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# I'll Take "Improper Declarations Of Mistrial" for $2,000.00: Applying the Protection Against Double Jeopardy - Robar v. Labuda

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# I'LL TAKE "IMPROPER DECLARATIONS OF MISTRIAL" FOR $2,000.00: APPLYING THE PROTECTION AGAINST DOUBLE JEOPARDY

## SUPREME COURT OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

Robar v. LaBuda[1]
(decided April 28, 2011)

## I. THE MATTER OF *ROBAR V. LABUDA*

The petitioner, a hunter from Lumberton, New York, faced retrial following the declaration of a mistrial at the county court.[2] The petitioner sought a motion to stay retrial in order to seek "a writ of prohibition [which would] preclud[e] a retrial on the criminal charges" against the petitioner on the grounds of double jeopardy.[3] Pursuant to one's rights under both the United States and New York State Constitutions, a person shall not be placed in jeopardy more than once for the same offense.[4] The Appellate Division, Third Department, granted the petitioner's motion, pending review by special proceeding.[5] Upon review, the court, citing relevant statutory and case law, ruled in favor of the petitioner, subsequently granted his petition, and held that retrial is precluded under the principle of double jeopardy.[6]

The petitioner in this matter was originally "charged . . . with the crimes of assault in the second degree and reckless endangerment

[1] 921 N.Y.S.2d 710 (App. Div. 3d Dep't 2011).

[2] *Id.* at 713-15.

[3] *Id.* at 715; *see also* N.Y. CONST. art I, § 6 ("No person shall be subject to be twice put in jeopardy for the same offense . . . .").

[4] U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."); N.Y. CONST. art. I, § 6.

[5] *Robar*, 915 N.Y.S.2d at 715.

[6] *Id.*

in the second degree," stemming from an incident which occurred on his property in which another hunter was mistakenly shot and injured by the petitioner.[7] At voir dire, defense counsel exercised a series of peremptory challenges to remove five hunters from serving as jurors.[8] The prosecution objected to these challenges, claiming that the hunters were inappropriately struck pursuant to *Batson v. Kentucky*[9] and its progeny.[10] The county court allowed the challenges and excused the challenged jurors, but reserved its right to decide on the propriety of the *Batson* challenges.[11] After another juror was struck on a seemingly similar basis, the prosecution objected a second time, to which the court responded in the same manner as before.[12] Following the completion of jury selection, "the court continued to reserve decision" on the *Batson* arguments.[13]

After the prosecution presented its case and rested, the petitioner in this matter presented his testimony.[14] The court then excused the jury in order to contemplate mistrial for an unrelated issue.[15] The following day, the prosecution agreed with the court that "a mistrial was necessary" and reasserted its *Batson* argument, which was yet again reserved for decision by the court.[16] Later that day, the prosecution sent a letter to the court "asserting that they were not seeking a mistrial," and the defense similarly faxed a letter to the court stating that it was distinctly opposed to a mistrial.[17] The following day, the court ruled that petitioner's counsel violated the rule of law in *Batson*, and subsequent cases, by using its peremptory challenges to remove jurors who belonged to a constitutionally-protected class.[18] Without regard to the letters from both parties concerning a

[7] *Id.* at 713-14; *see* People v. Robar, 907 N.Y.S.2d 627, 628 (Sullivan Cnty. Ct. 2010).

[8] *Robar*, 921 N.Y.S.2d at 714. For a discussion regarding the facts and reasoning of the lower court's decision, see Andrew W. Koster, Note, *People v. Robar*, 27 TOURO L. REV. 885 (2011).

[9] 476 U.S. 79 (1986).

[10] *Robar*, 921 N.Y.S.2d at 714.

[11] *Id.* (stating that the court "thereafter swore in the 10 remaining jurors who had not been challenged").

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Robar*, 921 N.Y.S.2d at 714.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 714-15 (explaining that hunters exercise their fundamental right to bear arms,

mistrial, the court decided in favor of the prosecution and declared that a mistrial was the only proper " 'cure' for [such a] violation."[19]

Following this decision, the petitioner commenced a new proceeding against the respondent, the County Judge of Sullivan County, in order to seek a writ of prohibition in order to preclude retrial on the grounds of double jeopardy.[20] In reaching its ultimate decision to grant the defendant's petition, the court relied heavily on both established case law as well as statutory prohibitions against retrial as found in both the United States and New York Constitutions.[21]

In order for retrial to be an acceptable remedy for an inappropriate action taken by the prosecution to which the defendant objects, the court looked to the Fifth Amendment of the United States Constitution[22] and the seminal federal court case on double jeopardy, *United States v. Perez*,[23] for guidance.[24] The Constitution reads that no person may be subjected to jeopardy of life or limb twice for the same offense.[25] Therefore, where jeopardy has attached, the retrial of a case is constitutionally barred, save a few exceptions.[26] For example, in such matters where the defendant does not consent to mistrial, the court acknowledged that retrial is prohibited "unless 'there is a manifest necessity for [the mistrial], or the ends of public justice would otherwise be defeated,' " as set forth in *Perez*.[27] For there to exist a "manifest necessity" warranting a mistrial and retrial without the consent of the defendant, there must be a situation in which justice would otherwise be defeated if the defendant was not subjected to a subsequent retrial.[28] The Supreme Court has also traditionally qualified "manifest necessity" as a situation in which there exists a "high

which is protected by the Second Amendment of the United States Constitution).

