Reaffirming a Narrow Interpretation of the Perez "Manifest Necessity" Doctrine

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B. Reaffirming a Narrow Interpretation of the Perez "Manifest Necessity" Doctrine

In United States v. Sloan, the Court of Appeals for the Fourth Circuit held that Willie E. Sloan could not be retried after the trial...

203. See supra note 189 and accompanying text.

204. Justice Marshall's definition of commerce in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824), when viewed in the context of federal restrictions on conduct at reproductive health services, offers a rather ironic pun: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Id.

205. See generally Sullivan, Free Speech, supra note 189.

1. 36 F.3d 386 (4th Cir. 1994).
court's sua sponte declaration of a mistrial during his first trial on charges of embezzlement, mail fraud, and violation of the Taft-Hartley Act. The trial judge declared a mistrial when, late in the defense's case-in-chief, Sloan decided not to testify on his own behalf. After the United States rescheduled Sloan for trial, the Fourth Circuit held, on double jeopardy grounds, that Sloan could not be retried because no "manifest necessity" existed for the trial court's declaration of a mistrial. To determine whether a "manifest necessity" existed, the court applied a standard first set forth over 170 years ago in United States v. Perez. Under Perez, a defendant may be retried if "manifest necessity" or the "ends of public justice" required a mistrial.

In prohibiting a retrial of Sloan, the court failed to consider the "public justice" component of the Perez formulation, and instead, only examined whether manifest necessity required a mistrial. The Supreme Court, however, has held that the ends of public justice may, in limited circumstances, take precedence over a defendant's right to trial by a single tribunal. The vague concept of public justice has been interpreted to mean either the public's interest in fair, unbiased


3. Sloan, 36 F.3d at 388.

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

5. See infra notes 7-8 and accompanying text.


7. 22 U.S. 579, 580 (1824) (holding that a defendant may be retried when a jury is discharged from giving a verdict for reasons of "manifest necessity," or because the "ends of public justice would otherwise be defeated").

8. Id. at 580; see also infra text accompanying notes 58-66.


10. Sloan, 36 F.3d at 401. The court concluded that "[t]here was no manifest necessity for the district court's sua sponte declaration of a mistrial over Sloan's objections. Thus, when the Government sought to retry Sloan, his motion to dismiss the indictment on double jeopardy grounds should have been granted." Id.

11. See Arizona v. Washington, 434 U.S. 497, 505 (1978) (holding that a trial judge's decision to declare a mistrial based on improper argument must be accorded great deference, and that there is public interest in the prosecutor having "one full and fair opportunity to present his evidence to an impartial jury"); Illinois v. Somerville, 410 U.S. 458, 471 (1973) (holding that a mistrial met the standard of manifest necessity when the ends of public justice would not be served by allowing a trial to continue under an insufficient indictment); United States v. Jorn, 400 U.S. 470, 484 (1971) (holding that while a defendant cannot be guaranteed "a single proceeding free from harmful governmental or judicial error," a trial judge must make every effort to exercise sound discretion when discharging a jury); Gori v. United States, 367 U.S. 364, 367-68 (1961) (holding that a mistrial granted in the interest of the defendant and based upon sound judicial discretion does not prevent a retrial); Wade v. Hunter, 336 U.S. 684, 689 (1949) (holding that under certain circum-

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judicial administration or the public's interest in the complete prosecution of those accused of felonies. In Sloan, the court did not consider the impact of either meaning on the trial judge's decision to declare a mistrial. Had the court more broadly interpreted the Perez standard, Sloan likely would have been retried.

1. The Case.—On April 13, 1993, the grand jury for the Eastern District of North Carolina returned a ten-count indictment against Willie E. Sloan for acts Sloan allegedly committed while serving as president of Local 1426 of the International Longshoreman’s Association. His trial began on December 6, 1993. Opening statements by defense counsel included what the government called a “'Horatio Alger-like' account of 'the long history of Willie E. Sloan's rise from humble origins to that of a union President.'” In its appellate brief the Government asserted that this portion of the opening statement was improper because the defense “was unable to produce the testimony via the defendant” to support it.

In reviewing the trial transcript, the court noted five occasions that defense counsel represented that Sloan would testify. Defense counsel's first representation occurred while the Government's eighteenth witness, James Earl Carroll, testified. When defense counsel attempted to impeach Carroll with evidence of Carroll's prior conviction for bribery and racketeering, the trial judge asked defense counsel if Sloan would testify. After counsel indicated that he would, the judge ruled that the impeachment information could only

stances, the public's interest in a fair trial outweighs the defendant's right to a complete trial by a single tribunal).

