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One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy

Rick A. Bierschbach

INTRODUCTION

In a Pennsylvania community, a middle-aged schoolteacher is found dead in the trunk of a car. A massive investigation ensues and results in the indictment of a single defendant for first-degree murder. No evidence exists that directly implicates the defendant in the killings, and he adamantly professes his innocence from the outset. The prosecutor is convinced that the defendant is guilty but is frustrated by the lack of direct evidence and fears that he will not be able to secure a conviction at trial. He negotiates with a key prosecution witness to deliver damaging false testimony against the defendant and with a detective to "discover" evidence linking the defendant to the crime scene. At trial, the defendant — repeatedly contesting the truthfulness of the prosecution's case — is convicted and subsequently sentenced to life in prison.

While preparing for appeal, the defense counsel discovers the prosecutor's misconduct. The appellate court reverses the conviction because of the misconduct and finds that without the fabricated evidence there would have been insufficient evidence to convict. Nevertheless, the Government initiates a new trial on the same charges. The defendant then moves to bar the retrial under the Constitution's Double Jeopardy Clause to avoid the ordeal of a second trial.¹

Given the uncertain relationship between prosecutorial misconduct and the Double Jeopardy Clause, whether a court would grant the defendant's motion is unclear. Under the long-established rule of *United States v. Ball*,² the Double Jeopardy Clause does not bar the retrial of a defendant whose conviction simply has been reversed on appeal.³ *Burks v. United States*⁴ established the only existing exception to *Ball* when it forbade retrial after the reversal of a conviction on grounds of insufficient evidence.⁵ But the Supreme

1. The Double Jeopardy Clause states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

The facts of this hypothetical case are based roughly on those of *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992).

2. 163 U.S. 662 (1896).

3. See 163 U.S. at 672.

4. 437 U.S. 1 (1978).

5. See 437 U.S. at 18.

Court also has recognized, albeit in the context of mistrials, that particularly egregious prosecutorial misconduct can and should trigger the protections of the Double Jeopardy Clause. In *Oregon v. Kennedy*,⁶ the Court held that double jeopardy prohibits retrial when a defendant successfully moves for a mistrial on the basis of prosecutorial misconduct intended to goad him into requesting the mistrial.⁷ When prosecutorial misconduct in the submission of evidence provides the basis for an appellate reversal, however, double jeopardy jurisprudence remains undeveloped.⁸

This Note argues that the Double Jeopardy Clause bars retrial after reversals of convictions tainted by prosecutorial misconduct in the submission of evidence when two conditions are met: (1) the prosecutor intentionally introduced tainted evidence,⁹ and (2) excluding the tainted evidence would have left insufficient evidence at trial to support the defendant's conviction. This Note contends that this limited extension of double jeopardy protection is both mandated by the policies underlying the Double Jeopardy Clause and consistent with existing double jeopardy jurisprudence.

Part I identifies the competing interests that the Court attempts to balance whenever a defendant invokes the double jeopardy ban on successive prosecutions. Part II examines the balance of inter-

6. 456 U.S. 667 (1982).

7. See 456 U.S. at 679.

8. Uncertainty among courts of appeals regarding the application of double jeopardy analysis to reversals tainted by prosecutorial misconduct has grown steadily since the *Kennedy* decision. The Second Circuit, for instance, twice has suggested strongly that *Kennedy*'s rationale should preclude retrial after reversal in cases in which a prosecutor anticipates an acquittal and avoids it by a deliberate act of misconduct at trial. See *United States v. Pavloyianis*, 996 F.2d 1467, 1474-75 (2d Cir. 1993); *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992). The Eighth Circuit noted in *Palmer v. Clarke*, 961 F.2d 771 (8th Cir. 1992), that the Court's double jeopardy jurisprudence suggests that retrial after reversals of convictions secured in part by prosecutorial misconduct might be barred in certain instances. See 961 F.2d at 775. Similarly, the Fifth Circuit recognized early on that the principle of *Kennedy* could be applied to "bar retrial where the [misconduct] caused a tainted verdict to be set aside, rather than a tainted proceeding to be aborted." *Robinson v. Wade*, 686 F.2d 298, 307 (5th Cir. 1982). These positions are apparently contrary to those of the Seventh and Fourth Circuits, both of which have found that a defendant who did not move for a mistrial on the basis of intentional prosecutorial misconduct cannot claim a double jeopardy bar to retrial after his conviction is reversed on that ground. See *Beringer v. Sheahan*, 934 F.2d 110, 114 (7th Cir.), cert. denied, 502 U.S. 1006 (1991); *United States v. Head*, 697 F.2d 1200, 1206 (4th Cir.), cert. denied, 462 U.S. 1132 (1982). In *Jacob v. Clarke*, 52 F.3d 178 (8th Cir. 1995), the Eighth Circuit recognized this apparent circuit split as it again noted but skirted the issue of whether the *Kennedy* principle should extend to reversals tainted by prosecutorial misconduct. See 52 F.3d at 182 ("[W]e need not dissect [the defendant's] . . . legal theory to see if any part would state a claim under the Second Circuit's decision in *Wallach*. We leave for another day whether this court will follow *Wallach*, or the Seventh Circuit's seemingly contrary rule.").

9. As used in this Note, "tainted evidence" refers to any evidence that the prosecutor knows is inadmissible at trial. The term thus includes both falsified evidence, such as perjured testimony and fabricated test results, and nonfalsified evidence that is clearly inadmissible in a criminal proceeding, such as evidence obtained as a result of an illegal search and seizure.

ests in two lines of double jeopardy cases — those dealing with reversals of convictions and those dealing with mistrials tainted by prosecutorial misconduct — and concludes that when the event triggering a retrial cannot be characterized as a procedural error, the defendant's double jeopardy interests generally outweigh those of the state. Part III argues that in cases of reversals based on intentional prosecutorial misconduct in the submission of evidence, double jeopardy should bar retrial if insufficient evidence exists to sustain the conviction in the absence of the tainted evidence.

I. DOUBLE JEOPARDY INTERESTS

The fundamental tenet animating the Double Jeopardy Clause is that the State should not be able to oppress individuals through abuse of the criminal process.¹⁰ No single principle, however, determines when the reprosecution of a defendant is oppressive for purposes of double jeopardy. Rather, defining that point involves balancing the competing rights and interests of both individuals and society.¹¹ This Part identifies and examines the interests contemplated by the double jeopardy ban on successive prosecutions. Section I.A defines the protected interests of the accused. Section I.B defines the interests of society against which the rights of the accused are balanced.

A. *The Interests of Defendants*

The Court traditionally has viewed the Double Jeopardy Clause as safeguarding three interests of defendants: the interest in being free from successive prosecutions, the interest in the finality of

10. See, e.g., *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988) (acknowledging that the Double Jeopardy Clause aims to prevent governmental oppression); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) ("At the heart of [the double jeopardy] policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."); Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 771 (1983) (characterizing the Double Jeopardy Clause as a "shield against governmental tyranny"); Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1, 18 (1983) ("[W]e can identify at least one core value [of the Double Jeopardy Clause] — protection of the individual from the government's use of the criminal justice system to harass and oppress."); James F. Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 CORNELL L. REV. 76, 87 (1983) ("[Protection of] citizens from governmental abuses of power . . . is . . . the fundamental principle underlying the mandatory language of the double jeopardy clause."); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325 (1986) ("In the United States, virtually everyone agrees that [the double jeopardy] prohibition is an essential part of an individual's protection against governmental tyranny.").

11. Of course, this is not to say that the interests of defendants and of society are diametrically opposed. At the broadest level, society undoubtedly has a significant interest in ensuring that the individual rights and interests of defendants are respected.

judgments, and the interest in having the trial completed in front of the first tribunal. This section examines each interest in turn.

The most basic interest protected by the Double Jeopardy Clause is the defendant's interest in being free from the consequences of successive prosecutions.¹² *Green v. United States*¹³ best articulates the fundamental policy underlying this interest:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the 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.¹⁴

The accused has a fundamental interest in restricting the Government to a single attempt to prove his guilt at trial for two main reasons. First, multiple attempts by the Government to prove guilt seriously disrupt a defendant's personal life during trial¹⁵ and thus provide a vehicle for severe governmental harassment of the defendant.¹⁶ Second, repeated prosecutions increase the risk of an unjust conviction of an innocent defendant by wearing down the defendant and giving the Government new opportunities to learn from its earlier mistakes and to hone its trial strategies.¹⁷

12. See *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980); *Martin Linen Supply Co.*, 430 U.S. at 569; *United States v. Wilson*, 420 U.S. 332, 346 (1975) (characterizing the prohibition against multiple trials as "the controlling constitutional principle" of double jeopardy).

13. 355 U.S. 184 (1957).

14. 355 U.S. at 187-88.

15. See *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978) ("[A] second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused [and] prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing . . ."); *United States v. Dinitz*, 424 U.S. 600, 608 (1976) (noting that the Double Jeopardy Clause protects a defendant against the "anxiety, expense, and delay occasioned by multiple prosecutions"); see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 25.1(b) (2d ed. 1992) (noting the burdens placed on defendants by successive prosecutions).

16. See *United States v. Tateo*, 377 U.S. 463, 470 (1964) (Goldberg, J., dissenting) (" 'Harassment of an accused by successive prosecutions . . . [is an example of when] jeopardy attaches.' " (quoting *Downum v. United States*, 372 U.S. 734, 736 (1963))); *Gori v. United States*, 367 U.S. 364, 369 (1961) (noting that the Double Jeopardy Clause applies to cases in which the defendant would be "harassed by successive, oppressive prosecutions").

17. See *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) ("[I]f the Government may re prosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."); *Arizona v. Washington*, 434 U.S. at 503-04 ("[A] second prosecution may . . . enhance the risk that an innocent defendant may be convicted.").

