The Burger Court Opinion Writing Database

United States v. Dinitz

424 U.S. 600 (1976)

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

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAR 5 1976

Recirculated: _____

No. 74-928 - United States v. Dinitz

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully with Mr. Justice Stewart's opinion for the Court. I add an observation only to emphasize what is plainly implicit in the opinion, i.e., a trial judge's plenary controlof the conduct of counsel particularly in relation to addressing the jury.

An opening statement has a narrow purpose and scope. It is to state what evidence will be presented and make it easier for the jurors to understand what is to follow and relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

A trial judge is under a duty in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct. Here the misconduct of the attorney, Wagner, was not only

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 11, 1976

RE: No. 74-928 United States v. Dinitz

Dear Potter:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 2/24/76

Recirculated: ____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–928

United States, Petitioner, *v.* Nathan George Dinitz.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, dissenting.

The Court's premise is that the mistrial was directed at respondent's request or with his consent. I agree with the Court of Appeals that, for purposes of double jeopardy analysis, it was not, but rather that, ". . . the trial judge's response to the conduct of defense counsel deprived Dinitz's motion for a mistrial of its necessary consensual character." 492 F. 2d 53, 59 n. 9. Therefore the rule that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution," *United States* v. *Jorn*, 400 U. S. 485, is inapplicable. Accordingly, I agree that respondent's motion, for the reasons expressed in the panel and en banc opinions of the Court of Appeals, did not remove the bar of double jeopardy to reprosecution in "the extraordinary circumstances of the present case, in which judicial error alone, rather than [respondent's] exercise of any option to stop or go forward, took away his 'valued right to have his trial completed by a particular tribunal.'" 504 F. 2d, at 855. I would affirm.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 3/26/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–928

United States, Petitioner, *v.* Nathan George Dinitz.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court's premise is that the mistrial was directed at respondent's request or with his consent. I agree with the Court of Appeals that, for purposes of double jeopardy analysis, it was not, but rather that, ". . . the trial judge's response to the conduct of defense counsel deprived Dinitz's motion for a mistrial of its necessary consensual character." 492 F. 2d 53, 59 n. 9. Therefore the rule that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution," *United States* v. *Jorn*, 400 U. S. 485, is inapplicable. Accordingly, I agree that respondent's motion, for the reasons expressed in the panel and en banc opinions of the Court of Appeals, did not remove the bar of double jeopardy to reprosecution in "the extraordinary circumstances of the present case, in which judicial error alone, rather than [respondent's] exercise of any option to stop or go forward, took away his 'valued right to have his trial completed by a particular tribunal.' " 504 F. 2d, at 855. I would affirm.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 3/3/76

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-928

United States, Petitioner, *v.* Nathan George Dinitz.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court's premise is that the mistrial was directed at respondent's request or with his consent. I agree with the Court of Appeals that, for purposes of double jeopardy analysis, it was not, but rather that, ". . . the trial judge's response to the conduct of defense counsel deprived Dinitz's motion for a mistrial of its necessary consensual character." 492 F. 2d 53, 59 n. 9. Therefore the rule that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution," *United States* v. *Jorn*, 400 U. S. 485, is inapplicable. Accordingly, I agree that respondent's motion, for the reasons expressed in the panel and en banc opinions of the Court of Appeals, did not remove the bar of double jeopardy to reprosecution in "the extraordinary circumstances of the present case, in which judicial error alone, rather than [respondent's] exercise of any option to stop or go forward, took away his 'valued right to have his trial completed by a particular tribunal.'" 504 F. 2d, at 855. I also agree with the holding in the panel opinion that "[i]n view of . . . [the] alternatives which would not affect the ability to continue the trial, we cannot say that there was manifest necessity for the trial judge's actions." 492 F. 2d, at 61. I would affirm.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: FEB 11 1976

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-928

United States, Petitioner, v. Nathan George Dinitz. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment was violated by the retrial of the respondent after his original trial had ended in a mistrial granted at his request.

I

The respondent, Nathan Dinitz, was arrested on December 8, 1972, following the return of an indictment charging him with conspiracy to distribute LSD and with distribution of that controlled substance in violation of 21 U. S. C. §§ 841 (a)(1), 846. On the day of his arrest, the respondent retained a lawyer named Meldon to represent him. Meldon appeared with the respondent at his arraignment, filed numerous pretrial motions on his behalf, and was completely responsible for the preparation of the case until shortly before trial. Some five days before the trial was scheduled to begin, the respondent retained another lawyer, Maurice Wagner, to conduct his defense. Wagner had not been admitted to practice before the United States District Court for the Northern District of Florida, but on the first day of the trial the court permitted him to appear *pro hac vice*. In addition to Meldon and Wagner, Fletcher Baldwin, a professor of

continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

The Court of Appeals viewed the doctrine that permits a retrial following a mistrial sought by the defendant as resting on a waiver theory. The court concluded, therefore, that "something more substantial than a Hobson's choice" is required before a defendant can "be said to have relinguished voluntarily his right to proceed before the first jury." [10] See 492 F. 2d, at 59. The court thus held that no waiver could be imputed to the respondent because the trial judge's action in excluding Wagner left the respondent with "no choice but to move for or accept a mistrial." *Ibid.* But traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error. See *United States* v. *Jorn, supra,* at 484–485, n. 11; *United States* v. *Jamison,* 164 U. S. App. D. C. 300, 305–306, 505 F. 2d 407, 412–413. In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial

[10] The brief *per curiam* opinion of the Court of Appeals en banc concluded:

"In order for a defendant's motion for a mistrial to constitute a bar to a later plea of double jeopardy, some choice to proceed or start over must remain with the defendant at the time his motion is made. The dicta from *United States* v. *Jorn* . . . does not encompass the extraordinary circumstances of the present case, in which judicial error alone, rather than defendant's exercise of any option to stop or go forward, took away his 'valued right to have his trial completed by a particular tribunal.'" 504 F. 2d, at 854–855 (footnote omitted).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1976

Re: No. 74-928 - United States v. Dinitz

Dear Potter:

I agree with your circulating opinion in this case.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 26, 1976

Re: No. 74-928 -- United States v. Nathan George Dinitz

Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 19, 1976

Re: No. 74-928 - United States v. Dinitz

Dear Potter:

Please join me.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 12, 1976

No. 74-928 United States v. Dinitz

Dear Potter:

Please join me.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 19, 1976

Re: No. 74-928 - United States v. Dinitz

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference