

trol or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant's right in having the trial completed against the public interest in fair trials designed to end in just judgments.⁷⁹ Thus, when, after jeopardy attached, a mistrial was granted because of a defective indictment, the Court held that retrial was not barred; a trial judge "properly exercises his discretion" in cases in which an impartial verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error. "If an error could make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."⁸⁰ On the other hand, when, after jeopardy attached, a prosecutor successfully moved for a mistrial because a key witness had inadvertently not been served and could not be found, the Court held a retrial barred, because the prosecutor knew prior to the selection and swearing of the jury that the witness was unavailable.⁸¹ Although this case appeared to establish the principle that an error of the prosecutor or of the judge leading to a mistrial could not constitute a "manifest necessity" for terminating the trial, *Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation, in being the sort of instance that the prosecutor could use to abort a trial that was not proceeding successfully and obtain a new trial that would be to his advantage.⁸²

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona v. Washington*,⁸³ defense counsel in his opening statement made prejudicial comments about the prosecutor's past conduct, and the prosecutor's motion for a mistrial was granted over defendant's objections. The Court ruled that retrial was not barred by double jeopardy. Granting that in a strict, literal sense, mistrial was not "necessary" because the trial judge could have given limiting instructions to the jury, the Court held that the highest degree of respect should be given to the trial judge's evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as sup-

⁷⁹ *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

⁸⁰ 410 U.S. at 464.

⁸¹ *Downum v. United States*, 372 U.S. 734 (1963).

⁸² *Illinois v. Somerville*, 410 U.S. 458, 464–65, 468–69 (1973).

⁸³ 434 U.S. 497 (1978).