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STATE V. CUNNINGHAM AND MONTANA'S RULE ON DOUBLE JEOPARDY

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On May 2, 1975, in the case of *State v. Cunningham*,[1] the Montana supreme court determined that the state statutory provisions on the attachment of jeopardy[2] violated neither the United States nor Montana Constitutions. This note will examine that decision in light of recent United States Supreme Court determinations on double jeopardy.

I. THE DECISION IN STATE V. CUNNINGHAM

Clancy Cunningham was charged in Yellowstone County with first degree assault, to which he entered a plea of "not guilty". On the date set for trial, March 21, 1974, a jury was duly selected and sworn. Subsequent to reading an omnibus jury instruction, the district judge recessed court for the noon hour. When court reconvened, the deputy county attorney informed the court that the victim of the alleged assault, the prosecution's key witness, was not available to testify. The victim, a resident of Wyoming, had not been served with a subpoena. The deputy county attorney moved to dismiss the action on the ground that a new charge of third degree assault, based on the same incident, was being filed against defendant Cunningham in the justice of the peace court. The State's motion to dismiss was granted without objection. Defendant entered a plea of "guilty" to the third degree assault charge and was sentenced in the justice court to six months incarceration.

On May 17, 1974, two months after the sentencing, defendant Cunningham, represented by different counsel, withdrew his prior plea of "guilty" and entered a plea of "not guilty" to the third degree assault charge. The State responded by dismissing the third degree assault charge and refiling a first degree assault charge, based on the same incident, in the district court. Defendant moved to dismiss the latter charge on the ground that it placed him twice in jeopardy, thereby violating the double jeopardy provisions of the federal and state Constitutions.[3] The district court, Honorable Rob-

1. State v. Cunningham, ___ Mont. ___, 535 P.2d 186, 32 St. Rptr. 433 (1975).
2. REVISED CODES OF MONTANA, § 95-1711 (1947) [hereinafter cited as R.C.M. 1947].
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; . . .

MONT. CONST. art. II, § 25:

   . . . No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction.

ert H. Wilson, granted defendant's motion to dismiss and the state appealed to the Montana supreme court.

R.C.M. 1947, § 95-1711 provides in pertinent part:

> (3) When prosecution barred by former prosecution. . . .
> [A] prosecution is barred by such former prosecution under the following circumstances: . . .
> (d) 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. . . .

The federal rule, by contrast, has been consistently construed by the United States Supreme Court to mean that jeopardy attaches when a defendant is put to trial before the trier of the facts.[4] Thus in federal court and in the majority of state courts, jeopardy attaches in a jury trial when the jury is impaneled and sworn.[5]

In the *Cunningham* decision, the high court of Montana acknowledged that in *Benton v. Maryland*,[6] the United States Supreme Court determined that the Fifth Amendment's proscription against placing a person twice in jeopardy for the same offense was applicable to state court criminal proceedings through the due process clause of the Fourteenth Amendment.[7] This proscription applies not only against being twice punished, but also against being twice put in jeopardy.[8] In continuing a trend of what has come to be known as the process of selective incorporation,[9] the Supreme Court in *Benton* proclaimed:

> [W]e today find that the double jeopardy prohibition of the Fifth Amendment presents a fundamental ideal and a constitutional heritage, and that it should apply to the state through the Fourteenth Amendment.[10]

Once it is determined that a particular Bill of Rights guarantee is "a fundamental ideal", it is then necessary to inquire whether the challenged state procedure satisfies due process of law. Given the

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4. Serfass v. United States, ___ U.S. ___, 95 S. Ct. 1055, 1062; United States v. Jorn, 400 U.S. 470, 479 (1971); Kepner v. United States, 195 U.S. 100, 128 (1904).

5. Serfass v. United States, *supra* note 4 at 1062; Illinois v. Somerville, 410 U.S. 458, 467 (1973); Downum v. United States, 372 U.S. 734 (1963).

6. Benton v. Maryland, 395 U.S. 784 (1969). This principle has been reiterated in Illinois v. Somerville, *supra* note 5 at 468; Waller v. Florida, 397 U.S. 387, 390 (1970).

7. U.S. CONST. amend. XIV, §1:
. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

8. United States v. Jorn, *supra* note 4 at 479; United States v. Ball, 163 U.S. 662 (1896).

9. Duncan v. Louisiana, 391 U.S. 145 (1968).

10. Benton v. Maryland, *supra* note 6 at 794.

fundamental nature of the right, in this case protection against double jeopardy, is a particular procedure such as the time of attachment of jeopardy, essential to the protection of that right? Or, as the Montana supreme court phrased it:

> [I]s the federal rule [jeopardy attaches when the jury is impaneled] so fundamental to the American system of justice that the "due process" clause of the Fourteenth Amendment mandates its application to state court criminal proceedings?[11]

In answering that question, the court maintained the federal rule was not essential to the right of a defendant to be protected against double jeopardy, and that Montana was thus at liberty to adopt its own rule.

> We perceive no inherent merit in the federal rule over Montana's state law. . . .
> We fail to see in what manner the federal rule protects against [prosecutorial manipulation] to a greater extent than Montana law. Prosecutorial manipulation can be effected as easily under one rule as under the other. . . .
> Nor do we see any greater protection in the federal rule as far as securing to defendant the right to have his trial completed before the court and jury selected to try his case. . . .
> We find no substantial difference between the two rules.[12]

The court implied that the Montana rule that specifies jeopardy attaches when the first witness is sworn is as "fundamentally fair" to a defendant as the federal rule that specifies jeopardy attaches when the jury is impaneled. It is true that the states were once free to determine for themselves at what point jeopardy attaches.[13] In a series of recent decisions, however, the United States Supreme Court expressly rejected the notion that the states could fashion for themselves a "watered-down, subjective version" of the individual guarantees of the Bill of Rights.[14] Mr. Justice Marshall expressed the sentiments of the Court on this issue in the *Benton* decision:

> Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the states as long as the totality of the circumstances does not disclose a denial of "fundamental fairness."[15]

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11. State v. Cunningham, *supra* note 1 at 188.
12. *Id.* at 188-189.
13. The Supreme Court in *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) found that point to be where the defendant has been subjected to a "hardship so acute and so shocking that our polity will not endure it."
14. Benton v. Maryland, *supra* note 6 at 794; Malloy v. Hogan, 378 U.S.1, 10-11 (1964).
15. Benton v. Maryland, *supra* note 6 at 795.

By applying a "watered-down, subjective version" of fundamental fairness in *Cunningham*, the Montana supreme court contravened the spirit of *Benton*. In determining whether a particular procedure is essential to the protection of a fundamental right it is incumbent upon a state court to abide by standards established in the federal system:

> Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan v. Louisiana* (391 U.S. 145, 149 (1968)), *the same constitutional standards apply against both the State and Federal Governments.* Palko's roots had thus been cut away years ago. We today only recognize the inevitable.[16] [Emphasis added.]

Insofar as it was inconsistent with the mandate in *Benton*, *Palko* was overruled.[17]

The significance of this for state criminal courts is that once the Supreme Court has determined that a Bill of Rights guarantee is a fundamental right, the Fourteenth Amendment makes that guarantee applicable to the states.[18] What *Benton* does indicate is that when the United States Supreme Court has determined that a particular federal procedure *is* essential to the protection of a fundamental right, the determination establishes a minimum standard which state courts are compelled to follow. Other due process decisions illustrate this concept.

Since 1960, the Supreme Court has selectively incorporated an increasing number of the Bill of Rights guarantees into the Fourteenth Amendment. "And in that process, the Court insisted that, once incorporated, the scope of the guarantee would be exactly the same in state and federal proceedings."[19] *Duncan v. Louisiana*[20] summarizes the incorporation development and reflects the current approach in criminal due process analysis: *de facto* incorporation of most procedural guarantees in exactly the manner in which they apply to the federal government.[21] A pertinent example reflecting this development concerns the Fifth Amendment privilige against

16. *Id.*

17. *Id.* at 794.

18. *See* Mr. Justice Powell's concurring opinion in *Apodaca v. Oregon*, 406 U.S. 375, 404 (1972), setting forth the proposition that to impose upon the state every detail of incorporated federal guarantees would derogate basic principles of federalism and would deprive the states of "freedom to experiment with adjudicatory processes different from the federal model."

19. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, pp. 525-526 (9th ed. 1975) [hereinafter cited as Gunther].

