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Stephen S. Maris

seem to be compelling arguments for the schedules' existence. And it certainly should be noted that the practice of law and professions in general are not proper spheres for competition based on competitive pricing and that the bar association minimum fee schedules assist the public as well as attorneys, particularly young practitioners, in determining the reasonable value of particular services.

Minimum fee schedules in a profession which has heretofore not been placed within the prohibitions of the Sherman Act deserve a considered evaluation under the rule of reason, if for no other justification than that the legal profession has long been considered exempt. Therefore, suddenly to apply the Sherman Act to the profession would result in the same adverse effects avoided by the Supreme Court in continuing baseball's exempt status. The court in *Goldfarb* appeared far more zealous in condemning the legal profession's use of the fee schedules than it did in finding support for its decision. Whether a fee schedule promulgated by a state bar association is exempt from the Sherman Act under the *Parker v. Brown*[73] analysis is not entirely clear from the *Goldfarb* case. This would certainly be resolved by litigation in a state having a fee schedule issued by a state bar association empowered by the supreme court of that state to regulate the practice of law.

Robert R. Veach, Jr.

Illinois v. Somerville: An Encroachment on the Double Jeopardy Protection

The defendant, Donald Somerville, was indicted by an Illinois grand jury for theft. After the jury was impaneled and sworn, and before any evidence had been presented, the prosecutor realized that the indictment was fatally defective under Illinois law since it failed to allege that the defendant intended to deprive the owner of his property permanently. The combined operation of Illinois rules of procedure and substantive law rendered this defect jurisdictional,[1] forming a non-waivable basis for a successful appeal of any verdict rendered at the trial level. Faced with this procedural impasse, the trial court concluded that further proceedings under the faulty indictment would be a waste of time and granted the state's motion for a mistrial, over the defendant's objection. Subsequently, the grand jury returned a second indictment which did allege the requisite intent. After the defendant's claim of double jeopardy was rejected, a second trial proceeded to a verdict of

[73] *See* note 46 *supra*, and accompanying text.

[1] ILL. REV. STAT. ch. 38, § 16-1(d)(1) (1963) provides that an intent to deprive the owner of his property permanently is a necessary element of the crime of theft, and omission of this element renders an indictment insufficient to charge any crime. Another Illinois statute provides that only defects in form, not substantive defects such as this one, may be cured by amendment. ILL. REV. STAT. ch. 38, § 111-5 (1964). ILL. CONST. art. I, § 7 provides that an indictment is the sole method by which a criminal prosecution may be commenced.

guilty, which was upheld on appeal.[2] The defendant's application for a federal writ of habeas corpus was denied by the district court, and the Court of Appeals for the Seventh Circuit affirmed.[3] The United States Supreme Court granted certiorari and remanded the case for reconsideration,[4] whereupon the Seventh Circuit held that habeas corpus relief had been improperly denied since jeopardy had attached when the jury was impaneled and sworn, and that a declaration of a mistrial, over the defendant's objection, precluded a retrial under the valid indictment.[5] The state appealed to the United States Supreme Court. *Held, reversed*: Under the circumstances of this case, the declaration of a mistrial was required by "manifest necessity" and the "ends of public justice," and, therefore, the double jeopardy clause of the fifth amendment, as made applicable to the states by the fourteenth amendment, did not bar the defendant's retrial. *Illinois v. Somerville*, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973).

I. DOUBLE JEOPARDY: A FUNDAMENTAL PREMISE

The fifth amendment protection against double jeopardy is, and has been, consistently recognized as a basic and necessary tenet of our legal and constitutional system.[6] There has been a plethora of litigation attempting to establish the point at which jeopardy attaches, the courts continually seeking to ascertain whether or not the defendant actually and legally will be put in jeopardy of life or limb by a second criminal trial, and attempting to draw the line accordingly. Although the situations are diverse,[7] the general rule, gleaned from the more recent cases, appears to be that jeopardy attaches when the jury is impaneled and sworn.[8]

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[2] 88 Ill. App. 2d 212, 232 N.E.2d 115 (1967). The defendant's petition for leave to appeal to the Illinois Supreme Court was denied. 37 Ill. 2d 627 (1967).

