
Background to the 1988 Presidential Campaign

Dismissal of LaRouche indictments sought in Court of Appeals

Independent presidential candidate Lyndon LaRouche and other defendants have asked the U.S. Court of Appeals for the First Circuit in Boston to dismiss the indictments against them on grounds that a retrial would violate the U.S. Constitution's prohibition against double jeopardy.

The case ended in a mistrial on May 4, after 92 days of proceedings.

In their appeal brief filed Sept. 23, the LaRouche defendants accused District Judge Robert Keeton of erroneously ruling that a retrial could take place. Argument on the appeal is scheduled for Oct. 5. Following are excerpts from the defense's appeal brief.

Statement of the case

This is an interlocutory appeal from the District Court's denial of defendants' dismissal motions on double jeopardy grounds. After 92 days of trial, only 47 of which the jury actually heard testimony, the District Court declared a mistrial when its excusal of five jurors on hardship grounds rendered the pool of jurors inadequate to proceed. The hardships were caused by prosecutorial misconduct. As a result of the misconduct, the trial was longer at its half-way point than the entire trial was originally represented to be.

The District Court, in refusing to dismiss the indictments, erroneously placed the burden of proof for demonstrating there was no manifest necessity of a mistrial on defendants. Moreover, the District Court ignored the fact that the delays which gave rise to the juror hardships were due entirely to the prosecutor's conscious withholding of relevant evidence and information. Instead, the lower Court asserted its opinion that the mistrial was "foreordained" and masked that opinion in an erroneous and unsupported "conclusion of fact." Given the District Court's error and the enormous burdens upon the defendants which have already been incurred, this Court should conduct a plenary review of the record and thereafter, dismiss these indictments.

A. Procedural history

A grand jury returned the original indictment in this case on Oct. 6, 1986. That indictment charged 10 individuals, two 1984 political campaign entities, two non-profit corporations and a membership association with a credit card and loan fraud scheme and a conspiracy to obstruct the grand jury's investigation of that allegedly fraudulent scheme. In December 1986, a superseding indictment expanded the indictment to include three more individual defendants, additional credit card and loan fraud counts and a count of criminal contempt of the U.S. District Court. In June 1987, the principal target of the entire investigation—Lyndon H. LaRouche, Jr.—was added in a Second Superseding Indictment.

In the course of pretrial proceedings, a number of severance motions were filed. By agreement of the government, three individual defendants (Greenspan, Black, and Billington) were severed and their trials are still pending. Among other severance motions, all defendants sought severance from defendant Frankhauser on grounds of prejudicial joinder and inconsistent defenses. Those motions were opposed by the government and denied by the Court.

In late September 1987, jury selection commenced. A jury questionnaire was used to aid in early detection of bias or other reasons for excusal. To uncover hardships of potential jurors, the questionnaire included representations that the trial would last "three months or substantially longer." After nearly three weeks of screening, 12 jurors and four alternates were selected and empaneled on Oct. 19, 1987, with opening arguments scheduled to commence the next day.

Immediately after empanelment, defendants renewed their motions to sever from Frankhauser. This time, however, the prosecutor changed his position: He no longer opposed severance, but agreed to sever Frankhauser and try him alone first. The court granted the severance and proceeded with the separate trial.

The Frankhauser trial ended on Dec. 10. At a status call

on that day, the prosecutor represented that the case would last four to six months. On Dec. 14, the Court represented to the jury his estimate that the trial would last six months.

On Dec. 17, 1987, trial commenced against seven individual defendants and five entity defendants.

During the first weeks of trial, the jury was told the case would last six months and that it would be over by mid-July or by the late summer in any event.

On Feb. 23, day 55, the prosecutor disclosed to defense counsel for the first time FBI interview reports (302s) on a listed government witness (Emerson) who was also an informant. The disclosure was required, by agreement, to have been made pre-trial. Defendants immediately protested that the disclosures not only breached agreements with the prosecutor and violated the demands of *Brady v. Maryland*, but also contradicted two of the prosecutor's central theories of the case: The Emerson documents supported defendants' contention that their notebooks were mere reportage (rather than inculpatory references to the conspiracy as the prosecutor would have it) and that they did not act, when they acted, with the specific "corrupt intent" to obstruct justice. Though the trial continued from Feb. 23rd through the 26th, colloquies were conducted outside of the jury's presence regarding the prosecutor's conduct and its implications without the Court determining what to do about it. . . .