20. Duncan v. Louisiana, *supra* note 9.

21. Gunther, *supra* note 19 at 526.

self-incrimination.[22] In *Molloy v. Hogan*,[23] the Supreme Court held that privilege to be applicable to the states through the Fourteenth Amendment. A year later, in *Griffin v. California*, the Court found a particular state procedure that permitted the prosecution to comment on a defendant's failure to testify to be unconstitutional.[24]

What the attachment of jeopardy question in *Cunningham* lacks is the adjudicative equivalent of *Griffin v. California*. In arriving at its conclusion, the Montana supreme court did not have the guidance of an express mandate proclaiming time of attachment to be essential to the fundamental right of protection against double jeopardy. Nonetheless, there are extensive resources to which the Montana court could have referred in endeavoring to determine whether time of attachment was essential.

One such resource is the United States Supreme Court's repeated reference, in establishing the essential nature of a particular procedure, to the function that procedure performs and its relation to the purpose underlying a fundamental right.[25] The function performed by the federal rule on attachment of jeopardy is evident; it operates to ensure that jeopardy attaches when a defendant is put to trial before the trier of the facts.[26] The distinction in federal courts between jury and non-jury trials and its relation to the concept of attachment of jeopardy has been consistently adhered to by the United States Supreme Court, most recently in *Serfass v. United States*.[27] In that decision the Court reaffirmed the longstanding principle that in a jury trial, jeopardy attaches when a jury is impaneled and sworn. That the federal rule has been in effect for a long period of time supports the argument that such a rule is essential to the fundamental right. The Supreme Court has often used the history and extent of reliance upon a particular procedure as criteria in establishing the essential standards of procedure.[28]

Although articulated in various ways by the Supreme Court, the purpose and policies which animate the Double Jeopardy Clause are equally clear:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all

22. U.S. CONST. amend V:

. . . nor shall any person . . . be compelled in any criminal case to be a witness against himself. . . .

23. Malloy v. Hogan, *supra* note 14.

24. Griffin v. California, 380 U.S. 609 (1965).

25. Williams v. Florida, 399 U.S. 78 (1970); Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965).

26. *See* authorities cited *supra* note 4.

27. Serfass v. United States, *supra* note 4 at 1062.

28. Stovall v. Denno, *supra* note 25; Linkletter v. Walker, *supra* note 25.

> its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[29]

Another "deeply ingrained" purpose underlying the protection against double jeopardy concerns the valued right of a defendant to have his trial completed by a particular tribunal.[30]

The Montana rule operates to deprive defendant Cunningham of both underlying protections of the Double Jeopardy Clause. Such a deprivation engenders a manifest contravention of the theory behind the extension of due process guarantees to the states. The Supreme Court recognized the futility of extending a fundamental right to defendants in state criminal proceedings without also extending the procedural protections in *Mapp v. Ohio*:

> Since the Fourteenth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, [the] freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."
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> . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon. . . . To hold otherwise is to grant the right but in reality withhold its privilege and enjoyment. . . .[31]

The same granting of the right but withholding of the privilege occurs in double jeopardy situations as a result of the Montana rule. To submit that states must offer defendants the protection of the general concept of double jeopardy but not the protections envisaged by the specific federal standards of double jeopardy is to sever the privilege from its conceptual nexus. The end result is to provide Clancy Cunningham with less protection in a state court than he would be accorded in a federal court. Such a determination does not appear to be in accord with the intentions of the Supreme Court as expressed in *Benton*.[32]

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29. Green v. United States, 355 U.S. 184, 187-188 (1957).
30. Wade v. Hunter, 336 U.S. 684, 689 (1949).
31. Mapp v. Ohio, 367 U.S. 643, 655-656 (1961).
32. In *Curry v. Superior Court of the City and County of San Francisco*, 2 Cal. 3d 707,

Mapp v. Ohio is significant to the *Cunningham* determination for an additional reason. Following a Supreme Court decision establishing the federal exclusionary rule,[33] several states voluntarily altered their criminal procedures so as to include equivalents of the federal exclusionary rule. The adoption of the federal rule by these states was one of the factors that inspired the Supreme Court in *Mapp v. Ohio* to mandate uniform application of the federal rule to all of the states.[34] A similar situation attends the circumstances in the attachment of jeopardy inquiry. Since the high Court's decision in *Benton*, a number of states have conformed their rules of criminal procedure to the federal rule on attachment of jeopardy.[35]

Duncan v. Louisiana, a decision antedating *Benton*, may well provide the most compelling indication that the Supreme Court, were it to confront a time of attachment question, would determine that the federal rule is to be made applicable to the states. In the *Duncan* case the state of Louisiana maintained that while the United States Constitution[36] required that citizens be granted a right to trial by jury, the state retained the latitude and discretion to determine *when* that right should be conferred. Much like the Montana court's reasoning on the attachment of jeopardy, the Louisiana court maintained that as long as the state constitution[37]

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470 P.2d 345, 350-351, 87 Cal. Rptr. 361 (1970), the California supreme court interpreted *Benton* as follows:

> *Benton* requires only that the states accord their citizens *at least as much* protection against double jeopardy as is provided under the Fifth Amendment of the United States Constitution. [Emphasis supplied.]

See also State v. Boyd, ___ Ore. ___, 527 P.2d 128, 131 (1974) for the proposition that the standard of the double jeopardy rule prohibiting a second prosecution where the charges arose out of the same act or transaction, is the constitutional minimum.

33. Weeks v. United States, 232 U.S. 383 (1914).

34. Mapp v. Ohio, *supra* note 31 at 654-655.

35. Recent cases holding that jeopardy attaches in a state proceeding when the jury is impaneled and sworn: Torres v. State, 519 P.2d 788 (Alaska 1974); Bunnell v. Superior Court, ___ Cal. 3d ___, 531 P.2d 1086, 119 Cal. Rptr. 302, (1975); Maes v. District Court, 180 Colo. 169, 503 P.2d 621 (1972); Fanning v. Superior Court, 320 A.2d 343 (Del. Supr. 1974); State v. Warren, 133 Ga. App. 743, 213 S.E.2d 53 (1975); People v. King, 1 Ill. App. 3d 757, 275 N.E.2d 213 (1971); Crim v. State, ___ Ind. ___, 294 N.E.2d 822 (1973); State v. Gustin, 212 Kan. 475, 510 P.2d 1290 (1973); Blondes v. State, 19 Md. 714, 314 A.2d 746 (1974); In re Juvenile, ___ Mass. ___ 306 N.E.2d 822 (1974); Smith v. Mississippi, 478 F.2d 88 (5th Cir. 1973), *cert. den.* 414 U.S. 1113 (1973); Shuman v. Sheriff of Carson City, 90 Nev. 227, 523 P.2d 841 (1974); United States ex rel. Gibson v. Ziegele, 479 F.2d 773 (3rd Cir. 1973), *cert. den.* 414 U.S. 1008 (1973); People v. Scott, ___ N.Y.2d ___, 40 A.D. 2d 933, 337 N.Y.S.2d 640 (1972); State v. Charis, 24 N.C. App. 148, 210 S.E.2d 555 (1974); State v. Allesi, 216 N.W.2d 805 (N.D. 1974); In re Lamb, 34 Ohio A.2d 85, 296 N.E.2d 280 (1973); State v. Ellis, 14 Ore. App. 84, 511 P.2d 1264 (1973); Commonwealth v. Smith, 232 Pa. 546, 334 A.2d 741 (1975).

36. U.S. CONST. amend. VI:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .

37. LA. CONST. art. VII § 41:

provided the right to jury trial in capital cases, there was compliance with the provisions of the Sixth Amendment. The United States Supreme Court, *per* Mr. Justice White, emphatically disagreed:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.[38]

Thus the federal standards of trial by jury and not merely the general concept of the Sixth Amendment were made applicable to the states through the due process clause. The *Duncan* decision, striking in its similarity to the "fundamental" language in *Benton*, indicates by analogy that the federal standards as to when jeopardy attaches should likewise be applied to the states.

The *Cunningham* decision would perhaps have disappeared quietly into the shadows had it not borne so heavily upon a case of much greater import in Montana. On October 31, 1974, the State of Montana filed a multiple-count information against Merrel Cline, Shirley Lankford Cline and L. R. Bretz in the initial stages of prosecution emanating from the Attorney General's investigation of the Workman's Compensation Division.[39] On April 4, 1975, subsequent to the selection, impanelment and swearing of the jury, this information was dismissed, and a new one filed against the same defendants, charging them with identical offenses.[40] The second information culminated in verdicts of guilty against all three defendants. Appeals on the conviction to the Montana supreme court[41]

> All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

38. Duncan v. Louisiana, *supra* note 9 at 149-150.

39. Criminal Cause No. 3921, The State of Montana, Plaintiff v. Merrel Cline, L.R. Bretz and Shirley Lankford Cline, Defendants, before the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark.

40. Criminal Cause No. 3963, The State of Montana, Plaintiff v. Merrel Cline, L.R. Bretz and Shirley Lankford Cline, Defendants, before the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark.

