

**Constitutional Law—Fifth Amendment Prohibits Empaneling a  
Second Jury Where First Jury Was Discharged (Downum v. United  
States, 372 U.S. 734 (1963))**

St. John's Law Review

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## RECENT DECISIONS

CONSTITUTIONAL LAW — FIFTH AMENDMENT PROHIBITS EMPANELING A SECOND JURY WHERE FIRST JURY WAS DISCHARGED DUE TO THE ABSENCE OF PROSECUTION WITNESS — Petitioner was indicted in federal district court for forging checks he had stolen from the mails. On the day preceding the trial, the prosecutor learned that his key witness had not been located and, consequently, had not been served with a subpoena to appear at the trial. The marshal informed him, however, that there remained a possibility that service would be effected. When the case was called for trial the following morning, the prosecutor answered ready, although he was unable at that time to ascertain the presence of this witness. A jury was selected, sworn but then excused until the afternoon. Prior to reconvening, the prosecutor was informed by the marshal that the witness had not been found; therefore, he asked the court to discharge the jury. Over petitioner's objection, the application was granted. Two days later, when the case was again called and a second jury sworn, petitioner pleaded former jeopardy. The plea was overruled and he was subsequently convicted. The United States Supreme Court, in a 5-4 decision, reversed, *holding* that petitioner had been subjected to double jeopardy, since the absence of the witness for the prosecution was not such an "urgent necessity" as to justify a discharge of the jury. *Downum v. United States*, 372 U.S. 734 (1963).

The prohibition against double jeopardy is an ancient doctrine, accepted without question in the United States.<sup>1</sup> Among the many

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<sup>1</sup>*Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). "It seems always to have been imbedded in every system of jurisprudence, as it is 'a part of the universal law of reason, justice and conscience.'" *Mullins v. Commonwealth*, 258 Ky. 529, 530, 80 S.W.2d 606, 607 (1935). For an interesting discussion of the historical background of the double jeopardy doctrine, see the dissenting opinion of Mr. Justice Black in *Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1959). In that case the Supreme Court held that a prosecution in the state court for the same crime that defendant had been acquitted of in the federal court did not amount to double jeopardy under the fifth amendment. The holding followed the view expressed by the federal courts and a majority of state courts. See cases cited in *Bartkus, supra* at 133-36. The prohibition is expressed in the fifth amendment of the United States Constitution as well as in the constitutions of forty-one states. In the remaining jurisdictions it is recognized by statute or common law. 1 WHARTON, CRIMINAL LAW AND PROCEDURE 299-301 (12th ed. 1957).

reasons given to justify this rule have been the unnecessary expense to the public involved in successive trials, the increased likelihood of convicting an innocent person, and the right of the defendant to be free from undue anxiety and harassment.<sup>2</sup> In addition, this doctrine furnishes the necessary respect and support for the criminal processes.<sup>3</sup> Because a second trial is, in effect, a statement that the first was a nullity, all trials might be viewed with doubt. It would also be unreasonable for a court to strictly apply a standard of fairness during a trial, if the trial itself may be disregarded.<sup>4</sup>

Since it is second jeopardy that is forbidden by the fifth amendment, it follows that a person must have undergone initial jeopardy before he can claim the defense.<sup>5</sup> Jeopardy is the danger of conviction and punishment with which a defendant is faced when he is put on trial in a criminal action.<sup>6</sup> When the claim of double jeopardy is made, it becomes necessary to ascertain whether the accused had in fact been in jeopardy at a former prosecution. Although a person is not put in jeopardy until the trial,<sup>7</sup> there are differences of opinion at what *stage* of the trial it actually attaches.

If the defendant is tried by jury, it is generally agreed that jeopardy attaches when the entire jury has been empaneled and sworn.<sup>8</sup> If the defendant was tried by a court sitting without a jury, either because he waived the jury or because he was not entitled to one, jeopardy attaches when the production of evidence is begun, *i.e.*, after the first witness is sworn.<sup>9</sup> Thus, the basic

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<sup>2</sup> Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 592 (1961). "[T]he State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense. . . ." *Green v. United States*, 355 U.S. 184, 187 (1957).