Argument

In presenting their double jeopardy claim to the District Court, the defendants demonstrated that the proper focus of the Court's attention was the question of whether the mistrial was declared as a result of "manifest necessity." See *United States v. Perez*, 9 Wheat. 579 (1824). Accepting that standard for the purposes of its decision, the District Court attempted to resolve the question by making reference to a previously entered finding of fact. The Court's Memorandum and Order of Aug. 11, 1988 states:

I need not decide whether the government's misconduct in this case is the type that, if it caused a mistrial, could be considered as having a bearing upon "manifest necessity," because I have found as a fact that the government misconduct in this case did not cause or in any way contribute to causing the mistrial. As stated in finding number 155 of the Findings of Fact filed on Aug. 10, 1988:

Even if there had been no violation of disclosure obligations and no hearing to determine the scope and effect of any violation, a mistrial would have been necessary. I had been foreordained by the fact that the length of the case drastically exceeded the expectations of the court and the jury at the time of jury selection. The discrepancy between the court's expectations regarding the length of the trial at the time of jury selection and the court's expectations by May 2, 1988

was greatly increased by defendants' strategy of defense which was quite properly withheld from the court by defense counsel at the time the court required disclosures from the government and invited (but did not require) disclosures from defense counsel in order to determine what the jury panel should be told about the length of the trial during jury selection. App. I.6-7.d (Memorandum and Order, Aug. 11, 1988, pp. 6-7)

Thus the District Court's determination of the double jeopardy issue turns on a finding of fact. But that finding of fact was made in a context entirely unrelated to the double jeopardy inquiry, and under an entirely different, and, as applied to double jeopardy questions, completely inappropriate burden of proof. As finding number 155 itself makes clear, the finding was made in the context of determining the scope of potential remedies for the government misconduct and violations of disclosure obligations in the Emerson affair. In such hearings, it has always been the case that the defendant has borne the burden of proving the appropriateness of a remedy. Once the disclosure violation has been shown, the burden is on the defendant to show prejudice.

Finding of Fact number 155 merely expresses the Court's view that the defendants did not meet their burden of proving that they were prejudiced by the government misconduct in the loss of jurors which resulted in the mistrial.

In the context of a constitutional claim of double jeopardy however, the allocation of the burden of proof is precisely the opposite. Once the defendant has demonstrated a non-frivolous *prima facie* double jeopardy claim, the burden shifts to the government to demonstrate facts which show the double jeopardy clause is not a bar to reprosecution. . . .

Thus, where the manifest necessity determination turns on a question of fact, the government has the burden of proof. The government bears the "heavy burden" of showing that "taking all the circumstances into consideration," the mistrial was manifestly necessary. It was an error for the trial court to decide the factual crux of the double jeopardy question by simply importing a finding of fact made under a different and opposite burden of proof.

Where the District Court erroneously shifted the burden of proof, this Court, rather than remand, should conduct its own examination of the record to determine whether the government has met its burden of showing the manifest necessity of this mistrial. . . .

A. The mistrial was not foreordained

A plenary review by this Court of the record does not permit a finding that the government has sustained its burden of proving that a mistrial would have occurred in the absence of government misconduct. Without the suspension of the jury trial from early March until early May, the government

cannot establish that a mistrial was "foreordained." The record reveals the contrary. Based on the pace of trial, estimates of the prosecutor and Court, and the nature of the juror hardships, completion was likely by mid-July. To determine whether the government has sustained its burden of proving that a mistrial was foreordained, this court should look to the time estimates made and evaluate whether the trial could have been completed by mid-July, in the absence of delay.

At the very outset of the trial in mid-December, the District Court represented to the jury that the length of trial would be six months. It arrived at this conclusion by taking the prosecutor's estimate of direct testimony, multiplying by two for cross-examination, and adding 50 percent to this total as a margin of error.

In mid-February, prosecutor Rasch told the Court that after some 30 witnesses had testified, that the government's case was four to five days behind schedule, but that some of the testimony already elicited would make some future witnesses unnecessary. At that point, the credit card portion of the case was over and a substantial portion of evidence regarding organizational structure, the state of mind of defendants, and evidence relating to the government's theory of the motive for the conspiracy to obstruct justice, had been completed. The remaining testimony involved the specific overt acts of the conspiracy alleged, and no more than four or five witnesses relative to a charged loan fraud scheme. The clear inference of prosecutor Rasch's statements was that the government's case was either on schedule or ahead of schedule.

Moreover, it was just at this point in the trial, March 7, that the District Court implemented its new, expanded trial schedule, including a significantly longer time during each trial day for the jury to hear evidence. The District Court's projected calendar ended on July 15, at a time it is fair to infer, when the Court anticipated the case would be at or near completion. For the few days in March that the jury heard testimony, the expanded schedule was in effect. Particularly given this expanded schedule, had there been no jury trial suspension, the trial would have been well into its final stages (the conspiracy and loan fraud counts) by early May and there would be good reason to believe the trial would be over by mid-July.