41. On July 23, 1975, the Montana supreme court denied petitions by L.R. Bretz and Merrel Cline for writs of habeas corpus. *See State ex rel. Bretz v. Sheriff of Lewis and Clark County*, 32 State Rptr. 762, 539 P.2d 1191 (1975).

as well as petitions to federal district court for writs of *habeas corpus*[42] are currently pending.

II. When the Attachment of Jeopardy Prohibits Retrial

There is a second, complex and highly volatile issue concerning double jeopardy that the Montana court did not discuss. The issue involves the cases in which a mistrial has been declared prior to the verdict. In such cases, the conclusion that jeopardy has attached begins the inquiry of whether the double jeopardy clause bars a retrial.[43] As the United States Supreme Court noted in *Wade v. Hunter*, "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."[44] A leading decision construing the double jeopardy clause in the context of a mistrial is *United States v. Perez*.[45] In that decision, Mr. Justice Story, speaking for a unanimous court, declared:

> 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. . . . To be sure, the power ought to be used with the greatest caution, under urgent circumstances. . . .[46]

The problem of moving from the general formula articulated in *Perez* to the facts of an individual case is complicated by the absence of any rigid rules. Indeed, the Supreme Court specifically rejected the use of a rigid, mechanical formula in *Illinois v. Somerville*.[47] Nonetheless, it is possible to distill a general approach premised on the "manifest necessity" and "public justice" policy of *Perez*. The Court in *Perez* recognized two lines of authority. The first indicates that a proper exercise of judicial discretion in declaring a mistrial occurs when an impartial verdict cannot be reached, when physical circumstances such as the illness, death or absence of a judge, juror or defendant prevents the continuance of the trial, or if a verdict of conviction could be reached but would have to be

42. In November 1975, consolidated petitions for writs of habeas corpus were filed on behalf of L.R. Bretz, Merrel Cline and Clancy Cunningham in the United States District Court, District of Montana, Billings Division, Hon. James F. Battin, presiding.

43. Illinois v. Somerville, *supra* note 5 at 462.

44. Wade v. Hunter, *supra* note 30 at 689.

45. United States v. Perez, 9 Wheat. 579 (1824).

46. *Id.* at 580.

47. Illinois v. Somerville, *supra* note 5 at 462.

reversed on appeal due to an obvious procedural error in the trial.[48]

Retrials are permitted when a court properly determines, under the circumstances, that "manifest necessity" and "public justice" mandated the declaration of mistrial. The crucial question is whether there was manifest necessity. The first line of authority cited by the *Somerville* Court enumerates instances where such necessity existed,[49] while the second line of authority concerns what the Court refers to as "prosecutorial manipulation."[50]

The facts in *Cunningham* do not resemble the first line of authority as the circumstances surrounding the dismissal disclose neither the incidence of prejudice that would have impeded the obtainment of an impartial verdict, nor the occurence of procedural error that would have warranted dismissal of the jury. *Downum v. United States*, the case relied on by the *Somerville* Court to exemplify the occurrence of "prosecutorial manipulation," does bear striking resemblance to *Cunningham*, however. In *Downum*, the prosecuting attorney proceeded with the selection and swearing of the jury before discerning whether or not the key prosecution witness was present to testify. The witness had not been served with a subpoena. In *Cunningham*, the prosecuting attorney likewise proceeded with jury impanelment before determining whether the key witness, who had not been subpoenaed, was available on the day of the trial. In both *Downum* and *Cunningham* the jury was discharged as a result of the witnesses' absence.

While the absence of witnesses will not always bar a retrial,[51] the Supreme Court in *Downum* determined that the lack of prosecutorial diligence in securing the presence of a vital witness, coupled with the jury impanelment before the prosecution ascertained whether the witness was in fact present, did not amount to a "manifest necessity". The second prosecution thus constituted double jeopardy and was therefore a violation of a constitutional right of the defendant.[52] It appears that the same conclusion should have been reached in *Cunningham*.

The controversy between "manifest necessity" and "prosecutorial manipulation" on the issue of procedural error has the most extensive ramifications for the *Bretz-Cline* appeal. In the *Somerville* case, the Supreme Court determined that the defective indictment filed against the defendant did not prevent a retrial. The

48. *Id.* at 464.