Judge Leventhal's description of the evolution of the government's case in *Carsey v. United States*, 392 F.2d 810 (D.C. Cir. 1967), provides a good illustration of how successive prosecutions may enhance the possibility of a defendant's conviction:

[T]he Government witnesses came to drop from their testimony impressions favorable to the defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for

Growing out of a defendant's interest in facing only one prosecution for an alleged offense is his interest in the finality of judgments.¹⁸ Protection of the finality of judgments recognizes the value of the repose that attaches to the entry of a conclusive verdict, whether in favor of or against a defendant.¹⁹ Thus, a verdict of acquittal represents a final judgment that frees the defendant from the specter of future prosecution.²⁰ In short, finality contemplates "the importance to the defendant of being able, once and for all, to conclude his confrontation with society."²¹ In doing so, it seeks to define those instances in which retrial of a defendant constitutes the sort of oppressive governmental action that the Double Jeopardy Clause is intended to prevent.²²

the first time in four trials that the words between them had been 'firm,' and possibly harsh and 'cross.' We also note that the police officer who readily acquiesced in the two 'hung jury' trials that appellant was 'hysterical' later withheld that characterization. This shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made a statement inconsistent with what he later told another officer.

392 F.2d at 813-14 (footnote omitted).

18. See *Oregon v. Kennedy*, 456 U.S. 667, 681-82 (1982) ("The Double Jeopardy Clause represents a constitutional policy of finality for the defendant's benefit in criminal proceedings.") (Stevens, J., concurring); see also *DiFrancesco*, 449 U.S. at 128 (recognizing that the Double Jeopardy Clause aims to preserve the finality and integrity of judgments); *Arizona v. Washington*, 434 U.S. at 503 ("If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair."); *United States v. Jorn*, 400 U.S. 470, 479 (1971); Anne Bowen Poulin, *The Limits of Double Jeopardy: A Course Into the Dark?*, 39 VILL. L. REV. 627, 639 (1994) ("The original purpose of the double jeopardy protection and its predecessors was to preserve the finality of judgments.").

The notion of finality often is referred to as the primary interest protected by the Double Jeopardy Clause. See *United States v. Scott*, 437 U.S. 82, 92 (1978) ("[T]he primary purpose of the Double Jeopardy Clause [is] to protect the integrity of a final judgment."); *Crist v. Bretz*, 437 U.S. 28, 33 (1978) (noting that a primary purpose of the Double Jeopardy Clause is "to preserve the finality of judgments").

19. See *LaFAVE & ISRAEL*, *supra* note 15, § 25.1(b) (discussing the "entitlement to a sense of repose" protected by finality); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1051 (1980) ("The [finality] interest is easy to articulate: it is a need for 'repose,' a desire to know the exact extent of one's liability, an interest in knowing 'once and for all' how many years one will have to spend in prison." (quoting *Benton v. Maryland*, 395 U.S. 784, 810 (1969) (Harlan, J., dissenting); and *Jorn*, 400 U.S. at 486)).

20. See *Kennedy*, 456 U.S. at 682 (Stevens, J., concurring); see also *Sanabria v. United States*, 437 U.S. 54 (1978) (holding that an erroneous acquittal constitutes a final, unreviewable judgment); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (holding that an acquittal that a judge improperly directed was final even though "based upon an egregiously erroneous foundation").

21. *Jorn*, 400 U.S. at 486.

22. See *LaFAVE & ISRAEL*, *supra* note 15, § 25.1(b) ("Finality . . . looks . . . to the concerns of protecting the defendant against prosecution oppression. . . . [T]he adverse consequences of . . . governmental oppression . . . are checked in several different ways by a double jeopardy clause aimed at preserving the 'finality' or 'integrity' of final judgments."); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 840 ("The potential for government oppression of individuals by multiple use of the criminal process . . . makes applying the finality principle to the process peculiarly appropriate. . . . The underlying-

Related to but separate from a defendant's interest in the finality of judgments is his interest in his first tribunal.²³ This interest encompasses a defendant's right to have his guilt or innocence determined in a single proceeding by the initial jury empaneled to try him.²⁴ The right stems from the Court's early recognition that if the Government simply could abort any proceeding that it perceived as going poorly, the defendant's protected interest in the finality of a verdict would be little more than a "hollow shell."²⁵ Pre-verdict trial terminations deprive a defendant of the "option to go to the first jury and, perhaps, end the dispute then and there with an acquittal."²⁶ In doing so, they deprive the defendant of the repose that would have attached had the trial been allowed to run its course. The defendant's interest in a particular tribunal thus supplements his core interest in final judgments by protecting him against governmental manipulation of process designed to prevent the initial fact finder from reaching a verdict in the defendant's case.²⁷

ing goal is prevention of government oppression; the goal finds its voice in the finality of the initial proceeding."). Consider also the statement of the Court in *United States v. Jorn*:

A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.

Jorn, 400 U.S. at 479.

23. See *Crist v. Bretz*, 437 U.S. 28, 36 (1978) (recognizing the defendant's "valued right to have his trial completed by a particular tribunal"); *Arizona v. Washington*, 434 U.S. 497, 503 (1978); *Illinois v. Somerville*, 410 U.S. 458, 471 (1973); *Jorn*, 400 U.S. at 484; *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

24. See, e.g., *Kennedy*, 456 U.S. at 673 ("[O]ne of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him."); *Somerville*, 410 U.S. at 471.

25. See *Kennedy*, 456 U.S. at 673; see also *Wade*, 336 U.S. at 688 ("Past cases have decided that a defendant . . . may be subjected to the kind of 'jeopardy' that bars a second trial for the same offense even though his trial is discontinued without a verdict." (citing *Kepner v. United States*, 195 U.S. 100, 128 (1904))).

26. *Jorn*, 400 U.S. at 484; see also *Poulin*, *supra* note 18, at 634-35 ("An acquittal absolutely eliminates [the possibility of retrial]. Therefore, the government may manipulate the first trial to avoid a probable verdict of acquittal and keep open the option of retrying the defendant.").

27. As LaFave and Israel state:

[T]he Supreme Court recognized at an early point that the protection of verdict finality could be subverted by actions that terminated a trial prior to verdict and thereby took away from the defendant his opportunity to gain an acquittal. If such actions invariably allowed the prosecution to retry the defendant, the finality of a likely acquittal could be avoided and the prosecution could be given the opportunity to regroup and try again by simply not allowing the trial to proceed to verdict. . . . Implicit in this protection is the recognition . . . that there must be a barrier to prosecution manipulation of a trial termination to give it another chance [This] protection . . . was designed basically as a supplement to the core interest in preserving the integrity of judgments

LAFAVE & ISRAEL, *supra* note 15, § 25.1(b); see also Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 90 (characterizing "the

B. *The Interests of Society*

The defendant's interests protected by the Double Jeopardy Clause are not absolute.²⁸ Balanced against those interests is the state's need for effective enforcement of its criminal laws.²⁹ As the Court has recognized repeatedly, that need is satisfied by guaranteeing to society the right to one full and fair opportunity to prove a defendant's guilt.³⁰ When circumstances at trial have denied soci-

defendant's interest in retaining the particular tribunal with which he began" as part of his "larger interest in finality").

28. A defendant's interest in the finality of an acquittal is the sole exception to this statement. When "the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). This presumption of unfairness extends to all dispositions that amount to acquittals, even those that are manifestly erroneous:

[I]t is well-established that terminations deemed 'acquittals' cannot be appealed by the government. This rule applies to implied acquittals; to acquittals by the judge as trier of fact; and to a trial judge's judgment of acquittal in the face of a deadlocked jury. The rule holds even when an acquittal is due to trial court errors of law.

OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS 41 (1987) (citations omitted); see also *supra* note 20. The absolute protection afforded a defendant's interest in the finality of an acquittal is a consequence of "society's 'fundamental value determination . . . that it is far worse to convict an innocent man than to let a guilty man go free.'" Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 814 (1988) (quoting *In re Winship*, 397 U.S. 358, 372 (1970)). Such absolute protection has caused both the Court and commentators to characterize acquittals as carrying special weight in the double jeopardy analysis. See, e.g., *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight."); Westen & Drubel, *supra* note 27, at 123 (noting the "particular significance" that the law attaches to an acquittal).

29. See, e.g., *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) (reaffirming the notion that the accused's interest in a fair trial must be balanced against society's interest in "punishing one whose guilt is clear" (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964))); *Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring) ("Decisions by this Court have consistently recognized that the finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law."); *Richardson v. United States*, 468 U.S. 317, 325 (1984) ("[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." (quoting *Wade*, 336 U.S. at 689)); see also Poulin, *supra* note 18, at 663-64 (noting that the "threat to the defendant's double jeopardy interests must be balanced against the public interest in full and fair prosecution"); Westen & Drubel, *supra* note 27, at 103 (stating that in each double jeopardy case involving successive prosecutions, "one must balance the defendant's interest in finality against 'the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case'" (quoting *United States v. Scott*, 437 U.S. 82, 101 (1978))).

This balancing approach often has been criticized by commentators. See, e.g., Thomas, *supra* note 22, at 832 (rejecting the notion that each species of double jeopardy cases requires a balancing of the defendant's interests against the government's interest in prosecuting crime); Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 VA. L. REV. 1381, 1401 & n.130 (1993) ("[T]he Court's balancing approach has been criticized as uncertain and erratic Such an approach allows judges almost unlimited discretion in weighing the scales and determining the outcome.").

30. See, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 682 (1982) (Stevens, J., concurring) ("The defendant's interest in finality . . . must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury."); *Arizona v. Washington*, 434 U.S. at 505 ("[The defendant's] valued right to have the trial concluded by a

ety that right, the need of society to vindicate its laws usually will outweigh the double jeopardy interests of a defendant.³¹ Justice Harlan stated the rationale underlying this balancing approach and its centrality to the Court's double jeopardy jurisprudence in *United States v. Jorn*.³²

Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the societal interest in law enforcement through the vehicle of a single proceeding for a given offense. Thus, for example, reprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction. *United States v. Ball*, 163 U.S. 662 (1896) The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error.³³

The State's right to a complete and error-free prosecution thus defines the boundaries of the defendant's interests. Although a defendant is guaranteed freedom from prosecution after the completion of a single error-free proceeding, he is not guaranteed such a proceeding in the first instance.³⁴ Indeed, when trial error deprives society of its right to attempt to prove the defendant's guilt in a single prosecution, well-accepted rules of double jeopardy dictate that retrial is almost always permissible.³⁵

particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.”).

