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Sua Sponte

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SUA SPONTE

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Upon taking their oath of office, trial judges assume the duty of conducting trials through a fair process calculated to ascertain the truth while achieving justice within reasonable costs. Furthermore, judges are expected to remain fair and impartial in both their conduct and rulings. In large part, the motions and requests of counsel prompt the rulings judges make prior to, during, and following the actual trial. Nonetheless, in certain situations judges have the authority to act sua sponte.

The term "sua sponte" means taking action of one's "own will or motion voluntarily, without prompting or suggestion."[2] In court proceedings, "sua sponte" refers to a trial judge acting, without being requested, on his or her own volition. A sua sponte ruling by a judge is appropriate provided such action is called for by a manifest necessity.

The parameters of sua sponte conduct have presented difficulties for trial judges in recent years, with appellate courts continuously defining and redefining what constitutes a manifest necessity. On the one hand, the risk of a reversal looms when a judge fails to act under circumstances which require judicial intervention. On the other hand, if the judge acts when he or she should not have acted, the result would be the barring of a subsequent criminal trial on double jeopardy grounds, and a possible reversal on other grounds in a civil case. The purpose of this article is to discuss when there is or is not manifest necessity in various contexts and to identify useful guidelines for the trial judge in determining when such conduct is appropriate.

I. Manifest Necessity

A "judge has the inherent discretion to declare a mistrial sua sponte or to declare it pursuant to the State's motion, [and] he or she may declare a mistrial over the defendant's objection or without the defendant's acquiescence."[3] A trial judge has "the authority to discharge a jury from giving any verdict, whenever, in [his or her] opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of the public justice would otherwise be defeated."[4]

In addressing the issue of manifest necessity, the Supreme Court has "explicitly declined the invitations of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial."[5] The Court has stated, however, that when deciding whether a manifest necessity existed, an appellate court must examine the trial as "viewed in the light of the particular problem confronting the trial judge."[6] Furthermore, an appellate court should "accord the highest decree of respect to the trial judge's evaluation" regarding the manifest necessity to declare mistrial.[7]

Whether upon request or sua sponte, the decision to declare or not to declare a mistrial in a criminal case requires the trial judge to consider well established double jeopardy principles, which, *inter alia*, dictate that where a trial is needlessly aborted, the defendant cannot be retried.[8] Maryland, however, like the federal courts, has not adopted a clear formula for determining when there is a manifest necessity for the declaration of a mistrial. As a result, the courts may differ in their analyses regarding whether a particular occurrence at a trial warrants such declaration.

The Court of Appeals of Maryland has expressly declined to place significant limits on the capacity of trial judges to declare a mistrial on their own volition in a criminal case. In *Crutchfield v. State*,[9] the court of appeals reversed a decision by the court of special appeals which attempted to restrict the trial court's power to declare a mistrial sua sponte. During the trial in *Crutchfield*, the substance of statements made by the defendant was admitted into evidence despite the fact that the statements were made during a custodial interrogation without the defendant having been advised of her *Miranda* rights. The trial judge recognized the potential damage to the defendant's case and advised counsel to move for a mistrial. Defense counsel declined to do so, and further stated his intentions "to move for a dismissal if the court declared a mistrial without [the defendant's] consent."[10] The trial judge declared a mistrial sua sponte, over the objection of the defense.

On appeal, the court of special appeals held that there was no indication of "a manifest . . . necessity for the trial judge to have aborted the trial."[11] Furthermore, the intermediate court concluded that the defendant should be the person to determine "whether a mistrial is necessary to protect [his

or her] interest."[12] Reasoning that "great deference should be given [to the defendant's] determination as to whether his own interests would be better served by aborting the trial or by submitting his fate to the jury that is already impaneled,"[13] the court of special appeals overturned the trial court's decision to declare a mistrial.

The court of appeals reversed, holding that the trial judge had properly exercised his authority in declaring a mistrial under these circumstances, even over the defendant's objection. Rejecting the view expressed by the court of special appeals which favored deference to the wishes of the defendant, the court of appeals reasoned that the effect of placing the ultimate determination with the defendant and not the trial judge would be to render "the trial judge a useless appendage in the judgmental process of determining whether a mistrial was manifestly necessary in the interest of public justice."[14]

II. Guidelines

Although there are no rigid federal or state standards for explicitly defining manifest necessity, case law does provide some guidance in determining when a manifest necessity exists. As an overriding principle, it is important to keep in mind that "there are [varying] degrees of necessity and . . . a 'high degree' [is required] before concluding that a mistrial is appropriate."[15]

Before declaring a mistrial, the trial judge must determine whether an error that has occurred is so egregious that the defendant cannot continue to have a fair trial once the error has been committed.[16] If the trial judge correctly makes such a determination, the requisite manifest necessity then exists and the court should, sua sponte, abort the trial. By declaring a mistrial sua sponte, however, a judge needs to be cognizant of the danger of showing bias to one of the parties. Case law has emphasized that a trial judge should not declare a mistrial if there are less drastic alternatives available to the court. For example, the trial judge should consider the option of giving a curative instruction, as opposed to declaring a mistrial sua sponte, if such an instruction can effectively remedy the error.[17]

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In many instances, however, no feasible alternative exists and a trial judge is compelled to declare a mistrial sua sponte. Sua sponte declarations of a mistrial, based upon manifest necessity, have been upheld in a variety of circumstances. The situations in which a trial judge must decide whether to declare a mistrial include: 1) after some testimony mistakenly comes in that is highly prejudicial to the defendant; 2) following the presentation of improper instructions to the jury; 3) plain error; 4) a hung jury; 5) unfair prejudice against the accused; and 6) absent witnesses. To avoid reversal, the trial judge must guard against abusing his or her discretion through inaction as well. Accordingly, appellate review of such sua sponte conduct or lack thereof may be warranted.

A. Error in Testimony

The first situation which may warrant a trial court's sua sponte declaration of a mistrial involves error occurring when the jurors acquire prejudicial information during a witness's testimony at trial. In *Bailey v. State*,[18] three of the State's witnesses at the defendant's second trial referred to the first trial during the course of their testimony. Defense counsel did not object to the first witness's reference to the previous trial.[19] When the second witness made a similar reference, however, defense counsel requested a mistrial.[20] The trial judge declined to take such action. Although willing to give a cautionary instruction, the trial judge expressed concern that doing so would only emphasize the first trial.[21] When the third witness made a statement regarding the defendant's conviction at the first trial, the trial judge sua sponte declared a mistrial.[22] The declaration of a mistrial was upheld on appeal based upon a finding of manifest necessity. The court reasoned that "when prejudicial information is acquired by jurors during trial, there is a high risk that the prejudicial information will be held against the accused."[23]

Conversely, other appellate courts have found that, in certain instances, trial courts abused their discretion by declaring a mistrial sua sponte after the jury heard unfairly prejudicial testimony. For example, in *United States v. Evers*,[24] the defendant was being prosecuted for federal income tax evasion. The trial judge sua sponte declared a mistrial after one of the witnesses for the prosecution suggested that the source of unreported income might have been from campaign contributions. The appellate court found that manifest necessity did not exist in this situation, concluding that the judge should have opted to use a curative instruction to remove any possible juror prejudice that might have arisen from the remark.[25]

B. Error in Jury Instructions

The issue of error may additionally arise in the course of the trial judge's presentation of instructions to the jury. Maryland Rule 4-325(a) states that the "court *shall* give instructions to the jury . . . ." (emphasis added). Advisory instructions are required, however, "only where a request for such instructions is made,"[26] providing there is an evidentiary and legal basis for the instruction. In *Stanley v. State*,[27] the trial judge asked counsel if there were any requests for instructions. Because neither counsel made such a request, the court of special appeals held that the defendant "waived his right to have the jury instructed . . . and cannot . . .

complain about the absence of such instruction."[28] However, in view of *Glover v. State*,[29] it appears that had the trial judge not asked counsel, unlike *Stanley* where such a request was made, proceeding without any instruction could well be reversible error.

Jury instructions are proper when they are "articulated fairly and impartially."[30] "[W]hen the instructions are lacking in some vital detail or convey some prejudicial or confusing message,. . . the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired."[31] In *State v. Hutchinson*,[32] for example, plain error occurred when the failure to give a not guilty option, excluded the possibility of a not guilty verdict, although the instructions did include various degrees of guilty verdicts.[33]

A trial judge is obligated to present a correct instruction to the jury even though a technically incorrect instruction was requested by counsel. In *Glover v. State*,[34] a question arose as to whether or not a trial judge was obligated to correct a technically erroneous jury instruction. The defense counsel requested an instruction relating to "fresh pursuit." The requested instruction specifically dealt with *interstate* pursuit, which was in error because the matter at hand dealt with *intrastate* pursuit. The trial judge refused to give the instruction, voicing concern that it might confuse the jury. Although defense counsel objected, it made no suggestion of an instruction on "intrastate" pursuit. While it is not error for a trial judge to refuse to grant a requested instruction which may mislead the jury, the appellate court held that, in a case such as the one at bar, the trial judge should have given the correct instruction sua sponte, *i.e.*, he should have changed the requested "interstate" instruction to "intrastate."[35] Offering some guidance, the court of special appeals in *Glover* devised a principle for determining whether a requested jury instruction is potentially misleading or technically erroneous: "[i]f the premise of the instruction requested by the defendant is relevant and sanctioned by law, rather than one contrary to it, a circuit court has an *obligation* to instruct on the point even if the language of the instruction offered by the defendant is in some respects erroneous."[36]

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C. Plain Error

Under the plain error rule, a legal doctrine which may also warrant sua sponte conduct, obvious errors which arise during the course of a judicial proceeding and which affect the substantive rights of a party "may be considered on motion for a new trial or on appeal though not raised in [the] trial court if manifest injustice or miscarriage of justice has resulted . . . ."[37] "Any error, once recognized, may be called plain error, and unless it can be held to be harmless, it must be considered as material to the rights of the accused."[38]

"The plain error rule evolved as an exception to the general rule that points or questions not raised at trial will not be considered on appeal."[39] Prior to 1825, the court of appeals was required to examine any error in the record from the trial court, regardless of whether or not such error was brought to the attention of the trial judge.[40] Following an 1825 legislative enactment, the court of appeals possessed authority to examine only those issues which had been adjudicated at the trial level.[41] Although that statutory principal is strictly followed in civil actions, appellate courts have greater flexibility in criminal matters to address issues not previously raised at the trial.[42] Such flexibility has been attributed to the need to protect the defendant's rights in situations "where errors are likely to have more serious consequences."[43]

Pursuant to the Maryland Rules of Procedure, "the appellate court will not decide any issue [other than subject-matter jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."[44] The rule encourages efficient judicial administration by "avoiding the expense and delay of appeals and new trials based on errors that might have been corrected by the trial court."[45] Consequently, the failure of a party to raise an issue in a timely manner during the course of the trial generally constitutes a waiver of that issue.[46] Likewise, the failure to raise an issue to the appellate court in brief or argument is usually also deemed a waiver as to the issue.[47]

Despite the judicially recognized view disfavoring review on appeal of issues not raised at the trial level, the plain error rule permits an appellate court, upon its own motion and without any prompting from counsel, to "take cognizance of [and correct] any plain error . . . material to the rights of the defendant" even though there was no objection made to the error at the trial.[48] An error may be classified as material if it affects the rights of the accused to a "fair and impartial trial."[49] Sua sponte acts of appellate courts are especially instructive for trial judges because it can safely be assumed that the appellate court, by rendering a sua sponte ruling, would not only have condoned such action at trial, but likely would have deemed it necessary for the trial judge to have raised and ruled on the same issue as well.

There is no fixed formula to ascertain when plain error has occurred such that it may be addressed on appeal.[50] Factors for consideration include "whether the error was

purely technical, the product of conscious design or trial tactics or the result of bald inattention . . . [T]hese factors . . . are ordinarily inconsistent with circumstances justifying an appellate court's intervention."[51] In deciding whether a reviewable plain error exists, an appellate court may be guided by a three-part test: 1) is there an unobjected-to error *readily apparent* on the face of the record?; 2) is the error of such a *prejudicial* nature that "it is material to the rights of the accused?"[52]; and 3) is the error "sufficiently serious or harmful to merit review in the absence of a trial objection?"[53]

Recently in *Austin v. State*,[54] the court of special appeals discussed four factors an appellate court might consider in determining whether to exercise its discretion in reviewing plain error not raised at the trial level. The first consideration concerns the egregiousness of the error, which does not include "mere misstatements of the law."[55] A second motivation for appellate review involves the impact of the error upon the defendant. The court is likely to review an error under this second factor "only where [the appellate court is] persuaded that the error *probably did* have a crucial bearing upon the verdict."[56] Furthermore, the burden is upon the defendant to prove that error did have an adverse impact. Under the third consideration, diligence of counsel, or "the degree of dereliction of the attorney in not making timely objection to an erroneous instruction" may influence the appellate court's decision regarding review.[57] The fourth and final consideration, according to the court, concerns whether the case is a vehicle in which review is "necessary to serve the ends of fundamental fairness and substantial justice" beyond the concerns of the particular case at hand.[58]

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Although the above-mentioned considerations may influence the appellate court's decision to review plain error, "[t]he touchstone remains, as it always has been, ultimate and unfettered discretion" of the court.[59] Unfortunately, such a "touchstone" is of limited assistance to a trial judge attempting to determine if sua sponte action is warranted in a particular instance.

There is a persuasive counter-argument as to why an appellate court should not always consider a lack of sua sponte action on the part of a trial judge to be reviewable plain error. In his dissent in *Hutchinson*,[60] Judge Smith reasoned that "an appellate court should not take cognizance of 'plain error' on its own motion if the alleged error was one which could be corrected readily if brought to the trial judge's attention."[61] Under certain circumstances, it may be part of defense counsel's strategy to waive the defendant's constitutional right to object to errors arising during the course of the trial.[62] "[A]n attorney might very well sit quietly by when an obvious error . . . arises saying to himself that if the jury in its wisdom does not acquit his client, then he has in the record a ground for appellate reversal."[63]

"[T]he exercise of our discretion to correct [plain error] should be limited to those cases in which correction is necessary to serve the ends of fundamental fairness and substantial justice."[64] Plain error should "not include bad guesses by counsel whether or not to object to anything done or left undone by the court."[65]

Similarly, the admission of erroneously admitted evidence does not necessarily invoke the plain error rule. "[A] failure to object to an offer of evidence at the time the offer is made . . . is a waiver upon appeal of any ground of complaint against its admission."[66] At issue in *Mack v. United States* was whether the "trial judge erred by failing to intervene sua sponte to assure the exclusion of . . . hearsay."[67] Hearsay testimony which was damaging to the defendant had been admitted during the trial. The trial judge recognized the impropriety of the testimony and advised defense counsel to object. Counsel offered no objection. The appellate court held that the trial judge did not commit "plain error" by not taking further action in reference to the testimony.

Maryland Rule 4-323(a) adheres to this same principle, stating that: "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."[68]

D. Hung Jury

In addition to a trial judge's ability to declare a mistrial sua sponte based upon error, the court may declare a mistrial if there is a hung jury. The hung jury is "considered to be the classic example of what constitutes manifest necessity for a mistrial."[69] The Supreme Court has held "that the trial judge may discharge a *genuinely* deadlocked jury and require the defendant to submit to a second trial."[70]

In *Hankins v. State*,[71] the jury had deliberated for approximately three hours when it informed the trial judge that it had not reached a unanimous decision. The judge instructed the jury to continue deliberation as requested by both counsel.[72] Less than one hour later, the jury made an inquiry as to how long it would be required to remain in deliberation.[73] Although the court and the prosecutor believed the jury to be deadlocked, defense counsel, objecting to the declaration of a mistrial, requested that the jury be allowed to continue to deliberate after a recess until the following morning.[74] Instead of adopting defense counsel's suggestion, the court decided to ask the jury whether it would

be able to reach a verdict if given more time.[75] When the jury responded in the negative, the trial judge declared a mistrial.[76] The court of special appeals held that the trial judge acted within his discretion in deciding that allowing the jury to continue deliberations would be futile.[77] As a manifest necessity existed for the trial judge to declare a mistrial in the appellant's first trial, the double jeopardy clause of the Fifth Amendment did not preclude a retrial.[78]

There is no minimum length of time that a jury must remain in deliberation before a mistrial may be declared.[79] When it becomes obvious to the trial judge "that continued deliberation . . . would be futile," then he or she may correctly declare a mistrial.[80] As a mater of practice, the trial judge should note for the record the length of the trial and the length of the jury deliberations. The trial judge should also make some inquiry as to the likelihood of the jury reaching a verdict.

