

Case Comments

Readjudicating Partial Verdicts:

Wallace v. Havener

In *Wallace v. Havener*,¹ the Sixth Circuit Court of Appeals reviewed a state court's decision to declare a mistrial under unusual circumstances. The primary issue reviewed by the court was whether the trial judge's failure to accept a four-count partial verdict on a five-count indictment, coupled with the readjudication of every count of the indictment, subjected the defendant to double jeopardy. More particularly, the Sixth Circuit considered whether the potential effect of collateral estoppel during the subsequent retrial of the undecided issue would have justified the relitigation of the entire case.

This Case Comment presents an analysis of the *Wallace* case. First, a historical foundation is supplied from which to analyze the issues involved in *Wallace*. Second, the facts as well as the lower courts' disposition of the case are summarized. Finally, an analysis of the majority and dissenting opinions is presented. This review will indicate that because the controlling Supreme Court decisions are equivocal both the *Wallace* majority and dissent were able to rely on them as support for their positions. As a final matter, the writer of this Case Comment will argue that the majority opinion of the Sixth Circuit is more consistent with the dictates of the double jeopardy clause and our system of justice than is the dissenting opinion.

I. A HISTORICAL REFERENCE POINT

Engrained in American heritage and history² is the principle that "no person shall be . . . subject for the same offense to be twice put in jeopardy."³ This principle, expressed by the United States Constitution's double jeopardy clause, represents a policy of finality in the prosecution of an individual.⁴ It prohibits a prosecutor from using the government's wealth of resources in repeated attempts to gain a conviction.⁵ Its purpose is to free the defendant from the continuing state of anxiety, expense and embarrassment accompanying any criminal trial.⁶ The policy is also meant to guard against the possibility that the defendant, even though

1. 552 F.2d 721 (6th Cir. 1977).

2. See generally M. FRIEDLAND, *DOUBLE JEOPARDY* (1969); J. SIGLER, *DOUBLE JEOPARDY* (1969).

3. U.S. CONST. amend. V.

4. *United States v. Jorn*, 400 U.S. 470, 479-86 (1971).

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

6. *Id.*

innocent, may be found guilty.⁷ Another consideration recognized in recent Supreme Court decisions is the defendant's right to receive a particular tribunal's verdict, one which he may feel will favorably dispose of his case.⁸

As the law now stands, it is undisputed that jeopardy attaches once the jury is impanelled.⁹ To grant this constitutional protection at such an early stage of the adversary proceeding furthers the objectives of the fifth amendment but creates potential problems. A literal application of the double jeopardy clause would require release of the accused any time a trial was prematurely aborted—even for such an uncontrollable event as the death of a juror. But the law now recognizes that a trial strives not only to protect the defendant's rights but also to redress those acts society deems harmful to social order.

Under certain circumstances such as the untimely death of a juror, society's right to a fair and complete adjudication of the crime will prevail over the defendant's right to receive a particular tribunal's verdict. Should the trial judge correctly find that such circumstances exist, he possesses the power to declare a mistrial; the double jeopardy clause will not intervene to prohibit re prosecution of the accused. If the appellate court decides that under the particular circumstances of a mistrial and re prosecution the rights of the defendant outweigh the rights of society, the trial judge will be found to have abused his power. The consequence of an erroneous judgment by the trial judge is the release of the defendant for those unconstitutionally relitigated charges—even if the second prosecution resulted in conviction.

The test governing appellate review of a trial judge's decision to declare a mistrial was promulgated in *United States v. Perez*,¹⁰ decided by the United States Supreme Court in 1824. In *Perez*, the trial judge had declared a mistrial when the jury was unable to agree on a verdict. The defendant had been retried and convicted. On appeal, *Perez* argued that the retrial had deprived him of his fifth amendment rights by placing him in double jeopardy. In its review of the trial judge's decision, the Supreme Court articulated what has since been labeled the manifest necessity test:

7. *Id.* at 188.

8. *Lee v. United States*, 432 U.S. 23, 34 (1977) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (Brennan, J., concurring)); *Illinois v. Somerville*, 410 U.S. 458, 474 (1973) (White, J., dissenting); *United States v. Jorn*, 400 U.S. 470, 484 (1971) (Harlan, J., plurality opinion).

