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Dimensions of Confusion: Recent Supreme Court Decisions on Double Jeopardy

by David Hanley

On June 14, 1978, the Supreme Court handed down the following opinions: *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed. 2d 1 (1978), *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 2d 15 (1978), *Christ v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed. 2d 24 (1978), *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed. 2d 43 (1978), and *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978). There has been a great deal of confusion in the double jeopardy area of constitutional criminal procedure as can be seen by the number of opinions involved here. These five opinions may be helpful to courts in interpreting the breadth and scope of the Fifth Amendment provision that "no person be subject for the same offense to be twice put in jeopardy of life or limb."

Basically, the confusion is a result of the Court's engrafting several distinct doctrines onto the common law understanding of former jeopardy and placing them under the heading of double jeopardy. The doctrines which the Court has coalesced with former jeopardy to form the law of double jeopardy are those of retrial after mistrial, multiple prosecution, and collateral estoppel.

In England, there were four pleas in bar to the bringing of a criminal action against a defendant. These four pleas were known as *autrefois acquit*, *autrefois convict*, *autrefois attain*, and *former pardon*. When the colonies adopted the common law of England, they adopted the pleas in bar. Only the first two, however, seemed to have made it across the Atlantic. Former jeopardy fell into disuse and *autrefois attain* was not necessary since the Constitution of the United States did not permit the use of bills of attainder. See, Note, *Twice in Jeopardy* 75 *Yale L.J.* 262 (1965), Footnote 1.

Autrefois acquit and *autrefois convict* constitute the common law understanding of former jeopardy in the United States. The basis of these pleas is that once a person has gone through a complete trial on a charge and there is a final outcome of either acquittal or conviction, he can not be brought to trial again for that same charge. *Autrefois acquit* bars a subsequent trial if there has been an acquittal. *Autrefois convict* bars subsequent trial if there has been a former conviction.

Rarely will the State attempt to retry a man for the same offense after there has been a previous trial resulting in an acquittal or a conviction. It may be, however, that the State feels that an acquittal was obtained by

error and wishes to take an appeal from the decision. A problem is presented whenever there is an appeal after a final verdict of guilt or innocence in the lower court.

As noted in *Scott*, the United States has had no right of appeal in a criminal case absent explicit statutory authority. *United States v. Sanges*, 144 U.S. 310, (1892). Not until 1907 was statutory authority provided for appeals in a criminal matter. In 1971, Congress adopted legislation permitting appeals by the government from any decision dismissing an indictment, "except that no appeal shall lie where the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." 18 U.S.C. §3731. *United States v. Scott*, *supra* at 85.

Sanabria v. United States involves an appeal by the government from an acquittal in the lower court. In this case, the petitioner had been indicted for violating 18 U.S.C. §1955 (a) which makes it an offense to conduct an "illegal gambling business." §1955 (b) defines illegal gambling business as one which is in violation of state law in the state in which it is operated. The government alleged that the defendants' activities of horse betting and numbers betting were in violation of Massachusetts state law.

The government's evidence showed that the petitioner was involved in both horse betting and numbers betting. After the defendants rested, however, the trial judge granted a motion to exclude the numbers betting evidence because the government had relied on the wrong statute for that charge. At the close of the case, the trial judge granted petitioner's motion for judgment of acquittal since the evidence was insufficient on the other charge. From this ruling, the government took an appeal pursuant to §3731.

Justice Marshall frames the issue in terms of "whether the United States may appeal in a criminal case from a midtrial ruling resulting in the exclusion of certain evidence and from a subsequently entered judgment of acquittal." *Sanabria*, *supra* at 56. But this framing of the

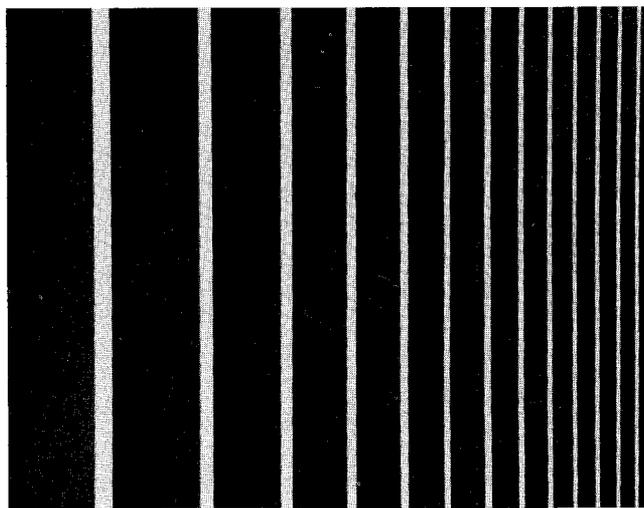


Photo by J.J.R.

issue is too simple. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) makes it clear that no matter how egregiously erroneous the legal rulings leading to the judgment of acquittal might be, there is no exception to the constitutional rule forbidding successive trials for the same offense. The court's conclusion reaffirmed this rule.