<sup>3</sup> Fisher, *supra* note 2, at 593.

<sup>4</sup> *Ibid.*

<sup>5</sup> Some courts have held, however, that the defense of double jeopardy may only be sustained in a capital case. *People v. Ellis*, 15 Wend. 371 (N.Y. 1836). See also *Commonwealth v. Commander*, 10 Pa. D. & C. 275 (1928), holding that a plea of former jeopardy was good as to a charge of first degree murder, but not good as to a charge of murder in the second degree.

<sup>6</sup> Comment, 5 N.Y.L.F. 393, 394 (1959).

<sup>7</sup> See *Wade v. Hunter*, 336 U.S. 684, 688 (1949).

<sup>8</sup> See 1 WHEARTON, *op. cit. supra* note 1, at 308-09. Some courts in the past have held, however, that jeopardy does not attach until a verdict has been rendered, *Anderson v. State*, 86 Md. 479, 38 Atl. 937 (1897), or until the court itself has entered judgment thereon, *United States v. Haskell*, 26 Fed. Cas. 207, 212 (No. 15321) (C.C.E.D. Pa. 1823). Compare *United States v. Kraut*, 2 F. Supp. 16 (S.D.N.Y. 1932), where the court said: "[B]eing put on trial involves the impaneling of the jury and the production of some evidence." *Id.* at 19. (Emphasis added.)

<sup>9</sup> *Clawans v. Rives*, 104 F.2d 240 (D.C. Cir. 1939); 1 WHEARTON, *op. cit. supra* note 1, at 309-10.

issue of when jeopardy attaches, depends upon whether it was a jury or non-jury trial.

The American Law Institute, in its Model Penal Code, rejects this approach as being arbitrary, unreasonable and unnecessary.<sup>10</sup> The Model Code selects the swearing of the first witness as the time when jeopardy attaches, regardless of who will weigh the evidence.<sup>11</sup> Under the Model Code, the first question therefore is: was a witness sworn?

Although jeopardy generally attaches when the jury is sworn, in certain instances a second trial may be had even though the jury, which was empaneled to hear the first trial, was discharged without rendering a verdict. The guiding principles in such a situation were set down by the United States Supreme Court in 1824 in *United States v. Perez*.<sup>12</sup> In that case, the jury, without defendant's consent, was discharged because they were unable to agree on a verdict. The question on appeal was whether a discharge of the jury under those circumstances was a bar to another trial for the same offense.

In answering this question, the Court stated:

[I]n 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.<sup>13</sup>

This "manifest necessity" of the circumstances must be coupled with the sound discretion of the trial court.<sup>14</sup> This test has been followed in all jury discharge cases.<sup>15</sup>

The "hung jury," as in *Perez*, is perhaps the most common situation in which the jury may be discharged without reaching a verdict and a second empaneled.<sup>16</sup> But it is by no means the sole situation. In *Simmons v. United States*<sup>17</sup> a juror stated

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<sup>10</sup> MODEL PENAL CODE § 1.09, comment (Tent. Draft No. 5, 1956).

<sup>11</sup> MODEL PENAL CODE § 1.08 (Proposed Official Draft 1962).

<sup>12</sup> 22 U.S. (9 Wheat.) 579 (1824).

<sup>13</sup> *Id.* at 580. (Emphasis added.)

<sup>14</sup> Concerning the power to discharge the jury, the Court stated: "[T]he power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . . [T]he security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests . . . upon the responsibility of the judges, under their oaths of office." *Ibid.*

<sup>15</sup> *Wade v. Hunter*, *supra* note 7, at 690.

<sup>16</sup> See cases cited in 1 WHEARTON, CRIMINAL LAW AND PROCEDURE, 321-22 (1957).

