Can And Should A Court Limit Repeated Retrials?

By **Steven Gordon** (May 16, 2022)

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It made headlines when a federal prosecution of chicken industry executives for alleged price-fixing resulted in mistrials in December and again in April after juries were unable to reach a verdict as to any of the 10 defendants.

It made more headlines when, following the second hung jury, the U.S. Department of Justice announced that it was dropping charges against five defendants but intended to proceed with an extraordinary third trial against the five remaining defendants. The case is U.S. v. Penn in the U.S. District Court for the District of Colorado.

U.S. District Judge Philip A. Brimmer summoned DOJ Antitrust Division chief Jonathan Kanter to appear before him and personally explain why a third trial is warranted. At that hearing, the judge said he would not bar a third trial as a violation of due process, but he urged the DOJ to consider whether another trial is justified under its own prosecution standards, which require a dispassionate determination that the evidence is sufficient to obtain a conviction.

The DOJ remained adamant about proceeding and so the third trial is now scheduled for June.

These events raise the question of whether there is, or should be, some limit on the number of retrials following hung juries. Do federal courts have the authority to preclude a retrial and, if so, at what point?

Framing the Issue

Hung juries are unusual. The classic 1966 study, "The American Jury," found a hung jury rate of 5.5% in a sample of over 3,500 criminal trials. A 1999 analysis of federal and state courts placed federal criminal hung jury rates between 2% and 3% over the period of 1980 through 1997.[1]

A hung jury does not necessarily result in any retrial. If the evidence was thin and/or the offense is not especially serious, the prosecutor may decide not to retry the case or may offer an attractive plea to dispose of it.

When prosecutors do decide to try a case a second time, they generally are successful. Most retrials result in a conviction. As former prosecutor Melba Pearson noted, "Usually the second time around it gets better for the prosecution. You're presenting the same evidence, you kind of know what worked and what didn't."[2]

Trying a case a third time, after two hung juries, is quite rare. And it is usually the limit. "There's an unspoken rule that three times is sort of the max," according to former New York City prosecutor and law professor Hermann Walz. "After three, most prosecutors decide that the evidence simply isn't there."[3]

Multiple trials impose significant costs on the parties, the court and the public. These costs include taxpayer dollars, the court's time, jurors' time and stress on victims, witnesses and

their families.

Multiple trials also place stress on defendants who must run the same gauntlet repeatedly with their liberty at stake. And the financial burden on defendants who are paying for their own defense can be crushing.

On the other hand, society has a significant interest is holding offenders accountable for their crimes in order to punish them, deter others and protect the community. This interest must be weighed against the costs of multiple trials and a balance struck.

Generally, cases that are tried a third time involve the most serious offenses, such as murder, where there is a strong public interest in convicting and punishing the offender and a concern about protecting the public from a potentially dangerous criminal.

But the offense at issue here is a nonviolent, regulatory offense. Former antitrust enforcers say it is unprecedented for the Antitrust Division to try a case a third time after two hung juries. "I'm not aware of any precedent for a third attempted trial in a criminal antitrust case — ever," said Eric Grannon, a White & Case LLP attorney and former counsel with the DOJ Antitrust Division.[4]

The Applicable Law

The U.S. Constitution theoretically places some limit on the number of retrials. Although the double jeopardy clause is not violated by a retrial following a hung jury,[5] the U.S. Supreme Court stated in Bartkus v. Illinois in 1959 that "at some point the cruelty of harassment by multiple prosecutions by a state would offend due process."[6] Thus, the government has acknowledged that successive trials could become so onerous and burdensome that they rise to the level of a due process violation.[7]

However, a due process violation based on successive retrials would require exceptional circumstances, and no federal case has ever found such a violation. Judge Brimmer conceded that a third trial in the chicken case would not violate due process.

Apart from the Constitution, there is no limit on the number of retrials that is imposed by statute or rule. Federal Rule of Criminal Procedure 31(b)(3) provides: "Mistrial and retrial. If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree."

The U.S. Court of Appeals for the Third Circuit held that this rule places no limits on the number of retrials in U.S. v. Wright in 2019: "The word 'may' means that the government has the discretion to retry a case, and nothing in the rule or its commentary provides or even suggests a limit on the number of retrials it may conduct."[8]

A few federal district courts have concluded that they have inherent authority to preclude multiple mistrials following hung juries. In U.S. v. Wright, the Third Circuit became the first federal appellate court to address this issue.

In that case, the district court had invoked its inherent authority to preclude a third trial of a defendant charged with being a felon in possession of a firearm. The Third Circuit reversed in a fractured 2-1 decision that illuminated divergent views among the panel.