[19] *Id.*

[20] *Robar*, 921 N.Y.S.2d at 715.

[21] *Id*; *see also* U.S. CONST. amend. V; N.Y. CONST. art. I, § 6.

[22] U.S. CONST. amend. V.

[23] 22 U.S. 579 (1824).

[24] *Robar*, 921 N.Y.S.2d at 715-16.

[25] U.S. CONST. amend. V.

[26] *Robar*, 921 N.Y.S.2d at 715-16.

[27] *Id.* at 716 (quoting *Perez*, 22 U.S. at 580).

[28] *Id.* at 717 (citing Arizona v. Washington, 434 U.S. 497, 505-06 (1978) (explaining that, in certain occasions, the defendant's right to have his case tried before the first jury impaneled "is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury")).

degree" of need justifying retrial.[29] In *Robar*, the Appellate Division, Third Department, determined that the trial court failed to establish a "manifest necessity," and therefore abused its discretion requiring the declaration of mistrial and subsequent retrial of the matter.[30]

In the event the court could find that the defendant somehow agreed to a mistrial, the court would then need to determine whether the defendant did so in response to improper actions on the part of the prosecution, or the court itself.[31] Traditionally, where a defendant declares or consents to a mistrial, courts have rejected the application of a double jeopardy analysis.[32] The court in *Robar* acknowledged, as does the Supreme Court, that there exists an exception which allows the defendant to raise the bar of double jeopardy, when it is found that the actions of the prosecution or court improperly "goad[ed] the [defendant] into requesting a mistrial."[33] In *Robar,* the court emphasized that defense counsel unequivocally objected and did not consent to a mistrial.[34] Because the petitioner blatantly objected to a declaration of mistrial, retrial would be barred without a showing of "manifest necessity," which the court here noted, is lacking.[35]

The court in *Robar* also applied the holdings of *Batson* and its progeny in determining whether or not the review of the *Batson* challenges constituted a sufficient ground for declaring a mistrial.[36] While the approach taken by the county court determined that the hunters made up a protected class under *Batson*, the appellate court rejected this view.[37] There is no codified requirement that "the 'jur[y] actually chosen must mirror the community and reflect the

[29] *Id.* (quoting *Washington*, 434 U.S. at 506).

[30] *Id.*

[31] *Robar*, 921 N.Y.S.2d at 716.

[32] *Id.*

[33] *Id.* (quoting United States v. Dinitz, 424 U.S. 600, 611 (1976)).

[34] *Id.*

[35] *Id.* at 716-17.

[36] *Robar*, 921 N.Y.S.2d at 719 (holding that a manifest necessity did not exist for retrial on the basis of a violation of the jurors' constitutional rights).

[37] *Id.* at 718 (emphasis in original) ("The fact that hunters may exercise their Second Amendment right—a right certainly not limited to hunters or conferred upon them *because* they are hunters—does not morph them into a cognizable group for equal protection purposes."); *see also* Koster, *supra* note 8, at 888 (discussing the lower court's finding of a " '*Batson*-'like' violation' in the defendant's removal of licensed hunters").

various distinctive groups in the population.' "[38] Furthermore, the court held that the declaration of mistrial and subsequent retrial is an improper approach to a *Batson* violation, as other more appropriate remedies exist.[39]

The court also noted that *Batson* challenges are typically argued and decided prior to the swearing in of a jury and require the satisfaction of a three-prong analysis, as outlined in *Batson* and its progeny.[40] All remedies for a *Batson* violation, such as "granting the nonoffending [sic] party additional peremptory challenges, or forfeiture of the peremptory challenges used [improperly]" cease to exist upon the swearing in of the jury.[41] Once the jury is impaneled, any viable remedies for the improper use of peremptory challenges under these cases are gone, and the court may not look to mistrial as a means of rectifying such a situation under the guise of "manifest necessity" existing to do so.[42] While an exception to this rule exists, it only applies when the defendant moves for mistrial for the prosecution's improper use of *Batson* challenges, which was not applicable in *Robar*.[43]

The court in *Robar* focused upon the notion, as previously established by the Court of Appeals in *People v. Michael*,[44] that the "prohibition against double jeopardy is fundamental not only to the process of criminal justice, but to our system of government itself."[45]

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[38] *Robar*, 921 N.Y.S.2d at 719 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

[39] *Id.* at 719-20 (citing *Batson*, 476 U.S. at 99 n.24 (stating that the judge should determine "whether it is more appropriate . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges")).

[40] *Id.* at 720. The three-prong analysis requires that:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citations omitted).

[41] *Robar*, 921 N.Y.S.2d at 719-20 (citing People v. Luciano, 890 N.E.2d 214, 219 (N.Y. 2008)).

[42] *Id.* at 720.

[43] *Id.*

[44] 394 N.E.2d 1134 (N.Y. 1979).

[45] *Id.* at 1136 (stating that the constitutional bar against double jeopardy "serves as an important check on the potential power of the State").

