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Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial

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DOUBLE JEOPARDY: AN ILLUSORY REMEDY FOR GOVERNMENTAL OVERREACHING AT TRIAL

During a trial for manslaughter,[1] a prosecutor improperly expressed his opinion of the credibility of witnesses,[2] argued facts to the jury that were not in evidence,[3] and attempted to shift the burden of proof of whether another person could have committed the homicide[4] to the defense. In another trial, the prosecution attempted to admit fabricated evidence on a foundation of inadmissible hearsay.[5] At a third trial, a prosecutor read highly prejudicial grand jury testimony to the jury over the defendant's continuing objection.[6] In each case the defense moved for a mistrial.[7] If these mistrials had been granted, would the Double Jeopardy Clause[8] prohibit retrial?

The Supreme Court stated in *United States v. Dinitz*[9] that:

> The double jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by the judge or prosecutor" threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.[10]

The prohibition against retrial when a mistrial motion by the defendant is forced by governmental overreaching[11] originated as a

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1. People v. Petrucelli, 44 A.D.2d 58, 59, 353 N.Y.S.2d 194, 197 (1st Dept. 1974).
2. *Id.* at 58, 353 N.Y.S.2d at 196.
3. *Id.* at 59, 353 N.Y.S.2d at 196.
4. *Id.* at 58, 353 N.Y.S.2d at 196.
5. United States v. Kessler, 530 F.2d 1246, 1257 (5th Cir. 1976).
6. United States v. Martin, 561 F.2d 135, 137 (8th Cir. 1977).
7. *Id.* at 137; United States v. Kessler, 530 F.2d at 1257; Brief for Relator-Appellant at 2, People v. Petrucelli, *appeal dismissed*, 50 N.Y.2d 927 (1980).
8. The Double Jeopardy Clause of the Fifth Amendment states that no person shall be "subject for the same offence to be twice put in jeopardy of life and limb." U.S. CONST. amend. V.
9. 424 U.S. 600 (1976).
10. *Id.* at 611 (citations omitted).
11. The term "overreaching" was coined by Justice Harlan in United States v. Jorn, 400 U.S. 470, 485 (1971). Though he never expressly defined the term, he characterized the circumstances as bad-faith conduct by a judge or prosecutor "designed to avoid an acquittal." *Id.* at 485 n.12.

limitation on the trial judge's broad discretion to declare a mistrial.[12] Usually, retrial is permissible when the defendant's motion for mistrial is granted.[13] But when excessive prosecutorial or judicial misconduct forces the defendant to move for a mistrial, the policies behind the Double Jeopardy Clause[14] should protect a defendant from the unethical prosecutor or judge, who fearing acquittal, attempts to abort the proceedings.[15]

This Comment will explore the history of the prohibition against retrial in cases of governmental overreaching: its development in Double Jeopardy case law, and its application by the lower courts. Recognizing that this relief is rarely given,[16] the problems in proving such a claim and the reluctance of the courts to grant the remedy will be examined. Finally, the predicament of the defendant whose mistrial motion is denied at the trial level will be considered; the Double Jeopardy prohibition protects the defendant's right to be judged by his first tribunal,[17] and, arguably, this right has not been violated if the motion is denied, and the trial proceeds to judgment. Finally, the possibility that the remedy is

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12. *See* Gori v. United States, 367 U.S. 364, 369 (1961), where the Court stated that situations where "a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused" by declaring a mistrial may be an abuse of the discretion vested and violate the Fifth Amendment.

13. United States v. Jorn, 400 U.S. at 485. This is because the defendant has

> a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.

Id.

14. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

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

15. *See* note 11 *supra*. A judge or prosecutor, who, fearing acquittal, engages in overreaching conduct, would be intending to end the present trial so as to retry the defendant, gaining a more favorable forum for conviction. *See* text accompanying note 10 *supra*.

16. United States v. Martin, 561 F.2d 135 (8th Cir. 1977) and United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976) are the only cases where circuit courts have barred retrial.

17. Wade v. Hunter, 336 U.S. 684, 689 (1949).

simply too drastic a remedy must be examined.

The general reluctance to prohibit retrial in cases of governmental overreaching would indicate that courts are unwilling to apply this drastic remedy without a resolution of the defendant's guilt or innocence.[18] Despite this, prosecutorial misconduct is an alarmingly frequent basis for appeal by defendants.[19]

I. The Evolution of the "Manifest Necessity" Standard and the Problem of Discretion

When a defendant's trial is terminated prior to final judgment,[20] the policies and interests behind the double jeopardy prohibition must be considered before retrial may be commenced. It is recognized that numerous prosecutions increase the probability of a defendant's eventual conviction, and unfairly burden the defendant with expense and continued anxiety.[21] The defendant's interest has been called the right to be judged by his first tribunal. The prosecution represents the public's interest in fair trials ending in a judgment as to the guilt of the accused.[22] Case law has developed that attempts a resolution of these competing interests where a mistrial has occurred, or proceedings are terminated prior to final judgment.

In *United States v. Perez*,[23] the seminal case in the mistrial context, a mistrial was declared due to a deadlocked jury.[24] On appeal, the Supreme Court held that the Double Jeopardy Clause does not prohibit defendant's retrial.[25] The Court stated that trial court judges must have 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,

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18. *See* text accompanying note 16 *supra*.

19. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 631 (1972).

20. Termination before final judgment can occur, for example, when a mistrial is declared or the indictment is dismissed. For retrial to be prohibited, jeopardy must "attach," which occurs, in nonjury trials, after the first witness is sworn, Serfass v. United States, 420 U.S. 377, 388 (1974), and in jury trials, when the jury is empaneled and sworn, Crist v. Bretz, 437 U.S. 28, 38 (1978).

