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Double Jeopardy-Mistrial Granted upon Motion by Defendant-Standard for Reprosecution

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entitled to share in the appreciation in value if divorce should occur. It is not difficult to imagine the discord this division of interest would cause in a marriage.

Of the various positions available in community property theory, the Missouri courts have not chosen that which treats the marriage as a partnership and avoids strife over property. The courts should adopt the "source of funds" theory on acquisition because, while it enables the owner of the separate property to retain both the title to the property and the equity in proportion to the amount of separate funds used to acquire it, the community would have a claim on the equity in proportion to the marital funds used in acquisition. If the Missouri courts continue to follow the *Cain* view on acquisition, the courts can and should treat improvements as the majority of community property states do. This entails a recognition that the improvement is acquired after marriage and that the increase in value due to the improvement by the marital community should be allocated between the spouses. The *Stark* decision, refusing to allocate increases in value of separate property which are attributable to the joint effort of the spouses, should be overruled. This would allow a more equitable distribution of earnings produced by marital efforts.

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DOUBLE JEOPARDY—MISTRIAL GRANTED UPON MOTION BY DEFENDANT—STANDARD FOR REPROSECUTION

United States v. Kessler[1]

In a trial for conspiracy and criminal intent to export military explosives, the prosecution introduced, over objections and on the basis of inadmissible hearsay testimony, an automatic rifle nonillustrative of the arms involved. A defense motion for a mistrial was granted by the trial judge. Upon retrial, the defense argued that the proceeding should be barred by the Double Jeopardy Clause of the fifth amendment.[2] The trial judge dismissed the indictment on this basis and the United States Court of Appeals for the Fifth Circuit affirmed.

The double jeopardy prohibition, made applicable to the states through the Due Process Clause of the fourteenth amendment,[3] has been

1. 530 F.2d 1246 (5th Cir. 1976).

2. The fifth amendment says in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." MO. CONST. art. 1, § 19, provides in part: "Nor shall any person be put again in jeopardy of life or liberty for the same offense."

3. Benton v. Maryland, 395 U.S. 784 (1969).

interpreted by the United States Supreme Court as representing the idea that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .[4]

Cases in which a mistrial has occurred followed by a request for a new trial provided courts with opportunities to consider the double jeopardy prohibition and the standards for barring reprosecution. These standards center upon who requested the mistrial, who was responsible for the mistrial and the severity of misconduct involved.

A mistrial results in the termination of a proceeding before a verdict can be rendered. It may be declared by the trial judge *sua sponte* or upon request of the prosecution without the defendant's consent. The Supreme Court in 1824[5] determined that in these situations there may be reprosecution after the mistrial if "there is a manifest necessity for [it] or the ends of public justice would otherwise be defeated."[6] These requirements for allowing reprosecution after a mistrial form a broad standard. Circumstances which delay a trial or prevent an impartial verdict constitute manifest necessity for a retrial. Reprosecutions have been allowed where the jury was unable after much deliberation to reach a verdict,[7] when an army court-martial was interrupted by battle,[8] and when the trial judge[9], juror[10] or the defendant[11] became ill during the trial.

The ends of public justice are served when the public and defendant are freed from expending time and effort in reaching a verdict which can easily be upset by one of the parties, necessitating retrial.[12] It has been held that the ends of public justice might best be served by the declaration of mistrial and subsequent retrial upon discovery at trial that a juror was biased against one of the parties,[13] or a juror had served on the grand jury that indicted the defendant,[14] or that the trial was based on a defective indictment.[15]

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4. Green v. United States, 355 U.S. 184, 187 (1957).
5. United States v. Perez, 22 U.S. (9 Wheat.) 194 (1824).
6. *Id.* at 194. *See* United States v. Dinitz, 424 U.S. 600, 607 (1976); Illinois v. Somerville, 410 U.S. 458, 461 (1973); United States v. Jorn, 400 U.S. 470, 481 (1971); Gori v. United States, 367 U.S. 364, 368-69 (1961).
7. United States v. Perez, 22 U.S. (9 Wheat.) 194 (1824).
8. Wade v. Hunter, 336 U.S. 684 (1949).
9. Freeman v. United States, 237 F. 815 (2d Cir. 1916).
10. United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied,* 313 U.S. 584 (1941).
11. United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956).
12. Illinois v. Somerville, 410 U.S. 458, 471 (1973).
13. Simmons v. United States, 142 U.S. 148 (1891).
14. Thompson v. United States, 155 U.S. 271 (1894).
15. Illinois v. Somerville, 410 U.S. 458 (1973).

