The Burger Court Opinion Writing Database

Illinois v. Somerville

410 U.S. 458 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Byron:

I voted to affirm in this case, albeit reluctantly, because of the distance the Court had gone in the past. That same "obedient" adherence to prior cases led me to join the reversal in Jorn. In my view the Court has stretched the Double Jeopardy Clause out of all semblance to its historic purpose and to the language of the Clause itself.

Like Potter (perhaps even more so) I am not very keen about perpetrating past error. Since there seems to be a growing concern with the mechanical application of the Clause, I will "join 3" to join Rehnquist's dissent.

Regards,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Joined 12/4

December 21, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Byron:

I have your memo of December 21 and I find little in it to disagree with. There have been several occasions in 3 1/2 years when mine would have been a fifth vote to modify or even overrule a holding antedating my tenure here and I refrained from doing so. I agree that "zigs and zags" in the law are undesirable and that continuity, per se, has many virtues. I could possibly "join 4" to clear up some problems in Double Jeopardy but I would be hard pressed to write it out.

Like you, I prefer not to use a "distinguishing" route to deal with sticky problems, although I do find solid bases for marked differences between this case and Jorn, et al.

Merry Christmas and the best in 1973 in Switzerland. When you return I'll pin you with the 10-year service medal as directed by the Marshal. We will also renew your term for another 10 years by unanimous vote -- of the law clerks!

Bon voyage and regards,

WEB

Mr. Justice White

Copies to the Conference

D A

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1973

Re: No. 71-692 - Illinois v. Somerville

MEMORANDUM TO THE CONFERENCE:

This will confirm the conclusion we reached at Conference last Friday -- the reassignment of the above opinion to Mr. Justice Rehnquist.

Regards,

WEB

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 26, 1973

Re: No. 71-692 - Illinois v. Somerville

Dear Bill:

Please join me.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

B

114

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 1, 1972

Dear Byron:

In No. 71-692 - Illinois v. Somerville - please join me in your opinion for the Court.

W. O. D.

Mr. Justice White

cc: Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 21, 1972

Dear Byron:

In No. 71-692 - Illinois v. Somerville, I am still with you.

W. O. D.

Mr. Justice White

cc: Conference

January 22, 1973

Dear Byron:

I joined your opinion in 71-692, Illinois v. Somerville when you wrote for the Court. Though the majority has gone the other way, I am still with you and hope you write a dissent.

William O. Douglas

Mr. Justice White

WD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 17, 1973

Dear Byron:

Please join me in your dissent in 71-692, Illinois v. Somerville.

WOD

William O. Douglas

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 1, 1972

RE: No. 71-692 - Illinois v. Somerville

Dear Byron:

I agree.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1973

RE: No. 71-692 Illinois v. Somerville

Dear Byron:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

B 14

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 1, 1972

71-692 - Illinois v. Somerville

Dear Byron,

As a dissenter (along with you) in Downum and Jorn, I am not wildly enthusiastic about the result you reach here, but unless those cases and others are to be reconsidered, I join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 27, 1972

71-692 - Illinois v. Somerville

Dear Bill,

I have already told Byron that I was a potential backslider in this case, and this is to advise you that I have now backslid and agree with what you have written in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 3, 1973

Re: No. 71-692, Illinois v. Somerville

Dear Bill,

I disagree with Byron that a reversal in this case means overruling Downum and Jorn, and I think it is of some importance to make clear that we are not overruling those decisions. Accordingly, I venture to make the following suggestions for you to consider in re-casting your opinion from a dissent to a Court opinion.

The discussion at the top of page 8, preceding the quotation from Wade v. Hunter, can be read to establish a rule that looks only to the possibility of prosecutorial misconduct once trial has commenced. This is contrary to Jorn, where there was no question of prosecutorial advantage and where the decision turned substantially on the defendant's interest in staying with his original jury. It is also contrary to Downum, inasmuch as the trial in that case had not gone beyond swearing in the jury. I would therefore suggest striking the sentence which begins, "Given this predicate . . ." Similarly, at the bottom of page 9, the sentence beginning "The Double Jeopardy Clause" can be read to limit the operation of the Clause to situations where the prosecution has used a mistrial as a way of improving its adversarial strength. While I agree that such a situation would raise a serious double jeopardy question, Jorn stands as an example of a case where double jeopardy bars re-trial in the absence of such prosecutorial misconduct. I would therefore suggest striking this sentence as well.