[3] 429 F.2d 1335 (7th Cir. 1970).

[4] 401 U.S. 1007 (1971).

[5] 447 F.2d 733 (7th Cir. 1971) (applying United States v. John, 400 U.S. 470 (1971)).

[6] Orfield, *Double Jeopardy in Federal Criminal Cases*, 3 CALIF. WESTERN L. REV. 76 (1967). *See also* United States v. Gibert, 25 F. Cas. 1287, 1294 (No. 15204) (C.C.D. Mass. 1834). *See id.* at 1294-1303 for extensive discussion of the history of the double jeopardy doctrine. It has been said that there is "no principle of the common law, grounded upon the great rock of the *Magna Charta*, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense." *Ex parte* Ulrich, 42 F. 587, 590 (W.D. Mo. 1890). *See also* Gore v. United States, 357 U.S. 386, 392 (1958). For a discussion of the antecedents of double jeopardy protection, see Bartkus v. Illinois, 359 U.S. 121, 150-55 (1959) (Black, J., dissenting). Prohibitions against a second trial for the same offense are found in the United States Constitution and in the constitutions of all but five states: Connecticut, Maryland, Massachusetts, North Carolina, and Vermont; however, in all of these states the protection is recognized at common law. *See* ALI, ADMINISTRATION OF THE CRIMINAL LAW 61-72 (1935).

[7] *See, e.g.*, United States v. Shoemaker, 27 F. Cas. 1067, 1069 (No. 16279) (C.C.D. Ill. 1840) (no jeopardy attaches if the defendant is tried on a void indictment); United States v. Haskell, 26 F. Cas. 207, 212 (No. 15321) (C.C.E.D. Pa. 1823) (jeopardy cannot attach until the entire criminal proceeding has been completed). *See generally* Note, *Double Jeopardy: The Reprosecution Problems*, 77 HARV. L. REV. 1272 (1964); Note, *Criminal Law—Double Jeopardy*, 24 MINN. L. REV. 522-24 (1940); Annot., 6 L. Ed. 2d 1510 (1962). For a discussion of the doctrine as it relates to practice in Texas, see Steele, *The Doctrine of Multiple Prosecutions in Texas*, 22 SW. L.J. 567 (1968).

[8] *See, e.g.*, Downum v. United States, 372 U.S. 734 (1963); United States v. Van Vliet, 23 F. 35 (E.D. Mich. 1885). *See also* Huey v. State, 88 Tex. Crim. 377, 227 S.W. 186 (1920) (defendant was not in jeopardy when convicted by a jury which was not sworn as required by law). *But see* Roberts v. State, 72 Miss. 728, 18 So. 481 (1895).

However, jeopardy may be prevented from attaching at the stage of the prosecution at which it would normally do so for a wide variety of reasons, including defective pleadings by the prosecuting authorities,[9] misconduct of a United States attorney and a mistrial on the defendant's motion,[10] granting of a mistrial on the court's own motion without the defendant's consent,[11] and the jury's inability to reach a verdict.[12] The doctrine of "manifest necessity"[13] was developed by the courts as a legal concept to prevent the acquittal of a defendant on a plea of double jeopardy where a mistrial had been granted for certain of the reasons stated. The concept has been employed where the courts felt that a mistrial was declared as the only way to protect the "ends of public justice."[14] Application of the doctrine has traditionally been limited to two general fact situations: those cases where a mistrial was necessitated by extraordinary and unforeseeable circumstances,[15] and those cases in which the jury has been unable, after sufficient deliberation,[16] to reach agreement on a verdict.[17] Although some courts have gone so far as to state that the jury may be discharged in any case where the "ends of justice" require,[18] without such discharge operating to bar another trial, the general weight of authority requires that the circumstances be compelling and beyond the control of court and attorney.[19]

[9] United States v. Ball, 163 U.S. 662 (1896) (indictment failed to charge murder due to failure to allege time or place of death); Simpson v. United States, 229 F. 940 (9th Cir.), *cert. denied*, 241 U.S. 668 (1916) (defective indictment).