12. Hunter, 336 U.S. at 689 (“[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.”).

13. Somerville, 410 U.S. at 463. The Court has asserted that “the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.” Id. at 471; see also Hunter, 336 U.S. at 689.

14. Sloan, 36 F.3d at 389. The government charged Sloan with accepting payment from an employer in violation of the Taft-Hartley Act, embezzling from the union, and mail fraud. Id.

15. Id.

16. Id.

17. After the mistrial, defense counsel filed an affidavit and the Government filed a response to that affidavit. See id. at 392 n.5. The Court of Appeals relied upon those documents and the trial transcript, as well as the appellate briefs. See, e.g., id. at 392, 397.

18. Id. at 389 (quoting the Government's brief); see also id. at 397.

19. Id. at 396-97.

20. Id. at 389.

21. Id.

22. Id.
be admitted into evidence through the testimony of Sloan.\textsuperscript{23} In accordance with this ruling, defense counsel did not refer to Carroll's previous conviction during cross-examination.\textsuperscript{24}

The issue of Sloan testifying arose again during the defense's cross-examination of Government witness Scipio Hawkins.\textsuperscript{25} After Hawkins denied knowing of certain threats and attacks on Sloan, defense counsel attempted to impeach Hawkins by introducing evidence that demonstrated Hawkins's knowledge of such incidents.\textsuperscript{26} The court ruled that counsel could ask Hawkins to identify the incriminating documents, thereby permitting counsel to enter the documents into evidence.\textsuperscript{27} The court, however, stated that Sloan would have to testify as to the documents' contents.\textsuperscript{28} Despite the court's ruling—to which the Government did not object\textsuperscript{29}—defense counsel never asked Hawkins about the documents.\textsuperscript{30}

The record indicates that the issue of Sloan testifying occurred a third time when the Government announced that it planned to impeach Sloan with information about false affidavits he filed in previous litigation.\textsuperscript{31} Noting that defense counsel "says his client's going to testify,'"\textsuperscript{32} the Government explained that it planned to question any witness accused of filing false affidavits about such incidents.\textsuperscript{33} The district judge refused the Government's request to use the information to impeach defense witnesses.\textsuperscript{34}

When defense counsel attempted to question its witness Andrew Canoutas, Sloan's former attorney, about a deed of trust he prepared for Sloan,\textsuperscript{35} the court sustained the Government's objection on the grounds of hearsay.\textsuperscript{36} Although defense counsel argued that Sloan's testimony would corroborate Canoutas's answer, the court neverthe-

\textsuperscript{23.} Id.
\textsuperscript{24.} Id.
\textsuperscript{25.} Id.
\textsuperscript{26.} Id. at 389-90.
\textsuperscript{27.} Id. at 390.
\textsuperscript{28.} Id.
\textsuperscript{29.} Id.
\textsuperscript{30.} Id.
\textsuperscript{31.} Id.
\textsuperscript{32.} Id. (quoting from trial court transcript).
\textsuperscript{33.} Id.
\textsuperscript{34.} Id. The district judge, before whom the matter of the false affidavits had occurred, initially noted that he did not "recall" the prior case. Id.
\textsuperscript{35.} Id.
\textsuperscript{36.} Id. at 390-91 ("[D]efense counsel argued that the government had been permitted to ask about the deed of trust on cross-examination 'for the purpose of making it look as if there was something strange about Mr. Canoutas doing it.'").
less upheld the objection noting that there was "nothing to corroborate... at this point."  

The fourth representation that Sloan would testify occurred when the Government again mentioned the false affidavits. The trial judge indicated that the Government would "probably" be able to impeach Sloan and other witnesses with them. Thereafter, defense counsel asked the court for a recess to look into the matter of the false affidavits. The court recessed for the weekend.

At a pretrial meeting on the following Tuesday, Sloan's counsel revealed that "unless things changed" Sloan would not testify. According to defense counsel's affidavit, the court "immediately" declared a mistrial because "it had relied on counsel's statement that Mr. Sloan would be a witness when it made certain rulings and felt sure the Government was prejudiced because it might have offered other objections or witnesses had it known the defendant would not testify." Despite the defense's objection, when the court reconvened the judge informed the jury of the mistrial.

