

## ARGUMENT

### I.

**JUST-DISCOVERED ATTORNEY GENERAL INVESTIGATORY INTERVIEW UNDER OATH OF TRIAL JUDGE WATERSTONE REVEALS SHE DELIBERATELY DECLARED “HUNG JURY” MISTRIAL NOT BECAUSE OF JURY’S HONEST, INFORMED INDECISION, BUT DELIBERATELY AND CALCULATEDLY TO AVOID ATTACHMENT OF JEOPARDY, AVOID REVELATION OF HER OWN COMPLICITY IN PERJURY CONSPIRACY, AND TO BELATEDLY “WASH HANDS” OF RESPONSIBILITY**

A. **“Strict Appellate Scrutiny” Required Where Trial Court Declares Mistrial When Prosecutorial Misconduct Present; So Much More So Necessary When Trial Court Unquestionably Proven To Have Co-Conspired In That Criminal Misconduct.** As discussed in Argument II of defendant-appellant's main Brief in Support of Application for Leave to Appeal, supplementing Exhibit “D.” to that brief [the more detailed analysis of double jeopardy “manifest necessity” declarations of mistrial], federal case law, including the *Perez-Richardson-Jorn-Washington* line of cases, and Michigan case law based on *Richardson, e.g. People v Lett*, 466 Mich 206, 218-219 (2001) requires “strict appellate scrutiny” where misconduct may be present:

“As this Court noted in *United States v. Dinitz*, 424 U. S. 600, 424 U. S. 611:

‘The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It 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.’

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe

that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.”  
*Arizona v Washington*, 434 US 497, 508; 98 SCt 824; 54 LEd2d 717  
(1978)[*Emphasis added*].

The WCPO used the “superior resources of the state” to an unprecedented degree in this matter, actually recruiting the trial court judge to co-participate in her criminal scheme to perjure and obstruct the entire pre-trial and trial process, and then, in the second trial, under another prosecutor [under a pending major “conflict of interest”], to *again* enlist the *trial court judge herself*, with all the unsullied prestige [for lack of her prior prosecution] of her office, and similarly the [un-prosecuted] police, to testify [again falsely] without prosecution, lending a patina of prosecutorial acceptability [*i.e.*, the exercise of the “superior resources of the state” by “non-prosecution”] to their testimony in the second trial, unquestionably obstructively, with the apparent approval of higher-ups.

“Strict appellate scrutiny” will reveal that Judge Waterstone did not engage in any meaningful analysis or even the most cursory consideration of whether the jury was truly deadlocked, because she knew that they were completely misinformed and lied to in almost every material respect. She knew that the jury may well have not thought itself deadlocked if she enforced the requirements of *People v Wiese*, 425 Mich 448 (1986), to require correction of the perjury to the jury before deliberation. There was every reason to believe that further deliberations may have produced a verdict, had she not criminally relinquished her duties, precisely as she is presently criminally charged. In such a circumstance, the defendant is deprived of his rights by such a declaration and

re-trial is barred:

“On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his valued right to have his trial completed by a particular tribunal.”

*Arizona v Washington*, 434 US 497, 508; 98 SCt 824; 54 LEd2d 717 (1978),  
quoted in *People v Lett, supra*, 466 Mich at p 220.

**B. Illogical, Inconsistent Excuses Belied By Conduct Point Towards  
Real**

**Reason For Corrupt Declaration Of Mistrial.** On 11-25-08,, by informal recording, and on 12-1-08, under oath pursuant to investigative subpoena, the Attorney General’s office conducted an interviews of trial Judge Mary Waterstone for purposes of investigating criminal misconduct of the police, the Wayne County Prosecutor's Office, and the trial court in the *Aceval* and *Pena* matters. New light was shed upon Judge Waterstone’s declaration of mistrial, when she was explicitly asked, why, as the trial judge, she didn’t take action, when she knew perjury was being committed then and there in the trial.

Throughout the interviews the canny Judge Waterstone attempted to portray herself as altruistically trying to protect a confidential informant, on one hand, and as naïvely dependent upon the so-called silver bullet “solution” to the increasingly complex perjury dilemma, brought to her by APA Plants supposedly directly from APA Tim Baughman, that a “sealed record” of the perjury instances be made for the “purposes of appeal.”

These excuses are easily refuted by their internal inconsistency and more profoundly, by her subsequent conduct, ultimately demonstrating, in an unguarded

moment during the interview, her clear understanding that jeopardy could be thwarted, and that her own complicity could be concealed, in corruptly declaring the mistrial on a hung jury basis, instead of dismissal upon a prosecutor-misconduct basis or instead of forcing APA Plants to correct the days of lies the jury had been told.

**1. "Secret Transcripts" Supposedly "Made For Appeal" But Kept Hidden**

**On Appeal And Hidden In 2nd Trial Pre-Trial Proceedings.** Judge Waterstone claims that the *ex parte* transcripts were made, at APA Plants's initiative, to protect the record for "purposes of appeal." Yet in the AG Interviews, she admits, under oath, that making a "sealed record" of the known instances of perjury occurring would do nothing to protect the jury from deciding the case still unaware of the extensive perjury, particularly the perjury of Povish, sole drug-driver, essential link between Aceval and the drugs, that he fully expected to gain at least \$100,000.00 or more in his role as voluntary paid informant for the police.

"Q. [AG Interviewer] the problem is, the jury has received perjured testimony; correct?

A. [Judge Waterstone] Yes.

Q. And how does a sealed record where the prosecutor acknowledges what you already as a judge know, how does that cure the problem?

A. Well, it makes it clear on appeal, if anyone is convicted, that there was perjury testimony given without revealing to Mr. Fienberg, the name of the person who was the confidential informant because—

Q. Okay. So it doesn't cure the problem of the jury receiving perjured testimony and using that in their decision-making

process; would you agree?

A. I would agree; I would agree. But it seemed to me—

Q. When I say that the sealed record doesn't clear that problem. Would you agree with that?

A. Well it doesn't in the sense of the jury but it does in the sense that the defendant would be entitled to a new trial."

[Waterstone AG Interview 12-1-08, p38, L 21–p39, L 13.]

\* \* \*

"Q. So you're going to allow perjured testimony, knowing that on appeal it's going to come back and get a new trial. Why would you do that?

A. Because Mr. Baughman had said that was the way you do that."

[Waterstone AG Interview 12-1-08, p41, L 6–L 9.]

Even if this incoherency is taken at face value, it requires one to believe that Judge Waterstone would have voluntarily unsealed the secret Plants-Waterstone 9-8-05 and 9-19-05 *ex-parte* transcripts upon *any* appeal by Aceval or Pena.

The obvious problem with this claim is that Aceval *did* interlocutorily appeal, and Waterstone certainly *did not* volunteer to open any any transcripts to the COA. Moreover, defendant-appellant Aceval brought a separate, formal motion in the COA for unsealing of the *Franks-Gates* hearing 6-17-05 transcript [in which PO McArthur revealed to Judge Waterstone that Povish was also the CI] as part of that interlocutory appeal, but the COA declined to open it, though it would have revealed then [*i.e.* over 3 years ago] whether or not Povish and the CI were the same person, and whether APA Plants and Judge Waterstone had been concealing this as the [as-yet-unenlightened]

defense had been claiming.

Further still, Judge Waterstone did not volunteer to “unseal” any transcripts when Pena was convicted by the jury and appealed his conviction. Nor did Pena get a new trial, based upon the transcripts, *until* undersigned counsel forced Judge Waterstone, by on-the-record confrontation of her over her complicity, to recuse herself, obtained an unseal-all-transcripts Order from the *subsequent* Judge, and furnished Pena’s counsel with the unsealed secret *ex-parte* transcripts.

Waterstone and Plants continued to conceal Povish’s identity through a variety of artifices, even *after* the first trial, as detailed in the Statement of Facts, p 15-17 of main Brief, obviously intending to attempt to conceal it even through a second trial. Were they then going to “unseal” them after the second trial, “if there was an appeal” on their earlier “logic?”

Of course not. They were going to keep them secret and sealed. They did not comply with the rules regarding their *ex parte* contacts and the sealing of transcripts. The details of their non-compliance, including [Pena’s attorney] Gerald Lawrence’s Affidavit, that at undersigned counsel’s suggestion he contact MSC Clerk Corbin Davis directly to determine compliance, are set forth in defendant-appellant’s Brief , Statement of facts, p11. They intended that the defendants be found guilty, and to never reveal the existence of the perjury scheme.

