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Circuit Bars Retrial of Two Defendants, Finds Mistrial Decision Was Premature

[By Mark Hamblett](#)

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A federal judge's hair-trigger declaration of a mistrial without polling the jury means the government is now barred by double jeopardy from retrying two white-collar defendants.

In what lawyers for the two men say is an unprecedented decision, the U.S. Court of Appeals for the Second Circuit in [United States v. DeGennaro](#), 06-4195-cr, said yesterday that Eastern District Judge Leonard Wexler abused the considerable discretion given judges for declaring a deadlocked jury.

The decision will be published Friday.

The ruling is a victory for Michael DeGennaro and Frank Borghese, who were among a group of senior executives at Symbol Technologies, a Long Island bar code scanning company, accused of fraudulent accounting practices and other misconduct designed to boost Symbol's stock price over a five-year period.

Second Circuit Judges Roger Miner and Robert Katzmann were joined by Judge J. Garvan Murtha of the U.S. District Court for the District of Vermont, sitting by designation, in deciding the appeal. Judge Katzmann wrote for the panel.

Mr. DeGennaro and Mr. Borghese faced just two counts each — securities fraud and conspiracy to commit securities fraud. But they were tried along with Kenneth Jaeggi, the former chief financial officer, who faced 23 counts. The trial began Jan. 6, 2006, and lasted six weeks.

Late during the third day of deliberations, the jury sent Judge Wexler a note reading, "Judge, We are at a deadlock. We have exhausted all our options. This has been going on since Thursday. P/S - We are ready to go home today. Thank You."

After the jury left, counsel for Mr. Jaeggi moved for a mistrial. Mr. DeGennaro's counsel, Michael S. Sommer of McDermott Will & Emery, said that, before he made a similar application, it might be a good idea for the judge to poll the jury.

Mr. Borghese's counsel, [Brad Simon of Simon & Partners](#), said, according to the trial transcript, that he "would ask for a mistrial," but the circuit ruling says Mr. Simon also claims he said he would join in Mr. Sommer's motion to poll the jury and see if they had reached a verdict on any of the defendants.

The government opposed polling the jury.

Judge Wexler declared a mistrial, and he stuck by his decision despite repeated requests from Mr. Sommer and [Mr. Simon](#) to reconsider. The circuit said Judge Wexler apparently believed the two lawyers had wanted a mistrial, when in the attorneys' view, that outcome would be conditioned on polling the jury.

With the mistrial declared, the lawyers learned that the jury had acquitted both of their clients on both counts against them, and that the panel's deadlock note only related to Mr. Jaeggi.

Mr. Sommer said yesterday that research in advance of appellate arguments revealed that the case was unique.

"When we sat down to write the brief, there was no prior decision by the Second Circuit in which they have found a declaration of a mistrial on the basis of hung jury" barred a retrial on double jeopardy

grounds, Mr. Sommer said.

In the circuit panel's opinion, Judge Katzmann said, "We grant particularly broad discretion in reviewing the determination by a trial judge that there is manifest necessity for a mistrial due to a genuinely deadlocked jury."

The trial judge is in the best position to assess the situation, he said, which forces the circuit to make a fact-intensive inquiry into statements made by the jury that it cannot agree, the length and complexity of the trial, the amount of time the jury has deliberated, "the impact that other, forced deliberations might have on a possible verdict," and, finally, "what actions the trial judge took prior to declaring a mistrial to help it determine whether the jury was genuinely deadlocked."

"Applying these considerations to this record," Judge Katzmann said, "we are not persuaded that the jury was genuinely deadlocked when the trial court declared a mistrial."

Alternative Actions

Judge Wexler could have taken "a number of actions" short of declaring a mistrial, including polling the jury, instructing it to continue deliberating, and instructing it on the possibility of reaching a partial verdict.

"The failure to pursue any of the alternatives also sets this case apart from other cases where we have upheld trial courts' determinations to declare a mistrial due to a genuinely deadlocked jury," he said.

And because Judge Wexler did not elaborate on his reasoning and offered no "further insight" in his post-trial opinion, "we are unable to satisfy ourselves that the trial judge exercised 'sound discretion' in declaring a mistrial," Judge Katzmann said. "We therefore conclude that the protections afforded by the Double Jeopardy Clause bar the retrial of DeGennaro and Borghese."

If a defendant moves for or consents to a mistrial, the judge said there is usually no double jeopardy bar. But this was a not a normal case.

"While the record indicates that Borghese initially joined in Jaeggi's motion, within seconds of the trial court declaring a mistrial, Borghese stated that he joined in DeGennaro's request that the jury be polled before any decision on the mistrial was finalized," he said. "We view the immediacy with which Borghese clarified his position as significant."

The mistrial was declared quickly, and, after it was declared, "the parties were still trying to come to grips with what had taken place and to figure out their positions," he said, adding that the government asked the court to hold off for a few minutes so prosecutors could consult with their superiors.

Judge Katzmann noted that Mr. Borghese's "change of position also had a legal significance - the decision to declare a mistrial is not irreversible until the jury has been discharged."

Mr. Sommer said yesterday, "We are thrilled the Second Circuit's decision bars the retrial and thereby honors the jury's unanimous decision that Michael DeGennaro was innocent. We were troubled that the government did not respect the jury's view of the evidence and instead sought to retry Mr. DeGennaro on the basis of the trial judge's error. The circuit's decision puts an end to that effort."

Mr. Simon said yesterday's ruling was "a big decision."

"We could not find a single case in any circuit where the trial court declared a mistrial without doing any inquiry whatsoever," Mr. Simon said, adding that the circuit had "corrected what we consider a grave miscarriage of justice."

Robert Nardoza, a spokesman for Eastern District U.S. Attorney Roslynn Mauskopf, declined to comment on the ruling except to say the office was going to conduct a "careful review" of the decision.

Having moved for a mistrial, Mr. Jaeggi waived any argument he might have had on double jeopardy grounds. He is subject to retrial.

- *Mark Hamblett can be reached at mhamblett@alm.com.*