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Constitutional Law - Former Jeopardy - Retrial for Greater Offense After Conviction of Lesser Included Offense Reversed on Appeal

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CONSTITUTIONAL LAW—FORMER JEOPARDY—RETRIAL FOR GREATER OFFENSE AFTER CONVICTION OF LESSER INCLUDED OFFENSE REVERSED ON APPEAL—Defendant was indicted by the District of Columbia grand jury on counts charging both arson and murder in the first degree for a death caused by the arson. He was convicted of arson and second-degree murder,[1] the jury returning no verdict on the first-degree murder charge. On appeal the conviction of second-degree murder was reversed[2] because the evidence permitted only a conviction of first-degree murder or an acquittal.[3] On remand defendant was retried on the original indictment for first-degree murder, convicted, and sentenced to death over his objection of former jeopardy. The court of appeals, sitting *en banc,* affirmed the conviction 6-to-3.[4] On appeal to the Supreme Court, *held,* reversed, four justices dissenting. Defendant had been placed in double jeopardy in violation of the Fifth Amendment.[5] *Green v. United States,* 355 U.S. 184 (1957).

The preliminary question faced by the Court was whether defendant had been acquitted of first-degree murder in his original trial, as a finding that he had not been acquitted could result in subjecting him to retrial after appeal.[6] Had the jury been asked to return an express verdict, it would of necessity have been one of "not guilty"; thus the verdict had the *effect* of acquitting the defendant. Nevertheless, the jury found him guilty of every element necessary to convict him of a felony-murder, both the arson and the death,[7] and the failure to return a guilty verdict can rationally be explained only by jury reluctance to impose the mandatory death sentence. Thus the *meaning* of the verdict would not seem to be an acquittal. While perhaps an acquittal should be implied when the meaning of the verdict is doubtful,[8] when mercy is the only explanation for failure to find defendant guilty of the greater offense, implying an acquittal runs counter to a fair interpretation of the facts.[9]

[1] In the District of Columbia second-degree murder is a lesser included offense which may be proved under an indictment charging first-degree murder. Green v. United States, (D.C. Cir. 1955) 218 F. (2d) 856.

[2] Green v. United States, note 1 supra, noted in 41 VA. L. REV. 385 (1955).

[3] The felony-murder rule furnished the basis for the first-degree murder charge. The government could not prove that the defendant burned the building with the intent to kill necessary to establish second-degree murder.

[4] Green v. United States, (D.C. Cir. 1956) 236 F. (2d) 708.

[5] U.S. CONST., Amend. V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

[6] The majority makes clear, however, that whether or not an acquittal is implied, the fact that the jury was discharged without returning a verdict on the first-degree murder charge and without defendant's consent is sufficient to support a plea of former jeopardy within the doctrine of Wade v. Hunter, 336 U.S. 684 (1949) (dictum). Principal case at 191.

[7] D.C. Code (1951) §22-2401: "Whoever . . . without purpose so to do kills another in perpetrating or attempting to perpetrate any arson . . . is guilty of murder in the first degree."

[8] See 66 YALE L. J. 592 (1957).

[9] See 14 WASH. & LEE L. REV. 228 (1957).

The more significant problem faced by the Court was whether defendant's appeal of his conviction for the lesser offense waived his right to plead former jeopardy to the greater. This question was faced by the Court in *Trono v. United States*,[10] a Philippine Islands case involving a statute[11] similar in wording to the Fifth Amendment. The defendant there was held subject to retrial in a five-to-four opinion, with four majority justices arguing that by appeal defendant had waived his right to plead former jeopardy as to the "whole controversy." Justice Holmes concurred in the result only, and a previous dissenting opinion[12] indicated that he believed that jeopardy continued until the final disposition of the case, including appeal and retrial, so that defendant was never placed in jeopardy a second time.[13] While the entire Court treated the case as if it involved the Fifth Amendment, and subsequent dicta approved it,[14] the majority in the principal case did not find it controlling.[15] They therefore regarded the question as open under the Fifth Amendment, although 36 state courts had passed on it,[16] and refused to find a waiver. State courts which have rejected the waiver analysis in this context have usually done so on the grounds that the appeal, which is the basis of waiver, is directed only at the lesser offense; the first-degree murder question simply is not raised on appeal.[17] The majority in the principal case, however, argued that "the law should not, and in our judgment does not" require the defendant to "barter his constitutional protection against a second prosecution for an . . . appeal from an erroneous conviction of another offense,"[18] thus apparently importing concepts of fundamental fairness into the double jeopardy clause. Whether retrial in this case was unfair to defendant is at least doubtful. His appeal was based on the proposition that he should have been tried only for first degree murder. He was aware that he faced a mandatory death sentence if he was convicted on retrial after a successful appeal.[19] Further, any convicted defendant given less than the maximum

[10] 199 U.S. 521 (1905).

[11] 32 Stat. 692 (1902): ". . . [N]o person for the same offense shall be twice put in jeopardy of punishment. . . ."

[12] Kepner v. United States, 195 U.S. 100 at 134 (1904).

[13] These same two arguments have been adopted as the rationale for permitting retrial of the defendant on the same offense after his successful appeal. As to waiver see, e.g., United States v. Ball, 163 U.S. 662 (1896); State v. McCord, 8 Kan. 232 (1871); Smith v. State, 196 Wis. 102, 219 N.W. 270 (1928). As to continuing jeopardy see, e.g., State v. Palko, 122 Conn. 529, 191 A. 320 (1937), affd. 302 U.S. 319 (1937).

[14] See Burton v. United States, 202 U.S. 344 at 378 (1906); Stroud v. United States, 251 U.S. 15 at 18 (1919). Cf. Brantley v. Georgia, 217 U.S. 284 (1910).

[15] The majority also attempted to distinguish the case by holding it to be a product of the Spanish system of jurisprudence prevailing in the Philippine Islands. See note criticizing this distinction in 66 YALE L. J. 592 (1957).

[16] See cases collected in note 4, principal case at 216-218. Nineteen states permit retrial for the greater offense while seventeen do not.

[17] See, e.g., Brennan v. People, 15 Ill. 511 (1854).

[18] Principal case at 193.

[19] Green v. United States, note 1 supra, at 859.

sentence faces this same "incredible dilemma" when he appeals for a new trial, and the Court has specifically held that when a defendant convicted of first degree murder and sentenced to life imprisonment appeals, wins a reversal, and on retrial is convicted and sentenced to death, the double jeopardy clause is not violated.[20] More fundamentally, it is doubtful that due process fairness concepts are relevant at all in this area. Under English common law neither appeal nor retrial was permitted.[21] The framers, however, apparently felt that appeal and retrial should be permitted to the defendant,[22] and this conclusion was generally accepted by the early American cases.[23] It therefore seems probable that the double jeopardy clause was intended to have no application to any case in which the defendant appealed an adverse verdict. The common law prohibition was designed to assure that no man would continually be vexed for the same offense, but when continued vexation is of his own choosing, the constitutional safeguard no longer seems applicable. Precedent, logic, and the interests of society in enforcing its criminal laws would therefore indicate a contrary result in this case.

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20 Stroud v. United States, note 14 supra.

21 Even now the English Court of Criminal Appeals generally lacks the power to order a new trial after reversing a conviction. See principal case at 203.

22 See 1 ANNALS OF CONG., Gale's Comp., p. 753 (1834).

23 See principal case at 189, 202, 203.