Moreover, Judge Waterstone’s “making a record for appeal,” not only, as the Special Agent observed above, “doesn’t cure the problem of the jury receiving perjured testimony and using that in their decision-making process, ” it *supports* and is

completely consistent with “using the superior resources of the State to harass or to achieve a tactical advantage over the accused, ”*Arizona v Washington*, 434 US 497, 508; 98 SCt 824; 54 LEd2d 717; *Lett, supra*, forcing defendants to a retrial.

**2. Waterstone Admits Considerations Of “No Trial On The ‘27 Million” Worth Of Drugs And Aceval Going Free More Important Than Jury Supposedly “Undecided.”** Waterstone’s explanations for her conduct are illogical and hastily made up excuses for simply protecting Plants’s and the police’s scheme to convict Aceval. Caught up in the conspiracy and then actively aiding and concealing it, she avoided revealing her role by declaring a mistrial, that she also knew would avoid the attachment of jeopardy.

We know this from her own words: First, in admitting that her declaration of a mistrial was based not upon considerations of whether the jury could reach a decision or not, and what else the law may have required or recommended from her to achieve a jury outcome, but upon the prosecution-biased, cynical calculation of whether jeopardy would attach or not, whether Aceval would go free, and whether there’s “no trial ever on this 27 million dollars worth of cocaine,” depending upon her actions. Nor surprisingly, jury indecision played no part in her “deliberation,” doubtless because, if one does the one thing that could properly inform the jury and likely break the deadlock, admit that you and the prosecutor have been constantly allowing them to be lied to, your career goes up in smoke, leaving little occasion or incentive for entertaining *Perez*, *Arizona v Washington*, and *Richardson*-type factors properly subject of such a decision:

“Q. [AG Interviewer] Why not just declare a mistrial?

A. [Judge Waterstone] That’s easy. Because if I just declare a mistrial and Mr. Steinberg (sic) and/or Mr. Scharg object, if the Appellate Courts don’t agree with me, then we have a double jeopardy situation. If they object and I declare it anyway, then we have double jeopardy and there’s no trial ever on this 27 million dollars worth of cocaine. So to me, since the trial has started, testimony was taken, jeopardy attaches and if I say I’m going to call a mistrial without the consent of the defense attorneys, it’s all over; A, I’ve identified Mr. Povich and B, I’ve precluded a second trial.”

[Waterstone AG Interview 12-1-08, p50, L 8–L 18.]

Second, in later attempting to tilt the *next* trial towards the prosecution by not allowing any questions regarding any witnesses’ prior perjury, [see p 36-38, Factual Summary, main Brief], by allowing ersatz “expert” opinions by the Officers (“frost laws” as probable cause; “Georgia not a coastal state”; “world cocaine price theory”) but categorically prohibiting *any* experts to the defense in re-trial] and defensively continuing to cover-up her involvement, even when accused by counsel on the record with APA Plants’s admission of the illegal witness duality in hand, showing *not* an “openness” and intent to “fix things for appeal, ” but rather a grossly obvious bias towards conviction and a transparent effort to continue the concealment of her role, just as she concealed it with a finding of mistrial [instead of a demand to Plants to remedy the perjury.]

**3. Judge Waterstone “Washes Her Hands” Instead Of Facing Up To Her**

**Complicity, Her Trial Judge’s Duty When Perjury Committed, And Critical Case-Law-Prescribed Role For Trial Judge In Mistrial Declarations. When**

a trial is at a critical stage, such as whether one stands up, as a public official is sworn to do, to face down the mob, or here, face up to the unpleasant circumstances of essentially torpedoing the prosecution's case on its most vulnerable point, the credibility of the witnesses claiming the defendant's direct connection to the narcotics, one can either do as one has sworn to do, despite the unpopularity of the accused's alleged deeds, or *one can seek to wash one's hands of the matter*. Judge Waterstone, like the most famous judge in antiquity, chose the latter course:

Ms. Waterstone: This alternatives seem to be allow to cool, sensible alternative that-

Mr. Ondejko; which was the-

Ms. Waterstone: to go ahead and finish it-

Mr. Ondejko; finish it.

Ms. Waterstone: -and-and--

Mr. Ondejko do a record.

Mr. Ondejko: Mmm hmm

Ms. Waterstone: [p 33] Then it's out of my hands. I mean, I just-that's the way I felt about it.

[11-25-08, p32, L14-p33, L2][*Emphasis added*].

She neglected her duty, precisely as the JTC correctly but so mildly informed her [see additional Exhibit "Q," JTC Ltr 9-12-06: "You should have instructed the prosecutor to take action to protect the informant, and proceeded under MCL 750.426, addressing a

judge's conduct when they reasonably believe perjury took place. . . in violation of [MCJC] Canon 3A(1). . . .The perjury should have been disclosed to defense counsel, eliminating the need for the *ex parte* conversations with the prosecuting attorney”, and just as the AG has now criminally charged her [See Exhibit “J”]. Of course, this would have required her to explain, fully, how she knew, exposing her co-complicity and prior obstruction.

**C. Judge Waterstone's Claim Of What Supposedly “Hung” The Jury Strongly Supports Likelihood That Deliberately Uninformed Jury Otherwise Would Have Acquitted.** The effect of this deliberate abandonment of duty completely mislead the jury, who still could not convict-- how much less still, had they been informed, by Judge Waterstone's actually doing her duty to require them to be informed, of the innumerable lies they had been told?

Judge Waterstone's interview supports a likelihood of acquittal, as she states that the jury told her they were hung upon the unexplained presence of the “four Mexicans” in the bar.

“ Q. [AG Investigator]: In your opinion, was there any doubt as to the guilt to Mr. Aceval and Mr. Pena in this case?

A. [Judge Waterstone]: No, not now--not once it was all over but I understood why the jury hung. They told me why, I understand why.

Q.. Why did they?

A. [p55] because of the people from Kalamazoo or the other 5 --the other five Hispanic--other four Hispanic people there.

Q. The ones in the bar?

A. Yeah, they felt their presence was to unexplained, that's basically why they hung, several of them just couldn't get past that. There were these guys of Mexican heritage there, they were just let go and that just seemed too--on a Sunday, at least the day that wasn't a workday. I can't remember. The bar was an open and they thought that was too weird."

[12-1-08, p54, L21-p55, L10].

Judge Waterstone failed to make any discernible notes, and neglected to make a detailed record [secretly or otherwise] of the factors leading her to declare a mistrial. This would be notable by itself, but for the threatened revelation of her own culpability explaining her evidently hasty, undocumented decision.

However, assuming *arguendo* what she said was true, *the jury was plainly, according to her, giving major weight to a factual issue* [the possibility that the Mexicans were in fact the drug importers/dealers, not Aceval] *collateral and independent of* the [perjured] facts allegedly showing Aceval's connection to the drugs, meaning *they were still not convinced*, to the exclusion of other possible theories [*i.e.*, the Mexicans] *by that [perjured] "evidence" alone*. If even that evidence, the [perjured] direct [and only] connection to the drugs was shown to the jury be a noxious cluster of lies, how much less, then, would the jury have been "undecided," but rather, driven towards acquittal, where already supposedly "hung" on a collateral issue?

In other words, the perjured "evidence" of Aceval's involvement was, according to Judge Waterstone, insufficient to gain a conviction when the jury apparently considered it together with the evidence of the unexplained presences of the Mexicans at the bar, that is, if put on one side of the scale, it did not outweigh towards conviction

the “4 Mexicans” question. Accordingly, if the so-called direct [perjured] evidence of Aceval’s connection with the drugs, the Povish-McArthur-Rechtizigel testimony, were shown to have been deliberate lies, that is, were removed from that side of the scale, the jury would have been left with the evidence that had already been enough to *prevent* conviction, the “4 Mexicans” question, leaving the scale tilting far more towards acquittal.

Double jeopardy should have attached to this deliberate non-informing of the jury prior to deliberation and to Judge Waterstone’s corrupt, complicity-concealing declaration of mistrial, where an already at-best *artificially* [allegedly] hung jury would more likely have acquitted.