The court in *Robar*, as noted previously, determined that the petitioner did not consent to a mistrial, and therefore did not waive his fundamental right to the protection against double jeopardy.[46] Because the defendant did not waive his protection against double jeopardy, the court deferred to the state constitution for guidance on whether to grant the defendant's petition.[47] The New York State Constitution stresses the inherent fundamental status of one's protection against standing trial for the same crime twice without consent.[48] The court applied this concept when it granted the defendant's petition.[49]

The court also noted that the defendant retains the right to be free from reprosecution of a matter in the event that the first trial had not reached a conclusion.[50] Here, the petitioner was subjected to a trial in which a jury was sworn in and heard the prosecution's arguments and part of the defendant's testimony.[51] The court, in comparing this situation to that of the defendant in *People v. Baptiste*,[52] emphasized that a defendant has a significant interest in having the jury render a verdict following the first attachment of jeopardy, barring a deadlock or some other inability of that jury to reach said verdict.[53] Because the petitioner in *Robar* had a "valued right" to have his case decided by the original jury "on the first presentation of the evidence," the court held that the county court judge should not have declared a mistrial and allowed the trial to continue regardless of the effect of the *Batson* challenges on the resulting jury.[54]

The court also recognized that the reasons for the grant of mistrial must be plain and clear, and in no way illusory or deceptive.[55] In order for the trial court to conclude that a mistrial is necessary, it

[46] *Robar*, 921 N.Y.S.2d at 716-17.

[47] *Id.* at 715 (stating that "a defense against prosecution premised upon constitutional double jeopardy principles poses a question of law" to be determined by the court in accordance with constitutional provisions).

[48] N.Y. CONST. art. I, § 6.

[49] *Robar*, 921 N.Y.S.2d at 715.

[50] *Id.* at 715-16.

[51] *Id.* at 714.

[52] 530 N.E.2d 377 (N.Y. 1988).

[53] *Robar*, 921 N.Y.S.2d at 715-16 (referencing *Baptiste*, 530 N.E.2d at 380).

[54] *Id.* at 716, 720.

[55] *Id.* at 717 (citing Matter of Enright v. Siedlecki, 451 N.E.2d 176, 180 (N.Y. 1983) ("The reasons underlying the grant of a mistrial may not be illusory; rather, in order fully to protect the defendant's right to trial by a particular tribunal they must be necessitous, actual and substantial.")).

falls upon the trial judge to use his or her discretion in determining whether or not the burden of a "manifest necessity" has been reached.[56] The court in *Robar* held that the trial court judge abused his discretion when he improperly granted a mistrial against the wishes of the defendant and "without considering alternatives."[57] Due to such an abuse of discretion, the retrial was therefore barred.[58]

In a unanimous decision, the Appellate Division, Third Department, held in *Robar* that there was no existence of "manifest necessity" warranting a mistrial, and that "retrial of [the] petitioner is barred by the prohibition against double jeopardy."[59] Because retrial is not permitted on the same offense and the first trial was improperly concluded by the judge's declaration of mistrial, the indictment against the petitioner was dismissed and the petitioner may no longer be tried on the charges contained in the original indictment.[60]

## II. FEDERAL APPROACH TO DOUBLE JEOPARDY

The Supreme Court of the United States has traditionally followed the holding of *United States v. Perez* when analyzing double jeopardy.[61] The Court in *Perez* considered whether the discharge of the jury prior to issuing a verdict and without consent is grounds for a bar to retrial of the matter.[62] Because no verdict had been reached, the defendant explained that he had a fundamental right as protected by the Constitution to be released from custody.[63] Justice Story, delivering the opinion of the Court, noted that the courts of the United States are endowed "with the authority to discharge a jury from giving any verdict . . . [where] there is a manifest necessity for the act, or

[56] *See Enright*, 451 N.E.2d at 180-81 (stating that trial judge may grant a mistrial when no other adequate alternative exists, and where there is a manifest necessity to do so).

[57] *Robar*, 921 N.Y.S.2d at 717 (citing *Enright*, 451 N.E.2d at 180).

[58] *Id.* at 717, 720.

[59] *Id.* at 720 (holding that a manifest necessity for retrial must exist, more specifically in situations where the defendant gave no consent to mistrial and did not waive his protection from double jeopardy).

[60] *Id.*

[61] *Id.* at 716.

[62] *Perez*, 22 U.S. at 579 (explaining that the jury, being unable to reach a verdict, was discharged by the Court without consent from either the defendant or the prosecution).