[10] Minker v. United States, 85 F.2d 425, 427 (3d Cir. 1936) (improper and prejudicial opening statement); Blair v. White, 24 F.2d 323 (8th Cir. 1928) (improper reference to a prior conviction). *See also* Himmelfarb v. United States, 175 F.2d 924, 932 (9th Cir. 1949).

[11] Gori v. United States, 367 U.S. 364 (1961), *aff'g* 282 F.2d 43 (2d Cir. 1943), *discussed in The Supreme Court, 1961 Term*, 76 HARV. L. REV. 104, 106 (1962); Comment, *Conditions Barring Plea of Double Jeopardy After Mistrial*, 36 N.Y.U.L. REV. 730 (1961). *See also* Annot., 6 L. Ed. 2d 1510 (1962).

[12] Logan v. United States, 144 U.S. 263 (1892) (hung jury as to two of the four defendants, the double jeopardy plea of the first two was upheld when they were joined with the remaining defendants for a second trial); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). For further examples of situations in which jeopardy has been held not to attach, see United States v. Jorn, 400 U.S. 470 (1971) (judge anticipated improper line of questioning by prosecutor and aborted trial); Wade v. Hunter, 336 U.S. 684 (1949) (tactical necessity of the military); Simmons v. United States, 142 U.S. 148 (1891) (outside influence brought to bear on juror).

[13] The manifest necessity rubric appears to have originated from an 1815 pronouncement by Justice Story that a trial court has the power to discharge the jury whenever it is necessary to serve the purpose of justice. United States v. Coolidge, 25 F. Cas. 622 (No. 14858) (C.C.D. Mass. 1815).

[14] *See, e.g.*, Logan v. United States, 144 U.S. 263 (1892).

[15] *See, e.g.*, Simmons v. United States, 142 U.S. 148 (1891) (letter published in newspaper rendered juror's impartiality doubtful); United States v. Haskell, 26 F. Cas. 207 (No. 15321) (C.C.E.D. Pa. 1823) (insanity of juror); United States v. Bigelow, 14 D.C. (3 Mackey) 393, 401 (1884) (the death or incapacity of the trial judge); State v. Malouf, 199 Tenn. 496, 287 S.W.2d 79 (1956) (death of juror); Woodward v. State, 42 Tex. Crim. 188, 58 S.W. 135 (1900) (serious illness in juror's family); Annot., 53 A.L.R. 1057 (1928).

[16] The court may abuse its discretion by ordering the discharge of the jury after too brief a period of deliberation. Grigsby v. State, 158 Tex. Crim. 484, 257 S.W.2d 110 (1953).

[17] *See, e.g.*, Logan v. United States, 144 U.S. 263 (1892) (jury deadlocked for 40 hours); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). COLO. CONST., art. II, § 18, expressly provides that a defendant shall not be deemed to have been placed in jeopardy if the jury is unable to agree on a verdict.

[18] *See* Thompson v. United States, 155 U.S. 271, 274 (1894); People v. Simos, 345 Ill. 226, 178 N.E. 188 (1931).

[19] *See* Himmelfarb v. United States, 175 F.2d 924 (9th Cir.), *cert. denied*, 338 U.S.

II. MANIFEST NECESSITY: A TRADITIONAL PERSPECTIVE

The earliest "manifest necessity" case, *United States v. Perez*,[20] involved a situation where the jury was unable, after lengthy deliberation, to reach a verdict. In that case the United States Supreme Court held that "in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act...."[21] Thus, the doctrine was initially formulated to cope with a narrow situation completely beyond the control of either the court or counsel.[22] The narrow strictures set out by the Court in *Perez* were noted and observed in *Wade v. Hunter*,[23] where the tactical necessities of a rapidly advancing wartime army required that a court-martial be aborted, transferred, and reconvened under a different authority. In denying the defendant's plea of former jeopardy, the Court in *Wade* was careful to point out that it was the exigencies of the situation, giving rise to unforeseeable circumstances, which made the completion of the original court-martial impossible, necessitating its continuance before a second tribunal.[24]

