Duquesne Law Review

Volume 22 | Number 2 Article 11

1984

Constitutional Law - Fifth Amendment - Double Jeopardy - Prosecutorial Misconduct

Pamela K. Wiles

Follow this and additional works at: https://dsc.duq.edu/dlr

 Part of the Law Commons

Recommended Citation
Pamela K. Wiles, *Constitutional Law - Fifth Amendment - Double Jeopardy - Prosecutorial Misconduct*, 22 Duq. L. Rev. 549 (1984).
Available at: https://dsc.duq.edu/dlr/vol22/iss2/11

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

CONSTITUTIONAL LAW—FIFTH AMENDMENT—DOUBLE JEOPARDY—PROSECUTORIAL MISCONDUCT—The Supreme Court of Pennsylvania has held that a finding on the defendant's argument for discharge on double jeopardy grounds is premature, but indicated that the defendant cannot be retried if the prosecutorial misconduct is found on remand to have been intentional or in bad faith.

Commonwealth v. Wallace, ____ Pa. ____, 455 A.2d 1187 (1983).*

On August 20, 1979, William Wallace, Jr. was arrested in Wheeling, West Virginia as a result of a robbery and shooting incident on August 17, 1979 in Canonsburg, Pennsylvania.[1] Wallace was tried in the Court of Common Pleas of Washington County commencing on December 3, 1980 on the charges of double homicide, robbery and criminal conspiracy.[2] Due to the inability of the jury to reach a verdict, a mistrial resulted.[3] At the second trial, which began on February 2, 1981, Wallace was convicted of murder of the first degree, murder of the second degree, robbery and criminal conspiracy.[4] The jury returned a sentence of death.[5] At an evidentiary hearing, the Honorable John F. Bell denied Wallace's post-verdict motion for a new trial based on after-discovered evidence.[6] Wallace

---

* Due to the unavailability of the *Wallace* opinion in the PENNSYLVANIA STATE REPORTS at the time of publication, citations to this reporter have been omitted.

1. Commonwealth v. Wallace, 455 A.2d 1187, 1188 (1983). Wallace was charged with the deaths of a shop owner and his employee who were found shot in the shop owner's store. They had been shot with a .32 caliber weapon. Witnesses observed two men (one in a trench coat, with the general appearance of Wallace) flee from the store carrying handguns and drive away in a car. The day's receipts of $227.00 had been taken from the cash register. Wallace was arrested while standing by Henry Brown's car, which matched the description of the car used in the robbery. There was evidence that Wallace was seen earlier that day wearing a beige trench coat, carrying a .32 caliber handgun and riding in Brown's car with Brown. Brown's fingerprint was found on the store's cash register. *Id.* at 1188-89.

2. *Id.* at 1188. *See* Commonwealth v. Wallace, No. 921, slip op. (C.P. Wash. Co. 1979).

3. 455 A.2d at 1188.

4. *Id.*

5. *Id.* at 1189. Pursuant to 42 PA. CONS. STAT. ANN. § 9711(d) (Purdon 1982), one of the aggravating circumstances which the jury may consider in the imposition of the death penalty is that the killing was committed in the perpetration of felony. The *Wallace* court noted that when the jury found that the aggravating circumstance that killing was committed in the perpetration of a felony outweighed any mitigating circumstances, the sentence of death was mandated by 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (Purdon 1982). 455 A.2d at 1188-89.

6. 455 A.2d at 1189.

was sentenced to death.[7] Due to the imposition of the death penalty, the case was appealed directly to the Supreme Court of Pennsylvania.[8]

The opinion of the court was delivered by Mr. Justice Larsen.[9] Although Wallace did not specifically challenge the sufficiency of the evidence to sustain the convictions, Justice Larsen began by conducting an independent review of the sufficiency of the evidence, in accordance with *Commonwealth v. Zettlemoyer*.[10] The court held that the evidence adduced at the second trial, considered with all reasonable inferences in the Commonwealth's favor,[11] was sufficient to sustain the convictions.[12]

The court proceeded to address Wallace's contention that the district attorney failed to (1) disclose the existence and identity of the Commonwealth's chief witness, Gorby, the witness' criminal record and the existence of other exculpatory evidence, and (2) correct false testimony of the witness Gorby.[13] Relying on *Brady v.*

---

7. *Id.*

8. *Id. See* 42 PA. CONS. STAT. ANN § 722 (Purdon 1982) (providing that the Supreme Court of Pennsylvania has exclusive jurisdiction of an appeal from a court of common pleas final order imposing a death sentence).

9. 455 A.2d at 1188. Justice Larsen was joined in the majority opinion by Justices Roberts, Flaherty and Hutchinson; Justice McDermott concurred in the result; Justice Nix filed a concurring opinion; Chief Justice O'Brien did not participate in the decision. 455 A.2d at 1193.

10. *Id.* at 1189 (citing Commonwealth v. Zettlemoyer, ___ Pa. ___, ___ n.3, 454 A.2d 937, 942 n.3 (1982)). In *Zettlemoyer*, the supreme court acknowledged the statutory obligation imposed on the court by 42 PA. CONS. STAT. ANN. § 9711(h) (Purdon 1982) to review the sufficiency of the evidence to sustain a first degree murder conviction even if the appellant does not contest the sufficiency of the evidence. ___ Pa. at ___ n.3, 454 A.2d at 942 n.3.

11. *See* Commonwealth v. Kichline, 468 Pa. 265, 361 A.2d 282 (1976), where the court held that the test to be applied when reviewing the sufficiency of the evidence to sustain a first degree murder conviction is " '[W]hether, reviewing all of the evidence admitted at trial in the light most favorable to the Commonwealth, there is sufficient evidence to enable the trier of fact to find every element of the crime beyond a reasonable doubt.' " *Id.* at 271, 361 A.2d at 285-86 (quoting Commonwealth v. Bastone, 466 Pa. 548, 552, 353 A.2d 827, 829 (1976)).

