

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

MSC No. _____
COA No. 279017
LC No. 05-3228-01
Prior MSC No.135149
Prior COA No. 269198
Prior MSC No.130784

v

ALEXANDER ACEVAL,
Defendant-Appellant.

_____ /

WAYNE COUNTY PROSECUTORS OFFICE
Attorneys for Plaintiff-Appellee
1441 St. Antoine St.
Detroit, MI 48226
313 224.7753

LAW OFFICES OF DAVID L. MOFFITT & ASSOCIATES
By: David L. Moffitt (P30716)
Attorney for Defendant-Appellant Alexander Aceval
30600 Telegraph Road, Suite 2185
Bingham Farms, MI 48025
248. 644.0880

_____ /

DEFENDANT-APPELLANT ALEXANDER ACEVAL'S

APPLICATION FOR LEAVE TO APPEAL

FROM COURT OF APPEALS DECISION OF FEBRUARY 5, 2009

TABLE OF CONTENTS

Table of Contents.....i

Statement of Jurisdiction.....iv

Statement of Questions Presented.....v

Index of Authorities.....vii

Statement of Facts.....1

Argument I:..... 23

**COA’S 2-5-09 PUBLISHED OPINION ERRONEOUSLY ANSWERS ‘NO’ TO
MSC 3-19-09 REMAND ISSUE OF**

**“WHETHER THE DEFENDANT WAS DENIED THE RIGHT TO
COUNSEL OF HIS CHOICE UNDER *UNITED STATES V
GONZALEZ-LOPEZ*, 548 US 140;126 S CT 2557; 165 L ED 409
(2006),”**

**WHERE SECOND TRIAL COURT'S UNJUSTIFIED EJECTION OF
RETAINED COUNSEL DENIED SIXTH AMENDMENT RIGHT TO
COUNSEL AND RIGHT TO PRESENT DEFENSE AND INVALIDATED
DEFENDANT-APPELLANT'S PLEA-BASED SECOND TRIAL
CONVICTION**

Argument I I31

**COA’S 2-5-09 PUBLISHED OPINION ERRONEOUSLY ANSWERS ‘NO’ TO
MSC 3-19-09 REMAND ISSUE OF**

“WHETHER THE PROSECUTION’S ACQUIESCENCE IN

THE PRESENTATION OF PERJURED TESTIMONY AMOUNTS TO MISCONDUCT THAT DEPRIVED THE DEFENDANT OF DUE PROCESS SUCH THAT RETRIAL SHOULD BE BARRED,”

WHERE THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS PRECLUDED THE PROSECUTOR FROM RETRYING DEFENDANT-APPELLANT WHERE AN INTENTIONAL PROSECUTORIAL AND JUDICIAL CRIMINAL MISCONDUCT CONSPIRACY OF A DEGREE UNPRECEDENTED IN MICHIGAN OR FEDERAL JUDICIAL HISTORY SOUGHT UNFAIR CONVICTION OF DEFENDANT-APPELLANT AND SUBVERTED THE “MISTRIAL” PROCESS SO RELIANT UPON JUDICIAL INTEGRITY

- A. Uniqueness Of Prosecutor And Judge Knowingly Committing *Criminal* Misconduct Presents Questions Of First Impression Beyond Conventional Double Jeopardy Analysis That Exemplify Policy Behind Prohibition.....32**
- B. Seminal Case Law Assigning Critical Role To Trial Court Completely Violated Where Trial Judge Corruptly Declares Mistrial.....36**
- C. The COA Opinion, With Numerous Instances Of From-Day-One Guileful, Criminal, And Secretive Behavior To Construe, Willfully Ignores That The Prosecutor Committed The Misconduct For The Purpose of Avoiding/Preventing Acquittal.....39**
- D. Federal And State Case Law Holds No Retrial Under These Circumstances.**

Argument III45

THE COA’S 2-5-09 PUBLISHED OPINION DECLARING THE SUBJECT PROSECUTOR’S AND TRIAL COURT’S CONDUCT “DISGRACEFUL,” “REPREHENSIBLE,” AND “OPPROBIOUS, AND SAYING THAT “DEFENDANT WAS DENIED DUE PROCESS BECAUSE OF THE TRIAL COURT [SIC] AND PROSECUTOR’S MISCONDUCT RAISES A NEWLY PREMISED ISSUE OF:

‘WHETHER THE NUMEROUS DUE PROCESS VIOLATIONS AND MISCONDUCT IRREPARABLY DENIED DEFENDANT HIS RIGHT TO

A FAIR TRIAL AND ANY POSSIBILITY OF PREVAILING IN ANY SUBSEQUENT TRIAL”

Relief Requested and Conclusion.....46

Proof Of Service

Appendix [Separate volume]

Table of Exhibits

Exhibit A Court of Appeals Opinion and Concurring Opinion of 2-5-09

B Order of Michigan Supreme Court of 3-19-08 For Remand As On Leave Granted

C Excerpt from Defendant-Appellant’s Brief On Appeal [Upon MSC Remand As If On Leave Granted] [COA No. 279017] , Issue I:

“SECOND TRIAL COURT’S UNJUSTIFIED EJECTION OF RETAINED COUNSEL DENIED SIXTH AMENDMENT RIGHT TO COUNSEL AND RIGHT TO PRESENT DEFENSE AND INVALIDATES DEFENDANT-APPELLANT’S PLEA-BASED SECOND TRIAL CONVICTION”

D Excerpt from Defendant-Appellant’s Brief On Appeal [Upon MSC Remand As If On Leave Granted] [COA No. 279017] , Issue II:

“THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS PRECLUDED THE PROSECUTOR FROM RETRYING DEFENDANT-APPELLANT WHERE AN INTENTIONAL PROSECUTORIAL AND JUDICIAL CRIMINAL MISCONDUCT CONSPIRACY OF A DEGREE UNPRECEDENTED IN MICHIGAN OR FEDERAL JUDICIAL HISTORY SOUGHT UNFAIR CONVICTION OF DEFENDANT-APPELLANT AND SUBVERTED THE “MISTRIAL” PROCESS SO RELIANT UPON JUDICIAL INTEGRITY”

E Excerpt from Defendant-Appellant’s Brief On Appeal [Upon MSC Remand As If On Leave Granted] [COA No. 279017] , Issue III:

**‘WHETHER THE NUMEROUS DUE PROCESS VIOLATIONS
AND MISCONDUCT IRREPARABLY DENIED DEFENDANT HIS
RIGHT TO A FAIR TRIAL AND ANY POSSIBILITY OF
PREVAILING IN ANY SUBSEQUENT TRIAL**

F Attorney Grievance Commission First Amended Formal Complaint
against APA

Karen K. Plants

G Request For Investigation Regarding Prosecutor Kym Worthy
[with referenced attachments]

H Response Of Prosecutor Kym Worthy To Request For Investigation

I Attorney General’s Investigative Report [first available 3-25-09]

J Complaint/Charges brought by Attorney General 3-25-09 against Judge
Waterstone, APA Karen Plants, PO Rechtzege and PO
McArthur

K Transcript, 2d Trial, Excerpt, Judge Waterstone’s Testimony As
Prosecution Witness

L 4-21-06 Motion to Dismiss [Attached to Prior COA and MSC
Applications]

M Statement of Transcripts Submitted [Attached to Prior COA and
MSC Application]

N Certified Docket Entries [Attached to Prior COA and MSC
Applications]

STATEMENT OF THE COURT'S JURISDICTION

The original Delayed Application For Leave To Appeal from the subject
criminal conviction was timely filed 6-29-07 under MCR 7.205(F)(3) with the Court of

Appeals as defendant-appellant was sentenced in the Wayne County Circuit Court by Judge Vera Massey Jones on 6-29-06 for possession of controlled substance with intent to deliver over 1000 grams, MCL 333.7401.

The Court of Appeals denied the Application 10-5-07. An Application For Leave To Appeal to the Supreme Court was timely filed 10-29-07 under applicable court rule.

The Michigan Supreme court issued its Order 3-19-08 remanding, as on leave granted, this matter to the Court of Appeals, and a Motion For Re-Hearing of said Order brought by the plaintiff-appellee prosecution was denied on 6-23-08.

The Court of Appeals heard the matter and issued its published opinion February 5, 2009. This Application For Leave To Appeal is timely filed within the 56 days permitted, to 4-2-09, for filing of same.

It should be noted that this matter was previously subject of interlocutory appeals by present defendant-appellant, in the Court of Appeals, No. 269198, and in this Honorable Court, MSC No.130784. Transcripts of the lower court proceedings were filed in support of the interlocutory appeals and are sought to be included as part of the record on appeal in this matter.

STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER COA'S 2-5-09 PUBLISHED OPINION ERRONEOUSLY ANSWERS
'NO' TO MSC 3-19-09 REMAND ISSUE OF

“WHETHER THE DEFENDANT WAS DENIED THE RIGHT TO
COUNSEL OF HIS CHOICE UNDER *UNITED STATES V*
GONZALEZ-LOPEZ, 548 US 140; 126 S CT 2557; 165 L ED 409
(2006),”

WHERE SECOND TRIAL COURT'S UNJUSTIFIED EJECTION OF RETAINED
COUNSEL DENIED SIXTH AMENDMENT RIGHT TO COUNSEL AND RIGHT
TO PRESENT DEFENSE AND INVALIDATED DEFENDANT-APPELLANT'S
PLEA-BASED SECOND TRIAL CONVICTION

The Defendant-Appellant Says “Yes.”

The Plaintiff-Appellee Says “No.”

The Trial Court Has Not Ruled Upon This Issue Because Remand Was Denied
By the COA

The Court Of Appeals Said “No.”

The Supreme Court Remanded This Issue For Further Consideration In Light of
US v Gonzalez-Lopez

II.

WHETHER COA'S 2-5-09 PUBLISHED OPINION ERRONEOUSLY ANSWERS
'NO' TO MSC 3-19-09 REMAND ISSUE OF

“WHETHER THE PROSECUTION'S ACQUIESCENCE IN THE
PRESENTATION OF PERJURED TESTIMONY AMOUNTS RO
MISCONDUCT THAT DEPRIVED THE DEFENDANT OF DUE
PROCESS SUCH THAT RETRIAL SHOULD BE BARRED,”

WHERE THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL
CONSTITUTIONS PRECLUDED THE PROSECUTOR FROM RETRYING
DEFENDANT-APPELLANT WHERE AN INTENTIONAL PROSECUTORIAL
AND JUDICIAL CRIMINAL MISCONDUCT CONSPIRACY OF A DEGREE
UNPRECEDENTED IN MICHIGAN OR FEDERAL JUDICIAL HISTORY

SOUGHT UNFAIR CONVICTION OF DEFENDANT-APPELLANT AND
SUBVERTED THE “MISTRIAL” PROCESS SO RELIANT UPON JUDICIAL
INTEGRITY

- A. Whether Uniqueness Of Prosecutor And Judge Knowingly
Committing *Criminal* Misconduct Presents Questions Of First
Impression Beyond Conventional Double Jeopardy Analysis That
Exemplify Policy Behind Prohibition.
- B. Whether Seminal Case Law Assigning Critical Role To Trial Court
Completely Violated Where Trial Judge Corruptly Declares Mistrial
- C. Whether The COA Opinion, With Numerous Instances Of
From-Day-One Guileful, Criminal, And Secretive Behavior To Construe,
Willfully Ignores That The Prosecutor Committed The Misconduct For
The Purpose of Avoiding/Preventing Acquittal
- D. Whether Federal And State Case Law Bars Retrial
Under These Circumstances.

The Defendant-Appellant Says “Yes.”

The Plaintiff-Appellee Says “No.”

The Trial Court Has Not Ruled Upon This Issue Because Remand Was Denied
By The Court of Appeals

The Court Of Appeals Said “No.”

The Supreme Court Impliedly Remanded This Issue For Further Consideration

III.

WHETHER THE COA’S 2-5-09 PUBLISHED OPINION DECLARING THE
SUBJECT PROSECUTOR’S AND TRIAL COURT’S CONDUCT “DISGRACEFUL,”
“REPREHENSIBLE,” AND “OPPROBIOUS, AND SAYING THAT “DEFENDANT
WAS DENIED DUE PROCESS BECAUSE OF THE TRIAL COURT [SIC] AND
PROSECUTOR’S MISCONDUCT RAISES A NEWLY PREMISED ISSUE OF:

‘WHETHER THE NUMEROUS DUE PROCESS VIOLATIONS AND
MISCONDUCT IRREPARABLY DENIED DEFENDANT HIS RIGHT TO A
FAIR TRIAL AND ANY POSSIBILITY OF PREVAILING IN ANY
SUBSEQUENT TRIAL”

The Defendant-Appellant Says “Yes.”

The Plaintiff-Appellee Says “No.”