A written order, issued fifteen days later, revealed the court's reasons for declaring a mistrial:

[D]efense counsel's representations to [the court] and to the United States preempted a fair determination of the issues.... In the court's view, reliance upon defense counsel's unequivocal assertion that defendant would testify rendered the trial fundamentally unfair to the United States. The integrity of the judicial process demands that the court and the

37. Id. at 391 (quoting the trial court transcript).
38. Id. ("During the testimony of the ninth defense witness, Buster Smalls, the question of Sloan's filing a false affidavit and whether he would testify again arose.").
39. Id. at this moment in the trial, the judge noted that he remembered the issue of the false affidavits and commented: "I'll tell you what happened. There were affidavits filed by both the employers and the union... and both... were false." Id.
40. Id. Defense counsel asserted that the United States had not given him notice of the false affidavits and that he had only learned of them through a newspaper article. Id.
41. Id.
42. Id. at 392 (quoting defense counsel's affidavit). Following the mistrial declaration, defense counsel filed an affidavit that stated that over the weekend Sloan decided not to testify in light of the possible damage that could result from cross-examination regarding the false affidavits. Id. at 391.
43. The court relied on defense counsel's affidavit and the Government's response and appellate brief, as no transcript was taken over the weekend. Id. at 391-92.
44. Id. at 392 (quoting defense counsel's affidavit).
45. Id.
attorneys who appear before it as its officers be able to rely upon the others' respective representations.46

When the court scheduled the case for retrial, "Sloan moved to dismiss the indictment on the 'grounds of double jeopardy.'"47 The court denied the motion, "stating that to 'preclude a retrial in this matter would be manifestly unjust and unfairly would exalt form over substance.'"48 From this order, Sloan filed this interlocutory appeal49 and the district court stayed the trial.50

2. Legal Background.—

a. Double Jeopardy Jurisprudence: Balancing the Defendant's Rights with the Public's Rights.—The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."51 Jeopardy attaches "in a jury trial when the jury is impaneled and sworn."52 From that point on, the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury.53 In limited circumstances, however, this right may be

46. Id. at 392-93. In its written order, the court noted that it did not "fault" or "blame" defense counsel, nor did it consider the late decision that Sloan would not testify a "premeditated ploy." Id. at 399.
47. Id.; see supra note 4.
48. Sloan, 36 F.3d at 393 (quoting the trial court's denial of motion to dismiss on the basis of double jeopardy).
49. Id.
50. Id.
51. See supra note 4. The policy behind the clause is the recognition that [t]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
Green v. United States, 355 U.S. 184, 187-88 (1957) (holding that defendant found guilty of second degree murder, when jury had a choice of first degree murder, could not be retried on charge of first degree murder).
53. E.g., Crist, 437 U.S. at 36 (holding that defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy); United States v. Jorn, 400 U.S. 470, 479 (1971) (holding that society's awareness of heavy personal strain of a criminal trial is manifested in its willingness to limit the State to a single criminal proceeding); Harris v. Young, 607 F.2d 1081, 1086 (4th Cir. 1979) (holding that noncompliance with discovery orders did not constitute manifest necessity to order a mistrial), cert. denied, 444 U.S. 1025 (1980).
subordinated to the public's interest in fair and just judgments. The Supreme Court reconciled this conflict between the defendant's rights and the public's interest 170 years ago in United States v. Perez. Under Perez, a criminal defendant can be retried only if manifest necessity or the ends of public justice required the trial judge to declare a mistrial. Justice Story, writing for the Perez Court, declared:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere . . . . [B]ut, after weighing the question with due deliberation, we are of the opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial.

(i) Manifest Necessity.—The Fourth Circuit consistently has followed Perez. However, because of the many factual situations in which courts declare mistrials, "the Supreme Court has refused to apply the manifest necessity standard in a mechanical fashion." Nevertheless, the Perez rule permits retrial if the trial judge declares a mistrial after finding that the jury is "deadlocked, biased, or unduly