## II.

**DOUBLE-JEOPARDY APPLICABILITY TRIGGERED BY PROSECUTOR’S “INTENT” TO “AVOID” OR “PREVENT” ACQUITTAL [INVISIBLE TO 2-5-09 COA PANEL] STARKLY EVIDENT IN AG INVESTIGATORY INTERVIEW UNDER OATH OF CI POVISH WHERE POVISH CONFIRMS PRE-EXAM AND PRE-TRIAL “COACHING” MEETINGS CONDUCTED BY APA PLANTS TO PERFECT PERJURY SCHEME AND WHERE PERJURY SCHEME DEEMED BY PO MCARTHUR TO BE “THE ONLY WAY” TO CONVICT DEFENDANT ACEVAL**

On 9-25-08 the Attorney General interviewed Chad Povish pursuant to investigatory subpoena. Povish’s interview provided factual circumstances of interest never disclosed by the Wayne County Prosecutor’s Office at any time during either Aceval’s first or second trial. See Exhibit “U.”

Particularly significant amongst these were his descriptions of meetings that APA Plants and the police officer held with Povich, before the preliminary examination held in Wyandotte, Michigan, to shape the outlines of the perjury conspiracy to follow, including APA Plants's assurance and PO McArthur's assurance that his identity would be protected, Povich demanding the assurance that Brian Hill would not be charged, and coaching meetings conducted by Plants both before the preliminary exam and before trial.

Povich also makes clear in many different places in his statement that he had been assured by McArthur and APA Plants that he was in not danger and had nothing to worry about in testifying as a witness. This suggests that the whole mythology of Povich's life being in danger [that even the WCPO now admits is without credible support in the record., *see, e.g.*, Prosecutions's Brief On Appeal, COA No. 279017, p3 (10-1-08): "Nothing in the record, however, discloses the nature of any credible threat to witness Povish . . . ."]

was in fact just a falsehood invented by Plants and adopted by Waterstone, to supply an "excuse" and ostensible explanation for the cover-up of Povich's dual identity, when the deception was becoming increasingly difficult to maintain under defense counsel's unrelenting challenges.

Povich's account of the assurances from McArthur and APA Plants of the lack of danger, the APA Plants-led coaching meetings, and other facts addressed in issue IV, *infra*, concealed by the Wayne County prosecutor's office from disclosure to the defense in the 1<sup>st</sup> *and also* in the 2nd trial, further add to the increasing mountain of

evidence [regrettably invisible to the COA 2-5-09 Panel, *see, e.g. Opinion*, p6, n.5: “[t]here is no indication whatsoever that the prosecutor committed the misconduct for the purpose of avoiding or preventing an acquittal.”] that APA Plants indeed took every unlawful action possible to avoid or prevent an acquittal. As discussed in Issue IV, *infra*, this will be even more evident as more information emerges [assuming this case has not been decided by then] through her and her co-defendants’ criminal prosecution. Details follow.

**A. Pre-Preliminary Exam Meetings Conducted By APA Plants To “Coach”**

**Police And Povish How To Perjure Themselves Demonstrates “Intent” To “Avoid” Or “Prevent” Acquittal.** Povish appeared for his AG interview 9-25-08 apparently without counsel. He is seen to attempt to weasel out of answers to many of the circumstances he was questioned about, but was finally cornered, and made to confirm, over and over, that even before the preliminary exam, APA Plants conducted “coaching” meetings to make sure the [“Wyandotte”] Preliminary Exam testimony was perjured.

Q. Okay. Let’s go back. At the meeting at the Inkster Police Department, was there one meeting or more than one meeting where you met to prepare to testify?

A. More than one.

Q. Okay. The first meeting is what I’d like to ask you about now. Who was there for the first meeting?

A. The first meeting, I believe, was myself, Brian Hill – I think we may have went together that day – Bob McArthur, Scott Rechtzigel, one of the other guys on their team – oh, Sean Beve, is

part of the Inkster Task Force. He was there.

Q. This is the first meeting?

A. Yes. And the first time we actually met it really wasn't like a meeting. I think they - I don't know what they did with Bryan. They took Bryan one way and I stayed there just to separate us.

Q. Who else was in the meeting?

A. I think just Karen Plants went and spoke with Bryan.

[9-25-08, p58, L 3-19].

\* \* \*

Q. I'm - what I'm trying to determine is when this first meeting happened.

A. The first meeting with Karen Plants, it had to have happened before we went to Wyandotte, because she was the prosecuting attorney for the case.

[9-25-08, P59, L 3-7].

\* \* \*

Q. Okay. At the first meeting, you said that Scott Rechtzigel was there; correct?

A. Yeah. We were down in the task force department down there. So Scott was, like, doing his own thing. I basically talked to McArthur and Karen Plants.

[9-25-08, p 59, L 18-22].

\* \* \*

Q. Mr. - they don't cloud it. Now, please tell me what you remember about the conversation with Ms. Plants.

A. I don't remember all whole lot of the conversation with Ms. Plants. My concern was that no one would know that I was the CI. That was my main concern of the conversation.

Q. Okay. And she assured you that she would not be asking you

questions about that; correct?

A. Correct.

Q. So it was clear that she understood that you were this CI?

A. Yes, 100 percent.

Q. I'm sorry. You just said 100 percent?

A. Yeah. She knew I was the CI.

Q. Tell me about that discussion with her about you being the CI.

A. She just knew that I was a CI. She wouldn't ask any questions that would try to bring me out, not to worry, everything was fine, everything is going to be okay. She's going to take care of it.

[9-25-08, p 62, L 6-23].

\* \* \*

Q. So did you feel confident after meeting with Ms. Plants that she would protect your status or your identity as a CI?

A. Yes.

[9-25-08, p 63, L 21-23].

Q. On this first visit to the Inkster Police Department to talk about what your testimony is going to be - correct? - that was the purpose of the visit?

A. Correct.

Q. And you went there with Bryan Hill; correct?

A. Correct.

Q. You met with Ms. Plants and Officer McArthur downstairs in a basement in a room, the three of you; is that correct?

A. That's correct.

Q. Ms. Plants told you that she would protect your identity as the confidential informant; correct?

A. Correct.

Q. Robert McArthur told you that he would protect your identity as the confidential informant; correct?

A. Correct.

[9-25-08, p 66, L 23 -p 67 , L1- 12].

\* \* \*

Q. We are asking for your memory here.

A. She coached us. That's what I know. That's what I'm saying, and it was before Wyandotte.

Q. All right. And when you say "us"--

A. Me and Bob McArthur and Scott Rechtzigel, to my knowledge. I don't know if she talked to Sean Beve. But I know Scott Rechtzigel, Bob McArthur, myself.

Q. All right. And when you say she "coached," you, what do you remember her saying?

A. If they asked the questions did we know each – one another, to say no. If we met each other before this or anytime before this, we never even knew each other, ever, before this day.

Q. Okay. Now, that's the assistant prosecuting –

A. That we never had contact.

Q. Okay. That's the assistant prosecuting attorney telling you that you should lie if these questions come to you; correct?

A. Correct.

[9-25-08, p 95, L1- 18].

There is only one reason to perjure a set of hearings from warrant swear-to,

arraignment, preliminary exam, to trial: to “avoid” or “prevent” an acquittal. The “intent” of APA Plants could nor have been plainer.

**B. Pre-Trial And Day-Of-Trial Meetings Conducted By APA Plants To**

**“Coach”Police And Povish How To Perjure Themselves Demonstrates “Intent” To “Avoid” Or “Prevent” Acquittal.** Povish testifies in the AG interviews that there were at least two other meetings conducted by APA Plants to continue to manage the perjury scheme,

including one following making sure Judge Waterstone was fully on-board and given her cues to cooperate in concealing the scheme:

“Q. So what I want you to tell us now is how did you and Bob McArthur wind up testifying identically?

A. Karen Plants, I believe, told – must have told me and him the same thing; we had to talk together – that we were told not to know each other. Karen Plants is the one – she was the one in charge. She was the prosecuting attorney. We were doing what she told us . And I remember – you know, I remember she saying she talked to the judge, everything is fine, this and that.

[9-25-08, p 83, L 5-13.].

Mr. Dakmak [AG Special Agent]: So was there another meeting between Inkster police station before the preliminary exam in Wyandotte and your quick meeting with Karen Plants on the day of trial at Frank Murphy? Is there another meeting right before – a few days before the trial somewhere else?

The Witness: I think there was, because we looked over the transcript from the Wyandotte one.

Mr. Dakmak: Okay. Now, where was that at?

The Witness: That one, I believe, was at the Inkster police station.

Mr. Dakmak: So two meetings at Inkster?

The Witness: Right. And then we got coached just before – they

had talked to the judge, Waterstone, what not, before we went there.

Mr. Dakmak: So the day of trial, is that when Karen Plants tells you, "I had a talk with the judge, and it's okay about your identity. Were going to keep that secret"?

