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Double Jeopardy: Discretion of a Trial Judge To Decalre a Mistrial on the Basis of a Hung Jury

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DOUBLE JEOPARDY: DISCRETION OF A TRIAL JUDGE TO DECLARE A MISTRIAL ON THE BASIS OF A HUNG JURY

Historically, the trial judge has always been given broad discretion in deciding whether to discharge a jury unable to reach a verdict. It is settled law that if the judge acts within his permitted discretion, the accused may be retried without running afoul of the double jeopardy prohibition of the fifth amendment.[1] No concrete guidelines have been developed by the federal courts for defining the extent of the trial court's discretion, but it is evident that there is an increasing tendency by reviewing courts to scrutinize the trial judge's decision to declare a mistrial and dismiss the hung jury.[2]

The fifth amendment provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[3] In *Benton v. Maryland*,[4] the Supreme Court held that the guarantee against double jeopardy was applicable to the states through the fourteenth amendment.[5] The guarantee consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[6] The purpose of the prohibition against multiple prosecutions for a single offense is to limit the expense and personal strain imposed on an accused and to diminish "the possibility that even though innocent he may be found guilty."[7]

For the double jeopardy protection to operate, the accused must initially have been in jeopardy.[8] In a non-jury trial, jeopardy attaches when the court begins to hear evidence; in a jury trial, jeopardy attaches when the jury is empaneled and sworn.[9] Thus, in certain circumstances, the double jeopardy protection includes the right not to be subjected to two prosecutions even when the first trial is inconclusive. There are, however, a number of exceptions to this rule, and it is established law that to be twice tried for the same offense is not necessarily "to be twice put in jeopardy of life or limb."[10] As the Supreme Court has stated:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that

1. Illinois v. Somerville, 410 U.S. 458, 461-62 (1973); United States v. Perez, 22 U.S. 256, 9 Wheat. 579 (1824).

2. See notes 25-27 infra and accompanying text.

3. U.S. Const. amend. V. For historical discussions of the double jeopardy clause see United States v. Wilson, 420 U.S. 332, 339-42 (1975); Bartkus v. Illinois, 359 U.S. 121, 150-55 (1959) (Black, J., dissenting); United States v. Jenkins, 490 F.2d 868, 870-78 (2d Cir. 1973), aff'd, 420 U.S. 358 (1975).

4. 395 U.S. 784 (1969).

5. Id. at 793-96.

6. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted).

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

8. The double jeopardy prohibition is not aimed against being twice punished but rather against being twice tried for the same offense. Price v. Georgia, 398 U.S. 323, 326 (1970); United States v. Ball, 163 U.S. 662, 669 (1896).

9. Serfass v. United States, 420 U.S. 377, 388 (1975).

10. For situations in which retrial has been allowed after mistrial see Annot., 6 L. Ed. 2d 1510 (1962).

every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict.[11]

The courts have resorted to the concept of "manifest necessity" in defining the circumstances during a criminal proceeding which allow a proper mistrial declaration by the judge and a subsequent permissible retrial of the defendant. The manifest necessity doctrine first appeared in *United States v. Perez,*[12] in which the Supreme Court held that a defendant may be retried following a mistrial, when the judge, without the defendant's consent, has discharged a jury that reported itself unable to reach a verdict. In that landmark decision, Justice Story, writing for the Court, declared:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.[13]

The doctrine established by *Perez* has been closely adhered to by the federal courts. It serves as the standard to be followed in deciding whether to allow reprosecution when, in spite of defendant's objection, a mistrial has been declared.[14] The rule has allowed trial judges to exercise their discretion in declaring a mistrial not only in the hung jury situation, but also in other instances where the "ends of public justice" would be defeated by the continuation of the trial.[15]

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11. Wade v. Hunter, 336 U.S. 684, 688-89 (1949).

12. 22 U.S. 256, 9 Wheat. 579 (1824).

13. Id.

14. Illinois v. Somerville, 410 U.S. 458, 461 (1973), called Perez "[t]he fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objection." In Gori v. United States, 367 U.S. 364, 368 (1961), the Perez decision was termed "the authoritative starting point of our law . . . stat[ing] principles which have since guided the federal courts in their application of the concept of double jeopardy to situations giving rise to mistrials."

