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Double Jeopardy - Declaration of Mistrial Without Consent of Defendant

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satisfactory in that it ignores the possibility of a reconciliation between the rehabilitative ideal of the juvenile court system and the preservation of the individual rights of juveniles. Rehabilitation for the guilty, as well as freedom for the innocent, begins with a fair and accurate determination of the facts.[60] The jury system both traditionally and practically is the best vehicle to achieve that beginning. The sixth amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." Read literally, the clear indication is that all criminally accused persons shall enjoy that right. The juvenile proceeding has been classified as criminal in nature in the *Gault* case so as to deserve other constitutional protections applicable in criminal proceedings.[61] Practical arguments which militate against the right to trial by jury in juvenile proceedings are not so insurmountable as to preclude its adoption. The *Duncan* decision, holding that due process of law necessarily involves the right to jury trial when the accused faces a significant abridgement of his freedom, should be particularly applicable to juvenile proceedings where the child accused of a crime may face a period of confinement many times longer than the imprisonment that would confront an adult charged with the same offense. The *McKeiver* decision, in creating a lesser standard of due process for juveniles, has fulfilled an earlier prophetic observation of the Court:

> "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[62]

Lawrence Roe Dodd

DOUBLE JEOPARDY—DECLARATION OF MISTRIAL WITHOUT CONSENT OF DEFENDANT

The defendant was charged in federal district court with willfully assisting in the preparation of fraudulent income tax

60. TASK FORCE REPORT 30 (1967).
61. 387 U.S. 1, 49-50 (1967).
62. Kent v. United States, 383 U.S. 541, 556 (1966).

returns.[1] Five of the Government's witnesses were taxpayers whom the defendant had allegedly aided in preparation of the returns. The trial judge concluded that the witnesses had not been adequately warned of their constitutional privilege against self-incrimination and that they must be allowed to consult with their attorneys prior to testifying. To afford them this opportunity, the trial judge discharged the jury and declared a mistrial on his own motion without the defendant's consent. The case was set for retrial, but, on a pretrial motion by the defendant, the same trial judge dismissed the information on the ground of double jeopardy. On direct appeal by the Government,[2] the United States Supreme Court affirmed the dismissal of the charge. *Held*, the trial judge, under these circumstances, abused his discretion in declaring a mistrial on his own motion without the consent of the defendant, and further prosecution of the defendant for the offense would violate the constitutional guarantee against double jeopardy. *United States v. Jorn*, 91 S. Ct. 547 (1971).

The fifth amendment guarantee against double jeopardy,[3] one of the principal constitutional safeguards for a defendant in a criminal trial, prevents the Government from subjecting the individual to repeated prosecutions for the same offense. This is essentially a manifestation of society's awareness of the heavy personal strain which a criminal trial places on the defendant, and its corresponding willingness to limit the Government to a single criminal proceeding to vindicate society's vital interest in the enforcement of criminal laws.[4] This concern for the rights of the individual is expressed in *Green v. United States*, wherein the United States Supreme Court noted that the policy underlying the double jeopardy provision

> ". . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an in-

1. Specifically the defendant was charged with violation of 26 U.S.C. § 7206(2) (1964) and brought to trial in the United States District Court for the District of Utah.

2. The Criminal Appeals Act (18 U.S.C. § 3731 (1964)) authorizes direct appeal by the government to the United States Supreme Court from a district court decision sustaining a "motion in bar" when the defendant has not been put in jeopardy. A defendant's plea of former jeopardy, based on the district court's prior declaration of a mistrial, constitutes a "motion in bar" within the meaning of the statute where the dismissal occurred prior to the impaneling of a second jury.

3. U. S. CONST. amend. V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

4. United States v. Jorn, 91 S. Ct. 547 (1971).

> dividual 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, as well as enhancing the possibility that even though innocent he may be found guilty."[5]

There are, however, certain occasions where, after the declaration of mistrial, it is appropriate to the sound administration of justice that the accused be subjected to a second trial.[6]

The question posed in *Jorn* is under what circumstances will retrial be precluded when the initial proceedings are aborted, prior to verdict, by the declaration of a mistrial without the defendant's consent. The standard which has been uniformly applied by the United States Supreme Court in reviewing the trial judge's exercise of discretion in these circumstances is the "manifest necessity" criteria of *United States v. Perez*.[7] There the defendant was brought to trial on a capital offense, and the jury, being unable to agree, was discharged by the trial judge without the consent of the defendant. The Court held that retrial of the defendant did not violate the prohibition against double jeopardy since the discharge, taking all the circumstances into consideration, was manifestly necessary.[8]

In applying the *Perez* requirement of "manifest necessity,"

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5. Green v. United States, 355 U.S. 184, 187-88 (1957).