The Witness: Yes. And she – and that's when she also said that the judge was going to grant me immunity.

[9-25-08 p 114, L23 -- p 115, L17].

\* \* \*

Q. Who coached you?

A. Karen Plants. She was the one that was in charge of everything. Once the bust went down, Bob McArthur no longer was the one in charge. He had no reason to come to me and say, "Chad, you do this. You do this." It was Karen Plants, because she's the prosecuting attorney to prosecute the case that was telling us – Bob McArthur, Scott Rechtzigel and myself what to do, what to say just on those questions on do we know each other or if I know Karen Plants.

[9-25-08, p 116, L9- 18].

Q. So what did she say?

A. She said she had talked to the judge and let the judge know that I'm the CI, that she wasn't going to let his lawyer direct questions to me to know my identity and that – to still say that I didn't know the police officers. 'Cause at the trial, I have already met Karen because she was the one asking me the questions in Wyandotte. So that question wasn't, "Hey, lie about that one now." So there was no more lying about her. It was just about the two officers."

[9-25-08, p 117, L 9-17].

**C. "Intent To Avoid Or Prevent Acquittal" Within Meaning Of Double**

**Jeopardy Applicability: Even PO McArthur Heard To Admit That Perjury Conspiracy Was “Only Way” To Convict Aceval.** These meetings APA Plants coached were crucial components of the perjury conspiracy to convict Aceval. Precisely as argued in defendant-appellant’s main Brief, p40-41, filed over 2 months before the instant materials were publicly disclosed, using Povish as both informant and witness, and concealing the duality, was the only way Aceval could be linked directly to the drugs and convicted. Povish recounts PO McArthur telling him exactly that:

“Q. Okay. Let me—so Officer Bob McArthur told you, “You’re okay . You don’t have anything to worry about,” is that correct?

A. [Mr. Povich]: that it’s correct.

Q. And obviously, in order for him to say this, you must be having a conversation about your welfare; correct?

A. Yes.

Q. And whether it’s safe for you to go to court; right?

A. Correct.

Q. Did you ask why your testimony was needed?

A. Yes.

Q. And what was his answer?

A. He said that it was important that I had—that I had to. That’s the only way they can convict Aceval.”

[9-25-08, p 53, L2-15].

The perjury conspiracy wasn’t to preserve Povish’s life, it was an absolute necessity to link Aceval directly to the drugs, and as PO McArthur himself stated, “that’s the only way they can convict Aceval.” The intent, from the earliest moment, on the part of the police and APA Plants to conspire to avoid a conviction by unlawful means, could not now be mistaken by even the strictest skeptic.

**D. Judge Waterstone Explains That “Intent” To “Avoid” Or “Prevent”**

**Conviction Came From APA Plants And Police Seeing “Dreams Of Glory” In Huge**

**Drug Bust.** The “intent” of APA Plants may be objectively inferred from the record.

*Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982), quoted in *People v Dawson*, 431 Mich 234, 256 (1988):

“Justice Powell, who provided the majority's fifth [Page 254] vote in *Oregon v Kennedy*, wrote in a special concurrence, ‘[b]ecause ‘subjective’ intent often may be unknowable,’ a “court—in considering a double jeopardy motion—should rely primarily on the objective facts and circumstances of the particular case.’ *Id.*, pp 679-680.”

*Dawson* at 256.

In this case, we even have clear indicia of subjective intent. Judge Waterstone supplies the human motivation behind the legal concept of “intent:” greed and dreams of glory, confirming defendant-appellant’s argument to the same effect, main Brief, p 41:

“MS.WATERSTONE: Rechtzigel wanted the glory.

MR. ONDEJKO: Mmmhmm.

MS.WATERSTONE: And Karen probably did, too.  
[11-25-08 p21, L11-13]

\* \* \*

MS.WATERSTONE: I think she just saw dreams Of glory. We get this guy on, you know, 27 million kilos [sic], and we’ll all be heroes and we’ll all get promoted.

MR/ ONDEJKO: Mmm.

MS.WATERSTONE: That’s—you know, that’s what—Rechtzigel I— I felt Rechtzigel and I felt Karen for the same thing; I think they just saw glory comin’ down the road.”  
[11-25-08, p 26, L8-14.

Not only is the “intent” clear now, but also the motivation that prompted formation of the intent. Such rare insight into the subject events all but forecloses any further debate upon the culpable intent, for double jeopardy/prosecutorial misconduct analysis, of the conspirators generally, and the prosecution, specifically.

### III.

#### **PERVASIVE PERJURY OF 2ND TRIAL, WCPO CONCEALMENT OF ADDITIONAL MISCONDUCT AND TAMPERING WITH EVIDENCE, AND PLAIN ERROR OF 2-5-09 COA OPINION'S AND WCPO'S CLAIM THAT DEFENDANT “RECEIVED ALL THE PROCESS HE WAS DUE” REVEALED IN JUST-DISCOVERED ATTORNEY GENERAL INVESTIGATORY INTERVIEW UNDER OATH OF CI / DRUG DRIVER POVISH**

**A. Povish 2<sup>nd</sup> Trial Testimony That He Acted Alone In Perjuring 1st Trial Testimony Obviously Coached by 2<sup>nd</sup> Trial Prosecution and Completely Contradicted by [Post Immunity Granted] AG Investigative Interview Testimony That APA Plants Arranged “Coaching” Meetings Prior to Preliminary Exam and Prior to Trial.** The majority opinion of the Court of Appeals 2-5-09 denied application of a double jeopardy bar to subsequent retrial claiming that such a bar was unsuitable where “the nature of the harm” that the double jeopardy clause was intended to prevent, “the embarrassment, expense and ordeal. . .[of living] in a continuing state of anxiety and insecurity” that arises from being twice placed in jeopardy, citing *People v Torres*, 452 Mich 43, at 64 (1996) [other citations omitted], *Opinion* at 6, was not prevented by applying it. .

Yet it is precisely that harm the double jeopardy clause was meant to forestall that defendant-appellant suffered because no law enforcement agency intervened to correct the corrupt conduct, that is, *the very agency charged with stepping in and making sure a second trial was fair was the very agency that conducted the first corrupt trial and which, unchecked, conducted a second corrupt trial.*

The 2-5-09 COA majority opinion appears to simplistically suggest that whatever horrors the government, both the executive and the judicial branches, simultaneously inflicted upon defendant, the legal system nonetheless lived happily ever after because the defendant was graciously granted a second trial by the government.

*Even if the one accepted this fundamentally flawed and internally inconsistent argument at face value, it would still fail, if that second trial were equally corrupt, similarly perjured, and conducted so as to deliberately conceal a great deal of what made the first trial corrupt. Two wrongs should not make a right. The second trial is plainly seen, even with the limited materials presently available to defendant-appellant, to have been materially perjured.*

Details follow, and more will be available when either the AG and AGC investigatory material is available, if ever, or where the criminal proceedings against the conspirators advance sufficiently to make such material public.

**B. Povich AG Interviews Demonstrate That He Perjured Himself In Second Trial Likely With Prosecution Assistance And Without Its Being Corrected To 2<sup>nd</sup> Trial Jury.** The AG Interviews contain other exculpatory information bearing

upon the issues in the instant appeal. They show that the second trial was perjured on crucial points, and that the prosecution just “learned from Plants’s mistakes” and cheated again in the second trial.

Consider Povish’s doubtless perjured testimony in the second trial, that he acted *alone* in lying from the witness stand in the 1<sup>st</sup> trial:

“Q. [APA Bernier:]: Did anybody tell you to get up on the stand and lie?

A. [Povish]: No.

Q. You and I have had conversations last week; right?

A. Right.

Q. Have I ever told you to lie?

A. No.

Q. Did Ms. Plants ever tell you to lie?

A. No.

Q. Did Judge Waterstone ever tell you to lie?

A. No.

Q. Did the police officers ever tell you to lie?

A. No.

Q. The decisions that you made on the stand, did you make those decisions yourself?

A. Yes.”

[Second trial, 6-6-06, p 43, L8-22].

The AG has not charged Mr. Povish along with the police, Ms. Plants and former Judge Waterstone. He has now been granted immunity [*see In re Investigation Of Perjury And Obstruction of Justice*, 54-B DCt. No. 08-9094, Order of 9-8-08, Judge D.L. Jordan] and will most likely cooperate and testify that the defendants orchestrated and

instructed his illegal behavior, just as the 6-9-09 AG Investigative Report [made public by the AG's Office and published on the *Free Press* website; see Exhibit "I" hereto] in this matter says APA Plants did.

