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FIFTH AMENDMENT—DOUBLE JEOPARDY AND THE SINGLE TRIBUNAL RULE

Arizona v. Washington, 434 U.S. 497 (1978).
Swisher v. Brady, 98 S. Ct. 2699 (1978).

INTRODUCTION

Throughout its rulings on the fifth amendment protection against double jeopardy,[1] the Supreme Court has held that implicated in that protection is "a defendant's valued right to have his trial completed by a particular tribunal."[2] The right to a single adjudication of guilt or innocence before a single tribunal, however, has never been accorded the same absolute status in double jeopardy considerations as has the finality of a verdict of acquittal, rendered on the merits of a case. The Supreme Court has developed a number of exceptions to the "single tribunal" rule. These exceptions have been based on such concerns as the public's interest in fair trials[3] and the state's interest in legitimate state policies.[4]

The ambiguities in the status of the right to a complete trial before one discrete factfinder have been increased by two cases decided by the Supreme Court in the 1977 term, which interpret and, to some extent, restrict that right. In *Arizona v. Washington*,[5] the Court held that a mistrial declared by the trial judge, based on improper remarks by defense counsel in his opening statement, did not bar retrial due to former jeopardy, even though the defendant objected to the mistrial ruling. In previous cases where reprosecution after a mistrial was held not to have violated the double jeopardy clause, the Court based its decision on either a justifiable finding of manifest necessity by the trial judge[6] or the defendant's own election of mistrial.[7] *Arizona v. Washington* made two significant departures from these standards. First, the Court drew an implication of manifest necessity from the facts of the case without any relevent specific findings by the trial judge. Second, the Court added a new ground upon which the finding of manifest necessity could be based: misconduct by the defense attorney.[8] That particular rationale for declaring a mistrial falls uncomfortably close to the risk of abuse which gave rise to the prohibition against reprosecution following a mistrial.[9]

In *Swisher v. Brady*,[10] the second important related case of this term, the Court held that the juvenile trial system of Baltimore, Maryland did not violate the double jeopardy constraints of the fifth amendment by allowing a state's attorney to take exceptions to a master's proposed finding of non-delinquency and to demand a hearing on the record by a supervising judge. The Court determined that a defendant's right to one trial before a single fact-

[1] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . . " U.S. CONST. amend. V.

[2] Wade v. Hunter, 336 U.S. 684, 689 (1949). The *Wade* Court went on to note, however, that this valued right was subordinate in some cases to the public's interest in fair trials and just judgments. The court held that a second trial was not barred in a court-martial proceeding which was transferred from the Third to the Fifteenth Army due to military exigencies created by the invasion of Germany.

[3] *Id.*

[4] Illinois v. Somerville, 410 U.S. 458 (1973). The state policy which, according to the Court, outweighed the defendant's interest in a continuing trial, was the requirement under Illinois law that the defendant in a criminal case be tried only on indictment of a grand jury. This policy prevented a mid-trial amendment of a defective indictment and necessitated a mistrial.

[5] 434 U.S. 497 (1978).

[6] Wade v. Hunter, 336 U.S. 684 (1949); Thompson v. United States, 155 U.S. 271 (1894); Simmons v. United States, 142 U.S. 148 (1891); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[7] United States v. Dinitz, 424 U.S. 600 (1976).

[8] The trial court in *Dinitz* also based its mistrial ruling on misconduct by the defense attorney. However, in that case the defendant was given a choice of accepting a mistrial or proceeding with his other counsel conducting the case. The defendant opted for a mistrial and the Supreme Court based its ruling that the defendant's valued right to a single trial was not offended on the ground that the mistrial ruling was at the behest of the defendant. The Court did not consider the issue of whether misconduct by the defendant's attorney could provide the basis for a ruling of manifest necessity that would justify declaring a mistrial over the defendant's objection. *Id.* at 601–11.

[9] The original basis for prohibiting a retrial after the declaration of a mistrial was to prevent a judge or prosecutor from aborting a trial when it appeared likely that the jury intended to acquit a defendant who the state believed was guilty. 434 U.S. at 507–08.

[10] 98 S. Ct. 2699 (1978).

finding body was not violated by Baltimore's present system, for, as the Court reasoned, the judge and master system constituted an ongoing process and not two discrete trials. Finally, the Court noted that none of the underlying reasons for the prohibition against repeated trials were implicated in the Maryland system. This decision calls into serious question the status of this "valued right"[11] to one trial before a single factfinding body and confuses the definition of a single tribunal.