6. "[A] criminal trial is, even in the best circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, *e.g.*, the health of the various witnesses, parties, attorneys, jurors, *etc.*, all of whom must be prepared to arrive at the courthouse at set times. And when one adds the scheduling problems arising from case overloads, and the sixth amendment's requirement that the single trial to which the double jeopardy provision restricts the government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from government harassment which such a mechanical rule would provide. As the court noted in Wade v. Hunter, 336 U.S. 684, 689 (1949), 'a defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments.'" United States v. Jorn, 91 S. Ct. 547, 554 (1971).

7. 22 U.S. 579 (1824). *See* United States v. Jorn, 91 S. Ct. 547 (1971); Downum v. United States, 372 U.S. 734 (1963); Gori v. United States, 367 U.S. 364 (1961); Brock v. North Carolina, 344 U.S. 424 (1952); Wade v. Hunter, 336 U.S. 684 (1949); Lovato v. New Mexico, 242 U.S. 199 (1916); Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Thompson v. United States, 155 U.S. 271 (1894); Logan v. United States, 144 U.S. 263 (1892); Simmons v. United States, 142 U.S. 148 (1891).

8. "[I]n all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever,

the Supreme Court has defined a limited number of situations in which retrial is permissible. Reprosecution has been permitted when a mistrial was declared because the jury was unable to agree,[9] when there was the possibility of juror prejudice,[10] and even where a military court martial was discharged due to tactical necessity in the field.[11] It is also clear that retrial is not prohibited where the discharge is due to physical necessity.[12]

While adhering to the "manifest necessity" doctrine, the Court has made it clear that the review of a trial judge's declaration of a mistrial is very limited, so that such declaration is not likely to be questioned in the absence of a clear abuse of the judge's discretion. This line of reasoning had served to dilute the constitutional guarantee against double jeopardy and to place the emphasis on trial administration at the expense of the individual rights of the accused. In *Gori v. United States*[13] the majority held, in effect, that it is the subjective determination of the trial judge that determines whether there is a manifest necessity for aborting the proceedings.[14] It was felt that a trial judge is in

in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." 22 U.S. 579, 580 (1824).

9. *Id. See also* Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1892).

10. Thompson v. United States, 155 U.S. 271 (1894) (reprosecution not barred where jury discharged because one juror had served on grand jury indicting defendant); Simmons v. United States, 142 U.S. 148 (1891) (reprosecution not barred where mistrial declared because letter published in newspaper rendered juror's impartiality doubtful).

11. Wade v. Hunter, 336 U.S. 684 (1949).

12. *See* note 6 *supra.*

13. 367 U.S. 364 (1961).

14. "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion." *Id.* at 368.

The defendant in *Gori* was brought to trial in federal district court on an information charging that he had knowingly received goods stolen in interstate commerce. The presiding judge declared a mistrial without the consent of the defendant when he apparently adduced that the prosecutor's line of questioning was likely to inform the jury of other crimes committed by the accused. The record indicated, however, that the prosecutor did nothing to instigate the declaration of a mistrial. The mistrial was clearly

the best position to determine whether to order a mistrial since "the cold record on appeal" cannot truly reflect "the heated atmosphere of trial." *Gori* also stands for the proposition that the discharge of the jury without the consent of the defendant, even if the discharge is unnecessary, still does not trigger double jeopardy where the judge's declaration "benefited" the defendant.[15] It is apparent that under these standards a trial judge had an almost unbridled discretion to declare a mistrial without the consent of the defendant, absent a clear showing of bad faith on the part of either the trial judge or the prosecution in attempting to secure a more favorable setting for obtaining a conviction of the defendant.[16] In a subsequent case, however, the Court made it clear that a lack of preparedness on the part of the prosecution, such as the inability to locate key prosecution witnesses, did not ordinarily justify declaring a mistrial without the consent of the defendant.[17]

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unnecessary, yet the court held that the retrial of the defendant did not violate the prohibition against double jeopardy because the trial judge acted according to his convictions in protecting the rights of the accused.

15. "Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. . . . We would not thus make them [federal trial courts] unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused. *Id.* at 369-70.

16. "Judicial wisdom counsels against anticipating . . . situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Id.* at 369.

