Florida State University Law Review

Volume 7 | Issue 2 Article 8

Spring 1979

Arizona v. Washington, 434 U.S. 497 (1978)

Criminal Law—MISTRIAL DECLARATION—OVER DEFENDANT'S OBJECTION, PROSECUTION MUST DEMONSTRATE HIGH DEGREE OF MANIFEST NECESSITY OR REPROSECUTION WILL BE BARRED. *Arizona v. Washington,* 434 U.S. 497 (1978).

Because of the protection afforded a criminal defendant by the double jeopardy clause of the fifth amendment, a mistrial declaration pursuant to a prosecutor's request can result in a bar to subsequent prosecution.[1] Thus, the need for clear standards by which to determine when a mistrial is necessary and not a bar to reprosecution is paramount. On February 21, 1978, this issue was partially resolved by the United States Supreme Court in *Arizona v. Washington.*[2] The decision, however, did not reach all the ambiguities and potential problems related to this mistrial issue.

On May 21, 1971, George Washington, Jr., was found guilty of the first degree murder of a hotel clerk.[3] Two years later, the Superior Court of Pima County, Arizona, ordered a new trial for the defendant because it was discovered that the prosecution had withheld exculpatory evidence from the defense. As the new trial began on January 7, 1975, the defense counsel informed the prospective jurors "that there was evidence hidden [by the prosecution] at the last trial."[4] The prosecution immediately moved for a mistrial. The trial judge granted the motion because jury knowledge of the previous trial and the prosecutorial error was held to be prejudicial to the prosecution.[5] In declaring the mistrial, the trial judge deviated from established procedures. He failed to state expressly the "manifest necessity" for the mistrial and failed to indicate for the record that alternatives, in lieu of mistrial, had been considered and rejected.[6]

After the mistrial declaration, on January 24, 1975, the defendant filed a special proceeding in the Supreme Court of Arizona,[7] contending that retrial was barred by both the double jeopardy clause

1. U.S. CONST. amend. V provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

2. 434 U.S. 497 (1978), *rev'g* 546 F.2d 829 (9th Cir. 1977).

3. 434 U.S. at 499.

4. *Id.*

5. The prosecution argued that the prejudice to the jury could not be repaired by any cautionary instructions, and that a mistrial was a "manifest necessity." The defense counsel countered that his comment was invited by the prosecutor's previous reference to a witness' earlier testimony and any prejudice could be avoided by curative instructions. Both the prosecutor and the trial judge recognized that an improper mistrial ruling would preclude another trial because of double jeopardy limitations. *Id.* at 500-01.

6. *Id.* at 501.

7. The defense filed both a "special proceeding" which is similar to a common law writ of mandamus or prohibition, and a petition for writ of habeas corpus. The defense also moved to dismiss or quash the information. *Id.* at 501 n.6.

of the fifth amendment and the due process clause of the fourteenth amendment to the United States Constitution. Despite the silent record and the constitutional allegations, the Supreme Court of Arizona declined to accept jurisdiction.[8] The defendant next sought habeas corpus relief in the United States District Court for the District of Arizona. He argued that reprosecution would violate the double jeopardy clause.[9] While the federal district court found the defense counsel's opening remarks improper and prejudicial, it granted the writ of habeas corpus and barred reprosecution.[10] The United States Court of Appeals for the Ninth Circuit affirmed the federal district court,[11] but the United States Supreme Court, on February 21, 1978, reversed.[12]

Historically, the double jeopardy clause of the fifth amendment has been made applicable to the states through the fourteenth amendment.[13] As a general rule, jeopardy attaches when the jury is impaneled and sworn to try a case,[14] or in a case without a jury, when either side begins to present evidence.[15] This "first jury right" is considered so fundamental that an improper, unnecessary mistrial declaration can result in a bar to reprosecution.[16]

The Supreme Court first considered the retrial issue in 1824, in *United States v. Perez*,[17] where Mr. Justice Story formulated the "manifest necessity" test.[18] According to Justice Story, a mistrial

8. *Id.* at 501. No justification for the refusal to accept jurisdiction was noted.