The government, however, argued that the numbers betting and horse betting theories were distinct bases of liability. They contend that by granting the defendants' motion to exclude the numbers betting evidence, the court dismissed that theory and thus a new trial would not twice put the defendant in jeopardy for the same offense. In other words, although the defendant has been acquitted on the horse betting theory, the government contends he had not been tried on the numbers betting theory.

Since the two theories were not placed in separate counts in the charging document, the Court feels that they can not be maintained as distinct bases of liability. Besides, the Court feels that if there were two possible theories for violating §1955, Congress would have expressed them in the statute. The statute only provides for one basis of liability on the theory of conducting an illegal gambling business. Petitioner has been tried on that charge and acquitted. Any retrial of petitioner would be for the same offense of conducting an illegal gambling business. The Court concludes that although the numbers evidence was erroneously excluded, under *Fong Foo*, the judgment of acquittal was final and unreviewable. *Sanabria*, *supra* at 77.

If an appeal from an acquittal is not allowed under §3731 because it violates the Double Jeopardy Clause, then what constitutes an acquittal? This is the question which the Court asked in *United States v. Scott*, *supra*. Does any dismissal pronounced by the trial judge constitute an acquittal and thus a bar to appeal and subsequent retrial? The Court found in *Scott* that not all dismissals bar appeals. Only a dismissal based on the merits of the case would bar any appeal.

In *Scott*, the defendant who was indicted for distributing narcotics, twice moved during the trial to have two counts dismissed on the grounds that his defense had been prejudiced by a preindictment delay. At the close of all the evidence, the court granted the defendant's motion. The United States appealed and the defendant relied upon *United States v. Jenkins*, 420 U.S. 358 (1975) to bar such appeal. The United States Court of Appeals for the Sixth Circuit concluded that any further prosecution would be barred by the Double Jeopardy Clause of the Fifth Amendment. The Supreme Court granted certiorari to give further consideration to the problem of a governmental appeal from a dismissal.

Jenkins held that whether or not a dismissal of an

indictment after jeopardy had attached amounted to an acquittal on the merits, the government had no right to appeal. The rationale given by Justice Rehnquist in *Jenkins* barring an appeal was that "further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." Justice Rehnquist in an unprecedented move overruled the opinion he wrote in *Jenkins*. *Scott supra* at 101. He relates that the court's decision in *Jenkins* was based upon the perception 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." *Green v. United States*, 355 U.S. 184, 187 (1957). Rehnquist, however states:

Upon fuller consideration, we are now of the view that this language from *Green*, while entirely appropriate in the circumstances of this opinion, is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution. *Scott*, *supra* at 95.

In *Scott*, the defendant sought termination of the trial on grounds unrelated to guilt or innocence.

Finally, Rehnquist concludes by stating that:

Here "the lessons of experience" indicate that Government appeals from mid-trial dismissals requested by the defendant would significantly advance the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without enhancing the possibility that even though innocent he may be found guilty. *Green*, *supra* at 188. Accordingly, the contrary holding of *United States v. Jenkins* is overruled. *Scott*, *supra* at 101.

Justice Brennan writes a very strong dissent joined in by Justices White, Marshall, and Stevens. He feels that the ruling of the majority will be difficult to apply. In contrast, the *Jenkins* rule was much easier to apply. The question for many state and federal judges will be "which dismissals bar appeal?" It is the opinion of the minority that "only confusion can result from today's decision." *Scott*, *supra* at 103.

Sanabria and *Scott* both dealt with government appeals from a favorable judgment for the defendant. Suppose, however, the defendant successfully appeals from a judgment for the State, that is, a verdict of guilty. Can the appellate court remand for a new trial upon finding error in the decisions of the trial judge? This is the question which the court asks in *Burks and Greene*.

Burks discusses the history of the law in this area. Prior to *Burks*, whether a new trial could be granted depended on two factors. The first factor is whether the defendant made a motion for a new trial at the trial court before taking his appeal. Justice Douglas felt that a rever-

sal in an appellate court for lack of evidence was equivalent to a judgment of acquittal and should bar subsequent trial. *Sapir v. United States*, 348 U.S. 373, 321 (1955). However, the concurring opinion in *Sapir* points out that the court's decision would have been different had the petitioner asked for a new trial. It is a fundamental principle of double jeopardy law that where a person's conviction is set aside by his appeal, he can be tried a second time for the same offense. *United States v. Ball*, 163 U.S. 662 (1891).