17. In Downum v. United States, 372 U.S. 734 (1963), a mistrial had been declared without the consent of the defendant when the prosecution could not make out a case due to its inability to locate key witnesses. The United States Supreme Court, in reversing the Fifth Circuit, held that while the absence of witnesses may justify the declaration of a mistrial under certain circumstances, such is not the case where the mistrial order is intended to afford the prosecution another opportunity to present its case properly. *See also* Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

The line of reasoning in *Downum* seemed to indicate a departure from the wide discretion allowed in *Gori*, but *Downum* may be viewed as an example of a trial judge unfairly aiding the prosecution in securing a more favorable opportunity to convict the accused.

It was apparent in United States v. Tateo, 377 U.S. 463 (1964), decided in the following year, that *Gori* was still in full effect. While *Tateo* did not specifically deal with a mistrial declared without the consent of the defendant, it is indicative of the mood of the Court in this area. The defendant's guilty plea in the first trial was coerced by the trial judge, yet the Court held that the defendant could be retried without violating the guarantee against double joepardy. The Court relied on *Gori*, stating that the defendant had not suffered any prejudice in the original proceedings.

In *United States v. Jorn* the Supreme Court announced a new policy involving greater scrutiny of a trial judge's declaration of a mistrial without the consent of the defendant. The Court rejected the reasoning in *Gori*, stating that:

> "[a]n appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has been unnecessarily declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action."[18]

No reason was found to doubt that the trial judge was acting in good faith to insure that the trial was being conducted properly, yet the fact remained that the accused was unnecessarily put in jeopardy twice, regardless of the actual intentions of the trial judge. The record indicated that there was substantial reason to believe that the witnesses had been adequately warned of their constitutional rights[19] and that, in any event, a continuance would have sufficed to remedy any deficiencies in the warnings. These factors led the Court to conclude that the trial judge had made no effort to assure that there was a manifest necessity for the declaration of the mistrial. In these circumstances, reprosecution of the defendant would have violated the double jeopardy provision of the fifth amendment.[20]

The effect of the decision in *Jorn* is to limit substantially the discretion a trial judge has to declare a mistrial without the consent of the defendant. While the traditional circumstances in which a mistrial may be declared without the consent of the defendant (such as inability of the jury to agree, jury bias, or physical necessity) appear to be unaffected by the *Jorn* ruling, it is clear that a mistrial declared without the defendant's consent in any other situation is likely to trigger double jeopardy,

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18. United States v. Jorn, 91 S. St. 547, 556 (1971).

19. The first taxpayer called by the government stated that he had been warned of his rights, and the prosecuting attorney indicated that each of the five witnesses had been advised of his rights upon initial contact. The trial judge expressed the opinion that they had probably not been warned at all, and that if they had been, the warnings were probably inadequate. In response to questioning by the trial judge, the prosecuting attorney attempted to state that he had no intention of presenting the government's case in a manner calculated to implicate the taxpayers, but he was cut short by the trial judge who abruptly declared a mistrial.

20. United States v. Jorn, 91 S. Ct. 547, 558 (1971).

especially where the declaration is not made for the benefit of the accused.[21] Therefore, a mistrial declared in order to aid the prosecution in presenting its case[22] or to protect witnesses, as in *Jorn*,[23] is not ordinarily permissible. The guarantee against double jeopardy not only prevents a defendant from being subjected unnecessarily to the ordeal of repeated prosecutions, but also safeguards his option to go to the first jury from whom he might receive a favorable judgment.[24] A mistrial declared without the defendant's consent for the benefit of any party other

21. This is not to say that a mistrial declared for the benefit of the defendant will automatically permit retrial for the offense. *See* note 18 *supra* and accompanying text. It does mean, however, that mistrial declared without the defendant's consent for the benefit of another party to the proceeding carries a strong presumption that retrial will be precluded. Such a mistrial is not likely to be considered of such necessity as to warrant the foreclosure of the defendant's option to go to the first jury.

22. "The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." United States v. Jorn, 91 S. Ct. 547, 557-58 (1971). *See also* Downum v. United States, 372 U.S. 734 (1963); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

23. "[I]t seems reasonably clear from the trial record here that the judge's insistence on stopping the trial until the witnesses were properly warned was motivated by the desire to protect the witnesses rather than the defendant." 91 S. Ct. 547, 556 (1971).

It is not entirely clear, however, whether the Court based its decision on the fact that the order was for the benefit of witnesses rather than in favor of the defendant, or whether it was because the mistrial declaration was obviously not necessary to protect the rights of the witnesses. The better view would seem to be that the Court took both of these factors into consideration in arriving at its decision. The Court was obviously disturbed with the trial judge's conduct in declaring a mistrial when it was so clearly unnecessary to achieve its avowed end. But there is also language in the majority opinion to indicate that the Court felt a mistrial declared for the purpose of protecting witnesses in itself raised double jeopardy questions. A recurrent theme throughout the *Jorn* ruling is the necessity of not foreclosing the defendant's option to go to the first jury which he may believe will render a favorable verdict. This indicates that the Court is establishing more than simply a recognition that the guarantee against double jeopardy serves to protect the accused from the harassment of repeated prosecutions.