12. 455 A.2d at 1189-90. The court considered the evidence introduced at the second trial including testimony given by the Commonwealth's key witness, Olen Clay Gorby, an inmate at the Washington County Jail where Wallace was detained after his arrest. The court identified the most crucial testimony of the prosecution as that of Gorby who testified that Wallace boasted to him of robbing the store with Brown, shooting the store owner who lunged at him, and shooting the employee in the store to prevent her from identifying him. Gorby also testified that Wallace told him he owned a .32 caliber gun, which he had hidden, and that he was considering killing Brown, whom he considered to be "the only real evidence against him." *Id.*

13. *Id.* at 1190. *See also* Brief for Appellant at 49-60, Commonwealth v. Wallace, 455 A.2d 1187 (1983) (contending that such prosecutorial misconduct warranted Wallace's dis-

Maryland,[14] the court held that the district attorney's failure to correct certain false testimony and to provide defense counsel with exculpatory evidence deprived Wallace of his right to a fair trial, and granted a new trial.[15]

The court substantiated its finding by quoting the *Brady* holding that there is a violation of due process when the prosecutor, irrespective of his good or bad faith, supresses evidence favorable to the accused which is material to either guilt or punishment.[16] The court continued by recognizing the principle that the prosecutor has an affirmative duty to disclose exculpatory information to the defense and to correct false testimony of a witness,[17] and further, that the prosecutor's office is an entity and, as such, the knowledge of one member of the office is imputed to all.[18]

Justice Larsen indicated that two of the three situations which constitute a violation of due process under *Brady* were present in this case: the prosecution achieved a conviction through the use of perjured or materially false testimony; and the prosecutor was unresponsive to requests by the defense for specific exculpatory evidence.[19] Discussing the first violation, the court said false testi-

---

charge on the ground of double jeopardy). Justice Larsen addressed the double jeopardy issue later in the court's opinion. *See infra* notes 33-39 and accompanying text.

14. 373 U.S. 83, 87 (1963). In *Brady*, the United States Supreme Court decided whether the suppression by the prosecution of an extrajudicial confession of a defendant's accomplice, notwithstanding a request by the defendant's counsel to review exculpatory statements, was a denial of the due process clause of the fourteenth amendment. The Court, by extending Mooney v. Holohan, 294 U.S. 103 (1935), held that the suppression was in violation of due process. 373 U.S. at 87.

15. 455 A.2d at 1190. The court, citing Commonwealth v. Cohen, 489 Pa. 167, 413 A.2d 1066 (1980), and Commonwealth v. Hoskins, 485 Pa. 542, 403 A.2d 521 (1979), noted that correctness of the trial court's rulings did not bear on the court's review of the evidence for sufficiency even though the trial court's rulings concerned constitutional issues. 455 A.2d at 1190 n.2.

16. 455 A.2d at 1190. Justice Larsen wrote: "the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Id.* (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). *See* 1 A.B.A. STANDARDS FOR CRIM. JUST. 3:36, Standard 3-1.1(c) which Justice Larsen cited as imposing a duty on the prosecution to seek justice, not merely to convict. 455 A.2d at 1190.

17. *See* Commonwealth v. Hallowell, 477 Pa. 232, 237, 383 A.2d 909, 911 (1978); PA. R. CRIM. P. 305D; 1 A.B.A. STANDARDS FOR CRIM. JUST. 3:36, Standard 3-1.1(c).

18. 455 A.2d 1190 (citing Commonwealth v. Hallowell, 477 Pa. 232, 237-38, 383 A.2d 909, 911 (1978) and Giglio v. United States, 405 U.S. 150, 154 (1972)).

19. 455 A.2d at 1190. *See* United States v. Agurs, 427 U.S. 97, 103 (1976). The third situation in which the *Brady* principle applies, but which is inapplicable to this case, is when the defense makes no special request for exculpatory evidence but the prosecutor knows, or has reason to believe, that he had evidence tending to exculpate a defendant. 455 A.2d at 1190 n.3. *See also infra* notes 46-50 and accompanying text.

mony is found material, resulting in the necessity for a new trial, if the false testimony could affect the judgment of the jury "in any reasonable likelihood."[20] The court found that testimony which the district attorney knew or should have known was false, was elicited and allowed to stand uncorrected by the district attorney.[21] In so doing, the court identified testimony rendered by the Commonwealth's chief witness, Olen Clay Gorby, and found that the prosecution failed to correct Gorby's statements when he falsely testified at the second trial that: he had been in prison since his arrest in November of 1979;[22] he had pleaded guilty to everything he had ever done;[23] he had not fired any shots during a previous incident for which he had been arrested;[24] and a plea bargaining recommendation of five to ten years imprisonment had been made on charges stemming from a prior arrest.[25] The court concluded that Gorby's reliability as a witness could be determinative of the jury's finding Wallace guilty or innocent and thus disclosure of evidence affecting Gorby's credibility was found to fall within the rule of *Brady*.[26]

The court also found that specific requests by defense counsel, in both the first and second trials, were repeatedly ignored by the district attorney's office, constituting a violation of the second *Brady* situation.[27] The court noted that in the first trial defense counsel attempted to discover if a "jailhouse confession" had been made

---

20. 455 A.2d at 1190, 1191. *See* Giglio v. United States, 405 U.S. 150, 154 (quoting Napue v. Illinois, 360 U.S. 264 (1959)).

21. 455 A.2d at 1191.