55. 22 U.S. at 579; see supra notes 7-8 and accompanying text.
56. Perez, 22 U.S. at 580; see also infra text accompanying notes 58-66.
57. Perez, 22 U.S. at 580.
58. See, e.g., United States v. Shafer, 987 F.2d 1054, 1057 (4th Cir. 1993) (holding that motive for mistrial was improper and other alternatives to a mistrial were available); United States v. Council, 973 F.2d 251, 255 (4th Cir. 1992) (holding that acquittal on two counts was actually a dismissal and could be retried, while other counts were barred from rehearing by double jeopardy); United States v. Sartori, 730 F.2d 973, 975 (4th Cir. 1984) (holding that circumstances surrounding recusal of trial judge did not warrant manifest necessity for calling a mistrial); Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1120-21 (4th Cir. 1973) (holding that both prongs of the Perez test were met in declaration of a mistrial due to the circumstances surrounding suspected juror bias), cert. denied, 419 U.S. 876 (1974).
59. Sartori, 730 F.2d at 975; see also Arizona v. Washington, 434 U.S. 497, 506 (1978) (holding that Perez does not "describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge"); Illinois v. Somerville, 410 U.S. 458, 462 (1973) (holding that the Perez formulation "consistently adhered to by this Court . . . abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial").
influenced." Courts also recognize manifest necessity "when the behavior of the defendant or her counsel triggered the mistrial," or if mistrial resulted from a defense motion. On the other hand, the Supreme Court has held that double jeopardy forbids the court from granting a mistrial to give the prosecution "another opportunity to supply evidence which it failed to muster in the first proceeding."

(ii) The "Ends of Public Justice."—In Illinois v. Somerville, the Supreme Court attempted to define Perez's "ends of public justice" component. The Court noted that the interests of the public in seeing that a criminal prosecution proceed to verdict... need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the "ends of public justice," or, more precisely, "the public's interest in fair trials designed to end in just judgments," has not been disregarded by this Court.

The Court held that the need for a mistrial may "yield... to the public's interest in fair trials designed to end in just judgments." Therefore, the public's interest in secure, unreversible judgments fits within Perez's "ends of public justice" component.

Most recently, in Arizona v. Washington the Supreme Court considered society's interest in final judgments. The Court emphasized the need to balance a defendant's right to be tried by a particular jury with the public's interest in providing the Government with a full opportunity to try its case.

Although the Sloan court did not follow the Supreme Court's broad interpretation of Perez, it did follow Fourth Circuit precedent regarding double jeopardy. While the court in Whitfield v. Warden of Maryland House of Correction applied a balancing test reminiscent of the Supreme Court's approach, in the four most recent cases decided by the Fourth Circuit the court focused solely on whether mani-

60. Loeb et al., supra note 52, at 1041.
61. Id. at 1041-43.
64. Id. at 463 (citing Perez, 22 U.S. at 580; Wade v. Hunter, 336 U.S. 684, 689 (1949)).
65. Id. at 469-71 (quoting United States v. Jorn, 400 U.S. 470, 480 (1971)).
66. Id. at 471.
68. Id. at 505; see also Wade, 336 U.S. at 689.
69. See supra notes 63-68 and accompanying text.
71. Id. at 1121.
fest necessity existed for the declaration of the mistrial. In each of these cases, the court failed to balance the defendant's right to a trial in a single tribunal with the requirements of evenhanded judicial administration and the needs of law enforcement.

b. Standard of Review for Mistrial Declarations.—The abuse of discretion standard is used to review a trial court's decision to declare a mistrial based on manifest necessity or the ends of public justice. In Arizona v. Washington, the Supreme Court explained that the "spectrum of trial problems" and the varying degree to which those problems can be assessed by a reviewing court demand that "the trial judge's determination [be] . . . entitled to special respect." However, a judge need not make an explicit finding of manifest necessity for a reviewing court to find that it existed.

In determining whether the trial judge exercised sound discretion in declaring a mistrial, reviewing courts look at different factors. In a case of possible jury bias or prejudice, the Supreme Court in Illinois v. Somerville applied "a general approach, premised on the 'public justice' policy enunciated in United States v. Perez." Under this standard, a trial judge has properly exercised his discretion to declare a mistrial if an impartial verdict could not have been reached or if an error would have made reversal on appeal a certainty.

More helpful for reviewing a judge's decision are the factors set forth in Arizona v. Washington. The factors include: (1) whether the judge acted precipitately, (2) if both the defense and prosecution

72. See, e.g., United States v. Shafer, 987 F.2d 1054, 1059 (4th Cir. 1993) (holding that there was no manifest necessity for mistrial where Government belatedly produced exculpatory documents); United States v. Council, 973 F.2d 251, 256 (4th Cir. 1992) (holding that manifest necessity for mistrial did not exist where "the trial court cited fairness to the defendant as a reason for its ruling"); United States v. Von Spivey, 895 F.2d 176, 178 (4th Cir. 1990) (holding that under the circumstances defense counsel's illness constituted manifest necessity for mistrial and reenactment was not a violation of double jeopardy); United States v. Sartori, 730 F.2d 973, 977 (4th Cir. 1984) (holding that circumstances surrounding recusal of trial judge did not warrant manifest necessity for calling a mistrial).