9. The defense dropped the previous due process allegations and relied entirely on the double jeopardy contentions.

10. 434 U.S. at 501-02. The court expressed the view that before granting a mistrial motion, the trial judge was required "to find that manifest necessity exists for the granting of it." *Id.* at 501. In fact, the court indicated that a simple statement by the trial judge acknowledging a manifest necessity would have been sufficient to defeat the double jeopardy claim. This view, however, was not directly supported by case law.

11. 434 U.S. at 501-02. In his opinion, Judge Kilkenny characterized the defense counsel's opening statement as improper. The court justified its affirmation by emphasizing that there was no express finding of manifest necessity or an explicit consideration of alternatives. Again, this view was not supported by any Supreme Court decisions.

12. 434 U.S. at 503. Generally, the Court held that the lower courts applied an inappropriate standard of review and attached too much significance to the form of the ruling. Mr. Justice Stevens delivered the opinion of the Court, in which Mr. Chief Justice Burger, Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Rehnquist joined. Mr. Justice Blackmun concurred in the result. Mr. Justice White filed a dissenting opinion. Mr. Justice Marshall also filed a dissenting opinion, in which Mr. Justice Brennan joined.

13. Benton v. Maryland, 395 U.S. 784, 793-96 (1969).

14. J. MILLER, CRIMINAL LAW 535-36 (1934). *See, e.g.*, Cornero v. United States, 48 F.2d 69 (9th Cir. 1931) (jeopardy attaches when jury is impaneled).

15. McCarthy v. Zerbst, 85 F.2d 640 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936).

16. J. MILLER, *supra* note 14, at 536.

17. 22 U.S. (9 Wheat.) 579 (1824) (retrial allowed after trial court, on its own motion, discharged jury due to jurors' inability to agree on a verdict).

18. For in depth discussions regarding the manifest necessity double jeopardy issue see Comment, *The Double Jeopardy Dilemma: Reprosecution After Mistrial On Defendant's*

declaration was proper, and thus not a bar to reprosecution "whenever . . . taking all the circumstances into consideration, there is a manifest necessity for [declaring a mistrial], or the ends of public justice would otherwise be defeated."[19] In *Perez*, the mistrial was held to be manifestly necessary because the jury was unable to reach a verdict. Thus reprosecution was permitted.[20] The Court, however, failed to adequately define the terms, "manifest necessity" or "the ends of public justice."[21]

The Supreme Court first interpreted the *Perez* test in *Simmons v. United States*[22] and concluded that if the ends of public justice require a declaration of a mistrial, and if the necessity is obvious, then the manifest necessity test has been met.[23] This standard, as enunciated by the Court, is now commonly labeled the *Simmons* test.[24] It was followed in only four subsequent cases and has not been directly applied since 1909.[25]

In 1949, almost sixty years after *Simmons*, the Supreme Court employed a less restrictive *Perez* interpretation in *Wade v. Hunter*.[26] This less restrictive interpretation is now commonly referred to as

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Motion, 63 IOWA U.L. REV. 975, 977-82 (1978); Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, 69 NW U.L. REV. 887, 887-909 (1975).

19. 22 U.S. (9 Wheat.) at 580.

20. *Id.* at 579-81.

21. Supreme Court cases interpreting and applying these terms include: Arizona v. Washington, 434 U.S. 497 (1978); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963); Gori v. United States, 367 U.S. 364 (1961); Wade v. Hunter, 336 U.S. 684 (1949); Simmons v. United States, 142 U.S. 148 (1891).

22. 142 U.S. 148 (1891).

23. After the trial had commenced, the prosecution presented evidence regarding an association between the defendant and a juror which had been denied on voir dire. Subsequently, other jurors read of this evidence in a newspaper. The Court permitted retrial, holding that the trial judge had properly dismissed the jury and declared a mistrial. *Id.* at 148.

