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Due Process Clause--Double Jeopardy--Cruel and Unusual Punishment--Second Electrocution After Failure of First Attempt (Louisiana v. Resweber, 329 U.S. 459 (1947))

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from their advantageous observation post, a more just and uniform result will surely follow.[11]

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DUE PROCESS CLAUSE—DOUBLE JEOPARDY—CRUEL AND UNUSUAL PUNISHMENT—SECOND ELECTROCUTION AFTER FAILURE OF FIRST ATTEMPT.—The petitioner, Willie Francis, a Negro citizen of the State of Louisiana, was tried and convicted of murder in September, 1945, and sentenced to death by electrocution. The prisoner was placed in the electric chair of that state on May 3, 1946. The The switch was thrown but, apparently because of a mechanical defect, death did not result. Petitioner was returned to prison. A new death warrant was issued. Applications for relief were filed in the Supreme Court of Louisiana. The petitioner claimed that the due process clause of the Fourteenth Amendment [1] protects him against double jeopardy and cruel and unusual punishment as prohibited by the Fifth [2] and Eighth [3] Amendments of the Federal Constitution. The court denied the application on the ground of lack of any basis for judicial relief. *Held,* the due process clause does protect a man against double jeopardy and cruel and unusual punishment by state action. However, a second execution after a failure of the first attempt is not double jeopardy or cruel and unusual punishment within the purview of the Fourteenth Amendment. The cruelty must be *inherent* in the method of punishment and double jeopardy involves a retrial after a valid acquittal. *Louisiana v. Resweber,* 329 U. S. 459, 91 L. ed. 422 (1947).

The court in reaching the conclusion, stated above, had three questions of Constitutional Law to determine. It was necessary to interpret the Fifth, Eighth and Fourteenth Amendments to the Federal Constitution. It first discussed the Fourteenth Amendment to determine if, through it, the Fifth and Eighth Amendments were binding upon the states.

Prior to the adoption of the Fourteenth Amendment there were no specific restrictions upon the states concerning the internal governing and administration of criminal justice. The broad terms of Article IV of the Constitution applied only to relations between states. The restrictions and limitations found in the first ten amendments apply only to federal action. The Fourteenth Amendment,

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[11] See 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940).

[1] U. S. CONST. AMEND. XIV, 1, ". . . Nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

[2] 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. . . ."

[3] U. S. CONST. AMEND. VIII, ". . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

though written in broad and inexplicit terms, placing no specific restrictions upon the state, does provide "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." It was believed by many that this clause was a "catch all" phrase and that it would have the effect of reverting back and including the first ten amendments within the privileges and immunities which a state could not deny a citizen. It was urged that a citizen of the United States enjoyed the protection of the first ten amendments against federal action and the Fourteenth Amendment was intended to extend the field of such protection to prohibit a state from denying a citizen a privilege he already enjoyed. This view was rejected by the Supreme Court.[4] The court in interpreting the Fourteenth Amendment has decided that it has a function independent of the first ten amendments. It places upon the states the duty of adhering to a code of conduct, or standard of natural justice fundamental in our concept of ordered society. This standard neither contains each provision of the first ten amendments, nor is it limited in its scope to these amendments.[5] The privileges and immunities guaranteed are the basic fundamental rights of free men. The Bill of Rights [6] is fundamental in our concept of justice and is therefore considered in creating this standard. By this construction the due process clause does not remove from the states the right to enforce their own conception of fairness unless it is in violation of this standard. Mr. Justice Cardozo stated in *Snyder v. Massachusetts* [7] ". . . unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . ." It would be in violation of these principles if in the principal case the petitioner was subjected to cruel and unusual punishment, or double jeopardy, for such punishment or jeopardy would be contrary to the standard of justice established by due process. However, the majority of the court felt that the petitioner was not so subjected.

The prohibition against cruel and unusual punishment has its origin in an Act of Parliament in 1688. The act was designed to abolish punishments of torture and unnecessary cruelty inflicted at the time for certain crimes. This concept of humane punishment for crimes is a part of our people's conception of natural justice and civilized standards. Our minds rebel against the infliction of torture, inhuman or barbarous punishment. The founders of our nation made such a prohibition expressly binding upon Congress and the federal courts through the Eighth Amendment. The due process clause has extended this protection to state action. Since cruel and unusual

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[4] Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616 (1877).
[5] Palko v. Connecticut, 302 U. S. 319, 82 L. ed. 288 (1937).
[6] U. S. CONST. AMENDS. I to X inclusive.
[7] 291 U. S. 97, 78 L. ed. 674 (1934).

punishment would be in violation of due process, the next question to be determined is, would a second electrocution after a failure of the first attempt be cruel and unusual punishment?

