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## Double Jeopardy

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## DOUBLE JEOPARDY

*N.Y. CONST. art. I. § 6:*

*No person shall be subject to be twice put in jeopardy for the same offense . . . .*

*U.S. CONST. amend. V:*

*No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . .*

### SUPREME COURT, APPELLATE DIVISION

#### SECOND DEPARTMENT

People v. Innis<sup>33</sup>  
(decided April 6, 1992)

Defendant claimed his constitutional rights under the Double Jeopardy Clause of the federal<sup>34</sup> and state<sup>35</sup> constitutions, were violated when he was tried by a jury and convicted following a mistrial on the same charge, declared after the jury had been chosen and sworn.<sup>36</sup> The court held that the “retrial violated [defendant’s] constitutional right not to be tried for the same crime twice . . . [since] jeopardy attaches once 12 jurors have been sworn . . . .”<sup>37</sup>

At the defendant’s first trial, the jurors were selected and sworn in on consecutive days in two groups of six.<sup>38</sup> Three days later a mistrial was granted upon the request of the prosecution because

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33. 182 A.D.2d 641, 582 N.Y.S.2d 245 (2d Dep’t 1992).

34. U.S. CONST. amend. V, cl. 2 (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”).

35. N.Y. CONST. art. I § 6 (“No person shall be subject to be twice put in jeopardy for the same offense.”).

36. *Innis*, 182 A.D.2d at 641, 582 N.Y.S.2d at 245.

37. *Id.* (citing *People v. Lawton*, 134 A.D.2d 454, 454, 521 N.Y.S.2d 76, 77 (2d Dep’t 1977)).

38. *Id.*

the prosecution's chief ballistics expert, whose testimony would "establish the operability of the defendant's gun," was ill and unable to testify for at least five days.<sup>39</sup> Prior to the granting of the mistrial, defense counsel suggested that another member of the Ballistics Department could retest the gun. While the prosecutor conceded that this was possible, he stated that it too would result in a delay of five days.<sup>40</sup> Thus, the prosecution's motion was granted over the objections of the defense counsel.<sup>41</sup>

The court declared that double jeopardy attached once the twelve jurors were sworn in, regardless of the fact that the swearing in was done in two groups.<sup>42</sup> The court rejected the prosecution's contention that double jeopardy does not attach until all the jurors are sworn in, including the alternate jurors.<sup>43</sup> Moreover, the court found that there was no "manifest necessity" for declaring a mistrial, "since the People could have arranged for an expert to testify without requiring more than a brief adjournment."<sup>44</sup>

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39. *Id.*; see N.Y. CRIM. PROC. LAW § 280.10 (McKinney 1982) ("At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances: (3) upon motion of either party or upon the court's own motion, when it is physically impossible to proceed with the trial in conformity with law.").

40. *Innis*, 182 A.D.2d at 641, 582 N.Y.S.2d at 245.

41. *Id.*

42. *Id.* at 642, 582 N.Y.S.2d at 245; see *People v. Lawton*, 134 A.D.2d 454, 454, 521 N.Y.S.2d 76, 77 (2d Dep't 1987) ("It is well settled that jeopardy attaches once 12 jurors have been sworn, regardless of whether the swearing was done individually or en masse.").

43. *Innis*, 182 A.D.2d at 642, 582 N.Y.S.2d at 245.

44. *Id.* at 642, 582 N.Y.S.2d at 246; see *Torres v. Justices of Supreme Court*, 82 A.D.2d 892, 440 N.Y.S.2d 294 (2d Dep't 1981). In *Torres*, during the course of defendant's trial, defendant was arrested while out on bail and unable to appear in court. The trial judge declared a mistrial reasoning that it would be improper to adjourn since that would reward defendant for his misconduct. *Id.* at 892, 440 N.Y.S.2d at 294. On appeal the court held that the trial judge should have granted a brief adjournment of a day or two in order to give the defendant an opportunity to be present at his trial. *Id.* at 892-93, 440 N.Y.S.2d at 294. Thus it was improper to declare a mistrial because there was no manifest necessity to do so. *Id.* at 892, 440 N.Y.S.2d at 294.

The holding in *Innis* is consistent with federal and other New York decisions on the issue. In *Downum v. United States*,<sup>45</sup> the United States Supreme Court held that the Fifth Amendment's Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been given.<sup>46</sup> The Court, in effect, pinpointed the stage at which jeopardy attaches in a jury trial to the swearing in of the jury. Subsequently, in *Crist v. Bretz*,<sup>47</sup> the Supreme Court held that the federal rule governing the time when jeopardy attaches is an integral part of the Fifth Amendment guarantee and thus is binding upon the states through the Fourteenth Amendment.<sup>48</sup>

In *People v. Micheal*,<sup>49</sup> the New York Court of Appeals held that unless there exists a manifest necessity for declaring a mistrial, or the ends of public justice would otherwise be defeated, when a court declares a mistrial without first obtaining the defendant's consent the double jeopardy provisions of both our state and federal constitutions prohibit retrial.<sup>50</sup> The court further noted that deference will be accorded to the trial judge's decision since he or she is in the best position to determine whether a

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45. 372 U.S. 734 (1963).

46. *Id.*

47. 437 U.S. 28 (1978).

48. *Id.* at 38.

49. 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979). After the commencement of defendant's first trial, the father of the defense counsel died unexpectedly. The office for defense counsel phoned the court the following morning to inform the court that defense counsel would not be able to appear that day. *Id.* at 8, 394 N.E.2d at 1137, 420 N.Y.S.2d at 374. Subsequently, when the case was called the prosecutor suggested that the case be adjourned until defendant's counsel could return. *Id.* The court stated that it would declare a mistrial since an adjournment was not feasible because the trial had to terminate by the end of the week since the court and several members of the jury had made plans for the following week. *Id.* On the retrial following mistrial, defendant was convicted. *Id.* at 1-2, 394 N.E.2d at 1134, 420 N.Y.S.2d at 371. The court of appeals held that it was an abuse of discretion to declare a mistrial solely on the fact that delay in trial would be inconvenient for the court and the jury and retrial was prohibited by both our state and federal constitutions. *Id.* at 9-10, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375.

50. *Id.* at 9, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375.

mistrial is in fact necessary.<sup>51</sup> However, such discretion is not unlimited. Thus, where the "decision to declare a mistrial is based solely on the fact that a delay in trial would inconvenience the court and the jury, and without an inquiry into the effect of such a delay on the jury's ability to render a fair verdict discretion falters and abuse appears."<sup>52</sup> The court reasoned that a defendant's right to have his or her fate determined as expeditiously as possible, and by the first jury to which the case is presented, is a basic one, and may not be set aside without a strong reason.<sup>53</sup>

Therefore, under both the state and federal constitutions, double jeopardy will prohibit the retrial of a criminal defendant whose previous trial was terminated after the jury was selected and sworn.

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51. *Id.*

52. *Id.* at 11, 394 N.E.2d at 1139, 420 N.Y.S.2d at 376.

53. *Id.* at 10, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375.