This conclusion is supported by three additional considerations. First, the last government witness list, submitted just prior to jury suspension, makes it clear that the trial would be completed by July. The government's original witness list was paired down at the commencement of trial. On March 14, Markham submitted an even shorter witness list with his estimates of direct testimony. Based on this witness list, and applying the District Court's formula of multiplying the estimates for direct testimony by two and adding 50 percent, the trial would have been over by the second week in July. . . .

Thus, the District Court's statement that the length of the trial was "foreordained to last more than a year for reasons

independent of any government misconduct" (App. I.9) is wholly unwarranted. That statement is no more than an arbitrary opinion masked as a factual finding. The "independent reasons" the trial was "foreordained to last more than a year" are never disclosed because there were none. If anything, the record supports a conclusion that in the absence of the delays caused by misconduct, the trial would have more probably than not been concluded by mid or late July. . . .

Therefore, in reviewing this record, subjecting it to the strictest scrutiny and applying the correct burden of proof, this Court must immerse itself in the world of governmental misconduct, overreaching, misrepresentation and deceit, as revealed in the Emerson hearings, which underlay the unnecessary hiatus of the jury trial and the resultant loss of jurors due to hardship. None of the misconduct in this case is immune from this court's review.

As demonstrated below, that review will compel the conclusion that the government bears the responsibility for this mistrial and that the mistrial itself was under all the circumstances manifestly unnecessary. . . .

In applying the balance to the present case, the weight of the defendants' interest cannot be overestimated. The defendants were forced to endure a cumulative total of over 100 days in detention, 92 days of trial, weeks of delay devoted to examining the scope of the governmental misconduct in the Emerson affair. The defendants incurred massive legal fees and costs. Ten attorneys, including four out-of-state attorneys, were necessary for nearly a year of pre-trial proceedings and six months of trial. The defendants lost the benefit of a jury they had every reason to believe would exonerate them. Enormous resources were expended, and as a result of the mistrial, wasted. It is obvious that the more deeply into the trial the mistrial is declared, the greater the defendants' interests weigh in the balance.

On the other hand, the governmental misconduct here not only undermined the defendants' interests, but the general societal interests in fair trials and just judgments as well. From the beginning, the government used its superior position to withhold exculpatory evidence, and on that basis, to freely mischaracterize evidence to the jury without fear of contradiction. . . .

This case demonstrates one of the chief evils the Double Jeopardy Clause was meant to protect against. At the heart of the clause is the notion that the government should have but one fair chance to put its evidence before the trier of fact in search of a conviction:

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 continued state of anxiety and insecurity, as well as enhancing the pos-

sibility that even though innocent he may be found guilty. *Green v. United States* 355 U.S. 184, 187-188 (1957).

Thus the courts have singled out for special condemnation those cases where a mistrial, declared as a result of governmental misconduct, has the tendency to operate as a "post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case."

That is precisely how the prosecutor views this mistrial (caused by his own misconduct): a post-jeopardy continuance to strengthen his case. He forthrightly admitted that on retrial he would try a different case. This Court should strongly disapprove such a blatantly prejudicial manipulation of the judicial process and attempted impoverishment of the defendants' double jeopardy interests. . . .

. . . [T]his Court must examine the conduct of the prosecution from the inception of this case to the present, and consider whether the numerous discovery violations, Brady violations, ethical violations, misrepresentations, and other misconduct already detailed in this brief demand the finding that the prosecutor knew or should have known that the delay caused thereby was substantially certain to provoke a mistrial. If so, the Court must reverse the ruling of the District Court.

That inference of culpable prosecutorial intent is compelling in this case. Unlike circumstances which have given rise to findings of excusable inadvertence, negligence or misunderstanding, the prosecutor's misconduct here has been deliberate and pervasive. The prosecutor's action before, during and even after the trial—when he conceded he would try a different case on his second effort—compel the conclusion that he knew or should have known that were his conduct uncovered a mistrial would result. That consciousness of wrongdoing is supported by Mr. Markham's repeated misrepresentations as to the expected length of the trial. Those misrepresentations, consistently unrealistic even in the face of the District Court's overt skepticism, point to Mr. Markham's hope that he would not be exposed and that, in the absence of discovery, the trial, played out on a tilted field, would end in the time he predicted. Given the set of circumstances here presented and as they painstakingly unfolded, Mr. Markham is chargeable with the foreseeable consequences of his malfeasance—that hardships would inevitably surface before the end of the trial as a direct result of his denouement. The prosecutor should have been charged with knowledge that his misconduct was certain to cause a mistrial, and the District Court's failure to do so was clearly erroneous.

Conclusion

For all the above reasons, this Court should reverse the ruling of the District Court denying the defendants' motion to dismiss on grounds of double jeopardy, and order the indictment dismissed with prejudice.



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