E. Prejudice

A third category of cases in which appellate courts have upheld a trial judge's sua sponte declaration of a mistrial based upon manifest necessity occurs when prejudice arises during the course of the trial. Any occurrence which has the potential of creating prejudice against the accused may warrant the declaration of a mistrial. For example, manifest necessity exists "where a juror has possibly been biased or the juror's impartiality is questionable."[81] A trial court's declaration of a mistrial was upheld when the "jurors accidently met four co-defendants at an elevator [where] the co-defendants were heavily shackled, chained together and guarded by a contingent of United States Marshals."[82] If the potentially prejudicial event is minor or only a quickly passing scene, the trial judge should inquire of the jurors individually what, if anything, they saw or heard and if those observations would keep them from rendering a fair verdict based only on the evidence.[83]

Prejudice against the accused may arise from improper remarks made during the course of the trial.

Improper Remarks

Prejudice against the accused may arise from *improper remarks* made during the course of the trial. When an improper remark has been made but not objected to by opposing counsel, the issue arises as to whether the trial judge should take action sua sponte to correct the comment. Generally, the answer is "no." However, to be on safe ground, the trial judge should ask counsel for a conference out of the presence of the jury to inquire into the prejudicial nature of the statement.

Upon determining that an improper remark was made to the detriment of the accused during the trial, an appellate court will examine "whether the trial court took appropriate action to overcome a likelihood of prejudice . . . ."[84] How the trial court handles such a remark may determine whether there is cause for reversal of the judgment.[85] Certainly, counsel may make an objection to an improper remark if done so in a timely manner so as to give the court an opportunity to take corrective measures.

"Generally the prosecutor has an obligation to refrain from making any remark within the hearing of the jury which is likely or apt to instigate prejudice against the accused."[86] The court should examine a questionable remark for its effect upon the jury. If the jury was possibly influenced against the defendant as a result of the remark, then a conviction might be reversed. To warrant a reversal, "[i]mproper conduct or remarks made by the state during a prosecution would have to be a direct and contributing factor that resulted in substantial prejudice to the defendant."[87]

In *Irick v. United States*,[88] the defendant sought a reversal of his conviction based upon prosecutorial misconduct that occurred during his trial.[89] After determining that misconduct did occur, the appellate court then considered "the gravity of the misconduct, its relationship to the issue of guilt, the effect of any corrective action by the trial judge, and the strength of the government's case."[90] The court went on to state that where the defendant has failed to object to the prosecutorial misconduct during the course of the trial, as was the case here, his conviction will be reversed only "if the misconduct so clearly prejudiced his substantial rights as to jeopardize the fairness and integrity of his trial."[91] The court acknowledged that when misconduct might result in "substantial prejudice, the judge should consider convening a bench conference sua sponte, even during argument, to protect a litigant from prejudice."[92] The court, however, viewed the particular case *sub judice* as "hardly a situation so extreme that it required or even warranted intervention by the judge in the absence of an objection . . . ."[93]

In *Brinand v. Denzik*,[94] the appellant failed to make a timely objection to the improper remarks made by the appellee's counsel during closing arguments.[95] Although conceding that the remarks in question may have indeed been improper, the court of appeals nonetheless affirmed the lower court's denial of appellant's motion for a new trial. "The appellant did not ask the trial court to declare a mistrial when the remarks were made, and did not then or at any time before the jury retired request the court to instruct the jury to disregard them. This being so, the appellant was deemed to have waived her right to object to the verdict."[96] "In the

absence of any further action by appellant [to protect herself from potential prejudice resulting from the improper remarks], there was no duty upon the trial court to make further reference to the matter."[97]

Case history provides examples of the effect of improper remarks made during the course of the trial. For instance, "[a]n appeal to racial or religious prejudice is improper."[98] Also improper are "remarks as to the right of appeal and the possibility of executive clemency and parole of the defendant."[99] "It is improper for the prosecutor to assert his personal belief or personal conviction as to the guilt of the accused, if that belief or conviction is predicated upon anything other than the evidence in the case . . . ."[100] A prosecutor is acting improperly when he or she encourages the jury to consider prior convictions of a defendant in reaching a verdict.[101]

"[W]hen passion and prejudice are heightened by emotions stirred during wartime, a prosecutor's reference, in his closing argument, to the war as being, wholly irrelevant to any facts or issues in the case," were held to be improper.[102] Here, the defendant was on trial for allegedly violating a statutory provision which called for the "registration of certain agents of foreign principals."[103] The reference by the prosecutor to the "harsh, cruel, murderous war" was clearly done to invoke prejudice against the accused.[104] The Supreme Court stated in dicta that "the trial judge should have stopped counsel's discourse without waiting for an objection."[105]

The failure to take action sua sponte may in some cases form the basis of a determination by the appellate courts that the trial judge abused his or her discretion.

