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Constitutional Law - Criminal Procedure - Successive State Prosecutions for Same Activity

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CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SUCCESSIVE STATE PROSECUTIONS FOR SAME ACTIVITY—Petitioner, suspected of having robbed five persons on a single occasion, was indicted and tried for the robbery of three of them. His sole defense was alibi and he was acquitted when only

one of the five victims identified him as the robber. Petitioner was then tried under an indictment for the robbery of a fourth victim. Petitioner interposed the same defense but was convicted at this second trial. The New Jersey Supreme Court affirmed. On certiorari to the United States Supreme Court, *held*, affirmed, three justices dissenting.¹ Neither the successive trials nor the failure of the court to apply the doctrine of collateral estoppel to the facts of this case constituted a deprivation of petitioner's liberty without due process of law. *Hoag v. New Jersey*, 356 U.S. 464 (1958).²

The circumstances of the principal case raise interesting questions regarding the protection to be afforded defendants in successive prosecutions for the same allegedly criminal conduct. There are three main defenses to such prosecutions: double jeopardy, collateral estoppel and due process of law under the Fourteenth Amendment. Jeopardy attaches when a jury is impaneled to try the accused on a valid indictment or information before a court of competent jurisdiction,³ and the double jeopardy safeguard is designed to prevent a second prosecution for the same offense.⁴ Double jeopardy frequently fails to provide adequate protection against harassment by successive prosecutions, however, because of the narrow meaning given the phrase "same offense."⁵ In a majority of states the offenses charged are not the same unless the facts alleged in the second indictment, if given in evidence, would have supported a conviction on

¹ Chief Justice Warren dissented on the ground that due process includes collateral estoppel and the trial court improperly refused to apply the doctrine. Justice Douglas, with Justice Black concurring, dissented on the basis of *Green v. United States*, 355 U.S. 184 (1957), apparently viewing that case as establishing a "same transaction" definition of "same offense" for purposes of double jeopardy. In this connection it should be remembered that Justices Black and Douglas have supported the proposition that the Fourteenth Amendment incorporates the Fifth Amendment. See their dissenting opinion in *Adamson v. California*, 332 U.S. 46 at 68 (1947).

² In a companion case petitioner was charged in four separate indictments with the murder of his wife and three children, all of whom were found in a burning building with bullet wounds in their heads. In three successive trials petitioner was convicted of first degree murder of his wife and two of the children respectively. In the first two trials the penalty imposed was imprisonment while in the third the penalty was death. The Court upheld this third conviction, four justices dissenting (including Justice Brennan who had disqualified himself in the *Hoag* case), despite the fact that evidence of all four deaths was allowed to go to the jury over petitioner's objections in each of the trials. The Court relied on the reasoning of the *Hoag* case. *Ciucci v. Illinois*, 356 U.S. 571 (1958).

³ *McCarthy v. Zerbst*, (10th Cir. 1936) 85 F. (2d) 640, cert. den. 299 U.S. 610 (1936); *People ex rel. Meyer v. Warden*, 269 N.Y. 426, 199 N.E. 647 (1936).

⁴ The double jeopardy provisions of most state constitutions are similar to the federal provision, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST., Amend. V. New Jersey's provision, involved in the principal case, is substantially different. "No person shall, after acquittal, be tried for the same offense." N.J. CONST., Art. I, §11.

⁵ See generally Kirchheimer, "The Act, the Offense and Double Jeopardy," 58 YALE L. J. 513 (1949).

