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Constitutional Law--Criminal Law--Conviction of Higher Offense After Reversal of Conviction of Lower Offense Held Double Jeopardy (Green v. United States, 355 U.S. 184 (1957))

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both sides, so that even the prosecution would not be barred from disregarding the judgment and filing a new indictment.[24]

It is submitted that the provisions of the Code of Criminal Procedure [25] requiring a jury where a question of fact is present should be amended. Furthermore, an express authorization by the legislature for the court to proceed without a jury would seem helpful.*

CONSTITUTIONAL LAW — CRIMINAL LAW — CONVICTION OF HIGHER OFFENSE AFTER REVERSAL OF CONVICTION OF LOWER OFFENSE HELD DOUBLE JEOPARDY.—Defendant was indicted in the District of Columbia for first degree felony murder [1] but was convicted of second degree murder.[2] The verdict was silent as to the greater offense. On appeal this conviction was reversed for lack of evidence, but on remand, petitioner was tried again and convicted of first degree murder. The Supreme Court of the United States, reversing this conviction, *held* that conviction of a lesser degree of the crime under an indictment for a higher degree was an acquittal of the higher degree and thus further trial for the latter was double jeopardy, a violation of the fifth amendment. *Green v. United States,* 355 U.S. 184 (1957).

At common law, a second trial for the same offense was prohibited whether the former trial resulted in an acquittal or a con-

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[24] For example, *D* is indicted, waives his right of jury trial, and is acquitted by the court alone. The waiver is defective because not "signed by the defendant in person in open court." (N.Y. CONST. art. I, § 2.) *D* is constitutionally entitled to trial by jury and the court was without power to decide a case alone unless there has been a waiver as prescribed by law. Therefore, the trial held was a nullity and a new indictment is still possible.

[25] See note 19 *supra.*

* [Editor's Note] The recent case of Scott v. McCaffrey, 139 N.Y.L.J. No. 63, p. 1, col. 8 (Sup. Ct. March 25, 1958), dealt with the problem of whether a defendant in a criminal case has the *absolute* right to waive a jury trial. Defendant who was indicted with five co-defendants was not allowed to waive, apparently on the grounds that it would bring about a severance. In a proceeding in the nature of prohibition and mandamus, the New York Supreme Court held that the state constitutional requirement of "court approval" concerns only the *intelligence* of the waiver. Where an intelligent waiver is found, it must be allowed by the trial judge. Thus, a defendant in a non-capital felony case may, by an intelligent waiver, indirectly obtain a severance which is solely in the discretion of the trial judge.

[1] "The punishment of murder in the first degree shall be death by electrocution." D.C. CODE ANN. § 22-2404 (1951).

[2] "The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years." *Ibid.*

viction.[3] This view was adopted in *United States v. Gibert*,[4] but subsequently rejected by the Supreme Court in *United States v. Ball*[5] in so far as it related to the effect of defendant's appeal from a conviction. The latter held that acquittal of a defendant, competently tried by a court having jurisdiction, is a bar to further prosecution for the same offense.[6] This bar exists even if the acquittal be erroneous.[7] However, this case also held that a defendant could be tried again for the same offense when his conviction was reversed on appeal.[8] In *Trono v. United States*[9] defendant, indicted for murder in the Philippine Islands,[10] was convicted of assault. On his appeal, defendant was convicted of murder, and the Supreme Court affirmed his conviction.

The *Trono* result was based on the theory that a defendant waives *all* claims to former jeopardy by taking an appeal.[11] The majority in the present case expressly rejected this rationale as too narrow an application of the double jeopardy clause.[12] Moreover, in the spirit of previous decisions that jeopardy may attach where a judgment[13] and even where a verdict[14] has not been rendered, the silence of the verdict as to the higher offense is considered an implicit acquittal.[15] The dissent, using an historical test, relied on *Trono* as precedent.[16]

The decision has enlarged the scope of double jeopardy in the *federal* courts, while the waiver rationale, if extant, has been limited to cases wherein defendant obtains a reversal, and thus subjects himself to a remand to trial for the *same* offense.[17] The majority attempts

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[3] See *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873).

[4] 25 Fed. Cas. 1287, 1300 (C.C.D. Mass. 1834). *But see* United States v. Harding, 26 Fed. Cas. 131 (C.C.E.D. Pa. 1846).

[5] 163 U.S. 662 (1896).

[6] *Id.* at 671.

[7] *Ibid.* See also *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 174 (1873).

[8] See United States v. Ball, 163 U.S. 662, 672 (1896). For a similar result in a state prosecution, see Stroud v. United States, 251 U.S. 15 (1919).

[9] 199 U.S. 521 (1905).

[10] Due to its Spanish heritage, the Supreme Court of the Philippine Islands, at the time of both Kepner v. United States, 195 U.S. 100 (1903) and the *Trono* case, had an appellate jurisdiction whereby it could decide questions of law and fact and substitute its findings for those of the trial court.

[11] See Trono v. United States, 199 U.S. 521, 534 (1905).

[12] Green v. United States, 355 U.S. 184, 198 (1957). The Court also noted that Holmes' theory of single jeopardy (expressed in his dissenting opinion in the *Kepner* case), in which the jeopardy initially attaching to proceedings continues until the defendant has been *finally* acquitted or convicted, ". . . has never outwardly been adhered to by any other Justice of this Court." *Id.* at 197.

[13] See Wade v. Hunter, 336 U.S. 684 (1949).

[14] See United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[15] Green v. United States, 355 U.S. 184, 190 (1957). It is interesting to note here that the *Trono* case involved an express acquittal of the higher offense.