9. *Crist v. Bretz*, 98 S. Ct. 2156 (1978). "[T]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy." *Id.* at 2162. See also *Breed v. Jones*, 421 U.S. 519 (1975) (jeopardy attaches at a juvenile court adjudicative hearing when the trier of facts begins to hear evidence); *McCarthy v. Zerbst*, 85 F.2d 640 (10th Cir.), cert. denied, 299 U.S. 610 (1936) (in nonjury trial jeopardy attaches when the trier of facts begins to hear evidence). *But cf.* *Swisher v. Brady*, 98 S. Ct. 2699 (1978) (reversing three-judge district court ruling that jeopardy attaches at evidentiary hearing conducted by master empowered to recommend findings of fact to juvenile court judge).

10. 22 U.S. (9 Wheat.) 579 (1824).

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 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. . . .¹¹

The Court in *Perez* found that the jury's inability to reach a verdict satisfied the manifest necessity test. Thus, the trial judge's declaration of a mistrial and the retrial of *Perez* had not violated the double jeopardy clause. For more than a century after *Perez*, mistrial declarations were routinely affirmed under the manifest necessity test.¹² Typical circumstances held to justify a retrial of the accused included jury inability to agree on a verdict¹³ and any form of juror contamination likely to prejudice the trial.¹⁴

During the past thirty years, appellate courts have reviewed cases presenting atypical circumstances and the problems inherent in the *Perez* test have begun to surface. First, the Court did not indicate in *Perez* the outer boundaries of "manifest necessity" or "the defeat of the ends of public justice," the phrases that it had used to describe the circumstances that will justify a retrial. Second, ever since *Perez*, the Supreme Court has steadfastly refused to supply definitions for these terms or in any way to delimit the applicability of the manifest necessity test.¹⁵ Concededly, this reluctance may stem from the Court's recognition that a trial judge oversees a unique interplay of events during each trial and must wield considerable discretionary power in order to deal appropriately with particular situations as they may arise. The result, however, is that trial judges lack meaningful guidelines to assist them when they determine whether the circumstances justify the declaration of a mistrial. Thus, the ambit of the defendant's constitutional right not to be twice put in jeopardy is uncertain.

Recent decisions indicate the Court's willingness to find that manifest necessity exists when uncontrollable events have terminated the trial prematurely. A classic example is the exigency faced by the trial court in *Wade v. Hunter*.¹⁶ *Wade*, an American soldier stationed in Germany during World War II, had been charged with rape. The trial began;

11. *Id.* at 580.

12. See Note, *Mistrial and Double Jeopardy*, 49 N.Y.U.L. REV. 937, 941 (1974).

13. *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).

14. *Thompson v. United States*, 155 U.S. 271 (1894) (disqualification of juror who was member of grand jury that had indicated defendant); *Simmons v. United States*, 142 U.S. 148 (1891) (juror had lied during voir dire about his acquaintance with defendant).

15. See *Illinois v. Somerville*, 410 U.S. 458, 462 (1973); *United States v. Jorn*, 400 U.S. 470, 480 (1971); *Wade v. Hunter*, 336 U.S. 684, 690 (1949).

16. 336 U.S. 684 (1949).

because of the Division's tactical situation, however, the Commanding General was forced to have the case transferred to a different location for a new trial.

A mistrial is also justified by a "breakdown of the judicial machinery such as happens when the judge is stricken, or a juror has been disqualified to sit, or when it is impossible or impractical to hold a trial at the time and place set."¹⁷ For example, if juror contamination is discovered and no alternate jurors are available, the trial judge cannot allow the trial to continue because a fair and impartial verdict cannot be reached. While it would be unjust to the defendant to allow the trial to continue in the face of juror contamination, it would be equally unjust to society if the double jeopardy clause barred retrial of the accused. Society has a strong interest in the enforcement of the law; it would defeat the "ends of public justice" to deny society the opportunity to obtain full and fair adjudication of the crime.

It should be recognized that these two categories, uncontrollable events and breakdown of the judicial machinery, emerge only through this writer's analysis of previous case law. They should not be construed as definitions for "manifest necessity" and "the defeat of the ends of public justice." Although individual members of the Court have discussed these two categories as if they constituted the boundaries of the manifest necessity test,¹⁸ the Court refuses to be bound by a rigid formulation.¹⁹

The equivocal language that concludes the *Perez* test exacerbates the Court's failure to delimit the boundaries of "manifest necessity" and "the ends of public justice."²⁰ In *Perez*, the Court stated that trial judges "are to exercise a sound discretion [before declaring a mistrial]; and it is impossible to define all the circumstances which would render it proper to interfere."²¹ This statement appears to support the proposition that once a mistrial has been declared, the double jeopardy clause should not prohibit a retrial unless there is evidence that the trial judge abused his discretion. The Court continued, however, with language that might controvert that proposition: "To be sure, the power ought to be used with the greatest of caution, under urgent circumstances, and for very plain and obvious causes . . ."²² The last-quoted language would seem to suggest that a

17. *Gori v. United States*, 367 U.S. 364, 372-73 (1961) (Douglas, J., dissenting).