In order to make it explicit that Downum and Jorn are not being overruled, I would suggest that some language reconciling those two cases with this one be included. I have in mind something along the following lines:

Unlike the situation in United States v. Jorn, 400 U.S. 470 (1971), the mistrial here constituted no abuse of discretion. Indeed, under a reasonable understanding of Justice Story's language in Perez, against the background of Illinois law, the mistrial in the instant case can be termed a "manifest necessity." Consequently, the interest on the part of the defendant in proceeding to verdict before his original jury is outweighed by the competing and equally legitimate demands of public justice, cf. United States v. Jorn, supra, at 484-486.

The case before us is equally distinguishable from Downum, where the mistrial entailed not only delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case. Here the delay was minimal, and the mistrial was under Illinois law the only way in which a simple technical defect in the indictment could be corrected. There is no question here of concrete prejudice to the defendant, or of manipulation of the proceedings by the prosecution to obtain an unfair advantage at trial.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copy to Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 24, 1973

Re: No. 71-692, Illinois v. Somerville

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

B —

Please join me
HAB

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 12-1-72

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, v. Donald Somerville. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises the issue whether a defendant is subjected to double jeopardy within the meaning of the Fifth and Fourteenth Amendments when he is retried and convicted after his first trial has been aborted by a mistrial ruling following selection of the jury and discovery by the prosecution that the indictment is defective.

Petitioner, Donald Somerville, was indicted for theft on March 19, 1964. A jury was selected and sworn to try the case on November 1, 1965. The following day the State moved for a mistrial on the ground that the indictment did not allege intent to deprive the owner of the use of his property and hence was void for failure to charge a criminal offense under Illinois law. The motion was granted over Somerville's objection. Arraigned again on a second indictment, Sommerville unsuccessfully pleaded double jeopardy and his conviction was affirmed over this same objection. *People* v. *Somerville,* 88 Ill. App. 2d 212, leave to appeal denied, 37 Ill. 2d 627, cert. denied, 393 U. S. 823 (1968). His petition for habeas corpus was filed in the District Court for the Northern District of Illinois in April 1969, alleg-

pp 4-6

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

2nd DRAFT

Circulated: _____

Recirculated: 12-19-72

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, v. Donald Somerville. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises the issue whether a defendant is subjected to double jeopardy within the meaning of the Fifth and Fourteenth Amendments when he is retried and convicted after his first trial has been aborted by a mistrial ruling following selection of the jury and discovery by the prosecution that the indictment is defective.

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D/

Desk

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 21, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Chief:

Your sentiments about the merits of this case, expressed in your note of December 18, are quite understandable to one who was in dissent in both Downum and Jorn; and I shall not be particularly distressed if your and Brother Rehnquist's views prevail on this occasion.

I voted the way I did because I thought, and still think, that Downum and Jorn require affirmance of the judgment of the Seventh Circuit and because I am unwilling at this juncture to overrule or eviscerate the approach of those decisions. Those cases were heavily debated here and the judgments represent institutional decisions of the kind that a nine-man court is expected to make. Perhaps there are outcomes that individual Justices oppose so strongly that they will never accept them, but this is relatively rare; and in any event--at least in my view--the double jeopardy rules recently embraced in this Court do not stand very high on my list of candidates for overruling.

Normally, I have not voted to overrule a case simply because I would have decided it differently than the five or more Justices who prevailed in deciding it. I am not that confident of my own views; and, besides, I doubt that we should lightly overrule or put aside a rule of constitutional law fashioned in accordance with those institutional procedures contemplated by the Constitution and Congress. A judgment reached in this fashion is entitled to at least some period for clinical observation before it is interred. It may be that experience will prove it as

wise as its authors expected. On the other hand, it may prove as improvident, in which event it will receive a timely enough burial.

I doubt that this view overemphasizes the value of precedent and stability in the law. I have joined in my share of overruling decisions and anticipate doing so as time goes on.