31. See *infra* notes 39-42, 56-62, 72-73 and accompanying text (describing instances in which the Court has held that society's right to a full and fair opportunity to convict the defendant outweighs the defendant's double jeopardy interests).

32. 400 U.S. 470 (1971).

33. 400 U.S. at 483-84.

34. See *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) (“It has long been settled . . . that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside . . . because of some error in the proceedings leading to the conviction.”); *Kennedy*, 456 U.S. at 685 (“A defendant cannot be guaranteed both that there will be only one proceeding and that it will be free of error.”); *Westen & Drubel*, *supra* note 27, at 103 (“[I]f the trial is tainted by an error . . . the defendant is not entitled to immunity from reprosecution, whether he proceeds by requesting a mistrial or by requesting reversal of his conviction on appeal, because immunity comes at ‘too high a price’ to society.” (quoting *Jorn*, 400 U.S. at 480)).

35. For specific examples of such rules, see *infra* notes 39-42, 56-62 and accompanying text.

II. THE CURRENT DOUBLE JEOPARDY BALANCE: REVERSALS OF CONVICTIONS AND MISTRIALS TAINTED BY PROSECUTORIAL MISCONDUCT

This Part examines two lines of double jeopardy cases: those dealing with reversals of convictions on appeal and those dealing with the effect of prosecutorial misconduct on the permissibility of retrial after a mistrial. Section II.A discusses the rationale of the appellate-reversal cases and contends that current double jeopardy rules governing retrial after reversal fail to address the impact on the double jeopardy balance of intentional prosecutorial misconduct in the submission of tainted evidence. Section II.B addresses the rationale of the cases concerning mistrials tainted by prosecutorial misconduct and concludes that the balance of double jeopardy interests weighs strongly in favor of the defendant when a mistrial is triggered by intentional prosecutorial manipulation of double jeopardy rules.

A. Appellate Reversals of Convictions

This section examines the current double jeopardy rules governing the retrial of defendants whose convictions have been reversed on appeal. Section II.A.1 elucidates *United States v. Burks*'s³⁶ exception to the traditional rule of *United States v. Ball*³⁷ and asserts that the exception contemplates situations in which a defendant's double jeopardy interests are strong and society's interests fully have been served. Section II.A.2 examines the Court's limitation of the *Burks* exception in *Lockhart v. Nelson*³⁸ and concludes that *Lockhart* leaves unanswered the question of how intentional prosecutorial misconduct in the submission of tainted evidence affects the application of the Double Jeopardy Clause to convictions reversed on appeal.

1. The Existing Exception to the Traditional Rule: *United States v. Burks*

Ball established the basic rule that the Double Jeopardy Clause does not bar the retrial of a defendant whose conviction is reversed on appeal.³⁹ The *Ball* rule is premised on the notion that society's interest in a full and fair opportunity to convict trumps the interests

36. 437 U.S. 1 (1978).

37. 163 U.S. 662 (1896).

38. 488 U.S. 33 (1988).

39. See *Ball*, 163 U.S. at 672.

of defendants in cases of ordinary reversals for trial errors.⁴⁰ Allowing a defendant to escape punishment by taking advantage of ordinary trial errors would severely undermine that interest.⁴¹ Thus, the Court clearly has maintained that requiring a defendant to stand trial a second time after a reversal based on trial error is not the sort of governmental overreaching against which the Double Jeopardy Clause is intended to protect.⁴²

Burks established the only existing exception to the *Ball* rule in holding that double jeopardy bars retrial when a defendant's conviction is reversed because the evidence presented at trial was insufficient to convict the defendant.⁴³ A reversal on grounds of evidentiary insufficiency, the Court pointed out, is the functional equivalent of an acquittal at trial.⁴⁴ The Double Jeopardy Clause must extend to such functional acquittals — "[t]o hold otherwise would create a purely arbitrary distinction" between defendants based upon the hierarchical level of the judiciary at which a finding of evidentiary insufficiency is made.⁴⁵

40. *United States v. Tateo* lays out what the Court accepts as the most reasonable justification for the rule:

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466 (1964); see also *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984) (citing "fairness to society" and "lack of finality" as interests supporting the *Ball* rule); *Price v. Georgia*, 398 U.S. 323, 326 (1970) (noting that the *Ball* rule permits retrial of a defendant when "criminal proceedings against an accused have not run their full course"); *LAFAVE & ISRAEL*, *supra* note 15, § 25.4(a); cf. *Breed v. Jones*, 421 U.S. 519, 534 (1975) (noting that any exception to the constitutional protection against a second trial "must be justified by interests of society").

41. Cf. *Westen & Drubel*, *supra* note 27, at 106 ("The essential teaching of *United States v. Ball* is that the Double Jeopardy Clause does not prohibit the State from retrying a defendant following an erroneous conviction. The defendant's interest in finality must yield to the public interest in law enforcement." (footnotes omitted)).

42. See *Tibbs v. Florida*, 457 U.S. 31, 40 (1982) ("[R]etrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause."); *United States v. DiFrancesco*, 449 U.S. 117, 131 (1980) (noting that reprosecution after a defendant's successful appeal of his conviction is not an act of governmental oppression barred by double jeopardy); *United States v. Scott*, 437 U.S. 82, 91 (1978) ("[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.").

43. See *United States v. Burks*, 437 U.S. 1, 18 (1978).

44. See 437 U.S. at 11; see also *Thomas*, *supra* note 22, at 856 (stating that *Burks* recognizes the equivalence of an appellate reversal for insufficient evidence with an acquittal at trial); *Wang*, *supra* note 29, at 1386 ("The *Burks* Court explained that an appellate reversal for insufficient evidence is the functional equivalent of an acquittal . . .").

45. *Burks*, 437 U.S. at 11; see also *Thomas Collins*, Note, *Double Jeopardy: Evidentiary Insufficiency v. Trial Error After Lockhart v. Nelson*, 1989 DET. C.L. REV. 283, 295 (noting

In reaching its holding, the *Burks* Court made an important distinction between the reversal of a conviction for trial error and the reversal of a conviction for evidentiary insufficiency.⁴⁶ A reversal for trial error, because it "does not constitute a decision to the effect that the government has failed to prove its case,"⁴⁷ is not the equivalent of an acquittal at trial. Rather, such a reversal is simply "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect."⁴⁸ It is unclear whether the defendant would have been entitled to an acquittal at trial had the error not occurred — in the absence of the error, the State might well have taken some different course of action at trial that would have resulted in an equally effective case against the defendant.⁴⁹ Consequently, the defendant cannot claim that retrial deprives him of the benefit of a valid verdict of acquittal.⁵⁰ The State, on the other hand, can claim that the trial error deprived it of a full and fair opportunity to prove the defendant's guilt.⁵¹ Because of the strength of the State's interests in such cases, retrial is permissible.⁵²

that, for double jeopardy purposes, no logical difference exists between an appellate court's finding of evidentiary insufficiency and an acquittal from a trial court).

46. See *Burks*, 437 U.S. at 13-16.

47. 437 U.S. at 15.

48. 437 U.S. at 15.

49. See Richard B. Lankford, Casenote, *Double Jeopardy and Appellate Acquittal Based on Insufficiency of Evidence*: *Thomas v. United States, an Unnecessarily Broad Calculus*, 10 GEO. MASON U. L. REV. 559, 573-74 (1988) (noting that *Burks* is based on the notion that "the government could have provided other evidence at trial if it had not relied on an erroneous evidentiary ruling from the bench"); *id.* at 571 (further noting that "[t]he government will often have evidence on hand at trial which might have been used but for reliance on an erroneous evidentiary ruling by the trial court that admitted other evidence").

50. Similarly, the defendant could not claim that he lost the full value of his initial tribunal because it is unclear whether that tribunal would have acquitted him in the absence of the error. Although the defendant's interest in avoiding a second prosecution remains substantial, the Court repeatedly has made clear that those interests by themselves are not enough to invoke a double jeopardy bar. When the defendant chooses to upset a verdict on appeal, he also chooses to endure the second prosecution in order to afford society its one fair opportunity to convict. See *supra* note 30.

51. See *Burks*, 437 U.S. at 15 (stating that, when a conviction is reversed due to procedural error, "society maintains a valid concern for insuring that the guilty are punished").

