No. 14-24-00808-CR

IN THE TEXAS COURT OF APPEALS
FOURTEENTH COURT OF APPEALS DISTRICT
HOUSTON, TEXAS

Ex Parte
CELESTE PEREZ, Appellant

Appeal from the 85th Judicial District,
Brazos County, Texas

BRIEF OF APPELLANT

[Oral Argument Requested]

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STATEMENT OF THE CASE

Appellant Celeste Perez was indicted in Brazos County for two counts of Manufacture or Delivery of a Controlled Substance, Penalty Group 1 and Penalty Group 2, each in an amount of ≥400 grams in cause no. 22-00776-CRF-85. The charges stemmed from a police operation in which a large quantity of drugs—specifically about a kilogram of cocaine and over 400 grams of MDMA—were recovered from a vehicle after Ms. Perez's boyfriend (the primary suspect, Ryan Stallings) was shot and killed at the scene. Ms. Perez was present during the incident, but the drugs belonged to Stallings, who was the original target of the investigation.

Perez's trial commenced on July 8, 2024. During trial, a mistrial was declared on July 10, 2024, when a seated juror revealed that one of the State's key pieces of evidence—a series of text messages purportedly involving Ms. Perez—implicated the juror's own sister. After the mistrial, on October 7, 2024, Ms. Perez filed a Pretrial Application for Writ of Habeas Corpus in the 85th District Court, asserting that double jeopardy bars any retrial due to the State's deliberate misconduct in provoking the mistrial. The trial court denied habeas relief by written order on October 10, 2024.

Ms. Perez timely filed notice of interlocutory appeal. This appeal is brought pursuant to Texas Code of Criminal Procedure article 11.08 and the Double Jeopardy clauses of the United States and Texas Constitutions, which permit immediate

appellate review of a claim that a retrial is barred by double jeopardy. Appellant now asks this Court to reverse the denial of habeas relief and dismiss the indictment with prejudice, thereby barring any retrial.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. This case presents a serious constitutional question concerning the Double Jeopardy Clause in the context of prosecutorial misconduct. The issue – whether a retrial is barred because the prosecution intentionally provoked a mistrial through egregious evidentiary misconduct – involves a detailed trial record and the application of nuanced precedent to those facts. Oral argument would significantly aid the Court's understanding of the complex factual sequence and allow counsel to address any questions about the intent and effect of the prosecutorial conduct at issue.

ISSUES PRESENTED

I. Whether the prosecution's deliberate introduction of inadmissible, unauthenticated text messages—after a pretrial warning and without calling the key witness—create the evidentiary crisis that compelled the defense to move for a mistrial?

II. Whether the objective facts and circumstances—including the State's failure to screen jurors for known risks, its decision to proceed without proper authentication, and its acceptance of the mistrial—support a finding that the prosecutor intended to provoke a mistrial or to avoid an acquittal?

III. Whether the prosecutorial misconduct in this case meet the intent standard under Oregon v. Kennedy, 456 U.S. 667 (1982), and Ex parte Lewis, 219 S.W.3d 335 (Tex. Crim. App. 2007), thereby barring retrial under the Double Jeopardy Clauses of the United States and Texas Constitutions?

STATEMENT OF FACTS

The Underlying Offense and Investigation

On January 27, 2021, Bryan police and DPS agents conducted a narcotics surveillance operation focusing on Ryan Stallings, who was believed to be trafficking large quantities of drugs. (RR Vol. 3, Pg. 22-23). Stallings was the boyfriend of Appellant Celeste Perez, and the two were observed traveling together during the investigation. (RR Vol. 3, Pg. 87). Investigators had received tips implicating Stallings in drug activity, and surveillance confirmed that Stallings made frequent trips to a suspected drug source, sometimes accompanied by Ms. Perez.(RR Vol. 3, Pg. 21). At all times, Stallings was treated as "the target of the investigation" and the primary suspect, with officers "more focused on Ryan" than on Ms. Perez. (RR Vol. 3, Pg. 48).

On the day in question, officers executed a plan to stop Stallings's vehicle, a Jeep, after he returned from one such trip. When confronted, Stallings pulled out a firearm, and an altercation ensued in which Stallings was shot and killed by law enforcement (RR Vol. 3, Pg. 188-91). Ms. Perez was at the scene (having been a passenger in the Jeep) but did not engage in any violence. In the aftermath, officers searched the Jeep and recovered approximately **one kilogram of cocaine and over 400 grams of MDMA (ecstasy)** (RR Vol. 3, Pg. 188-91). These drugs had been in Stallings's possession; indeed, officers observed that Stallings had the cell phone

linked to the drug operation "in his lap" and a large quantity of drugs in the vehicle at the time he was shot (RR Vol. 3, Pg. 168).

Stallings died at the scene, leaving Ms. Perez as the only person to potentially face charges for the contraband. Although **no direct evidence** tied Ms. Perez to ownership or control of the drugs (they were found with Stallings, who by all accounts was the dealer in question), the State proceeded to charge Ms. Perez with two counts of possession with intent to deliver the cocaine and MDMA recovered. The State's theory was essentially guilt by association – that Ms. Perez must have been complicit in Stallings's drug dealing because she was present during some related activities. However, apart from her presence and relationship with Stallings, the State had **little evidence** linking Ms. Perez to the drugs.

Pretrial Dispute Over Text Message Evidence

Aware of the weakness in directly implicating Ms. Perez, the prosecution sought to introduce a series of **text messages** to bolster its case. These text communications, extracted from one of Ms. Perez's phones, were **dated many months prior** to the January 2021 incident (during mid-2020) and appeared to be messages between Ms. Perez and another woman, **Amanda Monsivais**, discussing small quantities of drugs ("molly and shrooms") (RR Vol. 3, Pg. 158). The State argued that these historic messages showed Ms. Perez engaged in low-level drug transactions and thus tended to prove her **intent to deliver** the narcotics found with

Stallings by demonstrating involvement in a broader drug scheme. In essence, the State wanted to use the 2020 text thread as a sort of "ledger" or extraneous offense evidence to link Ms. Perez to the contraband, despite the significant gap in time and the different context. (RR Vol. 3, Pg. 158).

The defense objected to the admission of these text messages **before trial and outside the jury's presence**, highlighting multiple foundational and relevance problems. A pretrial motion in limine hearing was held on July 8, 2024, specifically addressing whether the State could use the text messages without calling **Amanda Monsivais (the other participant in the texts)** as a witness. (RR Vol. 2, Pg. 5) During this hearing, defense counsel argued that the messages could not be properly authenticated under Texas Rule of Evidence 901 without testimony from Ms. Monsivais or some direct evidence linking the messages to Ms. Perez and the alleged drug transactions. Counsel noted that the State was attempting to "bootstrap" other bad acts by Ms. Perez (if indeed it was her in the texts) to prove character or intent, which raised **Rule 404(b)** concerns, and that the **temporal remoteness** – texts from June 2020 relating to minor drug amounts, in a trial about a major January 2021 seizure – made them **irrelevant and highly confusing** to the jury (RR Vol. 2, Pg. 22-23). Any minimal probative value was vastly outweighed by the danger of unfair prejudice and misleading the jury (Rule 403). (CR pg. 55).