22. *Id.* In fact, the court found that Gorby had been released for a three month period in 1980 to work as an undercover agent for the Federal Bureau of Alcohol, Tobacco and Firearms. *Id.*

23. *Id.* The court also found that while Gorby was released for work as an undercover agent, he was arrested and charged with eleven counts of burglary to which he did not plead guilty until after Wallace's trial. *Id.*

24. *Id.* Gorby was arrested in November of 1979 on numerous charges stemming from an incident at a golf course in Washington County. The court found that, contrary to his testimony at the second trial, Gorby had discharged a gun at least twice during the incident. *Id.*

25. *Id.* Gorby, in actuality, received only a ten year probation on the charges. *Id.*

26. 455 A.2d at 1190, 1191. In so holding, the court cited as precedent Giglio v. United States, 405 U.S. 150, 153 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959), and Commonwealth v. Cain, 471 Pa. 140, 153, 369 A.2d 1234, 1240 (1977)).

27. 455 A.2d at 1192. In the second *Brady* situation, the prosecutor fails to respond to requests by defense counsel for specific exculpatory evidence. The court recognized the following principle set forth in United States v. Agurs: If the subject of defense counsel's request is material (or there is a substantial basis for materiality), it is reasonable to require the prosecutor to either submit the issue to the trial judge for determination or to provide it to the defense. 455 A.2d at 1192. *See* United States v. Agurs, 427 U.S. 97, 106 (1976).

by Wallace.[28] However, in response, the Commonwealth ignored the request, rather than challenge the appellant's right to discover the requested information and have the trial court make the determination.[29] The court also noted defense counsel's request for discovery regarding the criminal records of witnesses,[30] and found that the district attorney's office failed to reveal eleven burglary charges pending against the witness Gorby.[31] The court held that the district attorney's unilateral determination that the pending burglary charges were not discoverable was a violation of *Brady* principles since the defendant was entitled to know of any criminal charges pending against the government witness bearing upon his possible motivation for testifying and, therefore, his veracity.[32]

When confronted with the issue of whether the misrepresentation and nondisclosure by the district attorney constituted grounds for discharge by reason of double jeopardy, Justice Larsen held that such a remedy would be drastic and premature and that the award of a new trial was sufficient.[33] However, he further held that the granting of a new trial was without prejudice to Wallace's right to petition the lower court for discharge on double jeopardy grounds prior to reprosecution.[34] The court found that although the lower court had determined that the prosecutor had not intentionally misled the court and the jury, no such finding had been made with regard to the motivation of the district attorney's office at the first pre-trial and trial.[35] Justice Larsen ruled that the lower court had erred in not addressing the issue of prosecutorial misconduct at the first trial, noting that the issue was not rendered moot by a declaration of mistrial due to a hung jury.[36] He stated that a ruling that the prosecutorial misconduct at the first trial did not prejudice the defense might be valid if the district attorney's representations were found simply to be mistaken and not inten-

---

28. 455 A.2d at 1192. Requests for discovery were made by the defense pursuant to PA. R. CRIM. P. 305, as well as requests at oral argument on the discovery motion. 455 A.2d at 1192.

29. 455 A.2d at 1192. The court noted that PA. R. CRIM. P. 305A requires that the prosecution challenge the defense's right to discover the requested information, rather than ignore it. 455 A.2d at 1192.

30. 455 A.2d at 1192.

31. *Id.*

32. *Id.*

33. *Id.* at 1193.

34. *Id.*

35. *Id.*

36. *Id.*

tional or in bad faith.[37] However, if the representations were found to be intentional or in bad faith, "the taint of 'prosecutorial overreaching' would not have been dissipated by subsequent prosecution."[38]

Justice Larsen based his conclusion on the fact that the existence of the prosecutor's chief witness, Gorby, was not revealed to defense counsel at the first trial despite specific requests for jailhouse confessions, and that the district attorney informed the court at the first trial that his office first became aware of Gorby "probably a month ago."[39] Because there was evidence that the district attorney had met with Gorby and had had his statement transcribed five months prior to the first trial, the court questioned the truthfulness of the district attorney's representation.[40]

In a concurring opinion,[41] Justice Nix indicated that he would grant Wallace a new trial but preclude him from petitioning the lower court for discharge on double jeopardy grounds.[42] In so holding, Justice Nix reasserted his objection to the scope of protection under double jeopardy provided by the majority.[43] The Justice further cited *Oregon v. Kennedy*[44] as overruling the federal "prosecutorial overreaching" standard of double jeopardy for barring retrial which was relied upon by the majority.[45]

Two significant issues were therefore raised in *Wallace*. First, was Wallace deprived of a fair trial by the district attorney's failure to correct false testimony and to provide the defendant with exculpatory evidence? Second, could the misrepresentation and

---

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 455 A.2d at 1193-94 (Nix, J., concurring).

42. *Id.*

43. *Id.* Justice Nix has repeatedly expressed the opinion that prosecutorial misconduct is generally a violation of due process and not jeopardy; double jeopardy only becomes an issue where the prosecutorial misconduct prevents the jury from reaching a verdict. *See* Commonwealth v. Hoskins, 494 Pa. 600, 601, 432 A.2d 149, 150-51 (1981) (Nix, J., Opinion in Support of Affirmance); Commonwealth v. Lee, 490 Pa. 346, 350-51, 416 A.2d 503, 505-06 (1980) (Nix, J., concurring); Commonwealth v. Starks, 490 Pa. 336, 344, 416 A.2d 498, 502 (1980) (Nix, J., dissenting); Commonwealth v. Potter, 478 Pa. 251, 287, 386 A.2d 918, 936 (1978) (Nix, J., Opinion in Support of Reversal).

44. 456 U.S. 667 (1982). *See infra* notes 66-85 and accompanying text for a discussion of *Kennedy*.