15. Reprosecution has been constitutionally permitted in the following cases where the trial was terminated without a verdict: Illinois v. Somerville, 410 U.S. 458 (1973) (defendant was brought to trial under an incurably defective indictment); Turner v. Louisiana, 379 U.S. 466 (1965) (possible juror contamination because jury had been in custody of two deputy sheriffs who were principal prosecution witnesses); United States v. Tateo, 377 U.S. 463 (1964) (defendant requested and obtained a mistrial); Wade v. Hunter, 336 U.S. 684 (1949) (tactical situation of an advancing army made place of trial impracticable); Lovato v. New Mexico, 242 U.S. 199 (1916)

In considering the various ways in which a trial may come to a premature end, the courts have eschewed the formulation of a rigid set of rules.[16] Instead, they have acknowledged the discretion of the trial court,[17] and have affirmed the decisions of trial judges with little more than perfunctory review.[18] In recent years, however, the Supreme Court has initiated the exercise of a greater degree of scrutiny over the declaration of mistrials.[19] Nevertheless, the Supreme Court has rarely attempted to set down concrete guidelines in this area. The few attempts involved trials which were aborted for reasons other than a hung jury. Reprosecution was constitutionally permitted where the trial court declared a mistrial for the sole benefit of the defendant.[20] Yet, a plurality of the Court later rejected this guideline, and instead required the trial judge to consider procedural alternatives to mistrials before he could properly abort the trial.[21] The Court seemingly backed away

(defendant did not plead to the indictment after having a demurrer overruled); United States v. Ball, 163 U.S. 662 (1896) (conviction overturned because of insufficient indictment); Thompson v. United States, 155 U.S. 271 (1894) (juror was member of grand jury that indicted defendant); Simmons v. United States, 142 U.S. 148 (1891) (juror lied on voir dire as to acquaintance with defendant); United States ex rel. Stewart v. Hewitt, 517 F.2d 993 (3d Cir. 1975) (possible jury bias because father-in-law of defendant on trial for wife's murder served as tipstaff for jury); Whitfield v. Warden, 486 F.2d 1118 (4th Cir. 1973), cert. denied, 419 U.S. 876 (1974) (possibility that juror overheard arguments between opposing counsel which would bias him); United States ex rel. Gibson v. Ziegele, 479 F.2d 773 (3d Cir.), cert. denied, 414 U.S. 1008 (1973) (key witness too ill to testify); Loux v. United States, 389 F.2d 911 (9th Cir.), cert. denied, 393 U.S. 867 (1968) (defendant became too incapacitated to stand trial); United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967) (juror read prejudicial newspaper articles); Crawford v. United States, 285 F.2d 661 (D.C. Cir. 1960) (jury exhibited confusion as to what it actually decided); Himmelfarb v. United States, 175 F.2d 924 (9th Cir.), cert. denied, 338 U.S. 860 (1949) (district attorney referred to another criminal case pending against defendant in jury's presence); United States v. Potash, 118 F.2d 54 (2d Cir.), cert. denied, 313 U.S. 584 (1941) (juror became too ill to continue deliberations); Freeman v. United States, 237 F. 815 (2d Cir. 1916) (judge became ill during trial); United States v. Holland, 378 F. Supp. 144 (E.D. Pa.), aff'd mem. sub nom. In re Ehly, 506 F.2d 1050 (3d Cir. 1974), cert. denied, 420 U.S. 994 (1975) (juror became physically and emotionally unable to continue); Conner v. Deramus, 374 F. Supp. 504 (M.D. Pa. 1974) (witness made prejudicial remarks during trial); United States v. Giles, 19 F. Supp. 1009 (W.D. Okla. 1937) (trial judge made prejudicial comments during trial).

For a recent overall discussion of "manifest necessity" see Comment, Retrial after Mistrial: The Double Jeopardy Doctrine of Manifest Necessity, 45 Miss. L.J. 1272 (1974).

16. A "mechanical rule" prohibiting retrial whenever circumstances compelled the discharge of a jury without the defendant's consent was termed "too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." United States v. Jorn, 400 U.S. 470, 480 (1971).

17. The trial judge is "best situated intelligently" to make a decision whether to continue the trial. Gori v. United States, 367 U.S. 364, 368 (1961).

18. In Gori, Justice Frankfurter stated: "It is also clear that . . . we have consistently declined to scrutinize with sharp surveillance the exercise of [the trial judge's] discretion." Id.

19. Compare Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); and Logan v. United States, 144 U.S. 263 (1892) with Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U S. 470 (1971); and Downum v. United States, 372 U.S. 734 (1963).

20. Gori v. United States, 367 U.S. 364, 369 (1961).

21. United States v. Jorn, 400 U.S. 470, 487 (1971).

from this latter standard in *Illinois v. Somerville,*[22] when it held that a trial judge could properly declare a mistrial where a procedural error on the trial would make reversal on appeal a certainty. Whether this decision leaves the federal courts with no real standard to follow is unclear.[23] Still, it is axiomatic that with an increase in review comes an attendant decrease in the discretion reserved to the trial judge. It is this trend, as it affects the area of mistrial resulting from a hung jury, that this Note now considers.