The doctrinal history of the defendant's right to protection against repeated trials, even where those trials fail to end in a verdict, provides insight into the ambiguity inherent in the status of that right. In English law, the doctrine was not part of the double jeopardy prohibition; instead, it was a rule of jury practice,[12] which mandated that once a jury was impaneled, it could not be dismissed. The rule evolved, however, into a protection against the abusive judicial and prosecutorial practice of discharging a jury whenever an acquittal seemed likely.[13] In American law, the protection was incorporated into the double jeopardy rule through *United States v. Perez*[14] and *Wade v. Hunter*.[15]

The policies underlying the prevention of multiple prosecutions for the same offense serve equally well as a rationale for guaranteeing the defendant a single trial before a single factfinding body. The policies involved in each of these aspects of double jeopardy reflect a judgment that actual guilt or innocence, rather than the overwhelming resources of the government, should determine the outcome of a trial. Guilt should be established by one trial conducted in the adversary tradition and should not be the result of the "odds" that at least one of several factfinders who hear the case will be persuaded by the prosecutor. Moreover, successive prosecutions can easily become a weapon for harassment in the hands of the government or a means of punishing an uncooperative defendant. Finally, multiple prosecutions allow the state an opportunity to refine its evidence so that it can present a better case at subsequent trials.[16]

As both the *Arizona* and *Swisher* cases indicate, however, the right to be tried by a single tribunal does not receive the same treatment by the courts as does the protection against a subsequent prosecution for the same offense after conviction or acquittal. The protection against reprosecution after acquittal is absolute. But, the right to a trial before a single tribunal is subject to a balancing of interests, because "at times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest when there is an imperious necessity to do so."[17]

The Standards for Determining the Permissibility of Reprosecution After a Mistrial

In *Arizona v. Washington*,[18] the Supreme Court applied the "manifest necessity" standard in deter-

[11] 336 U.S. at 689.

[12] The rule arose in the context of hung juries. Civil as well as criminal juries were required to remain impaneled until they rendered a verdict. Crist v. Bretz, U.S. 98 S. Ct. 2156, 2163-64 (1978) (Powell, J., dissenting).

[13] *Id.* at 2164.

[14] 22 U.S. (9 Wheat.) at 579. Double jeopardy was not explicitly mentioned in the case. The Court simply held that retrials are not barred by a mistrial declared on the basis of a hung jury as long as there was a manifest necessity for the discharge of the jury. The following language, however, has been repeatedly quoted by the courts in ruling on the double jeopardy implications of a mistrial:

> 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 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.

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

[15] 336 U. S. at 689.

[16] Green v. United States, 355 U.S. 184 (1957). The court said:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

335 U.S. at 187. *See also* 75 YALE L.J. 262 (1965).

[17] 372 U.S. 734, 736 (1963).

[18] The defendant in *Arizona v. Washington* was being tried for the murder of a hotel night clerk. His original conviction was overturned when the prosecution withheld exculpatory materials to which the defendant was entitled under the Supreme Court ruling in Brady v. Mary-

mining that the public's interest in a fair trial outweighed the defendant's right to pursue a verdict from the original jury at a single trial. The Court ruled that it was possible to imply from the facts of the case that a mistrial had been necessitated by defense counsel's improper and possibly prejudicial opening remarks. In *Arizona*, defense counsel had commented on the fact that the defendant's initial conviction had been overturned because the prosecution had withheld exculpatory evidence.[19] The trial judge granted the prosecutor's motion for a mistrial over defense counsel's opposition. In opposition to the motion, defense counsel had asserted that any prejudicial impact of his statement could be cured by instructing the jury to disregard it. But, in granting the mistrial, the trial court made no explicit finding of necessity and gave no more than a minimal indication[20] on the record before the Supreme Court that the judge had considered the question of necessity or the possibility of alternatives.

The district court, in granting defendant's petition for habeas corpus,[21] felt that the controlling factor was the absence of an explicit finding of manifest necessity.[22] The court of appeals affirmed, but disagreed with the district court's emphasis on the need for a formal finding of manifest necessity.[23] Instead, the Ninth Circuit based its ruling on the absence of any indication on the record that the state trial court had even considered the necessity for a mistrial or the possible alternatives. The United States Supreme Court reversed and held that a finding of manifest necessity could be implied from the record. The Court reasoned that the court of appeals had used an overly exacting and technical standard and had failed to give proper deference to the trial judge who had been "in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate."[24]

In *Perez v. United States*,[25] the Supreme Court first articulated the standard of manifest necessity as the basis for allowing reprosecutions after mistrials. The Court in *Perez* faced the classic mistrial situation, that of a hung jury, and decided that retrial would not be barred if "there is a manifest necessity for the act or the ends of public justice would otherwise be defeated."[26] Subsequently, the manifest necessity requirement was held to have been met in cases involving possible jury bias due to outside events[27] and in a case involving a court martial where the exigencies of war interfered with the summoning of witnesses.[28] These cases gave the requirement the flavor of outside interference or circumstances beyond the control of the parties, an impression which was strengthened by *Downum v. United States*.[29] In *Downum*, the Court refused to find that a mistrial was manifestly necessary where a prosecutor had been unable to locate a witness, a fact of which he had been aware prior to the beginning of the trial.

However, in *Gori v. United States*,[30] decided prior to *Downum*, the Court held that a mistrial did not bar further prosecution when it was a result of an improper line of questioning by the prosecutor. The Court in *Gori* emphasized the discretionary nature of such a ruling and the fact that, in this case, it worked in favor of, rather than against the defendant's interests.[31] *Gori* was thus the first case to indicate that the determination of whether or not the defendant's interests were being served by a mistrial should be considered in questioning the

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land, 373 U.S. 83 (1963). During the second trial, the judge declared a mistrial based on an improper reference to the prosecution's conduct by the defense counsel in his opening statement.

[19] You will hear testimony that notwithstanding the fact that we had a trial in May of 1971 in this matter that the prosecutor hid those statements and didn't give those to the lawyer for George saying the man was Spanish speaking, didn't give those statements at all, hid them.