52. The Court has held that a similar balance of interests exists when a conviction is reversed because it is against the weight of the evidence at trial. Under *Tibbs v. Florida*, a reversal of a conviction because the verdict is against the weight of the evidence, unlike a reversal based on insufficient evidence, does not trigger a double jeopardy bar to retrial. See *Tibbs v. Florida*, 457 U.S. 31, 47 (1982). This is because a reversal based on the weight of the evidence "does not mean that acquittal was the only proper verdict." 457 U.S. at 42. Rather, such a reversal reflects a belief by the appellate court that the jury improperly assessed questionable testimony at trial. See 457 U.S. at 42. At bottom, reversal of a conviction that was against the weight of the evidence simply gives a defendant a second chance to prove his innocence before a new fact finder. See 457 U.S. at 42-43. Just as it is in the interests of justice to afford the defendant a second chance at an acquittal, it is also in the interests of justice to afford the state its own chance to re-prove the defendant's guilt before the new

In contrast, if a conviction is reversed due to insufficient evidence, the State "has been given one fair opportunity to offer whatever proof it could assemble" and hence "cannot complain of prejudice" upon being denied a retrial.⁵³ Because the defendant was entitled to an acquittal at trial, he has a valid claim that retrial would deprive him of the benefit of an acquittal and thus that his double jeopardy interests should prevail over those of society. Barring retrial simply affords the defendant the double jeopardy protection to which he was entitled from the outset of the case.⁵⁴ Permitting retrial, on the other hand, affords the State a second full and fair opportunity to convict the defendant, thereby implicating the concerns of oppressive reprosecution that the Double Jeopardy Clause seeks to avoid.⁵⁵

2. *The Limits of Burks: Erroneously Admitted Evidence and Lockhart v. Nelson*

The balance of double jeopardy interests is different in cases of reversals of convictions due to erroneously admitted evidence. In those cases, the *Burks* exception does not apply and retrial is permissible even if insufficient evidence exists to sustain a conviction in the absence of the erroneously admitted evidence. In *Lockhart v.*

jury. As *Tibbs* makes clear, the balance of double jeopardy interests in such a case is similar to that in cases of reversal due to procedural error:

While an appellate ruling based on the weight of the evidence thus fails to implicate the policies supporting *Burks* and *Greene*, it does involve the usual principles permitting retrial after a defendant's successful appeal. Just as the Double Jeopardy Clause does not require society to pay the high price of freeing every defendant whose first trial was tainted by prosecutorial error, it should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction and give him a second chance at acquittal. Giving the defendant this second opportunity, when the evidence is sufficient to support the first verdict, hardly amounts to "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect."

457 U.S. at 44 (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978)); see also *Hudson v. Louisiana*, 450 U.S. 40, 45 n.5 (1981) (distinguishing reversals based on insufficient evidence from those based on the weight of the evidence and noting that "nothing in *Burks* precludes retrial" in cases of the latter).

53. *Burks*, 437 U.S. at 16 ("[I]t is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.").

54. See 437 U.S. at 16 (noting that "an appellate reversal means that the government's case . . . should not have even been submitted to the jury").

55. Justice White in *Tibbs v. Florida* concisely stated the distinction drawn by the Court in *Burks*:

The relevant question is whether the reversal is " 'due to a failure of proof at trial' where the State received a 'fair opportunity to offer whatever proof it could assemble.' " . . . [T]he relevant distinction is between reversals based on evidentiary grounds and those based on procedural grounds: Only in the latter case can the State proceed to retrial without offending the deeply ingrained principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense."

Tibbs, 457 U.S. at 50-51 (White, J., dissenting) (citations omitted).

Nelson,⁵⁶ the Court held that an appellate court conducting a *Burks* analysis must consider all of the evidence admitted by the trial court, including that which was admitted erroneously.⁵⁷ Retrial is not barred as long as the quantum of evidence admitted at trial was sufficient to support a conviction, regardless of a finding that the evidence would have been insufficient to support a conviction had the erroneously admitted evidence been excluded.⁵⁸

The *Lockhart* Court looked to the rationale of *Burks* in reaching its decision. The Court explicitly noted that reversal for the erroneous admission into evidence of a conviction that had been commuted was "beyond dispute . . . a situation described in *Burks* as reversal for 'trial error' — the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction."⁵⁹ As in *Burks*, that error did not necessarily entitle the defendant to a judgment of acquittal. This is because "the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence" equivalent to that which should have been excluded at trial.⁶⁰ In such a case, society's interest in a full and fair opportunity to convict outweighs the double jeopardy interests of the defendant.⁶¹ Like *Burks*, *Lockhart* protects society's interest by characterizing a reversal for the unintentional use of inadmissible evidence as "trial error" and then recreating the situation that would have existed at trial had the error not occurred.⁶²

Lockhart provides little guidance, however, in cases of reversals due to *intentional* prosecutorial misconduct in the submission of tainted evidence. *Lockhart* dealt only with reversals triggered by procedural evidentiary error.⁶³ It thus contemplates instances in which a prosecutor did not intend deliberately to deceive the trial court when introducing inadmissible evidence.⁶⁴ Indeed, the Court

56. 488 U.S. 33 (1988).

57. See 488 U.S. at 40-42.

58. See 488 U.S. at 40-42.

59. 488 U.S. at 40.

60. 488 U.S. at 42.

61. See *supra* text accompanying notes 28-35.

62. See *Lockhart*, 488 U.S. at 40-42, 42 ("Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon.").

63. See 488 U.S. at 40 (treating the situation as a reversal for trial error); see also Collins, *supra* note 45, at 283 ("[The *Lockhart* holding] was based on the majority opinion that the admission of a pardoned conviction was mere trial error . . .").

64. Cf. William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 482 (1993) (noting the importance for double jeopardy purposes of the difference between a case involving a procedural defect that would prevent the public from obtaining a fair opportunity to convict and a case in which the prosecution is using the superior resources of the state to harass or achieve a tactical advantage over the accused).

itself recognized this important limitation on *Lockhart* when it twice carefully distinguished the *Lockhart* scenario of erroneously admitted evidence from scenarios involving deliberate prosecutorial misconduct and noted that it had “no occasion to consider” instances of the latter.⁶⁵ Thus, after *Lockhart*, the question of how intentional prosecutorial misconduct in the submission of evidence affects the application of double jeopardy to reversals of convictions remains unanswered.

B. *Mistrials Tainted by Prosecutorial Misconduct*

Though unfortunate, *Lockhart*’s failure to address the problem of intentional prosecutorial misconduct does not mean that analysis of the impact of such misconduct on appellate reversals of convictions must proceed without guidance from the Court. The Court’s mistrial cases provide an appropriate starting point for such an analysis, for it is in the context of mistrials that the interplay between intentional prosecutorial misconduct and double jeopardy is most fully developed.⁶⁶ This section briefly discusses the Court’s treatment of prosecutorial misconduct in the context of mistrials. Section II.B.1 examines the traditional rules governing the retrial of a defendant whose initial trial ends in a mistrial. Section II.B.2 explores the rationale of *Oregon v. Kennedy*⁶⁷ and asserts that *Kennedy* recognizes the necessity of protecting a defendant’s double jeopardy interests from subversion by intentional prosecutorial misconduct at trial.

1. *Traditional Double Jeopardy Rules in the Context of Mistrials*

Two fundamental rules traditionally governed double jeopardy protection in the mistrial context. First was the “manifest-necessity rule”: in the absence of manifest necessity for the declaration of a mistrial, the State could not retry a defendant following a mistrial declared without the defendant’s consent.⁶⁸ By preventing the

65. See *Lockhart*, 488 U.S. at 36 n.2. The Court pointedly noted at the outset of its opinion that “[n]othing in the record suggests any misconduct in the prosecutor’s submission of the [erroneously admitted] evidence.” 488 U.S. at 34. It then went on to state: “There is no indication that the prosecutor knew of the pardon and was attempting to deceive the court. We therefore have no occasion to consider what the result would be if the case were otherwise.” 488 U.S. at 36 n.2; see also *United States v. Quinn*, 901 F.2d 522, 531 (6th Cir. 1990) (noting the *Lockhart* Court’s emphasis on the lack of prosecutorial misconduct in the submission of evidence).

66. See Ponsoldt, *supra* note 10, at 94-97 (surveying the development of the Court’s treatment of prosecutorial misconduct in double jeopardy mistrial cases); Westen & Drubel, *supra* note 27, at 85 (“[T]he Court has had more experience [with the problems of re prosecution following mistrial] and its analysis of this aspect of double jeopardy is more mature.”).

67. 456 U.S. 667 (1982).

68. See *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (“The prosecutor must demonstrate ‘manifest necessity’ for any mistrial declared over the objection of the defendant.”); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824) (stating that a court may discharge a

Government from using a manipulative mistrial request to avoid the likely acquittal of a defendant,⁶⁹ this rule protected the defendant's double jeopardy interests in avoiding repeat prosecutions and in retaining the value of his initial fact finder.⁷⁰ At the same time, it protected society's need to vindicate its criminal laws by allowing the State to abort proceedings that suffer from irreparable procedural flaws.⁷¹

The second rule was that, if a defendant himself successfully moved for a mistrial, the Double Jeopardy Clause would not bar the State from retrying the defendant.⁷² Like the manifest-necessity rule, this rule protected society's interest in one full and fair opportunity to prove the defendant's guilt. That interest would have suffered if every defendant whose mistrial request were granted could have invoked a double jeopardy bar to retrial.⁷³

Over time it became apparent that a gap existed in the two traditional mistrial rules that prevented them from adequately serving the policies of the Double Jeopardy Clause. Combined, the rules allowed and encouraged prosecutors to skirt the manifest-necessity test by engaging in prosecutorial misconduct designed to compel a defendant to request a mistrial.⁷⁴ For example, a prosecu-

jury before a verdict has been rendered only if manifest necessity exists for doing so); see also Poulin, *supra* note 18, at 635-36 (discussing the application of double jeopardy to retrials after the granting of mistrials).

69. See *supra* notes 25-27 and accompanying text.

70. See *supra* section I.A.

71. For example, when an error in an indictment creates a jurisdictional defect that renders a conviction reversible on appeal, society's broad interest in the effective enforcement of its laws outweighs the defendant's double jeopardy interests. See *Illinois v. Somerville*, 410 U.S. 458, 471 (1973).

72. See *United States v. Scott*, 437 U.S. 82, 93 (1978) ("[A] motion [for mistrial] by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."); *United States v. Jorn*, 400 U.S. 470, 485 (1971) ("[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."); *United States v. Tateo*, 377 U.S. 463, 467 (1964) ("If [the defendant] had requested a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him.").

73. See *Jorn*, 400 U.S. at 480 (" '[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.' " (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949))).

74. The Court in *Oregon v. Kennedy* summarized the problem as follows:

[T]here would be great difficulty in applying [the traditional rules] where the prosecutor's actions giving rise to the motion for mistrial were done "in order to goad the [defendant] into requesting a mistrial." In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances.

