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DOUBLE JEOPARDY: MISTRIAL DECLARED WITHOUT THE CONSENT OF DEFENDANT AS A BAR TO REPROSECUTION

Baker v. State[1]

As co-defendants Baker and Whitfield were being tried for

1. 15 Md. App. 73, 289 A.2d 348 (1972), *cert. denied* (Md. June 29, 1972) (Nos. 134, 135).

conspiracy to murder, the trial court noticed that a juror could have overheard and been prejudiced by arguments on a motion for acquittal made after the state had presented its case. Although no formal motions were made, counsel for Baker made clear his desire that a mistrial be declared, while counsel for Whitfield made it equally clear that he opposed a mistrial.[2] The trial court considered the possibility of questioning the juror to determine what prejudice had actually occurred, but concluded that this could not be done in light of Baker's objection. The court then declared a mistrial and discharged the jury.

Shortly before the date set for retrial the defendants moved to dismiss the indictments, claiming that reprosecution was barred by the double jeopardy clause of the fifth amendment.[3] After a hearing, the court issued a written opinion and order denying the motion. Stating its reasons for declaring the mistrial, the court said that "[i]f it erred in its judgment, it was occasioned only by its desire to see that the defendants got as fair a trial as possible."[4] Baker and Whitfield appealed from the order, and the Court of Special Appeals affirmed, with one judge dissenting. All three judges agreed that since Baker had insisted upon a mistrial, he had waived any fifth amendment protection from reprosecution to which he might otherwise have been entitled.[5] Whitfield's situation, however, raised a more difficult problem since he had strongly objected to a mistrial.

2. The trial court itself first raised the mistrial issue, stating, "[I]f there's anybody that feels prejudiced at this time please say so. I don't want to go further with the trial if you feel so." *Id.* at 91, 289 A.2d at 358.

3. U.S. CONST. amend. V provides in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." *See generally* J. SIGLER, DOUBLE JEOPARDY (1969).

4. *Id.* at 93, 289 A.2d at 360. The mistrial was declared on June 22, 1971, and the motion to dismiss was argued on September 27, 1971, over three months later. The written opinion on the motion to dismiss was an attempt to justify the mistrial on the grounds that any other course of action would have been prejudicial to the defendants. This position, however, seems inconsistent with the court's stance at trial, where it appeared to be willing to resolve the issue by speaking with the juror in question. After noticing the juror it asked, "Would it be sufficient to ask the juror, after lunch, whether he heard anything or do you want to rest on the assumption that he did? That's entirely up to you." *Id.* at 91, 289 A.2d at 359.

5. Judge Orth relied on dictum in United States v. Tateo, 377 U.S. 463 (1964), to support his conclusion that a request for a mistrial prevents the accused from later asserting the claim of double jeopardy. Tateo had succeeded in having his conviction overturned in collateral proceedings because his guilty plea at the trial was coerced by the trial court, and the Supreme Court held that retrial was not barred under the circumstances. In an attempt to distinguish Downum v. United States, 372 U.S. 734 (1963), in which it was held that reprosecution was barred by a mistrial declared because of the absence of a prosecution witness, the Court said that "If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the

The majority explained that after *Benton v. Maryland*[6] made the fifth amendment double jeopardy clause applicable to the states, Supreme Court interpretations of the clause became the supreme law of Maryland; it lamented, however, that the divisiveness of the Court on the double jeopardy—mistrial issue made the task of determining the proper interpretation somewhat more difficult.[7] The court then discussed the major Supreme Court cases in the area, and concluded that the trial judge had not committed an abuse of discretion which would bar retrial. This note will discuss that holding in the light of the Supreme Court precedent on double jeopardy in the context of a mistrial.[8]

I

The leading case in the double jeopardy-mistrial area is *United States v. Perez*,[9] in which it was held that reprosecution was not barred after the discharge of a jury due to their inability to agree on a verdict.[10] In explaining the Court's decision, Justice Story said:

> "We think 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 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

Government would not have been barred from retrying him." 377 U.S. at 467. This emphasis on the accused's reaction to a potentially prejudicial situation tends to cloud the true issue: whether the trial judge has *unnecessarily* deprived the defendant of his ". . . [V]alued right to have his trial completed by a particular tribunal . . . ." Wade v. Hunter, 336 U.S. 684, 689 (1949); *see* United States v. Walden, 448 F.2d 925, 929-31 (4th Cir 1971), which held that the double jeopardy clause barred reprosecution after a mistrial declared with the consent of the accused when it appeared that the trial court would have declared the mistrial in any event; *but see* United States v. Henderson, 439 F.2d 531 (D.C. Cir. 1970), wherein the Court rejected the appellant's argument that he moved for a mistrial only after the trial court thrust that course of action upon him.

6. 395 U.S. 784, 787 (1969). *Benton* overruled, in the context of the double jeopardy clause, Palko v. Connecticut, 302 U.S. 319 (1937), under which the fourteenth amendment due process standard was the only federal restraint on state double jeopardy law.

7. 15 Md. App. at 78, 289 A.2d at 351.

8. Double jeopardy problems are also raised by several distinct situations not related to the mistrial problem. *See generally* 69 MICH. L. REV. 762 (1971) (collateral estoppel in criminal prosecutions); 56 MINN. L. REV. 646 (1972) (multiple offenses arising from the same act); 38 TENN. L. REV. 562 (1971) (harsher sentence after retrial); 11 WM. & MARY L. REV. 946 (1970) (overlapping federal and state jurisdiction).

9. 22 U.S. (9 Wheat.) 579 (1824).

10. *Id.* at 580.

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*."[11]

Subsequent cases decided by the Supreme Court have consistently applied the *Perez* "manifest necessity" standard in determining whether the declaration of a mistrial was a bar to further prosecution of the accused. Reprosecutions have been allowed in cases involving mistrials brought on by interruptions or breakdowns which, even if foreseeable, were unavoidable.[12] Thus

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11. 22 U.S. (9 Wheat.) at 580. The *Perez* manifest necessity standard has been almost universally accepted. The American Law Institute adopted the standard using language which was somewhat more specific. A 1935 draft on the subject of double jeopardy the provision on mistrials reads as follows:

> Discharge of jury—effect of. If during the trial of a person for an offense the jury is discharged before verdict rendered because it is impossible to proceed with the trial, or to proceed without manifest injustice to the defendant or to the state, or the defendant consents to or otherwise waives such discharge, the defendant may be again prosecuted for the same offense. If the jury is discharged, before verdict rendered, for any other cause than those above specified, without the consent of, or waiver by the defendant, such discharge is a bar to a subsequent prosecution of the defendant for any offense of which he might have been convicted on the former trial.

A.L.I. ADMINISTRATION OF THE CRIMINAL LAW: DOUBLE JEOPARDY sec. 7 (1935). The 1962 proposed draft attempted even greater specificity than the 1935 draft. It states that reprosecution is barred when:

> (4) The former prosecution was improperly terminated. Except as provided in this Subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:
>
> (a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.
>
> (b) The trial court finds that the termination is necessary because:
>
> (1) It is physically impossible to proceed with the trial in conformity with law; or
>
> (2) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or
>
> (3) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State; or
>
> (4) the jury is unable to agree upon a verdict; or
>
> (5) false statements of a juror on voire dire prevent a fair trial.

MODEL PENAL CODE sec. 1.08 (4) (P.O.D. 1962). The comments which accompanied this section in its tentative draft stage show that the new guidelines were nothing more than a restatement of the *Perez* standard. After referring to reasons justifying termination, the commentators said: "Many courts have subsumed all of these reasons under the single test of 'manifest necessity'. The proposed draft is somewhat more specific. . . ." MODEL PENAL CODE sec. 1.09, Comment (Tent. Draft No. 5, 1956) (Section 1.09 was renumbered 1.08 in the 1962 Proposed Official Draft).

For a contrasting view see 20 N.Y.U. INTRA. L. REV. 189, 220-201 (1965), in which the author urges abandonment of the manifest necessity standard on the grounds that it is unworkable. The author's assertion appears to be unique.