45. 455 A.2d at 1194 (Nix, J., concurring). The justice noted that the overruled "prosecutorial overreaching" standard was an "exception to the 'manifest necessity exception' to the general rule that when a mistrial is declared over the defendant's objection, retrial is barred." *Id.*

nondisclosure by the district attorney necessitate Wallace's discharge on double jeopardy grounds?

With regard to the first issue, the United States Supreme Court has identified three types of situations in which a prosecutor may violate due process by suppressing evidence favorable to an accused which is known during trial by the prosecutor but not the defense.[46] When the case involves either (1) perjured testimony, or (2) a request by the defense for specific evidence which is withheld by the prosecution, there is a violation of due process requiring a new trial if the perjured testimony might have affected the jury's judgment or the suppressed evidence might have affected the trial's outcome.[47] In the third type of situation, where the defense makes no specific request for exculpatory information,[48] a higher standard of materiality is applied:[49] nondisclosure of the evidence by the prosecution is a violation of due process only "if the omitted evidence creates a reasonable doubt that did not otherwise exist."[50]

The court's holding that Wallace was deprived of a fair trial by the prosecutor's failure to correct the false testimony of the Commonwealth's witness and suppression of specifically requested exculpatory evidence is in accordance with the principles set forth in

---

46. *See* United States v. Agurs, 427 U.S. 97, 103 (1976). *See generally* Mooney v. Holohan, 294 U.S. 103 (1935) (holding that due process was denied the defendant when the state secured a conviction through testimony it knew to be perjured); Napue v. Illinois, 360 U.S. 264 (1959) (extending *Mooney* to a situation in which the state did not solicit the false evidence, but allowed it to stand uncorrected); Brady v. Maryland, 373 U.S. 83 (1963) (further extending *Mooney* to include the prosecution's suppression of evidence favorable to the accused in situations in which the defense has made a specific request for the evidence).

47. 427 U.S. at 103-04. The strict standard of materiality set forth by the *Agurs* court had its origins in Napue v. Illinois, 360 U.S. 264 (1959), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 450 U.S. 150 (1972). In *Napue*, the Court determined there was a violation of due process when the prosecutor allowed known false evidence, which related only to the credibility of the witness, to stand uncorrected because the false evidence could have affected the jury's judgment in determining guilt or innocence. *Napue*, 360 U.S. at 269. In *Brady*, the Court said that the suppression of evidence by the prosecutor which is "material to either guilt or punishment" is a violation of due process. *Brady*, 373 U.S. at 104. In *Giglio*, the Court applied the rationale of *Napue* to the *Brady* standard and found testimony that might have affected the judgment of the jury in "any reasonable likelihood" to be material, and thus a violation of the defendant's right to a fair trial. *Giglio*, 405 U.S. at 154.

48. When the defense makes either no request for exculpatory information or a very broad request, such as "all *Brady* material," his actions constitute the third type of *Brady* situation. United States v. Agurs, 427 U.S. 97, 106 (1976).

49. *Id.*

50. *Id.* at 112. *See also*, Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 44 STAN. L. REV. 1133 (1982) (interpreting the drawing back of the *Agurs* Court as a reflection of the Court's valuation of the adversarial system).

Brady v. Maryland[51] and its progeny.[52] Since *Wallace* involved perjured testimony and specific requests for exculpatory evidence, the court correctly applied the standards of materiality set forth in *Giglio v. United States*[53] and *United States v. Agurs*.[54] Wallace was deprived of a fair trial in violation of due process because there was a reasonable likelihood that the nondisclosed exculpatory evidence and the jury's impression of the reliability of the witness could have affected the jury's judgment.[55]

With regard to the double jeopardy issue, the *Wallace* majority held that if the prosecutorial misconduct[56] at the first pretrial and trial were found to have been intentional or in bad faith, the prosecutorial overreaching would not have been cured by the subsequent prosecution, and Wallace would then be entitled to

---

51. 373 U.S. 83 (1963).

52. *E.g.*, Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); Napue v. Illinois 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). The Supreme Court of Pennsylvania has acted consistently with the decisions of the United States Supreme Court regarding prosecutorial overreaching. *E.g.*, Commonwealth v. Hallowell, 477 Pa. 232, 383 A.2d 909 (1978); Commonwealth v. Jenkins, 472 Pa. 467, 383 A.2d 195 (1978); Commonwealth v. Carpenter, 472 Pa. 510, 372 A.2d 801 (1977); Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234 (1977). In *Hallowell*, the defense alleged that the prosecution permitted a witness to testify falsely without correction. The court cited the affirmative duty of a prosecuting attorney to correct testimony of a witness which he knows to be false, as set forth in *Napue*, and cited standards set forth in *Brady*, *Mooney* and *Giglio*. The *Hallowell* court held that failure of the prosecution to correct testimony by the witness which the prosecution knew to be false even though the trial prosecutor may not have been aware of the false testimony was cause for reversal and the granting of a new trial. *Hallowell*, 477 Pa. 232, 383 A.2d 909. In *Jenkins*, the defense made a specific request for evidence regarding any statements made by the defendant and contained in reports of the Commonwealth, and the prosecution failed to disclose such statements. The court held that the withholding of the statement by the prosecution was reversible error, applying the strict standard of materiality to the *Brady* situation of a specific request by defense, as set forth in *Agurs*. *Jenkins*, 472 Pa. 467, 383 A.2d 195. In *Carpenter*, also, the accused argued that the witness testified falsely with the prosecutor's knowledge. The court acknowledged that a conviction obtained by false testimony must be overturned and that the prosecution has an affirmative duty to correct false testimony in accordance with *Giglio*, but found no evidence that the witness' testimony was false. *Carpenter*, 472 Pa. 510, 372 A.2d 801. In *Cain*, the accused argued that the witness testified falsely with the prosecutor's knowledge. The court acknowledged that the prosecution may not suppress evidence which is exculpatory, but found that there was no evidence that the witness' testimony was false. *Cain*, 471 Pa. 140, 369 A.2d 1234.