In *United States v. Jorn*,[25] a 1971 Supreme Court decision which applied the manifest necessity doctrine of *Perez*, the trial judge had aborted the proceedings so that witnesses might confer with counsel before answering government questions that might tend to incriminate them. The judge felt that warnings given the witnesses by agents of the Internal Revenue Service which concerned the witnesses' constitutional rights were, in all likelihood, inadequate to protect those rights. In sustaining a plea to bar of double jeopardy to an attempted second trial, the plurality opinion of the Court stressed the defendant's "valued right to have his trial completed by a particular tribunal"[26] and concluded, after reviewing the history and scope of the doctrine, that "the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial."[27] In reviewing cases where manifest necessity prevented a double jeopardy plea in bar of a second trial, the Court chose to cite those which emphasized the requirement of unusual and unforeseeable circumstances necessitating the declaration of a mistrial.[28] The Court specifically pointed out that situations which were brought

860 (1949); State v. Preto, 51 N.J. Super. 175, 144 A.2d 19 (1958); State v. Little, 120 W. Va. 213, 197 S.E. 626 (1938). *See also* note 12 *supra*.

[20] 22 U.S. (9 Wheat.) 579 (1824). "The rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy." Wade v. Hunter, 336 U.S. 684, 690 (1949).

[21] 22 U.S. (9 Wheat.) at 580 (emphasis added).

[22] *See* note 17 *supra*.

[23] 336 U.S. 684 (1949).

[24] "Furthermore, this record is sufficient to show that the tactical situation brought about by a rapidly advancing army was responsible for withdrawal of the charges from the first court-martial . . . . Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions." *Id.* at 691-92.

[25] 400 U.S. 470 (1971).

[26] *Id.* at 484, quoting Wade v. Hunter, 336 U.S. 684, 689 (1949).

[27] *Id.* at 487.

[28] *Id.* at 481-82, citing cases in which the *Perez* doctrine had been followed: Wade v.

about by carelessness or other factors within the control of the prosecuting authority did not come within the strictly circumscribed range of situations in which a mistrial could be declared without running afoul of the double jeopardy clause of the fifth amendment.[29]

III. ILLINOIS V. SOMERVILLE

In *Illinois v. Somerville* the Court had to decide whether the facts of the case presented one of those sets of circumstances where a trial, once begun, may be aborted over the defendant's objection and the defendant retried, without the constitutional prohibition against double jeopardy barring the second trial. In deciding to allow the second trial, the majority consistently resorted to citations from, and analogies to, cases involving situations which conformed to the traditional requirement of unusual circumstances which were beyond the control of the court or counsel[30] and had necessitated the declaration of a mistrial. The majority seemed to ignore the fact that the defect in this indictment could more properly be characterized as an error or oversight on the part of the prosecuting authorities. Beginning with the narrow concept espoused in *Perez*,[31] the *Somerville* Court expanded that decision by characterizing it as a "general approach, premised on a 'public justice' policy,"[32] which they found to be applicable to fact situations such as the one presented by *Somerville*.[33] Although the majority characterized the conglomerate of traditional "manifest necessity" cases as defying "meaningful categorization,"[34] it is obvious that none of the cases cited as precedent falls into any category that could even remotely be thought of as involving what may be called "prosecutorial error." For example, in *Logan v. United States*[35] the jury was closeted for more than forty hours without arriving at a verdict; and in *Simmons v. United States*[36] one of the jurors had been acquainted with the

Hunter, 336 U.S. 684 (1949) (*see* text accompanying note 24 *supra*); Thompson v. United States, 155 U.S. 271 (1894) (one petit juror had been member of grand jury that handed down the indictment); Logan v. United States, 144 U.S. 263 (1892) (hung jury for 40 hours); Simmons v. United States, 142 U.S. 148 (1891) (letter published in a newspaper rendered juror's impartiality doubtful).