Oregon v. Kennedy, 456 U.S. 667, 673 (1982) (citation omitted) (quoting *United States v. Dinitz*, 424 U.S. 600, 611 (1976)).

tor who made a grievous tactical error at trial or who perceived that an otherwise winnable case was going poorly might have made unwarranted and seriously prejudicial remarks in front of the jury. The defendant, not wanting to risk conviction in the face of such prejudice, likely would request a mistrial. If the judge declared a mistrial, it would have been with the defendant's consent, and the prosecutor could try a second time for a conviction in a new trial. If not, the prosecutor would have increased greatly the probability of conviction in the original trial through his misconduct. By manipulating the mistrial rules, the prosecutor had all but eliminated the double jeopardy protections to which the defendant was entitled.⁷⁵

2. *The Rationale of Oregon v. Kennedy*

*Oregon v. Kennedy*⁷⁶ recognized that such egregious prosecutorial misconduct is fundamentally incompatible with the policies underlying the Double Jeopardy Clause. *Kennedy* held that double jeopardy bars retrial of a defendant when a prosecutor engages in misconduct with the intent of provoking a mistrial request from a defendant and the prosecutor is successful in doing so.⁷⁷ This rule prevents prosecutors from subverting a defendant's double jeopardy interests by manipulating the mistrial rules to avoid a probable acquittal while retaining the possibility of a subsequent conviction.⁷⁸ At the same time, it does not discourage vigorous advocacy on the part of prosecutors, as only intentional — not negligent — misconduct triggers the double jeopardy bar.⁷⁹

75. As Justice Stevens explained, a defendant who is the victim of such misconduct faces a no-win situation:

[T]he defendant's choice to continue the tainted proceeding or to abort the proceeding and begin anew is inadequate to protect his double jeopardy interests. For, absent a bar to re prosecution, the defendant would simply play into the prosecutor's hands by moving for a mistrial. The defendant's other option — to continue the tainted proceeding — would be no option at all if, as we might expect given the prosecutor's intent, the prosecutorial error has virtually guaranteed conviction.

Kennedy, 456 U.S. at 686 (Stevens, J., concurring).

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

77. See 456 U.S. at 679.

78. Justice Stevens described the underlying reasoning of the rule as follows:

The rationale for the exception to the general rule permitting retrial after a mistrial declared with the defendant's consent is illustrated by the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial. . . . There is no room in the balance of competing interests for this type of manipulation of the mistrial device. 456 U.S. at 686 (Stevens, J., concurring) (footnote omitted); see also *supra* notes 28-31 and accompanying text. See generally L'FAVE & ISRAEL, *supra* note 15, § 25.2(b) (discussing the rationale behind and application of the *Kennedy* rule).

79. See *Kennedy*, 456 U.S. at 675-76 ("Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."); cf. *United States v. Ebens*, 800 F.2d 1422, 1439 (6th Cir. 1986) (noting, in holding that a prosecutor's aggressive closing arguments were fair, that a prosecutor is permitted to strike "hard but fair blows"). Consider also the following observation:

Like other double jeopardy rules, the *Kennedy* rule attempts to balance the competing interests of the defendant and society. A defendant in a goaded-mistrial situation has a clear interest in avoiding retrial and retaining the possibility of a favorable judgment from his initial tribunal: a prosecutor would be unlikely to engage in the misconduct if he did not believe that the jury would otherwise acquit the defendant and that the defendant could be convicted in a new trial.⁸⁰ In contrast, the State's interest in a full and fair opportunity to convict the defendant does not suffer from a retrial bar: the prosecutor cannot legitimately complain, after intentionally triggering a mistrial and thus aborting a fair proceeding, that the State's interest has been prejudiced if retrial is prohibited.⁸¹ To give credence to that complaint would allow the State to take advantage of its own deliberate abuse of process to secure the "proverbial 'second bite at the apple,'" ⁸² a result that the Double Jeopardy Clause and *Kennedy* forbid.⁸³

Because the American criminal justice system encourages vigorous advocacy, it is logical to assume that every prosecutor's act is generally intended to prejudice the defendant and obtain a conviction. The *Kennedy* decision holds that retrial of a defendant is not precluded unless the prosecutor acted with specific intent to achieve an end beyond the general intent to convict. Because the line between aggressive prosecution and harassment/overreaching is vague and nearly impossible to define, the Court feared that including overreaching in the retrial standard could serve to discourage aggressive prosecution, a result not necessarily in society's best interest.

Cynthia C. Person, Note, *Prosecutorial Misconduct and Double Jeopardy: Should States Broaden Double Jeopardy Protection in Light of Oregon v. Kennedy?* 37 WAYNE L. REV. 1699, 1706-07 (1991) (footnotes omitted).

80. See *supra* note 75 and accompanying text; see also BENNETT L. GERSHAM, PROSECUTORIAL MISCONDUCT § 11.5(b) (10th ed. 1995) ("[N]o prosecutor would intentionally seek to abort a trial when the chance of conviction was strong." (footnote omitted)); Westen & Drubel, *supra* note 27, at 94 (noting that the state might attempt to manipulate mistrial rules "in order to shop for a more favorable trier of fact[] or to correct deficiencies in its case").

81. The situation is contrary to that in *Burks*. See *supra* notes 43-55 and accompanying text. Rather than being deprived of a single opportunity to convict by an error beyond his control, the prosecutor essentially has forfeited that opportunity by using it to attempt to subvert the defendant's double jeopardy interests. See *Kennedy*, 456 U.S. at 686 (Stevens, J., concurring) ("[W]hereas we tolerate some incidental infringement upon a defendant's double jeopardy interests for the sake of society's interest in obtaining a verdict of guilt or innocence, when the prosecutor seeks to obtain an advantage by intentionally subverting double jeopardy interests, the balance invariably tips in favor of a bar to re prosecution." (footnote omitted)); cf. Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1255 (1977) ("[W]hile forfeiture rests on a balance between the defendant's interest in asserting defenses and the state's interest in cutting them off, waiver is thought to be based not on any such calculus of competing interests but on a concept of free choice.").

82. *Burks v. United States*, 437 U.S. 1, 17 (1978).

83. Cf. *West v. State*, 451 A.2d 1228, 1235-36 (Md. Ct. Spec. App. 1982) ("[I]n the Machiavellian situation where the prosecutor deliberately courts a mistrial . . . the normal sanctions are self-evidently inadequate. A scheming prosecutor cannot be rewarded by being handed the very thing toward which he connives.").

III. PROTECTION FROM OPPRESSIVE REPROSECUTION AFTER REVERSAL

As demonstrated in Part II, current double jeopardy jurisprudence does not provide clear guidance when a defendant's conviction is reversed because the prosecutor intentionally deceived the defendant and the court by submitting tainted evidence at trial.⁸⁴ *Lockhart* dealt only with the *accidental* introduction of inadmissible evidence at trial and thus fails to address such a situation. *Kennedy* is likewise inapposite because it addresses *mistrials* related to prosecutorial misconduct rather than reversals. In the absence of a standard to govern the gap between *Lockhart* and *Kennedy*, a defendant faces the unwelcome possibility of reprosecution in the face of an initial failed attempt by the State to secure an unjust conviction at trial.

To prevent such a result, this Part argues that double jeopardy should bar the retrial of a defendant whose conviction has been reversed due to intentional prosecutorial misconduct in the submission of tainted evidence when, absent the tainted evidence, insufficient evidence would have remained to support the conviction at trial. Section III.A describes this standard and contends that it finds substantial support in the Court's double jeopardy jurisprudence. Section III.B argues that the balance of double jeopardy interests in cases in which section III.A's standard is met further dictates that the Double Jeopardy Clause bar retrial in that limited class of cases. Section III.C examines possible criticisms of section III.A's limited extension of double jeopardy protection.

A. A Standard for a Limited Extension of Double Jeopardy Protection

An adequate standard for barring retrial should find support within the Court's existing body of double jeopardy jurisprudence and properly should balance competing double jeopardy interests. Those objectives are accomplished best by a standard barring retrial when two conditions are met: (1) the prosecutor intentionally introduced the tainted evidence at trial; and (2) excluding the tainted

84. For an example of such a situation, see the hypothetical case discussed *supra* in the text accompanying note 1. Consider also the notorious false-testimony case of *Mooney v. Holohan*, 294 U.S. 103 (1935). *Mooney* involved a prosecutor's intentional suppression of evidence and use of knowingly perjured testimony to obtain the conviction of a defendant for first-degree murder. See 294 U.S. at 110. The defendant, who did not discover the tainted nature of the evidence against him until after the trial had been completed, petitioned for habeas corpus on the grounds that his conviction should be set aside. See 294 U.S. at 110. Because the defendant's petition focused solely on his due process claim, however, the Court failed to consider the implications of the prosecutor's actions for a retrial bar based on the Double Jeopardy Clause. See 294 U.S. at 111-13; see also Ponsoldt, *supra* note 10, at 93 n.93 (discussing the Court's application of due process analysis to the *Mooney* line of misconduct cases).

evidence would have left insufficient evidence to support the defendant's conviction at trial.

The principle of *Kennedy* provides firm support for this standard. In arriving at its intent standard, the *Kennedy* Court distinguished between misconduct that should be treated as akin to trial error and misconduct that is so egregious that it implicates double jeopardy concerns.⁸⁵ On the former side falls misconduct committed with a general intent to prejudice a defendant, such as reckless misbehavior, aggressive comments in a closing argument, and the negligent introduction of inadmissible and prejudicial evidence, as in *Lockhart*.⁸⁶ On the latter side falls the intentional misconduct that the *Lockhart* Court failed to address — misconduct that deliberately destroys the value of the defendant's initial tribunal.⁸⁷ By analogy to *Kennedy*, double jeopardy should bar retrial when such misconduct succeeds in procuring a conviction that could not have been procured otherwise.⁸⁸

This standard also finds support in the rationale underlying *Burks*. If a defendant could not have been convicted in the absence of tainted evidence intentionally submitted by the prosecutor at trial, the principle of *Burks* requires that courts place the defendant in the position in which he would have been absent the misconduct and thus that he receive the double jeopardy benefit of his deserved acquittal from his initial tribunal.⁸⁹ Had the court or the defense

85. See *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982).

86. The Court stated:

Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt. Given the complexity of the rules of evidence, it will be a rare trial of any complexity in which some proffered evidence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court.