24. The *Simmons* test is somewhat similar to the most common *Perez* interpretation which is called the *Perez* dual standard (to be discussed *infra*). However, the dual standard is two separate tests. That is, either manifest necessity *or* the ends of public justice will justify a mistrial under the dual standard while the *Simmons* test requires a prospect that the ends of public justice will be defeated if the mistrial is not declared *and* that the necessity is of a manifest nature, *i.e.*, clear and obvious. *See Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, *supra* note 18, at 892-95.

It is possible that a form of the *Simmons* test appeared before *Perez*. *See United States v. Coolidge*, 25 F. Cas. 622 (C.C.D. Mass. 1815) (No. 14,858).

25. Keerl v. Montana, 213 U.S. 135 (1909) (reprosecution not barred when jury, after two days of deliberation, unable to reach verdict); Dreyer v. Illinois, 187 U.S. 71 (1902) (reprosecution not barred when jury unable to reach verdict); Thompson v. United States, 155 U.S. 271 (1894) (reprosecution not barred when mistrial declared because juror had also served on the grand jury that indicted defendant); Logan v. United States, 144 U.S. 263 (1892) (reprosecution not barred when misrial declared after jury deliberated unsuccessfully for forty hours).

26. 336 U.S. 684 (1949).

the *Perez* dual standard.[27] The Court in *Wade* allowed retrial when wartime maneuvers made it necessary to halt the trial and move the trial situs. The Court concluded that a manifest necessity for the mistrial existed since the situs of the trial was in a danger zone *and* the ends of public justice required that the declaration not be a bar to reprosecution in order to prevent the accused and untried rapist from going free.

The *Wade* rationale (*Perez* dual standard) was applied twelve years later in *Gori v. United States*.[28] In *Gori* the Court permitted retrial despite the fact that neither the court of appeals nor the Supreme Court could tell why the trial judge had dismissed a juror and declared a mistrial.[29] The Supreme Court justified the retrial by acknowledging that the trial judge had held that the declaration was in "the sole interest of the defendant."[30] Apparently, the Court included the interest of the defendant in the "public justice" standard and broadened the *Perez* dual standard by deferring to the discretion of the trial judge.[31]

In 1963, only two years after *Gori,* in *Downum v. United States*[32] the Court retreated from the more liberal dual standard. In *Downum,* the Court held that a mistrial was a bar to reprosecution because the mistrial had resulted from the failure of a prosecution witness to appear in court.[33] The Court concluded that *only* a manifest necessity, which the Court interpreted as an impracticability to proceed, would justify mistrial that would allow retrial. This interpretation is commonly referred to as the *Perez* single standard.[34]

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27. *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, *supra* note 18, at 892-95. The *Perez* dual standard is achieved by placing the emphasis on the word "or," thus making the "manifest necessity" and "public justice" clauses separate and independent. This interpretation has been read to mean that a court may discharge a jury without erecting a bar to reprosecution whenever there is a manifest necessity for the act or whenever public justice would otherwise be defeated. Usually, under this interpretation, manifest necessity is construed in the stricter sense of a severe impracticability to proceed. Alone, this would be a severe test but when coupled with the public justice rationale, the dual standard is much less rigorous, allowing more mistrials to be justified with no bar to reprosecution. *Id.* at 893 n.20. *See also* Arizona v. Washington, 434 U.S. 497 (1978); Illinois v. Somerville, 410 U.S. 458 (1973); Gori v. United States, 367 U.S. 364 (1961); Wade v. Hunter, 336 U.S. 684 (1949).

28. 367 U.S. 364 (1961).

29. This mistrial declaration was sua sponte and not pursuant to motions from either the prosecution or defense. *Id.* at 365.

30. *Id.* at 369.

31. *Id.* at 368.

32. 372 U.S. 734 (1963).

33. Although a subpoena had been issued for the witness, his whereabouts were unknown. This information was relayed to the prosecutor one day before trial, and the prosecutor made no further check to determine whether the witness was available. *Id.* at 735-37.

