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Steven Paul Shreder

contributions to an organization formed solely to support or oppose a state ballot question."[125] Another portion of the opinion withdrew earlier contradicting opinions.

The recent opinion leaves unanswered, as earlier opinions have done, the question of the status of organizations that were not "formed solely to support or oppose a state ballot question." Suppose an organization was formed for the purpose of expressing views on a particular subject long before there was a possibility of a ballot question on that subject. If a ballot question on the issue does arise, would the members be required to form a new organization, whose purpose is "solely to support or oppose a state ballot question" before they consider themselves free from contribution limitation? Such a result is inconsistent with recent first amendment interpretations, yet it would occur if the Attorney General's opinion were strictly followed.

Regardless of the potential for confusion discussed above, the Attorney General's opinion provides further support for the theme of this note: that certain provisions of the Oklahoma Campaign Contributions and Expenditures Act are markedly unconstitutional. It is hoped that Oklahoma's legislature will soon take action to reestablish the vital consideration which every democracy owes freedom of speech.

John W. Raley III

Criminal Law: *Oregon v. Kennedy:* Avoiding the Double Jeopardy Bar

The setting is a criminal prosecution. The state has rested, and counsel for the accused is wrapping up the defense by calling the accused as a witness. Believing that the state's case is weak and an acquittal is likely, the prosecutor decides to abort the trial and risk another. Intending to provoke the accused to move for a mistrial, on cross-examination the prosecutor questions the defendant about his post-arrest silence, contrary to the holding in *Doyle v. Ohio.*[1] The trial court then grants a mistrial at the request of the defendant.

In a similar situation, another prosecutor is reasonably satisfied with the strength of his case but decides that some extra leverage might be helpful. Not intending to provoke a mistrial, the prosecutor nevertheless attempts to direct prejudice at the defendant by questioning a witness concerning prior unprosecuted crimes allegedly committed by the defendant. Again, a mistrial is granted at the defendant's request.

In both cases, the defendant's right to a fair trial has been prejudiced by the conduct of the prosecutor. In the first case, the prosecutor has evinced

125. *Id.*

1. 426 U.S. 610 (1976).

a specific intent to provoke a mistrial motion; in the second case, the motion has been provoked by bad faith conduct, or overreaching, even though the prosecutor did not intend that this would be the case. In deciding whether to move for a mistrial in either situation, the defendant is faced with a "Hobson's choice": He may move for a mistrial and face a second prosecution on the same charge, or he might opt to continue the tainted proceeding, with a high likelihood that it will end in a conviction. In such a situation the option is an illusory one because few defendants would want to proceed when a conviction is the inevitable result. The Supreme Court of the United States has held that the double jeopardy clause of the fifth amendment to the Constitution guarantees the defendant at least a meaningful choice.[2] Where the conduct of the prosecutor denies the defendant a meaningful choice, the Court has held that a reprosecution would be barred after a successful motion for a mistrial by the defendant.[3]

In *Oregon v. Kennedy,*[4] the Supreme Court severely restricted the right of an accused to invoke the protection of the double jeopardy clause[5] after he has successfully moved for a mistrial on the ground that the prosecutor has acted in a manner prejudicial to the defendant. The Court held that in order for the reprosecution of the defendant to be barred by the double jeopardy clause, it would be necessary to show that the prosecutor had deliberately provoked the defendant to make the mistrial motion.[6] Under *Kennedy,* a defendant may not invoke the double jeopardy bar to reprosecution where a mistrial is granted because of mere overreaching or the prejudicial conduct of the prosecutor,[7] but must show that there was a specific intent on the part of the prosecutor to provoke the mistrial motion. Thus the *Kennedy* decision would bar reprosecution only in the first case mentioned above. Prior to *Kennedy,* however, a defendant could have invoked the bar in either of the cases.

This note will explore the ramifications of the decision in *Kennedy.* It will begin with an examination of the historical development of the overreaching standard adopted in pre-*Kennedy* cases and follow with a brief discussion of those cases, illustrating an intent to depart from that standard in *Kennedy.* The new subjective intent standard, established in *Kennedy,* will become evident in an examination of the opinions in the decision. Differing views of the protection afforded by the double jeopardy clause will be discussed in an attempt to determine what result, if any, is demanded by a particular view of the clause. Specific criticisms of the *Kennedy* decision will be offered. Final-

2. United States v. Dinitz, 424 U.S. 600, 609 (1976).

3. *Id.*

4. 456 U.S. 667 (1982).