[63] *Id.*

the ends of public justice would otherwise be defeated."[64] The Court, therefore, has the discretion to interfere with traditional judicial procedure, where there is a high degree of need to do so, in pursuit of a greater justice.[65] The Court highlighted the fact that it would be impossible to discern every situation that would satisfy the "manifest necessity" standard.[66] It did note, however, that future judges and courts would need to exercise substantial care when interfering with matters, such as these, that are subject to extreme scrutiny under the protections of the Constitution.[67]

The *Perez* opinion has long been applied in actions involving questions of double jeopardy. Since *Perez*, the Court has held that retrial by a second jury may be allowed in matters where the first jury was "discharged without reaching a verdict and without the defendant's consent."[68] In *Downum v. United States*,[69] the prosecutor requested to have the jury discharged after being sworn in due to the fact that one of the prosecution's key witnesses on a number of the counts was not present.[70] The defendant moved to have those counts at issue dismissed and to continue with trial on the remaining counts, to which the trial judge responded with a denial and then proceeded to discharge the jury.[71] After being found guilty, the defendant appealed and the Court of Appeals affirmed.[72] Upon grant of certiorari, the Supreme Court applied the standards from *Perez* and its progeny, and, in its opinion, explained that the prosecution "t[akes] a chance" when it impanels the jury "without first ascertaining whether or not its witnesses were present."[73] In determining whether there was a violation of the protection against double jeopardy as stated in the Fifth Amendment of the United States Constitution, the Court held that any doubt should be resolved "in favor of the liberty of the citizen, rather

[64] *Id.* at 580.

[65] *Id.*

[66] *Id.* (stating that "it is impossible to define all the circumstances which would render it proper to interfere" with a defendant's constitutional protection against double jeopardy).

[67] *Perez*, 22 U.S. at 580.

[68] Downum v. United States, 372 U.S. 734, 735-36 (1963) (citing *Perez*, 22 U.S. at 579 ("[T]he jury, being unable to agree, were discharged by the Court from giving any verdict upon the indictment, without the consent of the prisoner . . . .")).

[69] 372 U.S. 734 (1963).

[70] *Id.* at 735.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 737 (quoting Cornero v. United States, 48 F.2d 69, 71 (9th Cir. 1931)).

than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."[74] The Court here expounded upon and qualified Justice Story's concept of "manifest necessity," denoting that in all double jeopardy matters where judicial discretion may be abused, the Court should defer to what is most favorable to the defendant's liberty.[75]

In *United States v. Dinitz*,[76] the Court examined whether a mistrial requested by the defendant, due to an error on the part of the judge or prosecution, bars reprosecution under the Double Jeopardy Clause of the Constitution.[77] Unlike the previous cases on this matter, where the defendant objected to or did not consent to retrial, *Dinitz* was the first time the Supreme Court directly dealt with the issue of a defendant who requested a mistrial, but argued that retrial should be barred under double jeopardy.[78] Traditionally, a defendant's motion for mistrial is "assumed to remove any barrier to reprosecution."[79] In its opinion the Court stated that, because the trial court did not act in bad faith when it removed defendant's counsel due to improper conduct, this action cannot be seen to have been intended to "provoke mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions."[80] Because the defendant would not be subjected to an undue burden by the retrial of his matter, the Court held that the double jeopardy clause did not bar reprosecution of the defendant.[81]

In *Arizona v. Washington*,[82] the Court again evaluated the requirement for "manifest necessity" where there is gross misconduct that would cause the jury to improperly favor one party over the oth-

[74] *Downum*, 372 U.S. at 737.

[75] *Id.* at 738; *see also Perez*, 22 U.S. at 580 ("Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.").

[76] 424 U.S. 600 (1975).

[77] *Id.* at 605-06.

[78] *Id.* at 607.

[79] *Id.*

[80] *Id.* at 611 (stating that defense counsel's removal on the basis of his improper statements during opening arguments was not done in order to provoke defendant to move for a mistrial).

[81] *Dinitz*, 424 U.S. at 612; *see id.* at 613 (Brennan, J., dissenting) (referencing United States v. Dinitz, 492 F.2d 53, 61 (5th Cir. 1974) (emphasizing the need for the Court to agree with the panel hearing and look back to Justice Story's language that a "manifest necessity" be present in order to merit retrial without violating the constitutional protection against double jeopardy)).

[82] 434 U.S. 497 (1978).

er.[83] In this matter, the defendant was found guilty of murder, but was later granted a new trial due to the withholding of exculpatory evidence on the part of the prosecution.[84] At the opening of the second trial, defense counsel made inappropriate comments regarding the prosecution's previous failure to disclose evidence.[85] The prosecution responded with a motion for mistrial which was eventually granted by the trial judge.[86] The defendant subsequently filed a writ of habeas corpus with the district court, which was granted on the basis that the trial judge inappropriately granted a mistrial absent an explicit finding of "manifest necessity."[87] Upon review by the Supreme Court, the Court reversed the Ninth Circuit's decision, explaining that explicit use of the term "manifest necessity" by the trial court is not requisite in finding that such a degree of necessity has been met.[88] Further, the Court stated that the judge does not bear a burden to disclose "on the record all the factors which informed the deliberate exercise of his discretion."[89]

The issue of prosecutorial misconduct as grounds for a defendant's request for mistrial and subsequent barring of retrial under double jeopardy, as argued in *Dinitz*, was again brought before the Court in *Oregon v. Kennedy*.[90] The Court in *Dinitz* noted that an effort by the prosecution to "goad" the defendant into moving for a mistrial may bar reprosecution under the Double Jeopardy Clause.[91] In *Kennedy*, the prosecutor, on redirect examination of a witness, referred to the defendant as "a crook," which prompted the defense to

[83] *Id.* at 498.

[84] *Id.*

[85] *Id.* at 498-99.