12. *See* United States v. Jorn, 400 U.S. 480, 481-82 (1971).

prosecution has been allowed after mistrials declared because of the partiality of a juror,[13] because a juror had been a member of an indicting grand jury,[14] and because of the tactical position of an army in the field.[15] The wisdom of allowing retrials under these circumstances cannot be questioned. If mistrials induced by uncontrollable eventualities categorically operated to prevent reprosecution of a defendant, the loss of respect for the courts and the injustice to society which would result from such a haphazard policy would far outweigh its benefit.[16] The court in *Baker*, however, allowed reprosecution in a case in which the defendant opposed a mistrial which in all likelihood could have been avoided by a minimum of curative action on the part of the trial court.[17] The court's reasoning in so doing was based not on a strict application of the *Perez* standard but on variations on that standard which the court found in other Supreme Court cases.

II

In *United States v. Jorn*,[18] the trial court had declared a mistrial to warn the state's witnesses of their fifth amendment

13. Simmons v. United States, 142 U.S. 148 (1891).

14. Thompson v. United States, 155 U.S. 271 (1894).

15. In Wade v. Hunter, 336 U.S. 684 (1949), the Court held that reprosecution was not barred when a court martial being held in a combat zone had to be discontinued because of a tactical maneuver.

16. In United States v. Jorn, 400 U.S. 470 (1971), the Court said, ". . . [A] criminal trial is, even in the best of circumstances, a complicated affair to manage . . . ." and 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 governmental harassment which such a mechanical rule would provide." 400 U.S. at 479-80.

17. Judge Moylan, dissenting in the Court of Special Appeals, set forth the alternatives available to the trial court:

> The trial court was admittedly faced with an awkward situation when two codefendants pulled in separate directions. It did not, however, in my judgment, persevere sufficiently in exploring whether the juror in question had heard any argument at all or, even in that eventuality, had heard such argument as would be likely to prejudice him against the defendants. It did not explore with the defense counsel the possibility of seating an alternate juror. The trial court indicated that it foreswore this possibility out of solicitude for the two black defendants, since the replacement would have worked to remove the only black juror on the panel. I believe that the appellant Whitfield should have been permitted the option of weighing whatever advantage he thought that black juror might have been to him versus the disadvantage of having his trial aborted and having to go through the entire procedure again. Nor do I feel that the trial court gave sufficient consideration to the possibility of severing the two defendants and proceeding with the trial as to Whitfield, notwithstanding the mistrial as to Baker.

15 Md. App. at 112, 289 A.2d at 369; *cf.* Oelke v. United States, 389 F.2d 668 (9th Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

18. 400 U.S. 470 (1971), noted in 32 LA. L. REV. 145 (1971).

rights when it was abundantly clear to all but the apparently confused trial court that the witnesses had already been so warned and had knowingly elected to testify. The Supreme Court held that reprosecution was barred since the trial court had needlessly declared the mistrial, thereby failing to conform its actions to the *Perez* "manifest necessity" standard.[19] Justice Stewart dissented, however, believing that reprosecution should be allowed so long as a trial court's acts do not "harm" or "prejudice" the accused.[20]

The court in *Baker* decided that this dissenting opinion provided the appropriate standard for determining whether the double jeopardy clause bars reprosecution after the declaration of a mistrial. Since there was no majority opinion in *Jorn*, but only a plurality of four, the Court of Special Appeals stated that it was free to apply the reasoning of the dissenting opinion to the *Baker*

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19. 400 U.S. at 487. Speaking for a plurality of four, Justice Harlan adhered to a strict interpretation of the *Perez* manifest necessity standard. Although he recognized that *Gori* could be taken to suggest a variation on the standard based on the trial court's intent to "benefit" the accused, he made clear his conviction that the policy of the double jeopardy clause would not be served by rules based on an after the fact determination of "benefit". 400 U.S. at 483. *But see* United States v. Pappas, 445 F.2d 1194, 1200 (3d Cir. 1971). He emphasized that the policy underlying the double jeopardy provision is 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 embarassment, 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.