5. The general rule is that a defendant's motion for mistrial removes any bar to reprosecution. United States v. Dinitz, 424 U.S. 600, 610 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971). But there is an exception to the rule that obtains when prosecutorial or judicial misconduct provokes the motion for mistrial. *Dinitz,* 424 U.S. at 610; *Jorn,* 400 U.S. at 485.

6. Oregon v. Kennedy, 456 U.S. 667, 669 (1982).

7. The Court had previously established the overreaching or bad faith conduct standard as a bar to reprosecution in *Jorn* and *Dinitz.*

ly, the effect of the *Kennedy* decision on the application of the double jeopardy bar in lower courts will be discussed.

The Overreaching Standard

The previous standard for determining when a reprosecution is barred after a mistrial is granted at the defendant's request was set out in the Supreme Court cases of *United States v. Jorn*[8] and *United States v. Dinitz*.[9] In *Jorn,* the Court recognized the general rule that a bar to reprosecution is removed when a defendant moves for a mistrial, but noted an exception: "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."[10]

The opinion addressed the issue of the exception more directly in a footnote to the case: "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred."[11] In dicta the Court also noted that permitting reprosecution after an aborted trial "does not compel the conclusion that double jeopardy policies are confined to the prevention of prosecutorial or judicial overreaching."[12] This language compels the conclusion that prevention of conduct amounting to prosecutorial or judicial overreaching is a legitimate aim of the double jeopardy clause. The *Jorn* Court reasoned that overreaching that motivates the defendant to move for a mistrial would bar reprosecution and afford the defendant the protection intended by the double jeopardy clause.[13]

In *United States v. Dinitz,*[14] Justice Stewart clearly expressed the view of the Court that the prosecutor's conduct was controlling on the issue of whether reprosecution would be permitted. Reflecting on the purposes of the double jeopardy clause, he noted: "It bars retrials where 'bad faith conduct by a judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."[15] Although a defendant might freely elect to surrender "his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal,"[16] Justice Stewart reasoned that such an election induced by the conduct of the prosecutor might be the product of a meaningless choice:

8. 400 U.S. 470 (1971).
9. 424 U.S. 600 (1976).
10. United States v. Jorn, 400 U.S. 470, 485 (1971).
11. *Id.* at n.12. The Court cited the previous case of United States v. Tateo, 377 U.S. 463, 468 n.11 (1964), for that proposition.
12. 400 U.S. 470, 484 (1971).
13. *Id.*
14. 424 U.S. 600 (1976).
15. *Id.* at 611.
16. United States v. Jorn, 400 U.S. 470, 484 (1971).

> It is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interest served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.[17]

Thus, where bad faith conduct or conduct amounting to overreaching induced the mistrial motion:

> [T]he defendant generally does face a Hobson's choice between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.[18]

Thus, the Court in *Dinitz* held the standard to be one of bad faith conduct or overreaching on the part of the prosecutor.

The bad faith conduct language in *Dinitz* was an explicit definition of the overreaching standard announced in *Jorn,* rather than an expansion of that standard. Under the overreaching standard, the conduct of a prosecutor or a judge determined whether reprosecution was barred by the double jeopardy clause. Although the specific intent to provoke a mistrial motion would prohibit reprosecution, the protection of the double jeopardy clause was not limited to that situation; objectionable conduct on the part of the prosecutor might raise the bar absent a specific intent.[19]

In *Lee v. United States,*[20] Justice Powell further defined the sort of conduct that might bar reprosecution under the double jeopardy clause: "It follows under *Dinitz* that there was no double jeopardy barrier to petitioner's retrial unless the judicial or prosecutorial error that prompted the petitioner's motion was 'intended to provoke' the motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice' petitioner."[21] The holding in *Lee* suggested that there was a two-pronged test for determining whether reprosecution is barred after a successful mistrial motion by the defendant. One prong of the test involved conduct specifically intended to induce the mistrial motion by the defendant. However, conduct not intended to induce

17. United States v. Dinitz, 424 U.S. 600, 608 (1976).

18. *Id.* at 610.

19. The focus of *Kennedy* is solely on the intent of the prosecutor, not on the conduct itself.

20. 432 U.S. 23 (1977).

