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Recent Developments: Apostoledes v. State: Murder Retrial Not Barred by Double Jeopardy Where First Trial Resulted in Conspiracy Acquittal and Jury Deadlock

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Apostoledes v. State: **MURDER RETRIAL NOT BARRED BY DOUBLE JEOPARDY WHERE FIRST TRIAL RESULTED IN CONSPIRACY ACQUITTAL AND JURY DEADLOCK.**

In *Apostoledes v. State*, 593 A.2d 1117 (Md. 1991), the Court of Appeals of Maryland allowed the retrial of a defendant charged with murder committed by a principal in the second degree, even though her previous trial had resulted in an acquittal as to the conspiracy charge and a jury deadlock as to the second degree murder charge. The defendant, Marie Apostoledes, asserted that her prior acquittal barred a retrial for reasons based upon established double jeopardy grounds and the recent United States Supreme Court holding of *Grady v. Corbin*, 110 S. Ct. 2084 (1990).

While at his home in 1988, Stephen Apostoledes received three gunshot wounds to the head that resulted in his death. The victim's wife, Ms. Apostoledes, and her son, John Lacey, were also present in the home at the time of the shooting. Following the shooting, both Ms. Apostoledes and her son were charged in connection with the murder. John Lacey pled guilty to second degree murder. The State brought a four count indictment against Ms. Apostoledes, charging her with: (1) first degree murder including the lesser included offenses of second degree murder and manslaughter, (2) conspiracy to commit murder, (3) unlawful use of a handgun in the commission of a felony, and (4) accessory after the fact to murder.

At trial, the State presented evidence that after the shooting, Ms. Apostoledes waited approximately one hour before calling 911, thereby allowing her husband to bleed to death. The State also produced two key witnesses, the first of whom testified that he heard pinging sounds shortly after leaving the house and the room in which both Ms. Apostoledes and the victim were located. The State's second witness, Lacey's girlfriend, testified that she had confronted Ms. Apostoledes regarding her involvement in the shooting. Ms. Apostoledes neither denied nor commented on the accusation. Lacey's girlfriend also testified that Ms. Apostoledes had stated that she did not love her husband and wished he were dead. At the close of all evidence, the judge acquitted Ms. Apostoledes on the charges of conspiracy and accessory after the fact. The jury could not reach a verdict on the two remaining counts of murder and unlawful handgun use. The court, therefore, granted a mistrial.

The State subsequently moved to retry Ms. Apostoledes. Before the second trial, Ms. Apostoledes moved to dismiss the indictment for second degree murder arguing that a retrial would be violative of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *Apostoledes*, 593 A.2d at 1120. The circuit court denied her motion to dismiss and stayed proceedings until review by the Court of Special Appeals of Maryland . After the court of special appeals affirmed the circuit court's decision, the court of appeals granted certiorari.

In the course of her appeal, Ms. Apostoledes contended that a second trial was barred by three forms of double jeopardy: former jeopardy/ acquittal, collateral estoppel, and the " same conduct" test derived from the recent United States Supreme Court decision of *Grady v. Corbin*. *Apostoledes*, 593 A.2d at 1120, 1123.

The court of appeals began its analysis by first examining Ms. Apostoledes's argument that former jeopardy/acquittal barred retrial. The court agreed that under former jeopardy/acquittal, Ms. Apostoledes could not be retried if the two charges were found to be the same offense. However, the court determined that conspiracy and murder by a principal in the second degree were not the same offenses. The court stated, " [t]he gist of a conspiracy is an agreement between two persons to commit a crime." *Id.* at 1120.

The court emphasized that for the crime of murder committed by a principal in the second degree, there need not be proof of an agreement as in the case of a conspiracy. Rather, the court held that there must be proof that the defendant " was present and aided, counseled, commanded, or encouraged the commission of the murder." *Id.* Because Ms. Apostoledes could have aided Lacey in the murder without any agreement, the court concluded that " neither an acquittal nor a conviction of a conspiracy is a bar to a prosecution for the commission of that crime or for aiding or abetting another to commit it." *Id.* at 1121 (quoting *Gilpin v. State*, 121 A. 354, 356 (Md. 1923)).

The court further found that the retrial was not barred for collateral estoppel reasons resulting from Apostoledes's acquittal on the conspiracy charge. For collateral estoppel to apply, the court reasoned that the two criminal charges must have had a common, necessary factual component. 593 A.2d at 1121 (relying on *Ash v. Swenson*, 397 U.S. 436 (1970)). The court noted that collateral estoppel focuses on what the factfinder did find or must have found. 593 A.2d at 1121 (citing *Ferrell v. State*, 567 A.2d 937, *cert. denied*, 110 S. Ct. 3301 (1990)).

The court reviewed the comments of the trial judge who emphasized that an individual can be acquitted for conspiracy but still found guilty of murder in the second degree by aiding and abetting. The court agreed that the acquittal on the conspiracy count was not based on the State's failure to prove a fact that was an essential element of murder and thus, collateral estoppel did not apply. 593 A.2d at 1122.