[86] *Id.* at 499, 501 (stating that, after a series of arguments regarding the motion for mistrial, the trial judge granted the motion "based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion").

[87] *Washington*, 434 U.S. at 501-03 (stating that the Ninth Circuit affirmed, explaining that the trial judge granted the mistrial without first determining "whether [or not] there could, nevertheless, [still] be a fair trial" after the jury heard defense counsel's improper remarks).

[88] *Id.* at 517 (explaining that a trial judge's declaration of a mistrial "is not subject to a collateral attack in a federal court simply because he failed to find 'manifest necessity' [by using] those [exact] words").

[89] *Id.*

[90] 456 U.S. 667 (1982); *see Dinitz*, 424 U.S. at 611.

[91] *Dinitz*, 424 U.S. at 611 (stating that reprosecution is barred where the defendant is "provoke[d to motion for] a mistrial" by the prosecution's error, or the said error is either motivated by "bad faith conduct by judge or prosecutor" or undertaken for the purposes of "harassment of [the] accused").

motion for a mistrial.[92] Because the defendant motioned for a mistrial, the Court determined that it is not required to show a "manifest necessity" for a retrial after the declaration of mistrial.[93] In applying the *Dinitz* standard, the Court expressed that when the defendant moves for a mistrial in a criminal proceeding, the grounds for barring reprosecution under the Double Jeopardy clause are severely limited.[94] Because the Court determined that the prosecution in *Kennedy* did not make its statement for the purposes of eliciting a motion for mistrial from the defendant, reprosecution was not barred by the Fifth Amendment.[95]

## III. NEW YORK STATE AND DOUBLE JEOPARDY

Article I, Section Six, of the New York State Constitution, like the Fifth Amendment of the United States Constitution, provides for the protection of the individual from being tried twice for the same offense.[96] The courts of the State of New York have interpreted the language of the Constitution to establish when reprosecution of a matter is barred on the grounds of double jeopardy. A series of cases reached the New York Court of Appeals and appellate departments in which the courts have adopted a similar approach to double jeopardy as taken by the Supreme Court of the United States.

In *People v. Michael*,[97] the defendant sought a reversal of his conviction at retrial on the grounds of double jeopardy after the original trial court "[s]ua sponte declared a mistrial as to defendant Michael, [both] without obtaining his consent and in the absence of his counsel," in light of the events that occurred during the trial process.[98] The mistrial was declared shortly after the trial began because defense counsel was unable to attend due to a death in the

[92] *Kennedy*, 456 U.S. at 669.

[93] *Id.* at 672 (citing *Dinitz*, 424 U.S. at 607-10 (stating that since the defendant moved to end the trial by mistrial prior its culmination, a "manifest necessity" application is inapplicable)).

[94] *Id.* at 679.

[95] *Id.*

[96] *Michael*, 394 N.E.2d at 1138 ("[T]he double jeopardy provisions of both our State Constitution and the Federal Constitution prohibit retrial for the same crime [twice]. . . .").

[97] 394 N.E.2d 1134 (N.Y. 1979).

[98] *Id.* at 1135.

family.[99] The court wished to have the trial completed by the end of the same week, but was unable to proceed due to the unavailability of defense counsel.[100]

Following his conviction at the second trial and the affirming of that conviction at the appellate level, the defendant appealed to the Court of Appeals, citing a violation of his protection against double jeopardy under the state constitution.[101] Upon review, the Court of Appeals compared and contrasted the facts at bar with those of *Perez* and its New York State counterparts.[102] The Court of Appeals ultimately held that a mistrial for the purpose of judicial convenience absent "manifest necessity" is an abuse of discretion on the part of the original trial judge, and, as a result, the conviction of the defendant had to be reversed, and the original indictment dismissed.[103]

In the *Matter of Enright v. Siedlecki*,[104] the Court of Appeals addressed the declaration of a mistrial where the mistrial is based upon the unacceptable biasing of the jury by an improper statement made by the prosecution.[105] This issue was brought before the Court of Appeals to determine whether the trial judge abused his discretion by declaring a mistrial when the prosecution referenced a confession given by the defendant subsequent to his request for counsel in its statement, and, therefore, created an irreversible bias in the jury.[106] Additionally, defense counsel, during discussion regarding mistrial, stated openly that he believed there was no way "the jury could be 'sanitized' with respect to the defendant's inculpatory statement," and continued to object to a mistrial.[107] While the trial judge agreed in part with defense counsel when he stated that "[he did not] see

[99] *Id.* at 1137 (stating that "the court received a phone call from the office of defendant's attorney, notifying the court that the attorney's father had died unexpectedly" a few days after the start of the trial).

[100] *Id.*

[101] *Id.* at 1138.

[102] *Michael*, 394 N.E.2d at 1138 (discussing the reasoning behind Court of Appeals and Supreme Court decisions where retrial has been permitted without violating the constitutional protections of the defendant against double jeopardy).

[103] *Id.* at 1138-39.

[104] 451 N.E.2d 176 (N.Y. 1983).

[105] *Enright*, 451 N.E.2d at 179 ("[D]espite [the judge's] instructions to [this] jury [to disregard prosecutor's inappropriate remarks], it's impossible to unring a bell.").