53. 405 U.S. 150, 154 (1972).

54. 427 U.S. 97, 104 (1976).

55. *See id.* at 103.

56. 455 A.2d at 1193. Justice Larsen identified the prosecutorial misconduct in question as testimony by the district attorney at the first trial regarding when his office first became aware of the existence and identity of the witness Gorby. Although the district attorney testified it probably had been a month prior to trial, he had actually spoken to Gorby approximately five months before trial. *Id.*

discharge.[57]

Regarding this issue, the United States Supreme Court has set forth the general rule that prosecutorial misconduct does not give rise to protection against reprosecution where the defendant wins a reversal on appeal.[58] The Court has developed a line of exceptions to be applied when the original proceeding has terminated prematurely through mistrial.

In *United States v. Perez*,[59] the Court enunciated the principle to be applied in cases in which a mistrial is declared by the judge *sua sponte*. If the judge finds a manifest necessity to declare a mistrial, retrial is not barred.[60] In 1975, the United States Supreme Court was confronted with the landmark case of *United States v. Dinitz*,[61] dealing with a mistrial which had been declared at the defendant's request.[62] In an opinion by Justice Stewart, the Court found that different policy considerations inhere when a mistrial is declared at the defendant's request than when it is declared by a judge *sua sponte*.[63] The *Dinitz* Court held that the judicial overreaching was not a bar to retrial since the judge's actions were not a bad faith attempt to cause the defendant to move for a mistrial or to "prejudice his prospect for an acquittal."[64] The *Dinitz* Court stated the principle that the double jeopardy clause bars retrial where the judge or prosecutor, in bad faith, threatens harassment of the defendant by successive prosecutions or declarations of mistrial, thereby affording the prosecution a better opportunity to convict the defendant.[65]

In the United States Supreme Court's most recent pronounce-

---

57. *Id.* Thus, the new trial was granted by the *Wallace* court without prejudice to Wallace's right to petition the lower court for discharge on grounds that the prosecutorial overreaching at the first pretrial and trial was in bad faith or intentional, raising a bar to retrial. *Id.*

58. United States v. Ball, 163 U.S. 662 (1896).

59. 9 U.S. (1 Wheat.) 579 (1824).

60. *Id.* at 580. Following the *Perez* standard in United States v. Jorn, 400 U.S. 470 (1971), the Court found reprosecution to be barred where the trial judge did not assure that there was a manifest necessity for his declaration of a mistrial. *Id.* at 487.

61. 424 U.S. 600 (1976).

62. *Id.* at 604.

63. *Id.* at 608 (citing United States v. Jorn, 400 U.S. 470, 484 (1971), for the rationale that a defendant retains control over whether to request mistrial or go to the jury when the mistrial is at his request).

64. In *Dinitz*, Justice Stewart cited *United States v. Jorn*, 400 U.S. at 485, for the proposition that the double jeopardy clause protects a defendant against bad faith conduct by a judge or prosecutor. United States v. Dinitz, 424 U.S. at 611.

65. 424 U.S. at 611.

ment, *Oregon v. Kennedy*,[66] the defendant, who had been granted a mistrial at his request, argued that his retrial should be barred due to prosecutorial overreaching.[67] Citing *Dinitz*[68] as authority, the Oregon Court of Appeals held that when a mistrial has been granted at the defendant's request, retrial is barred if the prosecutorial error that prompted the defendant's mistrial request was intended to provoke a mistrial, or "motivated by bad faith or undertaken to harass or prejudice" the defendant.[69] The court of appeals accepted the finding of the trial court that the prosecution had not intended to cause a mistrial, but barred retrial due to a finding of prosecutorial overreaching.[70] In a plurality opinion rendered by Justice Rehnquist, the United States Supreme Court reversed.[71] The Court held that following a mistrial on the defendant's own motion, reprosecution is precluded by the double jeopardy clause of the fifth amendment of the United States Constitution only if the prosecution intended to provoke the defendant to move for a mistrial.[72] The Court thus refuted the general overreaching standard as a bar to retrial. Although the Court acknowledged that the language in *Dinitz* apparently recognized that retrial is barred by prosecutorial bad faith conduct or harassment,[73] it indicated that the general bad faith or harassment standard would be difficult to apply since it offered no standards for application.[74]

The majority also refuted the defendant's argument that the court of appeals had based its decision on the independent ground of the law of the State of Oregon, noting that the cases on which the court of appeals had relied were decided on federal grounds by the United States Supreme Court.[75] A concurring opinion by Jus-

---

66. 456 U.S. 667 (1982).

67. *Id.* at 670.

68. 424 U.S. at 611.

69. 49 Or. App. 415, 417-18, 619 P.2d 948, 949 (1980).

70. *Id.* at 419, 619 P.2d at 950.

71. 456 U.S. 667, 669 (1982), *rev'g* 49 Or. App. 415, 619 P.2d 948 (1980). Justice Rehnquist was joined by Chief Justice Burger, and Justices White, O'Connor and Powell. Concurring opinions were filed by Justices Brennan and Marshall, 456 U.S. at 680; Justice Powell, *id.* at 679; and Justice Stevens who was joined by Justices Brennan, Marshall and Blackmun, *id.* at 681.

72. *Id.* at 676.

73. *Id.* at 678. *See also* United States v. Jorn, 400 U.S. 470, 486 n.12 (1971) (citing United States v. Tateo, 377 U.S. 463, 468 n.3 (1964) for the proposition that reprosecution might be barred where prosecutorial or judicial misconduct designed to avoid an acquittal causes the defendant to move for a mistrial).