Defense counsel's **objections under Rules 901, 401, and 403** were specific and emphatic. In a trial brief provided to the court, defense counsel outlined "multiple ways" in which the texts were inadmissible: lack of authentication (Rule 901), hearsay concerns ("all the 800s") and other evidentiary rules, and ultimately Rule 403.. Counsel argued that introducing unrelated communications from mid-2020 would do nothing but prejudice and confuse the jury, essentially inviting them to convict Ms. Perez for being a "bad person" or drug user rather than on proof beyond a reasonable doubt that she possessed the huge quantities of drugs at issue in 2021. As counsel succinctly put it, "all that does is confuse this jury" and improperly inject extraneous bad acts to suggest Ms. Perez's propensity (RR Vol. 3, Pg. 162).

The State's response, was that such text messages have been admitted in other cases as proof of intent and that the timeline difference was not disqualifying. The prosecutor likened the messages to a drug ledger or record of controlled buys, claiming they could show Ms. Perez's knowledge and intent regarding the later-discovered drugs. The trial court, having reviewed the parties' briefs, appeared primarily concerned with the **authentication** issue: *Were these messages actually what the State claimed – communications between Celeste Perez and Amanda Monsivais?* The State did not plan to call Ms. Monsivais (the other party to the texts) to authenticate or explain the messages; instead, the State suggested it could

authenticate them circumstantially (e.g. by showing they were obtained from Ms. Perez's phone and that they contain drug-related content (RR Vol. 3, Pg. 167).

Significantly, this **put the State on notice** that Amanda Monsivais was a person with crucial knowledge about the texts and that her involvement could pose potential problems if not handled properly. The defense stressed that without Ms. Monsivais's testimony, the messages lacked context and foundation. Despite this notice, the State neither listed Ms. Monsivais as a witness for trial nor alerted the court or jury panel that Ms. Monsivais's identity might be important. Indeed, during **voir dire**, the prosecution did *not* ask the venire panel whether anyone knew Amanda Monsivais, even though they knew her name would come up in the text exhibit (RR Vol. 3, Pg. 170). This omission would prove disastrous.

After hearing arguments, the trial judge deferred a final ruling but strongly hinted he was inclined to admit the texts if the State could minimally authenticate them. He remarked that the issue was "not a hearsay objection" so much as "an authenticity objection," indicating that if authenticity could be satisfied, he might allow the evidence despite the defense's other concerns. (RR Vol. 3, Pg. 162). The court noted having read the defense's brief and seemed to believe the Rule 404(b)/403 issues might be overcome, provided the State could tie the messages to Ms. Perez.

Trial Proceedings and the Admission of the Texts

The jury was selected and sworn on July 8, 2024, and the guilt/innocence phase began on July 9. The State's case-in-chief included law enforcement witnesses detailing the investigation of Stallings and the events of the January 2021 bust. Through these witnesses, the State established that Stallings was under surveillance, that he and Ms. Perez traveled together on certain occasions, and that Stallings was killed during the attempted arrest where the drugs were seized (RR Vol. 3, Pg. 162). Notably, officers testified that **Stallings was initially the sole target** and that Ms. Perez's involvement was peripheral.

When it came to directly implicating Ms. Perez, the State had **no eyewitness or direct evidence** that she handled the drugs. There were no fingerprints, no controlled buys from her, no confession. The prosecution's strategy therefore hinged on circumstantial inferences and, crucially, the controversial **text messages from months earlier** to suggest Ms. Perez had a knowing role in drug dealing.

On the second day of trial (July 10, 2024), the State moved to introduce the text message thread during the testimony of a police investigator who had extracted data from Ms. Perez's iPhone. The text exchange was marked as **State's Exhibit 51** (and related exhibits) for identification. Outside the presence of the jury, the defense **re-urged its objections** to this evidence, noting that nothing had changed since the pretrial hearing: Ms. Monsivais was still not present to authenticate or explain the texts, and the State still could not connect the discussion of "molly and shrooms" in

mid-2020 to the cocaine and MDMA found with Stallings in 2021. Defense counsel also added a **Sixth Amendment** dimension – that admitting the messages without the other participant as a witness denied Ms. Perez the right to confront and cross-examine the person ostensibly making those statements (Ms. Monsivais). Counsel requested a running objection to the text message evidence, preserving all Rule 901, 403, 404, and Sixth Amendment grounds, to which the court agreed. (RR Vol. 3, Pg. 183).

The trial court then **overruled the defense objections** and allowed the State to proceed with the evidence. The judge's ruling encompassed the entirety of the text message exhibit. In doing so, the court implicitly found that the State had sufficiently authenticated the messages – presumably by showing they came from Ms. Perez's phone and bore the contact name "Amanda" – and that their probative value was not substantially outweighed by prejudice. The defense's multifaceted objections were thus rejected, clearing the way for the jury to see the content of these messages. (RR Vol. 3, Pg. 208)

The Juror's Revelation and Resulting Mistrial

The jurors had not seen the actual text exhibit during the initial foundational testimony, as the court had the discussion of admissibility outside their presence. Now, with the court's go-ahead, prosecutor Goodman began publishing Exhibit 51 to the jury through the testifying officer. The very **first portion** of the exhibit showed

the basic header information of the text thread: it listed the sending phone number (which the officer testified was associated with Ms. Perez's iPhone) and the receiving phone number and contact name – displayed as the number and "WM Amanda Monsivais." (RR Vol. 4, Pg. 169).

At that moment, before the content of any actual message was even discussed, a juror interrupted the proceedings. Juror number 2 (later identified in the record as **Natalie Cruz**) suddenly spoke up and **signaled that she recognized the phone number or name on the exhibit**. The court immediately halted the presentation. According to the record, the judge stated, "Juror's got a question," and then took an off-the-record discussion at the bench (RR Vol. 4, Pg. 170). The jury was promptly excused from the courtroom so the situation could be addressed outside their hearing. (RR Vol. 4, Pg. 170-71).

Once the jury was out, the court put on record what had occurred: Juror Cruz informed the court that **Amanda Monsivais is her sister**. Defense counsel's immediate reaction captured the shock: "Oh, jeez" The prosecutor, for her part, responded, "That's why we have an alternate," indicating that the State's first instinct was simply to remove this juror and substitute an alternate juror, as if this could neatly cure the problem. (RR Vol. 4, Pg. 170)

The trial court proceeded to discuss the matter with counsel on the record. Several important points emerged:

- **Voir Dire Omission:** The defense inquired whether Ms. Monsivais's name had been mentioned during voir dire (it had not). The State conceded it did not ask the panel about Ms. Monsivais, with the prosecutor explaining, *"Because she wasn't a potential witness."* In other words, the State had made a tactical decision not to list or mention Ms. Monsivais in jury selection since they did not plan to call her to testify. This exchange underscored that the State was fully aware pretrial of Ms. Monsivais's identity and potential relevance, yet took no steps to screen jurors for familiarity with her. Had the State exercised even minimal diligence on this front, Juror Cruz would undoubtedly have revealed her relationship during voir dire, avoiding her placement on the jury. (RR Vol. 4, Pg. 169-70)
- **Juror's Timing:** The court asked when Juror Cruz realized the connection. The prosecutor noted that the juror spoke up as soon as the exhibit displayed the name/number – "When she said it. I heard her say it." This indicates the juror recognized the phone number or name immediately upon seeing it and did exactly what jurors are instructed to do – alert the court to outside knowledge. (RR Vol. 4, Pg. 170)
- **State's Proposed Fix – Alternate Juror:** The State's first suggestion was simply to remove Juror Cruz and seat the alternate, attempting to downplay the incident by saying, "that's why we have an alternate". The State implied that Juror Cruz could be excused for cause (due to this newly discovered bias or conflict) and the trial

continue with the rest of the panel. However, the defense did not acquiesce to that quick fix, and the trial court was appropriately concerned that the impact of this event could not be so easily contained.