400 U.S. at 489, quoting Green v. United States, 355 U.S. 184, 187-88 (1957).

Equally as strong as the Court's insistence that unnecessary proscution is the "jeopardy" against which the fifth amendment guards, was its conviction that the accused has a ". . . significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be though to warrant the declaration of a mistrial." 400 U.S. at 485. Encompassing these considerations, the *Perez* doctrine: ". . . stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Id.* at 485. Since the Court was convinced that the trial court had precipitously aborted the defendant's trial, it concluded that reprosecution was barred. Justice Harlan was joined by Chief Justice Burger, and Justices Douglas and Marshall. Justices Black and Brennan believed that the Court lacked jurisdiction to review the case and therefore concurred in the judgment but not the opinion. Justice Stewart dissented in an opinion joined by Justices White and Blackmun.

20. Justice Stewart asserted that "The real question is whether there has been an 'abuse' of the trial process *resulting in prejudice to the accused* . . . ." 400 U.S. at 492 (emphasis added). Later, in applying this standard he argued that "[e]xcept for the inconvenience of delay always caused by a mistrial, the judge's ruling could not possibly have *injured* the defendant. . . . There is, of course, no showing of an intent on the part of the prosecutor or the judge to harass the defendant or to *enhance the chances of conviction in a second trial.*" 400 U.S. at 493 (emphasis added).

case.[21] This standard focuses not on whether the trial court has blundered according to standards of good trial practice, but rather on whether the trial court intended to benefit the accused by its actions, and on whether the accused was "prejudiced" thereby.[22] Since the majority in *Baker* was convinced that the trial court had acted in the "interest" of the accused and that the accused would not be strategically disadvantaged by the mistrial, it held that reprosecution was not barred.[23]

The seed of Justice Stewart's dissenting opinion in *Jorn*, and in turn of the majority opinion in *Baker*, is found in *Gori v. United States*.[24] At first glance it appears that the Court in *Gori* had swerved from its past insistence on a strict interpretation of the "manifest necessity" standard. Indeed, Judge Moylan, dissenting in *Baker*, characterized *Gori* as an "aberration on the theme of *Perez*."[25] Instead of allowing retrial only when a mistrial had been declared because of manifest necessity the majority of five in *Gori* appeared to suggest that there could be a retrial when there was manifest necessity *or* when the trial court *thought* there

21. 15 Md. App. at 82-83, 289 A.2d at 353-54; *see* Bartholimay v. State, 267 Md. 175, 197-200, 297 A.2d 696, 708-09 (Md. 1972) (dissenting opinion) wherein Judge Barnes argues that it is the duty of state judges to follow state law unless the Supreme Court of the United States produces a majority holding.

22. *See* note 26 *supra*. Justice Stewart's "prejudice" test would close the reviewing court's eyes to the primary purpose of the double jeopardy clause preventing the burden of a needless second trial. This overriding factor is discounted to zero value. Conceivably, an application of this test would allow any number of reprosecutions after needless mistrials. It seems that the only question which Justice Stewart would ask is whether the accused had a better chance of winning acquittal in his first trial than he would in his second. The glaring error of this reasoning is that it ignores the fact that the accused has already decided to take his chances with the jury sitting in the first trial. He has decided that a second trial would be more likely to end in his conviction than the first. Justice Stewart, on the other hand, would substitute the after-the-fact decision of the appellate court which could not possibly make anything more than a haphazard guess concerning the comparative strategic position of the accused.

Judge Moylan in his dissent in *Baker*, vigorously attacked Justice Stewart's position, stating:

> "I find the opinion of Justice Stewart permits its focus to wander from the fixed star of the fundamental purpose to be served. Its reasoning is circular. It begins with lip service to the fundamental protection against prejudice, discusses the exceptions to that protection, and ends by defining 'abuse' in terms of 'prejudice'. In the course of tracing the circle, however, 'prejudice' shifts its meaning. 'Prejudice,' in the first instance, contemplated the very act of standing trial or being placed in jeopardy; 'prejudice,' in the second instance, contemplates being placed at a disadvantage or in a position of greater peril upon the retrial."

15 Md. App. at 110, 289 A.2d at 368.

23. 15 Md. App. at 101-102, 289 A.2d at 361.

24. 367 U.S. 364 (1961).

25. 15 Md. App. 102, 289 A.2d 366 (dissenting opinion).

was manifest necessity. However, this common interpretation of *Gori*[26] breaks down under analysis.