21. *See* note 14 *supra*.

22. Wade v. Hunter, 336 U.S. at 689.

23. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

24. *Id.*

25. *Id.*

or the ends of public justice would otherwise be defeated."[26] The *Perez* standard of "manifest necessity" continues to govern mistrial declarations where a mistrial is requested by the prosecutor, or declared *sua sponte* by the trial judge, without the defendant's consent.[27]

Although the *Perez* standard was originally formulated to permit retrial when a defendant's trial is aborted due to "unforeseeable circumstances,"[28] the standard has broadened considerably.[29] Since the standard's application is at the discretion of the trial court judge, "who is best situated to make such a decision,"[30] the Supreme Court has deferred to the judge's decision, repeatedly stating that it will not develop "mechanical" rules that will inhibit that discretion or application of the discretionary standard.[31] Thus, manifest necessity no longer is found only if "unforeseeable circumstances" or a "breakdown in judicial machinery" has occured; instead the decision to grant a mistrial must only be "sound" to be justified under manifest necessity.[32] The result of such a broad standard is that the societal interest in final judgment usually prevails over a defendant's right to be judged by the first tribunal.[33]

The Court has recognized that vesting such broad discretion in the trial court judge can lead to abuse denying the defendant the protection of the Double Jeopardy Clause. Mistrials declared with the purpose of harassing a defendant or giving the prosecution the opportunity to find a more favorable forum for conviction violate the Double Jeopardy prohibition.[34] In *Arizona v. Washington,* the

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26. *Id.*

27. United States v. Jorn, 400 U.S. at 481, 485.

28. *See* Wade v. Hunter, 336 U.S. at 689; Gori v. United States, 367 U.S. at 372, 373 (Douglas, J., dissenting).

29. *See* Illinois v. Somerville, 410 U.S. 458, 477 (1973) (Marshall, J., dissenting). *Compare* United States v. Jorn, 400 U.S. 470 (1971) *with* Arizona v. Washington, 434 U.S. 497 (1978) *and* Illinois v. Somerville, 410 U.S. 458 (1973).

30. Gori v. United States, 367 U.S. at 368.

31. *See id.* at 367, and Illinois v. Somerville, 410 U.S. at 462.

32. *Compare* Downum v. United States, 372 U.S. 734 *and* Gori v. United States, 367 U.S. at 372, 373 (Douglas, J., dissenting) *with* Arizona v. Washington, 434 U.S. 497, 514.

33. *See* notes 29 & 32 and accompanying text *supra; see also* cases cited therein. *Downum,* which prohibited retrial of the defendant, found that a mistrial declared due to the absence of a prosecution witness did not constitute manifest necessity, 372 U.S. at 737-38. The case has been restricted to its facts by the reasoning of *Arizona v. Washington* and *Illinois v. Somerville.*

34. Downum v. United States, 372 U.S. at 736.

Court gave great deference to the trial court's decision but warned that the "strictest scrutiny" would occur if a mistrial is declared when "there is reason to believe that the prosecutor is using the superior resources of the state to harass or achieve a tactical advantage over the accused."[35] The concept that prosecutorial or judicial "overreaching" at trial can implicate the Double Jeopardy Clause evolved as a limitation on the potential abuses inherent in the broad grant of discretionary power to trial court judges.

II. Ramifications of Defendant's Motion for Mistrial — The Concept of Voluntariness

When a defendant moves for a mistrial, retrial is normally contemplated and is permissible.[36] It is recognized that a defendant may not wish to continue a trial where error or prejudice has occurred which may result in conviction and a lengthy appeal.[37] Thus, the defendant voluntarily relinquishes his right to be judged by the first tribunal by his mistrial motion.[38]

However, when governmental overreaching occurs at trial, and the judge does not *sua sponte* declare a mistrial, the defendant may be compelled to move for a mistrial. This places the defendant in the untenable position of either moving for a mistrial when he is not voluntarily relinquishing his right to be judged by the first tribunal and being retried, or completing the trial, knowing he will probably be convicted due to the prejudicial conduct.

The problem has evolved because the Court has found the defendant to possess a significant interest in controlling the proceedings. Thus, it is assumed that a defendant who moves for a mistrial consents to reprosecution even if his motion "is necessitated by prosecutorial or judicial error."[39] If the defendant does not move for a mistrial, and gambles on his conviction, he cannot contend on appeal that Double Jeopardy prohibits retrial because his right to be judged by his first tribunal has not been violated.[40] The Court

35. Arizona v. Washington, 434 U.S. at 508.

36. *See* note 13 and accompanying text *supra.*

37. *Id.;* United States v. Dinitz, 424 U.S. at 609.

38. *Id.* at 609-10.

