyond goading a defendant into a mistrial merited double jeopardy protection. Id. This breadth of double jeopardy

protection has been reaffirmed by the Court. Commonwealth v. Merry, 453 Mass. 653, 665-666 (2009).

In addition, in Commonwealth v. Smith, 404 Mass. 1, 4 (1989), the Court noted that "a defendant who moves for a mistrial must show that the prosecutor intended to provoke a mistrial or otherwise engaged in 'overreaching' or 'harassment.'" (emphasis added). For this proposition, the Court cited the Stevens concurrence in Kennedy, see Smith, 404 Mass. at 4, citing Kennedy, 456 U.S. at 683 (Stevens, J., concurring). Accordingly, the Court described double jeopardy protections beyond circumstances where a prosecutor intends to cause a mistrial, a proposition explicitly rejected by the Kennedy majority, Kennedy, 456 U.S. at 678-679 & n.8.

The Court should now join the federal and state courts that have found the Kennedy rule to be insufficiently protective of double jeopardy interests and explicitly hold that common law double jeopardy protections in Massachusetts are broader than the rule articulated in Kennedy. Specifically, the Court should hold that common law protections against double jeopardy apply where a prosecutor either 1) engaged in misconduct with the intent to goad the defendant into

requesting a mistrial or 2) engaged in misconduct that results in mistrial, order of new trial, or reversal; which had the effect of depriving a defendant of reasonable likelihood of acquittal; and where the prosecutor knew or reasonably should have known from all of the facts and circumstances that his or her conduct would require new trial.

The Supreme Court in Kennedy pointed to the correct guidepost for determining the scope of double jeopardy protections in this area—the protections must extend far enough to reach prosecutorial misconduct that "subvert[s] the protections afforded by the Double Jeopardy Clause." See Kennedy, 456 U.S. at 675-676. The scope of the rule articulated in Kennedy, limited to prosecutorial misconduct intended to goad a defendant into requesting a mistrial, is inadequate to protect a defendant's legitimate double jeopardy interests. See Batts, 30 Cal. 4th at 665. The proposed rule is broad enough to protect those interests without trenching on any legitimate societal and law enforcement interests.

The proposed rule expands upon the Kennedy rule in three critical respects. First, double jeopardy protections must extend beyond situations where a defendant's trial terminates due to his or her

successful motion for a mistrial. This Court has already recognized that double jeopardy interests are implicated even where a mistrial is not declared until after a guilty verdict is returned. Murchison, 392 Mass. at 275.[3] Federal and other state courts have gone further and recognized there is no principled reason to distinguish between prosecutorial misconduct that is sufficiently salient to precipitate of mistrial motion and prosecutorial misconduct that is not capable of resolution until a post-trial motion for a new trial or direct appeal. See Wallach, 979 F.2d at 916; Colton, 234 Conn. at 698; Lettice, 221 Wis. 2d at 85-86. Nor is there any reason to exclude a defendant from double jeopardy relief where a judge erroneously denies a motion for mistrial due to prosecutorial misconduct, only for a new trial to be ordered on that basis after trial or on appeal. See Gorghan, 7 N.Y.3d at 474. Because prosecutorial misconduct can subvert a defendant's double

[3] As the Court recently articulated, a motion for a mistrial after the entry of a verdict is properly considered a motion for a new trial. Commonwealth v. McCalop, 485 Mass. 790, 794 n.5 (2020). Accordingly, in Commonwealth v. Murchison, 392 Mass. 273, 274 (1984), where the judge allowed a renewed motion for a mistrial after the jury returned its verdict, the mistrial motion was properly considered a motion for a new trial, rendering the procedural posture of Murchison essentially equivalent to that of this case.

jeopardy interests where no mistrial is declared, double jeopardy protections must apply outside of the mistrial context. See Batts, 30 Cal. 4th at 665-666.