21. *Id.* at 33-34. Justice Powell's opinion in *Lee* is important in that his concurrence completed the majority in *Kennedy.*

the motion might also bar reprosecution if done in bad faith or in an attempt to harass or prejudice a defendant. This second prong of the test focused on the conduct itself, rather than the intent, and possibly included gross negligence on the part of the prosecutor, who reasonably should have known that his conduct would induce a mistrial motion.[22] Although *Lee* specifically rejected the notion that mere negligence on the part of the prosecutor would bar a retrial, the question of whether gross negligence would prevent reprosecution under the overreaching standard was left open.

Departure From the Overreaching Standard

The standard established by *Jorn, Dinitz,* and *Lee* did not long escape attack by the more conservative members of the Court. In *Divans v. California,*[23] Justice Rehnquist denied an application for stay of sentence. The petitioner had been reprosecuted and convicted after successfully moving for a mistrial based on prejudicial remarks made by the prosecutor at trial.[24] Justice Rehnquist interpreted the standard set out in *Jorn* and *Dinitz* as requiring a specific intent on the part of the prosecutor to provoke a motion for mistrial by the defendant. Absent that specific intent, reprosecution was not barred by the double jeopardy clause. The opinion, which ignored the language in *Lee,* held: "It must be shown that not only was there error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for mistrial."[25] The *Divans* opinion was important in that it demonstrated the intent to erode the overreaching standard into a specific intent standard. However, the opinion did not modify or overrule *Jorn, Dinitz,* or *Lee* because it was merely a memorandum opinion and, as such, not controlling authority.

In *United States v. DiFrancesco,*[26] Justice Blackmun cited *Dinitz* for the proposition that the intent of the prosecutor alone was controlling on the issue of reprosecution: "Furthermore, reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request."[27] The language in *DiFrancesco* is dicta, but it is important in that it was cited in *Kennedy* as precedent for the specific intent standard.[28] Although better authority for the standard than the memorandum opinion in *Divans,* it is nevertheless questionable that it was controlling on the issue in *Kennedy* because the *DiFrancesco* language was not a holding. In any event, the distortion of the overreaching

22. Certain jurisdictions have determined that gross negligence on the part of the prosecutor which prejudices the defendant bars retrial. *See* cases cited *infra* at note 72.

23. 434 U.S. 1303 (1977) (Rehnquist, J., memorandum opinion) (application for stay of sentence).

24. *Id.*

25. *Id.*

26. 449 U.S. 117 (1980).

27. *Id.* at 130. Justice Blackmun's opinion in *DiFrancesco* is interesting in that he concurred with the minority in *Kennedy.*

28. Oregon v. Kennedy, 456 U.S. 667, 673 (1982).

standard in *DiFrancesco* and *Divans* demonstrated the dissension among the Justices concerning the scope of the exception and laid the groundwork for the decision in *Kennedy*.[29]

The restrictive interpretation of the overreaching standard suggested in *Divans* and *DiFrancesco* was adopted by the Court in *Kennedy*. The defendant in the case was tried for the theft of a rug. During his initial trial, an expert witness was called to testify as to the value of the rug. In an attempt to establish bias on the part of the witness, defense counsel elicited an admission from the witness that he had previously filed a criminal complaint against the defendant but had failed to pursue that complaint. The prosecutor attempted to rehabilitate the witness by repeatedly asking the reason why the complaint was filed. Objections to each attempt were sustained, and the frustrated prosecutor finally asked the witness if he had done business with the defendant. When the witness replied that he had not, the prosecutor then asked, "Is that because he is a crook?"[30] At the defendant's request, the trial court granted a mistrial but permitted retrial because the court found that the prosecutor had not specifically intended to provoke the motion for mistrial. The defendant was retried and convicted, but the Oregon Court of Appeals reversed, holding that the prosecutor's conduct was overreaching and that reprosecution was barred by the double jeopardy clause.[31] The contrary holdings of the trial court and the appellate court reflected the inherent conflict between the restrictive approach taken in *Divans* and *DiFrancesco* and the approach taken in *Jorn, Dinitz,* and *Lee.*