39. *See* note 13 *supra.*

40. *See* United States v. Tateo, 377 U.S. 463, 467-68 n.4 (1964). In *Tateo,* the Court stated that where a defendant was coerced into pleading guilty at his first trial, his right to be judged by his first tribunal was not violated, 377 U.S. at 466-67, since "a defendant is no

has not ignored this dilemma. Justice Harlan, in *United States v. Tateo* and in *United States v. Jorn,* counseled defendants caught in this predicament to make the mistrial motion,[41] and stated that where a defendant's motion is "necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred."[42]

In *United States v. Dinitz,* the Court elaborated on Justice Harlan's dicta in *Tateo* and *Jorn.* The Circuit Court of Appeals had held that a mistrial motion by a defendant barred retrial where a defendant was compelled to move for a mistrial.[43] Though the defendant was not forced to make the motion due to governmental overreaching,[44] the case is significant because the Supreme Court refused to accept the Circuit Court's recognition of the "Hobson's choice" faced by a defendant when forced to move for a mistrial as invoking Double Jeopardy protection.[45] The Court stated that "the important consideration for the Double Jeopardy Clause"[46] is that the defendant retain control over the proceedings.[47] The Court argued that acceptance of the Circuit's "waiver" theory might cause trial judges to reject all defendants' mistrial motions fearing that granting the request erroneously might place the defendant beyond the reach of further prosecution.[48]

However, the Court recognized that the Double Jeopardy Clause must protect against governmental actions intended to provoke a mistrial motion from a defendant. For the first time, the Court definitively stated that retrial would be barred where "bad-

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less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial." *Id.* at 467. As Justice Goldberg points out in his dissent, the Court's reasoning ignores the fact that the right is important because of the possibility of acquittal. 377 U.S. at 473-74 (Goldberg, J., dissenting).

41. *See* note 40 *supra* and United States v. Jorn, 400 U.S. at 484-85 nn.11 & 12.

42. United States v. Jorn, 400 U.S. at 485 n.12.

43. United States v. Dinitz, 492 F.2d 53, 55-56 (5th Cir. 1974), *rev'd,* 424 U.S. 600 (1976).

44. In *Dinitz,* a defense counsel was expelled from the courtroom for engaging in improper conduct. When defendant's co-counsel stated he was not prepared to proceed, the trial court gave the defendant three alternatives — a stay or recess pending appellate review of the propriety of the expulsion, continuing the trial with co-counsel, or a mistrial. Defendant moved for a mistrial. 424 U.S. at 611.

45. *Id.* at 609-10.

46. *Id.* at 609.

47. *Id.*

48. *Id.* at 610.

faith conduct by the judge or prosecutor" threatens harassment of the defendant by "successive prosecutions or declaration of a mistrial" so as to afford the prosecution a more favorable forum for conviction.[49] In *Lee v. United States*,[50] the Court restated, and conceivably expanded this rule. Applying *Dinitz* principles, the Court stated that where errors which prompted the defendant's motion were "intended to provoke" the motion *or* were otherwise "motivated by bad faith or undertaken to harass or prejudice the defendant,"[51] retrial would be barred.

Analysis of the language employed by the Court in *Lee* raises the question whether the Court was consciously expanding the circumstances where retrial would be barred. Justice Harlan, in *Tateo* and *Jorn*, had stated that the Double Jeopardy Clause would only bar retrial where the judge or prosecutor, fearing that the defendant would be acquitted, performed the overreaching conduct and obtained the mistrial to find a more favorable forum in which to convict.[52] Since the objective of the Double Jeopardy Clause is to prevent successive prosecutions,[53] the strictest analysis of conduct by the government seeking to provoke a mistrial would allow Double Jeopardy protection for a defendant only when the conduct is performed with the intention of gaining more time or another tribunal more favorable to conviction.[54] However, the language of *Lee* could be an attempt by the Court to include those situations where the conduct is performed with the intention of merely insuring conviction. An intention to provoke a mistrial or a wish on the

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49. *Id.* at 611.

50. 432 U.S. 23 (1977).

51. *Id.* at 33-34. The defendant in *Lee* moved to dismiss a defective indictment before jeopardy attached. The motion was tentatively denied, and then granted after jeopardy had attached. 432 U.S. at 25-27. The defendant was retried and convicted. The Court affirmed the conviction, holding Double Jeopardy did not bar retrial. Finding that the dismissal was "functionally indistinguishable" from a mistrial declaration, since the trial court's order contemplated reprosecution, 432 U.S. at 31, the defendant's motion was treated as a motion for mistrial. Since no governmental overreaching by *Dinitz* principles had occurred, retrial was not barred. 432 U.S. at 33-34.

Lee appears to stand for the proposition that negligent conduct by the government is simply not sufficient to bar retrial. The error in drafting the information was characterized as negligence "as prejudicial to the Government as to the defendant." *Id.* at 34. This error was not "the product of the kind of overreaching outlined in *Dinitz*." *Id.*

52. United States v. Jorn, 400 U.S. at 485 n.12; United States v. Tateo, 377 U.S. at 468 n.3.

53. *See* note 14 and accompanying text *supra*.

54. *See* cases cited in note 52 *supra*.

part of the State to get a better day in court may not exist. Conduct motivated by bad faith, intended to harass or prejudice the defendant in the eyes of the jury who will then convict, could, under the language of *Lee*, be sufficient to bar retrial. But such conduct, though thoroughly reprehensible, may not warrant Double Jeopardy protection; the government is not attempting to place the defendant in jeopardy again — they only wish to convict him, not terminate the proceedings before judgment in order to gain another forum.

It can be argued that the rule should be expanded to include bad-faith conduct designed to convict. The defendant still must make a mistrial motion to protect his rights under the Double Jeopardy Clause. Regardless of the intention of the judge or prosecutor, by making the motion, the defendant places himself in the position of being retried if the motion is granted. His right to the judgment of the first tribunal has been violated, and he is once more in jeopardy.