The court of appeals also reviewed the most recent double jeopardy defense by interpreting *Grady v. Corbin*. 593 A.2d at 1123-24. Under the " same conduct" test in *Grady*,

Apostoledes argued that the State would be precluded from a retrial because to do so would force the State to prove conduct for which she was previously tried. *Id.* at 1123. However, the court of appeals stated, " [n]owhere in its opinion did the *Grady* Court suggest that the Double Jeopardy Clause protects against multiple trials when one or more counts are left unresolved following an initial trial due to jury deadlock, the grant of a new trial, or reversal on appeal." *Id.* at 1123. The court asserted, rather, that the holding in *Grady* applied to cases in which the State failed to bring and join for trial all charges arising from a single episode in a single proceeding. By initially bringing all criminal charges against Ms. Apostoledes in a single proceeding, the State conformed exactly to *Grady*'s new double jeopardy " same conduct" test, thereby avoiding the double jeopardy problems at issue in *Grady*. *Id.*

Judge McAuliffe concurred in the ruling with the exception of the majority's interpretation of double jeopardy in *Grady*. He opined that the Supreme Court did not limit *Grady* to successive prosecutions only, but may have intended it to apply to multiple punishments as well. Finding the *Blockberger* " same offense" test a rather sterile approach, McAuliffe stated, " [t]he *Grady* modification utilizes a case-oriented approach, adding flesh to the bare bones of each essential element the conduct used to prove that element, and then comparing the list of elements so defined." *Id.* at 1124 (citing *Blockberger v. United States*, 284 U.S. 299 (1932)). He concluded, though, that even if *Grady* did apply to multiple punishments, the result in this case would not have changed because conspiracy and murder are not the same offense. 593 A.2d at 1126.

In its review of double jeopardy challenges, the court ruled that former jeopardy/acquittal, collateral estoppel, and the recent *Grady* " same conduct" test did not preclude the State from retrying the case for second degree murder despite a prior conspiracy acquittal. This decision is significant as it gives the State the opportunity for a retrial in cases of acquittal or jury deadlock and provides insight into how *Grady* should be interpreted.

- Karl Phillips

Chisom v. Roemer: JUDICIAL ELECTIONS COVERED WITHIN MEANING OF " REPRESENTATIVES" IN VOTERS' RIGHTS ACT.

The Supreme Court of the United States settled a statutory interpretation conflict among federal courts of appeals in deciding *Chisom v. Roemer*, 111 S. Ct. 2354 (1991). In *Chisom*, the Supreme Court held that the use of the term " representatives" in the Voters' Rights Act of 1965, as amended in 1982, covers judicial elections as well as legislative elections. This holding overturned the interpretation of Section 2 by the United States Court of Appeals for the Fifth Circuit.

The petitioners in *Chisom* represented a class of approximately 135,000 African-American registered voters in Orleans Parish, Louisiana. The petitioners brought their suit against various state elected officials challenging the electoral process of judges to the Supreme Court of Louisiana.

The Supreme Court of Louisiana consists of seven members. Two are elected from one multi-member supreme court district. The remaining five members are elected in single-member supreme court districts. The one multi-member district consists of four parishes, one of which is the Orleans Parish. In the Orleans Parish more than one-half of the registered voters are African-American, whereas three-fourths of the registered voters in the other three parishes are white.

The petitioners alleged that the Louisiana method of electing judges impermissibly diluted the voting strength of African-Americans in violation of Section 2 of the Voters Rights Act of 1965 by broadening the populace of voters, thus frustrating efforts by African-Americans to elect an African-American judge. *Id.* The United States District Court for the District of Louisiana dismissed the petitioners' claim holding that judges are not " representatives," and thus judicial elections are not covered under Section 2 of the Voters' Rights Act. *Id.* at 2359.

On appeal, the court of appeals reversed and remanded the case finding that the term " representatives" within the Voters' Rights Act included anyone elected by a popular election from a field of candidates. The court thus held that judges were included within the meaning of " representatives." *Id.* On remand the district court concluded that insufficient evidence existed to establish a violation of Section 2 of the Voters' Rights Act and the petitioners appealed once again to the court of appeals. *Id.* at 2360. Following the *en banc* decision in a similar case, the court of appeals remanded *Chisom*, and the petitioners appealed. *Id.* at 2361.

While the petitioners' appeal was pending, the Court of Appeals for the Fifth Circuit decided *League of United Latin-American Citizens Council v. Clements*, 914 F.2d 620 (1990) (hereinafter "*LULAC*"), a case similar to *Chisom* involving the interpretation of " representative" within Section 2 of the Voters' Rights Act of 1965. *Chisom*, 111 S. Ct. 2360. The *LULAC* court reasoned that, because public opinion is irrelevant in the role of the judiciary, judges do not serve in a representative capacity and are not included within the meaning of " representative" in interpreting Section 2 of the Voters' Rights Act. *Id.*

The Supreme Court granted certiorari and consolidated *LULAC* and *Chisom* for determining the test to be applied in deciding whether a violation of the Voters' Rights Act of 1965 exists in judicial and other elections. *Id.* at 2362.

The Court began its analysis by setting out the text of Section 2 of the