In the years following *Perez,* the hung jury question has rarely ascended higher than the level of the court of appeals. The Supreme Court has reviewed only a few cases involving this issue, and in each, the Court reaffirmed the manifest necessity doctrine and its emphasis on "the sound exercise of [the trial judge's] discretion."[24] Similarly, the early court of appeals and district court decisions, perhaps guided by the Supreme Court's treatment of the subject, did little more than accept the trial judge's discretionary decision.[25] Only recently have the federal courts begun to examine the actions of the trial judge more closely.[26] As yet the judge has very rarely been held to have abused his discretion.[27]

Two recent decisions, *United States v. Beckerman*[28] in the Second Circuit, and *United States ex rel. Webb v. Court of Common Pleas*[29] in the Third Circuit, have confronted the question of whether "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice."[30]

In *Beckerman,* a mistrial was declared by the trial court because the jury failed to agree on a verdict. The defendant was charged with possession and distribution of cocaine in a single count indictment.[31] The trial, which took about three days, was the first to which the accused was subjected. After deliberating for about seven hours, the jury sent a note to the judge stating that it was deadlocked.[32] The trial court, addressing the forewoman, asked if

22. 410 U.S. 458, 468-69 (1973).

23. See Note, Mistrial and Double Jeopardy, 49 N.Y.U.L. Rev. 937, 943-48 (1974).

24. See Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71, 85-86 (1902); Logan v. United States, 144 U.S. 263, 298 (1892).

25. See, e.g., Kastel v. United States, 23 F.2d 156, 158 (2d Cir. 1927), cert. denied, 277 U.S. 604 (1928); Linden v. United States, 2 F.2d 817 (3d Cir. 1924); United States v. Lee, 123 F. 741 (N.D. Cal. 1903).

26. See, e.g., United States v. See, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975); United States v. Goldstein, 479 F.2d 1061 (2d Cir.), cert. denied, 414 U.S. 873 (1973); United States v. Brahm, 459 F.2d 546 (3d Cir.), cert. denied, 409 U.S. 873 (1972).

27. Few cases have been found, all decided within the past three years, in which the appellate court did not accept the trial court's exercise of discretion in declaring a mistrial on the basis of a hung jury. These cases are discussed in the text accompanying notes 36-40 & 59-62 infra.

28. 516 F.2d 905 (2d Cir. 1975).

29. 516 F.2d 1034 (3d Cir. 1975).

30. Illinois v. Somerville, 410 U.S. 458, 471 (1973). This has been termed a "balancing test," which at least one Justice feels was adopted by the Supreme Court's most recent decision dealing with the termination of a jury trial prior to the return of a verdict. Id. at 477 (Marshall, J., dissenting).

31. 516 F.2d at 905.

32. Id. at 907.

more time would enable the jury to reach a verdict. With some equivocation, the forewoman answered in the negative.[33] Defense counsel did not object to the discharge of the jury.[34] The Second Circuit affirmed the order of the district court denying a motion to dismiss the indictment on the basis of double jeopardy, thereby making reprosecution possible.[35]

In *Webb*, a mistrial was declared, over the objection of Webb's counsel, but the judgment of the district court denying a writ of habeas corpus was reversed by the Third Circuit.[36] The petitioner had been charged with robbery. His first trial lasted over a week. After almost two days of deliberations, the judge summoned the jury to the courtroom. The judge stated that his questions were addressed to each of the jurors and asked "whether they were close to a verdict; whether they felt that given additional time they would be able to reach a verdict; and whether they felt themselves hopelessly deadlocked."[37] Each juror indicated agreement with the foreman's statement that the jury was not close to a verdict and that it was hopelessly deadlocked.[38]

Webb was brought to trial again, with the second trial lasting approximately four days. The jury had deliberated for over six and one-half hours when the judge, on his own initiative, asked the jury to return to the courtroom.[39] Addressing only the foreman, the judge asked if there was any hope of arriving at a verdict. The foreman unequivocally replied in the negative, whereupon the judge, again over defense counsel's objection, discharged the jury.[40]

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33. The opinion set this important discussion out in full:

"The Court: Ladies and gentlemen I have your note which reads 'We the jury are deadlocked.'

"Does that mean that you are not able to reach a verdict, and the question I want to put to you whether you feel with a little more time you might be able to reach a verdict?

"The Forelady: It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest hassle and maybe another time, another day we may be clearer.

"The Court: The question I asked you was whether you thought with more time you would be able to reach a verdict, so the answer is no, is that it?

"The Forelady: The way it seems now, it doesn't seem as though we will be able to.

"Mr. Polstein [defense counsel]: May I make a suggestion?

"The Court: No, you may not.

"Thank you very much. The Court is going to declare a mistrial, the jury is excused."