The Kennedy Opinions

The Majority Opinion

The majority opinion in *Kennedy,* as written by Justice Rehnquist, sharply distinguished between prosecutorial misconduct that would justify a mistrial and conduct that would bar reprosecution after declaration of a mistrial.[32] Justice Rehnquist criticized the reprosecution exception as lacking clear and concise standards for application and specifically rejected the notion that prejudice to the defendant should prevent a retrial. He noted that a prosecutor must inevitably inject prejudice into the trial proceedings as a legitimate function of the prosecution. Justice Rehnquist concluded that every act would thus be objectionable, and a standard of prosecutorial overreaching incorporating conduct of the prosecutor that "seriously prejudiced a defendant"[33]

29. It is interesting to note that the standard under *Dinitz* and *Jorn* was not officially limited until *Kennedy*. Justice Stewart, the author of the *Dinitz* opinion, obviously considered bad faith conduct or harassment that resulted in a mistrial motion as sufficient to bar reprosecution. This portion of the exception was not abandoned until after Justice Stewart had left the Court. Presumably, had he remained, the minority concurrence would have been a majority and affirmed the standard as set out in the earlier cases.

30. Oregon v. Kennedy, 456 U.S. 667, 669 (1983).

31. *Id.*

32. *Id.* at 675-76.

33. *See* United States v. Dinitz, 424 U.S. 600, 608 (1976).

was too broad a standard to permit reasonable application.[34] To support this proposition, he pointed out that the Oregon Court of Appeals had found overreaching, but the trial court had not.[35]

Finding the overreaching standard inappropriate, Justice Rehnquist outlined a standard that bars reprosecution only when a prosecutor evinces a specific intent to provoke a motion for mistrial.[36] He found the specific intent standard more susceptible to application because the intent of the prosecutor could be inferred from "objective facts and circumstances."[37]

Justice Powell's Concurrence

Justice Powell concurred in the majority opinion insofar as it was limited to intent as controlling the issue of reprosecution.[38] Presumably fearing that the intent standard suggested by the majority opinion might be interpreted as a test of pure subjective intent, he emphasized the portion of the opinion that held intent could be inferred from objective facts and circumstances. Justice Powell then concluded that the requisite intent was absent in *Kennedy* and concurred in the result that reprosecution was not barred on the *Kennedy* facts.[39]

Justice Powell's concurring opinion is particularly important in that it established the requisite majority needed to modify the previous standard of overreaching. His concurrence is confusing, however, because his opinion in *Lee* had adopted the overreaching standard, which included conduct motivated by bad faith or designed to harass a defendant. This kind of conduct would no longer bar reprosecution under the *Kennedy* standard; therefore, it is unclear whether Justice Powell intended to completely abandon the position he had taken in *Lee*.

Justice Stevens' Concurrence

Justice Stevens' concurring opinion in *Kennedy* was joined by three other Justices.[40] He found it inconceivable that a defendant could prove "that a prosecutor's conduct was motivated by an intent to provoke a mistrial instead of an attempt simply to prejudice a defendant."[41] He found more realistic

34. 456 U.S. 667, 674 (1982).

35. *Id.* at 675 n.5.

36. *Id.* at 679.

37. *Id.*

38. Justice Powell wrote the opinion in *Lee*.

39. 456 U.S. 667, 679 (1982). Justice Powell mentions several factors which might indicate intent on the part of the prosecutor. A sequence of acts which amount to overreaching could imply intent to provoke a mistrial. A prosecutor's surprise at and resistance to a motion might negate the intent. Finally, a prosecutor's testimony at a hearing on the motion should indicate directly whether intent was present.

40. *Id.* at 681. Justices Brennan, Marshall, and Blackmun joined Justice Stevens' opinion. Justice Brennan also wrote an opinion, joined by Justice Marshall, which acknowledged that the Oregon court could conclude that the Oregon constitution might bar reprosecution where the U.S. Constitution did not.

41. *Id.* at 688.

the overreaching standard that focused on the nature of the prosecutor's conduct. Such a standard, denounced by Justice Rehnquist, could indeed be easily applied. "It is sufficient that the court is persuaded that egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or abort the proceedings."[42] Justice Stevens concluded that the broader standard of overreaching should "remain available for the rare case in which it may be needed."[43]

Views of the Purpose of the Double Jeopardy Clause

It is quite possible that the discrepancy between the various approaches taken in *Kennedy* is a result of each Justice's particular view as to the purpose of the double jeopardy clause. The classic definition of the protection afforded by the clause was announced in *Green v. United States.*[44] In *Green* the Court held that the double jeopardy clause prohibited multiple trials of a defendant that would have the effect of "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."[45] Thus *Green* delineated two purposes served by the double jeopardy clause. One purpose is to protect the defendant from suffering the indignity of multiple trials; the less protective purpose is to prevent subsequent trials from reducing the possibility of acquittal. The specific intent standard may adequately protect one of these purposes without addressing the other. A brief examination of the protections outlined in *Green* will illustrate the adequacy, or lack thereof, of the *Kennedy* standard in furthering the objectives of the double jeopardy clause.