You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. App. 180-81, 184.

434 U.S. at 499.

[20] *Id.* at 501.

[21] In Benton v. Maryland, 395 U.S. 784 (1969), the Court applied the double jeopardy prohibition to the states through the fourteenth amendment and hence a federal habeas corpus review of a state double jeopardy decision could be permitted.

[22] 434 U.S. at 502 n.8.

[23] Arizona v. Washington, 546 F.2d 829, 832 (9th Cir. 1976).

[24] 434 U.S. at 510 n.28.

[25] 22 U.S. (9 Wheat.) at 579.

[26] *Id.*

[27] Thompson v. United States, 155 U.S. 271 (1894); Simmons v. United States, 142 U.S. 148 (1891).

[28] Wade v. Hunter, 336 U.S. 684 (1949).

[29] 372 U.S. 734 (1963).

[30] 367 U.S. 364 (1961).

[31] The court emphasized that retrial after mistrials would be barred primarily in cases where the mistrial worked against the defendant. *Id.* at 368–69.

necessity of the mistrial ruling. This emphasis in *Gori* on the discretionary nature of the mistrial ruling was cited in *Illinois v. Somerville*,[32] where a judge aborted a trial because of a defective indictment. The Supreme Court in *Somerville* reiterated its holding that the judge had broad discretion, and although the mistrial was not declared solely in the defendant's own interests as it had been in *Gori*, the mistrial ruling did further a legitimate state policy against amending indictments in midtrial. With a defective indictment, the Court asserted, there was no reason to continue the trial because any guilty verdict obtained could be overturned at will on appeal. The dissent argued vehemently that the Court majority had failed to take into account the defendant's right to pursue a verdict of acquittal, a right the Court did not include in its balancing process.[33]

Prior to this term, the most recent case involving the issue of double jeopardy implications of a mistrial was *United States v. Dinitz*.[34] In that case, the trial judge had made misconduct by the defendant's attorney the basis for the mistrial ruling. However, the Court decided the case on the ground that the mistrial was the defendant's own choice, based on three options given him by the trial judge.[35] The Court ruled that the manifest necessity standard was therefore not applicable to the case.

Arizona v. Washington is the first case to present squarely to the Supreme Court the issue of whether a mistrial caused by defense counsel's misconduct and declared over the defendant's objection bars reprosecution on the basis of double jeopardy. Justice Stevens, writing for the Court, noted that the double jeopardy provision provides protection against the practice of declaring a mistrial because the judge or prosecutor fears the defendant may be acquitted. The danger of this type of ruling led the Court to apply the strictest type of scrutiny to mistrials declared on the basis of the unavailability of prosecutorial evidence or when there is a suspicion of harassment or tactical maneuvering by the prosecutor.[36] The Court went on to note that at the opposite end of the spectrum are cases involving hung juries. In these cases, a trial judge's ruling would be entitled to great deference. According to the Court, the trial judge is in the best position to assess the situation and thus should not be tempted to force the jury to return an improper verdict by his fear that a mistrial ruling would bar any further prosecution.[37]

The Court then applied its new analysis of the standards for reviewing the manifest necessity of a mistrial ruling to the type of situation which gave rise to the mistrial in *Arizona v. Washington*. Mistrials based on defense counsel misconduct were held to be analogous to those involving possible jury bias. Therefore, *Arizona's* factual circumstances were reviewed under the Court's policy of giving great deference to the trial judge's analysis of the situation.[38] It was not, according to the Court, the type of situation which called for strict scrutiny of the trial judge's decision. The Court found that the record in *Arizona* showed that the trial judge acted deliberately, responsibly, and in the exercise of sound discretion. The Court therefore dismissed as unimportant the failure of the state court to make any finding on the necessity for the mistrial, holding that such a finding could be implied from the record.[39]

The Court's decision did not pass without dissent. Justice White filed one of the two dissents and noted that since the district court applied the incorrect legal standard to the facts, the case should be remanded to that court and not decided by the Supreme Court in the first instance.[40] Justice Marshall, joined by Justice Brennan, dissented on the belief that it was improper to imply a finding of manifest necessity from a record which failed to indicate any consideration of alternatives or of the necessity for a mistrial on the part of the trial judge.[41] Marshall felt that a curative instruction could very possibly have dissipated any prejudicial effect of the prosecutor's remarks and that the failure of the Arizona State court to consider such an alternative indicated that there was no sound exercise of discretion on its part relative to the necessity of the mistrial.[42] Marshall believed that requiring on the record some indication that the judge had considered the necessity for a mistrial

[32] 410 U.S. at 462.

[33] *Id.* at 473–83 (White, J., dissenting).

[34] 424 U.S. 600 (1976).

[35] *Id.* at 608. The Court in *Dinitz* cited United States v. Jorn, 400 U.S. 470 (1971), where the Court had stated that a defendant's own motion for mistrial could not bar subsequent prosecution unless necessitated by prosecutorial or judicial misconduct. *Id.* at 606. In *Jorn*, the Supreme Court ruled, in a plurality opinion, that a trial judge who failed to exercise scrupulously his discretion in declaring a mistrial had failed to meet the *Perez* standard of manifest necessity and that a subsequent prosecution would be barred.