The Trial Court Has Not Ruled Upon This Issue Because Remand Was Denied

By The Court of Appeals
 The Court Of Appeals Said “No.”
 The Supreme Court Has Not Decided This Question Because The Issue Is Newly
 Raised Based Upon The Court Of Appeals Opinion Finding Due Process
 Violations

INDEX OF AUTHORITIES

United States Supreme Court Cases

Arizona v Washington, 434 US 497; 98 SCt 824; 54LEd2d 717.....8,39,D40,D41

Benton v Maryland, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).....D31

Berger v US, 295 US 78; 55 Sup Ct 629; 79 L Ed 1314 (1935).....22,E45

Burks v United States, 437 US 1 (1978) 98 S.Ct. 2141. 57 L.Ed.2d 1...44,D36,D37,D41

Crane v Kentucky,476 U.S. 683106 S.Ct. 2142. 90 L.Ed.2d 636. (1986).....C25

Crist v Bretz, 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978).....D31

Giglio v US, 405 US 150 92 S.Ct. 763. 31 L.Ed.2d 104 (1972).....E43,E46

Gori v United States, 367 US 364 81 S.Ct. 1523. 6 L.Ed.2d 901. (1961).....38,D39

Green v United States, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957).....4,D31,D32

Illinois v Somerville, 410 US 458 93 S.Ct. 1066. 35 L.Ed.2d 425. (1973).....37,45,D38,D39,D43

Kyles v Whitely, 514 US 419, 115 SCt 1555, 131 LEd 2d 342 (1976).....22

<i>Menna v US</i> , 423 Mich 61; 96 S Ct 241; 46 L Ed 2d 195 (1975).....	D31
<i>Napue v Illinois</i> , 360 US 264; 79 S Ct 1173; 3 LEd 2d 1217 (1959).....	E43,E46
<i>Powell v Alabama</i> , 287 US 45, 53, 53 S.Ct. 55, 589, 77 L. Ed. 158 (1932).....	D24
<i>Oregon v Kennedy</i> , 456 US 667, 675-76; 102 S Ct 2083; 72 L Ed 2d 416 (1982).....	38,42,43,D33, D34,D35
<i>Richardson v U.S.</i> , 468 US 317 104 S.Ct. 3081. 82 L.Ed.2d 242.(1984)	passim Issue II,D36-43
<i>Riverside v McLaughin</i> , 500 US 44; 111 S Ct 1661; 114 L Ed 2d 49 (1991).....	E44
<i>Strickland v Washington</i> , 466 U.S. 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).....	C26,C27
<i>Tollett v Henderson</i> , 411 US 258; 93 S Ct 1602; 36 L Ed 2d 235 (1973).....	C27
<i>United States v Augurs</i> , 427 US 9796 S.Ct. 2392. 49 L.Ed.2d 342. (1976).....	E45
<i>US v Gonzalez-Lopez</i> , 548 US 140; 126 S Ct 2557; 165 LEd 2d 409 (2006).....	31,C26
<i>United States v Jorn</i> , 400 US 470 91 S.Ct. 547. 27 L.Ed.2d 543.(1971).....	32,38,46,D39,D46
<i>United States v Perez</i> , 22 U.S. 579, 9 Wheat. 579 (1824).....	36,37,45,46,D38,D39
<i>Wade v Hunter</i> , 336 US 684, 689; 69 S Ct 834; 93 L Ed974(1949).....	D38,D41,D42
<i>Washington v. Texas</i> , 388 U.S. 14 87 S.Ct. 1920. 18 L.Ed.2d 1019(1967).....	C26

United States Cases

<i>Lundy v Campbell</i> , 888 F.2d 467 (CA 6, 1989), cert. denied, 495 U.S. 950, 110 S. Ct. 2212, 109 L.Ed2d 538 (1990).....	46,E47
<i>Miller v Straub</i> , 299 F3d 570 (CA 6, 2002).....	C30
<i>Reinehart v Brewer</i> , 561 F.2d 126 (CA 8, 1977).....	C27
<i>Richland v Dutton</i> , 864 F Supp, 686 (MD Tenn 1994).....	46,E47
<i>United States v Gordy</i> , 526 F2d 631 (CA5 1976).....	39,D41
<i>US v Wallach</i> , 979 F2d 912 (CA2, 1992).....	42
<i>Wilson v Mintzes</i> , 761 F2d 275 (CA 6, 1985).....	C24
<i>Walberg v Israel</i> , 766 F2d 1071 (1985).....	20
<i>Walker v Engle</i> , 703 F.2d 959 (CA 6, 1983), cert. denied, 464 U.S. 951, 104 S. Ct. 367, 78, L.Ed2d 327 (1983).....	46,E47