18. *See id.*

19. *See cases cited at note 15 supra.*

20. For further discussion of the ambiguities of the *Perez* test and the problems that this creates, see Comment, *Double Jeopardy—Trial Courts Granted Broad Discretion to Determine "Manifest Necessity" for Mistrial*, 26 RUTGERS L. REV. 682 (1973); see also Note, *supra* note 12. For an interpretation that provides three possible meanings for the *Perez* test, see Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, 69 Nw. L. REV. 887, 891-94 (1975).

21. 22 U.S. (9 Wheat.) 579, 580 (1824).

22. *Id.*

mistrial precludes retrial absent demonstration by the state of justifying circumstances.

The significance of this language should not be underemphasized. Under the first interpretation, it must be shown that the trial judge abused his power by declaring a mistrial. If neither "manifest necessity" nor "the ends of public justice" compelled the mistrial declaration, the trial judge abused his power. It should be recalled, however, that these two phrases are undefined. Furthermore, case law fails to provide a method for ascertaining the existence of such circumstances. Despite knowledge of the law and favorable facts, counsel cannot be certain that he can establish abuse of power by the trial judge. Because "it is impossible to define all of the circumstances, which would render it proper to interfere,"²³ however, this uncertainty tends to be resolved in favor of the trial judge's action.

On the other hand, the *Perez* opinion requires that such power "be used with the greatest caution . . . and for very plain and obvious causes. . . ." ²⁴ Such phraseology appears to require that the record disclose the reasons for the mistrial. Thus, any doubt regarding the necessity for the mistrial should be resolved in favor of the accused's right not to be placed in double jeopardy. In short, it seems that under the former interpretation, a presumption arises to uphold the trial judge's action on the basis of his discretionary power; the latter interpretation appears to raise a presumption in favor of the accused's fifth amendment rights. In fact, the interpretation may dictate the incarceration or release of the accused.

The uncertainties of the *Perez* test are partially resolved when one of the two interpretations is adopted. The policy orientation of the individual judge may determine his choice of interpretation. Judges who perceive themselves as protectors of individual rights and liberties will choose the interpretation of the *Perez* test that allows the broadest application of fifth amendment protection. These judges will emphasize the individual's right to receive a particular tribunal's verdict. "Necessity," strictly construed, will justify a retrial; anything less, for example, prosecutorial negligence,²⁵ should not justify subjecting the accused to another trial. Judges who regard themselves primarily as enforcers of the social order will give more consideration to complete adjudication of the crime. Under the latter view, society's interests should be subordinated to the accused's only when the defendant has suffered obvious and unjustified anxiety, expense and embarrassment in a second proceeding.²⁶

23. *Id.*

24. *Id.*

25. *Illinois v. Somerville*, 410 U.S. 458, 471-83 (1973) (White, J., dissenting); *Downum v. United States*, 372 U.S. 734, 737 (1963).

26. *See, e.g., Lee v. United States*, 432 U.S. 23, 32-33 (1977); *Breed v. Jones*, 421 U.S. 519, 530-31 (1975); *Illinois v. Somerville*, 410 U.S. 458, 469-70 (1973); *Downum v. United States*, 372 U.S. 734, 739-42 (1963) (Clark, J., dissenting).

II. THE BACKGROUND OF THE *Wallace* CASE

Robert Wallace was brought to trial for his alleged participation in a June 1972, robbery of a Cleveland grocery store. He had been charged under a five-count indictment: one count of armed robbery, three counts of shooting with intent to kill, and a count of illegal possession of a firearm. At trial, the jury returned with verdicts on the last four counts but stated an inability to reach a verdict on the armed robbery count. The trial judge subsequently declared a mistrial. He refused defense counsel's request to have the jury sign the four verdicts that had been agreed upon; he also refused to allow the determination of these verdicts to be revealed. Robert Wallace was then retried and convicted on all five counts of the indictment.

