STATE OF MICHIGAN
THIRD JUDICIAL COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 76-05890

v

Hon. Deborah A. Thomas

CHARLES LEWIS,
Defendant,
_____/

OPINION

The Defendant has filed a Motion For Reconsideration of this Court's June 17, 2002 opinion and order. In the motion the Defendant argues that the opinion rendered by this Court addressed four issues that were not raised by the Defendant. This Court addressed the following issues in Defendant's Motion For Relief From Judgment: 1) Defendant was denied his right to a fair and impartial trial; 2) Ineffective assistance of trial counsel; 3) Trial Court erred in allowing the admission of improper other crimes evidence; and 4) Ineffective assistance of Appellate Counsel.

A review of the record reveals that the Defendant raised the following four issues in his Motion For Relief From Judgment: 1) Conviction invalid because the prosecutor failed to conduct a Pearson evidentiary hearing within 30 days of the Court of Appeals order; 2) Counsel was unconstitutionally removed without due process; 3) The Trial Court directed the jury to find the Defendant guilty; and 4) Retrial was Double Jeopardy barred.

It is clear that the wrong issues were in fact addressed by this Court in the June 17, 2002 opinion and order. This Court will now proceed to properly address the four issues that were raised by the Defendant in his Motion For Relief From Judgment. This Court vacates its June 17, 2002 opinion and order.

FACTS

On July 31, 1976, at approximately 1:30 in the morning, off duty Detroit Police Officer, Gerald Swpitkowski was shot and killed on the corners of Harper and Barrett. Dennis Van Fleteren, an of duty Detroit Police Officer and partner of the deceased was an eye witness to the murder. Van Fleteren testified that he met the deceased on the night of the murder. (TT pg. 69). He also testified that he and the deceased went to several bars and ended up at Oty's Saloon where they had a few drinks. (TT pg 71). Van Fleteren testified that some time before 1:30 Swpitkowski left the bar and headed down Harper street. (TT pg 72). Van Fleteren testified further that he was talking to

Swpitkowski when a white Mark IV pulled up on Harper with the lights out next to Swpitkowski. (TT pg 73). He further testified that he saw Swpitkowski fall into the street and simultaneously heard a shotgun blast come from the drives side of a white Mark IV. (TT pg 75). Van Fleteren testified that he ran into the street and attempted to stop the Mark IV by waiving his hands. (TT pg. 77). Van Fleteren testified that the driver of the white Mark IV sped up and nearly ran him down. (TT pg 76-78). Van Fleteren testified that he crouched down, directed his full attention towards the license plate number and memorized the license plate number. (TT pg 76-77). Van Fleteren testified that at the time of the incident he thought that the shot that killed his partner Swpitkowski came from the white Mark IV. (TT pg. 78). And, that there was no other traffic in the streets.

Jay Smith testified that he was driving down Harper in his own Ford LTD with the following three passengers, Kim Divine, front passenger, Gloria Ratachek, back seat passenger side, and Donald DeMarc, back seat, driver's side. (TT pg, 135). Jay Smith testified that he pulled up in front of Oty's Saloon and double parked in the street to let Kim Divine out. Jay Smith further testified that he looked in his rear view mirror and saw a flash come from the driver's side of a white Mark IV that was traveling down Harper with the lights out heard a shotgun blast come from the side of Harper that the white Mark IV was on. Jay Smith also testified that he saw the headlights of the white Mark IV go off right after the shot was fired. (TT pg. 137). Jay Smith further testified that the white Mark IV was traveling west on Harper at a high rate of speed.

Detroit Police Officers Joseph Grayer and Lorraine Williams were the first officers to arrive on the scene of the crime. Lorraine Williams was the only officer that arrived on the scene of the crime. Lorraine Williams were the only officer that arrived on the scene that testified. Williams testified that she talked to Dennis Van Fleteren at the scene and he was irrational and intoxicated. (TT pg. 230).

Several minutes later Andrew Kuklock, Gerald O'Connor, Michael Kukla and Michael Yanklin also arrived on the scene of the crime. Some of the officers took statements from witnesses and some of the officers transported witnesses from the scene of the crime to the police homicide section. One of the officers was given the license plate number of a white Mark IV. The police learned later that the white Mark IV was owned and driven by Leslie Nathanial. An arrest warrant was issued for Leslie Nathanial and a swat team was sent to apprehend Mr. Nathanial and impound his white Mark IV. Three hours after the murder Leslie Nathanial was arrested. Mr. Nathanial made a statement to homicide detective Gilbert Hill. In his statement, Mr. Nathanial stated that the was driving his white Mark IV down Harper with the lights out on the night that the deceased was killed, and that he did not hear a gunshot or see anyone get shot. Mr. Nathanial was later released from custody and his car was destroyed in the seventh precinct impound lot. (TT pg. 399-412).