456 U.S. at 674-75.

87. See *supra* notes 74-75; see also Poulin, *supra* note 18, at 648 ("[I]ntentional government [mis]conduct . . . raises double jeopardy concerns because it manipulates the judicial process in order to prevent the defendant from receiving a fair trial with the first factfinder.").

88. See *supra* note 78 and accompanying text. In such a situation, the prosecutor has achieved exactly what he set out to do: avoid the acquittal of a defendant that would have occurred as the result of a fair process. As noted by the Second Circuit in *United States v. Wallach*:

The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct.

United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992)

89. See *supra* notes 53-54 and accompanying text. The Fifth Circuit has long recognized the logic of a limited extension of *Burks* to reversals of convictions tainted by prosecutorial misconduct:

[T]he rationale of *Burks* [is not] inconsistent with application of the "prosecutorial overreaching" exception to bar retrial where the overreaching caused a tainted verdict to be set aside, rather than a tainted proceeding to be aborted. *Burks'* holding, resting on a

counsel simply discovered the misconduct at trial, the court would have excluded the evidence, the conviction would have failed for lack of evidentiary support, and double jeopardy would have prohibited the State from re-prosecuting the defendant.⁹⁰ Failure to apply the *Burks* rationale in such a case thus has the anomalous result of allowing a prosecutor to undermine both *Burks* and *Kennedy* merely by concealing his misconduct throughout the trial.⁹¹ Protections so fundamental as those afforded by the Double Jeopardy Clause should not turn on simply whether the Government's oppressive abuse of process is apprehended during or after a trial.⁹²

Finally, application of the *Burks* rationale to reversals caused by intentional prosecutorial misconduct in the submission of evidence

perceived dichotomy between reversals for trial error and reversals for evidentiary insufficiency, indicated that, as the former hold no implication for the guilt or innocence of the defendant, they would raise no bar to further prosecution. . . . The extreme tactics which constitute prosecutorial overreaching offend the double jeopardy clause at least in part because they unfairly deprive the defendant of possible acquittal, by heightening, in a manner condemned by law, the jury's perception of the defendant's guilt . . .

Robinson v. Wade, 686 F.2d 298, 307-08 (5th Cir. 1982) (citations omitted). Professor Ponsoldt makes a similar observation:

In *Burks v. United States*, the Supreme Court unanimously held that categorical distinctions between appellate reversals and mistrials in the context of double jeopardy law situations are not tenable. The Court's analysis supports the elimination of a distinction between mistrial and appellate reversal cases involving judicial or prosecutorial overreaching, at least where the overreaching was obvious and intentional and . . . affected the defendant's fundamental rights . . .

Ponsoldt, *supra* note 10, at 92 (citations omitted). But cf. *Beringer v. Sheahan*, 934 F.2d 110, 114 (7th Cir.) (stating that "a defendant who did not move for a mistrial on the basis of intentional prosecutorial misconduct cannot invoke the double jeopardy clause to bar the state from retrying him after his conviction is reversed on that ground"), *cert. denied*, 502 U.S. 1006 (1991).

90. See *supra* note 20 and accompanying text.

91. In *Wallach*, the Second Circuit explained this difficulty while strongly approving of a limited extension of double jeopardy to reversals triggered by prosecutorial misconduct:

[I]f *Kennedy* is not extended . . . a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.

Wallach, 979 F.2d at 916; cf. *United States v. Singer*, 785 F.2d 228, 239 (8th Cir.) ("The defendant obtains mistrial only if the trial judge apprehends the sufficiently prejudicial misconduct. In reversing, the appellate court simply corrects the trial court's error."), *cert. denied*, 479 U.S. 883 (1986).

92. As Professor Ponsoldt notes:

[I]n a case involving prosecutorial or judicial overreaching, it should make no difference that the determination of overreaching is made on appeal as opposed to during trial. . . . If courts fail to bar retrial, regardless of the level of review at which prosecutorial overreaching is found, government conduct will go uncensured, the integrity of the judicial process will be tainted, and the double jeopardy clause will be judicially undermined.

Ponsoldt, *supra* note 10, at 92 (citations omitted); see also *Singer*, 785 F.2d at 239 ("The right of a criminal defendant not to be twice placed in jeopardy should not hang on which court correctly determines that misconduct infected the trial."); *Robinson*, 686 F.2d at 307 (noting the "strength of the criticism" that a defendant's double jeopardy protection could be affected "simply by the point in the judicial process at which a charge of overreaching is found meritorious").

is wholly consistent with the rationale of *Lockhart*. *Lockhart* rests on the presumption that inadmissible evidence accidentally introduced at trial could have been replaced with other admissible evidence of equivalent value had the State simply been aware of the nature of the evidentiary problem from the beginning.⁹³ The same presumption, however, does not apply to cases in which a prosecutor intentionally introduces tainted evidence at trial and deliberately deceives the court and the defense. The appropriate presumption in such cases is that the prosecutor had no admissible evidence of equivalent value to introduce at trial. A prosecutor would not assume the serious risks of intentionally introducing tainted evidence at trial if he possessed admissible evidence adequate to procure a conviction.⁹⁴ The prosecutor's deliberate deceptions simply confess the actual weakness of his case. In such a situation, the *Lockhart* presumption is no more applicable than it was in *Burks*. *Burks*, of course, did not require a court to presume that the prosecutor had on hand additional evidence at trial that could have been used to remedy the insufficient evidence offered as proof of the defendant's guilt.⁹⁵

B. *The Justification for Extending Double Jeopardy Protection*

In addition to finding support in double jeopardy precedent, section III.A's standard adequately protects competing double jeopardy interests by extending the double jeopardy bar to cases that involve the most egregious and deplorable governmental abuses of power. Intentional prosecutorial misconduct in the submission of evidence, like misconduct that manipulates mistrial rules, triggers serious concerns of state oppression through abuse of the criminal process. A prosecutor's intentional submission of tainted evidence all but guarantees one of two results for a defendant. First, the defendant faces a greatly increased risk of unjust conviction and punishment due to the prejudicial effect of the evidence on the jury.⁹⁶ Second, even if the prosecutor's misconduct is discovered, under *Ball* the defendant faces the onerous ordeal of a second prosecution after his conviction is reversed.⁹⁷ The prosecutor undoubtedly hopes for the first result. But even if his misconduct

93. See *supra* notes 59-60 and accompanying text and *infra* note 102.

94. Cf. *supra* note 80 and accompanying text.

95. See *United States v. Burks*, 437 U.S. 1, 16-17 (1978).

96. Cf. *supra* note 75; GERSHAM, *supra* note 80, § 9.4(f) ("[K]nowing use of perjured testimony . . . deprives the defendant of a fair trial . . .").

97. See *supra* notes 39-42 and accompanying text. It is well-accepted that due process affords the defendant no remedy of a bar to retrial in such a situation:

[D]ue process analysis focuses on the impact of nondisclosed or perjured testimony on the determination of factual guilt. A court finding a due process violation must overturn the unconstitutional conviction. Such a finding, however, does not bar retrial for the purpose of protecting the defendant from embarrassment, expense, and ordeal caused

leads to a reversal, under current law he remains secure in the knowledge that the State once again may put the defendant on trial after having failed in its initial attempt to obtain an unfair conviction.

Concerns of state oppression are even more grave when, absent the tainted evidence, insufficient evidence would have existed at the original trial to sustain the defendant's conviction. In that case the balance of double jeopardy interests weighs heaviest in favor of the defendant, and it is precisely in such a case that the test articulated in section III.A dictates that the Double Jeopardy Clause should bar retrial after reversal. Under existing doctrine, the defendant in such a case faces a no-win situation similar to that of the defendant in the mistrial context:⁹⁸ he either must endure a second prosecution at the hands of the State or accept a conviction that could not have been secured in the absence of the prosecutor's intentional misconduct. But the State cannot legitimately claim that a second prosecution is necessary to protect its own interest in effective enforcement of its criminal laws. The prosecutor has received the complete benefit of one full and fair opportunity to prove the defendant's guilt. His decision to spend that opportunity deceiving the defendant and the court does not entitle the State to a second attempt at conviction; the trial was not unfair to the prosecution.⁹⁹ Retrial in this instance merely would reward a prosecutor who took more than his share of the apple in the first place with a second bite. To prevent such egregious abuses of state power from contravening both the policies and spirit of the Double Jeopardy Clause, courts should apply this Note's standard to bar retrial in this limited class of cases.¹⁰⁰

by governmental misconduct. Due process only limits the right to retry a defendant when there is a danger that the decision to re prosecute will be vindictive Ponsoldt, *supra* note 10, at 92-93 n.93.

98. See *supra* notes 74-75 and accompanying text.

99. For the same reason, the prosecutor cannot ameliorate the damage done to the defendant's interests by arguing that, because the state could have taken different action at trial had the prosecutor's scheme failed, the jury would not necessarily have acquitted. See *supra* notes 28-35 and accompanying text; see also Poulin, *supra* note 18, at 648 (concluding that, when covert prosecutorial misconduct results in the reversal of a conviction, society's interest in a full and fair opportunity to convict has been "fully served" by the trial).