Assuming this is so, and that he would now tell the truth, given immunity, it is obvious that the above-cited second-trial testimony is all perjured--[and the AG presently knows it]--otherwise, of what value as a cooperating witness would he be in prosecuting the government actors if he acted totally on his own in offering the perjured testimony?

The proof that Povish perjured himself in the second trial is found in his own post-immunity granted testimony in the 9-25-08 AG interview:

Q. So what I want you to tell us now is how did you and Bob McArthur wind up testifying identically?

A. Karen Plants, I believe, told – must have told me and him the same thing; we had to talk together – that we were told not to know each other. Karen Plants is the one – she was the one in charge. She was the prosecuting attorney. We were doing what she told us . And I remember – you know, I remember she saying she talked to the judge, everything is fine, this and that.

[9-25-08, p 83, L 5-13].

Again, Povish testifies that APA Plants “coached” him how to handle certain issues and questions:

Q. Who coached you?

A. Karen Plants. She was the one that was in charge of everything. Once the bust went down, Bob McArthur no longer was the one in charge. He had no reason to come to me and say, “Chad, you do this. You do this.” It was Karen Plants, because she’s the prosecuting attorney to prosecute the case that was telling us – Bob McArthur, Scott Rechtzigel and myself what to do, what to say just on those questions on do we know each other or if I know

Karen Plants.

[9-25-08, p 116, L9- 18].

Q. So what did she say?

A. She said she had talked to the judge and let the judge know that I'm the CI, that she wasn't going to let his lawyer direct questions to me to know my identity and that – to still say that I didn't know the police officers. 'Cause at the trial, I have already met Karen because she was the one asking me the questions in Wyandotte. So that question wasn't, "Hey, lie about that one now." So there was no more lying about her. It was just about the two officers.

[9-25-08, p 117, L 9-17].

Indisputably this post-immunity testimony AG interview contradicts the 2nd trial testimony quoted above at page 22 that he acted alone in lying from the stand in the first trial, and shows his 2nd trial testimony to have been perjured.

There is also considerable likelihood that he was coached to falsely testify that he supposedly acted on his own. Would a prudent second case trial prosecutor, likely under supervision of WCPO higher authorities, have so carelessly allowed him to say anything he wanted on this critical and sensitive point? It is noted that 2<sup>nd</sup> trial prosecutor APA Bernier, still a relatively young man, suddenly retired from the WCPO shortly after criminal charges were filed against the judge, prosecutor and police. His interview by the AG is one of those sought but not released to defendant-appellant.

And if Povish wasn't coached in the 2<sup>nd</sup> trial, and just on-his-own offered those lies in the 2<sup>nd</sup> trial about going "maverick" with his lies in the 1<sup>st</sup> trial, wouldn't that be plainly *inconsistent* with the prosecution's 2<sup>nd</sup> trial gambit, buttressed by having Judge Waterstone herself testify in the 2<sup>nd</sup> trial, that it is perfectly OK to lie under oath if a CI's

life is supposedly in danger, and that's the perfectly OK reason why APA Plants, Waterstone, and the police made him tell those lies *i.e.* Povish supposedly followed the directions of the authorities in doing what he did when he was told to do it to protect his life. But testifying to the opposite, as above in the second trial that he was all on his own, would thus have made this 2<sup>nd</sup> trial perjury [that he was on his own] ] all the more obvious to the 2<sup>nd</sup> trial prosecution—but it never corrected this testimony to the 2<sup>nd</sup> trial jury, like APA Plants didn't, in the 1<sup>st</sup> trial.

Far more likely, he was told to say this by someone on the second trial prosecution side, to insulate APA Plants and the officers from possible prosecution. The WCPO, of course, has never disclosed whatever “secret” deal they made with not only Waterstone, but with Povish and the officers, not to prosecute them in return for their testifying in the second trial to their perjury in the first trial; “secret, ” because, if it existed in writing, Judge waterstone and the police would now likely be asserting it as an affirmative defense to their prosecution. The fact that they did testify as to their perjury at the first trial in the second trial without a written grant of immunity shows just how culpably fraternizing the perjury-committing second-trial testifying witnesses were with the second trial prosecutor in the second trial, *i.e.* the assurance came from “upstairs,” higher-ups in the WCPO. Who better to confirm this than elected Wayne County Prosecutor herself:

“A decision was made that everything should be turned over to the defense on the retrial, including the sealed ex parte in camera records, that Judge Waterstone would need to be a witness, and that a new judge needed to be assigned.”

[See Exhibit “H,” Worthy Response To AGC RFI Response, p5, paragraph 1.]

As known now, and as will be seen *infra*, “everything” was not turned over to the defense then, or even now, to the AG. *See, e.g.*, Exhibit “R,” AG Investigatory Report, p 4 of 7, by Special Agent Michael Ondejko:

“On December 17, 2008 by way of a previously served subpoena to produce, I received from [WCPO] APA Gonzalez the cell phone carried by Ms. Plants during her tenure in the drug unit. The phone was forensically examined for its contents as it relates to stored phone numbers and any text messages. I determined that the phone had been previously “wiped” of any data.”

*[italics-font information added].*

The WCPO never disclosed it held APA Plants’s phone. There is little doubt that it did not seek to examine the officers’ phone records, either. That would have further pointed up their perjury in the first trial, and provided a means to prove the perjury of their second trial testimony regarding their not-really-being-at-the-scene to see what they said they saw. *See C., infra* p 27.

The AG and AGC interviews will likely, when and if ever obtained by the defense, reveal details from which defendant-appellant will further prove how the second trial was perjured and obstructed, with whose higher-up consent, and identify more evidence [*e.g.*, “the 4 Mexicans,” *supra* p 8-9] that was secretly suppressed, hidden from discovery disclosure, or tampered with in the second trial. It is unlikely that the WCPO ever sought to have investigated any such transgressions, because of its “conflict of interest” [Exhibit “H,”

Worthy Response to AGC RFI, p6, paragraph 2].

**C. Povish AG Interviews Demonstrate That Rechtizigel And McArthur Perjured Themselves At 2<sup>nd</sup> Trial Regarding Crucial Events Allegedly Linking Defendant To Drugs.** The Povish AG interview also demonstrates, to those truly familiar with the pertinent transcripts, that Mc Arthur and Rechtizigel lied about when they arrived to observe the bar that morning and what they allegedly saw and

didn't see— they got there only long after Povish, Hill, and Aceval had arrived, and never saw any alleged transfer of duffel bags to the vehicles. This is why Povish and Rechtizigel exactly contradicted each other on the crucial point of Aceval's contact with the duffel bags—Povish said Aceval didn't load them, Rechtizigel said that Aceval did. See details below..

Povish testified in the second trial that he called only McArthur, once, from the bar, when he knew what was going to occur, on the day of the bust. [Defense Attorney] Harris:[2d trial][6-5-06] “How many times did you go to the bathroom and call the police?. . . Povish: I believe it was once.” [p65, L2-17]. As McArthur testified in the special closed session to Waterstone, a transcript neither thought would ever see the light of day [ST 6-17-05, p 7, L 6-12], PO McArthur: “I was *actually advised when it was taking place* and he was the person to be driving the vehicle with the *dope* in it. . .;” and [McArthur] [ST 6-17-05 p10, L8-10]: “Basically it was phone conversations, him telling me the cocaine was there, him telling who was driving the cocaine...”. But Povich's phone records in the second trial show that he first called McArthur that day at 9:14 a.m.[p 66, L4-p67, L 10]. So the police plainly did not know until then, at the earliest, and never saw what they claimed, Povish and Hill arrive at the bar [first trial][9-13-05, p7,L8-p8,L7]and [2nd trial][6-6-06, p142, L24--p143, L 23] , or Hill and Aceval put the bags in the trunk, *etc.*, the very basis of the probable cause to later stop them [2nd trial] [6-6-06,p152, L5-8][Rechtizigel]: “Mr. Aceval walked over to the trunk. The bag he was pulling, picked that up and sat it in the trunk.”].

Povish's 9-25-08 AG Interview testimony shows McArthur and Rechtizigel

perjured themselves again in the second trial, on crucial points.

**D. WCPO Never Revealed Povish Offered Share of Actual Drugs**

**Themselves, That McArthur and Povish Tampered with Evidence And/Or Stole Un-Inventoried Drug Kilos, That Povish Compensation To Include Unlawful Evidence-Re-Sale Proceeds, And That Kilo-Count Testimony All Perjured.** The AG interview of Povish revealed other significant events concealed by the WCPO in the first and second trials, that bore specifically upon the credibility of Povish and the Inkster officers, and would have been of significant assistance in impeaching their testimony in the second trial, if they had been disclosed to the defense.