Finally, I should say that I would not feel comfortable in purporting to distinguish Downum, Jorn and Ball. This is a more arguable matter, but to me reversing the Seventh Circuit scuttles the idea, to which I objected at the time, that the right to the verdict of a particular jury is such that it can be overridden only where manifest necessity warrants it, even where there is no overreaching, no attempt to manipulate, no discernible impact on the defense at a second trial and no other prejudice whatsoever.

Merry Christmas and a Happy New Year. I shall be away for about ten days.

Sincerely,

The Chief Justice

Copies to Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 30, 1973

Re: No. 71-692 - Illinois v. Somerville

Dear Bill:

I shall circulate a dissent in this case in due course.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 2-14-73

No. 71-692

Recirculated: _____

State of Illinois, Petitioner, *v.* Donald Somerville. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1973]

MR. JUSTICE WHITE, dissenting.

For the purposes of the Double Jeopardy Clause, jeopardy attaches when a criminal trial commences before judge or jury, *United Sttaes* v. *Jorn,* 400 U. S. 470, 479–480 (1971); *Green* v. *United States,* 335 U. S. 184, 188 (1957); *Wade* v. *Hunter,* 336 U. S. 684, 688 (1949), and this point has arrived when a jury has been selected and sworn, even though no evidence has been taken. *Downum* v. *United States,* 372 U. S. 734 (1963). Clearly, Somerville was placed in jeopardy at his first trial despite the fact that the indictment against him was defective under Illinois law. *Benton* v. *Maryland,* 395 U. S. 784, 796–797 (1969); *United States* v. *Ball,* 163 U. S. 662 (1896). The question remains, however, whether the facts of this case present one of those circumstances where a trial, once begun, may be aborted over the defendant's objection and the defendant retried without twice being placed in jeopardy contrary to the Constitution.

The Court has frequently addressed itself to the general problem of mistrials and the Double Jeopardy Clause, most recently in *United States* v. *Jorn, supra.* We have abjured mechanical, *per se* rules and have prefered to rely upon the approach first announced in *United States* v. *Perez,* 22 U. S. (9 Wheat.) 579 (1824). Under the *Perez* analysis, a trial court has authority to discharge

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 4, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–692

State of Illinois, Petitioner, *v.* Donald Somerville. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1973]

MR. JUSTICE MARSHALL, dissenting.

The opinion of the Court explicitly disclaims the suggestion that it overrules the recent cases of *United States Jorn,* 400 U. S. 470 (1971), and *Downum* v. *United States,* 372 U. S. 734 (1963). *Ante,* at —. But the Court substantially eviscerates the rationale of those cases. *Jorn* and *Downum* appeared to give judges some guidance in determining what constituted a "manifest necessity" for declaring a mistrial over a defendant's objection. Today the Court seems to revert to a totally unstructured analysis of such cases. I believe that one of the strengths of the articulation of legal rules in a series of cases is that successive cases present in a clearer focus considerations only vaguely seen earlier. Cases help delineate the factors to be considered and suggest how they ought to affect the result in particular situations. That is what *Jorn* and *Downum* did. The Court, it seems to me, today abandons the effort in those cases to suggest the importance of particular factors, and adopts a general "balancing" test which, even on its own terms, the Court improperly applies to this case.

The majority purports to balance the manifest necessity for declaring a mistrial, *ante,* at —, the public interest "in seeing that a criminal prosecution proceed to verdict," *ante,* at —, and the interest in assuring impartial verdicts, *ante,* at —. The second interest is

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, v. Donald Somerville. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1973]

MR. JUSTICE MARSHALL, dissenting.

The opinion of the Court explicitly disclaims the suggestion that it overrules the recent cases of *United States Jorn,* 400 U. S. 470 (1971), and *Downum* v. *United States,* 372 U. S. 734 (1963). *Ante,* at —. But the Court substantially eviscerates the rationale of those cases. *Jorn* and *Downum* appeared to give judges some guidance in determining what constituted a "manifest necessity" for declaring a mistrial over a defendant's objection. Today the Court seems to revert to a totally unstructured analysis of such cases. I believe that one of the strengths of the articulation of legal rules in a series of cases is that successive cases present in a clearer focus considerations only vaguely seen earlier. Cases help delineate the factors to be considered and suggest how they ought to affect the result in particular situations. That is what *Jorn* and *Downum* did. The Court, it seems to me, today abandons the effort in those cases to suggest the importance of particular factors, and adopts a general "balancing" test which, even on its own terms, the Court improperly applies to this case.