Conduct

Manifest necessity for the sua sponte declaration of a mistrial has also been upheld in a case where the defendant's conduct displayed such "obvious hostility to the judge's rulings [that it] could not help but influence the jury."[106] The appellate court in *State v. Brady* indicated that although "the judge had ruled quickly, . . . [he did not act] without consideration."[107] The trial judge, after assessing the impact of the defendant's conduct upon the jury, believed that there was no alternative other than to declare a mistrial.[108]

F. Absent Witnesses

Yet another indication for determining whether a manifest necessity for declaring a mistrial exists is whether there are less drastic measures available. "[W]here reasonable alternatives to a mistrial, such as a continuance, are feasible and could cure the problem," the judge should not declare a mistrial.[109]

It has been held that the absence of a key witness for the prosecution did not constitute a manifest necessity for a mistrial.[110] *Cornero v. United States*[111] set forth the general rule regarding the appropriate course of action a trial judge should follow when witnesses are absent from trial. In *Cornero*, the court noted that no previous court had held "that, after impanelment of the jury, . . . the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of the jury . . . operates as a protection against retrial of the same case."[112]

In *Downum v. United States*,[113] the Supreme Court held, in a 5-4 decision, that former jeopardy attached when the prosecution successfully requested that the first jury, which was already sworn, be discharged because a key witness, in two of the six counts charged against the defendant, was not present. A second jury was impaneled two days later when the case was again called. Although the trial court denied the defendant's plea of former jeopardy, the Supreme Court held that the plea should have been sustained. The Court noted that the prosecution, "allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found."[114] Furthermore, the prosecution could have dismissed the two counts for which the missing witness was needed, and proceeded on the remaining four counts.

Other courts, however, have refused to acknowledge the inflexible rule which states that "the absence of a witness can never justify the discontinuance of a trial."[115] Adhering to such a rule would violate the principles set forth in *United States v. Perez*,[116] which provided that the determination of whether there was a manifest necessity for the declaration of a mistrial must be assessed on a case-by-case basis. A situation similar to *Downum* arose in *United States v. Khait*,[117] where the court held that the defendant's second trial was not barred by double jeopardy when the first trial ended in a mistrial due to the unavailability of a witness. In *Khait*, a key witness was absent not as a result of an oversight of the prosecutor, but rather because of threats made upon family members of the witness in an effort to keep the witness from testifying. The district court distinguished the case before it from *Downum* in that the latter case involved fault on the part of the prosecution for "failing to arrange for the witness's presence, whereas in this case the government had no control" over the witness's refusal to testify.[118]

G. Abuse of Discretion

The failure to take action sua sponte may in some cases

form the basis of a determination by the appellate courts that the trial judge abused his or her discretion. In *Drummond v. Drummond*,[119] for example, the court of special appeals vacated the lower court's judgment after finding fault with the inaction of the trial judge. In *Drummond*, the husband had filed a complaint for absolute divorce in Maryland, but Mrs. Drummond received service of the complaint in New Jersey. According to Maryland Rule 2-321(b)(1), Mrs. Drummond had sixty days after service to file her answer (as opposed to the thirty day response time for in-state service). When Mrs. Drummond did not respond within thirty days, an order of default was entered against her despite the additional time allotted to her under the rules.[120]

Mrs. Drummond requested that the court reconsider the order of default, stating she was out of state and needed extra time to retain a lawyer.[121] She claimed that the order of default was mailed to her parents' home in Atlantic City where she no longer "commutted [sic] from."[122] Despite Mrs. Drummond's claim that she had not received the order of default in a timely fashion after its entry, her motion was denied. Mrs. Drummond then filed what appeared to be a request for reconsideration concerning the error in the time allotted for her answer. Although two hearings were held before a master, that particular issue was not addressed. Accordingly, the trial court granted an absolute divorce.

In vacating this judgment, the court of special appeals held that "either the motion to set aside the default alone, or taken together with the motion for reconsideration, contained sufficient information to alert the trial judge that he needed to look at the whole record."[123] Although not citing any authority for its position, the court believed that the trial judge "either erred in failing to set aside the default based on the first motion, or abused his discretion in denying the motion for reconsideration."[124] *Drummond* may be construed as placing an obligation upon trial judges to review, sua sponte, proceedings involving a pro se party for errors or inconsistencies which would ordinarily be raised by counsel. What remains to be seen is whether a trial judge is under such an obligation only in cases where the party is unable to obtain the assistance of counsel, as in *Drummond*, or whether a trial judge must examine a record even where both parties are assisted by counsel.

III. Conclusion

The decision whether or not to take sua sponte action can prove to be an extremely difficult one for the trial judge. Not acting when the judge should have acted could result in a reversal; acting when he or she should not have acted could precipitate a dismissal of the case based on double jeopardy considerations. With these considerations in mind, trial judges are encouraged to consider carefully the circumstances under which they are about to act, or refrain from acting, on their own motion. They should conduct all relevant inquiries into a particular matter before they decide whether or not to make a sua sponte ruling. With the proper level of well-informed foresight, trial judges can avoid the pitfalls of sua sponte action.

Endnotes

[1]The Honorable Marvin B. Steinberg is a circuit court judge in the Eighth Maryland Judicial District. He states: "The question of whether or not to act sua sponte is troublesome for obvious reasons, and I hope this article is of help not only to my fellow trial judges, but also to the bar." Tracy K. Garapolo and Gloria A. Worch served as law clerks to Judge Marvin B. Steinberg and have contributed significantly to this article.