Despite its theoretical appropriateness, the Court has not relied on the expansive language of *Lee*. Instead, in *Divans v. California*,[55] and *United States v. Scott*,[56] Justice Rehnquist cited only the *Dinitz* dicta that the Double Jeopardy Clause protects a defendant from retrial only when governmental actions occur that are intended to provoke mistrial requests.[57] Any reference to bad-faith conduct was omitted.[58] Under Justice Rehnquist's formulation, only conduct performed with the strict intent of provoking the defendant's motion in order to gain another forum would bar retrial. Further, Justice Rehnquist's holding in *Scott* requires submission of issues of factual guilt or innocence to a fact-finder prior to the

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55. 434 U.S. 1303 (1977) (Rehnquist, Circuit Justice). *Divans*, denying a stay pending certiorari, gave no facts. Justice Rehnquist relied on the trial court's finding that error occurred, not conduct intended to force the mistrial motion. *Id.* Justice Rehnquist reiterated this holding once again upon Divans' third application for a stay:

> In the instant motion applicant contends that he has acquired still more information demonstrating the prosecutor's bad faith. Applicant presents, however, only his own assertions to this effect, and none of the moving papers before me contain any findings, which contradict the Superior Court's finding . . . that the prosecutor's error was not calculated to force applicant to move for a mistrial.

Divans v. California, 439 U.S. 1367, 1368 (1978) (Rehnquist, Circuit Justice).

56. 437 U.S. 82 (1978).

57. *Id.* at 94.

58. *See* cases cited in notes 55 & 56 *supra*.

defendant's seeking termination of the proceedings.[59] This conceptually links the "actual" guilt or innocence of the defendant to whether or not the Double Jeopardy Clause prohibits retrial. The right to be judged by the first tribunal would then only be significant to the Court if they are confident of the defendant's innocence. Such a linkage between factual guilt and the Double Jeopardy Clause does not bode well for a defendant whose trial is tainted by governmental overreaching — the issue should be the government's conduct, not the defendant's.

III. THE PRINCIPLE AS APPLIED BY THE LOWER COURTS

Since *Dinitz*,[60] many appeals by defendants have included a claim that governmental overreaching occurred at trial, and the appellate court should bar retrial.[61] The Supreme Court, however, never defined "overreaching"[62] and the language of *Lee* implied, to some courts, that there were two kinds of conduct that could be found to reach the level that would bar retrial. The fact that the principle has remained dicta,[63] and that the Court had never encountered an illustrative factual situation of overreaching,[64] left

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59. *Scott* expressly overruled United States v. Jenkins, 420 U.S. 358 (1975), another Rehnquist opinion. *Jenkins* held that dismissal of an indictment after jeopardy had attached was not appealable by the government if retrial of factual issues would be required upon reversal and remand. *Id.* at 369-70. Rehnquist states in *Scott* that *"Jenkins* was wrongly decided. It placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him . . . ." 437 U.S. at 86-87. *Scott* held that where a defendant seeks to have his trial terminated without any submission to either judge or jury of factual issues of guilt or innocence, an appeal by the government is not barred. 437 U.S. at 101. Rehnquist found that since acquittals, which he termed a factual resolution of the offense charged favoring the defendant, *id.* at 99, have historically been the only bar to retrial, *id.* at 87-91, "legal claims," which cause the public to lose their "right to convict those who have violated its laws," *id.* at 96, 100, do not bar retrial. The dissenting justices were not convinced. They stated that historically or logically there is no basic legal correlation between the application of the Double Jeopardy Clause and a defendant's actual guilt or innocence. *See id.* at 103 (Brennan, J., dissenting).

60. *See* notes 43-49 and accompanying text *supra.*

61. Over 100 cases in appellate courts were surveyed for this Comment.

62. *See* note 11 *supra.*

63. *See* United States v. Martin, 561 F.2d 135, 141-42 (8th Cir. 1977) (Henley, J., dissenting). Judge Henley stated that *Lee, Dinitz* and *Jorn* all "contain dicta" that prosecutorial misconduct may bar retrial, but "the majority cites, and I can find, no Supreme Court case on appropriate facts holding that gross negligence or intentional prosecutorial trial error not calculated to produce a mistrial" can bar retrial. *Id.* at 142.

64. In fact, *Lee* is essentially the only case where the Court has applied the principle, and *Lee* only stated that the errors alleged were not overreaching conduct. *See* note 51

the lower courts to apply a principle without any substantial guidance from the Court.

Many courts disposed of the problem by simply stating that the conduct complained of did not rise to the level of overreaching.[65] Others reasoned that even though prejudicial conduct by the government occurred, the defendant's mistrial motion was not provoked by the conduct, but was made for other reasons.[66] Some opinions stated that the defendants failed to prove actual prejudice to their case resulting from the overreaching conduct.[67] Others weighed the evidence against the defendant, reasoning that a strong case would indicate that the prosecution did not need another forum to convict the defendant.[68]

Most courts recognize that retrial should be barred where a prosecutor or judge intentionally engages in overreaching conduct to force the defendant to move for a mistrial thereby avoiding an acquittal.[69] But such a case is rare; the dilemma arises for courts attempting to apply the principle when it is unclear what motivated the misconduct. *Lee* implied that bad-faith conduct would also bar retrial,[70] but courts are divided as to whether grossly negligent conduct by the prosecutor that provokes a mistrial motion should bar retrial.[71] The Fifth Circuit, in *United States v. Kessler,*

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supra.

65. *See, e.g.,* United States v. Heymann, 586 F.2d 1039, 1040 (5th Cir. 1978) (per curiam); United States v. Weaver, 565 F.2d 129, 133 (8th Cir. 1977); United States v. Kennedy, 548 F.2d 607, 609 & n.1 (5th Cir. 1977); United States v. Mandel, 550 F.2d 1001, 1002 (4th Cir. 1977); United States v. Beasley, 479 F.2d 1124, 1127 (5th Cir. 1973).