Second, double jeopardy protections must extend beyond misconduct undertaken with the specific intent of goading a defendant into requesting a mistrial to include other improper objectives. Engaging in misconduct with the intent to goad a defendant into requesting a mistrial and, thereby, terminating a first trial and subjecting a defendant to second trial surely violates a defendant's double jeopardy rights. Kennedy, 456 U.S. at 673. To the same extent, engaging in misconduct to avoid a likely acquittal and obtain a conviction regardless of the likelihood that the conviction will be reversed equally subverts double jeopardy protections. See Wallach, 979 F.2d at 916.

For this reason, double jeopardy protections must also reach prosecutorial misconduct that deprives a defendant of a likely acquittal and that is undertaken without regard to the risk that the verdict will be set aside and a new trial will be necessary. See Batts, 30 Cal. 4th at 689 ("Had the prosecutors intentionally committed their misconduct not

to cause a mistrial, but instead to improperly prejudice the jury to convict in order to avoid a likely acquittal, the prosecutors' misconduct clearly would implicate defendants' double jeopardy interests"). Such conduct would strike at the heart of the protections of double jeopardy—that a prosecutor should wrongfully deprive a defendant of the finality of acquittal by engaging in misconduct and subject the defendant to a second attempt to obtain a conviction. See Beal, 474 Mass. at 353-354.

The need for the rule to extend beyond prosecutorial misconduct intended to cause a mistrial to reach conduct depriving a defendant of a likely acquittal is closely related to the double jeopardy protection implicated by prosecutorial misconduct causing irremediable harm. In Murchison, 392 Mass. at 276, the Court held that double jeopardy protections are implicated by prosecutorial misconduct "[w]here the governmental conduct resulted in such irremediable harm that a fair trial of the complaint or indictment is no longer possible." If a prosecutor—knowing that an acquittal, final and unreviewable, is likely—successfully engages in misconduct that deprives a defendant of that acquittal, the defendant has suffered irremediable harm in the loss

of the acquittal and the resulting bar to further prosecution. See Wallach, 979 F.2d at 916.

Third, double jeopardy protections must not depend on a finding that a prosecutor has the specific intent to deprive a defendant of his double jeopardy rights. It must also apply in circumstances where a prosecutor knows or should know his or her conduct will have the effect of subverting of a defendant's double jeopardy rights. See Johnson, 231 A.3d at 826. As noted above, the scope of double jeopardy protections must extend far enough to ensure that misconduct by the Commonwealth does not subvert a defendant's double jeopardy rights.[4]

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[4] It is important to acknowledge the conceptual distinctions between double jeopardy protections and due process protections. Due process considerations have, on occasion, compelled dismissal with prejudice where the Commonwealth has engaged in egregious misconduct and dismissal is necessary to deter the Commonwealth or its agents from such conduct in the future. Commonwealth v. Manning, 373 Mass. 438, 444-445 (1977). In the due process context, the analysis of whether dismissal is required frequently focuses on the egregiousness or deliberateness of the government's conduct in determining an appropriate and necessary sanction for that conduct. See, e.g., id. at 444 Double jeopardy protections do not exist to punish or deter the government from misconduct but rather to affirmatively protect a defendant from the anxiety, embarrassment, and expense of unnecessary repeated trials. See State v. Breit, 122 N.M. 655, 663 (1996); State v. Kennedy, 295 Or. 260, 272-273 (1983). For this reason, the double jeopardy analysis properly focuses not on the egregiousness of the government's conduct but on the harm suffered by the defendant

As many courts have noted, there is not a material difference in the injury to double jeopardy interests where a prosecutor intentionally engages in misconduct with the explicit purpose of improperly terminating a defendant's trial and where a prosecutor engages in misconduct that they know or reasonably should know is likely to result in mistrial or order for a new trial.[5] See, e.g., Johnson, 231 A.3d at 826; Kennedy, 295 Or. at 272-273.

Where a prosecutor commits misconduct to avoid an acquittal and the prosecutor knows or should know that the misconduct is likely to result in a new trial or reversal, the prosecution has engaged conduct subverting a defendant's double jeopardy protections. See Johnson, 231 A.3d at 826. If such conduct were not sufficient to bar a successive trial,

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in the form of being wrongfully denied the finality of an acquittal. Cf. Commonwealth v. Light, 394 Mass. 112, 116 (1985) (Liacos, J., dissenting) (describing egregious misconduct, prejudice precluding a fair trial, and double jeopardy principles as independent bases to bar retrial).