49. Lovato v. New Mexico, 242 U.S. 199 (1916); Keerl v. Montana, 213 U.S. 135 (1909); Thompson v. United States, 155 U.S. 271 (1894).

50. Downum v. United States, *supra* note 5.

51. Wade v. Hunter, *supra* note 30 at 691.

52. Downum v. United States, *supra* note 5 at 737-738. *See* also Cornero v. United States, 48 F.2d 69, 71 (9th Cir. 1931).

determinative provisions of Illinois criminal procedure were drawn in such a way so as to leave the trial court with no alternative but to dismiss the indictment and begin anew. The Supreme Court determined that the lack of available alternatives under Illinois criminal procedure constituted "manifest necessity" and that the declaration of a mistrial was commensurate with the "ends of public justice."[53]

In *United States v. Jorn*,[54] by contrast, the filing of an insufficient information did operate to prevent a retrial. That conclusion was premised upon the fact that alternatives other than mistrial, such as trial continuance or amendment of information, were available to the trial court. The failure to utilize such alternatives was determined to be an abuse of judicial discretion.[55] If on appeal it is resolved that jeopardy did in fact attach, the presence or absence of alternatives available at the time of the dismissal of the first information in the *Bretz-Cline* case will be determinative of whether there was a "manifest necessity" compelling the dismissal.

An additional consideration, one that would pose implications for both the *Cunningham* and *Bretz-Cline* cases, was first articulated in *Gori v. United States*.[56] While primarily adhering to the *Perez* theme of "manifest necessity" the Court did nonetheless suggest a variation of that theme based upon a determination by the appellate court as to which party was the beneficiary of the mistrial ruling. If it appears that the mistrial operates fundamentally to benefit the defendant, an appellate court may be reluctant to conclude that there was an abuse of discretion. This was the conclusion in *Gori*. If, on the other hand, it is determined that the mistrial ruling benefitted the prosecution by providing them with a second opportunity to seek conviction, an appellate court may well conclude that there was an abuse of discretion and thus prohibit a retrial.[57] In the final analysis a judge must always temper the decision to dismiss the jury by weighing foremost the valued right of a defendant to have his trial completed by a particular tribunal.[58]

CONCLUSION

In an endeavor to inject substantive content into the spacious language of the Fourteenth Amendment the Supreme Court has continued to look to the Bill of Rights and the specific guarantees

53. Illinois v. Somerville, *supra* note 5 at 469.
54. United States v. Jorn, *supra* note 4.
55. *Id.* at 487.
56. Gori v. United States, 367 U.S. 364 (1961).
57. United States v. Jorn, *supra* note 4 at 482-483.
58. *Wade v. Hunter, supra* note 30 at 689.

therein. Such was the circumstance in *Benton v. Maryland*. The nation's high Court spoke clearly when it directed that the same constitutional standards of double jeopardy apply equally against both the state and federal governments. Section 95-1711 R.C.M. 1947, and the Montana supreme court's decision in *Cunningham* deny defendant Cunningham the protection he would be accorded in the federal system as well as in the majority of state criminal justice schemes.

AUTHOR'S NOTE — In a decision rendered on December 31, 1975, the consolidated writs of habeas corpus filed in United States District Court on behalf of L.R. Bretz, Merrel Cline and Clancy Cunningham were denied. *Cunningham v. District Court*, CV-75-112-BLG; *Bretz v. Crist*, CV-75-113-BLG; *Cline v. State of Montana*, CV-75-114-BLG. The judge, the Hon. James F. Battin, premised that decision on the conclusion that Montana's procedural rule on the attachment of jeopardy does not present a "watered-down version" of the constitutional right. Upon finding that a defendant's substantive rights receive no less protection under the Montana statute than under federal procedures, Judge Battin concluded that:

> Since the substance of the right has been clearly preserved, then the object of the constitutional provision guaranteeing that the defendant shall not be placed in jeopardy twice has been met.

Citing *Somerville*, Judge Battin commented, *arguendo*, that even if petitioners Bretz and Cline had been subjected to double jeopardy, manifest necessity would nonetheless require a further trial to be held since the prosecutorial error culminating in the dismissal of the first charges was merely a typographical error. Judge Battin did not mention the *United States v. Jorn* analysis involving available alternatives, nor does he comment upon what the outcome would have been for petitioner Cunningham in light of *Downum*.

Attorneys for petitioners Bretz, Cline and Cunningham have indicated that the United States District Court decision will be appealed to the 9th Circuit Court of Appeals.