The other factor to be considered is whether the reversal was based on trial error as opposed to evidentiary insufficiency. If there is trial error, then a remand for new trial will not hurt the defendant and must be balanced against society's interest in punishing the guilty. Chief Justice Burger in an opinion joined by all of the members of the Court participating stated that:

In short, reversal for trial error, as distinguished from evidentiary insufficiency does not constitute a decision to the effect that the government has failed to prove its case. As such it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some

fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. *Burks, supra* at p. 15.

On the other hand, a reversal based on the insufficiency of evidence is equivalent to the trial judge saying the Government's evidence was so lacking that the case should not be submitted to the jury. Thus, the trial judge would grant a judgment of acquittal for the defendant.

Prior to *Burks*, the first factor mentioned was the most significant in deciding whether a new trial could be had after a reversal by the appellate court. Often, the second factor was not even considered by the courts. However, *Burks* makes it clear that the reverse consideration must be made now. The distinction between a reversal based on legally insufficient evidence and trial error will be the decisive factor. Chief Justice Burger holds that "once the reviewing court has found the evidence legally insufficient, the only just remedy available for the court is the direction of a judgment of acquittal," which will bar any retrial. *Burks, supra* at 18.

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In *Greene v. Massey*, Chief Justice Burger simply stated that the rule enunciated in *Burks* would be applied to the states through the Fourteenth Amendment. The constitutional prohibition against double jeopardy in the Fifth Amendment is fully applicable to the states. *Benton v. Maryland*, 395 U.S. 784 (1967). This means that every decision interpreting the constitutional meaning of the double jeopardy clause applies to the states as well as the federal government. In a concurring opinion, Justice Powell expressed disagreement with the court's conclusion that the constitutional prohibition against double jeopardy was fully applicable to state criminal proceedings.

Richard Austin Greene appealed his conviction of first-degree murder to the Supreme Court of Florida. The court reversed the conviction and ordered a new trial holding that the evidence did not establish beyond a reasonable doubt that the defendant committed murder in the first degree. However, three of the four judges deciding the case filed a concurring opinion in which they stated the trial should be remanded for a new trial because of trial error. At the second trial, the defendant was again convicted of first-degree murder after unsuccessfully contending the second trial was barred under the Double Jeopardy Clause. His argument was taken into the federal courts by way of a writ of habeas corpus. The Supreme Court remanded the case to the Supreme Court of Florida to make a determination in light of *Burks v. United States* as to whether the reversal constituted an acquittal because it was based on insufficient evidence or that the reversal was based on trial error.

At this juncture, *Mandel v. United States* presents the opportunity for much speculation. Governor Marvin Mandel was convicted of several charges of mail fraud and racketeering in the United States District Court of Maryland. Upon appeal to the United States Court of Appeals for the Fourth Circuit, there was a reversal and remand for a new trial based on 28 U.S.C. 2106 which gives the government broad powers to remand. On remand, the defense would naturally want to raise the issue that a new trial for the same offense is barred by the Double Jeopardy Clause of the Fifth Amendment.

If this issue were raised, the court would have to base its decision on the analysis established in *Burks*. Thus, the ultimate question is whether the reversal was based on trial error or the insufficiency of the evidence produced. A reversal was granted on the grounds that inadmissible hearsay evidence was admitted to prove the essential part of the government's case. In its opinion, the court states "we do not reach the question of the sufficiency of the evidence as to any individual case or count, or as to the case taken as a whole." *Excerpts of Mandel Decision, The Baltimore Evening Sun*, Vol. 284, No. 48E, p. A10, January 12, 1979.

To conclude, the appellate court intimates that its decision is based on trial error and that the sufficiency of the evidence would have to be tested in the new trial. Therefore, under *Burks*, a new trial would not be barred.

All of the preceding cases have dealt with the problems which can arise under the traditional concepts of former jeopardy when an appeal is taken by either party from a prior judgment. What happens, however, if the trial is terminated before a final judgment is reached? In other words, the question becomes one of when jeopardy attaches for purposes of determining whether a person has been placed in jeopardy.

Prior to *Christ v. Bretz*, jeopardy attached at varying times depending upon the jurisdiction. Montana, the jurisdiction involved in *Christ*, has a statute which provides that jeopardy does not attach until the first witness is sworn. Mont. Rev. Code Ann. §1711 (3) (1947). Hence, a new trial was not barred by a termination after the swearing of a jury but prior to the swearing of the first witness. The federal rule was that jeopardy attached upon the swearing of a jury. *Downum v. United States*, 372 U.S. 734 (1963). In *Christ*, the court held that the federal rule requiring jeopardy to attach at the time the jury is sworn is constitutionally mandated. Therefore, the Montana statute was unconstitutional.

The only rationale provided by Justice Stewart and the majority for holding that the federal rule of when jeopardy attaches applies to the states was as follows:

Regardless of its historic origin, however, the defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, since it is that "right" that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. *Christ, supra* at 36.