[36] 434 U.S. at 508.

[37] *Id.* at 509.

[38] *Id.* 508.

[39] *Id.* at 516.

[40] *Id.* at 518 (White, J., dissenting).

[41] *Id.* at 520 (Marshall, J., dissenting).

[42] *Id.* at 521–22.

would insure that the judge would not overlook this concern in making his mistrial ruling and would, additionally, facilitate appellate review.[43]

In analyzing the importance of *Arizona v. Washington* to the development of the double jeopardy doctrine invoked in mistrial rulings, it is important to note that prior to the case, mistrial rulings reviewed by the Supreme Court were generally addressed to the subject of juror bias or prosecutorial misconduct or negligence. Apart from the ruling in *Dinitz*, which hinged on the mistrial being at the option of the defendant, misconduct on the part of the defendant or defense attorney had not been the basis for declaring a mistrial.[44] In deciding *Arizona*, however, the Court has, for the first time, categorized its former decisions on mistrials into two groups, cases which require strict scrutiny and cases in which the trial judge's ruling will be given greater deference. The basis asserted by the Court for this variation in the standard of review is that certain types of cases offer more likelihood of abuse by the prosecutor or by the judge in attempts to prevent an acquittal.

With *Arizona*, the Court has placed defense misconduct among those situations where it is appropriate to pay deference to the ruling of the trial court. Previous cases cited by the Court warranting such deference to trial court mistrial rulings were those involving jury bias or hung juries, wherein an unfair conviction was the likely outcome unless the trial was aborted. The rationale for allowing the trial judge this larger measure of discretion was that these situations did not lend themselves to the type of judicial or prosecutorial abuse which was the basis for the double jeopardy concern.[45] These situations were neither provoked by the prosecution to avoid a possible acquittal, nor were they the result of a judge's decision to end the trial simply because the jury appeared ready to acquit a defendant whom the judge believed was guilty. The common basis for the judge's ruling in the hung jury and jury bias cases was the possibility of an unfair conviction which could be overturned on appeal, wasting the time and money of all the parties.

On the other hand, prosecutorial misconduct situations have been strictly scrutinized because of a Court fear that the prosecutor intended his acts to provoke a mistrial and thereby deprive the defendant of his right to pursue a verdict of acquittal.[46] Likewise, mistrial rulings for which there is no apparent necessity and which indicate a lack of discrimination on the part of the judge should be subject to strict scrutiny for the same reason. Such rulings tend to lend themselves to the abusive practice of declaring a mistrial whenever acquittal seems likely.

The Court, without any extended analysis, placed the situation giving rise to the ruling in *Arizona* within the class of situations including jury bias and hung juries. While it is true that the basis for the judge's declaration of mistrial was the possible prejudice to the jury, the key to the proper analysis of these particular facts should have been the attempt by the judge to prevent an unfair acquittal. Like the situation of prosecutorial misconduct, defense misconduct as a basis for a mistrial lends itself to abuse. The judge who rules that defense counsel's actions necessitate a mistrial could be trying to prevent an unfair acquittal which is not reviewable on appeal.[47] A declaration of mistrial which is based on the judge's perception that counsel has acted improperly could simply be a mask for the judge's opinion that there is a strong possibility that the jury intends to acquit a defendant that the judge believes is guilty.

The necessity for such mistrial rulings, based on improper conduct by the defense attorney, was recognized by the Court in *United States v. Jorn:* "Unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process."[48] Admittedly, the courts must have the authority to prevent the defendant's attorney from seeking to prejudice the jury unfairly. However, the possibility of the abuse of such power by the judge would indicate a need for a standard of review closer to that of cases involving judicial or prosecutorial overreaching, rather than the deference accorded a judge's determination that a hung jury is unable to reach a fair verdict.

The Court's opinion in *Arizona* appears to be in line with two recent trends in Supreme Court cases. First, the Court has given increasing deference to

[43] *Id.* at 526–27.

[44] *See, e.g.,* Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949); Thompson v. United States, 155 U.S. 271 (1894); Simmons v. United States, 142 U.S. 148 (1891); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[45] 434 U.S. at 508.

[46] *Id.*

[47] In Fong Foo v. United States, 368 U.S. 141 (1962), the Court held that a verdict of acquittal in a criminal case could not be reviewed by an appellate court without offending the double jeopardy clause regardless of how erroneous was the basis for the acquittal.

[48] 400 U.S. at 485–86.

state court rulings which implicate issues of state policy and the orderly process of its courts. For instance, this deference formed the basis for the ruling in *Illinois v. Somerville*,[49] where the manifest necessity for a mistrial was caused by a state policy disallowing mid-trial amendments of indictments. In that case, the Supreme Court specifically included the implementation of a reasonable state policy in its balancing test.[50]

Second, the Supreme Court has shown increasing reluctance to give defendants the benefit of trial errors under the double jeopardy prohibition. In *United States v. Scott*,[51] another case decided during this term, the Court held that the government was entitled to appeal the mid-trial dismissal of an indictment as long as the dismissal was not based on a factual resolution relating to the actual guilt or innocence of the defendant. According to the Court, the double jeopardy clause was not offended despite the fact that if the government prevailed on appeal, a retrial would be necessitated.[52] This case overruled *United States v. Jenkins*,[53] which had established that the double jeopardy prohibition barred appeal from a dismissal of an indictment where retrial would necessitate the resolution of any factual elements of the offense. By overruling *Jenkins*, the Court in *Scott* broadened the government's right to appeal in situations where the judge had made a possibly erroneous ruling in favor of the defendant. *Arizona v. Washington*, in applying a less exacting standard of review to the question of the necessity for mistrials, allows judges a greater measure of freedom in terminating a trial when there has been a trial error favoring the defendant.