Multiple trials make conviction more likely from the simple standpoint of probability. The additional opportunities to convict make that result more likely than if the state were limited to one attempt. But convictions at subsequent trials are more likely even if one ignores the laws of probability. There is a distinction between extra opportunities to convict and more favorable opportunities to convict. At each subsequent trial, the state's evidence becomes stronger and stronger, thus enhancing the possibility of conviction.[46] This threat has been recognized as the most serious to the rights of the defendant by the Supreme Court in *Downum v. United States*[47]: "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford

42. *Id.* at 689. Justice Stevens apparently relied on the language in *Dinitz,* which is concerned with the defendant's control over the course of the trial.

43. *Id.* at 691. Justice Stevens also noted that the overreaching standard had not worked serious hardship on a prosecutor's chance to reprosecute, since very few reprosecutions had been barred by it.

44. 355 U.S. 184 (1957).

45. *Id.* at 187-88.

46. *See* Carsey v. United States, 392 F.2d 810, 813 (D.C. Cir. 1967). In *Carsey,* it was noted that subtle changes in the testimony of the prosecution's witnesses inevitably work to the detriment of the defendant; essentially neutral testimony becomes incrimination at subsequent trials (Levanthal, J., concurring).

47. 372 U.S. 734 (1963).

the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. . . ."[48] If the primary purpose of the double jeopardy clause is to prevent a prosecutor from "bootstrapping" a better chance at conviction, the specific intent standard of *Kennedy* may provide the defendant with adequate protection because the prosecutor would be prohibited from securing the "more favorable opportunity" by intentionally provoking a mistrial.[49]

While the *Kennedy* specific intent standard may be sufficient to protect one purpose of the double jeopardy clause, it is totally inadequate to further the purpose of assuring that a defendant will not suffer unwarranted multiple trials. Under *Kennedy,* the defendant could be reprosecuted after any mistrial, unless he could show that the prosecutor specifically intended to provoke the defendant's motion for mistrial. The only alternative to reprosecution available to the defendant would be to continue a proceeding tainted by the prejudice or harassment of the prosecutor, prejudice no less severe merely because it was not calculated to provoke a mistrial motion. As Justice Stewart pointed out in *Dinitz,* such a choice for the defendant is meaningless.[50] The overreaching standard of *Jorn, Dinitz,* and *Lee* addressed the issue of severity of prejudice by focusing on the egregiousness of the prosecutor's conduct. If his conduct so severely prejudices the defendant as to render this choice meaningless, reprosecution is barred. The *Kennedy* specific intent standard does not answer the question of meaningful choice because it ignores that degree of conduct that falls short of a deliberate intention to provoke a mistrial motion. Thus, although the specific intent standard may serve the less protective purpose of the double jeopardy clause, it completely ignores the other.[51] The adoption of the *Kennedy* standard may indicate which of the purposes outlined in *Green* is considered the more valuable by the majority in *Kennedy;* it may also indicate that the majority finds the ordeal of enduring multiple trials and prosecutions inconsequential.

In both *Divans* and *Kennedy,* Justice Rehnquist indicated that he favored the purpose of the double jeopardy clause that prevented a prosecutor from intentionally obtaining a better opportunity to convict a defendant by provoking a mistrial motion. The only passage from *Dinitz* that he cited with approval in the *Kennedy* opinion was that containing the "opportunity to convict" language.[52] In both *Divans* and *Kennedy,* Justice Rehnquist cited *Downum,* which mentions only the less protective double jeopardy protection.[53] Clearly, Justice Rehnquist regards the right to be free from the ordeal of multi-

48. *Id.* at 736.

49. Even this proposition may be questionable. As Justice Stevens points out, the intent standard would permit a prosecutor to try a case on inadmissible evidence and severely prejudicial remarks. This in and of itself gives a more favorable opportunity to convict, and that opportunity is secured by the fact that reprosecution would not be barred if a mistrial is granted at the request of the defendant.