24. "[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. . . ." *Id.* at 558.

"[E]ven in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." *Id.* at 557.

"[T]he crucial difference between reprosecution after appeal by the defendant [from a conviction] and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury. . . . On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'" *Id.*

than the defendant obviously conflicts with this right of the accused to have his case tried before the jury first impaneled.

In cases where the mistrial has been ordered for the benefit of the defendant, there is a greater likelihood that retrial will not be prohibited. But, as the Court in *Jorn* pointed out in rejecting the reasoning of *Gori*, the question of which party benefited from the mistrial order is not alone sufficient to determine whether retrial is to be precluded.[25] The trial judge's exercise of discretion in discharging the jury must still be examined in light of the manifest necessity criteria of *United States v. Perez*, as construed and applied in *Jorn*. Under the *Jorn* interpretation, any mistrial declared without the defendant's consent, in situations other than those traditionally held to permit retrial, must be considered suspect. The end result is to move towards the position that the double jeopardy provision of the fifth amendment is an absolute command that a defendant be allowed to have his trial completed by a particular tribunal, and that this command can be avoided only in the most limited and compelling circumstances.

The double jeopardy provision of the fifth amendment was made applicable to state criminal proceedings in *Benton v. Maryland*,[26] wherein the United States Supreme Court held that the double jeopardy prohibition represents a fundamental ideal in our constitutional heritage and must apply to the states through the fourteenth amendment.[27] The Louisiana Code of Criminal Procedure provides rules governing those situations in which a trial judge's declaration of a mistrial will either permit or preclude retrial. Article 591[28] defines double jeopardy and states that double jeopardy will preclude retrial where a mistrial is declared without the consent of the defendant, and where such declaration does not fall within one of the enumerations of article

25. *See* note 18 *supra* and accompanying text.

26. 395 U.S. 784 (1969).

27. The guarantee against twice being put in jeopardy is also incorporated in LA. CONST. art. I, § 9: "[N]or shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained."

28. LA. CODE CRIM. P. art. 591: "No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the express consent of the defendant."

775. Article 775[29] specifies those situations in which a mistrial may be declared without breaching the guarantee against double jeopardy. These situations are essentially the same as those which the United States Supreme Court has traditionally held to justify the declaration of a mistrial without the defendant's consent. In light of the restricted interpretation of "manifest necessity" applied in *Jorn*, article 775 should cover virtually every situation in which a mistrial can validly be declared.[30] It should be noted, however, that article 775 must necessarily be read in light of the "manifest necessity" requirement of *Jorn*, the latter obviously controlling should there be a conflict between the two.

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APPLICABILITY OF ARTICLE 1592 TO THE STATUTORY WILL

A statutory will, which named the plaintiff the universal legatee, was declared formally invalid on the ground that the plaintiff had acted as one of the two attesting witnesses, contrary

29. *Id.* art. 775: "A mistrial may be ordered, and in a jury case the jury dismissed, when:

"(1) The defendant consents thereto;

"(2) The jury is unable to agree upon a verdict;

"(3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

"(4) The court finds that the defendant does not have the mental capacity to proceed;

"(5) It is physically impossible to proceed with the trial in conformity with law; or

"(6) False statements of a juror on voir dire prevent a fair trial.

"Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudical conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.

"A mistrial shall be ordered, and in a jury case the jury dismissed, when the state and the defendant jointly move for a mistrial."

30. The categories of article 775 provide certainty in the existing guidelines as to ordering a mistrial, but the inflexible nature of this article may pose problems. One such problem is that it is impossible to define all of the circumstances in which it may become necessary to declare a mistrial without the consent of the defendant. Thus there may arise situations in which it would be advisable to declare a mistrial without the defendant's consent, yet which may not fit into any of the circumstances listed in Article 775. In such an event a mistrial would be invalid under article 775, and article 591 would preclude retrial for the offense.

One such situation which article 775 would not cover is when a mistrial must be declared without the defendant's consent due to prejudicial conduct within or without the courtroom. It is well settled that bias and prejudicial conduct may justify a mistrial in certain circumstances, yet article 775 states that such a mistrial may be declared only upon motion of the defendant.