74. 456 U.S. at 676.

75. *Id.* at 671. The Court further noted this would be acceptable even if "the case

tices Brennan and Marshall emphasized, however, that the Court's decision would not preclude the state courts, on remand, from finding that retrial would violate the double jeopardy provisions of the Oregon Constitution.[76]

In a concurring opinion delivered by Justice Stevens,[77] it was argued that a defendant's successful motion for a mistrial should remove the double jeopardy bar to reprosecution unless the mistrial was caused by prosecutorial overreaching *or* harassment or intent to cause mistrial.[78] Thus, the concurring Justices would have recognized a general overreaching standard under federal law.[79] The concurrence criticized the rationale of Justice Rehnquist, stating that although a prosecutor may intend to provoke a mistrial, it is almost "inconceivable" that a defendant could prove the prosecutor was so motivated.[80]

Kennedy also touched on the issue of whether double jeopardy principles apply when there is an appellate reversal of a denial of a defendant's motion for mistrial due to prosecutorial misconduct. In his discussion, Justice Rehnquist noted that trial judges might tend to deny a defendant's mistrial motion and let the error be corrected on appeal where double jeopardy would not bar retrial.[81] He reasoned that retrial would not be barred because the interests protected by double jeopardy would be satisfied by the trial culminating in a verdict.[82] In criticizing Justice Rehnquist's assumption, Justice Stevens identified the interest protected by the culmination of trial in a verdict as the defendant's retention of control over the course to be followed during trial. He noted that when a defendant is forced to choose between continuing in a tainted trial or provoking a mistrial, he has lost all control; his double jeopardy interests are no longer protected by the trial ending with a ver-

---

admitted of more doubt as to whether federal and state grounds for the decision were intermixed." *Id.*

76. *Id.* at 681-82 (Brennan, J., concurring). Note that the concurrence filed by Justice Stevens, and joined by Justice Blackmun as well as Justices Marshall and Brennan, also stated that the Oregon Supreme Court may interpret the double jeopardy provisions of the Oregon Constitution as providing broader protection than the federal provision. *Id.* at 681 n.1 (Stevens, J., concurring).

77. *Id.* at 681 (Stevens, J., concurring). Justice Stevens was joined in his concurrence by Justices Brennan, Marshall and Blackmun.

78. *Id.* at 683 (Stevens, J., concurring).

79. *Id.* at 684 (Stevens, J., concurring).

80. *Id.* at 688 (Stevens, J., concurring).

81. *Id.* at 676.

82. *Id.*

dict.[83] Justice Stevens, therefore, characterized the assumption of the Court as "irrational."[84]

After *Kennedy*, the Supreme Court of Pennsylvania was free to interpret the Pennsylvania Constitution as providing a broader standard of protection against double jeopardy than does the United States Constitution.[85] However, the *Wallace* majority did not indicate that it was basing its analysis on independent state grounds.[86] Rather, Justice Larsen cited *Commonwealth v. Starks*[87] and *United States v. Dinitz*[88] as authority for defendant's request that he be discharged on double jeopardy grounds, finding that if the prosecution made an intentional bad faith attempt to mislead the jury at the first pretrial and trial, retrial would be precluded.[89] The *Starks* opinion cited by the court relied on the federal constitutional standard of *Dinitz*, and held that prosecutorial conduct in bad faith, designed to prejudice or harass the defendant, bars retrial of the defendant.[90] Along with *Starks*, the Pennsylvania cases regarding double jeopardy due to prosecutorial overreaching have historically been guided by the United States Supreme Court decisions interpreting the fifth amendment of the United States Constitution.[91] This pattern was continued in *Wallace* with the majority's citation of *Dinitz*.[92] However, as noted by Justice Nix concurring in *Wallace*,[93] the federal constitutional standard that retrial is barred by the intentional, bad faith conduct of the prose-

---

83. *Id.* at 685-86 (Stevens, J., concurring).

84. *Id.* at 687 n.22 (Stevens, J., concurring).

85. *See* 456 U.S. at 671, 680-81 (Brennan, J., concurring), 681 (Stevens, J., concurring).

86. *Cf.* 455 A.2d at 1194 (Justice Nix' concurring opinion indicating that *Kennedy* overruled the federal constitutional standard regarding overreaching, and that there is no "such standard under state law"). *Id.*

87. 490 Pa. 336, 416 A.2d 498 (1980).

88. 424 U.S. 600 (1976).

89. *See Wallace*, 455 A.2d at 1193.

90. *Starks*, 490 Pa. at 339-41, 416 A.2d at 499-501.

91. *See, e.g.*, Commonwealth v. Potter, 478 Pa. 251, 260-67, 386 A.2d 918, 922-26 (1978) (deciding whether retrial of defendant was barred by the double jeopardy clause of the United States Constitution); Commonwealth v. Hogan, 482 Pa. 333, 342, 393 A.2d 1133, 1138 (1978) (following the *Dinitz* standards, and finding no basis for providing greater protection under the double jeopardy provision of the Pennsylvania Constitution than the federal constitution); Commonwealth v. Starks, 490 Pa. 336, 339-40, 416 A.2d 498, 499-500 (discussing both state and federal constitutions, but basing its analysis on decisions following United States Supreme Court decisions); Commonwealth v. Virtu, 495 Pa. 49, 65 n.7, 432 A.2d 198, 201 n.7 (1981) (relying on the standards set forth in *Dinitz* as recognized by *Starks*).

92. 455 A.2d at 1193 (citing *Dinitz*, 424 U.S. 600).