<sup>17</sup> 142 U.S. 148 (1891).

on his *voir dire* examination<sup>18</sup> that he did not know defendant and had never seen him before. After the jury had been sworn and evidence introduced, it came to the attention of the court that the juror had lied. The jury was discharged over defendant's objection and another was empaneled. Defendant was convicted after his plea of former jeopardy was overruled. In affirming, the Supreme Court held that when the jury is being sworn, and facts exist of which the trial court is ignorant, that court may, *in the exercise of its discretion*, discharge the jury and empanel another. The court may likewise exercise this discretion where, during the trial, the jurors have been subjected to outside influences and have thereby become biased either in favor of, or against, the defendant. The Court stated: "There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice. . . ." <sup>19</sup>

More recently, in *Wade v. Hunter*,<sup>20</sup> the Supreme Court was faced with the question of whether the rapid advance of the United States Army during the invasion of Germany, and the consequent difficulty of locating key witnesses, justified the withdrawal of the charges in a court-martial and the ordering of a new trial by another tribunal. The Court, following the "manifest necessity" test of *Perez*, found that under the circumstances presented, the second court-martial was not the kind of double jeopardy that was within the ambit of the fifth amendment. The petitioner urged the Court to adopt the rule of *Cornero v. United States*,<sup>21</sup> a leading Court of Appeals case, which held that the absence of witnesses can never justify the discontinuance of a trial. The Court refused to take this view, stating:

Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in

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<sup>18</sup> The *voir dire* examination is the interrogatory method whereby the jury is selected. The questions are propounded either by the court or by the attorneys, or by both the court and the attorneys. A juror may generally be excused from serving either for cause or, pre-emptively, without cause. See BLACK, LAW DICTIONARY, 1746 (4th ed. 1951).

<sup>19</sup> *Simmons v. United States*, 142 U.S. 148, 154 (1891). *Accord*, *Thompson v. United States*, 155 U.S. 271 (1894), where after the jury was sworn and one witness had testified, the court learned that one of the jurors was disqualified from serving because he had been a member of the grand jury that had returned the indictment.

<sup>20</sup> 336 U.S. 684 (1949).

<sup>21</sup> 48 F.2d 69 (9th Cir. 1931). In *Cornero*, a jury was empaneled and sworn and a five day continuance was granted in order to locate two government witnesses. When they could not be found the jury was discharged. Two years later a second trial was commenced. Defendant's plea of former jeopardy was overruled, and he was convicted. The Court of Appeals reversed.

considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.<sup>22</sup>

In 1961, the Supreme Court, in *Gori v. United States*,<sup>23</sup> held that a second trial did not violate the prohibition against double jeopardy where the first trial had been terminated by the trial judge's declaration of a mistrial *sua sponte*. On the meager record, the Court could not determine the lower court's reason for declaring the mistrial; nevertheless, the Court found this action to be within the discretion of the trial judge.<sup>24</sup> Since this discretion was declared to be of controlling importance, the Court refused "to scrutinize with sharp surveillance the exercise of that discretion."<sup>25</sup>

In the principal case the Supreme Court was faced with the question of whether the absence of the key prosecution witness was such an urgent necessity as to justify the discharge of a jury and permit a subsequent trial without violating the prohibition against double jeopardy. The petitioner asked the Supreme Court to adopt the *Cornero* rule, which it had rejected in the *Wade* case.

Although the Court expressly declined to say that the absence of a witness can never be a sufficient circumstance to justify the discharge of a jury, the Court reasoned that the facts in this case did not warrant the discharge. The Court quoted the language of *Cornero* which it considered determinative of the issue involved.

The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses.<sup>26</sup>

The Court then proceeded to lay down a very broad test to be employed in criminal actions in federal courts.<sup>27</sup> When *any*

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<sup>22</sup> *Wade v. Hunter*, 336 U.S. 684, 691 (1949).

<sup>23</sup> 367 U.S. 364 (1961).

<sup>24</sup> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id.* at 368.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Downum v. United States*, 372 U.S. 734, 737-38 (1963).