34. The *Perez* single standard is an interpretation that permits the "ends of public justice" to justify a mistrial when it has been declared because of a manifest necessity. Note

Since the Court eliminated the public justice standard, this single standard would make retrial after mistrial much more difficult to achieve.

In 1971, this single standard was applied in *United States v. Jorn.*[35] The Court held that there could have been no manifest necessity for a mistrial declaration because there was a viable alternative, and refused to allow the ends of public justice to justify the mistrial.[36] In *Jorn,* that alternative was to issue a continuance order so that the witnesses could have been properly informed of their constitutional rights.[37]

Read together, *Downum* and *Jorn* stand for the proposition that the mistrial evaluation is no longer totally a matter of judicial discretion.[38] The trial judge must expressly weigh the alternatives before declaring the manifest necessity of a mistrial.[39] However, due to a reorganization on the Supreme Court, the rigorous *Downum-Jorn* requirements were short-lived.[40]

The Burger Court's initial review of double jeopardy standards was in *Illinois v. Somerville.*[41] In *Somerville,* the prosecution discovered a defect in the indictment after the trial had commenced. Under Illinois law a mistrial and re-indictment was the only procedure available to cure the defect and allow retrial.[42] The Court returned to the *Perez* dual standard and held that retrial was not barred by the double jeopardy clause. *Either* a finding of manifest

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that the public justice standard, in this context, has no direct relation to the mistrial declaration. This standard is more rigorous than the dual standard because if there was no manifest need for the mistrial when it was declared, the mistrial will be held to be improper and thus a bar to reprosecution. Therefore, if a mistrial was declared in order to prevent the defeat of the ends of public justice but no manifest need was found to exist, the defendant would go free. *Id.* at 738. *See Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?, supra* note 18, at 892-95. *See also* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

35. 400 U.S. 470 (1971).

36. The case involved a charge of willfully assisting in the preparation of fraudulent income tax returns. The would-be witnesses were taxpayers for whom this service had been performed and their testimony involved self-incriminating statements. The trial court judge refused to allow the witnesses to testify until they had consulted a lawyer. The judge then discharged the jury. On retrial, the information was dismissed on motion of former jeopardy. *Id.* at 472-73.

37. *Id.* at 487.

38. *See generally* Scott v. United States, 202 F.2d 354, 355 (D.C. Cir.), *cert. denied,* 344 U.S. 879 (1952).

39. *See* United States v. Grasso, 552 F.2d 46, 53 (2d Cir. 1977); *The Double Jeopardy Dilemma: Reprosecution After Mistrial on Defendant's Motion, supra* note 18, at 980; Comment, *Retrial After Mistrial: The Double Jeopardy Doctrine of Manifest Necessity,* 45 MISS. U.L. J. 1272, 1275 (1974).

40. Justices Black and Harlan were replaced by Justices Rehnquist and Powell.

41. 410 U.S. 458 (1973).

42. *Id.* at 459-60.

necessity *or* a finding that the ends of public justice would be served would justify a mistrial which would not bar subsequent prosecution.[43]

In its reinstatement of the ends of public justice standard, *Somerville* appears to have overruled sub silentio both *Downum* and *Jorn*.[44] However, the *Somerville* majority apparently viewed its holding as consistent with *Downum* and *Jorn* by implying that the *Perez* single standard was not a separate test but rather merely one branch of the dual standard.[45]

The Court in *Somerville,* after recognizing the ends of public justice standard, realized the probable confusion that would result from its application. Consequently, the Court attempted to avoid this confusion by holding that there are two instances when a mistrial would not bar retrial: first, when an impartial verdict could not be reached, *e.g.,* jury prejudice; and, second, when a verdict of conviction would undoubtedly be overturned on appeal due to an obvious procedural error at trial, *e.g.,* an insufficient indictment.[46] Undoubtedly, there are other instances when the public justice standard would justify a mistrial and allow retrial; however, the *Somerville* Court failed to clarify the issue further.