Gori's first trial was abruptly ended by the court after a difficult proceeding marked by antagonism between the prosecution and the trial judge.[27] The Court of Appeals for the Second Circuit said that the reason for the mistrial was not clear, but concluded that the trial court had not abused its discretion.[28] The Supreme Court was also forced to speculate as to the reason for the mistrial, but in the absence of an adequate record of the trial court proceedings, the Court deferred to the judgment of the Court of Appeals that there had been no abuse of discretion.[29] Because of this amorphous factual posture, any interpretation of *Gori* involves a great deal more speculation than would be acceptable for valid analysis. Moreover, the strongest language in support of the *Baker* decision is, at best, merely suggestive dicta: "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 reprosecution."[30] The logical structure of this statement is open-ended, allowing a number of interpretations. The only valid assertion which can be drawn from it, however, is that the Court would not in *all* circumstances preclude retrial when a mistrial has been granted in the interest of the accused. One could hardly disagree with the propriety of this statement. There are, of course, many situations in which mistrials can be granted in the interest of the accused without *necessarily* barring reprosecution.[31] *Gori*, therefore, cannot be considered as setting forth any strong legal rule or proposition. Rather it must be recognized that there emanates from *Gori* no more than a suggestion that reviewing courts should not be overly strict with trial courts which have acted in the interest of the accused, under circumstances requiring hairline decisions.[32] Thus viewed, *Gori* is not the aberration on the *Perez* manifest

26. *See, e.g.*, United States v. Pappas, 445 F.2d 1194, 1200 (3d Cir. 1971), in which the court cited *Gori* to support the proposition that reprosecution is not barred after a mistrial declared out of solicitude for the "interest" of the accused.

27. United States v. Gori, 282 F.2d 43, 45 (2d Cir. 1960).

28. *Id.* at 48.

29. 367 U.S. at 367 n. 8.

30. *Id.* at 369 (emphasis added). The reasoning of Justice Stewart's dissenting opinion in *Jorn* can be traced to this intimation.

31. *See* notes 17-20 *supra* and accompanying text.

32. "We would not thus make them [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." 367 U.S. at 369-70. *See* 5 CRIM. L. BULL. 375, 382.

necessity doctrine which Judge Moylan suggested it might be;[33] nor is it valid support for Justice Stewart's *Jorn* opinion which later became the foundation of the court's opinion in *Baker*.[34]

The confusion in *Gori* was clarified in part by *Downum v. United States*,[35] which held that reprosecution was barred by the declaration of a mistrial because of the unavailability of prosecution witnesses, even though no evidence had been heard by the jury and retrial took place only two days later. The defendant had been charged with eight counts of uttering checks stolen from the mail. Although the unavailable witness was to testify on only two of the eight counts, the trial court discharged the jury. The harassment of the accused involved no more than his appearing in court on the day assigned, witnessing the discharge of the jury, and waiting two days for a new trial to begin. He was not victimized by the trial court; nor was he strategically disadvantaged.

The Court's holding that the double jeopardy clause barred reprosecution under these circumstances did not end all of the speculation engendered by *Gori*, but it did define the type of protection provided by the double jeopardy clause. More specifically, the lesson of *Downum* runs contra to the intimation by Justice Stewart's dissent in *Jorn* that the double jeopardy clause is merely a shield against "prejudice" which may attach to a second trial because of a mistrial in the first.[36] Rather, *Downum* instructed that the very act of needlessly standing trial a second time was the harassment from which the accused was protected by the double jeopardy clause, making it clear that "[T]he prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' "[37] But in spite of *Downum's* lesson on the meaning of harassment, the majority in *Baker* viewed *Gori* not as an ambiguous suggestion, but rather as setting forth a well-founded rule which would deny the plea of double jeopardy to a defendant faced with reprosecution after the most unnecessary of mistrials declared by the most careless of trial courts—so long as the trial court was well-intentioned and the defendant would not be strategically disadvantagd by the trial, no matter how financially and psychologi-

33. 289 A.2d at 366.

34. "We are satisfied that 'abuse of judicial discretion' is to be assessed by the manifest necessity standard of *Perez* as explicated by *Gori*. We are persuaded that the proper interpretation of *Gori* is that of the Stewart opinion in *Jorn*." *Id.* at 358.