On appeal, the Eighth District Court of Appeals for the State of Ohio rejected Wallace's claim that he had been placed in double jeopardy by the retrial of counts two through five.²⁷ In support of its decision, the appellate court cited *Jackson v. State*,²⁸ in which the Ohio Supreme Court had held that while a judge may receive a partial verdict, he is not bound to do so.²⁹

When he had exhausted his state court remedies, Wallace petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. The district court found merit in Wallace's double jeopardy claim and granted the writ. According to the district court, the trial judge could have accepted the partial verdict under the authority of *Selvester v. United States*,³⁰ a case in which the Supreme Court upheld a lower court's acceptance of a partial verdict and the retrial of the accused on the undecided matters. The district court also stated that as long as the jury had expressly stated its inability to reach a verdict on the armed robbery count, Wallace could constitutionally have been retried for that offense. The district court, unable to discern any other circumstances that necessitated the declaration of a mistrial on the entire indictment, found that the trial judge had abused his discretion. The court ordered that the conviction obtained in the second trial on counts two through five be vacated. Despite a vigorous dissent by Judge Miller, the Sixth Circuit Court of Appeals affirmed the decision of the district court.

III. THE WALLACE OPINIONS

The *Wallace* opinions reflect the inconsistent rulings that result from

27. *State v. Wallace*, No. 32404 (Ohio App., 8th Dist. Nov. 29, 1973).

28. 39 Ohio St. 37 (1883).

29. Reliance by the Court of Appeals on *Jackson* was not well founded. In *Jackson*, the trial judge had refused to accept a partial verdict but had instructed the jury to return for further deliberation. Subsequently, the jury returned with an entire verdict. Thus, *Jackson* does not stand for the proposition that a trial judge has complete discretion simply to accept or reject a partial verdict.

30. 170 U.S. 262 (1898). *Selvester* held that if the jury expressly states its inability to reach a verdict on a particular count of a multi-count indictment, a second trial on that count is constitutional. If the jury fails to express the inability to reach a verdict, there is an implicit acquittal on the count and a retrial of that count is not permissible. *Id.* at 270.

the inherent ambiguities of the *Perez* test. The majority found that Robert Wallace had been placed in double jeopardy. The court felt not only that the *Perez* test dictated this holding but also that recent Supreme Court decisions supported a finding for Wallace. The dissenting judge, on the other hand, believed that Wallace had not been deprived of his fifth amendment rights. Although he disagreed with the majority on each major issue, Judge Miller was able to cite authority equivalent to the majority's—*Perez* and recent Supreme Court decisions—that seemingly dictated the position he advocated. The absence of a precise standard and the existence of authority to support divergent views indicates that the judge's initial policy orientation may be decisive in resolving this double jeopardy issue.³¹

The Sixth Circuit identified the *Perez* manifest necessity test as controlling and determined that Robert Wallace had been placed in double jeopardy by the retrial of the previously decided counts of the indictment. The majority concurred with the district court that the failure of the jury to return verdicts on the entire indictment was insufficient justification for a retrial of all five counts of the indictment. The court's language made it clear that the majority adhered to the view that the record must disclose "plain and obvious reasons" that would justify the retrial of an individual:

In the present case, taking all the circumstances into consideration, we are directed to no problem at the first trial which would warrant a determination of manifest necessity to justify the discharge of the jury and the refusal to accept the verdicts that the jury had reached on Counts 2 through 5.³²

The Sixth Circuit's decision in *Wallace* follows a pattern of Supreme Court decisions that have emphasized a need for disclosure of the facts that justify the retrial and indicated a preference for the defendant's constitutional right to receive a particular tribunal's verdict. For instance, in *Downum v. United States*,³³ the Supreme Court held that the accused had been placed in double jeopardy when the trial judge declared a mistrial after the prosecution failed to have its witness present to testify. *Downum* emphasized the exceptional nature of the circumstances that justify the retrial of a defendant without his consent. The Supreme Court then attempted to clarify the interest that should govern during appellate review of this double jeopardy claim: "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.'"³⁴

A similar analysis was made by the plurality in *Jorn v. United States*.³⁵

31. See text accompanying note 25 *supra*.

32. *Wallace v. Havener*, 552 F.2d 721, 723 (6th Cir. 1977).

33. 372 U.S. 734 (1963).