93. 455 A.2d at 1194 (Nix, J., concurring).

cution[94] was disavowed by *Kennedy*.[95] From the United States Supreme Court's finding in *Kennedy*, it can be concluded that the Supreme Court of Pennsylvania must clearly rest its interpretation on the double jeopardy provisions of the Pennsylvania Constitution in order to continue to bar retrial of a defendant due to intentional, bad faith conduct of the prosecution.[96]

However, even assuming the Supreme Court of Pennsylvania has not adequately rested its double jeopardy decision on state grounds, an argument could be made that the facts are distinguishable from *Kennedy*. In *Wallace*, a mistrial of the first trial was declared by the judge *sua sponte*,[97] and the second trial terminated in a conviction.[98] The trial court denied the defendant's motion for a new trial based on after-discovered evidence of prosecutorial overreaching and the appellate court reversed the denial of the motion for a new trial based on after-discovered evidence. *Wallace*, therefore, raises the question of whether the principles barring retrial under the double jeopardy clause of the fifth amendment[99] as applied by the United States Supreme Court when a mistrial has resulted due to prosecutorial misconduct should be applied when trial has culminated in a jury verdict which has been set aside on appeal due to after-discovered evidence of prosecutorial overreaching.

Although the United States Supreme Court has not yet directly confronted this issue, it has been discussed by several United States circuit courts. In *United States v. Curtis*,[100] the Court of Appeals for the Third Circuit applied the *Kennedy* principle enunciated two months earlier by the United States Supreme Court to an appellate reversal of conviction due to prosecutorial miscon-

---

94. *See Dinitz*, 424 U.S. 600. *See also* Lee v. United States, 432 U.S. 23 (1977).

95. Oregon v. Kennedy, 456 U.S. 667, 676 (1982). However, the statement by Justice Nix that the prosecutorial overreaching standard had been an exception to the manifest necessity exception to the general rule is incorrect. *Compare Wallace*, 455 A.2d 1187, 1194 (Nix, J., concurring) *with Kennedy*, 456 U.S. 672-73. *See supra* notes 59-65 and accompanying text. The prosecutorial overreaching standard was suggested in *Dinitz* as an exception to the general rule that double jeopardy is not a bar to retrial when a mistrial is declared at the request of defendant. *Dinitz*, 424 U.S. 600, 607. The manifest necessity standard applies when a mistrial is declared *sua sponte* by the judge; retrial is barred unless the judge finds a manifest necessity for declaring the mistrial. *Id.*

96. *See* 456 U.S. at 671. *See also supra* notes 75-76 and accompanying text.

97. 455 A.2d at 1188. The mistrial was declared because the jury was unable to reach a verdict, not because of prosecutorial overreaching. *Id.*

98. *Id.*

99. The double jeopardy clause of the fifth amendment applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969).

100. 683 F.2d 769 (3d Cir.), *cert. denied*, 103 S. Ct. 379 (1982).

duct.[101] The court reasoned that a defendant should not be given less constitutional protection because the court failed to recognize the impropriety of the prosecutor's actions until the case was on appeal.[102] Finding there was no prosecutorial intent to abort the trial, the court held that the prosecutorial misconduct would not bar retrial under the *Kennedy* test even if retrial could be barred following appellate reversal for prosecutorial misconduct.[103] In *United States v. Singleterry*,[104] the Court of Appeals for the Fifth Circuit also discussed, and avoided deciding, this issue.[105] Although noting the anomaly in barring retrial in the case of a mistrial but not in the case of appellate reversal, the court reasoned that when mistrial is not declared, any prosecutorial intent to abort the trial has been thwarted, thus avoiding the danger being prevented under *Kennedy*.[106] The Fifth and Third Circuits both noted the apparent assumption of the plurality in *Kennedy* that when a conviction is reversed on appeal for a prosecutorial misconduct, double jeopardy is not a bar to retrial.[107] The courts further noted Justice Stevens' concurrence criticizing that assumption.[108]

One month later, the Court of Appeals for the Fifth Circuit dealt with this issue more extensively in *Robinson v. Wade*.[109] The court began by expressing some doubt whether the *Kennedy* limitation on the circumstances in which prosecutorial overreaching may bar retrial applies to cases which terminate in conviction rather than mistrial.[110] But citing the dissension in the *Kennedy* plurality[111] and concurring[112] opinions concerning whether retrial should be barred when the trial judge's denial of defendant's motion for mistrial has been overturned on appeal, the court noted the United

---

101. *Curtis*, 683 F.2d at 776-78.

102. *Id.* at 774. In *Curtis*, the defendant's attorney had moved for a mistrial and the motion had been denied by the trial judge. *Id.* at 771.

103. *Id.* at 776. The court carefully noted that it did not decide whether retrial could be barred following an appellate reversal for prosecutorial misconduct. *Id.* at 778.

104. 683 F.2d 122 (5th Cir.), *cert. denied*, 103 S. Ct. 387 (1982).

105. *Id.* at 123-24.

106. *Id.* at 124 (citing Oregon v. Kennedy, 456 U.S. 667, 673).

107. United States v. Curtis, 683 F.2d at 774-75; United States v. Singleterry, 683 F.2d at 124 (both citing *Kennedy*, 456 U.S. at 676).

108. United States v. Curtis, 683 F.2d at 775; United States v. Singleterry, 683 F.2d at 124 (both citing Justice Stevens' concurring opinion in Oregon v. Kennedy, 456 U.S. at 687 n.22). *See supra* notes 77-84 and accompanying text.

109. 686 F.2d 298 (5th Cir. 1982).

110. *Id.* at 305.

111. Oregon v. Kennedy, 456 U.S. at 676 n.7. *See supra* notes 81-82 and accompanying text.

112. *Id.* at 687 n.22. *See supra* notes 83-84 and accompanying text.