73. See supra notes 11-13 and accompanying text and note 72.

74. See, e.g., United States v. Shafer, 987 F.2d 1054, 1058 (4th Cir. 1993); Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979), cert. denied, 444 U.S. 1025 (1980).

75. 437 U.S. 497 (1978).

76. Id. at 510.

77. Id.

78. Id. at 517.


80. Id. at 464; see also United States v. Perez, 22 U.S. 579, 580 (1824).


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

83. Id. at 515.
had a full opportunity to explain their positions; and (3) whether the judge "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding." Many courts also look at whether the trial judge considered alternative remedies, such as curative instructions, before declaring a mistrial.

3. The Court's Reasoning.—In Sloan, the trial judge declared a mistrial because the court "relied upon . . . representations [that Sloan would testify] in its rulings upon evidentiary issues in both the Government's and the defendant's cases-in-chief, [and] admitt[ed] evidence presumed to be corroborative of defendant's anticipated testimony." Writing for the majority, Judge Motz found this reasoning unconvincing, noting that

there is simply no support in the record for the district court's finding that reliance on defense counsel's representations that Sloan would testify caused it to make evidentiary rulings and the government to make or fail to make objections, which rendered the trial fundamentally unfair to the United States when Sloan ultimately decided not to testify. In other words, no reason, let alone a manifest necessity, is apparent in the record to justify a mistrial on the ground set forth by the court.

The Fourth Circuit also found it significant that the issue of Sloan testifying was not mentioned in the record "until the trial was half over and defense counsel was cross-examining the Government's eighteenth witness." Furthermore, the court noted that in the two instances in which the issue of Sloan testifying was raised during the Government's case-in-chief, the trial judge made rulings that "did not affect [the Government's] portion of the trial in any way." In the case of Government witness Carroll, the trial judge prohibited defense

84. Id. at 515-16.
85. Id. at 516.
86. See, e.g., United States v. Jorn, 400 U.S. 470, 487 (1971) ("[N]o consideration was given to the possibility of a trial continuance . . ."); see also United States v. Von Spivey, 895 F.2d 176, 178 (4th Cir. 1990) ("[T]he district court considered every reasonable resolution to the situation posed by defense counsel's illness."); United States v. Sartori, 730 F.2d 973, 976 (4th Cir. 1984) ("[O]ther obvious and adequate alternatives to a mistrial were available in this case."); Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979) ("In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial."); cert. denied, 444 U.S. 1025 (1980).
87. Sloan, 36 F.3d at 392 (quoting the trial court's written order).
88. Id. at 397.
89. Id. at 396.
90. Id.
counsel from impeaching Carroll with information about a previous conviction because Sloan could testify about the conviction.\footnote{Id.; see also supra text accompanying notes 20-24.} As for Government witness Hawkins, the court allowed the defense to cross-examine Hawkins only about the identity, not the contents, of four grievances and a letter.\footnote{Sloan, 36 F.3d at 396.} The defense never actually pursued this opportunity.\footnote{Id. at 396; see also supra text accompanying notes 25-30.}

The court also found that the two representations relating to Sloan's testimony that occurred during the defense's case-in-chief did not affect the admission of evidence in the trial.\footnote{Sloan, 36 F.3d at 396.} In the first instance, the trial judge prohibited Andrew Canoutas from testifying about Sloan's deed of trust, which was "'presumed to be corroborative of defendant's anticipated testimony.'"\footnote{Id. (quoting the trial court's written order); see also supra text accompanying notes 35-37.} In the second, a mistrial was declared before the court had even decided whether or not it would allow the Government to cross-examine defense witnesses about Sloan's false affidavits.\footnote{Sloan, 36 F.3d at 396; see also supra text accompanying notes 38-44.}

Although the Government did not request a mistrial,\footnote{Id. at 397.} it did argue that the defense's opening statement, which contained the "Horatio Alger-like" account of Sloan's life, justified a mistrial.\footnote{Id. at 397.} The Fourth Circuit, however, found nothing in the trial court's order to support this contention.\footnote{Id. Nonetheless, the court briefly addressed the Government's core argument that, "while . . . not improper when given, the defense opening statement necessitated a mistrial 'when the defense was unable to produce testimony via the defendant to support the Horatio Alger-like statements made to the jury.'" Id. (quoting the Government's brief). The court noted that the Government failed to take into account the "well-established principle that when 'an opening statement is an objective summary of evidence [counsel] reasonably expects to produce, a subsequent failure in proof will not necessarily result in a mistrial.'" Id. at 398 (quoting United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986) (alteration in original)). The court explained that a different result might have issued if the objectionable material in the opening statement was highly prejudicial and unable to be cured by instruction or other remedy. In this case, however, even the government conceded that the statement was not "‘per se objectionable.'" Id. (citation omitted).} The court of appeals noted that the district judge's order did not even mention the defense's opening statement.\footnote{Id. at 392.} In fact, the court of appeals found nothing in the trial court's order to support this contention.\footnote{Id. at 392 n.4.} The court maintained that if the trial judge's declaration of a mistrial resulted from defense's opening state-
ment, the judge should have considered other readily available alternatives to mistrial, such as curative instructions.\(^{101}\)