[Defense Counsel requested the Court to charge the jury once again on the burden of proof before it was dismissed.]

"The Court: The jury is dismissed." Id. at 908.

34. Id. at 909 & n.8.

35. Id. at 910.

36. 516 F.2d 1034, 1045 (3d Cir. 1975).

37. Id. at 1035.

38. Id.

39. Id. at 1035-36.

40. The following is the entire colloquy which took place between the judge and the jury foreman:

"The Court: Mr. Foreman, is there any hope of arriving at a verdict?

Many of the facts and procedures involved in *Webb* and *Beckerman* proved to be similar. This is not to say, however, that differences were not present. In *Beckerman,* there was no objection by counsel to the declaration of a mistrial,[41] whereas, in *Webb,* counsel did object at both trials.[42] The jury first brought up the issue of deadlock in *Beckerman,*[43] but in *Webb,* "the impetus for a mistrial was provided solely by the judge rather than by the jurors."[44]

In both Beckerman's first trial and Webb's second trial, the judge spoke only to the foreman/forewoman in questioning the jury as to whether a verdict could be reached. No poll of the jurors was taken in either case. In *Beckerman,* the forewoman answered with some equivocation,[45] but in *Webb,* the foreman clearly stated that more time would not be of assistance.[46] The appellate court nevertheless held in *Webb* that the record did "not furnish an adequate showing that it was the collective sentiment of the jury that they had reached an impasse,"[47] while in *Beckerman,* the court noted that "[t]here

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"The Foreman: I don't believe so, sir.

"The Court: Do you believe that further deliberation might be fruitful?

"The Foreman: No, I do not.

"The Court: Do you feel that your positions are so adamant that you couldn't possibly arrive at a unanimous verdict? Is that what you're telling me?

"The Foreman: Yes, sir, I do believe that.

"The Court: All right. I discharge you from further consideration of the case. You may report to the jury room tomorrow morning." Id. at 1036.

The court of appeals noted that "[t]he entire proceedings from the jury's return to the courtroom to the adjournment of the court . . . consumed only seven minutes." Id.

41. Because defense counsel was silent on the prospect of a mistrial, the trial court construed an agreement by counsel that the jury, even with more time, would be unable to reach a verdict. The court of appeals approved and considered this to be implied consent by the defense to a mistrial declaration. 516 F.2d at 909. The decision also maintained that the defense had ample time in which to object to the mistrial if it had an interest in having guilt determined by the empaneled jury. Id.

42. The opinion stated that before a trial judge dismisses a jury over the defendant's objection, he must " 'take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment.' " 516 F.2d at 1043, quoting United States v. Jorn, 400 U.S. 470, 486 (1971).

43. Without initial prodding by the judge, the jury sent her a note indicating it was deadlocked. 516 F.2d at 907.

44. 516 F.2d at 1043. The jury had never indicated to the judge that it felt unable to agree on a verdict; yet, the judge called the jury into the courtroom and asked the foreman whether there was any hope of arriving at a verdict. Id. at 1036.

45. See note 33 supra.

46. See note 40 supra.

47. 516 F.2d at 1044. The majority opinion noted the possibility that one or more of the jurors may have "stood sufficiently in awe of the authority of the court" so as to deter them from "making unsolicited comments on the jury's progress." Id. The appellate court in Webb also contrasted Webb's second trial with his first, where the trial judge "made a scrupulous effort to ensure that he observed each juror's reply." Id. at 1043 n.54.

In the dissent, Judge Weis claims that "[t]he experience of most trial judges is that jurors will correct a statement made by their spokesman which is contrary to their understanding. A poll would have made the record more complete, but I am unwilling to say that a failure to follow

was no report that the jury was on the verge of a verdict," and "[n]one of the other jurors gave any indication that they could reach a verdict nor that additional time would cure their disagreement."[48]

Both cases involved issues which were not conceptually complex.[49] In both trials, the jury deliberated for under seven hours after hearing over three days of testimony. *Beckerman* concluded that the time the jury spent in deliberation was "not the determinant factor,"[50] whereas *Webb* maintained that this "is not irreconcilable with the jury's ability to arrive at a unanimous verdict within a reasonable time."[51]

The most distinguishing feature of the two cases is that, unlike *Beckerman,* where the defendant was subjected to only one trial, the defendant in *Webb* had already twice gone through " 'the heavy personal strain which a criminal trial represents for the individual defendant.' "[52] *Webb* held that because this was the defendant's second trial, the trial judge should have exercised "even greater caution" before depriving him of the opportunity " 'of being able, once and for all, to conclude his confrontation with society through the verdict' of the jury then sitting."[53]

Webb seems to stand for the proposition that the trial judge's discretion to declare a mistrial should be restricted when the defendant has already been subjected to a previous prosecution. Thus, the factors which may support a mistrial in a defendant's first trial may not be a basis for properly aborting a defendant's second trial. In order to help evaluate the effect that each of the factors in *Webb* had on the outcome of that case, it is instructive to compare them with similar factors in prior cases dealing with the mistrial-hung jury situation.