[29] "The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpining . . . the double jeopardy provision . . . ." 400 U.S. at 486.

[30] *See* notes 35 and 36 *infra*, and accompanying text.

[31] The majority quoted the statement by Mr. Justice Story, discussed *supra* at note 13 and accompanying text, through which the *Perez* Court, in a unanimous decision, held that the failure of a jury to reach an agreement on a verdict did not bar retrial of the defendant. 93 S. Ct. 1066 at 1069, 35 L. Ed. 2d 425 at 429. However, in the same paragraph, Mr. Justice Story continued with a word of caution to those who would abuse this limited suspension of the constitutional protection, saying, "To be sure, the power ought to be used with the greatest caution, under urgent circumstances . . . ." 22 U.S. (9 Wheat.) at 580.

[32] 93 S. Ct. 1066 at 1070, 35 L. Ed. 2d 425 at 431.

[33] From the relatively narrow holding and constrictive language of *Perez*, the majority in *Somerville* reached the conclusion that "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." *Id.* Under the test enunciated by the majority, the mere fact that a reversal is sure would justify the declaration of a mistrial, and unless some type of "prosecutorial manipulation" can be shown, the defendant may be retried to serve the "ends of public justice." *Id.*

[34] *Id.*

[35] 144 U.S. 263 (1892).

[36] 142 U.S. 148 (1891).

defendant, which fact was not discovered until after the jury was sworn.

In setting forth their standard for application of the "manifest necessity—ends of public justice" doctrine, the majority conspicuously omitted any requirement that the situation calling for a mistrial result from circumstances beyond the control of the parties, and promulgated what Mr. Justice Marshall, in a forceful dissent, referred to as a "general 'balancing' test."[37] The majority eschewed any rigid, mechanical rule. While they recognized that "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one,"[38] they laid great emphasis on "the public's interest in fair trials designed to end in just judgments."[39] As Mr. Justice Marshall indicated,[40] the deflation of the defendant's "valued right" to a mere "weighty" consideration is indeed a a great loss in prestige for the consideration he viewed as controlling in both *Jorn* and *Downum v. United States.*[41] Mr. Justice White, in a separate dissent, and Justice Marshall each took issue with the majority analysis of *Downum*[42] and felt that the new "balancing" approach failed to afford adequate consideration to the defendant's interests.[43]

Under the majority approach, the trial judge, in exercising his judicial discretion, must treat each case on an ad hoc basis. The factors to be considered include: any alternatives to declaration of a mistrial;[44] the interest of the public in seeing that criminal trials proceed to a verdict, either of acquittal or conviction; and the interest of the defendant in having his case considered by a jury, already impaneled, that he may feel is sympathetic to his cause. Then, after taking all the circumstances of the case into consideration, if the

[37] Mr. Justice Marshall expressed his feeling that the recent cases of United States v. Jorn, 400 U.S. 470 (1971), and Downum v. United States, 372 U.S. 734 (1963), had established principles to guide trial judges in determining what constituted a "manifest necessity" for declaring a mistrial over a defendant's objection. He felt that the majority's decision in *Somerville* reverted to a wholly unstructured analysis of such cases. 93 S. Ct. at 1077, 35 L. Ed. 2d at 438 (Marshall, J., dissenting).

[38] 93 S. Ct. at 1973, 35 L. Ed. 2d at 435. Compare the majority's statement with United States v. Jorn, 400 U.S. 470 (1971), and Wade v. Hunter, 336 U.S. 684 (1949), wherein the Court laid great stress on the defendant's "valued right to have his trial completed by a particular tribunal." 400 U.S. at 484.

[39] 93 S. Ct. at 1070, 35 L. Ed. 2d at 430.

[40] *Id.* at 1077, 35 L. Ed. 2d at 439.

[41] 372 U.S. 734 (1963) (failure of the prosecution to subpoena a key witness). *Downum* is characterized by the majority as a situation lending itself to "prosecutorial manipulation." 93 S. Ct. at 1073, 35 L. Ed. 2d at 434. *See* note 42 *infra*, and accompanying text.