Although the majority accepted the trial court’s assertion that the trial transcript did not reflect off-the-record comments that affected the trial judge’s rulings, the court nevertheless concluded that the trial judge failed to exercise sound discretion in declaring a mistrial.\(^{102}\) While acknowledging the sanctity of a trial court’s discretion, the court noted that it had “carefully, indeed painstakingly, examined the record”\(^{103}\) and found nothing to support even an implied finding of manifest necessity.\(^{104}\) Thus, the court held that, in the absence of manifest necessity for a retrial, Sloan’s “motion to dismiss the indictment on double jeopardy grounds should have been granted.”\(^{105}\)

In his dissent, Judge Niemeyer argued that the trial judge did not abuse his discretion in declaring a mistrial.\(^{106}\) He asserted that “[b]eyond circumstances where the defendant has been acquitted, or might have been acquitted because of an inadequacy of the government’s evidence,” the Supreme Court generally has given broad discretion to the trial judge to retry a defendant, even when a mistrial ruling may appear hasty or unclear.\(^{107}\) Judge Niemeyer asserted that the double jeopardy protections fall into two categories: (1) an absolute protection, where the defendant has been acquitted (or convicted) or would have been acquitted . . . and (2) a discretionary grant of protection at issue here, where the trial is aborted because of trial error or some other event tending to defeat the ends of public justice.\(^{108}\)

As it is impossible to define all the circumstances in which double jeopardy protection applies, Judge Niemeyer argued that a trial judge’s discretion must be broad.\(^{109}\)

Judge Niemeyer also concurred with the trial judge’s assertion that the trial transcript could not reveal the instances in which the court remained silent based on defense counsel’s representation that Sloan would testify.\(^{110}\) Finding that the defendant’s decision not to

\(^{101}\) *Id.* at 399-400.

\(^{102}\) *Id.* at 400-01.

\(^{103}\) *Id.* at 401.

\(^{104}\) *Id.*

\(^{105}\) *Id.*

\(^{106}\) *Id.* at 405-06 (Niemeyer, J., dissenting).

\(^{107}\) *Id.* at 404.

\(^{108}\) *Id.*

\(^{109}\) *Id.* at 404-05.

\(^{110}\) *Id.* at 405.
testify was abrupt,\textsuperscript{111} that this decision changed the “trial’s structural assumption,”\textsuperscript{112} and that a written record was unavailable to the district court when it prepared its order,\textsuperscript{113} Judge Niemeyer concluded that while the court might be “inclined to question the wisdom of the district court’s order based on the bare record, . . . speculation does not require us to find that the district court abused its broad discretion.”\textsuperscript{114}

Finally, Judge Niemeyer asserted that the “public justice” aspect of the Perez formulation demands that “the government be given the opportunity to complete a prosecution, unless its own actions preclude such an opportunity and as long as a district court did not act in bad faith or otherwise abuse its discretion.”\textsuperscript{115} Judge Niemeyer urged the court not to “deny the public its right to prosecute fully and fairly those accused of felonies.”\textsuperscript{116}

4. Analysis.—

a. Perez Misinterpreted.—Sloan does not represent a fundamental shift from prior Fourth Circuit decisions relating to double jeopardy. Nonetheless, the case does provide an opportunity to scrutinize the court’s misapplication of Perez and to comment on the incorrect standard of review employed by the appellate court.