35. 372 U.S. 734 (1963), noted in 77 HARV. L. REV. 1272 (1964); *see also* 82 HARV. L. REV. (1969) analyzing Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967), which relied heavily upon *Downum*.

36. *See* note 28 *supra*.

37. 373 U.S. at 736, quoting United States v. Ball, 163 U.S. 662, 669 (1896).

cally burdensome that new trial might be.

The majority in *Baker*, by taking pains to demonstrate that *Jorn* was not binding on the state of Maryland, impliedly conceded that the reasoning of the plurality in *Jorn* would have required a different result than the one reached. Judge Moylan in his dissenting opinion agreed, but unlike the majority he vigorously argued for that different result, registering his disapproval of Justice Stewart's *Jorn* opinion and his praise of the plurality opinion of Justice Harlan. It is submitted that Judge Moylan's praise is well placed and that society would best be served by a strict adherence to the *Perez* manifest necessity doctrine, as interpreted by Justice Harlan in *Jorn*. A recognition of the heavy economic burden involved in conducting an effective defense should alone be sufficient incentive for judicial diligence in seeing that the valuable labors of defense counsel are not rendered worthless by judicial indiscretion. By requiring that trials not be aborted in the absence of imperious necessity, the courts would protect the accused and society from the unwanted and unnecessary anxiety and expense of repeated prosecutions.

Moreover, the theory proposed by Justice Stewart in *Jorn* and followed by the majority in *Baker* would prove unworkable. A rule based on who benefited by an unnecessary mistrial would be no more than a springboard for speculation. Present day trials are far advanced in comparison with the trials of long ago, which were settled with sword and lance. But even though the weapons have been replaced with words, today's trial lawyers are not so much unlike their ancient counterparts, skilled in the use of tactics and ever aware of the flow of battle. Appellate courts, viewing a cold record, do not have the benefit of this "sixth sense" of the trial lawyer and are therefore unable to properly analyze a trial in terms of who was winning or losing at a particular point.

III

Since *Baker* the Supreme Court has handed down a new decision in the double-jeopardy mistrial area. In *Illinois v. Somerville*,[38] the defendant was brought to trial on a defective indictment.[39] After the jury had been impaneled and sworn, the point at which jeopardy "attaches"[40] in jury trials, the trial court,

38. 410 U.S. 458 (1973).

39. *Id.* at 459-60.

40. Although it was not a problem in *Baker*, misuse of the phrase "jeopardy attaches" has been a source of much confusion and deserves some attention.

Complexities abound in the law of double jeopardy, and the problems have been

over the defendant's objection, granted the prosecution's motion for a mistrial on the ground that further proceedings under the defective indictment would be useless.[41] Somerville was retried and convicted after the trial court rejected his plea of double-jeopardy. After the state appellate courts affirmed the conviction, the United States Court of Appeals for the Seventh Circuit granted habeas corpus relief.[42] The Supreme Court reversed the court of appeals and held that there existed "manifest necessity" for the trial court's declaration of a mistrial.[43]

Justice Rehnquist, writing for a majority of five, centered his opinion on *United States v. Perez*, thereby reaffirming the viability of the "manifest necessity" standard. The Court refused, however, to set down a strict formula which could be used to define the standard's elusive contours. Rather, the Court cited past cases with the unmistakable aim of emphasizing the standard's flexibility, prefacing its discussion with the assertion that the

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compounded by a willingness of the courts to merely repeat black-letter law handed down by their predecessors rather than making a much needed attempt at explanation. As Professor Charles Wright observed: "Labels are not bad things in the law if they are understood for what they are, a shorthand way of expressing the result of a more complicated reasoning process. Labels become treacherous and misleading if they are applied as substitute for reasoning." C. WRIGHT, LAW OF FEDERAL COURTS 297 (2d ed. 1970).