Three juveniles were arrested in connection with the murder of Gerald Swpitkowski, Jeffrey Mulligan (15), Mark Kennedy (16) and Ronald Pettway (16). Two of the juveniles Mark Kennedy and Ronald Pettway made incriminating statements implicating the Defendant Charles Lewis and were released from custody. The record indicates that Jeffery Mulligan was initially charged with the offense along with the Defendant. However, the charges against Jeffrey Mulligan were later dropped when he agreed to testify against the Defendant. (TT pg. 361-373).

Collectively the three juveniles testified that they met with the Defendant on the night of the murder and that the four stole a blue or green Ford Maverick then drove to another location and stole a yellow Ford Grand Torino. The four left with Jeffrey Mulligan and the Defendant in the yellow Grand Torino and Ronald Pettway and Mark Kennedy in the Ford Maverick. The four proceeded to 14181 Eastwood where the Defendant accosted Raymond Cassabon and the Defendant stated "Give me your fuckin money." Mr. Cassabon refused to comply with the Defendant's demands and was shot in the leg. The four juveniles apparently left Eastwood and traveled to Harper and Barrett where the Defendant asked Swpitkowski for his wallet then shot him with a sawed off shotgun. (TT pg. 242-335, 347-397, 414-456).

The Defendant in this case Charles Lewis, apparently turned himself in to attorney Gerald Lorence on August 1, 1976. The record does not disclose how the police came to view the Defendant as a suspect. The record shows that an attorney client conflict developed between the Defendant and counsel Gerald Lorence and that in November of 1976 Gerald Lorence was removed from the case. The record shows that the Defendant remained in the County Jail from November of 1976 until February of 1977 without counsel. On February 24, 1977, Arthur Arduin was appointed to represent the Defendant.

ARGUMENT I

The Defendant's first argument is that his conviction is invalid because the prosecutor failed to conduct a Pearson evidentiary hearing within 30 days of an order by the Michigan Court of Appeals to conduct the hearing.

This Court will review this issue under the "Clearly Erroneous," standard of review. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. This Court favors the definition of "abuse of discretion," in People v Briseno, 211 Mich App 11; 535 NW2d 559 (1995).

The good cause and actual prejudice prerequisites of MCR 6.508(D)(3) do not apply to this issue because the issue is a jurisdiction issue. See, People v Carpentier, 446 Mich 19; 521 NW2d 145 (1994). The Defendant has properly alleged a jurisdictional defect that is exempt from the requirements of MCR 6.508(D).

The second trial in this matter commenced on July 5, 1977. During the second trial five Detroit Police officers were not called to testify. The five officers in question were: Michael Kudla, Michael Yanklin, Andrew Kuklock, Gerald O'Connor, and Joseph Grayer. The Defendant requested the witnesses and was told by the trial court that the witnesses would be called. However, the witnesses were never called.

On November 23, 1979, Rose Mary Robinson was appointed by the Honorable Edward M. Thomas to represent the Defendant. Rose Mary Robinson filed a motion for a Delayed New Trial on December 20, 1979. Judge Edward M. Thomas denied the motion in January of 1980. The motion was denied and Rose Mary Robinson appealed the trial court's decision to the Michigan Court of

Appeals. The Michigan Court of Appeals issued the following opinion on August 22, 1980:

> IT IS ORDERED, pursuant to GCR 806.7 and 820.1(7), that this cause be and the same is hereby REMAND to the Recorder's Court for the City of Detroit for the purpose of conducting an appropriate evidentiary hearing on Defendant's delayed motion for new trial. People v Barrows, 358 Mich 267, 273; People v Parker, 393 Mich 531, 541 (1975). This Court's original opinion refused to consider the substantive merits of the res gestae witness issue; that refusal, however, was without prejudice to Defendant's right to pursue the issue according to the requisite procedures. See People v Wilbourne, 406 Mich 968 (1979).

It is clear from the record that the Michigan Court of Appeals ordered the trial court to conduct a Pearson, evidentiary hearing. The order was issued on August 22, 1980. Pursuant to People v Pearson, 404 Mich 698; 273 NW2d 856 (1979), the prosecutor had until September 22, 1980 to conduct the Pearson hearing.

In Pearson, the Michigan Supreme Court held: "Should the prosecutor fail to seek a post-remand hearing within 30 days the conviction shall be deemed vacated and the prosecutor may proceed with a new trial," id, at 723-724.

The prosecution's 30 days began on August 22, 1980 and expired on September 22, 1980. The Pearson hearing was not held until January of 1981. The prosecution did not conduct the hearing within 30 days and the conviction should have been deemed vacated on September 22, 1980.