100. It is difficult to understand how the Double Jeopardy Clause legitimately can be seen as giving the state a "free shot" unfairly to convict the defendant. Cf. Ponsoldt, *supra* note 10, at 89-90 ("[I]n order to protect defendants from abuses of government power, courts should prohibit retrial in some cases [of appellate reversals of convictions]."); Poulin, *supra* note 18, at 651-52 (noting that the government's use of deceptive tactics to avoid a feared acquittal in the initial trial may trigger a double jeopardy bar to retrial and that there is a need for "a principled and workable standard" to guide courts in determining when defendants who have been prejudiced due to governmental overreaching at trial should be discharged).

The case of *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), provides a good analogy of an instance in which a limited extension of the double jeopardy bar is necessary to preserve the protections afforded by the Double Jeopardy Clause. In *Smith*, the Pennsylvania

This Note's test permits retrial, however, in the broader class of cases in which double jeopardy interests are more balanced. For example, retrial is permissible if, absent the tainted evidence, sufficient evidence would have remained at trial to support a defendant's conviction. A defendant in that instance has not been fully deprived of the value of his initial tribunal; it is not clear that the jury would have reached a different verdict in the absence of the misconduct. Because the defendant is not clearly entitled to an acquittal, the State's vital interest in effective criminal punishment should prevail in such a case.¹⁰¹ This brings the case closer to the sphere of *Ball* and *Lockhart*, as opposed to that of *Kennedy* and *Burks*, making retrial permissible. Similarly, retrial is permissible when a prosecutor does not intentionally submit the tainted evidence leading to a conviction. For example, a prosecutor might unintentionally submit a piece of evidence or elicit testimony that in reality is false.¹⁰² Presumably, the prosecutor could have addressed the evidentiary problem had he known of it at trial.¹⁰³ This situa-

Supreme Court held that Pennsylvania's Double Jeopardy Clause protected defendants from retrial after the reversal of a conviction due to prosecutorial misconduct in the submission of evidence. See 615 A.2d at 325. Based on circumstantial evidence, the defendant in *Smith* was convicted and sentenced to death for the murder of a woman and her two children. See 615 A.2d at 322. On appeal, the court reversed the conviction and remanded the case for a new trial in light of the improper admission of a number of unreliable hearsay statements by the trial judge. See 615 A.2d at 322. Some time later, the defendant discovered that the prosecution had withheld important exculpatory evidence and bargained with a key prosecution witness for false testimony against the defendant in return for favorable treatment on other criminal charges that the witness was facing. See 615 A.2d at 322-23. Upon a motion for discharge by the defendant after remand, the trial court found as fact that both instances of misconduct were committed by the prosecution. See 615 A.2d at 323.

In light of the prosecutor's misconduct at trial, the Pennsylvania Supreme Court barred further proceedings in the case and discharged the defendant after finding that his retrial was prohibited by Pennsylvania's Double Jeopardy Clause. See 615 A.2d at 325. Finding that "it would be hard to imagine more egregious prosecutorial tactics," the court concluded that "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant . . . when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." 615 A.2d at 323, 325. In doing so, the court recognized that the societal right to one fair opportunity to prove a defendant's guilt in some instances may be forfeited by serious misconduct at trial. See Poulin, *supra* note 18, at 629 ("Through its decision, the [*Smith*] court foreclosed any opportunity for the Commonwealth to correct its errors and seek a new conviction in a trial untainted by error.").

101. For a useful comparison, see the discussion of *Tibbs v. Florida*, 457 U.S. 31 (1982), *supra* in note 52.

102. *Lockhart v. Nelson* provides a good illustration of such a case. In *Lockhart*, "[u]nbeknownst to the prosecutor," evidence of a prior conviction submitted in support of the claim that the defendant was a habitual criminal was false because the conviction had actually been pardoned by the state governor. See *Lockhart v. Nelson*, 488 U.S. 33, 34-36 (1988). Nor was defense counsel or the court aware that the conviction was void — as noted by the Court, "it was mistakenly thought by all concerned that the conviction had not been pardoned." 488 U.S. at 41 n.7. The *Lockhart* Court assumed that, had the fact of the pardon been discovered at trial, the prosecutor easily could have corrected the error by submitting evidence of another conviction. See Poulin, *supra* note 18, at 642; Collins, *supra* note 45, at 299.

103. See *supra* notes 28-33, 59-62 and accompanying text.

tion is controlled by the trial-error rule of *Ball* and *Lockhart* as opposed to the standard proposed in this Note. Through no fault of the prosecutor, the error deprives the State of a fair opportunity to convict the defendant, and retrial is necessary to vindicate the state's interests.¹⁰⁴

C. *Potential Criticisms of a Limited Extension of Double Jeopardy Protection*

There are three potential criticisms of this Note's limited extension of double jeopardy. First, critics might claim that language in *Burks* precludes such an extension. Second, one might object that *Kennedy* requires that the intent standard for an extension be more specific than that proposed in section III.A. Finally, an extension might be criticized on the ground that it raises insurmountable difficulties in practice. This section examines and responds to each criticism.

An initial objection to an extension of double jeopardy to reversals of convictions tainted by intentional prosecutorial misconduct is that such an extension is effectively precluded by language in *Burks*. In distinguishing between reversals for trial errors and reversals for evidentiary insufficiency, the *Burks* Court noted that "reversal for trial error . . . is a determination that the defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or *prosecutorial misconduct*."¹⁰⁵ Based on this statement, critics of a double jeopardy extension might argue that intentional prosecutorial misconduct in the submission of evidence should be treated like any other trial error,¹⁰⁶ the appropriate remedy for which is the reversal of the defendant's conviction followed by a retrial under the rule of *Ball* and *Lockhart*.

Both *Kennedy* and *Lockhart* contradict this reading of the language in *Burks*. *Burks*'s language only prevents an extension of double jeopardy if that language is read as being absolute, that is, if it is read as applying to *all* instances of prosecutorial misconduct, whether negligent or deliberate. In *Lockhart* and *Kennedy*, however, the Court explicitly recognized that deliberate prosecutorial misconduct raises different concerns than negligent prosecutorial misconduct or other procedural flaws that are akin to trial error.¹⁰⁷

104. See *supra* notes 28-35 and accompanying text.

105. *United States v. Burks*, 437 U.S. 1, 15 (1978) (second emphasis added).

106. Cf. Mary J. Fahey, Note, *Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial*, 29 *BUFF. L. REV.* 759, 774-75 (1980) ("[A] defendant who wishes to argue that if an appellate court finds that overreaching occurred which provoked his mistrial motion, then a mistrial should have been granted and double jeopardy should prohibit his retrial, will have to combat the dicta of *Burks*.").

107. See *supra* notes 63-65, 77-79 and accompanying text.

In light of this distinction, *Burks's* language should not be understood as referring to deliberate attempts by a prosecutor to deceive the court. Rather, that language should be taken as referring to less egregious instances of negligent prosecutorial misbehavior and overreaching — such as unwarranted and prejudicial remarks in front of the jury — that frequently lead to the reversals of defendants' convictions.¹⁰⁸

A second potential criticism of this Note's double jeopardy extension is that analogy to *Kennedy* requires a more specific intent than is required under section III.A's two-pronged standard. Arguably, *Kennedy* extends double jeopardy protection only to "cases in which the conduct giving rise to the successful motion for a mistrial was *intended to provoke the defendant into moving for a mistrial*."¹⁰⁹ This intent standard restricts itself to conduct intended to manipulate double jeopardy rules for the purpose of initiating a second prosecution and does not encompass conduct that is merely intended to avoid an acquittal or secure an unfair conviction from the jury. For an extension of double jeopardy to be consistent with this reading of *Kennedy*, it is not enough that a prosecutor deliberately submit tainted evidence at trial. Rather, *Kennedy* dictates that double jeopardy bar retrial only if a prosecutor's intentional misconduct is aimed at triggering a reversal that would subject a defendant to a second prosecution.¹¹⁰ Section III.A's standard does not require such a showing of specific intent.

108. As Professor Poulin observes:

Generally, when a criminal case goes to trial, the prosecutor has some hope of obtaining a conviction. The prosecutor's natural instinct is to zealously pursue a guilty verdict. The number of criminal appeals pointing to prosecutorial improprieties reveals that prosecutorial behavior that undermines the defendant's rights and risks an unfair trial is a common occurrence in criminal trials.

Poulin, *supra* note 18, at 659 n.161; *see also* *Evans v. Thompson*, 881 F.2d 117, 123 n.1 (4th Cir. 1989) (suggesting, based on the rationale of *Kennedy*, that the Double Jeopardy Clause would bar retrial after reversal for trial error "if the error was the product of deliberate prosecutorial misconduct").

109. *Oregon v. Kennedy*, 456 U.S. 677, 679 (1982) (emphasis added); *see also* *Beringer v. Sheahan*, 934 F.2d 110 (7th Cir.) (limiting *Kennedy's* retrial bar to situations in which the prosecutor specifically intended to provoke the mistrial request), *cert. denied*, 502 U.S. 1006 (1991).

110. *See, e.g.*, Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1425-26 (1987) ("The [*Kennedy*] Court ruled that no matter how egregious, a prosecutor's misbehavior at trial will not bar a subsequent retrial so long as the prosecutor did not act with the specific intent to deprive the defendant of the protection of the double jeopardy clause . . ."). One commentator summarizes the Court's focus on intent as follows:

The [*Kennedy*] Court . . . viewed [the defendant's] prime interest as the right to have his fate determined by the first tribunal. The Court pointed out that a deliberate sabotaging of a trial, intended to goad the defendant into moving for a mistrial, subverts that interest and must be protected by a bar against retrial. That interest, however, is distinguished from the defendant's right to a fair trial, free from error. This latter interest is protected, not by the retrial bar, but by the availability of a mistrial or appellate reversal. Where the defendant's right to a determination by the first tribunal is at issue, the

This argument is flawed for at least two reasons. First, the *Kennedy* test is not necessarily as narrow as critics may claim. Intent to trigger a mistrial, intent to avoid a fair acquittal, and intent to secure an unfair conviction are merely specific instances of an overriding intent to subvert the protections afforded by the Double Jeopardy Clause by denying a defendant the benefit of his first tribunal. These states of mind are nearly indistinguishable in practice,¹¹¹ and at least one court of appeals has included them all under the *Kennedy* standard.¹¹² Thus, this Note's test, though it may be inconsistent with select language in *Kennedy*, is not necessarily inconsistent with the principle underlying *Kennedy* itself.