Povish testified to the AG 9-25-08 that in addition to other compensation he was to receive, he had been promised 10% of the value of the drugs themselves:

“THE WITNESS: My understanding it would have been 10 per cent of everything that had to pertain to that case.

MR, DAKMAK: Including the drugs?

THE WITNESS: I would say so, yes.”

This might seem a misinterpretation, given that there is no practical way a person can be compensated 10 percent of the value of the drugs, unless, of course, they are illegally sold. That, however, is precisely what Povish says that he and McArthur attempted to do:

“A. You guys ask me a question earlier if I had worked with him after—didn’t you ask me a question did I do work for him after we went to court?

Q. I did.

A. Now I remember actually trying to sell those kilos to somebody, so I did do work. It had to be

worked after that, because we obviously had the kilos. And now I can remember that day plain as day. I think we had 3 kilos, me and Bob McArthur, in the car. We were trying to sell it to some other guy that asked me for kilos. So we were trying to set this guy up. So I did work for him maybe--this was still during--it might still be during that case was going, maybe not after. But we had those kilos in possession. So I'm thinking it was during. But I know we tried to use those kilos to sell them again."

[9-25-08, p103, L22-p104, pL7].

There was no disclosure to the defense that Povish and McArthur somehow made off with some of the evidence from the bust scene or from the trial. There was equally no disclosure that they went off and tried to peddle it. Further, the clear implication is that Povish was going to be allowed to keep the proceeds of the peddling of the bust scene/trial evidence drugs as his compensation. This\_would have negatively impacted their credibility at trial; the failure of the WCPO to prosecute such conduct, thus enhancing their credibility at trial, is another instance of obstruction of justice similar to not prosecuting the other perjury actors before allowing them to testify at the second trial.

The lab reports, and the trial testimony from the first trial, and indeed, the physical presence in the courtroom of the kilos themselves, came to 47 kilograms. Accordingly, if the 3 kilos Povish and McArthur were trying to sell on the side were not part of the trial evidence, that is, the 47 kilos, then they were clearly extra kilos that had clearly been skimmed from the alleged drugs found at the scene, and all the reports of having found "47 kilos" were falsified, and all the testimony that "47" kilos were found

were perjured, because they really found 50 [or so] kilos, and decided to illegally hold onto three kilos for purposes of raising money for McArthur and himself. *See e.g.* 2<sup>nd</sup> trial, 6-6-06, p163, L 3-p169, L8.

Q. Sir, I'm going to show you what it's just been marked as proposed exhibit number two, a black-black and gray duffel bag. He recognized that?

A.. Yes.

Q. Have you ever seen that before?

A. Yes, I have.

Q. Aware of you seen that before?

A. In the trunk of Mr. Povich's car.

Q. Okay did you ever see that at the police department?

A. Yes.

Q. Is that the same bag that you processed?

A. Yes.

Q. Okay when you saw that at the car at the police department, where their items in it?

A. Yes, there were.

Q. Okay. What was in it?

A. Several or numerous kilo-size packages of substance we believed to be cocaine then.

Q. I'm going to show you what's been marked as proposed exhibit number

3, similar bag. Do you see that?

A. Yes.

Q. Have you ever seen that before?

A. Yes.

Q. Where have you seen that?

A. The second bag that was in the trunk of Mr. Povich's car.

Q. Okay. And did that contain anything?

A. Yes.

Q. What did it contain?

A. Again, another numerous amount of kilo-size packages of what we believed to be cocaine.

Q.. Okay. Based upon your experience as a police officer?

A. Yes.

Q. Okay. When he went to the police station, did you take the items out of those bags?

A. Yes.

Q. Did you tag them or mark them and mark them in any particular matter?

A.. Yes, I did

Q. Explain to the jury how you did that?

A All our evidence at the Inkster Police Department is heat-sealed in clear plastic bags. I heat-sealed each individual kilo-size package of cocaine, and marked them"1 of 47," "2of 47,"et cetera.

Q. Okay.

A. All the way through.

Q. When you counted the two bags, what was the combined number of kilos that you saw?

A. 47.

Q. Okay. And you're indicating for the jury that you mark them all "1 of 47, all the way through "47 of 47," all the way through "47 of 47"?

A. Correct.

Q. And you indicated you heat-sealed them in some manner; is that correct?

A. Yes. [p 161, L14--p163, L16]

\* \* \*

Q Okay. So you heat-sealed those and you put the count on them; is that correct?

A. Correct.

Q.. And that is the count that you wrote on there?

A. Yes.

Q. Did you do that for each and every one of the kilos?

A. Yes. [2<sup>nd</sup> trial, p164, L17-23].

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Q. So you would agree that we counted out 47 kilos here?

A. Yes.

Q. Okay. And are these in fact the same kilos that you confiscated from Mr. Povish's car?

A. Yes.

Q. That were contained in these two items?

A. Yes.

[2<sup>nd</sup> trial, p169, L2-8][Most directly perjured responses underscored].

Of course, if the 3 kilos were part of the 47 kilos in the courtroom, and were not skimmed off at the scene, then Povish and McArthur actually stole some of the trial evidence, *i.e.* evidence tampering, complicating, to say the least, yet a third trial.

The 2<sup>nd</sup> trial is as tainted as the first—the prosecution just [probably] didn't make a secret *ex parte* transcript to prove it—but the spectacle of the first trial witnesses testifying in the 2<sup>nd</sup> trial with impunity, *i.e.* without prosecution, despite having obviously lied in the first trial, what Kym Worthy herself has now admitted was a “conflict of interest,” and lying again in the 2<sup>nd</sup> trial, with the prosecution's knowledge, shows that nothing was gained, in terms of the fundamental fairness of the process, in the second trial.

The prosecution was allowed to benefit from getting caught, given a second chance to cover its tracks, violated again its duty to make constitutionally-required disclosures [aided by sorry-about-the-perjury-thing ineffective trial counsel Mr. Harris and Judge Jones's ejection of Moffitt from the case over exactly just such a motion seeking such further disclosures], and cheated more effectively the 2<sup>nd</sup> time.

The second trial should be deemed to have been barred by double jeopardy, should not be cynically termed as a “remedy” to the first trial’s corruption, and should be seen to demonstrate the impracticality and likely repeated corruption of a third trial: No one has sanctioned the WCPO itself yet, and it still continues itself to defend this case, despite Ms. Worthy’s admitted “conflict of interest, ” its continuing cover-up of its complicity at higher levels, its failure to refer 2<sup>nd</sup> trial perjury and obstruction to the AG or the PACC, and its failure to file a Confession Of Error in the 2<sup>nd</sup> trial, to date.

More *proof* of the existing misconduct in both trials, and *more instances* of as-yet-uncharged misconduct in both trials, will be evident *if and when* the AG interviews of the other, uncharged, actors, and the AGC interviews of members of the WCPO, now part of the AG’s withheld file, become available to defendant-appellant, if ever. *See Exhibit “S” hereto*, “People’s Proposed Stipulation For Purpose Preliminary Exam, filed by the AG in *People v Plants, Waterstone, et al*, 36<sup>th</sup> D Ct No. 09-57635, p 2, Paragraph “f.,” seeking stipulation to admission for the purposes of Preliminary Exam (scheduled for 9-14-09): “f. The entire Attorney Grievance Commission file regarding Karen Plants.” The file is known to contain AGC interviews of unknown-to-defendant-appellant WCPO management-level members.

#### IV.

**ADDITIONAL PROOF OF PERVASIVE PERJURY OF 2ND TRIAL, OBSTRUCTION OF JUSTICE AND ADDITIONAL PERJURY KNOWN TO TRIAL PROSECUTOR AND TO HIGHER-UPS IN WCPO DURING 2D TRIAL, ALL DEMONSTRATING CORRUPT FUTILITY OF ANY POTENTIAL 3<sup>RD</sup> THIRD TRIAL, WILL BE REVEALED IN JUST-DISCOVERED ATTORNEY GENERAL INVESTIGATORY INTERVIEW UNDER OATH OF KYM WORTHY, APA PLANTS'S**

**SUPERVISORS, 2ND TRIAL ATTORNEY APA BERNIER,  
INKSTER PD OFFICERS RECHTZIGEL AND MCARTHUR AND  
THEIR SUPERIORS, AND AGC INTERVIEWS**

**A. Even Greater Official Culpability And More Deliberate, Unlawful  
“Intent” To “Avoid” or “Prevent” Acquittal, By Other Public Officials Yet  
Criminally Uncharged, Will Almost Certainly Be Revealed In Withheld WCPO And  
AG Investigatory Materials [Refused To Defendant-Appellant Herein But  
Produced To Criminal Conspirators].** Perjury and misconduct in the *second trial*,  
showing prosecutorial “acquiescence,” to use the MSC’s mild term, likely reached the  
highest level of the WCPO, and is still in issue in the current appeal where the MSC  
Order of Remand had previously framed the issue,

“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.”[MSC No. 135149, 3-17-08].