By extending a less exacting standard of review to cases of mistrial based on a defense attorney's improper conduct, the *Arizona* Court has also lowered the constitutional status of the defendant's right to have his trial completed before a single tribunal.[54] This may possibly indicate that in the future this right will continue to be restricted at the expense of the government's right to an error-free trial. The second major case decided in this term involving the defendant's right to trial before a single tribunal indicates a similar direction.

The Constitutionality of a Two-Tiered Trial System in Juvenile Courts

In *Swisher v. Brady*,[55] the Court addressed the contention that the Maryland Juvenile Court system is unconstitutional because it allows the state to take exceptions from a master's proposed finding of non-delinquency and demand a hearing on the record before a supervising Juvenile Court judge. The Court held that this type of system does not offend the double jeopardy constraint against second trials.

In the Maryland Juvenile Court system, the vast majority of the cases begin with an adjudicatory hearing before a master.[56] The master's findings are then accepted, rejected or remanded with recommendations by a supervising judge. If the state or the juvenile desire, they may take exceptions, and, until 1975, could demand a hearing de novo before the judge.

In the instant case, after the state took exceptions to the master's finding of non-delinquency for three of the petitioners, the supervising judge ruled on their motion to dismiss the exceptions. Ruling in favor of dismissal, the judge declared that the system of allowing the state to take exceptions to the master's recommendation of acquittal offended the prohibition against double jeopardy. On appeal,[57] the Maryland Special Court of Appeals overturned the lower court ruling on the ground

[49] 410 U.S. 458 (1973).

[50] A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached or if a verdict of conviction could be reached, but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when it succeeded before the jury, it would automaticallly be stripped of that success by an appellate court.
410 U.S. at 464.

[51] 98 S. Ct. 2187 (1978).

[52] *Id.* at 2191.

[53] 420 U.S. 358 (1975).

[54] An analogous situation has developed in equal protection cases. In that area, the Supreme Court has developed a rule that the more disfavored a classification, the stricter the scrutiny to which it is subjected. *See* Craig v. Boren, 423 U.S. 1047 (1976) and discussion in dissenting and concurring opinions.

[55] 98 S. Ct. 2699 (1978).

[56] The district court in Aldridge v. Dean, 395 F. Supp. 1161, 1170 (D. Md. 1975), a case involving the same issues but different juvenile petitioners, noted that in 1974, 5,345 adjudicatory hearings were held in the Baltimore Juvenile Court before the masters and only 327 were heard before the judges. Furthermore, the total of cases heard before judges included cases previously heard by masters to which the state or the juvenile took exception, demanding a de novo hearing before the judge.

[57] Under the recent ruling in United States v. Scott, 98 S. Ct. 2187 (1978), the government may appeal in criminal cases from a judge's ruling dismissing the case as long as the basis for the dismissal is not one which involves the actual innocence of the accused.

that there was only one continuing trial in the Baltimore system and that the defendant was therefore only placed in jeopardy once.[58] The juveniles then appealed, and the Maryland Court of Appeals affirmed on a different basis.[59] The Court held that jeopardy failed to attach at the master's hearing, since the master had no judicial power.[60]

Having exhausted their state remedies, the juveniles petitioned the federal district court for a writ of habeas corpus.[61] The district court in *Aldridge v. Dean* dismissed the case as to the three petitioners involved in the present Supreme Court case on considerations of ripeness, because no hearing by the judge on the state's exceptions had yet taken place. However, with respect to the remaining petitioners, the court granted the writ and declared that the Maryland system violated due process because it subjected juveniles to a second trial after a finding of acquittal. The court held that double jeopardy attached at the time of the master's hearing. The court reasoned that a master's hearing was identical in form and substance to those adjudicatory hearings initially held before the supervising juvenile court judge rather than before a master.[62] The court then found that allowing the state to present exceptions and obtain a de novo hearing performed the same function and was subject to the same abuses as a state appeal from an acquittal by a criminal court.[63]

Subsequent to the decision in *Aldridge v. Dean*, the Maryland Court of Appeals amended its rules to provide that the state could take exceptions to a master's findings but that it was not entitled to a hearing on the record before the supervising judge unless the juvenile agreed to a hearing de novo.[64] It was under this new rule that the district court entertained the class action of *Brady v. Swisher*,[65] which sought an injunction declaring the Maryland law unconstitutional. The court issued the injunction and based its finding on the fact that though the master's findings were not final and the state could not present its evidence anew,

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a. Authority

1. Detention of Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. Report to the Court.

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

c. Review by Court if Exceptions Filed.

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 906 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. Review by Court in Absence of Exceptions.

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearings, or may, on its own motion, schedule and conduct a further hearing relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions.

Rule 911, MARYLAND RULES OF PROCEDURE (1970).