The court recognized the gravity of the situation. A juror had effectively become an **unsworn fact witness** in the middle of trial, even if inadvertently. By stating that her sister was the person in the text messages, Juror Cruz had, in the presence of at least some other jurors (those who heard her exclamation), essentially authenticated a key fact the State had not proven: that the "Amanda" in the texts was a real person known to be involved with drugs. The prejudicial potential was enormous—**far beyond** what the juror herself might consciously do with this knowledge. As the trial judge astutely noted, even if Juror Cruz were replaced with an alternate, the remaining jurors might have *overheard her remark* or at least sensed something highly irregular occurred involving that exhibit. There was a risk that other jurors would speculate or discuss it. Moreover, if Juror Cruz stayed, she would be judging evidence that directly implicated her own sister, raising serious questions about whether she could remain impartial (either she might disbelieve the texts to protect her sister or conversely be extra harsh on Ms. Perez out of resentment for her sister's involvement).

The trial court decided to **question Juror Cruz on the record** to assess the impact and determine the next steps. Juror Cruz was brought back into the courtroom

individually (outside the presence of the rest of the jury) for a formal examination by the judge and counsel (RR Vol. 4, Pg. 179). **Juror Cruz confirmed that Amanda Monsivais is indeed her sister** and that they are not estranged (they "know each other pretty well," though they don't live together). The judge probed whether she had any prior knowledge of her sister's involvement with drugs or any information relevant to the case: Juror Cruz admitted that it was public knowledge her sister had been in trouble before: "my sister has gone to jail for that [drugs]. ... I know that at [one] time that is something she did. It's nothing that I'm surprised about. That's her, not me.". This statement is striking – the juror essentially acknowledged that her sister has a history of drug use or drug crime (which is "public knowledge" to her) and that seeing her sister's number in this context did not surprise her. In effect, **the juror herself supplied the key missing link**: that the "Amanda" asking to buy drugs in those texts is someone who, in real life, actually *did* have a drug problem. This is information far beyond the admissible trial evidence, and it directly touched on the credibility and significance of the text messages. (RR Vol. 4, Pg. 179-83).

When asked hypothetically if she would be able to judge her sister's credibility fairly if, say, her sister's statements or involvement were at issue, Juror Cruz struggled. From this colloquy, it became painfully clear that Juror Cruz could not simply **unknow** what she knew. Even if she sincerely vowed to decide the case

only on the evidence presented, her spontaneous recognition of the phone number and her internal knowledge of her sister's behavior meant that *the bell could not be unrung*. The integrity of the trial had been irrevocably compromised: one juror was tainted with extrinsic evidence (and potentially others were indirectly tainted), and an unavoidable conflict of interest had arisen (a juror related to a de facto witness/actor in the events).

The defense at this juncture moved for a mistrial, albeit reluctantly. As defense counsel put it on the record the next day, "We -- okay. **We don't want to ask for a mistrial, but ... it seems like that is the only option we have available to us.** (RR Vol. 5, Pg. 5). The defense recognized that any verdict under these circumstances would be suspect and that Ms. Perez's right to an impartial jury had been irretrievably lost. The juror's outburst and knowledge introduced a risk of unfair bias that could not be purged by instructions or substitution.

Initially, the trial court took the motion for mistrial under advisement, adjourning for the day to allow research and reflection on possible alternatives. The State was clearly anxious to avoid a mistrial and argued that the court should consider lesser remedies. The prosecution's stance was that Juror Cruz could simply be removed and replaced with the alternate, and that the remaining jurors could be polled or instructed to ensure they were not influenced (RR Vol. 4, Pg. 179-83). In an overnight brief and argument, the State asserted that a mistrial was premature and

"not ... appropriate" because perhaps the prejudice could be contained. They urged the court to individually question the other jurors to see if anyone overheard Ms. Cruz's remark or if they could still be fair.

However, the defense opposed simply swapping in the alternate. Defense counsel pointed out that the problem was not merely the biased juror herself, but the fact that the *evidence* had effectively been improperly bolstered in front of the whole jury. As counsel argued, questioning each juror about their exposure would "just cause the poison to spread" by further emphasizing the issue (RR Vol. 4, Pg. 179-83). Additionally, the defense had not consented to proceed with only 11 jurors, and was not willing to agree to replace the juror and pretend nothing happened. Indeed, forcing the defense to accept a curative measure that still left the tainted evidence in play would be unfair. The defense's position was that **only a mistrial** could adequately protect Ms. Perez's right to a fair trial by an impartial jury.

After considering the arguments and the extraordinary circumstances, the trial court ultimately **granted a mistrial** on the morning of July 11, 2024. (RR Vol. 5, Pg. 25). The Court placed the findings on the record, acknowledging that Juror Cruz's situation made it impossible to proceed fairly. Importantly, the trial judge explicitly stated that this was a case of "manifest necessity" for a mistrial – there was no feasible way to continue the trial without either prejudicing the defendant or

undermining confidence in the verdict (RR Vol. 5, Pg. 26). The court thus discharged the jury and reset the case for a new trial date, over defense objection.

In sum, Ms. Perez's first trial ended in a mistrial **through no fault of her own**. It was the State who introduced the problematic evidence and the State who failed to take precautions that would have revealed the juror's conflict earlier. The mistrial relieved the acute prejudice to Ms. Perez in that moment, but it set up a serious question: **Should the State be permitted a second chance to prosecute, or does double jeopardy bar reprosecution?**

Post-Mistrial Habeas Corpus Proceedings

On October 7, 2024, prior to the second trial setting, Ms. Perez invoked her constitutional right *not* to be put in jeopardy again by filing a pretrial application for writ of habeas corpus. (CR 78) The application argued that the mistrial was provoked by intentional prosecutorial misconduct, and therefore, under the Double Jeopardy Clauses of both the U.S. and Texas Constitutions, the State is barred from retrying her. Specifically, the writ alleged that the prosecution **goaded** the defense into moving for a mistrial by (1) insisting on the admission of highly prejudicial, marginally relevant text messages without proper authentication; (2) intentionally failing to disclose or warn about a key witness (Ms. Monsivais) who turned out to be related to a juror; and (3) in doing so, acting with the specific intent to avoid a likely acquittal in a weak case.