The phrase "jeopardy attaches" is one of those black-letter labels which may once have been useful but which now fosters more confusion than clarity. Faced with having to allow retrial after saying that jeopardy had "attached", courts have produced verbiage to the effect that: Jeopardy hadn't "really" attached, but only "apparently" attached; People v. Hunckelor, 48 Cal. 331, 334 (1874); *see* J. SIGLER, DOUBLE JEOPARDY 89 (1969); or they have conveniently avoided vigorous analysis by saying that jeopardy "depends" on a presumption of "complete proceedings". State v. Emery, 59 Vt. 84, 88, 7 A. 129, 133 (1886). Likewise in Hernandez v. Nelson, 298 F. Supp. 682 (N.D. Cal. 1968), the issue presented to the court was whether reprosecution was barred by the double jeopardy clause after any of three mistrials. The court erroneously framed the issue in terms of whether "jeopardy attached." 298 F. Supp. at 687. Jeopardy had, of course, "attached" when the jury was empanelled in each trial. This, however, still left open the entirely different question of whether reprosecution was barred.

Much to Justice Harlan's credit is his effort in *Jorn* to end judicial cobweb-spinning around the question of when "jeopardy attaches". He explained that:

> The conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceeding. The question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without the defendant's consent.

400 U.S. at 480. Thus, it is a *policy* rather than a ban which "attaches". This simply means that once the jury is sworn, the double jeopardy clause dictates that certain actions of the parties *may*, if they result in mistrial, induce the raising of the bar against further prosecution of the accused. The phrase should under no circumstances be used to express the conclusion that this bar has been raised.

41. 410 U.S. at 460.
42. United States *ex rel.* Somerville v. Illinois, 447 F.2d 733 (7th Cir. 1971).
43. 410 U.S. at 471.

Perez standard ". . . abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial."[44] The Court characterized the action of the trial court as "a rational determination" which, in the Court's view, contrasted with the "erratic" action of the trial court in *Jorn*.[45] Moreover, the Court relegated the concept of lack of "prejudice," a cornerstone of the *Baker* decision, to a minor role in the determination of whether reprosecution is barred: "Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration."[46]

Although the majority in *Somerville* did not concern itself with a situation in which the trial court had capriciously declared a mistrial in an attempt to "benefit" the accused, one must conclude that the erratic behavior of the trial court in *Baker* would be found by the present Court to be the type of action against which the double jeopardy clause was designed to protect. The determinative factor in allowing reprosecution in *Somerville* was that the trial court had made a rational decision ". . . designed to implement the State's policy of preserving the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury."[47] The Court concluded that "if a mistrial were constitutonally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned."[48]

The mistrial declaration in *Baker* was neither "rational" nor designed to implement a state policy. The trial court's action was hasty and unwarranted, and it denied the accused of his interest in ". . . having his fate determined by the jury first impaneled . . . ,"[49] an interest which the court in *Somerville* characterized as "weighty."[50] Most striking, however, is the conspicuous absence of a worthwhile purpose to be served by such a mistrial declaration. Indeed, the mistrial rendered the entire proceeding

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44. *Id.* at 462.
45. *Id.* at 469.
46. *Id.* at 471.
47. *Id.* at 468.
48. *Id.* at 469.
49. *Id.* at 471.
50. *Id.*

a "waste of time, energy, and money for all concerned", in addition to putting the defendant through the unnecessary anxiety and expense of a new trial.[51]

CONCLUSION

The Maryland Court of Special Appeals stands alone in its adherence to the Stewart opinion in *Jorn*.[52] Its reasoning seemingly rests upon the questionable theory that *Jorn*, because of the configuration of opinions, provided no definitive Supreme Court statement of the constitutional requirements of the double jeopardy clause in this area; the Court's decision in *Somerville* should therefore have removed all doubt as to the unacceptability of the *Baker* standard by providing such a statement. However, the Court of Special Appeals has recently reaffirmed its position in *Baker*, stating that: "We see nothing in Illinois v. Somerville, *supra*, to cause us to change our view."[53] Clarification of the Maryland double jeopardy law relating to mistrials will come only through unequivocal rejection of the *Baker* standard.

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51. See text accompanying note 46 *supra*.

52. *See, e.g.*, Clemenson v. Municipal Court, 18 Cal. App. 3d 442, 499, 96 Cal. Rptr. 126, 129-30 (1971); People v. Gardner, 37 Mich. App. 520, 195 N.W.2d 62 (1972).

53. Jones v. State, 17 Md. App. 504, 516, 302 A.2d 639, 645 (1973).