A comparison of the length and complexity of the trial in relation to the time the jury spent in deliberations in recent cases seems to indicate that while this factor is significant when taken in conjunction with other issues, it is not the determining factor in deciding whether a mistrial was properly declared. In *United States v. See,*[54] the jury deliberated for ten hours following a three and a half day trial involving a single count indictment.[55] By comparison, the

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that procedure is a reversible omission." Id. at 1046 (Weis, J., dissenting). Thus, the dissent in Webb, in essence, agrees with the opinion in Beckerman.

48. 516 F.2d at 910.

49. Both Beckerman and Webb involved a one count indictment and one defendant. Webb, in holding that the jury was not given a "reasonable time" to reach a verdict, characterized the contested issue as "not complex conceptually" but "an onerous one to resolve—involving as it did the credibility of the witnesses on each side weighed against the witnesses' respective opportunities to observe and remember." 516 F.2d at 1044-45. Beckerman, holding that additional time would not cure the jury's disagreement, simply declared that "[t]he issues were not complicated." 516 F.2d at 910.

50. 516 F.2d at 910.

51. 516 F.2d at 1044.

52. Id. at 1045, quoting United States v. Jorn, 400 U.S. 470, 479 (1971).

53. 516 F.2d at 1045, quoting 400 U.S. at 486.

54. 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

55. Id. at 849.

jury in *United States v. Goldstein,*[56] deliberated for only eight hours following a five week trial involving complex issues and fifty possible verdicts.[57] Yet in both cases reprosecution was permitted since the trial judge in each case was held properly to have exercised his discretion to discharge the jury for failure to reach a verdict.[58]

The trial in *United States ex rel. Russo v. Superior Court*[59] lasted nine days, after which the jury deliberated for fifteen hours on the question of a witness' credibility.[60] The trial judge discharged the jury because he felt that the jury was weary.[61] In *United States v. Lansdown,*[62] the trial was suddenly aborted by the trial judge after the jury deliberated for approximately eleven hours on testimony presented within one day.[63] In neither of these cases did the appellate court accept the judgment of the trial court in discharging the jury.[64]

The foregoing cases suggest that the crucial factor in determining the probability of jury agreement is not the length of jury deliberations, but is rather a specific statement by the jury that it is hopelessly deadlocked.[65]

56. 479 F.2d 1061 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

57. Id. at 1068.

58. In See, the Ninth Circuit held that the trial judge properly concluded "that further deliberations would be inappropriate, given the length of time already spent, the complexity of the case, and the clear assertions of the jury that they were hopelessly deadlocked." 505 F.2d at 852-53. In Goldstein, the Second Circuit based its decision on a theory of implied consent by the defendant to the mistrial, but clearly stated that its decision was valid even in the absence of consent. 479 F.2d at 1067-68. Affirming the broad discretion granted the trial judge in the mistrial-hung jury situation, the court declared that "[t]he complexity of a case and the amount of time requested by 12 reasonable jurors to reach unanimity on some or all of many possible verdicts are determinations best left to a trial judge and are difficult to gauge by another district judge or by appellate judges on a cold record." Id. at 1069.

59. 483 F.2d 7 (3d Cir.), cert. denied, 414 U.S. 1023 (1973).

60. Id. at 10-11 & n.3.

61. Id. at 11.

62. 460 F.2d 164 (4th Cir. 1972).

63. Id. at 166-69 & n.1.

64. In Lansdown, the Fourth Circuit found that there was no manifest necessity for the mistrial and held that reprosecution was constitutionally improper because the trial judge simply concluded that the jury had deliberated long enough although he made no inquiry as to whether the jury thought that a verdict was possible. Moreover, the jury never indicated that it was hopelessly deadlocked. Id. at 169-70. In fact, the foreman and another juror attempted to convince the judge not to declare the mistrial because the jury was "on the verge" of a verdict. Id. at 167. The Third Circuit's Russo decision was based on Lansdown. 483 F.2d at 16-17. The court found that there was no manifest necessity to dismiss the jury on the basis of the physical exhaustion of the jurors because the trial judge "did not ask the jury about its physical condition" and the jury "never indicated that it was exhausted." Id. at 15.

65. See United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975), where the court agreed with Lansdown that the "crucial factor" is a statement by the jury that it is unable to reach agreement. In addition, See distinguished both Lansdown and Russo, since in those cases the jury had not indicated that it was hopelessly deadlocked. Id. at 853-54.