The majority purports to balance the manifest necessity for declaring a mistrial, *ante,* at —, the public interest "in seeing that a criminal prosecution proceed to verdict," *ante,* at —, and the interest in assuring impartial verdicts, *ante,* at —. The second interest is

B M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 4, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Byron:

Potter, in his note of December 1 to you, states my view for I too was a dissenter in Jorn. Please join me.

Sincerely,

H. A. B.

Mr. Justice White

Copies to the Conference

December 18, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Bill:

I write this note because I wonder whether I detect a factual error in your circulation of December 15. On page 5 you refer to the Lovato case and (near the bottom of the page) say that "a new jury was sworn." As I read the case "the same jury previously impaneled was sworn and the trial proceeded." 242 U.S. at 200. Does this make a difference so far as the helpfulness of Lovato in the present case is concerned?

Sincerely,

HAB

Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 18, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Byron:

Bill Renquist's dissent circulated December 15 almost convinces me that he is on the right track. This case disturbs me, particularly in view of my having joined the dissent in Jorn. I would like to think about this a little more but, at the moment, please regard my joining your proposed opinion as very tentative.

Sincerely,

H. A. B.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 27, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Bill:

My views still coincide with Potter's in this matter and, with the changes he has suggested, I would now join your dissent. I thus withdraw my tentative concurrence in Byron's circulation.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 30, 1973

Re: No. 71-692 - Illinois v. Somerville

Dear Bill:

Please join me in your circulation of January 23.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

Copies to the Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1972

Re: No. 71-692 Illinois v. Somerville

Dear Byron:

I will await Bill Rehnquist's dissent before coming to rest in this case.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 19, 1972

No. 71-692 State of Illinois v. Somerville

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

Lewis

Mr. Justice Rehnquist

cc: To the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 11, 1973

Re: No. 71-692 Illinois v. Sommerville

Dear Bill:

I remain with you, now that you have written for the Court.

Sincerely,

Lewis

Mr. Justice Rehnquist

cc: The Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 29, 1973

No. 71-692 Illinois v. Somerville

Dear Bill:

Please join me in your excellent opinion for the Court.

Sincerely,

Lewis F. Powell, Jr.

by WC Kelly Jr/law clerk

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 4, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Byron:

I voted the other way at Conference, and will probably write a dissent trying to focus on the undesirability of applying the rather restrictive rule of Jorn to the states.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, *v.* Donald Somerville. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

The Court's decision in this case is very likely the logical outcome of the sharp departures from history, precedent, and reason which have during the past decade marked this Court's construction and application of the prohibition against double jeopardy found in the Bill of Rights.

In its application to the Federal Government, the rule has evolved from one in which the trial judge's discretion to declare a mistrial was virtually unreviewable, as held by Mr. Justice Story in *United States* v. *Perez,* 9 Wheat. (22 U. S.) 579, to the extremely restrictive view of "manifest necessity" embodied in *United States* v. *Jorn,* 400 U. S. 470, and in the Court's opinion in this case. The length the Court has come since 1961 is brought home by the statement of Mr. Justice Frankfurter for the Court in *Gori* v. *United States,* 367 U. S. 364 (1961):

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

Circulated: 12/15

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, *v.* Donald Somerville. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

I agree with the Court that the fountainhead case of *United States* v. *Perez,* 9 Wheat. (22 U. S.) 579 (1824), would have us abjure mechanical rules in the application of the Double Jeopardy Clause, but I do not believe that the Court has followed the counsel of Mr. Justice Story in deciding this case as it has. It is possible, through the construction of a syllogism that is nothing if not mechanical, to decide that the Double Jeopardy Clause requires affirmance of the instant case: since *Downum* v. *United States,* 372 U. S. 734 (1963), held that jeopardy "attaches" when a jury has been selected and sworn, and since *United States* v. *Ball,* 163 U. S. 662 (1896), held that jeopardy had obtained even though the indictment upon which the defendant was first acquitted had been defective, therefore the Illinois trial judge's action in this case offended the Double Jeopardy Clause of the Fifth Amendment. But such a result is not only at odds with the broad latitude, and policy therefor, which the decision in *United States* v. *Perez, supra,* reserved to the trial judge in making such a determination, but it is at odds with far more recent decisions of this Court.