Second, even if the *Kennedy* test is as narrow as critics might claim, no reason exists for applying the same narrow standard to this Note's proposed extension of double jeopardy. The *Kennedy* Court based its narrow intent standard largely on the worry that a broader "overreaching" standard would greatly increase the number of mistrial requests and subsequent double jeopardy claims in trial courts as well as encourage trial judges to deny defendants'

Court's focus is not on the error itself, nor on the position of the defendant as a result of the error. Rather, the Court focuses on the intent with which the error was committed. Person, *supra* note 79, at 1706.

111. The objective circumstances that lead an observer to infer the existence of one of these states of mind likely will lead to the same inference with respect to the others. For instance, one observer rationally might conclude that overt and extremely egregious misconduct was intended to cause the jury to convict a defendant, while another observer might conclude that such misconduct was intended to provoke a mistrial request. See, e.g., 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 23:32, at 361-62 (2d ed. 1986) (discussing circumstances under which courts generally have found official misconduct to be "accidental or unintended"); Fahey, *supra* note 106, at 771 (discussing the circumstances under which a defendant has an "ideal claim" that a prosecutor intended to trigger a mistrial through his misconduct). Compare Justice Marshall's statement in his dissent from the denial of certiorari in *Green v. United States*:

Regardless of whether the Government's misbehavior was designed specifically to provoke a mistrial or was simply intended to reduce the chances of an acquittal, the net effect on the defendant is the same: he is faced with the burdens and risks of a second trial solely because the Government has deliberately undermined the integrity of the first proceeding.

Green v. United States, 451 U.S. 929, 931 (1981) (Marshall, J., dissenting).

112. In *United States v. Pavloyianis*, 996 F.2d 1467 (2d Cir. 1993), the Second Circuit summarized the scope of *Kennedy*'s intent standard as follows:

[T]he Double Jeopardy Clause protects a criminal defendant from multiple successive prosecutions for the same offense that arise from prosecutorial overreaching engaged in with the deliberate intent of depriving him of having his trial completed by a particular tribunal or prejudicing the possibility of an acquittal that the prosecutor believed likely. 996 F.2d at 1473 (emphasis added). But compare the following statement of the court in *West v. State*, 451 A.2d 1228 (Md. Ct. Spec. App. 1982):

Ordinarily, when the prosecutor injects error into the trial, grievous as that may be, the sanction is mistrial or reversal. It is only where the prosecutor deliberately subverts the right of the defendant to stay with the original tribunal that the double jeopardy bar becomes the appropriate relief. [*Kennedy* distinguished] not between grave error and lesser error and not between intended error and unintended error, but rather between deliberate error designed to accomplish Purpose A and deliberate error designed to accomplish purpose B

451 A.2d at 1234.

mistrial requests.¹¹³ That concern is unique to *Kennedy's* mistrial context; no similar worry exists with respect to the intentional submission of tainted evidence when the remaining evidence would have been inadequate to support a conviction. Unless the tainted evidence is instrumental in securing a conviction,¹¹⁴ defendants will have little incentive to raise claims of deliberate prosecutorial misconduct on appeal with an eye toward raising a subsequent double jeopardy bar to retrial. For the same reason, appellate courts will not face the specter of possible double jeopardy claims in every case of reversal for prosecutorial misconduct. Consequently, the pragmatic considerations that make a narrow test necessary in the context of *Kennedy* — fear of incessant claims of “government overreaching” — are inapplicable to this Note’s standard.

A final objection to the extension of double jeopardy proposed herein is that it creates serious difficulties in practice. Critics may argue, for instance, that appellate courts cannot adequately discover and assess evidence of governmental intent in applying this Note’s standard.¹¹⁵ Similarly, it may be objected that the extension will discourage vigorous advocacy on the part of prosecutors by making them reluctant to submit evidence of questionable admissibility or to call witnesses of uncertain integrity at trial. Finally, one may criticize an extension on the ground that courts will be extremely hesitant to make open findings of serious overreaching against prosecutors and that such findings may only serve to wound the integrity of and undermine respect for the criminal justice system.¹¹⁶

None of these problems is serious enough to defeat the extension of double jeopardy proposed in section III.A. Appellate courts should have little difficulty applying this Note’s intent standard — appellate judges are well-accustomed to inferring subjective intent from objective circumstances, and any possible difficulties in proving and assessing governmental intent would be

113. See *Kennedy*, 456 U.S. at 676 (“Knowing that the granting of the defendant’s motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be more loath to grant a defendant’s motion for mistrial.”) (rejecting broader overreaching standard for triggering double jeopardy bar to retrial); see also LAFAYE & ISRAEL, *supra* note 15, § 25.2(b) (noting two considerations influencing the Court in adopting the narrow test of *Kennedy*: first, that a broader overreaching standard would “be at issue in virtually every case” and second, that “a broader test would be counterproductive because it would influence the denial of mistrial requests”); Fahey, *supra* note 106, at 772 (noting that the Court recognized that a broader standard might cause appellate courts to refuse to find the necessary conditions for triggering a double jeopardy bar for fear of that result becoming commonplace).

114. See *supra* note 101 and accompanying text.

115. See Poulin, *supra* note 18, at 653 (discussing problems with intent-based tests).

116. Cf. *Illinois v. Somerville*, 410 U.S. 458, 483 n.1 (1973) (Marshall, J., dissenting) (“[T]he relations between judges and prosecutors in many places may make judges reluctant to find intentional manipulation.”).

no greater than those in other intent determinations.¹¹⁷ Moreover, because the extension applies only to deliberate misconduct, it will not discourage vigorous advocacy on the part of prosecutors.¹¹⁸ Admittedly, a double jeopardy extension does require a willingness by courts to make damaging findings against prosecutors who engage in misconduct, but the possibility that a court will be reluctant to make such findings is insufficient to outweigh a defendant's interest in a fair trial, free of prosecutorial misconduct.¹¹⁹

CONCLUSION

To many observers, the modern American criminal justice system more closely resembles a laboring and overburdened machine than a well-oiled instrument of state oppression. Ever-increasing caseloads, decreasing budgets, and an emphasis on the rights of the accused might cause some observers to dismiss fears of governmental abuse as unfounded.¹²⁰ Nevertheless, governmental power remains awesome when selectively employed, and the potential for abuse in any given case is "virtually unlimited."¹²¹

As gatekeepers to such overwhelming power, prosecutors shoulder a massive responsibility.¹²² Even the most well-meaning prose-

117. See *Kennedy*, 456 U.S. at 680 (Powell, J., concurring) (noting that a court can and should "rely primarily upon the objective facts and circumstances of [a] particular case" in determining whether the requisite intent exists). See generally GERSHAM, *supra* note 80, § 11.8(d)-(e) (discussing proof of prosecutorial intent under objective and subjective standards).

118. For example, a prosecutor would have no disincentive to call a witness of questionable integrity for fear that, should the witness perjure himself on the stand, a reversal of the defendant's conviction on that ground would bar retrial. In the absence of prosecutorial intent that the witness perjure himself, the limited extension of double jeopardy proposed in this Note would not apply.

119. Indeed, allowing a prosecutor's misconduct to go uncensured can have serious social consequences quite apart from undermining a defendant's double jeopardy interests at trial: Lawless enforcement of the law [by the] officials most definitely responsible for law enforcement causes public disrespect for the entire legal process. When judges and prosecutors violate their sworn oaths, and engage in unethical conduct that deprives a defendant of a full and fair trial, the defendant is not the only victim — the jurors, spectators, and the public become aware that the law can be violated with impunity in the courtroom, by those sworn to protect and uphold it.

NATIONAL COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 268 (1931).

120. See Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 505 (1977).

121. See *id.*

122. See *United States v. Bagley*, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting) ("The prosecutor is by trade, if not necessity, a zealous advocate. . . . At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth."); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1992) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

cutor can far overstep the bounds of justice in his zeal to further the interests of the state in effective criminal punishment. When that happens, the Double Jeopardy Clause should stand ready to work as a shield for the accused and protect him from prosecutorial misconduct that so undermines fundamental tenets of justice as to implicate values enshrined in the Constitution. The Clause can hardly fulfill this function as long as its implications for misconduct in the context of reversals of convictions remain ill-understood and largely unaddressed. This Note by no means settles all of the issues that may confront a court as it applies the Double Jeopardy Clause to reversals of convictions tainted by prosecutorial misconduct. It does, however, establish an effective analytical framework to guide a court in determining when prosecutorial misconduct in the submission of evidence implicates double jeopardy concerns. Still, more than a theoretical understanding of double jeopardy is needed to protect defendants from egregious prosecutorial misconduct. Until courts bear the difficult burden of transforming theory into practice, double jeopardy protection against one of the most condemnable state practices — the making of repeated, unfair attempts to visit criminal sanctions upon an individual — will remain a largely illusory guarantee.¹²³

123. See Fahey, *supra* note 106, at 761, 772 (noting the “general reluctance [of courts] to prohibit retrial in cases of governmental overreaching” and the hesitancy to subject prosecutors and the judicial system as a whole to the severe consequences and criticism that attend findings of misconduct and abuse); Eric Loeb et al., Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 839, 1044 n.1488 (1995) (“The circuits are reluctant to find the intent necessary to satisfy the *Kennedy* standard.”); Poulin, *supra* note 18, at 646 (stating that no courts have extended double jeopardy protection to cases reversed on appeal on grounds that would have implicated *Kennedy* at trial). Consider also the Court’s observation in *Green v. United States*:

The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.
Green v. United States, 355 U.S. 184, 198 (1957).