34. *Id.* at 738 (quoting *United States v. Watson*, 28 F. Cas. 499, 501 (C.C.S.D.N.Y. 1868) (No. 16,651)).

35. 400 U.S. 470 (1971).

In *Jorn*, the trial judge, who refused to believe that the government's witness had been adequately apprised of his rights, had terminated the trial because the witness began to make self-incriminating statements. A plurality of the Court held that *Jorn* had been constitutionally deprived of his "valued right to have his trial completed by a particular tribunal."³⁶ Over the dissenters' objection that there had been no prosecutorial manipulation or judicial overreaching, the plurality ruled that the facts failed to justify denying the accused the opportunity to complete the first trial and perhaps be acquitted.³⁷

Judge Miller's *Wallace* dissent contrasted sharply with the majority's reasoning. He argued that the majority had misconstrued the basic presumption underlying the *Perez* test: that because the trial judge's position allowed him to assess the entire set of circumstances surrounding the trial, his decision should be afforded a presumption of validity. The dissent charged that the majority had subjected the trial judge's action to overly sharp surveillance.

As this writer has argued, the language of the *Perez* test is susceptible to the interpretation of the *Wallace* dissent.³⁸ Judge Miller felt that the Supreme Court's refusal to provide a mechanical test for the application of the *Perez* test also supported his reasoning. As specific support for his opinion, Judge Miller cited *Gori v. United States*.³⁹ In *Gori*, the Supreme Court upheld a trial judge's decision to declare a mistrial. The Court focused on the broad discretion of the trial judge and emphasized that the judge had apparently desired to prevent prejudicial questioning of the defendant. The Court in *Gori* further emphasized that the record before it was inadequate to support a reversal. Judge Miller's dissent in *Wallace* also emphasized this point. He argued that the end result of the majority opinion was to deny the trial judge the power to oversee the course of a trial. To support this point, Judge Miller focused on the majority's failure to insist on a complete record:

However, without all the circumstances before them, the court below and the majority here have determined that the Ohio trial court judge "abused his discretion" by failing to accept the partial verdict because there was "no manifest necessity" for not doing so; that there was "no manifest necessity" for not doing so, because he *could have done so*.⁴⁰

Judge Miller's emphasis on the scant record before the Sixth Circuit presents two problems. First, *Wallace* was admitted into the United States District Court on a petition pro se for a writ of habeas corpus,⁴¹

36. *Id.* at 484.

37. *Id.* at 486-87.

38. See text accompanying notes 20-24 *supra*.

39. 367 U.S. 364 (1961).

40. 552 F.2d at 725 (Miller, J., dissenting) (emphasis in original).

41. Brief for Petitioner at 1, *Wallace v. Havener*, 552 F.2d 721 (6th Cir. 1977).

in which counsel and court determine the amount of record to be submitted.⁴² Thus, it was particularly incumbent upon the prosecution to submit that portion of the trial record that would have substantiated *its* argument.⁴³ Second, Judge Miller failed to acknowledge that the Sixth Circuit's own Rules of Appellate Procedure limit the amount of transcript that may be submitted to the court.⁴⁴

The majority and the dissent differed on another issue, the potential effect of the doctrine of collateral estoppel at the trial level. This doctrine precludes the relitigation of any previously litigated fact that is essential to proving a crime. For instance, in order to prove that the defendant committed armed robbery, one of the facts that the prosecution would have to prove is that the defendant had used a weapon in the course of the robbery. If this ultimate fact had been decided in favor of the defendant in the earlier proceeding then the state would not be able to pursue a verdict on the armed robbery charge even though the jury had been unable to reach a verdict on that issue. The state argued that an acquittal of Wallace on counts two through five would constitute a determination that Wallace did not have a gun in his possession at the time of the robbery. Those counts charged Wallace with the offenses of shooting with intent to kill and illegal possession of a firearm. Wallace's acquittal for these crimes would, according to the state, deny society a full and fair opportunity to litigate the crime of armed robbery because the doctrine of collateral estoppel would prevent the relitigation of Wallace's possession of a gun. If the state could not relitigate Wallace's possession of a gun, it was deprived of an element essential for establishing a *prima facie* case of armed robbery. It was argued that this deprivation would defeat the ends of justice, and therefore the mistrial declaration was justified.