[5] Nor is there a material difference in culpability between a prosecutor acting with specific intent to violate a defendant's double jeopardy rights and a prosecutor acting where he or she knows or should know that a violation of double jeopardy rights is likely to result. As the Court has noted, wanton and reckless conduct—engaging in conduct with "indifference to or disregard of probable consequences"—is "the legal equivalent of intentional conduct." Commonwealth v. Welansky, 316 Mass. 383, 399, 401 (1944).

the protection against successive prosecutions would offer very little protection indeed.

Beyond being underinclusive, requiring any specific intent also makes double jeopardy violations nearly impossible to prove. As Justice Stevens observed in his concurrence in Kennedy, every prosecutor is trying to prejudice a defendant from obtaining an acquittal, and it is thus "almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant." Kennedy, 456 U.S. at 688 (Stevens, J., concurring). The same could surely be said of a specific intent to subvert a defendant's double jeopardy rights. If the Commonwealth can defeat a motion to dismiss by positing an intent to win a conviction, as opposed to an intent to cause a mistrial or to violate a defendant's double jeopardy rights, double jeopardy rights will offer virtually no protection against prosecutorial misconduct. See Reiss, supra, at 1426. Rather, double jeopardy protection must reach circumstances where the Commonwealth engages in misconduct and it knows or should know

that the effect will be to subvert a defendant's double jeopardy rights. See Kennedy, 295 Or. at 272-273.

The scope of the proposed rule would not extend so far to encroach on legitimate law enforcement or societal interests. It is important in this regard to point out what the proposed rule would not do. It would not guarantee an error-free trial to every defendant, granting a windfall bar to retrial should any error occur during trial. Contra Donavan, 426 Mass. at 15. Nor would the rule apply to preclude retrial of a defendant where proof of a defendant's guilt was overwhelming notwithstanding prosecutorial misconduct necessitating a new trial. See Batts, 30 Cal. 4th at 697. Rather, the rule would only provide relief where a trial is terminated or a conviction is reversed due to misconduct by the Commonwealth, and there was a real question as to whether the misconduct deprived the defendant of a not guilty verdict,[6] and the Commonwealth knew or should have known that its conduct would

[6] Practically, a requirement that the misconduct have the effect of depriving a defendant of reasonable likelihood of acquittal largely limits the rule to misconduct occurring during the course of a trial. See United States v. Pavloyianis, 996 F.2d 1467, 1474 (2d Cir. 1993) (noting that "the relevant period of inquiry" is whether misconduct occurred during the defendant's trial).

necessitate a second trial for the same offense.[7] There is no cost to legitimate prosecutorial or societal interests in barring a second trial where retrial would have been barred by an acquittal but for the Commonwealth's misconduct.

For these reasons, double jeopardy protections under Massachusetts common law must extend to prosecutorial misconduct where the Commonwealth engages in misconduct that results in a mistrial or reversal, where the defendant had a reasonable likelihood of acquittal and the Commonwealth knew or should have known that the misconduct would require a new trial.

[7] In this regard, the Commonwealth could avoid the operation of this rule in many cases by the simple expedient of requesting a ruling from the trial judge before eliciting evidence or making an argument that may be contentious. Seeking out judicial guidance in advance as to whether evidence was admissible or an argument was proper would largely undermine an argument that a prosecutor was proceeding without regard to the likelihood that a mistrial or reversal would follow.

II. COMMON LAW DOUBLE JEOPARDY PROTECTIONS BAR RETRIAL IN THE CIRCUMSTANCES OF THE DEFENDANT'S CASE DUE TO THE NATURE OF THE COMMONWEALTH'S MISCONDUCT DURING THE FIRST TRIAL THAT NECESSITATED A SECOND TRIAL.