If the Court is not to make double jeopardy a mechanical concept, it must be of some importance that the challenge to the second trial in *United States* v. *Ball,*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1972

Re: No. 71-692 - Illinois v. Somerville

Dear Harry:

Thanks for calling my attention to the peculiar fact situation in Lovato. It is certainly possible to take one of the arguments advanced in Jorn and in Byron's opinion in this case -- that the defendant has a strong interest in having his case ultimately decided by the jury originally empaneled to hear it -- and say that that interest was not impaired in Lovato because the same jury in fact did hear the case, although it was discharged and then sworn again. My own feeling is that the Lovato court accorded virtually no weight to this fact; its separate treatment of the defendant's double jeopardy argument and his argument (242 U.S. at 202) that he had a right to have another jury empaneled suggests that this factual wrinkle did not play any part in their decision on the double jeopardy issue.

If you agree with me on my analysis, do you nonetheless think that a word of explanation to this effect in the opinion would strengthen it? If you do, I will be more than happy to put it in.

Sincerely,

WEB

Mr. Justice Blackmun

2,5,6,7,9.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

2nd DRAFT

From: Rehnquist, J.

Circulated:

Recirculated: 12/18

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, v. Donald Somerville. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

I agree with the Court that the fountainhead case of *United States* v. *Perez,* 9 Wheat. (22 U. S.) 579 (1824), would have us abjure mechanical rules in the application of the Double Jeopardy Clause, but I do not believe that the Court has followed the counsel of Mr. Justice Story in deciding this case as it has. It is possible, through the construction of a syllogism that is nothing if not mechanical, to decide that the Double Jeopardy Clause requires affirmance of the instant case: since *Downum* v. *United States,* 372 U. S. 734 (1963), held that jeopardy "attaches" when a jury has been selected and sworn, and since *United States* v. *Ball,* 163 U. S. 662 (1896), held that jeopardy had obtained even though the indictment upon which the defendant was first acquitted had been defective, therefore the Illinois trial judge's action in this case offended the Double Jeopardy Clause of the Fifth Amendment. But such a result is not only at odds with the broad latitude, and policy therefor, which the decision in *United States* v. *Perez, supra,* reserved to the trial judge in making such a determination, but it is at odds with far more recent decisions of this Court.

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M 2, 4, 5, 7, 8, 9, 10

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: _____

Recirculated: 12/19

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner, v. Donald Somerville. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

I agree with the Court that the fountainhead case of *United States* v. *Perez,* 9 Wheat. (22 U. S.) 579 (1824), would have us abjure mechanical rules in the application of the Double Jeopardy Clause, but I do not believe that the Court has followed the counsel of Mr. Justice Story in deciding this case as it has. It is possible, through the construction of a syllogism that is nothing if not mechanical, to decide that the Double Jeopardy Clause requires affirmance of the instant case: since *Downum* v. *United States,* 372 U. S. 734 (1963), held that jeopardy "attaches" when a jury has been selected and sworn, and since *United States* v. *Ball,* 163 U. S. 662 (1896), held that jeopardy had obtained even though the indictment upon which the defendant was first acquitted had been defective, therefore the Illinois trial judge's action in this case offended the Double Jeopardy Clause of the Fifth Amendment. But such a result is not only at odds with the broad latitude, and policy therefor, which the decision in *United States* v. *Perez, supra,* reserved to the trial judge in making such a determination, but it is at odds with far more recent decisions of this Court.