At the habeas hearing, the defense emphasized that the State's case against Ms. Perez was tenuous – absent the tainted text evidence, the jury might well have acquitted, given that all evidence pointed to Stallings as the owner of the drugs. The timing and manner in which the State introduced the texts suggested a **"win at any cost" mentality**, raising an inference that the prosecution preferred to provoke a mistrial (and get a do-over) rather than risk an acquittal. The State, for its part, denied any ill intent and pointed to the trial judge's on-record finding that it did not act maliciously. The State argued that it had simply been an unfortunate coincidence and that double jeopardy should not attach because the prosecution had not *intended* to abort the trial. (RR Vol. 6, Pg. 5-14). The trial court denied relief. This appeal followed.

SUMMARY OF ARGUMENTS

The Double Jeopardy Clause bars the retrial of Celeste Perez because the mistrial in her first trial was provoked by intentional prosecutorial misconduct. The State, facing a weak case, introduced highly prejudicial and dubiously admissible text messages without proper authentication or disclosure. The predictable result materialized immediately when a juror announced that the person named in the texts was her own sister, injecting extrinsic information into the trial and tainting the

proceedings. The defense had no choice but to seek a mistrial, which the trial court granted.

While a defendant's mistrial request usually permits retrial, an exception applies when the mistrial is caused by prosecutorial conduct intended to provoke it. *See Oregon v. Kennedy*, 456 U.S. 667 (1982). Texas follows this rule and recognizes that retrial is also barred when the State acts to avoid an expected acquittal. *See Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007). Here, the State knowingly introduced unauthenticated text messages, failed to disclose or screen for a juror's connection to a critical figure in the evidence, and when the conflict was revealed, offered no meaningful resistance to a mistrial.

These actions deprived Ms. Perez of her constitutional right to have her trial completed by the original jury. The Fifth Amendment and Article I, § 14 of the Texas Constitution prohibit successive prosecutions following a mistrial caused by such misconduct. *See Green v. United States*, 355 U.S. 184 (1957). Because the mistrial was provoked through deliberate acts that jeopardized Ms. Perez's fair trial rights, retrial is barred. This Court should reverse the denial of habeas relief and dismiss the indictment with prejudice.

ARGUMENT

DOUBLE JEOPARDY BARS RETRIAL AFTER A GOADED MISTRIAL

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall be "twice put in jeopardy" for the same offense. U.S. Const. amend. V; *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Texas law provides coextensive protection. Tex. Const. art. I, § 14; Tex. Code Crim. Proc. art. 1.10. This constitutional guarantee not only protects against a second punishment or a second trial after acquittal or conviction, but also safeguards a defendant's "valued right to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). Accordingly, if a criminal trial is terminated over the defendant's objection (without his consent), a retrial is generally barred unless the mistrial was required by "manifest necessity." Id. at 505–06. Conversely, if the defendant himself requests or consents to a mistrial, the usual rule is that jeopardy is not terminated, and retrial is permitted. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). The rationale is that by moving for mistrial, the defendant normally elects to forego the first tribunal and thus consents to continue jeopardy in a new trial. *Id*. at 676; *United States v. Dinitz*, 424 U.S. 600, 607–10 (1976).

However, there is a critical exception to that rule: when the prosecutor's misconduct provokes the mistrial request. In *Oregon v. Kennedy*, the Supreme Court

held that if the government intentionally goads the defendant into moving for a mistrial, the Double Jeopardy Clause will bar a retrial. 456 U.S. at 673, 679. The Court in *Kennedy* emphasized a narrow standard focusing on the prosecutor's intent: "Only 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." *Id*. at 673 (emphasis added). In other words, the defendant must show the prosecutor engaged in the prejudicial conduct with the specific intent to force the defendant to seek a mistrial. Id. at 679. If that intent is found, the law deems the defendant's mistrial motion not truly voluntary, and double jeopardy will prohibit a do-over by the State. *Id.* at 676–77. By contrast, if the prosecutor's improper question or conduct was not intended to terminate the trial, then a mistrial at the defendant's behest is considered a valid waiver of the right to that specific jury, and retrial is allowed. *Id*. at 675–79.

The facts of *Kennedy* illustrate the distinction. There, during cross-examination of a State's witness, the defense brought out that the witness had never done business with the defendant. In response, the prosecutor pointedly asked, "Is that because he is a crook?" – a highly prejudicial question that the trial court had forbidden. 456 U.S. at 669. The defense immediately moved for a mistrial, which was granted. *Id*. The Oregon courts barred retrial, finding the prosecutor's

overreaching should prevent a second trial. *Id*. at 669–70. The U.S. Supreme Court disagreed, reinstating the indictment because there was no evidence that the prosecutor had intentionally tried to abort the trial. *Id*. at 679–680. The record showed this was a **single**, **impulsive instance of misconduct** in the heat of trial. Given the lack of intent to subvert the trial, the Double Jeopardy Clause did not bar retrial. 456 U.S. at 679–80. Justice Powell summarized the holding: absent prosecutorial intent to force a mistrial, a defendant's mistrial request removes any double jeopardy bar to re-prosecution *Id.*

Texas's constitutional protection against double jeopardy is textually similar to the Fifth Amendment (Tex. Const. art. I, § 14; *see also* Tex. Code Crim. Proc. art. 1.10), and Texas courts have historically interpreted it in lock-step with federal law. For many years, Texas followed the federal standard in mistrial situations. *See* ***Collins v. State***, 640 S.W.2d 288, 289–90 (Tex. Crim. App. 1982). In 1996, however, the Texas Court of Criminal Appeals decided *Bauder v. State*, introducing a more expansive state standard. 921 S.W.2d 696 (Tex. Crim. App. 1996) (Bauder I). The Court in *Bauder I* held that the Texas Constitution could bar a retrial even absent the prosecutor's specific intent to provoke a mistrial, if the prosecutor's **reckless** misconduct forced the defendant into seeking a mistrial. *Id.* at 699–700. The Court reasoned that a prosecutor who is *"aware [of] but consciously disregarded the risk that an objectionable event… would require a mistrial at the defendant's request"*

acts in a way *"constitutionally indistinguishable from deliberately forcing"* the mistrial (and thus should similarly be barred from retrying the defendant). *Id.* at 699. In short, under *Bauder*, Texas extended double jeopardy protection to cases of **knowing or reckless** prosecutorial error that made a mistrial inevitable, not just those of *intentional* provocation. The court expressly declared that the defendant's "valued right" to conclude his trial with the first jury could be violated by prosecutorial overreaching *"even recklessly"*, because such misconduct puts the defendant to a *Hobson's choice* between an unfair trial or no trial at all. If the prosecutor's *"manifestly improper"* acts render any verdict unreliable and incurable, the defendant's mistrial motion is not truly a free choice, and double jeopardy principles should apply. *See Bauder*, 921 S.W.2d at 699–700; *Ex parte Bauder*, 974 S.W.2d 729, 731–32 (Tex. Crim. App. 1998) (Bauder II).