United States Constitution

US Const, Am VI	.....<i>passim</i>
US Const, Am V	.....D31
US Const Am XIV	.....D31

Michigan Supreme Court Cases

<i>Missaukee Prosecuting Attorney v Missaukee Circuit Judge, 85 Mich 138, 139 (1891)</i>	.....
.....E45	
<i>People v Barker, 60 Mich 277, 290 (1886)</i>	.....D31,D34.D35
<i>People v Dawson, 431 Mich 234 (1988)</i>	.....32,42,43,D30,D33
<i>People v Herron, 464 Mich 593, 599 (2001)</i>	.....24,32,C19,D30
<i>People v King, 412 Mich 145 (1981)</i>	.....E45
<i>People v Lett, 466 Mich 206, 219 (2001)</i>	.....32,44,45,D31,D37,D43
<i>People v Mehall, 454 Mich 1 (1997)</i>	.....42
<i>People v New, 427 Mich 482 (1986)</i>	.....D31
<i>People v Pickens, 446 Mich 298 (1994)</i>	.....C27
<i>People v Sierb, 456 Mich 519, 522 (1998)</i>	.....24,32,C19
<i>People v Smallwood, 306 Mich 49, 55 (1943)</i>	.....D36
<i>People v Stafford, 434 Mich 125, 133-134 (1989)</i>	.....E45
<i>People v Thompson, 424 Mich 118, 128 (1985)</i>	.....32,D37,D40
<i>People v Van Den Dreissche, 233 Mich 38, 46 (1925)</i>	.....D36
<i>People v White, 411 Mich 366(1982)</i>	.....32
<i>People v Wiese, 425 Mich 448 (1986)</i>	.....12,14,E46
<i>People v Williams, 386 Mich 565, 578 (1972)</i>	.....C24,C25

Michigan Court of Appeals Cases

<i>Hyslop v Wojjusik</i> , 252 Mich App 5000 (2002).....	27
<i>In Re Oakland Co. Prosecutor</i> , 191 Mich App 113 (1991).....	C27
<i>People v Arquette</i> , 202 Mich App 227 (1993).....	31, C25
<i>People v Bersine</i> , 48 Mich App 295; 299 (1973).....	D36
<i>People v Bordash</i> , 208 Mich App 1 (1994).....	C28
<i>People v Dawson</i> , 154 Mich App 260, 273 (1986), affirmed, 431 Mich 234(1988).....	passim Issue II, passim E
<i>People v DuPree</i> , 215 Mich App 677 (1996).....	31, C25
<i>People v Echavarria</i> , 233 Mich App 356, 363 (1999).....	D35
<i>People v Effinger</i> 212 Mich App 67 (1995).....	C28
<i>People v Fett</i> , 257 Mich App 76 (2003).....	31, C23, C24
<i>People v George</i> , 114 Mich App 204 (1982).....	E44, E45
<i>People v Johnson</i> , 215 Mich App 658, 666–669 (1996).....	31, C26
<i>People v Kryszopaniec</i> , 170 Mich App 585 (1988).....	30
<i>People v Mayes (after remand)</i> , 202 Mich App 181 (1993).....	C27
<i>People v Pulley</i> , 66 Mich App 321, 331 (1976).....	D36
<i>People v Thew</i> , 201 Mich App 78 (1993)	C27
<i>People v Vonins.(after remand)</i> 203 Mich App 173 (1993, lv den 447 Mich 971)(1994).....	C27, C28
<i>People v Watson</i> , 245 Mich App 572, 596-597 (2001), lv ap den 465 Mich 933 (2001).....	...44, D37
<i>People v Walls</i> , 117 Mich App 691 (1982).....	E45

Michigan Constitution of 1963

<i>Michigan Const of 1963, Article 1, Section 15</i>	42, D31, D33
--	--------------

Michigan Court Rules

<i>MCR 1985 8.119</i>	11, Exhibit 1
<i>to Exhibit “L” MCR 1985 6.101</i>.....	.....E44
<i>MCR 1985 6.102(B)</i>	E44

Michigan Rules of Professional Conduct

<i>MRPC [various]</i>	passim, Exhibits F, G, and H
<i>CJC Canon 3.4</i>	9

Foreign Cases

<i>Poole v Superior Court</i> , 139 Arz 98; 677 P 2d 261(1984).....	D33
<i>State v Kennedy</i> , 295 Or 260; 666 P 2d 1316 (1983).....	D33
<i>People v Shilitano</i> , 218 NY 161, 170; 112 NE 733 (1916).....	D36