Defendant-appellant’s counsel was informed in June, 2009, by a reporter for a  
major metropolitan newspaper that certain of the AG conducted interviews eliciting  
never-before-disclosed material regarding the origins of the perjury conspiracy, the  
conduct of the first and second trials, and who-knew-what in the WCPO.

Counsel requested disclosure of these materials from the Attorney General on  
6-26-09. Counsel for defendant-appellant called the following week and was advised  
by First Assistant AG William A. Rollstin, Esq., that the request was “under  
consideration.” On Friday, 7-10-09, in response to a follow-up request, he simply  
indicated that he was “in a meeting,” and that he “would call back,” but did not.

Correspondence attached as Exhibit "T" was sent 7-19-09, emphasizing the relevance of the material of the instant appeal and noting the short time-frame available within which to use it, given the current average MSC Application-response time of around six months [present Application filed 4-2-09]. No response to the request of any kind, verbal or written, approving or denying, has been received to date.

**1. AG Materials Show Officers Insist Scheme Directed By APA Plants And Judge Waterstone.** The AG also apparently interviewed Inkster PO McArthur. Motions fled by the Officers blame APA Plants and Judge Waterstone for telling them to commit the charged instances of perjury and/or obstruction, that while possibly in part self-serving, would be strongly demonstrative of APA Plants's intent to "avoid" or "prevent" conviction. *See, e.g. Detroit Free Press, 5-2-09, "Two Inkster cops want perjury charges dismissed" "They claim they lied with approval from a judge and an assistant prosecutor," and Detroit Free Press, 4-14-09, "Inkster cop says he just did as he was told."* Only a little of the charged officers' interviews were disclosed in support of the motions referenced in those articles, but enough to demonstrate their relevance and materiality, and that the conspirators-defendants themselves have few compunctions about releasing the information contained in the AG discovery.

**2. AG Materials Show "Higher-Up" Police Department Involvement.** It is now also evident from a memo referenced in the AG discovery that the conspiracy was known to higher-ups at the Inkster Police Department. A Lt. Diaz and a Sgt. Paul Martin wrote a memo dated 4-7-09 that Lt. Diaz "states he was advised by Ofc. McArthur

shortly after the preliminary examination that perjury had occurred. . . . ” Defendant-appellant has been refused this discovery but is aware of it from reference to it in Exhibit “R.” This information was concealed from the defendant-appellant in the first and second trials. It is unlikely the WCPO will have sought to investigate this conflict-of-interest-laced instance of higher-up perjury subornation in the Inkster Police Department, and only the AG investigatory materials will likely display its relation to the “intent” of the WCPO to “avoid” or prevent” acquittal.

**3. AG Materials Show “Higher-Up” Involvement In First Trial Perjury And In Second Trial Perjury And Obstruction.** The AG has conducted interviews of the entire chain of command above APA Plants, to Kym Worthy herself [on 3-3-09]. Defendant-appellant has been denied access to this information. The AG went this high-up for a reason, though political considerations may preclude any charges being issued against higher-ups, who probably didn’t, unhelpfully, make transcripts of their own transgressions.

The 4-line summaries of two such interviews [see Exhibit R, p “3 of 7”] state that high level supervisors of APA Plants were aware of the first trial perjury at or when it was occurring: (1) APA Timothy Baughman, Esq., whose involvement was claimed by [*supra*, p 4; Waterstone AG Interview, 12-1-08, p 41, L 6–L 9.] Judge Waterstone, quoting APA Plants, to have furnished the final solution to the perjury problem [making the “sealed transcripts”][AG Report: “Mr. Baughman is a Wayne County prosecutor who was consulted by APA Plants after the perjury occurred in the trial”]; and (2) APA Nancy Diehl, Esq., Karen Plants supervisor, whom the report states

*“was also consulted about the perjury.”*[like APA Baughman].

If a WCPO way-higher-up like APA Diehl was [“also”] consulted about the perjury around the time it was happening [like APA Baughman], how likely is it that the highest-ups were *not* consulted when the first trial witnesses were allowed to testify in the second trial without having first been prosecuted, first, for their first trial perjury? The corruption and obstruction in the second trial likely goes right to the top, and should properly be considered part of the “prosecution’s acquiescence in the presentation of perjured testimony” in any complete consideration of matter. It also plainly bears on the prosecutorial “intent” to “avoid” or “prevent” acquittal, for double jeopardy purposes.

There is little doubt that the WCPO’s failure to make a full disclosure of all the misconduct that had occurred up to the time of the second trial doomed the second trial to be merely a better-rehearsed, but equally criminal re-run of the first trial.

Instead the WCPO chose to embark on a second trial without first resolving the criminal conduct in the first trial, without disclosing the full nature of what it knew, without noting the embarrassingly obvious fact that it had a “conflict of interest” [Exhibit “H” p 6] in further pursuing the matter, that prevented it from prosecuting the first trial witnesses and the trial judge before calling them as witnesses in the second trial, *and from preventing additional perjury in the second trial.* [Note: The AG investigatory materials may well reveal that the WCPO’s belated transmittal of the file to the PACC or AG, after more than two years of inaction, didn’t reference or request investigation or referral for any *second trial misconduct* by its witnesses or by its own personnel].

Only with what has been gleaned from what has been disclosed to the

conspirators by the AG from their present criminal cases' discovery has defendant-appellant been able to demonstrate with the present clarity that Povish perjured himself in the second trial [*supra*, p22-24], that it was likely done with the assistance [or "acquiescence"] of the WCPO, that the officers perjured themselves in the second trial about their arrival time at the scene that is the gravamen of any however-otherwise-flawed probable cause, and that they perjured themselves in the second trial about the amount of drugs, its chain of custody, and/or tampered with it. The interview transcripts of the top prosecutors, the second trial prosecutor, and the staff prosecutors in the drug unit are essential to demonstrating the "extent of the misconduct" involved here.

Consider: It is unlikely that then-still-sitting Circuit Judge Waterstone was called to actually testify in the second trial to her having personally suborned perjury in the first trial, without herself being first prosecuted, without WCPO higher-ups having been consulted-- a "failure to investigate/prosecute" defendant-appellant has asserted on appeal and to the Attorney Grievance Commission was an obvious obstruction of justice, *i.e.* enhancing their credibility in [the second] trial by having them testify without prosecuting them for perjury first, and simultaneously revealing nothing to the effect that any deal [or "unspoken understanding," *see e.g., United States v. Risha*, 445F3d 298, 303 n.5 (CA 5, 2006) ("There can be no dispute that the information in question is favorable to the defense because [[the witness's]] expectation of leniency in the state proceedings could have been used to impeach him.")] had been reached with them to do so. Note that APA Nancy Diehl, whose AG interview transcript is sought

herein, disqualified herself in 2006 from participating in the Judicial Tenure Commission's decision regarding Judge Waterstone. *See* Exhibit "Q," p 2, last line, the JTC Letter to Judge Waterstone, normally confidential, found in AG discovery materials partly made public in conspirators' pending case.

This situation alone, the police and the judge, still holding their official offices with impunity, blunted the [second trial] defenses's attack on their credibility that would have been so sullied by their first trial criminality, denying the accused a fair [second] trial, let alone Povish's being allowed to similarly testify in the second trial without criminal consequences for his first trial perjury.

The second trial was no "remedy" for the first trial misconduct, and the AG materials will plainly demonstrate this.

**B. Insufficient Information Caused: (1) Courts And Tribunals To Render**

**Insufficiently Informed Decisions; (2), Culpable Parties To Be Shielded, (3) Second Trial To Be Rendered A Similarly Corrupt Exercise; (4) , And Incarcerated Defendant Forced To Extended Litigation.**

**1. COA Declined Receipt Of Complete Information In Denial Of Interlocutory Appeal.** In defendant-appellant's interlocutory appeal, when Judge Waterstone made rulings that signaled significant wrong-doing was afoot, a separate, formal motion was filed with the interlocutory appeal that requested that the COA look *in-camera* at the sealed *Franks/Gates* 6-17-05 {PO McArthur and Waterstone

in-chambers] transcript, so it could easily determine if what defendant-appellant had been saying, that indeed a circuit judge, prosecutor and police were engaged in a vast perjury conspiracy, was in fact true.