Under current Fourth Circuit jurisprudence, the court will not overturn a trial judge’s determination that a defendant may be retried if analysis of the trial transcript reveals that a mistrial was absolutely necessary and that no alternatives to mistrial existed.\textsuperscript{117} By using such a strict, inflexible standard of review, the court applied the Perez standard in precisely the “mechanical fashion” that the Supreme Court has rejected.\textsuperscript{118} As the Supreme Court in Washington explained, “[the language of Perez does] not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word ‘necessity’ cannot be interpreted literally.”\textsuperscript{119}

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.; see also United States v. Perez, 22 U.S. 579, 580 (1824).
\textsuperscript{116} Sloan, 36 F.3d at 405.
\textsuperscript{117} See supra notes 70-73 and accompanying text.
\textsuperscript{118} See supra note 59 and accompanying text.
The Sloan court did not affirmatively reject the balanced reasoning of the Supreme Court in Arizona v. Washington,120 Illinois v. Somerville,121 and Gori v. United States122 in favor of a stricter approach. In fact, the court actually recited the history of Perez and its progeny.123 In practice, however, the Fourth Circuit's application of a single factor test—whether the mistrial was absolutely necessary124—indicates that the court misinterpreted the Supreme Court holdings relating to Perez.

The Fourth Circuit's rigid interpretation of Perez is problematic for several reasons. First, an inflexible interpretation of Perez may inhibit judges in the execution of their duties.125 The Supreme Court noted in Gori that requiring judges to apply "formalistic artificialities" could make them "unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused."126 Expressing the same concern, the Court in Washington noted that "[t]he adoption of a stringent standard of appellate review in this area...would seriously impede the trial judge in the proper performance of his 'duty...'."127

Under the Fourth Circuit's current interpretation of the Perez doctrine, if a trial judge believes that an incident during trial prejudiced a party, the judge might hesitate to declare a mistrial if the trial transcript alone would not adequately support the judge's determination.128 On the same basis, a judge may delay a mistrial determination until certain that the trial transcript reveals the prejudicial event.129 A trial judge in the Fourth Circuit also may hesitate to declare a mistrial if any alternatives, even possibly inadequate alternatives, to mistrial existed. These effects are especially problematic in light of the judiciary's desire to expedite trials and avoid delay. Any result that creates unwarranted expenses and burdens litigants or the court runs contrary to the "ends of public justice" component of Perez. Further, any result that additionally burdens a criminal defendant

120. Id.
123. Sloan, 36 F.3d at 393-95.
124. See infra text accompanying notes 153-154.
126. Id.
128. See supra text accompanying note 117.
129. See supra text accompanying notes 125-127.
clearly violates the principles underpinning the purpose of double jeopardy protections.\textsuperscript{130}

\textit{b. Lack of Deference to the District Judge's Discretion.}—A second problem with the \textit{Sloan} decision is the court's failure to defer to the discretion of the trial judge. The Supreme Court's ruling in \textit{Washington}\textsuperscript{131} explains why a mistrial determination is left to the discretion of the trial judge.\textsuperscript{132} In \textit{Washington}, the trial judge granted the prosecutor's motion for a mistrial based on improper and prejudicial comments made during defense counsel's opening statement.\textsuperscript{133} In that case, the Supreme Court noted that "the extent of the possible bias cannot be measured,"\textsuperscript{134} that "some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions,"\textsuperscript{135} and that a mistrial was not "in a strict, literal sense . . . necessary."\textsuperscript{136} The Court, however, allowed a retrial of the defendant and commented that "[n]evertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation."\textsuperscript{137}

The issues before the Fourth Circuit in \textit{Sloan} were substantively similar to those before the Supreme Court in \textit{Washington}: the difficulty in measuring the extent of prejudice to the prosecutor; the availability of alternatives to a mistrial; and the public's interest in evenhanded judicial administration. Despite the fact that in reviewing \textit{Sloan} the court purported to follow \textit{Washington},\textsuperscript{138} the \textit{Sloan} court actually applied a far more inflexible interpretation of \textit{Perez}. In prohibiting a retrial, the \textit{Sloan} court focused solely on the bare requirement that a mistrial be absolutely necessary for a defendant to be retried.\textsuperscript{139}

In \textit{United States v. Gori},\textsuperscript{140} a case that, like \textit{Sloan}, involved possible prejudice to a party, the Supreme Court read \textit{Perez} as allowing a flexible, balanced approach to the determination of whether a defendant

\textsuperscript{130} The \textit{Gori} Court noted that cases requiring the "safeguard of the Fifth Amendment" are those cases "in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." \textit{Gori}, 367 U.S. at 369.
\textsuperscript{131} \textit{Washington}, 434 U.S. at 497.
\textsuperscript{132} See generally id. at 509-14.
\textsuperscript{133} Id. at 498-501.
\textsuperscript{134} Id. at 511.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} \textit{Sloan}, 36 F.3d at 393-95.
\textsuperscript{139} Id. at 388-89.
\textsuperscript{140} 367 U.S. 364 (1961).
could be retried. In that case, the trial judge declared a mistrial when he inferred that the prosecutor's line of questioning would soon lead to inappropriate statements about the defendant's criminal record. Although the Court found that the judge's action showed "an overeager solicitude" to the accused, the Court held that the defendant could be retried. The Court determined that the mistrial declaration was hasty and the reason for it "not 'entirely clear,'" but nevertheless held that the fundamental concepts of judicial administration give broad discretion to a judge, a responsibility "which 'is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal.'"

