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Defense Counsel Misconduct Resulting in Mistrial and Double Jeopardy

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DEFENSE COUNSEL MISCONDUCT RESULTING IN MISTRIAL AND DOUBLE JEOPARDY

A recent decision of the United States District Court, District of Columbia, represents an ominous extension of the double jeopardy plea to prevent retrial after a mistrial. In *United States v. Whitlow*,[1] the trial court on its own motion ordered a mistrial because of defense counsel's misconduct in cross-examining a witness beyond the limit of inquiry set by the court. Defendant's subsequent plea of former jeopardy was upheld at the hearing for a new trial.[2]

Whitlow was indicted on two counts. He and two other defendants were jointly charged with blackmail in the first count, while in the second count he was singly charged with obtaining money by false pretenses. Specifically, in the latter count, he was indicted for wilfully and knowingly passing a worthless check which he and his two accomplices had allegedly extorted from the complainant. Defense counsel moved for and was granted a severance of the two counts on the ground that the evidence for each count was "totally different."[3] Thereupon, Whitlow was tried only upon the false pretenses count. The blackmail charge was subsequently dismissed.

During the trial, the court instructed defense counsel as to the scope of permissible cross-examination in an effort to confine testimony to the false pretenses count and to prevent introduction of blackmail evidence.[4] Nevertheless, while cross-examining a witness in an attempt to show prior conflicting statements made by the complainant, defense counsel introduced testimony relating to the blackmail count which the court had previously held to be inadmissible.[5] The court labeled counsel's conduct as "improper," questioned his motive in seeking a severance of the counts,[6] and indicated it would entertain a motion for mistrial. Although the prosecution refused so to move, a mistrial was ordered by the court on the ground that the violation of the court's instructions had resulted in the introduction of "highly prejudicial" testimony.[7]

1. 110 F. Supp. 871 (D.D.C. 1953).

2. Within the meaning of the Fifth Amendment to the Constitution of the United States, the established rule in federal courts is that an accused person is in jeopardy of life or limb when he is put on trial in a court of competent jurisdiction upon a sufficient indictment, and a jury has been impaneled and sworn. A defendant's right to a verdict from the jury originally impaneled and sworn to try him is well-settled. Hunter v. Wade, 169 F.2d 973 (10th Cir. 1948), *aff'd* 336 U.S. 684 (1949).

3. Severance motion filed November 12, 1952. Authorities listed: Rules 8, 13, and 14 of the United States District Court, District of Columbia; United States v. Cohen, 124 F.2d 164 (2d Cir. 1941).

The Grand Jury indictment charged that the defendants induced complainant to give them a $2,500 check by threatening to accuse him of committing unnatural sex acts on them. Whitlow, to whom the check was made payable, cashed it at a bank.

4. Transcript of Record, pp. 105-107, United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953).

5. *Id.* at 50-51; 106-107.

6. *Id.* at 107.

7. *Id.* at 109.

Defense counsel's conduct was improper because he resorted to evidence which he himself had sought to exclude at the outset by obtaining a severance.[8] This testimony impugned the veracity of the complainant for all purposes. It was designed to cast doubt on the existence of any circumstances of extortion, and by implication, to question whether complainant informed Whitlow that the check was worthless.[9] Although these matters are seemingly relevant to the charge of false pretenses, the forbidden testimony was prejudicial because the prosecution, which was restricted by the same evidentiary barriers imposed by the severance, was precluded from relying on such testimony to support its case.

A court's power to discharge a jury after it has been impaneled and sworn, and without defendant's consent, by declaring a mistrial was established by Mr. Justice Story in *United States v. Perez*.[10] In holding that a discharge of the jury where it was unable to agree did not bar a new trial, the court there proclaimed a formula which has been cited in virtually every subsequent decision involving the mistrial issue:

> ". . . 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."[11]

The opinion did not articulate the meaning of "manifest necessity" but added that the authority was to be exercised with "sound discretion".[12] Later courts have viewed such necessity as an emergency situation where the continuance of a trial is impossible or impractical due to a breakdown of judicial machinery, or simply unjust. Like the *Perez* case, these precedents are descripitve, not analytical. They tend to enumerate instances of "manifest necessity" without evolving principles for applying the term. Most frequently, "manifest necessity" for mistrial has been found in cases where members of the jury become incapacitated or disqualified.[13] In other cases, either the court[14] or prosecution[15] was directly responsible for the events

8. *Id.* at 107. In retrospect, it seems that the two counts were too closely connected for convenient separation and that the evidence for each was not "totally different." Moreover, the record suggests that even the Government was at a loss to prove its case without reference to the circumstances under which the worthless check was obtained. In this situation, a relaxation of the court's ruling on admission of evidence was advisable, if not imperative, for the benefit of both parties. Timely adjustment of this ruling might well have avoided the need for mistrial and its consequent pitfalls.