[16] *Id.* at 206-19 (dissenting opinion).

[17] To the effect that this is a limited waiver, see People v. Dowling, 84 N.Y. 478, 483-84 (1881).

to harmonize this result with that of *Trono,* by confining the latter to its peculiar Philippine jurisdictional facts.[18] However, the dissent's contention that *Trono* has been overruled [19] appears correct.

In *Kepner v. United States,*[20] defendant was tried and acquitted in the Philippine Islands for embezzlement. The government appealed and secured a conviction. The Supreme Court reversed under a construction of the fifth amendment double jeopardy clause, as applied to the Philippine Islands by statute,[21] which demonstrates that the same body of law surrounding double jeopardy controlled these two Philippine cases. Thus, *Trono* must have been decided under a construction of traditional constitutional double jeopardy, and consistency would require that it be overruled. The concept of an expanding Constitution [22] would have been sufficient justification.

Furthermore, the majority describes the privilege against double jeopardy as "a vital safeguard in our society." [23] This is language reminiscent of the test of *Palko v. Connecticut,*[24] which construed the due process clause of the fourteenth amendment. In that case, the *state* prosecutor appealed, under Section 6494 of the Connecticut General Statutes, from a conviction of murder in the second degree. On remand the defendant was convicted of murder in the first degree and the Supreme Court *affirmed.* Would not this be double jeopardy in the light of the language of the present case? And what of the constitutionality of state law which permits such a result? [25]

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[18] Green v. United States, 355 U.S. 184, 197 (1957). See note 10 *supra.*

[19] *Id.* at 198, 214 (dissenting opinion).

[20] 195 U.S. 100 (1903).

[21] *Id.* at 123-25. The Court, in both *Kepner* and *Trono,* construed a statutory provision of double jeopardy whose wording was based on the clause as found in the Bill of Rights. The statute had been made applicable to the Philippine Islands by the Act of July 1, 1902, 32 STAT. 691, 692.

Moreover, in the *Trono* case, the Court said of the issue involved: "We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country. . . ." Thus, necessarily, a construction of the fifth amendment was involved. Trono v. United States, 199 U.S. 521, 530 (1905).

[22] This organic nature of the Constitution was early described in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819), by this language: ". . . [A] constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."

[23] Green v. United States, 355 U.S. 184, 198 (1957).

[24] 302 U.S. 319, 328 (1937). This case involved a prosecution appeal and held that the protection of defendant from conviction of a higher offense on remand was not within the "fundamental principles of liberty and justice" secured by the due process clause of the fourteenth amendment. But how can a right be considered "a vital safeguard in our society" and yet not come within "fundamental principles of liberty and justice?"

See also Brantley v. Georgia, 217 U.S. 284 (1910) (per curiam), which involved an appeal by defendant under similar facts but reached the same result.

[25] See CONN. GEN. STAT. § 8812 (1949); IND. ANN. STAT. § 9-2102 (1956); OHIO REV. CODE § 2953.14 (1953). See also state law permitting varying degrees of double jeopardy as cited in Green v. United States, 355 U.S. 184, 216-18 (1957) (dissenting opinion).

Moreover, the Court's interpretation of the silence of the verdict, as to first degree murder, as an "implicit acquittal" presents logical problems.[26] All the Court knew from this silence was that the jury did not convict of first degree murder. Yet this was treated as an acquittal, which is a form of unanimous verdict;[27] but the jury may have merely *disagreed* on first degree murder. This is a form of "hung jury,"[28] a situation which the prosecution may possibly verify by the simple expedient of polling the jury,[29] and which is traditionally cured by a new trial.[30]

The underlying purpose of the privilege is protection from undue governmental harassment.[31] This, rather than speculation on the deliberations of the jury with all its attendant problems in logic, may afford a sounder vehicle for this result.[32]

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[26] See, *e.g.*, the following queries:

a. If a jury at a trial for first degree murder has been discharged for failure to reach a verdict may they be recalled on the ground that a verdict on first degree murder had been reached, disagreement existing only as to second degree murder? If a poll of the jury then reveals an acquittal of first degree murder, is further prosecution barred as to that offense? See N.Y. Times, Mar. 4, 1958, p. 22, col. 4.

b. On a trial of a felony murder indictment when a jury has erroneously been instructed on and convicts of second degree murder leading to a reversal, is the prosecution limited on remand to manslaughter in the commission of a misdemeanor? If the felony does not include a misdemeanor is the defendant immune from prosecution? This appears to be the situation in the present case.

c. Where an indictment charges one crime committed in different ways and the prosecution is compelled to elect to go to the jury on one count, on a new trial may all the original counts be retried?

[27] FED. R. CRIM. P. 31(a). "A verdict must be unanimous."

[28] Hung: sometimes applied to a jury which fails to agree on a verdict. 1 BOUVIER, LAW DICTIONARY (8th ed. 1914).

[29] FED. R. CRIM. P. 31(d). "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." It would appear under this rule that a jury might possibly be polled as to a higher offense on which their verdict was silent.

[30] Keerl v. Montana, 213 U.S. 135, 138 (1909).

[31] Green v. United States, 355 U.S. 184, 187 (1957).

[32] The interpretation of silence as an "implicit acquittal" may logically lead to the passage of a statute making it mandatory for a jury to state its verdict on the higher offenses upon a conviction of a less offense. Such a statute would be necessary to remove the doubt presently created. The lack of an express acquittal under the statute would then make conviction of a higher offense possible. As the Court placed its *emphasis on acquittal*, it would appear to be of no consequence whether the prosecution or the defendant initiated the action. However, such a result, contrary to the philosophy underlying double jeopardy, would insure harassment.