Over the decade following *Bauder*, the Court of Criminal Appeals struggled to apply this broader standard. It decided a series of cases refining the analysis. In *Ex parte Bauder* (Bauder II), the Court clarified that the critical inquiry is whether the defendant was *"required to move for a mistrial"* because the prosecutor **"deliberately or recklessly"** crossed the line of acceptable conduct, creating such unfair prejudice that no instruction could cure it. 974 S.W.2d at 732 (quoting *Bauder I*, 921 S.W.2d at 699–700). If so, then despite the defendant's motion, the mistrial is attributed to the State's misconduct and retrial is barred. *Id. Bauder* II emphasized

that courts should distinguish ordinary trial error (which might warrant an appellate reversal, but not double jeopardy relief) from the sort of *prosecutorial overreaching* that "renders trial before the jury unfair to such a degree that no judicial admonishment could have cured it." 974 S.W.2d at 732; *see also Oregon v. Kennedy*, 456 U.S. at 673 (recognizing that the defendant's right to his first jury "would be a hollow shell" if prosecutors could force mistrials whenever a trial was going badly).

In *State v. Lee*, 15 S.W.3d 921 (Tex. Crim. App. 2000), the Court of Criminal Appeals reaffirmed the Bauder rule. It held that when a trial court grants a mistrial on a defendant's motion due to prosecutorial misconduct, the court must assess whether the mistrial was necessitated by the prosecutor's conscious disregard of the substantial risk that his misconduct would require a mistrial at the defendant's request. *Id.* at 923–24. If yes, double jeopardy bars retrial; if not (for example, if the misconduct was inadvertent or could have been cured), then retrial is permitted. *Id.* at 924. The Court in *Lee* underscored that the trial judge's decision is reviewed deferentially: the appellate court should uphold the ruling if it is supported by the record and within the zone of reasonable disagreement. *Id.* at 924–25. (In practice, this meant that a trial court's finding on the prosecutor's mental state—intentional, reckless, or merely negligent—would typically be upheld if it was supported by the evidence. *See Vasquez v. State*, 22 S.W.3d 28, 31–32 (Tex. App.–Amarillo 2000, no

pet.) (applying *Lee* and reviewing trial court's denial of relief for abuse of discretion, i.e., whether the ruling falls outside the zone of reasonable disagreement); *George v. State,* 41 S.W.3d 241, 250 (Tex. App.–Waco 2001, pet. ref'd) (same).)

In *Ex parte Peterson*, 117 S.W.3d 804 (Tex. Crim. App. 2003), the Court of Criminal Appeals again addressed this area, attempting to synthesize a clear test. The *Peterson* court declined to overrule *Bauder* at that time, instead "clarify[ing] the three-pronged analysis" for reviewing a double jeopardy mistrial claim. *Id.* at 817. Under *Peterson*, courts were to consider: (1) **the misconduct** – was the prosecutor's conduct *"so egregious that an ordinary admonishment could not cure the prejudice"*, thus rendering the trial *intrinsically unfair*?; (2) **the trial judge's ruling** – was a mistrial in fact warranted and requested because of that misconduct (as opposed to a strategic choice by the defense to abort a trial that might result in conviction)?; and (3) **the prosecutor's *mens rea*** – did the prosecutor act with the intent **or** awareness that his actions would likely force the defendant to seek a mistrial? *Id.* at 818–21. The Court noted a non-exhaustive list of *"objective facts and circumstances"* that courts could examine to infer the prosecutor's state of mind. *Id.* at 818–19. Such factors include: whether the misconduct was a single incident or part of a pattern; whether it was blatant or a close call; at what stage of trial the misconduct occurred; whether the prosecutor was trying to stave off an acquittal; and whether the prosecutor resisted or welcomed the mistrial. *Id.* at 818–20 & n.28.

The overarching principle remained that only if the defendant was **compelled** to move for a mistrial by the State's *"manifestly improper"* methods could he invoke double jeopardy to bar retrial. *Id.* at 821 (citing *Bauder II*, 974 S.W.2d at 732).

Ultimately, in 2007, the Court of Criminal Appeals decisively *overruled the Bauder line* and aligned Texas law with the federal *Kennedy* standard. *Ex parte Lewi***s**, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007). In *Ex parte Lewis*, the Court undertook an extensive review of Article I, § 14's history and the policy arguments, and concluded that Texas's Double Jeopardy Clause does not afford broader protection than its federal counterpart in this context. *Id.* at 348–58, 371. The Court acknowledged that the *Bauder* rule had proven ambiguous and difficult to apply consistently. It held that going forward, the *Oregon v. Kennedy* formulation would govern Texas double jeopardy claims arising from defense-requested mistrials. *Lewis*, 219 S.W.3d at 348, 371. Thus, under current Texas law, a retrial is *jeopardy-barred* **only** if the prosecution **engaged in conduct intended to provoke the defendant's mistrial motion** (or *"goad"* the defense into moving for mistrial). *Id.* at 348 (adopting *Kennedy* standard).

However, even as Texas adopted the *Kennedy* rule, the Court of Criminal Appeals has recognized that *proof of intent* can sometimes be inferred from a prosecutor's deliberate trial strategy to avoid an acquittal. In *Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007), decided just months after *Lewis*, the Court

confronted a egregious case of withheld evidence. In *Masonheimer*, the State failed to disclose critical exculpatory evidence in two successive trials, each failure leading the defense to seek a mistrial when the evidence belatedly came to light. *Id.* at 497–500. The record showed the lead prosecutor knew of the evidence before the first trial yet kept it hidden, apparently to deprive the defendant of a likely acquittal. *Id.* at 506–08. The Court of Criminal Appeals found that the prosecutor had acted with the *"specific intent to avoid the possibility of an acquittal"* in the first trial. *Id.* at 508. Although the prosecutor's immediate goal may have been to win the trial unfairly, the Court concluded that, at minimum, he was willing to accept a mistrial rather than risk a defense victory – which satisfied the *Kennedy* intent standard. *Id.* at 507–09. The Court thus held it was *constrained to find* that the prosecutor's **intentional misconduct** (withholding exculpatory evidence) that *necessitated the mistrial* barred any third attempt to prosecute the defendant. *Id.* at 508–09. In reaching that result, Masonheimer cited *Kennedy* and other courts' interpretations that a prosecutor's **"impropriety designed to avoid an acquittal"** is equivalent to intentionally provoking a mistrial for double jeopardy purposes. *Id.* at 507–08 (quoting *Kennedy*, 456 U.S. at 678–79; also citing cases from the Second Circuit and various states following this approach). In essence, *Masonheimer* teaches that a prosecutor cannot escape the double jeopardy bar simply by claiming the intent was to *win* unfairly rather than to *abort* the trial – when the effect of his deliberate

misconduct is to deny the defendant a fair chance at acquittal, the law will treat it as an intent to subvert the trial itself. See *id.* at 509 (State's intentional failure to disclose evidence "with the specific intent to avoid the possibility of an acquittal" bars retrial).