The principles of manifest necessity and public justice which provide a basis for reprosecution are balanced by the defendant's right to have a trial taken to its completion before a particular tribunal.[16] The Supreme Court has held that trial judges should not foreclose the defendant's option without a scrupulous exercise of judicial discretion[17] and consideration of the possible alternatives to declaration of a mistrial.[18] It was determined in *United States v. Jorn*[19] to be an abuse of discretion for a trial judge to order a mistrial when he was convinced that witnesses had not been adequately warned of the possible consequences of their testimony.[20] In *United States v. Kin Ping Cheung*[21] a judge declared a mistrial due to difficulties with the translation of testimony from a Chinese witness. The Fifth Circuit barred reprosecution on the ground that the trial judge had given insufficient consideration to the alternatives to a mistrial.[22]

As with mistrials granted *sua sponte,* courts required that mistrials granted upon request of the prosecution consider the defendant's interest in having a trial completed before one tribunal before reprosecution is allowed. In analyzing the prosecution's motion for retrial courts will give great weight to the defendant's interest when the declaration of the mistrial appears to have a "tantalizing potential for prosecutorial misconduct,"[23] "[which entails] not only a delay for the defendant, but also [operates] as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case."[24] Courts recognize that there may be a need for a mistrial and subsequent retrial of a defendant, but they will not lightly sustain the foreclosure of a defendant's right to a particular tribunal where there is only "sloppy prosecutorial preparation."[25]

It is the exception rather than the rule that retrial is barred after a mistrial has been granted upon a motion by the defendant.[26] The usual

16. United States v. Dinitz, 424 U.S. 600, 608 (1976).
17. United States v. Jorn, 400 U.S. 470, 485 (1971).
18. United States v. Kin Ping Cheung, 485 F.2d 689, 691 (5th Cir. 1973).
19. 400 U.S. 470 (1971).
20. The Court said, "It is apparent from the record that no consideration was given to the possibility of a trial continuance. . . . " *Id.* at 487.
21. 485 F.2d 689 (5th Cir. 1973).
22. The court suggested that the trial judge should have considered deleting the testimony from the record with appropriate instructions to the jury or a short continuance. *Id.* at 691.
23. United States v. Kin Ping Cheung, 485 F.2d 689, 692 (5th Cir. 1973); McNeal v. Hollowell, 481 F.2d 1145, 1150 (5th Cir. 1973).
24. Illinois v. Somerville, 410 U.S. 458, 469 (1973). *See* McNeal v. Hollowell, 481 F.2d 1145, 1150 (5th Cir. 1973). *See also* Downum v. United States, 372 U.S. 734 (1963), where the prosecution failed to ascertain before the swearing in of the jury whether a key witness would be present for trial, and absence of the witness was the basis for the prosecution's motion.
25. McNeal v. Hollowell, 481 F.2d 1145, 1151 (5th Cir. 1973).
26. United States v. Dinitz, 424 U.S. 600, 608 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971). *See* United States v. Romano, 482 F.2d 1183, 1188 (5th Cir. 1973), *cert. denied,* 414 U.S. 1129 (1974).

reasoning is that when the defendant requests or consents to a mistrial he is, in effect, consenting to the dismissal of the immediate tribunal, waiving his right to have the present trial taken to its completion, and consenting to a new trial. Thus, the defendant removes the obstacle to reprosecution presented by the Double Jeopardy Clause.[27]

The exception to this reasoning occurs when actions of the trial judge or prosecution bring about the mistrial. Judicial or prosecutorial error might so prejudice a defendant that he could reasonably conclude that continuation of the trial would result in conviction, lengthy appeal and, if successful, reprosecution. In reference to such situations the Supreme Court has recently said "a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions."[28]

When the defendant's mistrial motion is based upon error by the judge or prosecution, the courts are forced to consider the question of what constitutes sufficient error or overreaching to bar reprosecution. It is in analysis of this question that conflict between the public's interest in conviction of the guilty and the defendant's right to a fair trial free from prejudicial error and the possibility of multiple prosecution is most clearly presented.