This Court concludes that it was an abuse of discretion for Judge Edward M. Thomas to fail or refuse to vacate the Defendant's conviction and order a new trial. Trial court's are required to follow the published decisions of the Michigan Supreme Court under the doctrine of Stare Decisis even if they disagree with the Supreme Court's decision. See, Negri v Slotkin, 397 Mich 105; 244 NW2d 98 (1976). The Court agrees that the Defendant's conviction should haven been reversed on September 23, 1980. However, this Court is bound by the law of the case doctrine which bars reconsideration of an issue by an equal or subordinate Court during subsequent proceedings in the same case. See People v Herrera, 204 Mich App 333; 514 NW2d 543 (1994). It is the hope of this Court that the Michigan Court of Appeals will treat this issue as a miscarriage of justice and grant the relief that the facts and case law warrants.

ARGUMENT II

The Defendant's second argument is that his court appointed attorney Rose Mary Robinson was arbitrarily removed without cause. The record shows that Rose Mary Robinson was appointed to represented the Defendant on November 23, 1979 by the Honorable Edward M. Thomas. Defense counsel, Rose Mary Robinson filed a Motion For A delayed New Trial before Judge Edward M. Thomas on December 20, 1979. The motion was denied by Judge Edward Thomas.

Rose Mary Robinson appealed the decision of the Honorable Edward M. Thomas to the Michigan Court of Appeals and was successful. The Michigan Court of Appeals issued a ruling overturning the Honorable Edward M. Thomas on August 22, 1980.

In October of 1980 the Honorable Edward M. Thomas removed Rose Mary Robinson from the case. The Defendant cites People v Durfee, 215 Mich App 677; 547 NW2d 344 (1996) and People v Johnson, 215 Mich App 658; 547 NW2d 65 (1996) to support his argument that the arbitrary removal of counsel violated his right to counsel. The Michigan Court of Appeals concluded that the unjustified removal of a Defendant's appointed counsel during a critical stage in the proceedings violates the Defendant's Sixth Amendment right to counsel. This Court concludes that the removal of Rose Mary Robinson by Judge Edward M. Thomas was arbitrary and unjustified. Unfortunately, this Court is also bound by the law of the case doctrine to deny relief.

ARGUMENT III

In the Defendant's third argument he asserts that the original trial Judge Joseph E. Maher directed the jury to find him guilty during his instructions. This is a very complicated issue that has been argued by the Defendant before. This Court believes that this issue is controlled by the law of the case doctrine. However, this Court will still address this issue. Judge Maher gave the jury the following instruction:

> Now you have heard evidence tending to show that the Defendant, Charles Lewis was **GUILTY** of another shooting in the course of an armed robbery for which he is now on trial here. (TT pg 666).

The United States Court of Appeals For the Sixth Circuit concluded that the above instruction was harmless error. This Court disagrees. This Court believes that the above instruction was a structural defect which defies analysis by the harmless error standard of review. I would reverse this case based on the above instruction. This Court is of the opinion that any time a judge instructs a jury that the Defendant is **GUILTY** of any element of the offense, regardless of his motives that it should be deemed reversible error.

The above instruction in this case was especially offensive. Two versions of the deceased death were presented to the jury. The three juveniles testified collectively that Jeffrey Mulligan was driving a stolen yellow Grand Torino, and that Ronald Pettway was a passenger in the front seat and the Defendant was a passenger in the back seat, seated on the passenger's side of the car with a sawed off shotgun. The three also testified that the yellow Grand Torino pulled up to the curb, and further that the deceased was standing at a bus stop when the Defendant requested his wallet then shot him in the head with a sawed-off shotgun.

What is disturbing is the fact that the jury had to reject the testimony of Dennis Van Fleteren, an eye witness who was also a Detroit Police Officer, and the partner of the deceased, to convict the Defendant. The jury had to also reject the testimony of Jay Smith, who was also an eye witness to the murder. Both Dennis Van Fleteren and Jay Smith testified that the fatal shot that killed the

deceased came from the driver's side of a white Mark IV. The jury had to also reject the testimony of Kim Divine, Gloria Ratachek, Donald DeMarc, and William Eichman. The jury also had to totally disregard the testimony the first alleged perpetrator Leslie Nathanial. Mr. Nathanial testified that he was driving down Harper with his lights out on the night of the murder. The white Mark IV that was driven by Leslie Nathanial, it should be noted was destroyed in the Seventh Precinct impound lot.

To convict the, jury had to reject the scientific impossibility that the three juveniles version of the murder presented. To convict the jury had to believe that the deceased was standing at a bus stop when he was shot in the head, and that the force of the fatal shotgun blast blew the deceased from the bus stop into the street. The coroner testified that the deceased was shot at close range with a 12 gauge shotgun that was loaded with double "O" buck shot.