In sum, under governing law, Ms. Perez can prevail on her double jeopardy claim if she demonstrates that the prosecutor's misconduct in the first trial was **intended to provoke the defense into moving for a mistrial**. This standard can be met by direct evidence of the prosecutor's intent, but more often is proven circumstantially, by examining the objective facts and the sequence of events. *Kennedy*, 456 U.S. at 675 (intent can be inferred from "objective facts and circumstances"). Texas courts have emphasized that trial and appellate judges should focus on the objective indicators of intent. *Ex parte Lewis*, 219 S.W.3d at 353; *Ex parte Peterson*, 117 S.W.3d at 818. Relevant considerations include whether the prosecutor had a motive to abort the trial (for example, a belief that the jury might acquit absent some drastic measure), whether the misconduct involved a significant violation known to be impermissible, whether it was repeated despite warnings, and how the prosecutor reacted when the defense moved for a mistrial. See *Peterson*, 117 S.W.3d at 818–19 & n.28; *State v. Lee*, 15 S.W.3d at 924. Ultimately, the court must decide whether the defendant's mistrial motion was essentially forced by the prosecutor's conduct, rather than a truly voluntary strategic choice. *Bauder II,* 974

S.W.2d at 732; *Masonheimer*, 220 S.W.3d at 506.

The Prosecutor Intentionally Goaded the Defense into Moving for a Mistrial

Under the above principles, the retrial of Celeste Perez is **barred** because the prosecution's actions in the first trial were calculated to "win at any price" – even at the cost of provoking a mistrial – rather than risk an acquittal. The record of the first trial and the pretrial habeas hearing establishes that the prosecutor intentionally created the predicament that led inexorably to a mistrial. Unlike in *Oregon v. Kennedy*, where the prosecutor was surprised and dismayed by the mistrial, here the prosecutor's conduct and responses show that he anticipated the defense's mistrial motion and *welcomed* (or at least accepted) it as a favorable outcome under the circumstances. Because the mistrial resulted from the State's deliberate **overreaching**, double jeopardy law forbids the State from getting a second bite at the apple. U.S. Const. amend. V, XIV; Tex. Const. art. I, § 14.

1. The prosecutor's "hail Mary" use of inadmissible evidence created the crisis that forced the mistrial.

Perez's first trial began on July 8, 2024. Prior to jury selection, the court held a *pretrial hearing* to address, among other things, an evidentiary dispute over certain text messages the State wanted to introduce. (RR Vol. 2, Pg. 5–27.) These were text messages purportedly between Ms. Perez and another woman, **Amanda Monsivais**,

discussing small drug transactions many months before the offense in questionfile-upfeciqja91sxusmv3t9hk. The State argued these texts showed Perez's involvement in drug dealing; the defense objected that the messages were irrelevant, hearsay, and – critically – could not be properly authenticated without testimony from the alleged other participant, Monsivais. Monsivais was a known figure (a friend or acquaintance of Perez) who was *not* charged in this case. The defense pointed out at the hearing that unless the State called Monsivais as a witness to authenticate and explain those texts, there was no competent evidence tying the phone number or messages to Ms. Perez. In response, the prosecution maintained it could authenticate the texts through other circumstantial means, even if Monsivais did not testify. This pretrial hearing **put the prosecution on notice** that Monsivais's involvement was a key issue. Indeed, the very fact of the hearing underscored the risk: if the State persisted in attempting to use the texts without calling Monsivais, it ran a substantial chance of injecting reversible error (or worse) into the trial.

Despite this forewarning, the State proceeded to trial *without listing or calling Amanda Monsivais* as a witness. The prosecutor did not even mention Monsivais during voir dire – he did not ask the venire panel if anyone knew Monsivais's name or had any connection to herfile-upfeciqja91sxusmv3t9hk. This omission is striking, because it later became clear that one of the seated jurors did, in fact, recognize the name or phone number. By failing to screen the panel for ties to an obviously

pertinent person, the State set the stage for the very "surprise" that occurred.

Once the jury was sworn and trial commenced, the State forged ahead and sought to introduce the contested text messages. During the State's case-in-chief, the prosecutor offered into evidence a series of text message screenshots purporting to be between "Celeste" (Perez) and a contact saved as "Amanda" discussing drug quantities and prices. The defense repeatedly objected on the grounds raised pretrial (lack of authentication, hearsay, Rule 403, etc.), but the court – relying on the prosecutor's assurances – **overruled** the objections and admitted the messages. (RR Vol. 3, pg. 46.) The prosecutor then published the text messages to the jury. This was, as defense counsel described it, the State's "hail Mary" attempt to shore up its case. The State's case linking Ms. Perez to the large quantities of drugs found with her boyfriend was tenuous; the texts were essentially the *only* evidence suggesting she had knowingly participated in drug dealing. Lacking Monsivais's testimony, the State gambled that it could get the texts in and persuade the jury to infer their authenticity and meaning.

The gamble **immediately backfired**. As soon as the jury saw the exhibits, one juror (Juror No. 3) abruptly stood up and announced to the court that she *recognized the phone number on the text messages as belonging to her sister*. (RR Vol. 4, pg. 169) In other words, the juror realized that the "Amanda" in the text exchange was her own sister – a stunning revelation that meant: (a) a sitting juror now had personal

knowledge of pivotal evidence in the case; (b) that juror's **sister** was effectively an uncalled witness (and possibly an unindicted participant) in the alleged offense; and (c) the State had inadvertently achieved what it could not do on its own – link the phone number to a specific person (through the juror's statement). The trial court immediately halted the proceedings and sent the jurors out while this was addressed on the record. (RR Vol. 4, pg. 169-79)

The ensuing *hearing during trial* confirmed the severity of the problem. The juror was questioned by the court and counsel, and she affirmed that the phone number on the exhibit was her sister's number, and that she (the juror) had previously heard about "Amanda" in some related context. (RR Vol. 4, pg. 169-79.) In effect, the juror's testimony **authenticated the messages** (establishing that they were indeed messages involving her sister Amanda Monsivais). But of course, this "authentication" came at an outrageous cost – it turned a juror into a witness. The juror was now disqualified from continuing to serve (due to her personal knowledge of material facts), and her disclosure had likely tainted the rest of the panel as well. Even if the juror were removed, the remaining jurors had witnessed this dramatic episode and would certainly speculate about the content of the conversation and the connection between the defendant and the juror's sister. There was no realistic way to *un-ring* this bell. The very scenario the defense feared all along – inadmissible, highly prejudicial evidence being considered by the jury without proper vetting –

had come to pass, multiplied by the irregularity of how it was revealed.

At that juncture, **no remedy short of a mistrial** could have protected Ms. Perez's right to a fair trial. The defense had **no choice** but to move for a mistrial, despite having dearly wanted to conclude the trial with that jury (which had been empaneled after extensive selection). The motion was made with clear reluctance, but counsel emphasized that the State's failure to disclose the witness issue earlier left the defense in an impossible position: continuing the trial would mean proceeding with a juror-turned-witness and likely bias infecting the panel, whereas granting a mistrial would reward the State's ambush by giving it another try. Faced with that dilemma, the defense moved to abort the trial in order to avoid an "incurably unfair" proceeding. See *Bauder II*, 974 S.W.2d at 732.

The trial court **granted the mistrial**. Notably, the prosecution *did not oppose* the mistrial request. When the court inquired, the prosecutor denied doing anything wrong but explicitly stated the State was "okay" with a mistrial under the circumstances (in essence, conceding that there was no viable way to save the trial). The judge found that a mistrial was manifestly necessary given the prejudice and discharged the jury. A new trial date was then set, over defense objection (the defense immediately indicated it would be filing a writ to bar retrial).