In Sloan, the court failed to consider the special position of a trial judge in determining whether a party has been prejudiced during trial. Although, admittedly, the record offered little support for the trial judge's decision, even the majority acknowledged that intangible off-the-record factors likely provided additional support. And in overturning the trial judge's decision, the court failed to consider the underlying reason for the judge's action—the desire to prevent prejudice to a party. More important, however, the court seemed to ignore the very reason that a mistrial determination rests within a judge's discretion—that the trial judge occupies a special position in the "'heated atmosphere'" of the courtroom.

As Judge Niemeyer pointed out, the transcript from Sloan's trial indicated that a basis did exist for the trial judge's action. The record revealed that the trial court decided several evidentiary rulings

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141. Id. at 366-70.
142. Id. at 365-66.
143. Id. at 367.
144. Id. at 365.
145. Id. at 366 (quoting United States v. Gori, 282 F.2d 43, 46, 48 (2d Cir. 1960)).
146. Id. (quoting Gori, 282 F.2d at 47).
147. Judge Niemeyer noted that the Court of Appeals "might be inclined to question the wisdom of the district court's order based on the bare record" but urged the majority to go beyond the transcript in making its determination. Sloan, 36 F.3d at 405 (Niemeyer, J., dissenting).
148. See supra text accompanying note 102.
149. The trial judge declared that "[d]efense counsel's unequivocal assertion that defendant would testify rendered the trial fundamentally unfair to the United States. The integrity of the judicial process demands that the court and the attorneys who appear before it as its officers be able to rely upon the others' respective representations." Sloan, 36 F.3d at 393 (quoting the trial court's written order).
150. Gori, 367 U.S. at 366 (quoting Gori, 282 F.2d at 47).
151. Sloan, 36 F.3d at 405 (Niemeyer, J., dissenting).
based on the assumption that Sloan would testify. Whether Sloan's decision not to testify actually influenced the admittance of evidence or resulted in prejudice to a party is a separate issue. It can be inferred from the transcript that the Government and the court thought and received reassurances that Sloan would testify until they learned late in the trial that he would not. Under these facts, the trial judge was in the best position to decide to what degree defense counsel's representations that Sloan would testify influenced the structure of the trial. The judge also was best able to determine whether an alternative to mistrial would have cured the damage wrought by Sloan's decision not to testify. The trial judge's decision should have been respected.

5. **Conclusion.**—The first sentence in the Sloan majority opinion states that "[t]he sole question presented here is whether the declaration of a mistrial was justified by 'manifest necessity.'" The court concluded that "[b]ecause Sloan's decision not to testify did not create a 'manifest necessity' requiring declaration of a mistrial, we must reverse." This language makes clear that the Fourth Circuit adhered to an unduly formalistic interpretation of Perez that directly contradicts the flexible, balancing approach encouraged by the Supreme Court. Most important, the Fourth Circuit's approach ignores the "ends of public justice" component of Perez, thereby exposing defendants to the burdens of successive, oppressive prosecution that the double jeopardy clause of the Constitution intended to prevent.

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C. **Permitting the Use of Videoconferencing in Civil Commitment Hearings**

In *United States v. Baker,* a divided panel of the Court of Appeals for the Fourth Circuit held that the use of videoconferencing procedures in a civil commitment hearing does not violate an inmate's pro-

152. *See supra* text accompanying notes 19-40.
153. *Sloan,* 36 F.3d at 388.
154. *Id.* at 389.
2. The relevant statutory provision is 18 U.S.C. § 4245 (1994), which permits the federal government to involuntarily commit federal prisoners for psychiatric care in an appropriate institution under certain circumstances. *See also Baker,* 45 F.3d at 840 (discussing the criteria that the Government must satisfy to justify involuntary commitment under § 4245). Also relevant for purposes of this Note is 18 U.S.C. § 4247(d) (1994), which provides for certain procedural rights at a civil commitment hearing. Other statutory provisions exist that provide for similar commitment of federal prisoners. *See* 18 U.S.C. §§ 4241–4246 (1994).