The majority opinion ruled that, under separation-of-powers principles, "a court may

dismiss an indictment based upon its inherent authority only if the Government engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice."[9]

It was undisputed that there had been no prosecutorial misconduct in that case, and the majority perceived no prejudice to the defendant "simply because he faces the anxiety and the normal stress of undergoing a[nother] trial."[10]

But the second member of the majority, in a separate concurring opinion, took a less categorical position. U.S. Circuit Judge Theodore McKee asserted that "a District Court can step in at some point and bar a retrial without infringing on the separation of powers."[11] Nonetheless, he "simply d[id] not believe that the current state of the law supports [dismissal] in the absence of prosecutorial misconduct, bad faith, or more than two unsuccessful trials."[12] Notably, this formulation suggests that a district court might be able to bar a fourth successive trial.

The dissent reasoned that courts have inherent authority to end a case. "A court, by its nature, must be able to dismiss with prejudice actions brought before it, just as it must have the power to decide cases and enter judgments."[13]

Conversely, after two full and fair opportunities to present its case, the government had no absolute right to try again. The separation of powers does not require federal courts to "automatically defer to a prosecutor's decision to retry a defendant in this situation."[14]

The dissent added that prosecutorial misconduct is not a prerequisite to a court's exercise of its inherent authority. Although many of the precedents have involved misconduct, "courts may use their inherent authority to dismiss indictments whenever necessary to vindicate 'principles of fairness to the defendant and the interests of the public in the effective administration of justice.'"[15]

Analysis

There is no debate among criminal practitioners that prosecutors generally are entitled to pursue one retrial following a hung jury. Likewise, most practitioners agree that two retrials is the practical limit. Thus, the issue centers on whether and when the government should be able to pursue a second retrial.

This issue was addressed in 2010 by the England and Wales Court of Appeal in R v. Bell, a decision that upheld a conviction for murder, following a third trial. Lord Chief Justice Igor Judge cautioned that

> A second retrial should be confined to the very small number of cases in which the jury is being invited to address a crime of extreme gravity which has undoubtedly occurred (as here) and in which the evidence that the defendant committed a crime (again, as here), on any fair minded objective judgment remains very powerful.[16]

This observation strikes to the heart of the matter.

The existing state of U.S. law on the issue of repeated retrials is neither settled nor satisfactory. The limit imposed by the constitutional guarantee of due process — which the court administers — exists in theory only. This means that there is no limit in the real world. As the Third Circuit majority concluded, "absent constitutional concerns, the decision to try or retry a case is at the discretion of the prosecutor."[17]

It hardly seems fair or wise to leave this decision to the unbridled discretion of the prosecutor. Although most prosecutors exercise sound judgment, it is desirable that the neutral court should have a voice in deciding when the real world limit has been reached.

However, reliance on the court's inherent authority to achieve this result, as the Third Circuit dissent advocates, presents its own set of problems. The concept of inherent authority is subject to abuse and does not include standards on its exercise. If the court is to play a role, it is desirable that it do so pursuant to an explicit grant of authority and an established standard.

One way of addressing these concerns might be an addition to Rule 31(b)(3) that provides: "Another retrial on any count on which the jury again could not agree may proceed if the court finds that it is in the interest of justice given the gravity of the offense and the strength of the evidence."

Meanwhile, the DOJ should develop and publish a standard for exercising its discretion on this issue. In England and Wales, for example, the Crown Prosecution Service has published guidance that states: "There is a presumption that the prosecution will seek a re-trial where a jury fails to agree on a verdict at the first trial" but that "where two juries fail to reach a verdict, the presumption is that the prosecution will not seek a third trial unless there are exceptional circumstances."[18] The latter presumption correctly channels decision making on this issue.

Unfortunately, the DOJ currently has no official policy on retrials following hung juries, and most federal courts believe they lack authority to weigh in on the issue, other than to jawbone the government as Judge Brimmer attempted without success. This leads to the unfortunate spectacle of a third trial in a case that does not warrant it.

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[1] William S. Neilson & Harold Winter, The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts, International Review of Law and Economics 25 (2005) at 1-2.

[2] Parker Yesko, How can someone be tried six times for the same crime?, APM Reports (May 1, 2018), https://www.apmreports.org/story/2018/05/01/how-can-someone-be-tried-six-times-for-the-same-crime.

[3] Id.

[4] Matthew Perlman & Bryan Koenig, Despite 2 Mistrials, DOJ Won't Say Chicken Case Is Done, Law 360 (March 31, 2022).

[5] Richardson v. United States, 468 U.S. 317, 324 (1984).

[6] Bartkus v. Illinois, 359 U.S. 121, 127 (1959).

[7] See United States v. Wright, 913 F.3d 364, 387 (3d Cir. 2019) (McKee, J., concurring).

[8] Id. at 370 (majority opinion).

[9] Id. at 371.

[10] Id. at 372.

[11] Id. at 387.

[12] Id.

[13] Id. at 381.

[14] Id. at 382 (internal quotation and citation omitted).

[15] Id. at 384.

[16] R v Bell [2010] EWCA Crim 3.

[17] United States v. Wright, 913 F.3d at 374.

[18] https://www.cps.gov.uk/legal-guidance/retrials.