Although the *Somerville* Court adopted the *Perez* dual standard, until *Arizona v. Washington* it was unclear as to which instances were "manifest." It was also unclear whether the trial court had to find expressly that at least one of the two standards had been met. Undoubtedly, trial court judges were uncertain as to whether they were required to record the alternatives that they considered (in lieu of a mistrial) and whether their discretion would be honored.[47] Nevertheless, prior to *Washington* in 1978, but after the 1973 *Somerville* decision, there was little change in the state of the law regarding the former-jeopardy-because-of-mistrial problem.[48]

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43. The Court stated:

> In reviewing the propriety of the trial judge's exercise of his discretion, this Court, following the counsel of Mr. Justice Story, has scrutinized the action to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by "manifest necessity" or the "ends of public justice."

Id. at 462-63.

44. *See Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?, supra* note 18, at 904-05.

45. 410 U.S. at 463-71. Note that *Downum* held that a prosecutorial mistake was not a valid reason to justify a mistrial and retrial. Thus the insufficient indictment, due to the prosecution's negligence, would probably be considered an insufficient justification if the single standard had been applied. *Jorn* was in fact dissimilar because there were alternatives available in *Jorn,* but no alternatives were available in *Somerville.*

46. *Id.* at 464.

47. *See* Arizona v. Washington, 546 F.2d 829 (9th Cir. 1977).

48. *See* United States v. Dinitz, 424 U.S. 600 (1976) (if mistrial declared at request of

On February 21, 1978, the United States Supreme Court decided *Arizona v. Washington.* While the majority readily conceded that an inherent unfairness to the defendant results whenever a trial is aborted,[49] the Court also recognized that the defendant's right to have the trial concluded (first jury right) is sometimes subordinate to the public interest in affording the prosecution a full and fair opportunity to present evidence to an impartial jury.[50] In support of this ends of public justice position, the Court cited *Simmons v. United States,* in which the Court honored the trial judge's discretion and allowed reprosecution for that very reason.[51] But the *Simmons* test does not represent the *Perez* dual standard. Instead, the *Simmons* standard only allows a mistrial declaration when it is manifestly necessary in order to prevent the defeat of public justice. In view of the limited following of *Simmons* in the past, the holding in *Washington* is apparently reaffirming the *Somerville* adoption of the *Perez* dual standard while broadening the ends of public justice standard in order to allow the trial judge a high degree of discretion.[52] Therefore, it appears that the Court in *Washington* has made the *Perez* dual standard much less restrictive, with the probable result of more reprosecutions.[53]

The *Perez* dual standard was further expanded in *Washington* by requiring the prosecutor to shoulder the burden of justifying this mistrial in order to avoid the double jeopardy plea. The Court stated, "The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant."[54] This

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defendant, without judicial or prosecutorial manipulation, manifest necessity test is not applicable due to implication of waiver).

49. 434 U.S. at 504. The Court, citing Illinois v. Somerville, stated:

> The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one . . . . Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration.

Id. at 504-05 n.15.

50. *Id.* at 505. *See* United States v. Jorn, 400 U.S. at 479-80.

51. 142 U.S. at 154.

52. *See* 434 U.S. at 511. The *Washington* Court concluded: "We recognize that the extent of the possible bias cannot be measured, and that . . . some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions." *Id.* The Court also stated that, "[i]f the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears." *Id.* at 510 n.28.

53. The *Perez* dual standard had always been considered the most lenient standard, but did not include specific language with respect to the judge's discretion.