66. United States v. Brooks, 599 F.2d 943, 945 (10th Cir. 1979); United States v. Leonard, 593 F.2d 951, 954 (10th Cir. 1979); United States v. Nelson, 582 F.2d 1246, 1249 (10th Cir. 1978); United States v. Crouch, 566 F.2d 1311, 1318, 1320 (5th Cir. 1978); United States v. Cerilli, 558 F.2d 697, 701 (3d Cir. 1977); State v. Harrell, 85 Wis.2d 331, 339-40, 270 N.W.2d 428, 433-34 (1978); Commonwealth v. Myers, 422 Pa. 180, 189-91, 220 A.2d 859, 865 (1966).

67. United States v. Klande, 602 F.2d 180, 183 (8th Cir. 1979); United States v. Davis, 589 F.2d 904, 906 (5th Cir. 1979); Drayton v. Hayes, 589 F.2d 117, 122 (2d Cir. 1979).

68. *See, e.g.,* Commonwealth v. Myers, 422 Pa. 180, 189-91, 220 A.2d 859, 865 (1966).

69. United States v. Leonard, 593 F.2d 951, 954 (10th Cir. 1979); Drayton v. Hayes, 589 F.2d 117, 121 (2d Cir. 1979); United States v. Clayborne, 584 F.2d 346 (10th Cir. 1978); United States v. Crouch, 566 F.2d 1311, 1317 (5th Cir. 1978); Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977); State v. Baylor, 2 Kan. App. 2d 722, 587 P.2d 343, 346 (1978); State v. Harrell, 85 Wis.2d 331, 335, 270 N.W.2d 428, 431 (1978); City of Tucson v. Valencia, 21 Ariz. App. 148, 517 P.2d 106, 111 (1973).

70. *See* notes 54 & 55 and accompanying text *supra.*

71. *Compare* United States v. Martin, 561 F.2d at 140 *with* Tabbs v. State, 43 Md. App. 20, 403 A.2d 796 (1979).

barred retrial where fabricated evidence had been admitted at trial on a foundation of inadmissible hearsay.[72] Finding that such misconduct was intentional, the court, nevertheless, included in their definition "grossly negligent conduct . . . which caused aggravated circumstances to develop which seriously prejudices a defendant, causing him to reasonably conclude that continuation of the tainted proceeding would result in conviction,"[73] a statement that shows an extraordinary misreading of *Dinitz*.[74] The Eighth Circuit in *United States v. Martin*[75] barred retrial where prejudicial grand jury testimony had been read to the jury over continuing objection, and immediately thereafter, the defendant had moved for a mistrial.[76] The court stated that this was grossly negligent conduct, "best described as prosecutorial error undertaken to harass or prejudice the defendant,"[77] which left the defendant "no choice"[78] but to move for a mistrial. In both cases, the courts did not examine whether the government was intentionally trying to obtain a more favorable forum for conviction or gain more time.[79] These opinions have been criticized by other courts for failing to consider that ultimately the Double Jeopardy Clause only protects against successive prosecutions.[80] Critics argue that a Double Jeopardy

72. United States v. Kessler, 530 F.2d at 1257. In 1973, the Fifth Circuit first stated that the misconduct provoking the mistrial motion could be either intentional or grossly negligent and constitute overreaching. United States v. Beasley, 479 F.2d 1124, 1127 (5th Cir. 1973).

73. *Id.* at 1256-57.

74. The language cited in *Kessler*, which cites back to *Dinitz*, is exactly the opposite of what the Supreme Court stated in *Dinitz*. The "reasonable conclusion" defendants drew, that "continuation of the trial may lead to conviction," was the "Hobson's choice" that defendants considered when making a mistrial motion due to error, not overreaching. The Court recognized that it is truly a "Hobson's choice," but stated expressly that this interest would not preclude retrial. *Compare* Kessler, 530 F.2d at 1256 *with* Dinitz, 424 U.S. at 409-10.

75. 561 F.2d 135.

76. *Id.* at 137, 140.

77. *Id.* at 140.

78. *Id.*

79. *See* United States v. Kessler, 530 F.2d at 1256; United States v. Martin, 561 F.2d at 140.

80. *See* United States v. Martin, 561 F.2d at 141 (Henley, J., dissenting), where the dissent states that retrial cannot be barred where the court does not find that the essential design of the prosecution was to secure a more favorable forum. Tabbs v. State, 43 Md. App. 20, 403 A.2d 796 (1979) is a virtual treatise on the subject of why grossly negligent conduct cannot constitute overreaching that bars retrial. Judge Moylan follows the principle through Supreme Court case law, holds the Fifth Circuit cases up to an unforgiving light (exposing the misreading in *Kessler* of *Dinitz*) and cites "The Great Weight of Authority in the State

remedy is inappropriate where there has been no specific intent to place the defendant in jeopardy.[81] Because gross negligence by its terms lacks the intent to gain another forum, the Double Jeopardy Clause does not apply.[82]

Kessler and *Martin* are the only cases where Circuit courts have barred retrial due to overreaching conduct, though hundreds of appeals have been filed stating the claim.[83] Most appeals encounter problems of proof, and the inescapable fact that prohibition of retrial is a drastic remedy which courts are loathe to employ unless the record of the trial below "shocks the conscience" of the appellate court.[84]

IV. The Problems of Proof and Remedy

The burden of proving that governmental overreaching provoked a defendant's mistrial motion lies with the defendant.[85] Such a claim is extremely difficult to prove, because it requires substantial documentation of misconduct at trial and because the defendant must prove the state of mind of the judge or prosecutor.