To summarize, the sequence of events in the first trial shows that the **proximate cause** of the mistrial was the State's intentional introduction of evidence

it could not properly authenticate, and its failure to alert the court and defense to the obvious danger that a juror could have a personal connection to the unseen texter. This was not a mere accident or unforeseen development; it was the product of the prosecutor's calculated decisions. The prosecutor chose to proceed without Monsivais, knowing full well from the pretrial hearing that this was risky. He chose not to screen jurors about Monsivais, despite that risk. He then deliberately offered the texts (the *very evidence whose admissibility was in doubt*), undoubtedly aware that if something went awry – as it did – the trial would be in jeopardy. In short, the prosecutor *created* the mistrial scenario through his "overreaching." The law deems such a scenario attributable to the State, not the defendant. *United States v. Jorn*, 400 U.S. 470, 485 n.12 (1971) (if a mistrial is provoked by the prosecution's errors, the defendant's motion does not purge the taint for double jeopardy purposes).

2. The objective facts show the prosecutor intended to provoke a mistrial (or was willing to incur one to avoid acquittal).

Applying the *Kennedy/Lewis* standard here, the only rational explanation for the prosecutor's conduct is that he **intended** to force a mistrial if his gambit failed. In other words, the prosecutor acted with the specific intent to deny Ms. Perez a verdict from that first jury – either by securing a conviction through highly improper means, or by aborting the trial and getting a chance to start over. This satisfies even the most exacting definition of *intent to goad the defense into a mistrial*. See

Kennedy, 456 U.S. at 675–76. A review of several objective indicators supports this conclusion:

- **Motive to Avoid an Acquittal:** The State's case was weak and hinged on tenuous inferences about Perez's involvement. By the prosecutor's own characterization in opening statements, the State's evidence was largely circumstantial – they pointed to Perez's relationship with Stallings and some generic behaviors, but had little connecting her to the specific large stash of drugs (which were undisputedly in Stallings's possession when he was killed by police gunfire). The text messages with "Amanda" were critical to the State's theory that Perez was more than an unwitting passenger. Without those messages, the jury very well could have harbored reasonable doubt that Perez knowingly participated in any drug offense (especially as the principal offender was dead and could not inculpate her). The prosecutor had a strong motive to get the texts in at any cost. Conversely, he had a strong motive to avoid a straight acquittal by the jury due to insufficient evidence. This motive aligns with what happened: the prosecutor took a **high-risk action** (using the texts improperly) that any experienced attorney would recognize might derail the trial. Doing so makes sense only if the prosecutor preferred a mistrial to a likely defense verdict. See *Ex parte Masonheimer*, 220 S.W.3d at 507–08 (if misconduct is undertaken with *"the specific intent to avoid the possibility of*

an acquittal," it meets the *Kennedy* test).

- **Deliberate Misconduct, Not Accident:** The introduction of the unauthenticated texts was a **intentional act**, not an inadvertent slip. This is not a case of a prosecutor blurting out an inappropriate comment in the heat of cross-examination (as in *Kennedy*). Here, the prosecutor **premeditated** his course of action: he argued for the admissibility of the texts pretrial, lost that argument (in the sense that he was warned of the problem), and still went forward without curing the foundational gap. He knowingly violated the spirit, if not the letter, of the evidentiary rules by using a piece of evidence whose sponsoring witness was absent and whose prejudicial effect was tremendous. Furthermore, the State failed to comply with its obligation to disclose witnesses and potential juror conflicts. Prosecutors are officers of the court and are expected to alert the court to any issues that could cause a mistrial rather than ambushing the defense. In this case, the State's nondisclosure of Monsivais as a witness (or person of interest) prior to trial was **intentional** – likely because disclosing her or attempting to call her would have undermined the State's case (perhaps Monsivais was unavailable or would testify favorably to the defense). By keeping her out of the process, the prosecutor sought to *have it both ways*: introduce her statements (via text) without subjecting her to cross-examination. This *deliberate tactical choice* is the kind

of "ill-conceived" prosecutorial strategy that the Double Jeopardy Clause aims to deter. *See Bauder*, 921 S.W.2d at 699–700.

- **Foreseeability of a Mistrial:** The prosecutor's choices made a mistrial not just foreseeable, but, as it turned out, practically inevitable. Any reasonable prosecutor would foresee that seating a jury without vetting for knowledge of a key unseen witness (Monsivais) and then injecting that witness's information mid-trial carried a significant risk of mistrial. It is common in cases involving unindicted co-actors or extraneous misconduct for the court and counsel to ensure no juror has a personal connection that could surface unexpectedly. Here, had the prosecutor asked the panel, Juror No. 3 would have revealed her relation to Monsivais *before* the trial, likely leading to her strike for cause or at least alerting everyone to the issue. The prosecutor's *failure to do so* suggests that he did **not want to highlight Monsivais's importance** – possibly to keep the defense (and jury) in the dark. But by forgoing that safeguard, he *knowingly accepted* the risk that exactly what happened would happen. In *Bauder I*, the Court noted that if a prosecutor is *"aware [his conduct] is reasonably certain to result in a mistrial"* and does it anyway, that is equivalent to intent. 921 S.W.2d at 699. Here, even under the stricter standard, the evidence shows the prosecutor was at least *consciously aware* of the risk and *consciously disregarded* it. That satisfies

the Texas standard as it existed pre-*Lewis* (Bauder's recklessness test), and it certainly reinforces a finding of specific intent under the current standard.

- **No Curative Effort – Only Mistrial Would Do:** Once the juror's revelation occurred, the prosecutor made no effort to propose an alternative remedy to a mistrial. He did not, for example, suggest simply removing that juror and continuing with an 11-person jury (which, though irregular, might be consented to by both sides in some situations), nor did he attempt to argue that a curative instruction could somehow untaint the jury. Instead, the record reflects that the prosecutor *acquiesced* in the mistrial. His lack of opposition is telling. In *Oregon v. Kennedy*, by contrast, the prosecutor was described as having "resisted" the mistrial motion, indicating he truly wished to continue and was not trying to provoke the defense. 456 U.S. at 679 (Powell, J., concurring). Here, the State's ready acceptance of the mistrial suggests that it got exactly what it wanted: an opportunity to retry the case with its evidentiary deficiencies fixed (or to rethink its strategy). See *Ex parte Lewis*, 219 S.W.3d at 349 n.13 (noting that when a prosecutor's conduct effectively **secures a do-over** trial under more favorable conditions, double jeopardy must prevent the "unfair advantage" gained).
- **The State's Advantage in a Retrial:** Allowing a retrial in this case would undeniably reward the prosecution's tactics. The State has now identified a

crucial witness (Amanda Monsivais) whom it failed to prepare the first time. In a second trial, the State could attempt to subpoena Monsivais or otherwise properly authenticate the messages – curing the evidentiary problem that it previously ignored. The State also now knows the defense strategy and can adjust to it. This is precisely the kind of benefit that a prosecutor might seek by provoking a mistrial when his case is on shaky ground. The Supreme Court has recognized that a prosecutor might intentionally induce a mistrial in order to *"afford the prosecution a more favorable opportunity to convict"* the accused in a new trial. *Dinitz*, 424 U.S. at 611. The record here raises exactly that concern: the prosecution ended the first trial on a dramatic note that prevented an acquittal and will now get a fresh start – unless double jeopardy stops it. Any doubt on this point must be resolved in favor of the citizen's liberty and constitutional protection, not in favor of giving the State "another chance to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978).