[106] *Id.* at 180 (acknowledging that the trial judge's assessment of the circumstances surrounding the declaration of a mistrial should be afforded "the highest degree of respect" when being reviewed by an appellate court).

[107] *Id.* at 178.

how [the defendant] could get a fair trial with all th[ese issues]," he ultimately declared a mistrial.[108]

The Court of Appeals reviewed the defense's claim of a violation of the defendant's protection against double jeopardy.[109] The court held that the declaration of a mistrial and subsequent retrial is appropriate and constitutional where there is "gross misconduct" on the part of the defendant or his counsel, or where it is "impossible to proceed [fairly] with the trial" in accordance with applicable law.[110] Therefore, the court determined that the trial judge, in considering the inappropriate actions and behaviors of defense counsel and the unavailability of a key witness, found a "manifest necessity" to declare a mistrial and order retrial, and did not abuse his discretion in doing so.[111]

In *People v. Baptiste*,[112] a mistrial was declared at the first trial when the jury took a substantial period of time to deliberate and decide upon a verdict.[113] Defense counsel did not consent to a mistrial, yet it was granted because, as the trial judge stated, "if they can't reach a verdict, it has to be a mistrial."[114] In a unanimous decision, the Court of Appeals held that there was an abuse of discretion on the part of the trial judge in declaring a mistrial absent a "manifest necessity" to do so.[115] The foreman of the jury indicated that there had been some movement, but that it may not be able to reach a verdict by the deadline set by the court.[116] To the Court of Appeals, that statement on the record indicated that the jury was still fully capable

[108] *Id.* at 181.

[109] *Id.* at 178.

[110] *Enright*, 451 N.E.2d at 179-80 (stating that mistrial is necessary "when it is physically impossible to proceed with the trial in conformity with law").

[111] *Id.* at 181 ("Where, for reasons deemed compelling by the trial judge . . . 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 182 (Jones and Simmons, JJ., dissenting) (quoting Wade v. Hunter, 336 U.S. 689 (arguing that the majority made an improper determination to allow the mistrial, and that, as a result, the defendant was being deprived of his "valued right to have his trial completed by a particular tribunal")).

[112] 530 N.E.2d 377 (N.Y. 1988).

[113] *Id.* at 379.

[114] *Id.*

[115] *Id.* at 380-81 (elucidating that there was no indication that the jury found itself so "hopelessly deadlocked" that it could not reach a verdict, and, therefore, declaration of a mistrial is an improper remedy).

[116] *Id.* at 380.

of eventually reaching a verdict, and that the trial judge allowed them an insufficient amount of time to render a decision.[117] Therefore, "as a matter of law," the defendant could not be subjected to reprosecution of the matter.[118]

In *People v. Adames*,[119] a unique procedural situation presented itself regarding the defense's request for a mistrial due to prosecutorial misconduct.[120] At trial, the prosecution was admonished for improperly questioning the defendant and co-defendant, and, when it continued to happen, the defense counsel motioned for mistrial.[121] At that time, the trial judge "reserved decision [on the motion]" and allowed the trial to continue.[122] Upon the jury's rendering of a guilty verdict, the trial judge chose to then decide upon the mistrial motion, and ultimately vacated the verdict.[123]

Upon review by the Court of Appeals, the court considered whether it should adopt a new standard that retrial should be barred in situations where "the case proceeded to verdict before the selected jury, [and where] the trial conduct of the prosecutors is grossly and fundamentally prejudicial to defendant's fair trial rights."[124] A unanimous court held that, in matters such as this, the court should not "depart from the general analytical mode for deciding such cases," as established in the *Kennedy* holding.[125] Furthermore, the vacatur, as issued by the trial court judge, was a similar sort of relief as would be granted by an appellate court, and therefore, cannot be viewed as a bar to retrial.[126]

The Court of Appeals also addressed whether mistrial, and subsequent retrial, is the appropriate remedy to prosecutorial miscon-

[117] *Baptiste*, 530 N.E.2d at 380.

[118] *Id.* at 381 (emphasizing that the jurors were not afforded a sufficient amount of time to properly deliberate on the case).

[119] 629 N.E.2d 391 (N.Y. 1983).

[120] *Id.* at 392.

[121] *Id.* (stating that the prosecution's badgering of the defendants in regards to their police interviews was improper).

[122] *Id.* at 392-93.

[123] *Id.* at 393 (stating that the defendant was convicted at his retrial and appealed to the First Department, which rejected his double jeopardy claim and affirmed defendant's conviction).

[124] *Adames*, 629 N.E.2d at 393.