[58] In re Anderson, 20 Md. App. 31, 315 A.2d 540 (1974).

[59] In re Anderson, 272 Md. 85, 321 A.2d 516 (1974).

[60] Jeopardy attaches in a jury trial when the jury is impaneled and sworn. In a bench trial, jeopardy attaches when the judge begins to hear evidence. The doctrine of early attachment is a direct outgrowth of the defendant's right to a trial before a single tribunal, and was held to apply to the states in Crist v. Bretz, 98 S. Ct. 2156 (1978). 2156 (1978).

[61] Aldridge v. Dean, 395 F. Supp. 1161 (D. Md. 1975).

[62] *Id.* at 1172-73. The district court noted that originally the cases involving serious violence were heard by a judge rather than a master. Recently, however, due to an increasing case load, cases involving serious violence are frequently heard by masters. The court felt that this fact supported its contention that the masters were indeed independent factfinders. *Id.* at 1170.

[63] *Id.* at 1173.

[64] The present rule reads as follows:

[65] Brady v. Swisher, 436 F. Supp. 1361 (D. Md. 1977).

the juvenile was placed in jeopardy a second time at the hearing on the record before the supervising judge.[66]

On appeal, the Supreme Court, in an opinion written by Chief Justice Burger, agreed with the district court that the juvenile was placed in jeopardy at the adjudicatory hearing before the master.[67] The Court reasoned, however, that the proceeding before the master did not end until the entry of judgment by the supervising judge and that, therefore, the proceeding was one whole and not subject to double jeopardy objections. The Court pointed out that none of the reasons behind the right of a defendant to have his case heard and decided by a single tribunal were implicated in this situation.[68] The state was only allowed to present its evidence once and therefore was unable to refine or strengthen it. There was no enhancement of a risk that an innocent defendant would be convicted since there was only one adjudicator empowered by the state as a factfinder—that being the supervising judge. Finally, because the hearing was on the record and because the juvenile's attorney rarely even appeared, this type of proceeding could not have been used to harrass, embarrass or subject the defendant to the expense of a second trial.[69]

The Court distinguished this type of system from the one in *Breed v. Jones*,[70] in which the Court first applied the constitutional prohibition against double jeopardy to state juvenile courts. The Court pointed out that *Breed* involved *two distinct trials* before two judges, both of whom were empowered to enter a final acquittal. In the situation at hand, the Court found only *one continuous* proceeding, culminating only when a final judgment was entered by the supervising juvenile court judge.

The dissent, written by Justice Marshall and joined in by Justices Powell and Brennan, argued vehemently that the Maryland system did not employ one continuous proceeding but rather was analogous to an appeal by the state of a criminal conviction.[71] In support of their conclusion, the dissenters pointed out that the master performed a fact finding function and that unless the state raised exceptions, the master's judgment was virtually "rubber stamped" by the supervising judge.[72] The dissent felt that the Court had adopted a "continuing jeopardy" argument which was indistinguishable from that employed by Justice Holmes in his dissent to *Kepner v. United States*.[73] As the dissent pointed out, this argument has been consistently rejected by the Supreme Court as the basis for state appeals of acquittals in criminal cases.[74]

The dissent argued, secondarily, that even if the Maryland system did not offend the double jeopardy clause, it was offensive to due process because it permitted a judge who did not hear the evidence first hand to enter the ultimate verdict. The dissent cited *Holiday v. Johnston*[75] for the importance of hearing live witnesses rather than ruling from a cold record.

As the dissent recognized, the right of a defendant to have his trial conducted by a single discrete tribunal is implicated in this decision. While this right is most often cited in connection with mistrials, the justification for such a rule also applies to situations involving bifurcated trial systems such as the one under consideration in *Swisher*. The rule is an attempt to protect a criminal defendant against undue harassment, anxiety and expense at the hands of the state.[76] It also prevents the state from refining and strengthening evidence. Finally, it prohibits prosecutorial "judgeshopping" in an attempt to find a judge who is favorable to the prosecutor's case.[77] All such practices enhance the likelihood that a state, with its superior resources, may obtain the conviction of an innocent person.[78] However, the Court in *Swisher v. Brady* addressed

[66] *Id.* at 1369.

[67] 98 S. Ct. at 2706 n.12.

[68] *Id.*

[69] 355 U.S. at 187.

[70] 421 U.S. 519 (1975). *Breed* involved a situation where a juvenile was first subjected to an adjudicatory hearing in juvenile court to determine whether he had violated any criminal statutes, after which he was found unfit for treatment as a juvenile. He was then brought to trial as an adult. The Supreme Court held that the double jeopardy prohibition applied to juvenile court and that California had violated the provision by subjecting the accused to two trials for the same offense.

[71] 98 S. Ct. at 2709 (Marshall, J., dissenting).

[72] "The District Court found that, except when the state filed an exception, all of the masters' recommended findings of non-delinquency had been approved by the judge." 98 S. Ct. at 2711 n.5.

[73] 195 U.S. 100, 134 (1904) (Holmes, J., dissenting). Mr. Justice Holmes reasoned that double jeopardy was not implicated in appeals from conviction by the government because the initial jeopardy only ended when there had been "a final judgment in the court of last resort." 195 U.S. at 134.

[74] *See* Breed v. Jones, 421 U.S. at 534.