Taken together, these factors compellingly show that the mistrial was the product of **intentional prosecutorial overreaching**. This case goes beyond the typical scenario of a prosecutor merely *"crossing the line"* in the heat of battle; it shows a prosecutor willing to derail his own trial to avoid an unfavorable verdict.

As one commentary observed about cases like this, the prosecutor essentially decides to *"win at any price"* – either through a tainted verdict or no verdict at all – which is fundamentally at odds with a fair adversarial process. The Double Jeopardy Clause exists to prevent the State from subjecting the accused to multiple trials in such fashion, with all the attendant anxiety, expense, and oppression of repeated prosecution. *See Green v. United States*, 355 U.S. 184, 187–88 (1957). Ms. Perez has already been through one trial and has had to mount a habeas proceeding to assert her rights; forcing her to stand trial again after the State's misconduct would exacerbate the very evils double jeopardy is meant to bar.

3. Texas precedent confirms that retrial is barred on these facts.

Finally, barring Ms. Perez's retrial is consistent with – indeed, compelled by – the relevant precedents. This is not a case of mere *"error"* by the prosecution; it is a case of *"prosecutorial goading"* in the purest sense. The Court of Criminal Appeals in *Ex parte Lewis* could not have been clearer that when a prosecutor **intends** to provoke a mistrial, relief *must* be granted. 219 S.W.3d at 348. Here, the record evidence of intent is far stronger than in most reported cases. In *Ex parte Masonheimer*, for instance, the court inferred intent to avoid acquittal from the prosecutor's repeated *Brady* violations. 220 S.W.3d at 508. In Perez's case, the State's misconduct occurred in a single trial, but it was just as prejudicial and just as *intentional*. The result – aborting a trial that was going badly – is exactly what the

prosecutor aimed for. If *Masonheimer* was deemed an extraordinary case warranting relief, this case is on par. Indeed, the facts here align neatly with what other courts have dubbed *"overreaching intended to subvert the trial."* See *Masonheimer*, 220 S.W.3d at 507–08 (citing Second Circuit and state cases). In *State v. Lee*, the Court of Criminal Appeals noted that a trial court's finding of prosecutorial intent (or lack thereof) in these situations is entitled to deference, but also indicated that where the facts clearly show the prosecutor's culpable state of mind, a bar to retrial is appropriate. 15 S.W.3d at 923. In the present case, the trial court's denial of habeas relief (to whatever extent it implied a finding of "no intent") was an abuse of discretion because it ignores the overwhelming evidence and reasonable inferences of bad intent. *Vasquez v. State*, 22 S.W.3d 28, 32 (Tex. App.–Amarillo 2000) (trial court abuses its discretion when its decision is not supported by the record or misapplies the law).

To be sure, claims of intentional provocation are not to be made lightly. The law presumes that prosecutors, as servants of the law, do not deliberately seek to sabotage their own trials. But when that presumption is rebutted by the facts, courts must not shrink from enforcing the Double Jeopardy Clause. This Court's task is not to gauge the personal culpability or ethics of the prosecutor, but to safeguard the defendant's constitutional right *not to be twice placed in jeopardy* in violation of fundamental fairness. The Supreme Court has reminded us that the *"underlying*

idea" of double jeopardy is to prevent the State, with all its power, from making repeated attempts to convict an individual, thereby subjecting him to *"embarrassment, expense and ordeal,"* and increasing the risk of an erroneous conviction even if innocent. **Green**, 355 U.S. at 187–88. Those concerns apply fully here. The prosecutor's actions forced Perez into a mistrial that she did not truly want; allowing a retrial would compound her ordeal and hand the State an unfair advantage. The better course – indeed the constitutionally required course – is to **dismiss the indictment** and hold the State to the consequences of its misconduct in the first trial.

Texas courts have not hesitated to enforce double jeopardy in cases of clear goading. In *Ex parte Masonheimer*, the Court of Criminal Appeals dismissed the indictment with prejudice after finding the mistrial there was prompted by the State's intentional withholding of evidence. 220 S.W.3d at 509. More recently, at least one Texas appellate court has affirmed a trial court's decision to bar retrial on facts analogous to ours. See *State v. Yetman*, No. 01-15-00531-CR, 2016 WL 7436645, at *5–6 (Tex. App.–Houston [1st Dist.] Dec. 22, 2016, no pet.) (upholding double jeopardy dismissal where prosecutor intentionally engaged in prejudicial conduct, knowing it would provoke a mistrial). In the *Yetman* case, as here, the State's calculated disregard of a court order resulted in a mistrial, and the trial judge found the prosecutor intended that result; the court of appeals deferred to that finding and

barred retrial. *Id.* Although *Yetman* is an unpublished opinion, it reflects the straightforward application of *Kennedy/Lewis* that should be applied in Ms. Perez's case as well. Here, even if the trial court did not explicitly make a finding on intent, the only supportable finding on this record is that the prosecutor knew his actions were *certain* (or at least very likely) to cause a mistrial and proceeded regardless. Under *Kennedy* and *Lewis*, that is enough to invoke the double jeopardy bar. See *Lewis*, 219 S.W.3d at 346 (even under narrower federal rule, showing prosecutor's specific intent to trigger mistrial suffices).

In conclusion, the prosecution's conduct in the first trial of Celeste Perez was *egregious and intentional*. The mistrial cannot be squared away as a mere "unfortunate accident" or "good-faith mistake" – it was the **intended outcome** of the State's trial strategy once the State realized it could not safely obtain a conviction with the evidence it had. The Double Jeopardy Clauses of the United States and Texas Constitutions do not tolerate such manipulation of the system. Because the prosecutor's actions were intended to provoke the defense into moving for a mistrial (or were undertaken with the specific intent to avoid an acquittal that was looming), any further prosecution of Ms. Perez for these charges is **jeopardy-barred**. The proper remedy is dismissal of the indictment with prejudice. This Court should therefore reverse the habeas trial court's ruling, sustain Ms. Perez's double jeopardy claim, and order that she not be tried again.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully asks this Court to find that retrial is prohibited and to render judgment dismissing the charges against her with prejudice. The Double Jeopardy Clause guarantees that the State does not get a do-over when it itself caused the first trial's collapse through deliberate misconduct. Ms. Perez's constitutional rights were violated by the prosecutorial goading in her first trial, and she is entitled to the protection of those rights now. The Appellant prays that the Court grant her relief and bar any further prosecution in Cause No. 22-00781-CRF-85 and further relief as she may show herself deserving, at law and in equity.

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CERTIFICATE OF SERVICE

This is to certify that on April 15, 2025 a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Brazos County, by the e-filing system.

____/s/_Chad Van Brunt_____
Chad P. Van Brunt

CERTIFICATE OF COMPLIANCE

I, Chad Van Brunt, attorney for the appellant, pursuant to Tex. R. App. P. 9.4, the word count from the beginning of the statement of facts until but excluding the signature block is 10,501 words.

_/s/Chad Van Brunt_____
Chad Van Brunt
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