The high hurdles that the jury overcame to convict is clear evidence that the jury was swayed by the judge's instruction. It is the opinion of this Court that the complained of instruction pierced the veil of judicial impartiality. See People v Collier, 168 Mich App 687; 425 NW2d 118 (1998).

It is hard to phantom that a jury would summarily dismiss the testimony of a police officer who was also the partner of the deceased in favor of three juveniles. I also have some questions about how four juveniles in two cars could be missed by everyone on the scene of the crime. It is the opinion of this Court that this above instruction by Judge Maher had a devastating effect on the jury. Unfortunately, this Court is bound by the law of the case doctrine to deny relief.

ARGUMENT IV

The Defendant argues that his first trial was dismissed without cause by the original trial court Joseph E. Maher. The record shows that the first trial in this matter began on March 9, 1977. On Friday, March 18, 1977, the jury began jury deliberations. The jury deliberated on Monday, March 21, 1977 and Tuesday, March 22, 1977. On Tuesday March 22, 1977, the jury was dismissed. Judge Maher declared a mistrial without making a record that explained his decision. See People v Hicks, 201 Mich App 197.

A Constitutional Double Jeopardy challenge presents a question of law that we review De Novo. Necessarily intertwined with the constitutional issue in this case is the threshold issue whether Judge Maher properly declared a mistrial.

Jeopardy attaches in a jury trial once the jury is impaneled and sworn. See Crist v Bretz, 437 US 28, 98 S Ct 2156, 57 L Ed2d 24 (1978). The Double Jeopardy Clause affords a criminal defendant a valued right to have his trial completed by a particular tribunal. See Oregon v Kennedy, 456 US 667, 102 S Ct 2083, 72 L Ed2d 416 (1982); Wade v Hunter, 336 US 684, 69 S Ct 834, 93 L Ed2d 974 (1949). In this case Jeopardy attached on March 9, 1977 when the jury was impaneled and sworn.

Once Jeopardy attaches a defendant may not be re-tried after a mistrial has been declared unless (1) there is a "Manifest Necessity," for a mistrial or (2) the defendant either requests or consents to a mistrial. See US v Dinitz, 424 US 600; 96 S Ct 1075, 47 L Ed2d 267 (1976).

Judge Joseph Maher discharged the jury on March 22, 1977 without conducting a hearing or making findings on the record. This Court has thoroughly reviewed the transcript of the first trial looking for any possible reason to dismiss the jury. This Court could not find a reasonable, or logical reason to dismiss the first jury.

This Court also searched the record looking for a request for a mistrial by the Defendant. There is no request on record by the Defendant for a mistrial. The Court also looked for a request by the prosecution for a mistrial. and there is likewise no request on the record by the prosecution for a mistrial.

A thorough reading of the first trial transcript discloses no errors that would warrant a mistrial. There is nothing in the record that indicates that either the Defendant or the prosecution brought a motion for a mistrial. Thus, this Court can only conclude from a silent record that Judge Joseph Maher dismissed the jury sua sponte. This Court concludes that the unconstitutional discharge of the first jury in this matter was the equivalent of an acquittal. However, the Court also concludes that the Defendant failed to object or raise the issue in a timely fashion. Clearly, the Defendant's second trial was held in violation of the Defendant's constitutional rights. However, criminal Defendant's are not free to sit on issues for decades before raising them for the first time. The Defendant had an opportunity to raise the issue on his appeal of right. The Defendant had an opportunity to raise the issue in his first Motion For Relief From Judgment.

COMPANION CASE

This Court notes sua sponte that a review of the transcripts and presentence report in Defendant's companion case (76-05925) shows that the Defendant was sentenced on December 1, 1977 to a 40 to 60 years for Assault With the Intent to Rob While Being Armed. The Defendant was not sentenced with an updated presentence report pursuant to People v Triplett, 407 Mich 510; 287 NW2d 165 (1979), People v Anderson. 107 Mich App 62; 308 NW2d 662 (1981), and People v McKeever, 123 Mich App 503; 332 NW2d 596 (1983). This Court would vacate Defendant's 40 to 60 year sentence and impose a 20 to 30 year sentence with good time starting on August 1, 1986 and ending on August 1, 2006.

CONCLUSION

It is the sincere hope of this Court that the Defendant will appeal this order to the Michigan Court of Appeals, and further that the Michigan Court of Appeals will render an opinion in this matter that is consistent with justice.

DATED: 8-16-06

JUDGE DEBORAH A. THOMAS
CIRCUIT COURT JUDGE

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