The court in See considered the length of jury deliberations to be "not a determinative factor." Id. at 852. Lansdown made it clear that there was no "minimum period of time which a court

Moreover, although it is "safer" for the judge to take a poll of the jurors to determine whether there is a consensus that the jury is hung, federal courts over the years have looked to the jury foreman as the spokesman for the panel without soliciting the opinions of individual jurors.[66]

The presence of an objection by the defense counsel is also not a paramount factor. From *Perez* through *Somerville,* it has been established that where required by "manifest necessity," the trial judge may declare a mistrial "without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."[67]

Nor is the fact that the trial judge has initiated the inquiry into possible jury deadlock, itself, a determining factor. In *United States v. Phillips,*[68] after the jury deliberated for almost five hours, the trial judge submitted a note to the jury asking how soon the jury would be able to agree on a verdict. The response was that the jury had "no idea," whereupon the judge dismissed the jury.[69] The Court of Appeals for the Third Circuit affirmed.[70] Because there was no objection to the mistrial, the court did not hesitate to rely on "the actions of an experienced trial judge who heard all the evidence, knew the complexity or simplicity of the case, and decided further deliberation would be vain."[71]

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must wait before declaring a mistrial because of a hung jury." 460 F.2d at 169. A comparison of the length of trial and time spent in jury deliberations in other cases, all of which affirmed the trial judge's dismissal of the jurors, reinforces the conclusion that this is not a determinative factor. See, e.g., United States v. Brahm, 459 F.2d 546 (3d Cir.), cert. denied, 409 U.S. 873 (1972) (jury deliberated for about five hours after a two day trial); United States v. Cording, 290 F.2d 392 (2d Cir. 1961) (after short trial, jury deliberated for three hours and fifty minutes); Lynch v. United States, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951) (forty-eight hours of jury deliberation after a five week trial); Emmons v. United States, 298 F. Supp. 1143 (D. Ore. 1968) (one day trial followed by six and one-half hours of deliberations); United States v. Fitz Gerald, 205 F. Supp. 515 (N.D. Ill. 1962) (five hours of deliberations following a thirteen day trial); United States v. Lee, 123 F. 741 (N.D. Cal. 1903) (jury dismissed after two and one-half hours of deliberations).

For empirical data on the correlation between the length of a trial and the time in which a jury may be expected to return a verdict or become deadlocked see H. Kalven & H. Zeisel, The American Jury (1966). Although cited by cases in support of the conclusion that a particular jury would not come to agreement even with the benefit of additional time, the statistics have never been held to be conclusive. See United States v. See, supra at 852.

66. See, e.g., United States v. Medansky, 486 F.2d 807 (7th Cir. 1973), cert. denied, 415 U.S. 989 (1974); United States v. Goldstein, 479 F.2d 1061 (2d Cir. 1973), cert. denied, 414 U.S. 873 (1974); United States v. Brahm, 459 F.2d 546 (3d Cir.), cert. denied, 409 U.S. 873 (1972); Marienfeld v. United States, 214 F.2d 632 (8th Cir.), cert. denied, 348 U.S. 865 (1954); Thames v. Justices of Super. Ct., 383 F. Supp. 41 (D. Mass. 1974); McGuire v. Blubaum, 376 F. Supp. 284 (D. Ariz. 1974).

67. Gori v. United States, 367 U.S. 364, 368 (1961).

68. 431 F.2d 949 (3d Cir. 1970).

69. Id. at 950. Since there was no objection to the mistrial, the defense impliedly consented to the jury discharge. Id.

70. Id. at 951.

71. Id. at 950-51. The decision was written by the same circuit court judge, who, four years later, wrote the Webb opinion in which he criticized the trial judge for raising the issue of jury

The trial judge was held not to have abused his discretion in *Grogan v. United States,*[72] where, after five hours of deliberation, he recalled the jury and charged that upon unanimous agreement a verdict could be reached on any of the counts concerning any of the defendants.[73] The judge reserved decision on whether to declare a mistrial on those counts to which no verdict would be forthcoming.[74] The jury again retired to the jury room and within five minutes returned a verdict of acquittal against one defendant, but no verdict as to the other three. "Because of the late hour and the inability of the jurors to agree," the judge declared a mistrial.[75] The court of appeals held that the mistrial did not prevent a retrial of any of the defendants because the facts in the case did "not warrant a deviation" from the manifest necessity standard.[76]

Moreover, in *United States v. Fitz Gerald,*[77] the trial court, in a discussion with the defendant and both counsel after the jury had retired, stated his determination to discharge the jury unless it reached agreement within six hours.[78] Upon failure to do so, the jury was discharged. Such dismissal did not bar a subsequent prosecution of the defendant, since the appellate court found no indication of an attempt by the trial court to thwart an acquittal by the jury.[79]

The fact that a defendant has already been subjected to two previous trials which were aborted by the judge because of jury disagreement does not, by itself, prohibit a third prosecution of the defendant. In *United States v. Castellanos,*[80] the Court of Appeals for the Second Circuit held that further prosecution did not violate the double jeopardy clause solely because two

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deadlock sua sponte, although the jury foreman, in response to the judge, indicated that the jury was incapable of agreement. 516 F.2d at 1043.