50. United States v. Dinitz, 424 U.S. 600, 610 (1976).

51. Other courts have decided that an intent standard does not adequately protect the rights of the defendant. *See* Commonwealth v. Bolden, 478 Pa. 602, 373 A.2d 90 (1977).

52. 456 U.S. 667, 680 (1982).

53. *Id., citing* Downum v. United States, 372 U.S. 734 (1963). *See* Divans v. California, 434 U.S. 1303, 1304 (1977).

ple trials as secondary and finds a test based on intent to be a sufficient safeguard for the defendant.

Criticisms of Kennedy

Several problems are evident in the *Kennedy* opinions. The threshold question is whether the majority will uphold the *Kennedy* specific intent standard in future cases before the Court. Justice Powell, whose concurrence completed the majority, is already on record as supporting both the *Kennedy* standard and the overreaching standard. In *Lee* he supports the overreaching standard, focusing on a prosecutor's conduct from an objective view; in *Kennedy* he seems to agree that the subjective intent of the prosecutor is the controlling factor. Even in concurring, though, Justice Powell closely scrutinized the conduct of the prosecutor and finally concluded that no such intent could be found. He noted that *Kennedy* could easily have been a close case factually had any other indicia of intent been present.[54] His reluctance to summarily dismiss the prosecutor's conduct as permitting reprosecution may indicate an uneasiness with the *Kennedy* standard.

It appears that Justice Powell may prefer a standard that incorporates both the objective conduct test and the subjective intent test. This was clearly his position in *Lee*. He seems to have concurred in the *Kennedy* majority under the assumption that the objective conduct that would result in overreaching would be sufficient to establish an inference that the prosecutor harbored the specific intent to provoke a motion for mistrial. It remains to be seen what Justice Powell's position will be if the Court is confronted with conduct more egregious than that in *Kennedy*. Since Justice Powell declined in *Lee* to address the issue of whether a prosecutor's gross negligence might bar retrial when a motion for mistrial is granted, that issue may still be open to future consideration.[55]

Assuming the majority in *Kennedy* does stand fast, the problem still remains of determining a prosecutor's subjective intent at the time of such conduct.[56] This was the brunt of Justice Stevens' attack on the specific intent standard. He found particularly repugnant any standard that would require a prosecutor to testify as to his intent during the course of the trial.[57] This is a likely result of the *Kennedy* decision because other evidence of intent may not be obvious from the prosecutor's conduct.[58] This concern with the *Kennedy* standard seems to be for the integrity of the proceedings. In such circumstances a prosecutor might have two motives for hedging the truth.

54. 456 U.S. at 680.

55. In *Lee*, Justice Powell finds mere negligence as insufficient to bar reprosecution (432 U.S. 23, 34 (1977)), but has never considered grossly negligent conduct in either *Lee* or *Kennedy*.

56. Other courts have decided that specific intent of the prosecutor is just too hard to determine. *See* Commonwealth v. Bolden, 478 Pa. 602, 373 A.2d 90 (1977).

57. 456 U.S. 667, 688 n.25.

58. This issue is not addressed by Justice Rehnquist, but Justice Powell mentions it as a criterion for determining intent. See *supra* note 39.

First, he would wish to preserve an opportunity to retry the defendant. Second, he would be placed in a compromising position if required to reveal his thoughts just prior to committing an act of prosecutorial misconduct.[59] If he indicates that he did intend to provoke a mistrial motion by the defendant, he obviously loses the chance to retry the defendant in the future. But he also would have admitted a violation of the Model Code of Professional Responsibility.[60] Moreover, a prosecutor would also violate the Code if he succumbed to the pressure to preserve a retrial and lied about his intent to prevent a double jeopardy bar.[61] Thus, Justice Stevens' concern for the integrity of the proceedings is borne out by the prosecutor's dilemma; the standard would encourage a prosecutor to misrepresent his intent, which would be a serious breach of ethics.