[2]*Black's Law Dictionary* 1424 (6th ed. 1990).

[3]*State v. Frazier*, 79 Md. App. 118, 128, 555 A.2d 1078, 1083 (1989), *see also Gori v. United States*, 367 U.S. 364, 369 (1991) (concluding that sua sponte declarations of mistrials will not bar subsequent retrials "where it clearly appears that a mistrial has been granted in the sole interest of the defendant"); *United States v. Holley*, 986 F.2d 100 (5th Cir. 1993)(stating that retrial following sua sponte declaration of mistrial over defendant's objection is not prohibited by double jeopardy clause if trial court determines that declaration of mistrial is called for by manifest necessity); *United States v. Nichols*, 977 F.2d 972 (5th Cir. 1992).

[4]*United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

[5]*United States v. Jorn*, 400 U.S. 470, 480 (1971).

[6]*Arizona v. Washington*, 434 U.S. 497 (1978), *quoted in Hankins v. State*, 80 Md. App. 647, 651, 565 A.2d 686, 688 (1989).

[7]*Arizona*, 434 U.S. at 511.

[8]*West v. State*, 52 Md. App. 624, 630, 451 A.2d 1228, 1232 (1982)(emphasis added); *see also United States v. Jorn*, 400 U.S. 470, 481 (1971)(standing for the proposition that when mistrial is declared without the defendant's consent, double jeopardy precludes retrials unless there existed manifest necessity to declare a mistrial); *Glover v. McMackin*, 950 F.2d 1236 (9th Cir. 1991) (stating that retrial following a trial aborted without the consent of defendant is permitted for double jeopardy purposes only if the prosecutor can prove a manifest necessity for mistrial).

[9]318 Md. 200, 567 A.2d 449 (1989).

[10]*Crutchfield v. State*, 79 Md.App. 101, 103, 555 A.2d 1070, 1071 (1989).

[11]*Id.* at 110, 555 A.2d at 1074.

[12]*Id.* at 108, 555 A.2d at 1073.

[13]*Id.* at 107, 555 A.2d at 1073.

[14]*State v. Crutchfield*, 318 Md. 200, 214, 567 A.2d 449, 456 (1989).

[15]*Arizona v. Washington*, 434 U.S. 497, 506 (1978).

[16]*Leak v. State*, 84 Md. App. 353, 358, 579 A.2d 788, 791 (1990).

[17]*See United States v. Sandini*, 888 F.2d 300 (3d. Cir. 1989).