In fact, it is highly doubtful that the doctrine of collateral estoppel posed a threat to the readjudication of the armed robbery charge. In *Ashe v. Swenson*,⁴⁵ the Supreme Court enunciated the test to be applied to determine which facts that have previously been adjudicated may not be relitigated because of their prior adjudication:

42. See 28 U.S.C. § 2254; RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 7.

43. See 28 U.S.C. § 2254(e).

44. 6TH CIR. R. 13. The persuasiveness of Judge Miller's opinion is also decreased if one considers that this case originated in state court and that Ohio case and statutory law require the trial judge to enter into the journal his reason for declaring the mistrial. See *Hines v. State*, 24 Ohio St. 134 (1873); OHIO REV. CODE ANN. § 2945.36 (Page 1975). Failure to make the appropriate journal entry will acquit the defendant unless a subsequent order cures the omission. *Benedict v. State*, 44 Ohio St. 679, 11 N.E. 125 (1887). In *Wallace*, the trial court's journal entry and the state court of appeals opinion do not indicate any basis for the mistrial declaration other than the opinion in *Jackson v. State*, 39 Ohio St. 37 (1883). Brief and Appendix of Respondent at 15B, *Wallace v. Havener*, 552 F.2d 721 (6th Cir. 1977). As previously indicated, *Jackson* fails to support the proposition that a trial judge has complete discretion to accept or reject a partial verdict. See note 29 and accompanying text *supra*.

45. 397 U.S. 436 (1970).

Where a previous judgment of acquittal was based upon a general verdict . . . a court [must] "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."⁴⁶

Absent special interrogatories, a general acquittal on each of the last four counts of the Wallace indictment would not have established any ultimate fact vital to the reprosecution of the armed robbery count. The statutes that Wallace was charged with violating may be paraphrased as armed robbery, shooting with intent to kill, and illegal possession of a firearm. Quite clearly the jury could have acquitted Wallace on the three counts of shooting with intent to kill because the prosecution had failed to prove the requisite intent. The final count, on its face, appears to require the adjudication of Wallace's possession of a gun. If Wallace had been acquitted of a possession charge, it would seem that there could be no retrial of the armed robbery count because possession of a deadly weapon is essential for establishing armed robbery. But the caption on the indictment, "illegal possession of a firearm," is misleading because the statute in force at the time prohibited only specific groups of people from carrying firearms.⁴⁷ For instance, an individual who had been adjudged insane was prohibited from carrying a gun. Thus the jury could have acquitted Wallace of the "possession" charge even if he had actually possessed a gun, if it found that Wallace did not fall into any of the classes of people whose actions the statute addressed.⁴⁸

The majority in *Wallace*, although it did not articulate its reasoning, was not persuaded by the state's argument. To the majority, that argument suggested something "*de hors* the record."⁴⁹ The majority indicated that even if acceptance of the first four verdicts would effectively have prevented relitigation of the armed robbery charge through the

46. *Id.* at 444 (footnotes omitted).

47. Wallace was charged with violating § 2923.56 of the Ohio Revised Code, entitled "Persons prohibited from obtaining or having firearms:"

[N]o person shall purchase, own, possess, receive, carry, control or use any firearm, if such person is a fugitive from justice, is under indictment or has been convicted of any felony of violence and involving moral turpitude or adjudged a juvenile delinquent for commission of any act which if committed by an adult would be such felony in this or any other state, the United States or any of its territories or possessions, or the District of Columbia, is addicted to or illegally uses any narcotic drug, hallucinogen, or other dangerous drug, is an habitual drunkard, or is under adjudication of mental incompetence.

Amended Substitute House Bill, No. 484, § 2923.56, 133 Ohio Laws 2245 (1969) (repealed 1972, effective 1974).

48. Neither the State's nor Wallace's brief or appendix indicates the use of special interrogatories at the trial. In short, the majority correctly asserted that the application of the doctrine of collateral estoppel to the case before it suggested a fact pattern *dehors* the record. Had special interrogatories been used to establish an ultimate fact adverse to reprosecution, the prosecutor would have been able to argue this point.

49. 552 F.2d at 723.

operation of collateral estoppel, this would not create the requisite necessity that would justify early discharge of a jury. Rather, the court felt that if the doctrine of collateral estoppel prevented a relitigation of the armed robbery charge "the ends of public justice would be served."⁵⁰

Judge Miller rejected the majority's treatment of the collateral estoppel issue. He noted that *Selvester*,⁵¹ which allowed the acceptance of partial verdicts, had been decided before the doctrine of collateral estoppel had been incorporated into the fifth amendment. Judge Miller would have sustained the trial judge's action. In his opinion, the doctrine of collateral estoppel would have prevented relitigation of the armed robbery charge, a serious crime that deserved complete adjudication for protection of the public interest.