If the Court is not to make double jeopardy a mechanical concept, it must be of some importance that the challenge to the second trial in *United States* v. *Ball,*

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner,
v.
Donald Somerville.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We must here decide whether declaration of a mistrial over the defendant's objection, because the trial court concluded that the indictment was insufficient to charge a crime, necessarily prevents a State from subsequently trying the defendant under a valid indictment. We hold that the mistrial met the "manifest necessity" requirement of our cases, since the trial court could reasonably have concluded that the "ends of public justice" would be defeated by having allowed the trial to continue. Therefore the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), did not bar trial under a valid indictment.

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On March 19, 1964, respondent was indicted by an Illinois grand jury for the crime of theft. The trial was called and a jury impaneled and sworn on November 1, 1965. The following day, before any evidence had been presented, the prosecuting attorney realized that the indictment was fatally deficient under Illinois law because it did not allege that respondent intended to

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2nd DRAFT

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 1, 1973

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Somerville

The two cases held pending final disposition of Illinois v. Somerville involve discrete circumstances arising during trial that motivated the trial judge to declare a mistrial sua sponte or on motion by the prosecution. Wilson v. Maryland, 72-5308, involved a prosecution for breaking and entering. A witness had observed the defendant breaking into the storehouse and had told the police prior to trial that the defendant was the individual she had seen. This witness was called by the State, and she testified that although she saw a male at the scene and originally thought she recognized him, she could not say that the accused was that person. The prosecution claimed surprise and requested a mistrial. At this point the trial judge told a spectator, who had spoken to the witness prior to her testimony, to approach the bench; he said he spoke to the witness because she asked him the time. The trial judge then questioned the witness, who admitted that the spectator was the father of her grandson and said that she had asked him the time. The court recessed, with the trial judge ordering that no one speak with this witness and that she and another witness be sequestered pending decision on the prosecution's motion. When the court reconvened, the prosecution stated that the witness had told them that, on her way to court that morning, the spectator had approached her and asked what it would take for her to forget what she saw; fearful for her safety, she replied "$100," which the spectator gave her; she produced a $100 note. She admitted she had not told the truth. A voire dire was held, out of the presence of the jury, and defense counsel asked her why she had changed her story. At this point the trial judge interjected that he was concerned that the witness might incriminate herself. The trial judge then sua sponte declared a mistrial, reasoning that to allow the State to continue direct

examination, forcing the witness to recant her previous testimon could result in either the witness' self-incrimination of perjur or the defendant's inability to cross-examine effectively. On retrial, petitioner was convicted, the State court rejecting his claim of double jeopardy, stating that there was a manifest neces sity for the declaration of a mistrial. Under the "public justi approach of Perez and Somerville, this decision appears probably correct; for double jeopardy purposes, the mistrial was "caused" by the subornation of perjury for the benefit of the accused. I will vote to deny.

Cook v. United States, 72-169 involved a prosecution of 11 defendants for conspiracy to burglarize banks. On the third day of the trial, two jurors remained momentarily in the jury room while the marshal took the others to lunch. The two apparently saw the defendants in the hall, and the court "assumed" that some if not all were in handcuffs. When these facts were made known to the trial judge, he indicated that the episode constituted prejudice; four of the defendants moved for mistrials, but petitioner did not. The trial judge believed that the whole jury had been tainted, and that severance of those defendants who wished to proceed with the trial, including petitioner, was impractical. The trial judge did not factually determine that the two jurors who saw the defendants in handcuffs had relayed this observation to the other jurors; he rejected the defendants' motion that two alternative jurors be substituted. Of the two possible curative measures that might have been taken, the denial of the motion for separate trials for seven of the 11 defendants was discretionary; such determinations are appropriately made by the trial judge, and there is no showing that severance would not have been impractical in this case. Although the second curative measure -- substitution of alternative jurors -- might have provided a solution, to effectuate it the trial judge would have had to inquire whether the two jurors in fact relayed their observations to the other 10; not to make such an inquiry appears justified in this case, as the court probably felt that such a procedure would raise too many collateral suspicions or questions in the minds of the "untainted ten" jurors as to why two of their members were absent or why the trial had been interrupted, such as to divert their attemtion from the factual issues they were supposed to resolve.

The issues are factual, and involve the exercise of the trial judge's discretion. I recommend denial.

Sincerely,