54. 434 U.S. at 505. "Whether the phrase 'manifest necessity,' 'evident necessity,' . . . or 'imperious necessity,' . . . is used, the meaning is apparently the same." *Id.* at 505-06 n.17 (citations omitted).

requirement bears no mention of the use of the ends of public justice standard to bolster the prosecutor's argument. The "public justice" language elsewhere in the opinion, however, in combination with the holding in support of reprosecution would probably support a prosecutor's manifest necessity argument.[55]

The Court in *Washington* recognized and attempted to clarify the ambiguity surrounding the term "manifest necessity" by noting varied degrees of necessity.[56] Citing *Winsor v. Queen,*[57] the Court concluded that a "high degree" of necessity must be present in order to permit reprosecution after a mistrial declaration.[58] The Court indicated that a "high degree" of necessity would include situations where alternatives exist but are dismissed by the trial judge.[59] Since the Court failed to discuss specifically the future application of this new requirement, the judge's discretion in considering those alternatives probably would be honored unless clearly erroneous.

The majority in *Washington,*[60] the federal district court,[61] the Court of Appeals for the Ninth Circuit,[62] and Justice Marshall,[63] who dissented in *Washington,* were in agreement that the opening statement made by the defense counsel was improper. Furthermore, all agreed that the statement could have resulted in jury prejudice against the prosecution.[64] However, none of the aforementioned courts or justices resolved the issue of the judge's failure to make explicit findings justifying the mistrial in a similar manner.

The majority gave little explanation and cited virtually no precedential authority for its holding with regard to the absence in the trial record of an express finding of manifest necessity or other express justifications for the mistrial. The Court simply concluded that a failure to explain the ruling more completely, or a failure of

55. *See* 434 U.S. 505-17.

56. *See id.* at 505-07.

57. L.R. 1 Q.B. 289 (1866) (Cockburn C.J.).

58. 434 U.S. at 506-07.

59. *See id.* at 511-12. Logically, the *Washington* Court stated that the public interest in justice would be needlessly frustrated if the appellate court viewed "necessity" differently from the trial court. So the Court pointed out that the mistrial was appropriate despite the fact that it was not strictly necessary (alternatives were available, *e.g.*, corrective instructions to the jury). The Court said that "the overriding interest in the even handed administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation . . . ." *Id.* at 511.

60. *Id.* The majority stated: "[W]e regard this issue [of the improper and prejudicial nature of the defendant's remarks] as foreclosed by respondent's failure to proffer any Arizona precedent supportive of his contention and by . . . the consistent opinion of the Federal District Court and the Court of Appeals." *Id.* (footnote omitted).

61. 546 F.2d at 830.

62. *Id.*

63. 434 U.S. at 519-21.

64. *Id.* at 497, 517, 519-21.

the trial court to use procedural language like "manifest necessity" did not render the mistrial declaration constitutionally defective.[65] The Court reasoned that the record provided sufficient justification for the state court ruling and, citing *Cupp v. Naughten*,[66] held that an explanation supporting a decision in this area was not constitutionally mandated.[67]

Therefore, the *Washington* holding indicates that despite the "high degree of necessity" requirement the trial judge need not avail himself of the possible alternatives before declaring a mistrial (unlike *Jorn*). Moreover, public justice considerations alone may justify a mistrial (unlike *Jorn* and *Downum*) even though the Court requires the prosecutor to demonstrate a "manifest necessity" for the mistrial. Most importantly, the trial judge's evaluation of the situation will be accorded the highest respect and he will not be required to make explicit findings as to manifest necessity or alternatives considered. In this context, the holding seems clear. However, the evaluation of a "high degree" of necessity or of "viable alternatives" or of "public justice considerations" are still to be accomplished on a subjective basis. This use of subjectivity without clearer guidelines may result in further confusion because the appellate review of the cold record is also restricted to a subjective analysis.

Dissenting in *Washington*, Mr. Justice White noted the limitations on the function of the Court and that it should not have undertaken an examination of the record.[68] This examination, according to White, is a burden that should be placed on the district court and not the appellate system.[69] Therefore, Justice White would have remanded the case to the district court to determine whether the mistrial was necessary pursuant to the "correct legal standard."[70] But Mr. Justice White failed to recognize the fact that this "judicial buck passing" without any clarification would have resulted in a continuation of the confusion, since there still remained a lack of established guidelines by which to measure the necessity of the mistrial or the viability of alternatives.