9. The Government's case may have been a weak one from the evidentiary standpoint. One can only speculate how much this factor influenced the District Court's decision to sustain the double jeopardy plea.

10. 9 Wheat. 579 (U.S. 1824).

11. *Id.* at 580.

12. *Ibid.*

13. Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1891) (inability of jury to agree on verdict). United States v. Potash, 118 F.2d 54 (2d. Cir.), *cert. denied*, 313 U.S. 584 (1941) (illness of juror, court, or accused); Simmons v. United States, 142 U.S. 148 (1891) (juror falsely swearing on his *voir dire* that he was unacquainted with accused); Thompson v. United States, 155 U.S. 271 (1894) (juror served on Grand Jury which indicted accused); United States v. McCunn, 36 F.2d 52 (S.D. N.Y. 1929) (prejudiced juror). Less typical is the case of an essential witness who, for reasons of conscience, refuses to take the required oath. See United States v. Coolidge, 25 Fed. Cas. 622, No. 14,858 (C.C.D. Mass. 1815).

14. United States v. Giles, 19 F.Supp. 1009 (W.D. Okla. 1937) (court questioned good faith of prosecution and made other statements prejudicial to the Government, then retracted its remarks and declared mistrial *sua sponte*); Ercoli v. United States, 131 F.2d 354 (D.C. Cir. 1942) (court varied order of proof and received evidence out of its logical

that gave rise to a mistrial and yet the double jeopardy plea was denied on the ground that adequate necessity existed. However, entry of a *nolle prosequi* by the prosecution due to insufficient evidence for conviction,[16] or to unaccountable absence of prosecution witnesses[17] is not "manifest necessity" but a concession of acquittal. Retrial for the same offense after failure of proof for conviction would indisputably create double jeopardy.

The unsubstantial basis which precedent affords the double jeopardy plea in the *Whitlow* case is evident from the authorities relied upon by the defense. Of seven decisions cited, five rejected the double jeopardy plea[18] and two sustained it.[19] One of these sustaining decisions involved entry of a *nolle prosequi* because of insufficient evidence for conviction.[20] The second, more nearly in point, is distinguishable on facts.[21] A similar dearth of supporting authority is reflected in the United States District Court's opinion in favor of defendant Whitlow. Of the four cases cited by the court in which the double jeopardy plea was upheld, two were *nolle prosequi* cases[22] and hence unrelated to the issues of the *Whitlow* case; mistrial in a third was produced by unexplained absences of Government witnesses and the prosecuting attorney.[23]

Both defense counsel and district court relied principally upon a non-federal decision, *State v. Whitman*,[24] to show that Whitlow had been in jeopardy.[25] There, the trial court declared a mistrial and discharged the jury because it considered defense counsel's conduct "reprehensible, if not contemptuous," and because it felt it had erred in a prior ruling.[26] The

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order so that mistrial was "necessary"); Scott v. United States, 202 F.2d 354 (D.C. Cir. 1952) (sustaining trial court's order of mistrial where judge decided he had erred by granting admission of an associate counsel *pro hac vice*).

15. Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) (improper reference by prosecutor to another criminal case pending against defendant); Blair v. White, 24 F.2d 323 (8th Cir. 1928) (improper reference by prosecutor to a previous conviction); Lovato v. New Mexico, 242 U.S. 199 (1916) (accused improperly arraigned and pleaded). See also note 14 *supra*. These authorities indicate that "manifest necessity" is not an emergency in the sense that neither responsibility for nor control over the situation need be present. It is an emergency, irrespective of cause, if a fair trial cannot be had by continuing the proceedings. Fault, therefore, cannot be the criterion.

16. United States v. Shoemaker, 2 McLean 114 (7th Cir. 1840).

17. United States v. Watson, 28 Fed. Cas. 499, No. 16,651 (S.D.N.Y. 1868); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931); Hunter v. Wade, 169 F.2d 973 (10th Cir. 1948), *aff'd*, 336 U.S. 684 (1949).

18. United States v. Perez, 9 Wheat. 579 (U.S. 1824); Thompson v. United States, 155 U.S. 271 (1894); United States v. Coolidge, 25 Fed. Cas. 622, No. 14,858 (C.C.D. Mass. 1815); Simmons v. United States, 142 U.S. 148 (1891); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949). These cases were cited by defense counsel simply for dicta which restated the words of the *Perez* case that "manifest necessity" is required for mistrial.

19. United States v. Shoemaker, 2 McLean 114 (7th Cir. 1840); state v. Whitman, 93 Utah 557, 74 P.2d 696 (1937).

20. United States v. Shoemaker, *supra* note 19.

21. State v. Whitman, *supra* note 19.

22. United States v. Farring, 25 Fed. Cas. 1052, No. 15,075 (C.C.D.C. 1834); Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939).