72. 394 F.2d 287 (5th Cir. 1967), cert. denied, 393 U.S. 830 (1968).

73. Id. at 289 & n.1.

74. Id. at 290 & n.2.

75. Id. at 289.

76. Id. at 290. Similarly a mistrial did not prevent reprosecution in Emmons v. United States, 298 F. Supp. 1143, 1145 (D. Ore. 1968), where the judge raised the question of jury inability to agree.

77. 205 F. Supp. 515 (N.D. Ill. 1962).

78. Id. at 515-16.

79. Id. at 518. Although the jury never indicated that it would be unable to reach a verdict, the trial judge had determined at the outset of deliberations not to keep the jury deliberating into the late hours of the night, so as not to create hardship for the jurors. Id. at 516. The court, in reviewing a motion for acquittal, found this to be a proper exercise of the trial judge's discretion because "it was not done at a moment when it was believed the jury was about to acquit the defendant" therefore depriving him of an acquittal. Id. at 518. This should be contrasted to the situation in United States v. Lansdown, 460 F.2d 164, 169 (4th Cir. 1972), where the jury was dismissed at 1:00 P.M., and the court of appeals in criticizing the trial judge, noted that "[t]he jurors would have suffered little additional hardship if required to remain at least until the end of the day."

80. 478 F.2d 749 (2d Cir. 1973).

previous trials of the accused had resulted in deadlocked juries.[81] The court stated:

It is obvious that the defendant's interest in a final determination before the first jury he faces is not the only one here. If that were so, *Perez* would bar even the second trial, and contrary to [settled law] there would be no retrials after appellate reversals. But the cases clearly recognize that the accused's right to a quick determination on the merits may in some instances be outweighed by the "ends of public justice," or put another way, "the public's interest in fair trials designed to end in just judgments."[82]

Similarly, even the Third Circuit, prior to the *Webb* decision, has allowed reprosecution of defendants after the first two trials ended in jury deadlock.[83]

There is conflict, however, in just how far the allowance of reprosecution may be carried. At least one court[84] has concluded that there is no deprivation of constitutional rights, even though defendants have been subjected to five trials.[85] Still another court[86] has found that where four previous prosecutions had resulted in mistrials by reason of jury disagreement, trying the defendants a fifth time would violate the double jeopardy protection.[87]

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81. The court of appeals reversed the district court order which prohibited a third prosecution of the defendant. Basing its decision on the ideas that a criminal trial puts a heavy personal strain on a defendant and that an accused has an important interest in getting a final verdict out of the first jury he faces, the district court had held that the double jeopardy clause did not allow more than one retrial after mistrial. United States v. Castellanos, 349 F. Supp. 720, 722-23 (E.D.N.Y. 1972), rev'd, 478 F.2d 749 (2d Cir. 1973). The court of appeals held that because "the jury deadlocks were genuine," each mistrial satisfied the manifest necessity test. Therefore, any double jeopardy claim was "barred by Perez and its progeny." 478 F.2d at 752.

82. 478 F.2d at 752 (citations omitted). The court of appeals criticized "limiting the government to two bites at the apple" because "such an approach is the kind of 'mechanical application of an abstract formula' that the cases condemn." Id. The court concluded that "the Perez standard itself . . . embodies the appropriate balancing test [between the rights of the accused and the public interest]—the defendant's interests bar retrial in all but those instances where there is 'manifest necessity' for taking the case away from the jury. Since each mistrial was properly declared . . . the Perez formulation tips the balance in the government's favor, and does not constitutionally bar retrial." Id.

For an unfavorable review of the Second Circuit's Castellanos decision see Note, Double Jeopardy and Hung Juries: United States v. Castellanos, 5 Rutgers-Camden L.J. 218 (1974). That Note approves of the opinion of the district court in Castellanos and advocates releasing an accused who has gone through two mistrials, although each was properly declared.

83. United States v. Corbitt, 368 F. Supp. 881 (E.D. Pa. 1973), aff'd mem., 497 F.2d 922 (3d Cir. 1974).

84. United States v. Persico, 425 F.2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970).

85. The first and third trials ended in mistrial because of jury disagreement. The second and fourth trials resulted in conviction but were reversed on appeal. Id. at 1377. Without even mentioning the double jeopardy clause as a possible limitation, the court of appeals held that retrying the defendants for a fifth time was constitutionally permitted. Id. at 1384-85.