Double jeopardy principles require that retrial be barred in this case, where the Commonwealth's misconduct necessitated a second trial, Mr. Perrier had a reasonable likelihood of acquittal at the time of the misconduct in the first trial, and the Commonwealth should have known that its misconduct would result in a mistrial or reversal of any conviction.

Before trial, the trial judge excluded any reference to Mr. Perrier's age because the minimal probative value of such evidence was substantially outweighed by the danger of unfair prejudice arising from the fact that he was under the legal drinking age. RA:18-22. Nonetheless, the trial prosecutor raised the issue of Mr. Perrier's youth twice, the second time asking the jury to infer that he was under the legal drinking age. RA:186-187. This conduct caused Mr. Perrier to move for a mistrial. RA:188. Although the motion for a mistrial was denied, RA:189, the judge allowed a post-trial motion for a new trial on

the basis of the Commonwealth's violation of the judge's pretrial order and other improper argument. RA:337-338.

A. The Judge's Findings and Legal Analysis Were Insufficient to Vindicate the Defendant's Double Jeopardy Rights.

The judge's findings and legal analysis in ruling on Mr. Perrier's motion to dismiss were inadequate to vindicate Mr. Perrier's double jeopardy rights. The judge limited his consideration to whether the prosecutor intended to goad Mr. Perrier into requesting a mistrial and whether the misconduct was otherwise egregious. Because the judge did not make findings as to whether the Commonwealth engaged in misconduct to avoid a likely acquittal, the judge's analysis would have permitted retrial even where Mr. Perrier's protected double jeopardy interests were violated.

In his decisions on the motion for a new trial and motion to dismiss, the judge found that the prosecutor was instructed not to refer to Mr. Perrier's age and nonetheless put his age before the jury in her closing argument. RA:337. He also concluded at trial that a portion of the prosecutor's argument appealed to the jury's emotions. RA:194-195; 337.

The judge's findings referenced the prosecutor's proffered explanation that she had misunderstood the judge's order but did not make a finding on whether the explanation was credible or the understanding of the ruling was reasonable in light of the circumstances known to the prosecutor and the training reasonably expected of a trial prosecutor. RA:337. The only findings made by the judge regarding the mental state of the prosecutor were that the conduct of the prosecutor did not "rise[] to the level of 'prosecutorial misconduct intended to goad or provoke [the Defendant] into moving for the mistrial," RA:359, and did not constitute "deliberate, intentional and/or egregious prosecutorial misconduct sufficient to give rise to presumptive prejudice" or to find the Commonwealth in contempt. RA:359.

The judge applied these findings to the rule articulated in Kennedy and concluded that Mr. Perrier was not entitled to relief due to lack of intent to goad him into requesting a mistrial. RA:359. Alternatively, the judge indicated his understanding that the rule from Kennedy had not been applied outside of the context of a successful motion for a mistrial but noted, even if it did, that this Court has

"declined to extend it to unintentional prosecutorial mistakes."[8] RA:359. The judge thus denied the motion to dismiss. RA:359.

The judge's findings were insufficient to resolve the issue of whether the Commonwealth had violated Mr. Perrier's double jeopardy rights. The judge limited his findings to whether the misconduct was intended to goad Mr. Perrier into a mistrial or was sufficiently deliberate, intentional, and egregious to give rise to "presumptive prejudice" or to find the Commonwealth in contempt. RA:359. Even federal courts, which are bound by the restrictive Kennedy rule, have articulated that a defendant's double jeopardy rights can be violated where a prosecutor engages in misconduct to avoid a likely acquittal and that misconduct results in a reversal or an order for a new trial. Catton, 130 F.3d at 806-807; Pavloyianis, 996 F.2d at 1474; Wallach, 979 F.2d at 916. The judge did not consider whether the misconduct

[8] It appears that the judge was referring to intent in the sense of the specific intent to goad Mr. Perrier into requesting a mistrial. The record of the trial prosecutor's statements only allows the conclusion that she put Mr. Perrier's age before the jury intentionally after considering the judge's ruling and that it was not an accident or slip of the tongue. See RA:188 ("Judge, I know the evidence didn't come out, but I can draw an inference from the appearance of the Defendant."); id. (responding to the judge referring to his exclusion the evidence as unfairly prejudicial, "As to . . . the testimony. This is argument.").

was undertaken to avoid a likely acquittal and in that way violated Mr. Perrier's double jeopardy rights. See Wallach, 979 F.2d at 916.