[18]521 A.2d 1069 (Del. Super. Ct. 1987),

[19]*Id.* at 1073.
[20]*Id.*
[21]*Id.* at 1074.
[22]*Id.*
[23]*Id.* at 1076; *see also Arizona v. Washington*, 434 U.S. 497 (1978)(finding that manifest necessity existed for declaration of mistrial where defense counsel had improperly focused jury's attention on allegedly improper prosecutorial misconduct regarding the suppression of evidence which caused the state supreme court to remand the case); *U.S. v. Nichols*, 977 F.2d 972 (5th Cir. 1992) (concluding that the trial court's sua sponte declaration of mistrial was manifestly necessary where prosecutor violated a motion in limine by eliciting evidence from witness that explosives were found at defendant's house); *State v. Grasso*, 600 F.2d 342 (2d. Cir. 1979)(upholding trial court's sua sponte declaration of mistrial after prosecution witness recanted his testimony after nine days of trial had elapsed and fifty-three witnesses had testified).
[24]569 F.2d 876 (5th Cir. 1978).
[25]*Id.* at 879; *see also United States v. Sandini*, 888 F.2d 300 (3d. Cir. 1989)(finding reversible error in trial court's sua sponte declaration of mistrial after co-defendant implicated defendant in conspiracy during closing argument. In so ruling, the appellate court noted that "we point out that declaring a mistrial because of the conduct at trial of a co-defendant, as opposed to that of the government, may well encourage collusive conduct by defendants at a joint trial so as to set the stage for mistrials...." Id. at 309); *United States v. Sanders*, 591 F.2d 1293 (9th Cir. 1979) (declaring a mistrial sua sponte over defendant's objection seen as error when probability arose that a witness for the prosecution had committed perjury, where an integral part of the defense of the accused was to cast doubt on the credibility of that witness).
[26]*Stanley v. State*, 43 Md. App. 651, 655, 406 A.2d 693, 695 (1979)(quoting *Couser v. State*, 36 Md. App. 485, 499, 374 A.2d 399, 406-07 (1977)).
[27]43 Md. App. 651, 653, 406 A.2d 693, 694 (1979).
[28]*Id.* at 659, 406 A.2d at 697.
[29]88 Md. App. 393, 594 A.2d 1224 (1991).
[30]*State v. Hutchinson*, 287 Md. 198, 205, 411 A.2d 1035, 1039 (1980).
[31]*Id.*
[32]*Id.*
[33]*Id.* at 198, 411 A.2d at 1035.
[34] 88 Md. App. 393, 594 A.2d 1224 (1991). *Glover* is a very important case for trial judges.
[35]*Id.* at 400, 594 A.2d at 1224; *see also Hunt v. State*, 321 Md. 387, 583 A.2d 218 (1990), *cert. denied*, 112 S.Ct. 117 (1991).
[36]*Id.* at 400, 594 A.2d at 1228 (emphasis added); *see also United States v. Morales*, 978 F.2d 650 (11th Cir. 1992) (finding that if a requested instruction is not substantially correct, the trial court does not abuse its discretion by failing to charge the jury with the erroneous instruction); *United States v. Neal*, 951 F.2d 630 (5th Cir. 1992) (refusal of trial court to give requested instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions deemed proper); *United States v. Bafia*, 949 F.2d 1465 (7th Cir. 1991); *United States v. Baptista*, 834 F.2d 1 (1st Cir. 1987).
[37]*Black's Law Dictionary* 1150 (6th ed. 1990).
[38]*Brown v. State*, 14 Md. App. 415, 418, 287 A.2d 62, 63 (1972).
[39]Hessler, *Casenotes: State v. Hutchinson*, 10 U. Balt. L. Rev. 362, 365 (1981).
[40]*Id.*
[41]*See Id.* at 365 (discussing Act of Feb. 16, 1926, ch. 117, 1825 Md. Laws 92.)
[42]*See* Note, *Appellate Review in Criminal Cases of Points Not Raised Below*, 54 Harv. L. Rev. 1204, 1205 (1941).
[43]*Id.* at 1205.
[44]Maryland Rule 8-131.
[45]Hessler, *supra* note 39, at 366; *see also Davis v. State*, 189 Md. 269, 273, 55 A.2d 702, 704 (1947).
[46]*See, e.g., Sine v. State*, 40 Md.App. 628, 394 A.2d 1206 (1979).
[47]*See Health Services Cost Review Comm'n v. Lutheran Hosp. of Md., Inc.*, 298 Md. 651, 472 A.2d 55 (1984); *but see Glover v. State*, 88 Md. App. 393, 594 A.2d 1224 (1991).
[48]*See* Maryland Rule 4-325(e), *quoted in Franklin v. State*, 319 Md. 116, 121, 571 A.2d 1208, 1210 (1990).
[49]*State v. Hutchinson*, 287 Md. 198, 202, 411 A.2d 1035, 1038; *see also Gore v. State*, 309 Md. 203, 522 A.2d 1338 (1987); *Trimble v. State*, 300 Md. 387, 478 A.2d 1143 (1984); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1980).
[50]*See Hutchinson*, 287 Md. at 203, 411 A.2d at 1038.
[51]*Id.* at 203, 411 A.2d at 1038.
[52]Hessler, *supra* note 39, at 368-69.
[53]*Id.*
[54]90 Md. App. 254, 600 A.2d 1142 (1992).
[55]*Id.* at 268, 600 A.2d at 1149 (1992).
[56]*Id.* at 269, 600 A.2d at 1149 (emphasis in original). The court contrasted this standard with that of "harmless error," which requires that the court be persuaded "beyond a reasonable doubt that the error *did not* contribute to the guilty verdict" before it may be overlooked.
[57]*See Austin*, 90 Md. App. at 270, 600 A.2d at 1150.
[58]*Id.* at 272, 600 A.2d at 1151 (quoting *Evans v. State*, 28 Md. App. 640, 650-51, 349 A.2d 300, 309 (1975), *aff'd State v. Evans*, 278 Md. 197, 362 A.2d 629 (1976)).
[59]*See Austin*, 90 Md.App. at 268, 600 A.2d at 1149.
[60]287 Md. 198, 210, 411 A.2d 1035, 1041.
[61]*Hutchinson*, 287 Md. at 209, 411 A.2d at 1041.
[62]*See Canter v. State*, 220 Md. 615, 155 A.2d 498 (1959),