States Supreme Court's strong criticism of the policy of hinging application of the double jeopardy clause on whether the prosecutorial misconduct was found improper by the trial court or the appellate court.[113] Although the court recognized Justice Stevens' rationale in *Kennedy* that the double jeopardy clause is offended by prosecutional overreaching designed to avoid acquittal,[114] the court of appeals applied the *Kennedy* plurality standard barring retrial only if the prosecutorial misconduct was intended to "provoke a motion for a mistrial."[115]

The *Wallace* majority did not directly confront the issue of whether the *Kennedy* limitation[116] should apply when a jury verdict has been set aside on appeal due to after-discovered evidence of prosecutorial overreaching. If *Kennedy* is applicable to cases in which the appellate court reverses the trial court's denial of a defendant's motion for new trial based on after-discovered evidence of prosecutorial overreaching, retrial is not barred unless the prosecutorial misconduct was prompted by an intent to cause a mistrial.[117] As indicated in the decisions by the United States Courts of Appeals[118] and the dissension between the majority and the concurring opinions in *Kennedy*,[119] it is not clear whether the United States Supreme Court would apply the principles barring retrial when a mistrial has resulted, to situations of appellate reversal.

However, the Supreme Court of Pennsylvania has addressed the issue in cases in which the defendant's motion for mistrial due to prosecutorial misconduct was denied and the appellate court reversed.[120] In *Commonwealth v. Potter*,[121] the court held that a case in which a new trial was granted at the defendant's request should

---

113. Robinson v. Wade, 686 F.2d at 306-07 (distinguishing United States v. Scott, 437 U.S. 82 (1978) and Burks v. United States, 437 U.S. 1 (1978)).

114. 686 F.2d at 307-08 (citing Oregon v. Kennedy, 456 U.S. at 689).

115. 686 F.2d at 308.

116. The plurality in *Kennedy* stated that a defendant may not be retried when the prosecutorial "conduct giving rise to the *successful motion for a mistrial* was intended to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 679 (emphasis added).

117. *Id.* at 676.

118. *See, e.g.*, Robinson v. Wade, 686 F.2d 298 (5th Cir. 1982); United States v. Curtis, 683 F.2d 769 (3d Cir. 1982); United States v. Singleterry, 683 F.2d 122 (5th Cir. 1982).

119. 456 U.S. at 676, 687 n.22.

120. *E.g.* Commonwealth v. Hoskins, 494 Pa. 600, 432 A.2d 149 (1981); Commonwealth v. Starks, 490 Pa. 336, 416 A.2d 498 (1980); Commonwealth v. Hogan, 482 Pa. 333, 393 A.2d 1133 (1978); Commonwealth v. Potter, 478 Pa. 251, 386 A.2d 918 (1978).

121. 478 Pa. 251, 386 A.2d 918 (1978).

not be distinguished from one in which mistrial was granted by an appellate court for double jeopardy purposes.[122] The court cited recent cases in the United States Supreme Court[123] for the proposition that the applicability of double jeopardy should not turn on "nice procedural distinctions."[124] The *Potter* court further noted that if a different standard were applied to reprosecution of a verdict set aside on appeal than were applied where a mistrial was granted at trial, mistrial motions might be denied even though legitimate.[125]

In *Wallace,* the Supreme Court of Pennsylvania applied for the first time discharge principles applicable to cases of mistrial due to prosecutorial overreaching to a case in which the defendant did not move for a mistrial due to prosecutorial overreaching, but rather moved for a new trial after the verdict was rendered due to after-discovered evidence of prosecutorial overreaching. Although dicta in *Kennedy* suggests otherwise,[126] this interpretation by the Supreme Court of Pennsylvania may be justified. As Justice Stevens noted in his concurring opinion in *Kennedy,*[127] the rationale for barring retrial when a mistrial has been granted on request of defendant seems equally applicable when trial has been terminated other than by the mistrial request of a defendant. The same rationale may apply when trial has resulted in a verdict but the appellate court reverses the trial court's denial of defendant's motion for new trial due to after-discovered evidence. Although the defendant had his opportunity to receive a verdict, he retained no control over the course of trial.[128] Rather than being faced with a Hobson's choice, he had no choice at all; the double jeopardy interest satisfied by the rendering of a verdict[129] was defeated.

Even if the Supreme Court of Pennsylvania in *Wallace* is correct in applying the mistrial discharge principles to a case reversed on appeal, the majority should acknowledge that the United States

---

122. *Id.* at 254, 386 A.2d at 919.

123. *Id.* at 253, 386 A.2d at 918 (citing Lee v. United States, 432 U.S. 23 (1977); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Jenkins, 420 U.S. 358 (1975)). *But see* Commonwealth v. Hogan, 482 Pa. 333, 393 A.2d 1133 (1978) (where Justice Nix wrote that double jeopardy does not prohibit retrial).

124. 478 Pa. at 256, 386 A.2d at 921.

125. *Id.* (citing United States v. Dinitz, 424 U.S. 600, 611 (1976)).

126. *Kennedy,* 456 U.S. at 676.

127. *Id.* at 685-86 (Stevens, J., concurring).

128. *See supra* note 83 and accompanying text.

129. *Id.*

Supreme Court's recent decision, *Oregon v. Kennedy*,[130] limits the federal double jeopardy bar to cases in which the prosecutor acted with an intent to cause a mistrial. Unless the alignment of the plurality in *Oregon v. Kennedy* should change, the Supreme Court of Pennsylvania must either distinguish *Kennedy* or ground its opinion on the Pennsylvania Constitution in order to hold that retrial of the defendant is barred by double jeopardy where the defendant has been granted a new trial due to after-discovered evidence of intentional misconduct or bad faith representations by the prosecution.

Pamela K. Wiles

130. *Kennedy*, 456 U.S. at 667.