As set out above, however, double jeopardy protections are not sufficiently protected by where the only question is whether the Commonwealth acted with the specific intent to goad a defendant into a mistrial or to avoid an acquittal. See Pool, 139 Ariz. at 108-109 Johnson, 231 A.3d at 826. Rather, a court must consider whether the Commonwealth misconduct deprived a defendant of a likely acquittal where the Commonwealth knew or should have known that its conduct would necessitate another trial. See Johnson, 231 A.3d at 826. The judge's failure to consider whether, in light of the objective facts of the proceeding, the Commonwealth's references to Mr. Perrier's age in closing argument deprived him of a likely acquittal where the Commonwealth knew or reasonably should have known the result would be a second trial rendered the findings insufficient.

Under the judge's analysis, the Commonwealth could have perceived that an acquittal was likely and engaged in misconduct that they knew or should have known likely to result in a new trial to avoid that acquittal, without double jeopardy consequences. See Catton, 130

F.3d at 806-807. Because such conduct would subvert Mr. Perrier's double jeopardy rights, see Batts, 30 Cal. 4th at 689, the judge's analysis was flawed.

B. The Record Supports the Conclusion that the Defendant's Double Jeopardy Rights Were Violated by the Commonwealth's Misconduct in His Case.

The record supports the conclusions that the Commonwealth engaged in misconduct that resulted in a new trial being ordered, the misconduct had the effect of depriving Mr. Perrier of a reasonable likelihood of acquittal, and the Commonwealth knew or reasonably should have known from all of the facts and circumstances that its conduct would likely necessitate new trial. In these circumstances, Mr. Perrier's double jeopardy rights were violated. See Johnson, 231 A.3d at 826.

First, the record clearly establishes that the misconduct by the Commonwealth resulted in the judge ordering a new trial. The judge found that the prosecutor had been instructed not to reference Mr. Perrier's age but, nevertheless, referred to his age in closing argument. RA:337. This, combined with an appeal to emotion also contained in the Commonwealth's closing, required that a new trial be ordered. RA:337.

Second, the record supports a finding that the Commonwealth's misconduct deprived Mr. Perrier of a likely acquittal. The evidence that alcohol had impaired Mr. Perrier's ability to operate a car safely was not overwhelming. There was no direct evidence of Mr. Perrier's blood alcohol level. The Commonwealth presented circumstantial evidence suggesting impairment, namely that the Trooper observed Mr. Perrier to be speeding, RA:108; that the Trooper observed "cues" indicating impairment during field sobriety tests, RA:120-123, 127; that Mr. Perrier was argumentative while being driven to the barracks, RA:128; and that the Trooper smelled alcohol in the cell Mr. Perrier was held in after his arrest, RA:129-130.

On cross-examination, however, defense counsel elicited testimony that would have allowed the jury to find that Mr. Perrier, despite the speed at which he was driving, maintained control of the car and did not drive erratically. RA:138, 139-140. The Trooper also testified that he did not observe any lack of coordination or balance in retrieving his license and registration or exiting the car. RA:143-147. The defense also elicited evidence that Mr. Perrier's performance on the field sobriety tests was equivocal, including that Mr. Perrier stood for fifteen seconds

without swaying during the one-legged stand, RA:149, 153; and that the Trooper allowed Mr. Perrier to return to his car after the field sobriety tests before deciding whether to arrest him, RA:153-154. This evidence raised a real question as to whether the Commonwealth proved that alcohol had impaired his ability to operate a car beyond a reasonable doubt.