Unlike Justice White, Mr. Justice Marshall, with whom Mr. Justice Brennan joined in dissent, did not object to an examination of

65. 434 U.S. at 516-17.

66. 414 U.S. at 146.

67. *Cf. id.* (the holding in *Cupp* was restricted to limited factual situations but included the *Washington* situation).

68. 434 U.S. at 518.

69. *Id.*

70. *Id.* Justice White stated that the lower courts were "therefore in error in granting relief without further examination of the record to determine whether the use of an incorrect legal standard was sufficiently indicated by something beyond mere silence. . . ." *Id.*

the record at the appellate level as long as the record was clear on its face.[71] Instead, their view was that the Court reached an improper result because the silent record neither justified the termination of the trial; nor indicated that less drastic alternatives were available.[72] Thus since the record was not clearly indicative of a single solution these dissenters simply would not have allowed reprosecution.[73]

Although both dissenting opinions in *Washington* discussed the problems that appellate courts face when reviewing a trial court's mistrial declaration, the absence of specific guidelines due to an ad hoc type of review suggests that a future review will be conducted in a subjective manner.[74] Therefore, as noted by the dissent in *United States v. Martin*,[75] the subjectivity of the review established in *Washington* could result in a general reluctance by the trial judge to grant mistrial motions. In other words, because of the possibility that retrial might be barred due to an unfavorable appellate review, the trial judge might allow a trial to proceed even though it is marked by reversible error. A convicted defendant in such a case will appeal, but he will not automatically escape trial. Clearly, this reluctance to declare a mistrial could result in a great waste of both time and money spent trying reversible proceedings.[76]

If a trial judge does declare a mistrial, an appellate court could use *Washington* to achieve varied results. Indeed, the *Washington* decision could allow the appellate court to choose from a number of standards. Hence, the standard chosen will be the one that best accommodates the court's predetermined resolution of the double

71. *Id.* at 519.

72. Justice Marshall stated: "Where I part ways from the Court is in its assumption that an 'assessment of the prejudicial impact of improper argument,' *ante*, at 514, sufficient to support the need for a mistrial may be implied from this record." *Id.* at 520.

73. Justice Marshall concluded: "[I]t is not apparent on the face of the record that termination of the trial was justified by a 'manifest necessity' or was the only means by which the 'ends of public justice' could be fulfilled." *Id.*

74. Manifest necessity does "not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Id.* at 506.

75. 561 F.2d 135 (8th Cir. 1977). In *Martin*, the prosecutor read a grand jury transcript which contained irrelevant and highly prejudicial material to the jurors at trial. The defense moved for a mistrial. Normally, the double jeopardy clause would not bar reprosecution because the defendant had requested the mistrial; however, the court held that the double jeopardy clause protects defendants against governmental actions intended to provoke mistrial requests. Therefore, the mistrial declaration was held to be a bar to subsequent prosecution, notwithstanding the request by the defense. *Id.* at 136-38.

76. *See generally* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. U.L. REV. 1272, 1279-81 (1964); Comment, *The Double Jeopardy Dilemma: Reprosecution After Mistrial on Defendant's Motion*, 63 IOWA U.L. REV. 975, 988 (1978); Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, *supra* note 18, at 908.

jeopardy problem. When the reviewing court is primarily concerned with reprosecuting the defendant, the ends of public justice language can be used to achieve that result. If, on the other hand, the defendant's right to be protected from possible double jeopardy is considered to be of paramount importance, or if the court wishes to protect the defendant from further prosecution, then the more stringent manifest necessity language will be used to hold the trial court's ruling erroneous and bar reprosecution. Therefore, although the former-jeopardy-because-of-mistrial problem was partially resolved in *Arizona v. Washington* by specifying that a "high degree" of manifest necessity is required, many ambiguities and possible problems still exist.

THOMAS J. WALSH, JR.