Judge Miller's view receives collateral support from *Illinois v. Somerville*,⁵² the latest Supreme Court decision to consider the circumstances that justify a mistrial declaration without the defendant's consent. In *Somerville*, the trial court declared a mistrial when it was discovered that the indictment charging the defendant insufficiently stated the elements of the offense. The Supreme Court upheld the trial judge's action as within his discretionary powers and untainted by prosecutorial manipulation or undue harassment. In response to *Jorn's* emphasis on the defendant's right to receive the first tribunal's verdict, the Court stated that the *Jorn* decision "did not hold that that right may never be forced to yield, as in this case, to the 'public's interest in fair trials designed to end in just judgments.'" ⁵³ It is apparent that Judge Miller subscribed to this view because he felt that, despite Robert Wallace's considerable interest in receiving the original verdicts on the four counts of the indictment, society's interest in a total adjudication of the crime should prevail. Because the intervention of the doctrine of collateral estoppel could have defeated society's interest, the potential effect of this doctrine created, for Judge Miller, the manifest necessity needed to justify the trial judge's declaration of a mistrial.

Even though the majority was willing to assume that collateral estoppel would have applied in the *Wallace* case, the majority opinion differed from the dissent on whether the potential effect of the doctrine of collateral estoppel should justify the declaration of a mistrial. The majority's view represents a more accommodating view of the dictates of the fifth amendment, as well as of the public's rights. The prosecution had had a complete opportunity to convince the jury of the facts needed to convict Robert Wallace. If the issue of Wallace's presence at the scene of the crime or his possession of a deadly weapon had been decided in his

50. See text accompanying note 43 *supra*.

51. 170 U.S. 262 (1897).

52. 410 U.S. 458 (1973).

favor, then, quite simply, the prosecution had failed to carry its burden of proof. In *Wallace*, the defendant had undergone the entire trial and received verdicts on four of the five counts; society's interest in receiving a total adjudication on these counts and the issues they encompassed had been satisfied. It would indeed be grossly unjust to force an individual into a renewed state of anxiety, ordeal and embarrassment under such conditions.

Absent extenuating circumstances, such as the wartime environment in *Wade*, mandatory acceptance of partial verdicts would further fifth amendment objectives and would not contravene the public's interest in prosecuting the accused. Society does not in justice deserve, nor should the defendant be required to undergo, a retrial of any issues fully determined in a prior adjudication. To allow such retrial would contravene the defendant's constitutional rights. The injustice is particularly apparent when, as in *Wallace*, each count could be resolved independently of the others; if each count had been tried separately, the judge would clearly have abused his discretion by declaring a mistrial absent proof of manifest necessity. There is no logical reason for a different result merely because the counts are joined in one indictment.

IV. CONCLUSION

Wallace v. Havener presented the Sixth Circuit Court of Appeals with the opportunity to review a trial judge's refusal to accept a partial verdict and the subsequent retrial of the entire case. The controlling standard of review for the resolution of the *Wallace* issue was the manifest necessity test enunciated in *United States v. Perez*.⁵⁴ Although this standard contains inherent ambiguities, the Sixth Circuit interpreted the test to require the state to prove the existence of circumstances that justify the retrial. The Sixth Circuit failed to discern any justifying circumstances; the court specifically rejected the state's contention that the trial judge's action was justified by the potential effect of the doctrine of collateral estoppel on the retrial of the undecided issue.

The Sixth Circuit's decision for *Wallace* provides the soundest interpretation of the *Perez* test. Robert Wallace had undergone the rigors of an entire trial and had been deprived of the opportunity to receive the partial verdict. Society's interest in litigating those matters had been satisfied. That the doctrine of collateral estoppel might have affected the subsequent relitigation of the undecided issue does not mean that the

53. *Id.* at 470.

54. 22 U.S. (9 Wheat.) 579 (1824).

public's rights have been deprecated; it means that at some crucial point, the prosecution failed to carry its burden of proof. The Sixth Circuit has recognized this distinction and has struck a sound and practical balance between society's right to full adjudication of alleged criminal activity and the protection given the accused by the double jeopardy clause.

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