Given this state of the evidence as to impairment, the judge found that the Commonwealth's improper argument, linked to risk that the jury would apply a lower standard of impairment, went to the heart of the case. RA:337. The court also concluded that the case was a close one for the jury, which, he noted, was supported by the jury's indication that they were deadlocked at one point. RA:337. The judge found that "it cannot be said with assurance that the improper remarks of the prosecutor had little or no effect on the jury's deliberations." RA:337. The evidence and the judge's findings make clear that Mr. Perrier had a real prospect of acquittal at the time of the Commonwealth's misconduct.

Third, the record also supports a finding that the Commonwealth knew or should have known that aspects of their argument were

improper and would necessitate a new trial. The circumstances of the argument and ruling on the motion in limine are telling in this regard.

Mr. Perrier's motion in limine was clear in its request for relief and the reasoning for the motion. Mr. Perrier moved to "preclude the Commonwealth from making reference to the Defendant's age" on the basis that "the probative value [wa]s substantially outweighed by a danger of unfair prejudice." RA:14. He explained the prejudice specifically while arguing the motion: "when the Commonwealth starts mentioning my client's under the age of 21, that starts ringing bells in people's heads that perhaps there's a more stricter standard that applies." RA:19.

The judge was clear in his ruling. He repeated several times that the prejudice from evidence of Mr. Perrier's age "would overcome any relevancy." RA:20, 22. The judge allowed the motion without qualification. RA:22.

The Commonwealth clearly understood the basis of the judge's ruling that the danger of unfair prejudice substantially outweighed the probative value of the evidence of Mr. Perrier's age. While asking the court to reconsider its decision to allow the motion, the Commonwealth

engaged with the judge on the issue of prejudice and argued that "any prejudice could be resolved with a limiting instruction." RA:21. The judge rejected this suggestion and did not alter his ruling. RA:21-22.

Notwithstanding that the basis for the motion and the rationale of the judge's ruling—that the probative value of any reference to Mr. Perrier being under the legal drinking age was overwhelmed by the danger of prejudice that could not be cured by a jury instruction—were clear, the Commonwealth referenced Mr. Perrier's age in its closing twice.[9] RA:186-187. In the second instance, the prosecutor asked the jury to infer that Mr. Perrier was under the legal drinking age. RA:187.

The prosecutor indicated that she understood the references to be permissible because the judge's ruling only excluded testimony that Mr. Perrier was nineteen years old. RA:334; MNT:24-26. Because she did not do that but only asked the jury to infer Mr. Perrier's young age from his appearance in the courtroom, she suggested that the violation was the product of a mistaken understanding. MNT:24-25. The judge did not

[9] That the judge understood the Commonwealth's comments to clearly violate his ruling is evidenced by his exasperation at sidebar after the comments. RA:188 ("[n]o, no. We had the -- we, we discussed earlier and I was -- I said that . . . it's gonna be prejudicial.").

make an explicit finding as to whether this explanation was credible in light of the objective circumstances of the trial Whether or not the judge deemed this explanation credible, there is a strong basis on the record to conclude that the prosecutor reasonably should have understood any reference to Mr. Perrier's age would violate the judge's order and that a violation of the order would necessitate a mistrial or a new trial.

In order for the internal logic of this explanation to hold, the prosecutor would have had to conclude that despite the clear premise of the ruling that eliciting testimony that Mr. Perrier was nineteen years old would raise the danger of unfair prejudice, referencing Mr. Perrier's youth and encouraging the jury to infer that Mr. Perrier was under the legal drinking age would somehow not implicate that risk of prejudice. Such a conclusion is not reasonable. The prosecutor should have known that referencing Mr. Perrier's youth and exhorting the jury to infer that he was under the legal drinking age would violate the judge's pretrial order.[10]

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[10] During the argument on the motion to dismiss, the judge indicated that he agreed with the Commonwealth's concession that the prosecutor's argument was negligent. MTD:21. The judge did not make a finding as to whether the prosecutor's conduct reached a more culpable mental state than negligence.