the first indictment,⁶ or unless the same evidence would sustain a conviction in each case.⁷ By charging the accused with a theoretically different offense a prosecutor can frequently avoid the prohibition against a second trial.⁸ A few courts apply double jeopardy whenever the offenses charged result from a single transaction or act.⁹ Properly applied this test could provide real protection against harassment but the same courts have narrowed this concept to the point where the robbery of two persons at the same time, for example, constitutes two different acts.¹⁰ This approach, taken by the state courts in the instant case,¹¹ was accepted by the Supreme Court as removing petitioner's claim of double jeopardy from application. Collateral estoppel, which can arise only after a valid final judgment,¹² prevents relitigation of issues already determined.¹³ This aspect of the doctrine of *res judicata* is generally accepted as applicable in criminal proceedings by most jurisdictions that have faced the issue.¹⁴ Yet it provides little practical help to a defendant because of the difficulty in determining what issues were in fact resolved by a prior general verdict of not guilty or guilty of a lesser included offense. In federal prosecutions this is a determination of law made by the judge after examining the record in the first trial.¹⁵ This procedure was accepted by the court below in the principal case but the trial judge was unable to determine what issues had actually been decided by the jury despite the fact that petitioner's sole defense in the first trial had been *alibi*.¹⁶ The majority of the Supreme Court refused to upset this ruling and thus held collateral estoppel inapplicable as a defense. The criminal defendant's last hope against harassment is to invoke the due process clause of the Fourteenth Amendment, which protects against an attempt "to wear the accused out by a multitude of cases with accumulated trials."¹⁷ Apparently no case,

⁶ *Rex v. Vandercomb and Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (1796); *State v. Roberts*, 152 La. 283, 93 S. 95 (1922); *State v. McGaughey*, 45 S.D. 379, 187 N.W. 717 (1922).

⁷ *Morgan v. Devine*, 237 U.S. 632 (1915); *Duvall v. State*, 111 Ohio St. 657, 146 N.E. 90 (1924); *State v. Magone*, 33 Ore. 570, 56 P. 648 (1899).

⁸ See Lugar, "Criminal Law, Double Jeopardy and *Res Judicata*," 39 IOWA L. REV. 317 (1954).

⁹ *State v. Cooper*, 13 N.J.L. 361 (1833); *State v. Mowser*, 92 N.J.L. 474, 106 A. 416 (1919); *Spannell v. State*, 83 Tex. Crim. Rep. 418, 203 S.W. 357 (1918).

¹⁰ *State v. Hoag*, 21 N.J. 496, 122 A. (2d) 628 (1956). See also *Thompson v. State*, 90 Tex. Crim. Rep. 222, 234 S.W. 400 (1921).

¹¹ *State v. Hoag*, note 10 *supra*.

¹² JUDGMENTS RESTATEMENT §50 (1942).

¹³ JUDGMENTS RESTATEMENT §45(c) (1942).

¹⁴ *Regina v. Miles*, 24 Q.B.D. 423 (1890); *United States v. Oppenheimer*, 242 U.S. 85 (1916); *Sealfon v. United States*, 332 U.S. 575 (1948); comment, 27 TEXAS L. REV. 231 at 239 (1948).

¹⁵ *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). This case involved use of a criminal prosecution as an estoppel in a subsequent civil suit against the defendant but the problem presented was the same as that here considered.

¹⁶ *State v. Hoag*, note 10 *supra*.

¹⁷ *Palko v. Connecticut*, 302 U.S. 319 at 328 (1937).

however, has been found to exceed this broad limitation. The question may then be raised concerning the extent to which the vague due process standard of fundamental fairness might be applied by reference to the more precise safeguards of double jeopardy and collateral estoppel. The Court has already indicated that subjection to double jeopardy is not necessarily a violation of due process.¹⁸ It has here expressed "grave doubts" whether collateral estoppel is a constitutional requirement.¹⁹ Consequently, and in light of a companion case in which the defendant was permitted to be tried three times for his life,²⁰ it would appear that the constitutional protection of due process may be of only slight practical significance to defendants confronted with this type situation.²¹ It is thus left for the states themselves, through remedial legislation, to deal with the problem presented²² or else leave their citizens open to successive prosecutions for the same criminal activity.

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¹⁸ *Palko v. Connecticut*, note 17 supra; *Brock v. North Carolina*, 344 U.S. 424 (1953). The holding of the principal case that successive prosecutions for different offenses arising out of the same occurrence is not fundamentally unfair is thus not surprising.

¹⁹ Principal case at 471.

²⁰ *Ciucci v. Illinois*, note 2 supra.

²¹ The fact that defendant in the *Ciucci* case was charged with a capital offense would seem to eliminate any possible argument that the Court might modify its position depending on the nature of the crime involved.

²² For an example of one suggested statutory change, see American Law Institute, *MODEL PENAL CODE*, Tentative Draft No. 5, §1.08 (1956).