Negligence by the prosecution does not ordinarily constitute sufficient overreaching to bar reprosecution.[29] The courts cite several considerations in support of this position but of primary importance are the beliefs that a "trial is . . . a complicated affair to manage"[30] and that it would be asking too much for society to guarantee every defendant a trial free from any reversible error.[31] To allow negligent errors committed by the prosecution

27. United States v. Jorn, 400 U.S. 470, 485 (1971).

28. United States v. Dinitz, 424 U.S. 600, 608 (1976). The Supreme Court of Pennsylvania said:

> To hold that an accused must barter away his constitutional protection against the oppression of multiple prosecution in order to avoid the hazards of continuing with a proceeding which by hypothesis has been tainted so as to prejudice his right to a fair trial would not be consistent with the administration of justice.

Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 189, 220 A.2d 859, 864, *cert. denied,* 385 U.S. 963 (1966).

29. United States v. Jorn, 400 U.S. 470, 485 (1971); United States v. Tateo, 377 U.S. 463, 466 (1974); United States v. Romano, 482 F.2d 1183, 1188 (5th Cir. 1973).

30. United States v. Jorn, 400 U.S. 470, 479 (1971).

31. United States v. Tateo, 377 U.S. 463, 466 (1974). This reasoning is analogous to that which concerns allowing retrial of a defendant who on appeal has obtained the reversal of his conviction. It has been said that the rule pertaining to retrial after a successful appeal:

> protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal errors at a previous trial, and . . . it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error.

United States v. Ewell, 383 U.S. 116, 121 (1966); United States v. Tateo, 377 U.S. at 465.

or judge to constitute sufficient grounds for barring retrial "would fail to adequately take into account the public interest in prosecuting and punishing individuals guilty of crime."[32] For these reasons, failure by the prosecution to instruct a witness not to give certain testimony relating to another charge against the defendant,[33] questions by the prosecution which elicited from a witness a remark about "spots" on the defendant's arm which implied drug addiction,[34] and a question by the prosecution which implied that the defendant had previously been involved in criminal activity[35] have been held insufficient grounds for barring reprosecution after a mistrial based upon the defendant's motion. While these actions were obviously erroneous and prejudicial to the defendants, they did not constitute overreaching.

Several courts have attempted to define overreaching. The generally accepted standard that has developed encompasses conduct more reprehensible than simple negligence. Descriptions of *prosecutorial overreaching* as conduct intended to secure "another, more favorable opportunity to convict the accused,"[36] remarks "calculated to precipitate the mistrial"[37] or "intentionally abort the trial,"[38] and as "prejudicial misconduct" intended for an "improper purpose"[39] illustrate the consistency of the courts in requiring an intentional act of misconduct coupled with an awareness of improper results before reprosecution will be barred by the double jeopardy prohibition. The burden is on the defense to prove that the conduct was sufficient to constitute overreaching.

In several cases involving alleged overreaching by the prosecution it was determined that the defense had failed to present sufficient evidence that the conduct of the prosecution was intentional and for improper purposes.[40] These cases involved such prosecutorial conduct as telling the

32. Muller v. State, 478 P.2d 822, 827 (Alas. 1971). "Where, as here, the risk of harassment is slight and that of improper acquittal great, the state's interest in securing convictions must be given fair and considerable weight." Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 191-92, 220 A.2d 859, 865 (1966).