The first hurdle is proof that the conduct rose to the level of overreaching conduct. Prosecutorial misconduct will not serve as a basis for barring retrial if it is viewed by an appellate court as simply error or mistake.[86] The conduct must infer intention by the prosecution or the court to secure another, more favorable tribunal. Thus, a defendant has a second hurdle; besides establishing overreaching conduct, he must show that this conduct was performed with the intention of forcing him to move for a mistrial.[87] Finally, he must establish that this overreaching forced him to move for a mistrial.

In attacking the first obstacle, defendants should recognize that prosecutors, though ethically interested in justice, are realisti-

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Courts." He deals with the case at bar in three paragraphs.

81. *See, e.g.*, Commonwealth v. Potter, 478 Pa. 251, 265-67, 386 A.2d 918, 925-26 (1978) which expressly overruled Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977), which had held that grossly negligent conduct could constitute overreaching barring retrial.

82. *Id.*

83. *See* Alschuler, *supra* note 18.

84. *See* text accompanying note 92 *infra.*

85. United States v. Rumpf, 576 F.2d 818, 823 (10th Cir. 1978), *cert. denied* 439 U.S. 893 (1978).

86. *See, e.g., id.* at 822.

87. *See* cases cited in note 69 *supra.*

cally interested in winning their cases and gaining convictions, and a single improper comment, question or reference will not be viewed as overreaching conduct by an appellate court. Defendants most often lose on appeal because the appellate court will not prohibit retrial where a zealous prosecutor overstepped the bounds of ethical conduct once or twice.[88] The defense should document a series of instances of improper conduct which constitute overreaching when viewed as a whole. The best case establishes a series of events where the conduct becomes more flagrant as the trial continues, buttressed with argument that this conduct occurred as the prosecution's case deteriorated.[89] A defendant should also document for the appellate court the prejudice that resulted to his case due to the conduct, and the improbability of acquittal due to the prosecution's actions.[90]

The second hurdle, proving the state of mind of the actor, is crucial, and immensely difficult. Since the prohibition or retrial is such a drastic remedy, many courts require clear and convincing proof that the prosecution, by its conduct, was attempting to force a mistrial. Once again, a carefully constructed argument, illustrating successive instances of misconduct will allow an appellate court to infer the requisite intent.[91] An ideal claim would expose a governmental scheme to force a mistrial[92] based on a crescendo of events, with conduct that becomes more and more flagrant, until the defendant moves for the mistrial.

Finally, a defendant must prove that his mistrial motion was forced upon him by the conduct. Some courts view the totality of the circumstances leading to the mistrial motion to determine whether the motion was actually caused by the conduct.[93] If other factors are found that were not in the direct control of the prosecution,[94] or if the mistrial motion does not appear provoked directly

88. United States v. Garza, 603 F.2d 578, 580 (5th Cir. 1979).

89. United States v. Gaultney, 606 F.2d 540, 547 (5th Cir. 1979); United States v. Kessler, 530 F.2d at 1256.

90. United States v. Klande, 602 F.2d 180, 183 (8th Cir. 1979); United States v. David, 589 F.2d at 906; Drayton v. Hayes, 589 F.2d at 122.

91. *See* Brief for Relator-Appellant at 23, *appeal dismissed*, People v. Petrucelli, 50 N.Y.2d 927 (1980).

92. United States v. Nelson, 582 F.2d at 1249. In *Nelson*, this was the standard used by the court to determine the claim.

93. United States v. Gaultney, 606 F.2d at 547.

94. *See, e.g.*, United States v. Cerilli, 558 F.2d at 701 (mistrial declared due to illness of juror).

by conduct, the claim will fail.[95]

The institutional problems faced by defendants seeking protection from the Double Jeopardy Clause are several. First, appellate courts have indicated reluctance to bar retrial in these circumstances, fearing that trial judges will begin to reject mistrial motions by defendants because of the possible prohibition against retrial.[96] Appellate courts also give great deference to the trial judge's findings of fact concerning the mistrial, setting them aside only if they appear clearly erroneous. But at the trial level, a judge who has a continuing relationship with a prosecutor, may be loathe to find that prosecutor guilty of overreaching on the record.[97] Appellate courts will be equally as reluctant to characterize judicial conduct as overreaching, due to the belief that fellow judges should be protected by their brethren, and that open criticism of a judge may lead to public disrespect for the judiciary as a whole.[98] In addition, proof needed for the claim may be in the sole control of the government,[99] and tremendous difficulty can be expected if the defendant attempts discovery of this evidence, if he is even aware of its existence.[100] Finally, it should be recognized that the defendant is impugning the motives of the government in the same system that injured him initially. He is asking the same institutional system to recognize its misconduct and grant relief in the form of a serious sanction.

The relief requested may be the reason why these claims usually fail. Since the clause bars retrial, the defendant's offense, no matter how egregious, is being forgiven due to the excesses of the state. Though appellate opinions have not expressed this as a rea-

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95. United States v. Brooks, 599 F.2d at 945; United States v. Leonard, 593 F.2d at 954; United States v. Nelson, 582 F.2d at 1249; United States v. Crouch, 566 F.2d at 1318, 1320.

96. United States v. Garza, 603 F.2d at 581; United States v. Crouch, 566 F.2d at 1321.

97. United States v. Phillips, 600 F.2d 186, 187 (9th Cir. 1979); United States v. Davis, 589 F.2d at 906; Moroyoqui v. United States, 570 F.2d at 864. The problem of institutional relationships between judges and prosecutors was recognized by Justice Marshall in *Somerville*, 410 U.S. at 482 n.1.