Another criticism of the *Kennedy* specific intent standard is that it is inadequate to protect a defendant's rights. As has been seen earlier, the *Kennedy* standard fails to serve both double jeopardy purposes adequately, thus compromising an accused's rights under the clause.[62] The specific intent standard also fails to guarantee the defendant a trial free from prejudice intentionally injected by a prosecutor. As Justice Stevens pointed out, the prosecutor would be permitted to use prejudicial tactics and inadmissible evidence, similar to those problems posed in the opening examples, without forfeiting his chance at a second prosecution, provided that his intent is to convict rather than to provoke a mistrial motion.[63] Although the conduct of the prosecutor might conceivably be punished by contempt, this does not guarantee that the defendant will not have to endure the prejudice at the trial. Only the possibility of a bar to reprosecution, independent of the subjective intent of the prosecutor, will ensure that the prosecutor does not engage in impermissible attempts to convict. With this additional sanction for conduct not amounting to intentional provocation, a prosecutor will consider his conduct more thoroughly before acting in an irresponsible manner.[64]

A final criticism of the *Kennedy* decision is that the majority went beyond existing precedent and made new law where it was unnecessary. Justice Stevens prefaced his opinion by recognizing this fact,[65] and attacked the majority: "Instead of explaining why that conclusion is required by settled law, the Court gratuitously lops off a portion of the previously recognized exception."[66] Since all the Justices concurred in the result, it does seem evident that the existing standard of overreaching under *Jorn, Dinitz,* and *Lee* was adequate

59. 456 U.S. at 688 n.25.

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (C)(6) (1979). In such a case the prosecutor would knowingly be violating an established rule of procedure or of evidence.

61. *Id.*, DR 7-102 (A)(5). He would have knowingly made a false statement of fact.

62. See *supra* text accompanying notes 44-53.

63. Oregon v. Kennedy, 456 U.S. 667, 689 (1982).

64. Although punishment of prosecutorial misconduct is not an explicit goal of the double jeopardy clause, this would satisfy one of the aims of the clause.

65. 456 U.S. 667, 689 (1982).

66. *Id.*

to decide the case. The Oregon Court of Appeals simply failed to apply that overreaching standard properly; it did not apply the wrong standard, as Justice Rehnquist asserted.[67]

Justice Rehnquist defended this accusation by noting the confusion of lower courts in adopting the overreaching standard and concluded that the majority did not make new law. He asserted that the majority had merely chosen to adopt one of the interpretations given the overreaching standard in *Jorn* and *Dinitz,* and that the minority had done the same in adopting the other interpretation.[68] This argument seems tenuous, however, because Justice Rehnquist first announced this interpretation in *Divans* at a time when few courts recognized the intent standard as a possible interpretation of *Jorn* and *Dinitz.* Most lower courts did not focus singularly on the subjective intent of the prosecutor until after *Divans,* and courts doing so cited *Divans* for that proposition.[69]

The Effect of Kennedy on Lower Court Application of the Exception

Criticism notwithstanding, the decision in *Kennedy* will have the effect of introducing uniformity of application to the double jeopardy bar to reprosecution. Justice Rehnquist was correct in pointing out the confusion experienced by the lower courts when interpreting the overreaching standard set forth in *Jorn, Dinitz,* and *Lee.*[70] Certain courts of appeal in the federal branch have taken the position that overreaching also includes bad faith conduct intended to harass or prejudice the defendant, though not intended to provoke a mistrial motion.[71] Others have gone farther and determined that the overreaching standard includes gross negligence on the part of the prosecutor, and that such conduct would bar reprosecution after a successful mistrial motion by the defendant.[72] However, some federal courts have confined the overreaching

67. This notion is reinforced by the fact that the Oregon court discussed intent in terms of whether the question was intentional; but the issue in the overreaching standard is whether the intent was to provoke a mistrial motion. *See* State v. Kennedy, 49 Or. App. 415, 619 P.2d 948 (1980).

68. 456 U.S. 667, 678 n.8 (1982).

69. *See* United States v. Leppo, 641 F.2d 149, 153 (3d Cir. 1981); United States v. Roberts, 640 F.2d 225, 228 (9th Cir. 1981); United States v. Green, 636 F.2d 925, 929 (4th Cir. 1980). *Compare* United States v. Martinez, 667 F.2d 886, 889 (10th Cir. 1981); State v. Iglesias, 374 So. 2d 1060 (Fla. Dist. Ct. App. 1979) (rejecting expansion beyond intentional conduct).

70. Numerous courts have cited *Jorn* and *Dinitz* for the overreaching standard. *See* United States v. Westhoff, 653 F.2d 1047, 1049 (5th Cir. 1981); Baker v. Metcalf, 633 F.2d 1198, 1201 (5th Cir. 1981); United States v. Klande, 602 F.2d 180, 182 (8th Cir. 1979). These particular cases are interesting because they do not mention *Divans,* even though they were decided after that memorandum opinion, indicating that *Divans* has little, if any, precedential value.

71. Wilkett v. United States, 655 F.2d 1007, 1011 (4th Cir. 1981); United States v. Pollack, 640 F.2d 1152, 1155 (10th Cir. 1981); United States v. Love, 597 F.2d 81, 86 (6th Cir. 1979); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). Some courts have adopted the bad faith conduct standard initially, but then reversed their positions, holding that only subjective intent to provoke a mistrial motion would bar reprosecution. *See* United States v. Roberts, 640 F.2d 225, 228 (9th Cir. 1981).

72. United States v. Westhoff, 653 F.2d 1047, 1049 (5th Cir. 1981); United States v. Enoch, 650 F.2d 115 (6th Cir. 1981); United States v. Zozlio, 617 F.2d 314 (1st Cir. 1980); United States

standard to conduct intended to provoke a mistrial motion.[73] At least one has adopted a position that bad faith conduct was by definition that which was intended to provoke a mistrial motion, and that intentional conduct that only prejudices the defendant is not bad faith conduct and would not bar reprosecution.[74]

Application of the overreaching standard laid down in *Jorn, Dinitz,* and *Lee* has been similarly confusing at the state court level.[75] The lower courts in Oregon provide a convenient illustration of this confusion. The trial court in *Kennedy* found no overreaching because the conduct of the prosecutor was not intended to provoke a mistrial motion, and retrial was therefore permissible.[76] The Oregon Court of Appeals accepted the finding that the prosecutor lacked this intent, but found the conduct to be overreaching:

> We think the prosecutor is charged with the knowledge that the comment—which we must regard as intentional, at least in the sense that it appears it was made deliberately and after some thought—was certain to interfere with the trial process. Defendant was then faced with a Hobson's choice.[77]

Both lower courts in *Kennedy* applied the same standard in determining whether the double jeopardy clause barred reprosecution and reached diametrically opposite results.

Conclusion

Uniformity in the application of the overreaching standard is a desirable result and will no doubt be enhanced by the decision in *Kennedy.* What is bothersome is that this result is reached by unnecessarily narrowing the previously established standard of overreaching as a bar to reprosecution and infringing on the rights of the defendant in the process. The *Kennedy* specific intent standard is inadequate to protect a defendant against the harassment of multiple trials, and is equally inadequate to prevent intentionally injected prejudice on the part of the prosecutor. Even less desirable is the result that the integrity of the trial process is threatened by a narrow rule that permits

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v. Weaver, 565 F.2d 129 (8th Cir. 1977), *cert. denied,* 434 U.S. 1074; United States v. Kennedy, 548 F.2d 608 (5th Cir. 1977), *reh. denied,* 554 F.2d 476, *cert. denied,* 434 U.S. 865.

73. United States v. Leppo, 641 F.2d 149, 153 (3d Cir. 1981); United States v. Roberts, 640 F.2d 225, 228 (9th Cir. 1981); United States v. Green, 636 F.2d 925, 929 (4th Cir. 1980); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978).

74. United States v. Gamble, 607 F.2d 820, 823 (7th Cir. 1979).

75. The state courts are also in disagreement. Some use the bad faith conduct implicit in the overreaching standard in *Dinitz.* People v. Peterson, 113 Mich. App. 537, 318 N.W.2d 233 (1982); State v. Mendoza, 101 Wis. 654, 305 N.W.2d 166 (1981). Others include gross negligence. Commonwealth v. Watson, 274 Pa. Super. 233, 418 A.2d 382 (1980). *But see* Commonwealth v. Palmer, 276 Pa. Super. 473, 419 A.2d 555 (1980). Still others confine the overreaching standard to intentional conduct. State v. Aillon, 182 Conn. 124, 438 A.2d 30 (1980); State v. Connor, 383 So. 2d 389 (La. 1980); Lee v. State, 47 Md. App. 367, 423 A.2d 267 (1980); State v. Soldier, 299 N.W.2d 568 (S.D. 1980).

76. 456 U.S. 667, 669 (1982).

77. State v. Kennedy, 49 Or. App. 415, 619 P.2d 948 (1980).