Justice Powell eloquently dissented. He was of the opinion that the majority failed to justify its holding that the Fifth Amendment mandates the rule of attachment adopted. Accordingly, the only justification by the majority was the hitherto unexplained "valued right" to a particular jury. Powell explains that the common law rule requiring that a person's case be heard by a single jury was a procedural rule and not part of the understanding of former jeopardy brought to the colonies. *Christ, supra* at 41. Many state courts, however, began to engraft this rule onto the guarantee against double jeopardy contained in the federal and state constitutions. The dissent points out that the federal courts accepted almost without articulated thought the doctrine that the Double Jeopardy Clause protects against needless discharge of the jury. To conclude, Justice Powell writes that "we should be hesitant to constitutionalize a rule that derives no support from the Framers' understanding of English practice from which the Double Jeopardy Clause was derived." *Christ, supra* at 49.

Although *Christ* settles the issue of when jeopardy will attach in a jury trial for purposes of the Fifth Amendment, it offers no standards for determining when a retrial will be barred after a mistrial. The rule established early was that retrials would be barred unless there was a manifest necessity for the mistrial. *United States v. Perez*, 9 Wheat 579 (1924). Significant factors in determining whether there should be a retrial after mistrial are (1) the source of difficulty (the prosecution or defendant), (2) the associated motivation (intentional harassment), (3) the indicated prejudice to the defendant associated with retrial and (4) the available alternatives to mistrial. Schulhofer, *Jeopardy and Mistrials* 125 U.Pa. L. Rev. 449 (1977).

Another case, *Arizona v. Washington*, 434 U.S. 497 54 L.Ed. 2d 717, 98 S.Ct. (1978) decided February 21, 1978, grappled with the issue of when there was manifest necessity for a mistrial. Respondent in this case has been granted a new trial because the prosecutor had withheld exculpatory evidence. During opening argument of the new trial, defense counsel made comments to the effect that a new trial had been granted by the superior court because of prosecutorial misconduct. The prosecutor at the second trial moved for a mistrial on the basis that defense counsel's statements were inadmissible. In granting the prosecutor's motion, the trial judge failed to find that there was manifest necessity for a mistrial or consider alternatives to a mistrial.

It is the conclusion of the Court that the record amply demonstrates the need to terminate the trial because of possible prejudice of the jurors. The trial judge was present during the trial and the decision to declare a mistrial, because of prejudice, was a matter entirely within his discretion. Hence the Court concludes that:

The trial judge's mistrial declaration is not subject to collateral attack simply because he failed to find "manifest necessity" in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion. *Arizona v. Washington*, supra at 517.

Although four doctrines were mentioned at the beginning of the article, only those confronted by the Supreme Court this term were discussed. These cases only deal with the first two doctrines. As in the case of the rule that jeopardy attaches after the first juror is sworn, the other doctrines were engrafted into the constitutional doctrine against being placed twice in jeopardy without a great deal of discussion as to the rationale for doing so.

Judge Charles E. Moylon would say that when one thinks about the law of double jeopardy, that person should think plural. There is no single law of double jeopardy, but many.

An Analysis of the Baltimore City Police Complaint Evaluation Procedures

by Stephen R. Cochell
John Alan Jones

Introduction

Society entrusts the police officer with an awesome responsibility; literally the power of life and death. Because society grants this authority to the police officer, it is also society's responsibility to review the actions of the police, particularly when it comes to the use of their ultimate weapon, the gun.

WJZ-TV 13 (Baltimore, Maryland)
Editorial Aired June 20, 1978.

Review of police misconduct by the community has traditionally generated friction and conflict among advocates of so-called "civilian review boards" and the police community. A number of civilian review boards have been established in several cities across the country. Their history of failure is mostly attributed to what has been termed the "dilemma" of civilian review of police misconduct. Simply stated, the pro-civilian review groups believe that police are not responsive to the realities of their everyday lives while, on the other hand, police are unwilling to open the processes by which their actions are examined and potentially evaluated to those outside the police department.

A 1969 study of police attitudes towards civilian review revealed that two-thirds of the officers surveyed believed that the public had a right to "pass judgment on the way the police are doing their job." Sixty percent of the officers, however, were opposed to the mere idea of a civilian review board even if the members were "fair and unbiased."

While citizens wish to protect their civil liberties against potential abuse of police authority, they also view the police as a symbol of safety and security.

This "love-hate" relationship fosters disputes between citizens and police which are difficult to resolve. During the civil disorders of the late 1960's, attention was focused on the allegations of police brutality and other forms of alleged police misconduct. In the wake of the actions by the Chicago Police during the 1968 Democratic National Convention (termed a "police riot"), a number of cities began to search for a method to investigate allegations of police misconduct. See National Advisory Commission on Civil Disorders (Kerner Commission Report).