<sup>27</sup> The double jeopardy prohibition of the fifth amendment applies only to federal prosecutions. *Brock v. North Carolina*, 344 U.S. 424, 426 (1953).

doubt exists, whether the second trial has placed the defendant in double jeopardy, the fifth amendment dictates that the defendant should be released.<sup>28</sup> The Court determined that the only alternative to this approach was an "unlimited, uncertain, and arbitrary judicial discretion," which is insufficient to protect the rights of the accused.<sup>29</sup>

The dissent questioned whether the prosecutor's oversight, in failing to ascertain the presence of his witness prior to swearing the jury, deprived the petitioner of his rights without a trial. Relying on the *Perez* test, they found no violation of petitioner's rights, since the first jury heard no evidence, the delay was only two days with no continued or prolonged anxiety, and no additional expense or embarrassment was suffered by petitioner. Where such circumstances exist, the dissent believed that the decision of the majority only results in preventing the government from fairly presenting its case without any corresponding benefit to anyone but the accused. It objected to the view of the majority which apparently will preclude the trial judge from exercising his discretion in this type of situation. Rather, they felt there is no justification in freeing a defendant "because of the harmless oversight of the prosecutor."<sup>30</sup>

The dissent drew a distinction between this "harmless oversight" and the situation where the prosecutor is guilty of negligent preparation or deliberate harassment. If this were the latter situation, it indicated they might have found double jeopardy.<sup>31</sup>

By its decision in the instant case, the Supreme Court appears to have disregarded the *Perez* principles which have been used as a guide since 1824. Those principles require that the trial judge be permitted to exercise his discretion and discharge the jury if it is manifestly necessary, or if public justice requires. This rule of flexibility has now apparently been replaced by a rigid standard which favors the accused whenever there is any doubt as to former jeopardy.

With the *Perez* principle apparently having been rejected, cases such as *Wade* and *Gori*, applying that principle, would likewise seem to be of no force and effect. In effect, the Court has adopted the rule of *Cornero v. United States*. Although the Court paid lip service to *Wade*, it felt that the principle contained in *Cornero* was correct. Quoting at length from the latter, the Court intimated that the mere failure of a prosecutor to have his key witness ready to testify is equivalent to a finding that he has

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<sup>28</sup> *Downum v. United States*, *supra* note 26, at 738.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 743 (dissenting opinion).

<sup>31</sup> *Id.* at 742 (dissenting opinion).

failed to make out a prima facie case because of insufficient evidence.<sup>32</sup>

This decision also indicates that the Supreme Court has retained the traditional approach that jeopardy attaches when the jury is sworn, even though the first witness has not taken the stand and no evidence has been produced. Thus, the Court has apparently rejected the test employed by the Model Penal Code. This choice is unfortunate, for it continues an illogical distinction between jury and non-jury trials. In all cases, jeopardy should attach at the same stage of the proceedings, regardless of who is the trier of the facts.<sup>33</sup>

The rigid standard which the Supreme Court has adopted runs counter to many of its prior decisions in this area, which generally stressed flexibility.<sup>34</sup> The reason for choosing this course is not apparent, since no widespread abuse of discretion by trial courts seems to exist. While it is important to safeguard the rights of those accused of crime, we should also keep in mind that the fair administration of justice demands that the public be permitted to try the accused. This "public right" ought not to be defeated because of an inconsequential failure of the prosecutor to have the witnesses in the courtroom.



DOMESTIC RELATIONS—MEXICAN DIVORCE WHERE BOTH PARTIES APPEARED DECLARED INVALID.—In an action for separation, the defendant husband counterclaimed for annulment alleging that a Mexican divorce procured by his wife from her former spouse was a nullity. Both parties appeared in the Mexican action, the plaintiff personally and her former husband by appointed attorney. In granting the annulment and declaring the divorce invalid, the New York Supreme Court *held* that since neither spouse was domiciled in Mexico, the foreign court was without jurisdiction as we commonly understand that term. *Wood v. Wood*, (Sup. Ct.), 150 N.Y.L.J., Aug. 15, 1963, p. 5, col. 7.

New York attorneys are very often confronted with the necessity of advising their clients on foreign divorce because "New York's antiquated divorce law just simply does not resolve the problem when the parties to a marriage have reached the end

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<sup>32</sup> See text accompanying note 26 *supra*.

<sup>33</sup> MODEL PENAL CODE § 1.09, comment (Tent. Draft No. 5, 1956).

<sup>34</sup> See, *e.g.*, *Wade v. Hunter*, 336 U.S. 648 (1949); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).