It is significant that the prosecutor did not take any action to clarify that her understanding of the judge's ruling was correct. Even accepting the internal logic of the prosecutor's argument—that eliciting testimony of Mr. Perrier's age would be unduly prejudicial, but other methods of placing his age before the jury were not—it was tacking uncomfortably close violating the judge's order. Yet, the Commonwealth did not seek clarification at the time the judge made its ruling that its alternate theory for putting Mr. Perrier's age before the jury was permissible. Nor did the Commonwealth approach sidebar at any time thereafter to clarify that its intended argument was not precluded by the judge's ruling. The failure of the Commonwealth to take reasonable steps to assure itself that its alternate basis for referencing facts deemed unfairly prejudicial was permissible suggests that the Commonwealth may not have been interested in knowing the answer.

Finally, the record also supports a finding that the Commonwealth should have known that violating the judge's order excluding references to Mr. Perrier's age would necessitate a mistrial or the order of a new trial. As explained above, the judge clearly and repeatedly explained his ruling that referencing Mr. Perrier's age would

raise the risk of unfair prejudice. RA:20, 22. He explicitly rejected the Commonwealth's suggestion that the prejudice could be cured by a limiting instruction. RA:21-22. The prosecutor reasonably should have known that referencing facts that the judge had determined gave rise to a danger of unfair prejudice that could not be cured with a jury instruction would result in the judge ordering a mistrial or a new trial.

For these reasons, the judge's findings and analysis resolving Mr. Perrier's motion to dismiss was insufficient to vindicate Mr. Perrier's double jeopardy rights. Further, the record supports the findings that the Commonwealth engaged in misconduct that resulted in the order for a new trial, that the misconduct had the effect of depriving Mr. Perrier of reasonable likelihood of acquittal, and the Commonwealth knew or reasonably should have known from all of the facts and circumstances that its conduct would likely require new trial. In such circumstances, Mr. Perrier's double jeopardy rights have been violated and retrial must be barred.[11]

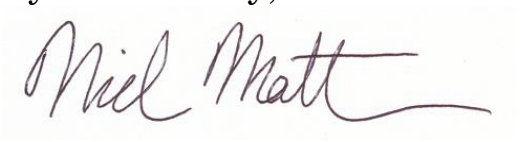
[11] Should the Court determine that the record is not sufficient to determine whether the Commonwealth's misconduct violated Mr. Perrier's double jeopardy rights, remand to the trial court for supplemental findings may be appropriate.

CONCLUSION

For the foregoing reasons, Mr. Perrier requests that the Court reverse the judgment of the single justice and hold that the motion to dismiss on double jeopardy grounds was erroneously denied. Should the Court deem it necessary, Mr. Perrier alternatively requests that the Court remand this case to the county court for entry of an order directing the District Court judge to make the necessary findings consistent with the Court's opinion.

Respectfully submitted,

JOSHUA PERRIER
By his attorney,



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Dated: January 21, 2021.

CERTIFICATE OF COMPLIANCE

I, Nicholas Matteson, certify that this Brief complies with the rules of court that pertain to the filing of such papers, including but not limited to Mass. R. A. P. 16(a)(13) (addendum); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 18 (appendix to the briefs); Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. A. P. 21 (redaction).

I also certify that this Brief has been produced using 14-point Century Schoolbook, a proportionally spaced font, and contains 10,539 words (including headings, footnotes and quotations, but excluding portions of the Brief exempted from the word limit under Mass. R. A. P. 20(a)(2)(D)), which I calculated using the word count feature of Microsoft Word for Office 365.

Signed under the pains and penalties of perjury,

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ADDENDUM

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Constitutional Provisions

Statutes

Constitutional Provisions

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

G.L. c. 90, § 24, in relevant part:

Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one–hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety–four C, or while under the influence from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270 shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one–half years, or both such fine and imprisonment.

G.L. c. 263, § 7

A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits; but he may plead such acquittal in bar of any subsequent prosecution for the same crime, notwithstanding any defect in the form or substance of the indictment or complaint on which he was acquitted.

CERTIFICATE OF SERVICE

I hereby certify, under pains and penalties of perjury, that I have on this date made service upon the Commonwealth by directing that a copy of this Brief and Record Appendix be electronically served on Assistant District Attorney Thomas H. Townsend, by the Court's e-file protocol.

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