That panel, including even the distinguished jurist Judge Talbot, didn't recognize the significance of the transcript, or didn't want to know the truth, and declined to look at it even *in-camera*, and the case, the corruption, and the cover-up continued, and worsened.

**2. Hasty, Un-Investigated JTC Decision Looks Like A Whitewash In Retrospect.** The Judicial Tenure Commission, despite the participation of Judge Talbot, obviously investing only the briefest investigation and deliberation to mildly admonish Judge Waterstone for what it misconstrued as mere minor indiscretions, has in retrospect exposed it, at best, to frank questions regarding the effectiveness of its largely self-regulating operation, and at worst, to ridicule and well-intended doubt of its institutional fitness and integrity for its appointed task.

**3. COA 2-5-09 Opinion, Unable To Glimpse APA Plants's "Intent," Decided Without Knowing That Officers And She Are Shown In AG Materials Acknowledging They "Couldn't Convict Without Perjury Scheme."** Similarly, perhaps, had the 2-5-09 COA Panel known that the police, Povish, and Plants openly acknowledged amongst themselves that the only way to convict Aceval was to pursue the perjury duality scheme, and implement and coach it from Day One, perhaps even they would have seen what inexplicably was so invisible to them then, *see, e.g.* Opinion, p6, n.5: "[t]here is no indication whatsoever that the prosecutor committed the misconduct

for the purpose of avoiding or preventing an acquittal.”].One wonders if the Panel may have concluded differently had they had the information available to the AG when he charged the conspirators with life-offenses only 6 weeks after that opinion was written.

**4. AG Investigatory Materials [Including Under-Oath Interviews] And [Included] AGC Interviews, In Defendant-Appellant’s Informed Hands, Will Assure Fully Documented, All Embracing, Fully Informed Decision By This Honorable Court.** Now, defendant-appellant attempts to demonstrate what occurred behind the scenes from the few bits of the AG’s investigation that he has been able to pull from the public record, at \$1.00 per page, the 8000 page plus additional investigatory material refused to him by the AG [by lack of any response or even acknowledgment of repeated requests and letters] [the same as when his counsel first attempted to bring this matter to the AG’s attention over 3 years ago], but ironically available to those conspirators who wronged the process of his conviction. The material so-far obtained, however incomplete, is strongly supportive of defendant-appellant’s position on appeal. The withheld material will undoubtedly be more so.

This Honorable Court, unlike its predecessors, should recognize the scope and breadth of the expanding scenario of corruption, compel immediate disclosure by the WCPO, and facilitate the immediate disclosure by the AG [the latter *in-camera* or not], and authorize and/or otherwise empower defendant-appellant to obtain the g AG investigatory materials, including the under oath interviews of the police, the drug unit staff prosecutors, the policeman’s bosses, Karen Plants’s bosses, the second trial prosecutor Paul Bernier, and Kym Worthy herself, as well, specifically, of the Attorney

Grievance Commission interview transcripts, that are all part of the AG discovery package in the conspirators' criminal case now, and that may be [but are probably not ] part of the WCPO file in this matter today.

One thing is certain, the sought AG investigatory materials will certainly *not mitigate the culpability of any charged or uncharged public officials*, nor *demonstrate any less factual support for the violations of double jeopardy and due process*, than are already evident.

The policy considerations of the state and federal double-jeopardy cases cited, the might of the government in submitting an accused to multiple flawed processes until his will and resources are exhausted, imprisoned all the while, will prove to have seldom been so panoramically manifest.

Defendant-appellant has been correct in every factual projection, interpretation and extrapolation in this unfolding-from-mere-suspicion-to-actual-prosecution saga so far.

This Honorable Court, *in camera* or otherwise, should have every piece of information available that will support a remedial decision of the worst corruption case in the state's history. Defendant-appellant should have every piece of information that will help him bring the significance of those as-yet hidden facts and non-disclosures to this Honorable Court, so its seminal decision on the state's worst, most publicly visible, most plainly proven, most court system reputation-damaging, judicial, prosecutorial, and police corruption case is not similarly betrayed by incomplete information on the full extent of the subject misconduct, and its import for any possible re-trial.

### **CONCLUSION AND RELIEF REQUESTED**

The 2-5-09 COA Opinion from which leave to appeal is sought herein, though acknowledging the appalling reprehensibility of the trial court's and the prosecutor's conduct, and their violation of defendant-appellant's's due process rights, generally ignored, in denying any remedy, that the matter is a case of first impression, in degree of prosecutorial misconduct, nature of prosecutorial-judicial collusion, and in the unique nature of the judicial subversion of ages-old reliance on the trial court's discretion and integrity in the administration of double jeopardy 'hung jury' determinations.

The COA 2-5-09 Opinion further held double jeopardy did not apply because [although it could clearly divine that Judge Jones's "intent" was the opposite of what she actually said, when saying that no attorneys would be allowed to substitute in, and that she was primarily basing her actions upon the efficiency of her docket] it could not see, in APA Plants's myriad criminal actions, any "intent" whatsoever to "avoid" or prevent an acquittal,"and claimed, despite Judge Waterstone declaring a mistrial to conceal her own culpability and to avoid having had to explain why she did not compel Plants to correct the perjury, that this was a "classic case of declaration of mistrial because of a hung jury."

The AG interviews now reveal the factual bankruptcy of these already-factually inexplicable conclusions. APA Plants planned the perjury from day one, as now even the police are seen in the AG materials to acknowledge to Povish that this was essential to convict defendant. Judge Waterstone's explanations of her conduct are irrational and contradicted by her subsequent conduct, demonstrating her abuse of discretion of her power to declare a mistrial where further, actually informed deliberations, though revealing her criminal complicity, would doubtless have allowed a verdict to occur.

As clearly as such matters can ever be seen through the dim glass of “what might have been” [*that* uncertainty being chargeable to the conspirators herein], a truly and truthfully *informed* verdict would more likely have been for defendant Aceval.

The second trial was not a “remedy,” as the COA 2-5-09 Opinion termed it, where

it is now known from the AG materials that Povish perjured himself in the second trial, that the officers did also, the latter on the crucial point of the defendant’s direct involvement with the drugs, that only obstruction of justice, as a

result of a  
now admitted  
“conflict of  
interest” in the  
WCPO,  
allowed them  
to testify  
without prior  
credibility-dam  
aging  
prosecution,  
and that  
substantial  
corruption is  
yet to be  
revealed from  
the further  
interviews of  
involved  
police,  
prosecutors,  
and others. The

AG materials,  
in the hands of  
defendant-appellant, will  
unquestionably  
demonstrate  
that not only  
did  
defendant-appellant not get a  
fair trial the  
first or second  
time, he still  
wouldn't get  
one if there  
were a third  
trial.

The second conviction should be vacated for denial of counsel, for an uninformed plea, for applicability of double jeopardy that should have precluded it in the first place, and despite being given yet second chance, for the unrepentant WCPO's repeated perjury, obstruction of justice and non-disclosures in the second trial. Re-trial should be barred.

Pending a decision on this matter defendant-appellant should be granted, by any

appropriate mechanism, discovery of the AG discovery materials [which include the whole discovery package to conspirators, such as the AGC interviews] j in the pending criminal case against the conspirators, to further substantiate his position, *and* should be granted bail while the matter is pending so that the prosecution does not further benefit from by its non-disclosure and concealment of pertinent information by his continued incarceration.

WHEREFORE, defendant-appellant Alexander Aceval respectfully prays that this Honorable Court grant the qualified relief requested in his accompanying Motion To Compel Disclosure, Alternatively, To Remand, *et al*;

WHEREFORE FURTHER, defendant-appellant Alexander Aceval respectfully prays that this Honorable Court grant leave to appeal, and upon leave granted, reverse and/or vacate his conviction, and determine that the misconduct, double jeopardy, and due process rights violations presented herein are so numerous, so egregious, and re-trial otherwise so legally, morally and practically attenuated, that any such re-trial, under the unique facts of this case, is barred, and discharge him fully and finally;

Respectfully submitted,

LAW OFFICES OF DAVID L. MOFFITT &  
ASSOCIATES

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