[125] *Id.*

[126] *Id.* at 394 ("In such instances [as this case], the double jeopardy bar to retrial should not attach and the correct and proportionate remedy should allow for retrial.").

duct at the original trial in *Gorghan v. DeAngelis*.[127] At trial, the prosecution continuously mentioned "evidence of petitioner's prior uncharged criminal and immoral acts" previously deemed inadmissible.[128] Defense motioned for a mistrial several times, which were denied by the court, and the defendant was subsequently found guilty on all charges.[129]

The defendant, following the Appellate Division's reversal of the conviction and remand for a new trial, petitioned the court in order to bar retrial on the grounds of double jeopardy, which was denied by the Appellate Division, Third Department.[130] The appellate court determined that the actions taken by the prosecution were made in order to "secur[e] a conviction, not . . . to provoke defendant into moving for a mistrial."[131] The Court of Appeals, in maintaining its view in *Adames*, affirmed the judgment of the appellate court, and stated that a new trial is a sufficient remedy for matters where "defendants suffer both prejudicial prosecutorial misconduct . . . and erroneous denial of a mistrial motion."[132]

The *Matter of Rivera v. Firetog*[133] presented the Court of Appeals with the question of whether a judge must ask the jury whether it had reached a partial verdict before declaring a mistrial on the grounds of jury deadlock.[134] At trial, the jury was presented with three counts on which to render a verdict, with instructions that each of the latter counts should not be considered if the jury found the defendant to be guilty of the higher charge.[135] Deliberations continued for days, prompting the judge to ask if the jury had reached a verdict on any of the charges, to which the defendant's counsel "countered that there was some indication that the jury had progressed past the first count and requested the court to inquire about the possibility of a

[127] 857 N.E.2d 523, 524 (N.Y. 2006).

[128] *Id.*

[129] *Id.* at 524-25 (stating that, on appeal from the county court, the Appellate Division determined that the proper remedy to the misconduct of the prosecution would be a new trial and remitted to the lower court).

[130] *Id.*

[131] *Id.* (quoting Gorghan v. DeAngelis, 808 N.Y.S.2d 787, 788 (App. Div. 3d Dep't 2006)).

[132] *Gorghan*, 857 N.E.2d at 525-26.

[133] 900 N.E.2d 952 (N.Y. 2008).

[134] *Id.* at 953.

[135] *Id.*

partial verdict."[136] The judge did not inquire about partial verdict and deliberations continued.[137] Mistrial was eventually declared because no verdict was reached and the defendant subsequently "filed a written motion to dismiss the indictment on double jeopardy grounds."[138]

In reviewing the appeal of the granted motion, the Court of Appeals ultimately reversed the judgment of the Appellate Division and dismissed the petition.[139] In delivering the majority opinion, the court examined this case's relationship to *People v. Baptiste* and *Arizona v. Washington*, in which the Court of Appeals determined that a mistrial on the grounds of a jury deadlock is to "involve[ ] the exercise of judicial discretion."[140] The Court of Appeals held that the trial judge acted with reasonable discretion when he declared a mistrial on the basis of the three jury deadlock notes he received.[141]

## IV. COMPARING FEDERAL AND STATE APPROACHES TO DOUBLE JEOPARDY AND REPROSECUTION

The federal court and the courts of New York have taken a similar approach to issues involving protection of a defendant from double jeopardy. In determining whether retrial would violate a defendant's due process rights under the Constitution, the federal judiciary has consistently deferred to the seminal doctrine as set forth in *Perez*. *Perez*'s holding that a "manifest necessity" need be present in order for the bar to retrial to be done away with is consistently reiterated throughout its progeny.[142]

[136] *Id.* at 954.

[137] *Id.* The prosecution requested a mistrial on the basis of a continuance of jury deadlocks. In response, the defense requested that the judge yet again check for a partial verdict, which the judge declined doing, since the jury made no statement declaring that it had reached one. *Rivera*, 900 N.E.2d at 954.

[138] *Id.* (stating that the motion was granted by the Appellate Division, and subsequently reviewed by the Court of Appeals).

[139] *Id.* at 955.

[140] *Id.*

[141] *Id.* at 956; *Rivera*, 900 N.E.2d at 958-59 (Pigott, J., dissenting) (stating that defense counsel's argument that the trial court had a duty to inquire as to a partial verdict was correct, especially if there was a chance that the jury did not know it could return such a verdict).

[142] *Perez*, 22 U.S. at 580 ("We think, that in all cases of this nature, the law has invested Courts . . . with the authority to discharge a jury . . . whenever . . . there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.").

The cases on double jeopardy heard by the Supreme Court after *Perez* have interpreted the meaning of "manifest necessity." The Court in *Washington* determined that Justice Story's "necessity" could not be read literally, but rather, it meant that there is a lofty burden that must be met by the prosecution to show that mistrial and subsequent retrial is the appropriate remedy for the issue at bar.[143] Through its application of this standard, the Court has predominantly held in favor of retrial in the majority of cases regarding double jeopardy.[144] Unless an egregious abuse of discretion has been exercised by a trial judge as in *Downum*, the Supreme Court has been reluctant to hold that retrial would be barred by the Fifth Amendment.[145]

The courts of New York State have followed a similar pattern to that of the Supreme Court regarding the barring of reprosecution of the defendant under Article I, Section Six of the state constitution. A majority of the mistrial declarations in lower courts that have been appealed to the Court of Appeals have resulted from what is claimed to be an abuse of discretion on the part of the trial court judge. The Court of Appeals in *Michael*, while not directly stating so, seems to focus more on Justice Story's latter words in the Court's opinion in *Perez*:

> 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; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.[146]

[143] *Washington*, 434 U.S. at 506 ("[I]t is manifest that the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.").

[144] *See, e.g.*, *Kennedy*, 456 U.S. 667; *Washington*, 434 U.S. 497; *Dinitz*, 424 U.S. 600.