The subject of cruel punishment was considered by the New York Court of Appeals in *People* ex rel. *Kemmler v. Durston* [8] where the petitioner challenged the state's right to change the mode of execution. The court stated ". . . The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered in this age, some degree of cruelty, and it is deemed necessary for the protection of society." In upholding the statute the court stressed the fact that the new mode of execution, electrocution, caused instantaneous and painless death and was more humane than the previous method of death by hanging. The case was taken to the Supreme Court of the United States on writ of error.[9] The court in affirming the New York decision stated "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of the word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life." Cruel and unusual punishment must involve cruelty *inherent* in the method of punishment.

The real question to be determined is, would it be cruelty inherent in the method of execution to once again compel the prisoner to undergo the mental strain of preparation for execution? It is not questioned that any type of lingering death would be cruelty and in violation of due process. The law concerns itself only with physical punishment and the only punishment imposed upon the petitioner is death. The principle does not protect against the necessary mental suffering involved in any method employed to extinguish life humanely. An unforseeable accident cannot add the element of cruelty to this otherwise permissible method of execution. The death itself will not be lingering, but instantaneous, it is this with which the law is concerned. The second execution would not be cruel and unusual punishment.

The third question to be answered is, would the second electrocution subject the petitioner to double jeopardy? The restriction against double jeopardy is basic in our concept of justice and a violation of the doctrine would be a violation of due process. The prohibition against double jeopardy was found in the common law of England and was considered so fundamental to early Americans that the prohibition was included in the Federal Constitution and in the New York State Constitution.[10] In establishing an accurate concept of what constitutes double jeopardy, the common law, which forms

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[8] 119 N. Y. 569, 24 N. E. 6 (1890).
[9] *In re* Kemmler, 136 U. S. 436, 34 L. ed. 519 (1890).
[10] N. Y. CONST. Art. 1, § 6.

its basis, must be considered. Common law protection from second jeopardy for the same offense insures a prisoner against a second prosecution after a court, having jurisdiction, had acquitted him of the offense. The second jeopardy is not against the peril of second judgment but against being again tried for the same offense. It is well settled that the double jeopardy clause applies only to a second prosecution, after a valid acquittal, not to a new trial after appeal.[11] Thus when the accused successfully seeks review of a conviction upon a new trial there is no double jeopardy for the first trial is a nullity. The court in *Kepner v. United States*[12] restated the common law doctrine of double jeopardy in arriving at the federal rule. The court stated its interpretation as follows: ". . . The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction. . . ."[13] The New York courts in interpreting Article I, Section 6, of the New York Constitution have reached the same conclusion as the federal courts. The question of double jeopardy came before the Court of Appeals early in the development of our constitutional interpretation in *Ratzky v. People*,[14] in which the petitioner challenged the state's right to resentence after an improper judgment. The prisoner had been tried under the provisions of the Criminal Code of 1860 and sentenced under the Code of 1862. The court determined that resentencing the prisoner was not in violation of the double jeopardy clause of the New York State Constitution. A person is subjected to double jeopardy only when he is a second time tried on a criminal accusation, after a previous trial, legal and regular in form. The provision does not apply to a resentence after an erroneous judgment, and the Court of Appeals on reversal will remit the record, with directions to pronounce the appropriate sentence.[15] As we have seen from the authorities the double jeopardy clause of both the Federal and New York State Constitution applies only to a retrial after a valid, binding, errorless conviction or acquittal. It has no application in the principal case.

It would seem that the federal and New York courts have arrived at the same conclusions in interpreting the cruel and unusual punishment and double jeopardy clauses in their respective Constitutions. The principal case, therefore, though it would be one of first impression, would in all probability be followed in New York.

R. J. McD.

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[11] Kepner v. United States, 195 U. S. 100, 49 L. ed. 114 (1904).
[12] 195 U. S. 100, 49 L. ed. 114 (1904).
[13] *Id.* at 129, 49 L. ed. at 124.
[14] 29 N. Y. 124 (1864).
[15] People v. McKee, 32 N. Y. 239 (1865).