quoted in Hutchinson, 287 Md. at 210, 411 A.2d 1042.
[63]*Hutchinson*, 287 Md. at 218, 411 A.2d at 1046.
[64]*Brown v. State*, 14 Md. App. 415, 421-22, 287 A.2d 62, *quoted in Hutchinson*, 287 Md. at 217, 411 A.2d at 1045.
[65]*Madison v. State*, 200 Md. 1, 10, 87 A.2d 593, 596 (1951), *quoted in Hutchinson*, 287 Md. at 215, 411 A.2d at 1044.
[66] E. Cleary, *McCormick on Evidence* § 52 at 126 (3d. ed. 1984) (citations omitted), *quoted in Mack v. United States*, 570 A.2d 777 (D.C. Cir. 1990).
[67]*Mack*, 570 A.2d at 782.
[68]*Holle v. State*, 26 Md. App. 267, 275, 337 A.2d 163, 167 (1975).
[69]*State v. Crutchfield*, 318 Md. 200, 209, 567 A.2d 453, 453 (1989).
[70]*Arizona v. Washington*, 434 U.S. 497, 509 (emphasis added); *see also Rogers v. United States*, 609 F.2d 1315, 1317 (9th Cir. 1979) (listing the following relevant factors that a trial judge should consider when determining whether a jury is deadlocked: 1)the jury's collective opinion that it cannot agree; 2) the length of the trial and complexity of the issues; 3) the length of time the jury has deliberated; 4) whether the defendant has made timely objection to the mistrial; and 5) the effects of exhaustion or coercion on the jury).
[71]80 Md. App. 647, 565 A.2d 686 (1989).
[72]*Id.* at 650, 565 A.2d at 687.
[73]*Id.*
[74]*Id.*
[75]*Id.*
[76]*Id.*, 565 A.2d at 688.
[77]*Id.* at 653, 565 A.2d at 689.
[78]*Id.*
[79]*See, e.g., United States v. Cawley*, 630 F.2d 1345 (9th Cir. 1980) (finding no abuse of discretion by the trial court when it declared a mistrial sua sponte following a jury deliberation of only three and one-half hours.)
[80]*Hankins v. State*, 80 Md. App. at 653, 565 A.2d at 689; *see also Commonwealth v. Hamilton*, 334 A.2d 588 (Pa. 1975) (discussing court's declaration of a mistrial after the jury had deliberated for over 30 hours during the course of four days, having "twice declared itself hopelessly deadlocked," and after having two jurors become physically ill, while others became "hysterical" at the idea of extended deliberations. *Id.* at 593, *quoted in State v. Frazier*, 79 Md.App. 118, 130, 555 A.2d 1078, 1084 (1989)).
[81]*State v. Crutchfield*, 318 Md. at 209, 567 A.2d at 453; *see also Thompson v. United States*, 155 U.S. 271 (1894).
[82]*United States v. Jarvis*, 792 F.2d 767, 768 (9th Cir. 1986), *quoted in State v. Frazier*, 79 Md. App. 118, 130, 555 A.2d 1078, 1084 (1989).
[83]*See, e.g., United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978).
[84]*Holbrook v. State*, 6 Md. App. 265, 270, 250 A.2d 904, 907 (1969).
[85]*See Id.*, 250 A.2d at 970-08.
[86]*Id.* at 269, 250 A.2d at 906.
[87]*Leak v. State*, 84 Md. App. 353, 358, 579 A.2d 788, 791, citing *Wilhelm v. State*, 272 Md. 404, 429, 326 A.2d 707, 723 (1974).
[88]565 A.2d 26 (D.C. Cir. 1989).
[89]The prosecutor allegedly threatened, outside the courtroom, to "bust [defense counsel] in the mouth." *Id.* at 27. The prosecutor had also remarked during the trial "that defense counsel 'sandbagged'" one of the government's witnesses. *Id.* at 34.
[90]*Id.* at 32.
[91]*Id.* at 32. The court also noted that "a motion for a mistrial [by the defendant] at the end of the prosecutor's initial closing argument [in response to alleged prosecutorial misconduct] is timely." *Id.* at 32, n. 13; *see also Hawthorne v. United States*, 476 A.2d 164, 169-70 (D.C. 1984).
[92]*Irick*, 565 A.2d at 34, n.22.
[93]*Id.* at 38.
[94]226 Md. 287, 173 A.2d 203 (1960).
[95]*Brinand* involved a motor vehicle tort. In his closing argument, counsel for the appellee made reference to a formula for damages based upon a purely hypothetical mathematical equation. After the verdict, it was clear that the jury used counsel's formula for its calculation of an award of damages. *Id.* at 289, 173 A.2d at 204.
[96]*Brinand*, 226 Md. at 292, 173 A.2d at 205 *quoted in Cam's Broadloom Rugs, Inc. v. Buck*, 87 Md. App. 561, 570, 590 A.2d 1060, 1064 (1991).
[97]*Brinand*, 226 Md. at 293, 173 A.2d at 206.
[98]*Holbrook v. State*, 6 Md. App. 265, 269, 250 A.2d 904, 906 (1969) (citing *Contee v. State*, 223 Md. 575, 165 A.2d 889 (1960)).
[99]*Shoemaker v. State*, 228 Md. 462, 468, 180 A.2d 682, 685 (1962).
[100]*Cicero v. State*, 200 Md. 614, 620, 92 A.2d 567, 570 (1952).
[101]*See Conway v. State*, 7 Md.App. 400, 413, 256 A.2d 178, 185 (1969).
[102]*Viereck v. United States*, 318 U.S. 236, 247-48 (1943).
[103]*Id.* at 237.
[104]*Id.* at 247.
[105]In *Viereck*, the conviction of the defendant was reversed based upon the interpretation of the statute allegedly violated. The Supreme Court noted, however, that the "conduct of the prosecuting attorney . . . independently of the error for which [the case] was reverse[d] might well have placed the judgement of conviction in jeopardy." *Id.* at 247.
[106]*State v. Brady*, 424 A.2d 407, 409 (N.H. 1980). In *Brady*, in which multiple defendants were tried together, the trial judge felt that the actions of one of the defendants during the trial might adversely affect the other defendants.
[107]*Id.* at 409.
[108]*Id.* The sua sponte declaration of a mistrial has also been

upheld "in a rape case when defense counsel questioned the complaining witness regarding her sexual experience." *Crutchfield*, 318 Md. 200, 212, 567 A.2d 449, 454 (citing *Abdi v. State*, 294 S.E.2d 506 (Ga. 1982)).

[109]*Cornish v. State*, 272 Md. 312, 320, 322 A.2d 880 (1974), *quoted in Crutchfield*, 318 Md. at 213, 567 A.2d at 455.

[110]*Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931).

[111]*Id.*

[112]*Id.* at 71.

[113]372 U.S. 734 (1963).

[114]*Id.* at 735.

[115]*Wade v. Hunter*, 336 U.S. 684, 691 (1949).

[116]22 U.S. (9 Wheat.) 579 (1824).

[117]643 F. Supp. 605 (S.D.N.Y. 1986).

[118]*Id.* at 608.

[119]91 Md. App. 630, 605 A.2d 657 (1992).

[120]*Id.* at 631-32, 605 A.2d at 657-58.

[121]*Id.*

[122]*Id.* at 632, 605 A.2d at 658.

[123]*Id.* at 635, 605 A.2d 659.

[124]*Id.*