23. United States v. Watson, 28 Fed. Cas. 499, No. 16,651 (S.D.N.Y. 1868). The fourth case is State v. Whitman, 93 Utah 557, 74 P.2d 696 (1937), discussed in the text following.

24. 93 Utah 557, 74 P.2d 696 (1937).

25. At the hearing for the double jeopardy plea, the Government confined its argument to the trial transcript which it alleged was inaccurate and incomplete in certain respects. It contended that the transcript should be corrected before the jeopardy plea could be decided.

26. State v. Whitman, 93 Utah 557, 559, 74 P.2d 696, 697 (1937). Trial court was also in doubt about the propriety of some of its remarks.

Utah Supreme Court held that these facts did not constitute "absolute" or "legal" necessity and sustained defendant's plea of double jeopardy.[27]

Two factual distinctions make *State v. Whitman* an unreliable precedent for defendant's cause. In the first place, misconduct of Whitman's counsel was not the sole element involved. The decision put equal emphasis on the fact that the trial judge sought to correct his own errors through the device of mistrial.[28] Secondly, the nature of misconduct was basically different from the *Whitlow* case. In *State v. Whitman,* the judge became incensed when defense counsel took exception to the remarks and action of the court and asked that the record show the exception.[29] Ordering a mistrial for such trivial cause was perhaps rightly regarded by the Utah Supreme Court as arbitrary and capricious.[30] In contrast, the objectionable testimony in the *Whitlow* case provided more than a source of irritation for the court; it prejudiced the prosecution. Fairness of trial was clearly at issue in the *Whitlow* case, not merely the disciplining of surly or disobedient counsel. If the introduction of prejudicial testimony by Whitlow's counsel precluded a fair trial, as asserted by the trial court,[31] it would seem that a mistrial was properly declared under the "manifest necessity" doctrine of the *Perez* case.[32]

Fairness is a component of necessity and justice. If the judge thus believed that the misconduct materially damaged the Government's position, it would be necessary and just for him to order mistrial, not to punish counsel, but to insure a fair trial. On this basis, the trial judge's action in the *Whitlow* case was a defensible exercise of "sound discretion."[33] For the same reason, the district court's opinion sustaining Whitlow's plea of double jeopardy was a hazardous display of indiscretion.[34]

No case favors the view that an accused may gain his freedom through his own counsel's misconduct. Yet, in effect, the *Whitlow* case rejects the rule stated by the same court in 1939 that ". . . a defendant may not take advantage of his own actions in removing himself from jeopardy. . . ."[35]

27. *Id.* at 560, 74 P.2d at 698.

28. *Ibid. But see* note 14 *supra.* In federal courts, the trial judge has been allowed to correct his own errors by means of mistrial. United States v. Giles, 19 F. Supp. 1009 (W.D. Okla. 1937); Ercoli v. United States, 131 F.2d 354 (D.C. Cir. 1942); Scott v. United States, 202 F.2d 354 (D.C. Cir. 1952).

29. State v. Whitman, 93 Utah 557, 559, 74 P.2d 696, 697 (1937).

30. *Id.* at 560, 74 P.2d at 698.

31. Transcript of Record, pp. 109-110, United States v. Whitlow, 110 F. Supp. 871 (D.C. 1953).

32. United States v. Perez, 9 Wheat. 579, 580 (U.S. 1824).

33. Since the *Perez* case, it has been well established that mistrial is a matter within the "sound discretion" of the trial judge. United States v. Coolidge, 25 Fed. Cas. 622, No. 14,858 (C.C.D. Mass. 1815) held so earlier. See also Logan v. United States, 144 U.S. 263 (1891); Hunter v. Wade, 169 F.2d 973 (10th Cir. 1948). This discretion, however, has never been held to be unlimited or uncontrollable. The prevailing view is that the trial judge is in a better position to appraise incidents which occur during a trial with respect to their effect on the jury. Unless the judge has openly abused his discretion in declaring a mistrial, it is generally assumed by appellate courts that justice will be done if his action is not disturbed. United States v. Giles, 19 F. Supp. at 1012 (W.D. Okla. 1937); Himmelfarb v. United States, 175 F.2d at 932 (9th Cir. 1949).

34. If the purpose of the trial judge was merely to reprimand disobedient counsel, there were other measures to take more appropriate than mistrial, such as citing counsel for contempt or even removing him from the trial. But if, as it is arguable in the *Whitlow* case, the judge was more concerned with eliminating prejudicial effects of forbidden testimony, the only alternative to mistrial would be to strike that evidence from the record. Whether the jury could be expected to ignore the testimony and hence, whether the more drastic measure of mistrial was required, were matters for the judge to decide.

35. Pratt v. United States, 102 F.2d at 280 (D.C. Cir. 1939).