98. *See* Alschuler, *supra* note 19, at 687. Alschuler documents the fact that in appellate opinions which reverse convictions due to judicial misconduct, the reason for reversal is rarely stated in the opinion, and that this is the result of a "fraternal, protective spirit among judges."

99. United States v. Rumpf, 576 F.2d at 823.

100. *Cf. id.*, where the Court suggests that although the burden of proof lies with the defendant, that this "may have to give way" where the proof may be in the sole control of the government.

son for the denial of the claims, the fact that only two cases in the circuit courts have barred retrial leads one to suspect that courts, though acknowledging that governmental misconduct exists, believe that barring retrial is simply too drastic as a remedy. To many appellate courts, allowing retrial appears as a more equitable compromise. A defendant will finally receive a fair adjudication, and the public interest is not completely frustrated.

A finding of misconduct and the granting of a new trial does not adequately address the problem. It does not deter governmental misconduct, that appears to be occurring with alarming frequency.[101] Nor does it eliminate the unfair burden on the defendant which the Clause was specifically designed to prevent — continued anxiety, humiliation and expense.[102] Likewise, the defendant's right to be judged by the first tribunal is ignored by the compromise of retrial.

V. Denial of Mistrial Motion and Conviction — Problems of Appellate Review

The Supreme Court has considered only whether the Double Jeopardy Clause bars retrial where a defendant's mistrial motion due to governmental overreaching has been granted by the trial judge.[103] If the motion is denied, and the defendant is convicted, the defendant's right to be judged by the first tribunal has not been violated.[104] Does the rendering of judgment alone justify retrial?

Burks v. United States[105] provides reasoning to bar retrial in such a situation. It held that the Double Jeopardy Clause prohibits retrial when an appellate court finds that the evidence deduced at trial is legally insufficient to sustain a verdict of conviction.[106] The appellate court had remanded the case for a directed judgment of acquittal or a new trial, the defendant having requested retrial as

101. *See* note 18 and accompanying text *supra;* note 124 and accompanying text *infra.*

102. *See* note 14 and accompanying text *supra.*

103. *See* United States v. Dinitz, 424 U.S. at 611.

104. *See* United States v. Tateo, 377 U.S. at 466-68.

105. Burks v. United States, 437 U.S. 1 (1978).

106. *Id.* at 15-16. *Accord* United States v. Scott, 437 U.S. at 91-92. Justice Rehnquist characterizes the holding of *Burks* as one of the "venerable principles of double jeopardy jurisprudence" and states that this holding is the *only* basis for appeal by a defendant who has been convicted which can bar retrial.

one avenue of relief.[107] The defendant appealed the remand, arguing that the appellate reversal of his conviction was the "operative equivalent" of a trial court judgment of acquittal.[108] The Court agreed, stating "[t]o hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court."[109]

Burks' reasoning could be employed by a convicted defendant whose mistrial motion had been denied at trial.[110] The threshold argument could be that the trial court erred in denying the mistrial motion, and that if the appellate court found that the mistrial motion by the defendant had been provoked by governmental overreaching, the conviction should be reversed, and retrial prohibited.

There is dicta in *Burks,* however, that the Double Jeopardy Clause is not violated if a conviction is reversed due to trial error and retrial ordered.[111] *Burks* defined such a reversal as "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or *prosecutorial misconduct.*"[112] Thus, a defendant who wishes to argue that if an appellate court finds that overreaching occurred which provoked his mistrial motion, then a mistrial should have been granted and double jeopardy should prohibit his retrial, will have to combat the dicta of *Burks,* and the case law supporting the dicta.[113] A defendant encountering judicial overreaching may be

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107. Burks v. United States, 437 U.S. at 4.

108. *Id.* at 5.

109. *Id.* at 11. To reach this holding, the Court reviewed a line of case law that was procedurally inconsistent upon disposition after appeal. Where defendants on appeal requested retrial as alternative relief, they were retried after successful appeals; if retrial was not requested, retrial still occurred in some cases. Forman v. United States, 361 U.S. 416 (1960); Yates v. United States, 354 U.S. 298 (1957); Sapir v. United States, 348 U.S. 373 (1955); Bryan v. United States, 338 U.S. 552 (1950). These cases are now overruled "to the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency . . . ." 437 U.S. at 18.

110. This argument has been made to appellate courts, but has not been successful. *See, e.g.*, Brief for Relator-Appellant, *Petrucelli, supra* note 91, at 20-21.

111. United States v. Burks, 437 U.S. at 13-15.

112. *Id.* at 15 (emphasis added).

113. *Burks* states that the reversal due to trial error does not cause retrial to be barred because such a reversal determines "nothing with respect to the guilt or innocence of the

caught in an impossible trap. A judge, engaging in overreaching conduct, who merely wishes to insure conviction and not gain another forum, is unlikely to grant a mistrial motion based on his own overreaching conduct. Thus, the defendant is convicted, and may fail on appeal due to the dicta of *Burks* expressing the holding of *United States v. Tateo*,[114] that retrial is not barred where reversal is due to error in the proceedings.

No cases have been found where retrial has been barred after a successful appeal of a conviction. Partly, this is because in the vast majority of cases claiming prosecutorial overreaching, the appellate court assumes that if the mistrial motion was not granted at trial, then the misconduct was not of sufficient gravity to warrant the remedy.[115] There are, in addition, only a handful of cases where judicial overreaching is alleged,[116] and they do not establish a pattern on appeal.