[75] 313 U.S. 342 (1941).

[76] 355 U.S. at 187.

[77] Serfass v. United States, 420 U.S. 377 (1975).

[78] Green, 355 U.S. at 187-88. This is especially likely in the case of a juvenile who often will not have even the

these objections to trial before more than one tribunal and concluded that they were not implicated by the Maryland system.

First, the Court found that there would be no undue harassment, anxiety or expense resulting from the fact that the juvenile's attorney need not even appear before the judge at the second hearing.[79] However, in *Downum v. United States*,[80] the Court had held that a mistrial which involved a mere two day delay and no repetition of evidence, since witnesses had not yet been heard, could not be justified on the grounds of manifest necessity. Furthermore, the Court in *Swisher* failed to consider the anxiety or harassment engendered simply by the choice of the state to prolong the defendant's uncertainty by taking exceptions to the master's finding of non-delinquency, a finding which the juvenile certainly hoped would put an end to his ordeal.

As the Court correctly noted, Maryland's modified procedure does not directly offend the policy against allowing the state to strengthen its evidence by presenting it to a second tribunal, since the Maryland system now allows only a review on the record by the judge unless the juvenile consents to a hearing de novo.[81] This, as the dissent pointed out, raises an additional question of due process. The Court incorrectly failed to consider the due process issue, basing its failure to do so on an assertion that any due process objections to such a system do not arise from the guarantees of the double jeopardy clause.[82]

However, *North Carolina v. Pearce*[83] is directly to the contrary. The *Pearce* Court, in deciding the constitutionality of the imposition of a heavier sentence in a conviction on retrial following a successful appeal, held that a defendant cannot be forced to choose between constitutional rights. Yet, in future situations mandated by the *Swisher* holding, the juveniles acquitted by a master under the Maryland system will be forced into just such an unfair choice. If they do not waive their double jeopardy protection against giving the prosecution a second chance to present its case, then they will be forced to accept the findings of a judge who has not heard any of the evidence nor had an opportunity to evaluate the credibility of the witnesses. Surely such a procedure raises grave due process objections. Furthermore, the importance of such live hearings have been stressed by the Court repeatedly. In *Arizona v. Washington*,[84] for example, the court used the opportunity of the trial judge to hear the arguments and evidence first hand as a basis for a high degree of deference to his judgment. But, in *Brady*, the Court appears to have forgotten the *Arizona* concern despite its recent nature.

Moreover, due process considerations cannot be divorced from an analysis of the constitutionality of a juvenile court system. Beginning with *In re Gault*,[85] the Court has applied constitutional protections to juvenile courts only where it feels due process requires that juveniles be accorded certain rights.[86] Thus, any consideration of double jeopardy in a juvenile court setting necessarily implicates considerations of due process.[87] The Maryland system, which requires the juvenile to choose between having his fate decided by a judge on a cold record or allowing the state an opportunity to strengthen its evidence by a second presentation, does not meet the due process standards set forth in *Gault*.

Finally, the Supreme Court ruled that the Maryland system does not allow the state an opportunity to convince a second factfinder after failing to do so at the first hearing, because the Maryland law gives the master no authority. Therefore, the Court reasoned, the master is not a factfinder.[88] This Court reasoning, though, exemplifies the type of technicality that the court abjured in *Arizona v.*

level of resources of an adult and to whom the government presents an even more intimidating figure.

[79] 98 S. Ct. at 2707.

[80] 372 U.S. 734 (1963).

[81] 436 F. Supp. 1361 (D. Md. 1977).

[82] 98 S. Ct. at 2707 n.14.

[83] 395 U.S. 711 (1969).

[84] 434 U.S. at 510–11.

[85] 387 U.S. 1 (1967). The right extended to juveniles by the Court in this case was the protection against self-incrimination.

[86] McKeiver v. Pennsylvania, 403 U.S. 528 (1971); In re Winship, 397 U.S. 358 (1970).

[87] In *Gault*, the Court, after extended discussion of the failings of juvenile court systems, concluded that the lack of due process protection for minors could no longer be tolerated on the tenuous basis that the proceedings were civil and not criminal in nature, or that the state was acting as *parens patria* and not as an adversary. 387 U.S. at 16. However, the Court did not require that juvenile delinquincy hearings be procedurally equivalent to adult criminal trials. 387 U.S. at 30. Instead, the Court discussed each procedural safeguard separately and analyzed whether a due process standard required that the juvenile system be altered to incorporate that particular safeguard. The issues presented and resolved in *Gault* were the juvenile's right to counsel, notice of charges, freedom from self-incrimination, and confrontation and cross examination of witnesses.

[88] 98 S. Ct. at 2707.