86. Preston v. Blackledge, 332 F. Supp. 681 (E.D.N.C. 1971).

87. The court decided that "jeopardy attached" when the government began a fifth prosecution of the defendants, and held that the rights of an accused should not be "subordinated to the demands of public justice after four trials have resulted in hung juries." Id. at 687.

The Second Circuit's *Beckerman* decision is the latest in a series of federal cases reaffirming the broad discretion of the trial judge in declaring a mistrial once he determines that the jury is unable to agree on a verdict.[88] In *Webb,* decided the same day as *Beckerman,* the Third Circuit took a different approach and sharply scrutinized the actions of the trial court. It concluded that because the defendant had already twice gone through the "heavy personal strain" of a criminal trial, a higher judicial standard of care was mandated before the state could subject him to yet another trial.[89] The trial judge in *Webb* did not meet that standard of care and therefore abused his discretion.[90]

Although *Webb* and *Beckerman* are obviously not factually alike, the factors in *Webb* seemingly could have supported the conclusion, based on prior case law, that there was no abuse of the "broad discretion" traditionally reserved to the trial judge in the mistrial-hung jury area. The recent decisions on this topic reveal that the "crucial factor" contributing to the trial judge's discretion in declaring a mistrial is an indication by the jury that it cannot reach agreement.[91] Where this factor is absent, retrial has generally been prohibited.[92] But where the jury has stated that it was deadlocked, retrial has been permitted in conformity with the fifth amendment.[93] Whether the statement was made by the foreman as spokesman for the jury or by each juror separately is, in light of prior case law, not an important consideration.[94] Nor do the decisions place great significance on whether the judge or the jury initiates the inquiry into the possibility of deadlock.[95] Furthermore, the length of jury deliberation, while important, has uniformly been considered not crucial.[96] Prior to the *Webb* decision, both the Second and Third Circuits have held that the double jeopardy clause does not prohibit a third prosecution after two trials previously have ended in jury disagreement.[97]

Preston distinguished Persico because there the retrials did not result entirely from hung juries. Rather, some were the result of successful intervening appeals by defendants. Id. at 688. The Preston court relied on Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967), where it was held that three mistrials violated the double jeopardy prohibition. But in that case, while the first two mistrials were due to hung juries, the third trial was aborted because the defense counsel mentioned the previous mistrials in his closing argument. The Carsey court held that the third mistrial declaration was improper, and, therefore, reprosecution was not permitted. Id. at 811-12. Since all four mistrials in Preston were properly declared because of juror disagreement, Carsey is also distinguishable. Therefore, Preston's reliance on Carsey may be misplaced.

88. 516 F.2d at 910.

89. 516 F.2d at 1045. Although a trial judge must exercise "extreme caution" before declaring a mistrial, the existence of the prior proceedings in Webb required "the exercise of even greater caution." Id. at 1042, 1045.

90. Id. at 1045.

91. See, e.g., United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

92. See note 64 supra.

93. See note 65 supra and accompanying text.

94. See note 66 supra and accompanying text.

95. See notes 68-79 supra and accompanying text.

96. See notes 54-65 supra and accompanying text.

97. See notes 80-83 supra and accompanying text.

Webb, while demanding "greater caution" on the part of the trial judge before exercising discretion to discharge the jury in a defendant's second trial,[98] does not provide guidance as to the circumstances under which the judge would be able properly to declare a mistrial. A reading of the case suggests that had the jury, rather than the trial judge, first raised the spectre of deadlock and had the trial court asked the full panel, rather than only the foreman, about the prospects for agreement, the court of appeals would probably have affirmed the decision of the trial judge.[99] In light of precedent, however, it is clear that the factors governing the trial judge's decision all point to a traditionally permissible declaration of mistrial. *Webb* should be regarded as a maverick decision which seeks to protect the individual from the "embarrassment, expense and ordeal" of having to undergo repeated prosecutions, even where this is due to mistrials which were properly declared under the manifest necessity doctrine. *Webb* certainly does not advocate a "mechanical rule" which always prohibits a third trial following two mistrials. The decision does stand for the idea that, out of a solicitude for the protection of the constitutional rights of a criminal defendant, the trial judge's traditional discretion to declare a mistrial is to be restricted when the defendant has already been through a previous prosecution. Hopefully, future decisions by appellate courts will follow the lead of *Webb* in order to safeguard an accused from being subjected to a "continuing state of anxiety and insecurity" and to diminish the possibility "that even though innocent he may be found guilty."[100]

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98. 516 F.2d at 1045.

99. See id. at 1044 n.57.

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