[42] In his dissent, which was joined by Justices Douglas and Brennan, Mr. Justice White argued that no prosecutorial misconduct other than "mere oversight and mistake was claimed or proved" and he felt that "very similar considerations" should govern the instant case. 93 S. Ct. at 1075, 35 L. Ed. 2d at 436 (White, J., dissenting). Mr. Justice Marshall flatly accused the majority of mischaracterizing *Downum* since he saw the "prosecutor's negligence" as the abortive factor. *Id.* at 1079, 35 L. Ed 2d at 442. He saw *Downum* as an exact parallel of the *Somerville* situation since he "[could] not understand how negligence lends itself to manipulation. And even if [he] could understand that, [he could] not understand how negligence in failing to draw an adequate indictment is different from negligence in failing to assure the presence of a crucial witness." *Id.* Compare the characterization of the *Downum* situation by Mr. Justice Clark in his dissent in *Downum*, wherein he stated, "Indeed, it appears to be just one of those circumstances which often creep into a prosecutor's life as a result of inadvertence . . . ." Downum v. United States, 372 U.S. 734, 742 (1963) (Clark, J., dissenting).

[43] *See generally* 93 S. Ct. at 1075, 1077, 35 L. Ed. 2d at 437, 439.

[44] The Court pointed out that the trial judge in *Jorn* could easily have continued, rather than aborted, the proceedings. The failure to consider alternatives was characterized as "erratic" and thus the Court felt that no effort was made to exercise a sound discretion. *Id.* at 1073, 35 L. Ed. 2d at 434.

decision to abort the proceedings appears to be a rational determination required by "manifest necessity" and the "ends of public justice," the state may retry the defendant without violation of the double jeopardy clause of the fifth amendment. However, it seems that at least one of the factors the majority considered is a constant, arising with equal weight in every case. The public always has the same interest in seeing that criminal trials proceed to just verdicts. Thus, it would appear that the other circumstances must tip the scales one way or the other. Given the decreased emphasis on the defendant's right to have his case decided by the initial jury, it would seem that the deciding factor will henceforth be the nature of the circumstances necessitating the declaration of a mistrial. It is here that the majority's failure to consider the elements of prosecutor error or carelessness apparent in the instant situation is most important. Under the test established in this case, it appears that it will require the "declaration of a mistrial on the basis of a rule or a defective procedure that lent itself to prosecutorial manipulation . . ."[45] in order to preclude the application of the "manifest necessity" doctrine, and thereby prevent a retrial of the defendant for the same offense.

IV. CONCLUSION

An analysis of the factors deemed controlling by the Court, considered in conjunction with its failure to recognize other aspects of the case, makes it clear that the importance of *Somerville* is found in the Court's holding that "where the declaration of mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice."[46] Yet the full import of the decision depends on the coupling of the above holding with the Court's statement that "the declaration of a mistrial on the basis of . . . a defective procedure that lent itself to prosecutorial manipulation would involve an entirely different question . . . ."[47] In light of the majority characterization of *Downum*, and the similarity of the situation in that case with the one found in *Somerville*, subsequent cases will have to establish the difference between what is to be considered prosecutorial manipulation and what mere negligence. Difficulties in proof and the relationship between judges and prosecutors may make many judges reluctant to find intentional manipulation. Apparently, the mere fact that the prosecutor benefited by the delay will not sustain a finding of manipulation, since the prosecution in *Somerville* gained approximately two weeks to strengthen a somewhat weak case, and, to the extent that this time was so used, the prosecution did profit from its negligence. Following the rule and spirit of *Somerville*, future cases may have to be decided by thrashing through all the attendant circumstances and arriving at the decision that will best serve the dictates of that uncertain concept "the ends of public justice."

[45] *Id.* at 1070, 35 L. Ed. 2d at 431.
[46] *Id.* at 1074, 35 L. Ed. 2d at 435.
[47] *Id.* at 1070, 35 L. Ed. 2d at 431.