Washington as a basis for resolving double jeopardy issues. The state trial judge, who originally ruled that the system he supervised offended the double jeopardy provision, stated that:

> [I]t is impossible for the Judge . . . , who also carries a full docket of cases himself, to exercise any independent, meaningful judgment in the overwhelming majority of the many thousands of Master's orders put before him each year. . . . With this being the case it is difficult to see how realistically a Master can be called only an adviser. . . . The Master conducts for all intents and purposes, full blown and complete proceedings through the adjudicatory and dispositional phases and . . . as a practical matter he imposes sanctions and can effectively deprive youngsters of their freedom.[89]

The Court in *Swisher*, however, in failing to take account of the realities of the system, ignored the important considerations that the master's role was exactly analogous to that of the judge in the few cases where the judge conducted the initial hearing.[90]

The Court based its finding that there is only a single adjudication before a single tribunal on a theory of "continuity of the proceedings." Again, though, a similar theory was rejected by the Court in *Kepner v. United States*[91] and has been most recently rejected in a juvenile setting in *Breed v. Jones*.[92] The Court in *Swisher* attempted to distinguish these two cases by pointing out that the master under the Maryland court rules had no power to enter a final judgment. However, the Court's attempt does not sufficiently deal with the *Kepner* case since under Philippine law, a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon by the audencia, or supreme court.[93] In both *Breed* and *Kepner*, the state argued that there was a continuing jeopardy, based on its own characterization of its system. The major distinction from these cases thus seems to be that the Maryland courts passed their characterization of their system into law.

Nineteen states presently have master systems much like that of Maryland.[94] These systems have now been exonerated from the charge that they offend the double jeopardy provision of the Constitution. However, many states, such as Ohio, still allow the prosecutor to demand a de novo hearing after a recommendation of acquittal by the master.[95] The reasoning employed by the Court in *Swisher* would seem to indicate that such a system would violate double jeopardy constraints. However, the Court did not explicity so hold and did not explicity affirm *Aldridge v. Dean*, where the district court held that such a system did violate double jeopardy rights. Therefore, the matter remains open to further litigation.

Also, some states, such as Kentucky, employ a two-tiered system of inferior and superior criminal courts. The Supreme Court in *Colten v. Kentucky*[96] held that such systems are not in violation of the double jeopardy clause because the state is not allowed to appeal from the inferior court's ruling. It appears possible that by changing the nomenclature of the factfinders in such a system, the state could give itself the right to appeal from criminal convictions in the inferior courts. This possibility merely serves to emphasize the dangers arising from the Court's restriction of the defendant's right to a trial before a single tribunal.

Conclusion

The important constitutional right to trial before a single tribunal, implicated in the double jeopardy provisions of the fifth amendment, has been relegated to a position of lesser importance by the Court's *Swisher* and *Arizona* rulings this term. By

[89] *Id.* at 2711 n.5.

[90] In *Aldridge*, 395 F. Supp. 1161, the court noted that in both cases witnesses were called and sworn and evidence was introduced and since the revision of the Maryland Code in 1975, both hearings before a judge and those before a master are recorded.

[91] 195 U.S. 100 (1904).

[92] 421 U.S. 519 (1975).

[93] 195 U.S. at 121.

[94] Ala. Code § 12-15-6 (1975); Alaska Stat. § 47.10.075 (1975); Ariz. Rev. Stat. § 8-231 (Supp. 1977); Ark. Stat. Ann. § 45-408,409,440 (1977); Cal. Welf. & Inst. Code §§ 247-52 (West Supp. 1978); Colo. Rev. Stat. § 19-1-110 (1973); Del. Code tit. 10, § 921 (1974); Ga. Code Ann. § 24A-701 (1976); Miss. Code Ann. § 43-21-29 (1972); Mo. Ann. Stat. § 211.025-029 (Vernon Supp. 1977); Neb. Rev. Stat. § 43-236.01 (1974); Nev. Rev. Stat. § 62.090 (1973); N.J. Rev. Stat. § 2A:4-12 (1952); N.D. Cent. Code § 27-20-07 (1974); Ohio Rev. Code Ann. § 2151.16 (Page 1968); Okla. Stat. Ann. tit. 10, § 1126 (West Supp. 1978); Pa. Stat. Ann. tit. 11, § 50-301 (Purdon Supp. 1978); Tenn. Code Ann. § 37-207 (1977); Utah Code Ann. § 55-10-75 (1974). Several of these states do not explicitly provide for the taking of exceptions by the state. However, none of the statutes clearly prohibits state appeal from the master's or referee's findings. Given the ruling in *Brady*, the state courts may decide that exceptions by the state are acceptable.

[95] Ohio Rev. Code Ann. § 2151.16 (Page 1968).

[96] 407 U.S. 104 (1972).

allowing a more lenient standard of review in determining whether the trial court's declaration of mistrial was manifestly necessary, especially in situations arising out of defense counsel's misconduct, the Court in *Arizona v. Washington* opened the door to the abuse of such mistrial rulings by judges who perceive the possibility of acquittal of a defendant they believe is guilty. Additionally, in *Swisher v. Brady*, the Court indicated that it is willing to allow states to subvert the defendant's right to trial before a single factfinder by technical designations which only disguise the underlying reality of a system which allows state appeal from criminal acquittals. Therefore, while *Arizona* merely weakens the defendant's right to a single trial by endorsing a less stringent standard of review in dealing with certain exceptions to that right, *Swisher* calls into question the future viability of the right. Even under the new *Arizona* standard, flagrant abuses by the lower courts of the mistrial exception are unlikely to go uncorrected by the Supreme Court. On the other hand, the very existence of the right to a single trial before a single factfinder is undermined by the Court's sanction of a trial system, such as the one in *Swisher*, which allows a state to take exceptions. The Court in *Swisher* significantly decreased double jeopardy protection on the basis of a technical distinction.