[145] *Downum*, 372 U.S. at 738 ("We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.' ").

[146] *Michael*, 394 N.E.2d at 1138 (emphasis added) (referring to *Perez*, 22 U.S. at 580).

The discretion of the trial judge is to determine "whether a mistrial is necessary," not just convenient or one of a number of potential options.[147] In many of the cases composing *Michael's* progeny, the Court of Appeals has given deference to the actions of the trial judge, and determined that they had not abused their discretion in declaring a mistrial and subsequent retrial.[148]

The holdings of *Baptiste* and, more recently, *Robar*, have marked a deviation from the traditional approach of the New York courts to cases involving double jeopardy as a bar to reprosecution.[149] The Court of Appeals in *Baptiste*, and the Third Department in *Robar* both determined that the trial judges abused their discretion in declaring mistrials, and that reprosecution is barred by both the New York and United States Constitutions.[150] The majority of New York State court decisions have held otherwise, finding that "manifest necessity" existed and favoring retrial of the defendant.[151]

## V. IMPLICATIONS AND VALUE OF *ROBAR V. LABUDA*

The decision in *Robar v. LaBuda* is a triumph for supporters of a strict interpretation of the both the United States Constitution and the New York State Constitution. Both constitutions provide for a protection of an individual from being placed in jeopardy twice for the same offense.[152] While the court in *Robar* is respectful of and compliant with binding judicial precedent, it is also mindful of the implications if it were to permit reprosecution of a defendant. By allowing the prosecution a second chance to convict after the court fails to act in a procedurally-appropriate manner (in this case, rendering a mistrial after reviewing the *Batson* arguments following the impaneling of a jury), the court is, in effect, disregarding the intent of the

[147] *Id.*

[148] *See Rivera*, 900 N.E.2d 952; *Gorghan*, 857 N.E.2d 523; *Adames*, 629 N.E.2d 391; *Enright*, 451 N.E.2d 176.

[149] *See Robar*, 921 N.Y.S.2d at 720 (stating that where "[a] mistrial [is] not [a] necessary" remedy to an issue at trial, "retrial . . . is barred" by the state and federal constitutions); *Baptiste*, 530 N.E.2d at 381 (stating that, "as a matter of law," reprosecution is an inappropriate remedy where a true abuse of discretion on the part of the trial judge can be shown).

[150] *Robar*, 921 N.Y.S.2d at 720; *Baptiste*, 530 N.E.2d at 381.

[151] *See Rivera*, 900 N.E.2d 952; *Gorghan*, 857 N.E.2d 523; *Adames*, 629 N.E.2d 391; *Enright*, 451 N.E.2d 176.

[152] U.S. CONST. amend. V; N.Y. CONST. art. I § 6.

framers of the Constitution, and risks undermining the key principles of the United States criminal judicial system.

The court in *Robar* arrived at its conclusion in a manner which deviates slightly from the course of previous double jeopardy cases, further enhancing the protections given to the accused. While focusing on the same seminal "manifest necessity" doctrine as followed by its predecessors, the court in *Robar* promotes a much more stringent interpretation of Justice Story's hallowed words: "The power [to discharge a jury or to reprosecute] ought to be used with the greatest caution."[153] The holding in this case may mark the point where the Third Department differs slightly from the other courts of New York and the federal courts, by focusing less on trying to stretch or interpret the trial record in favor of retrial, and more on the civil liberties and rights of the accused.[154] Recently, the other appellate departments of New York have all taken pro-retrial stances in their findings of "manifest necessity" in cases regarding mistrials and double jeopardy.[155] The Third Department's decision in *Robar* remains a singular beacon in the state appellate courts for greater judicial deference to a defendant's constitutional protection against double jeopardy.

The *Robar* decision is also a refreshing ruling in an era where the fundamental rights of the citizens of the United States have become somewhat limited in favor of national security. Through acts of law, such as the USA PATRIOT ACT,[156] Congress has granted government bodies the ability to overreach certain constitutional limitations and protections in order to prevent or protect against terrorist acts. While seemingly unrelated to double jeopardy as mentioned in *Robar* and its antecedents, it demonstrates a willingness of the legislative arm of the United States to overstep clearly spelled-out protections of individual rights under the Constitution. Decisions, like that

[153] *Perez*, 22 U.S. at 580.

[154] *See Robar*, 921 N.Y.S.2d at 718 n.5 (emphasis in original) ("[I]t is not the role of a reviewing court to 'search the record' to decipher an alternative ground that we are convinced *would have* supported a mistrial.").

[155] *See, e.g.*, People v. Pearson, 911 N.Y.S.2d 432, 433 (App. Div 2d Dep't 2010); Marte v. Berkman, 895 N.Y.S.2d 376 (App. Div 1st Dep't 2010); People v. Hernandez, 849 N.Y.S.2d 137, 138 (App. Div. 4th Dep't 2007).

[156] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., 20 U.S.C., 31 U.S.C., 42 U.S.C., 47 U.S.C., 49 U.S.C., and 50 U.S.C.).

of *Robar*, demonstrate the judicial branch's dedication to maintaining the balance of power and protection of personal freedoms.

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