In summary, a defendant who is denied a mistrial declaration, and is convicted, faces an additional problem upon appeal. *Burks* states that the reason why reversal for trial error does not prohibit retrial is that such a reversal determines "nothing with respect to the guilt or innocence of the defendant."[117] Though it is difficult, historically, to determine how the factual guilt or innocence of the accused pertains to application of the Double Jeopardy Clause,[118] a

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defendant," *id.* at 15, unlike the reversal due to insufficient evidence, the "operative equivalent" of acquittal. *Id.* at 5.

114. 377 U.S. at 465. *See* note 40 *supra* for discussion of this case. This is one of the cases relied upon by the Court in *Burks* for the dicta concerning reversals due to trial error. 437 U.S. at 14. *Tateo*, along with United States v. Ball, 163 U.S. 662, 672 (1896), states that the Double Jeopardy Clause is not violated by retrial of a defendant where the conviction is reversed due to an error in the proceedings. 377 U.S. at 465. Underlying the opinion of *Tateo* is Justice Harlan's belief that the defendant in *Tateo* was guilty in fact; "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear." *Id.* at 466.

115. *See, e.g.*, United States v. Crouch, 566 F.2d at 1315-16, where the defendant argued that the trial court judge declared the mistrial for personal reasons, not at the defendant's request. The Circuit Court responded that "this court will not review the mental processes of a judge. A judge's statement of his mental processes is absolutely unreviewable." *Id.* at 1316. There may be so few cases due to the inability to prove the intent of a trial court judge.

116. Since a trial court judge's findings will not be set aside unless clearly erroneous, *see* text accompanying note 97 *supra*, it is assumed that if the trial court judge did not grant the motion for mistrial on the grounds of prosecutorial overreaching, the misconduct did not rise to the level necessary to bar retrial.

117. *See* note 113 *supra*.

118. *See* United States v. Scott, 437 U.S. at 103 (Brennan, J., dissenting).

reasonable conclusion would be that although the defendant has attempted to control the proceedings by his mistrial motion, denial of that motion may determine that he can be placed in jeopardy again, regardless of the overreaching conduct.

CONCLUSION

Commentators exploring the problem of prosecutorial misconduct agree on one point — such misconduct occurs frequently.[119] The remedy of prohibiting retrial is presently viewed by the courts as only appropriate when the judge or prosecutor is seeking a more favorable forum. Though this is doctrinally logical,[120] it presents a case nearly impossible to prove, and therefore, does not deter the misconduct.

The burden of proof lies with the defendant as to the intent of the judge or prosecutor,[121] and this intent requirement serves to partially insulate the appellate process against successful claims. Since it is difficult to show that the prosecutor or judge wanted to obtain another forum, claims fail.[122] Attention should not be focused on such a subjective element. If the conduct repeatedly violates ethical norms, and causes the defendant to lose his right to be judged by the first tribunal, this conduct should be deterred. Lesser sanctions have proved completely ineffective.[123]

One Supreme Court Justice has suggested that a prophylactic rule, such as that established in *Downum v. United States*,[124] may be necessary to provide courts with notice that certain conduct will bar retrial.[125] *Downum* held that retrial is barred when a mistrial

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119. R. POUND, CRIMINAL JUSTICE IN AMERICA 187 (1930); Alschuler, *supra* note 19, at 631; Hobbs, *Prosecutor's Bias: An Occupational Disease*, 2 ALA. L. REV. 40 (1949); Singer, *Forensic Misconduct by Federal Prosecutors — And How It Grew*, 20 ALA. L. REV. 227 (1968).

120. *See* test accompanying notes 52-55 *supra*.

121. *See* text accompanying note 87 *supra*.

122. *See* text accompanying notes 91-92 *supra*.

123. Appellate reversal and retrial have been found by commentators to be completely ineffective in controlling prosecutorial misconduct. "Appellate justices time and time again have condemned poor conduct and warned prosecutors to keep within the bounds of propriety. Later opinions reflect the result — frustrating failure." Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 487 (1959). *See* Alschuler, *supra* note 19, at 629.

124. 372 U.S. 734 (1963).

125. *Downum* may perhaps be read as stating a prophylactic rule. While the evil to be avoided is the intentional manipulation by the prosecutor of the availabil-

is declared because a crucial prosecution witness is unable to testify.[126] The holding of *Downum* has given notice to the lower courts and still serves as a prophylactic rule, barring retrial on these facts. Unfortunately, the present Court appears unwilling to pursue this course.

The interests of the defendant to be judged by his first tribunal and the public in fair trials designed to end in just judgments must be balanced by our appellate courts with a realistic eye to what occurs all too frequently in our trial courts. "Lawless enforcement of the law" by the "officials most definitely responsible for law enforcement" causes public disrespect for the entire legal process.[127] When judges and prosecutors violate their sworn oaths,[128] and engage in unethical conduct that deprives a defendant of a full and fair trial, the defendant is not the only victim — the jurors, spectators and the public become aware that the law can be violated with impunity in the courtroom, by those sworn to protect and uphold it.

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> ity of his witnesses, it may be extemely difficult to secure a determination of intentional manipulation. Proof will inevitably be hard to come by. And the relations between judges and prosecutors in many places may make judges reluctant to find intentional manipulation. Thus, a general rule that the absence of crucial prosecution witnesses is not a reason for declaring a mistrial is necessary. Although the abuses of misdrawing indictments are less apparent than those of manipulating the availability of witnesses, I believe that . . . a similar prophylactic rule is desirable here.

Illinois v. Sommerville, 410 U.S. at 482 n.1 (Marshall, J., dissenting).

126. 372 U.S. at 737-38.

127. NATIONAL COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 268 (1931).

128. *See* A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 7-13. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."