33. City of Tucson v. Valencia, 21 Ariz. App. 148, 517 P.2d 106 (1973).

34. White v. State, 523 P.2d 428 (Alas. 1974).

35. United States v. Beasley, 479 F.2d 1124 (5th Cir.), *cert. denied,* 414 U.S. 924 (1973).

36. State v. Ballinger, 19 Ariz. App. 32, 36, 504 P.2d 955, 959 (1973), *citing* Gori v. United States, 367 U.S. 364, 369 (1961).

37. Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 190, 220 A.2d 859, 865 (1966).

38. City of Tucson v. Valencia, 21 Ariz. App. 148, 153, 517 P.2d 106, 111 (1973).

39. People v. Hathcock, 8 Cal.3d 599, 611, 105 Cal. Rptr. 540, 547, 504 P.2d 476, 483 (1973).

40. One of the means by which the defendant may show that the prosecutor intentionally induced the mistrial motion is by showing that different evidence was presented by the prosecution at the retrial. In *Beasley* the court supported its decision to allow reprosecution with the finding that there was no indication that the prosecution had acted with the intent to strengthen its case as "virtually the same evidence [was presented] at both trials." United States v. Beasley, 479 F.2d 1124, 1127 (5th Cir.), *cert. denied,* 414 U.S. 924 (1973).

jury that while the defendant stole nine cars proof was only to be presented that the defendant had taken three,[41] referring to the defendant as an "old pro,"[42] or making reference to the defendant's alleged involvement in other criminal activities.[43] In each of these cases the defendant was reprosecuted due to the lack of proof of intentional misconduct.

A similar standard of intentional conduct for improper purposes applies to *judicial* overreaching. In *United States v. Dinitz*[44] the trial judge banished the defendant's counsel from the courtroom due to the attorney's improper conduct. The Supreme Court concluded that although the judge might have overreacted, there had been no showing that the actions of the judge were intended to intentionally prejudice or harass the defendant.[45]

The few cases in which the conduct of the prosecution has been held to bar reprosecution seem to indicate that the prosecutor's intent to precipitate a mistrial be obvious. In *Commonwealth v. Warfield*[46] a confession by the defendant had been ruled inadmissible prior to trial. Subsequently, in his opening statement to the jury, the prosecution stated that the defendant had made a confession to the police. The defendant's motion for a mistrial was granted and reprosecution on the particular charge was barred upon a finding that the statement was made for the specific purpose of causing a mistrial and therefore constituted overreaching.

United States v. Kessler[47] held that the conduct of the prosecution constituted overreaching. Conduct necessary to constitute overreaching was described as "gross negligence or intentional misconduct which seriously prejudiced the defendant."[48] This analysis does not require that the intentional misconduct be intended to precipitate a mistrial request by the defendant. The court concluded that the prosecution knew that the gun exhibited at trial had been legally purchased and was not, as it was purported to be, an example of the arms involved in the alleged conspiracy. By the conscious introduction of false evidence, an obvious error,[49] the pro-

41. United States v. Romano, 482 F.2d 1183 (5th Cir.), *cert. denied*, 414 U.S. 1129 (1973).

42. United States *ex rel.* Montgomery v. Brierley, 414 F.2d 552 (3rd Cir. 1969), *cert. denied*, 399 U.S. 912 (1970).

43. People v. Hathcock, 8 Cal. 3d 599, 105 Cal. Rptr. 540, 504 P. 2d 476 (1973).

44. 424 U.S. 600 (1976).

45. The Court said that it had not been shown or contended that the banishment was done in "bad faith in order to goad the [defendant] into requesting a mistrial or to prejudice his prospects for an acquittal." *Id.* at 611.

46. 424 Pa. 555, 227 A.2d 177 (1967).

47. 530 F.2d 1246 (5th Cir. 1976).

48. *Id.* at 1256.

49. The court's opinion gives no indication as to whether the conduct by the prosecution was intended to induce a mistrial, but appears to have accepted the defendant's contention that the prosecution committed "known error—in hopes of 'getting away' with it, with the ability to retry the case properly if the first trial [was] aborted by a mistrial." *Id.* at 1253.