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petuate discrimination continue, that the Supreme Court may use this method to combat the situation. When new tools are required they will be developed either by legislative or judicial decision. The decision in this case was not compelled by the present state of constitutional law as announced by the United States Supreme Court, but it must also be noted that it was a decision that the state court was free to reach on the basis of its power to supervise its own system of justice.

Robert M. Schwartz

CRIMINAL LAW—DOUBLE JEOPARDY—IMPOSITION OF HIGHER SENTENCE ON RECONVICTION FOR SAME OFFENSE VIOLATES PROHIBITION AGAINST DOUBLE JEOPARDY.

People v. Henderson (Cal. 1963)

Under an indictment for murder in the first degree, defendant waived jury trial and pleaded guilty to murder which the court found to be in the first degree, and he was sentenced to life imprisonment. On defendant's appeal, the conviction was reversed, and a new trial granted. At the second trial, which was before a jury, the defendant pleaded not guilty. Again he was found guilty of murder in the first degree, but this time sentenced to death. On appeal the Supreme Court of California held that to impose the death penalty upon a second conviction for first degree murder after a successful appeal from a conviction which carried with it a sentence of life imprisonment was a violation of the prohibition against double jeopardy.¹ *People v. Henderson*, Cal. 2d, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

The concept of double jeopardy has its roots in the common law where the pleas of *autrefois acquit* and *autrefois convict* were an absolute bar to a second prosecution of the same offense and to an appeal from the first prosecution.² These pleas were based on the maxim that no man should be confronted with jeopardy of his life more than once for the same offense.³ This ideal is embodied in the United States Constitution⁴ and in the constitutions of most states.⁵ Generally, jeopardy "attaches"

1. The decision below was reversed because of the failure of the trial court to instruct, even without defendant's request, on mental infirmity not amounting to legal insanity as bearing on the questions of premeditation and deliberation.

2. Cf. *United States v. Gibert*, 25 Fed. Cas. 1287 (No. 15204) (C.C.D. Mass. 1834) and *Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960), for a discussion of these common law pleas.

3. BLACKSTONE, COMMENTARIES 1019 (Chase ed. 1922).

4. 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. . . ." The Fifth Amendment does not apply to the states. *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937).

5. See Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 So. CAL. L. REV. 252, n.2 (1961).

when a valid information or indictment has been brought in a court of competent jurisdiction, and a jury is impaneled and sworn to try the case.⁶ Another viewpoint as to when jeopardy "attaches" is illustrated in Pennsylvania, where jeopardy does not occur until the accused has either been acquitted or received a sentence no longer subject to attack;⁷ that state's constitutional prohibition against double jeopardy applies only to prosecutions where the defendant may be sentenced to death, jeopardy being read in its most literal sense.⁸

Once a defendant has been in jeopardy he may not be tried again for the same offense, nor may the case be withdrawn from the jury over defendant's objection unless there is a legal necessity.⁹ For example, discharging the jury because of illness of the defendant¹⁰ or of a juror¹¹ or because it is impossible for the jury to reach a verdict (a "hung" jury)¹² will not bar a subsequent prosecution for the same offense. If the subsequent prosecution were barred when the discharges had been caused by any of these reasons, the administration of criminal justice would be unduly hindered. Furthermore, the defendant who commits an offense against each of two sovereignties may be prosecuted by each; the trial by the second sovereignty will not be barred by the jeopardy in which the defendant was placed in the first prosecution by the other.¹³

The prohibition against double jeopardy does not operate to prevent a second trial if a defendant appeals and has his conviction set aside; he may be retried upon the same indictment for the same offense.¹⁴ The result is the same when a defendant makes a successful motion for a new trial. The explanation of this result is not clear. The predominant theory is that by appealing, the defendant "waives" his right against being put in jeopardy twice. But the waiver approach merely states a conclusion, because the prohibition against double jeopardy does not impose an absolute bar to a new trial,¹⁵ an assumption necessary to the rationale of the waiver theory. However, if jeopardy is thought of as continuing until the final settlement of any one action, a new trial resulting from an appeal may be

6. *People v. Tibbits*, 60 Cal. App. 2d 335, 140 P.2d 726 (1943); *State v. Yokum*, 155 La. 846, 99 So. 621 (1924); *Holt v. State*, 24 S.W.2d 886 (Tenn. 1930); *State v. Witte*, 243 Wis. 423, 10 N.W.2d 117 (1943).

7. *Commonwealth ex rel. Farrow v. Martin*, 387 Pa. 449, 127 A.2d 660 (1956), *cert. denied*, *Farrow v. Pennsylvania*, 353 U.S. 986, 77 S.Ct. 1288 (1957).

8. *Commonwealth v. Simpson*, 310 Pa. 380, 165 Atl. 498 (1933).

9. *Jackson v. Superior Court*, 10 Cal. 2d 350, 74 P.2d 243 (1937); *People v. Brown*, 273 Ill. 169, 112 N.E. 462 (1916); *State v. Madden*, 119 Kan. 263, 237 Pac. 663 (1925); *Wilson v. Commonwealth*, 212 Ky. 584, 279 S.W. 988 (1926); *State v. Mason*, 326 Mo. 973, 33 S.W.2d 895 (1930).

10. *People ex rel. Jimeron v. Freiberg*, 137 Misc. 314, 243 N.Y.S. 590 (1930).

11. *State v. Kappen*, 191 Iowa 19, 180 N.W. 307 (1920).

12. *People v. Sullivan*, 101 Cal. App. 2d 322, 225 P.2d 645 (1950); *State ex rel. Williams v. Grayson*, 90 So. 2d 710 (Fla. 1956); *People v. DeFrates*, 395 Ill. 439, 70 N.E.2d 591 (1946).

13. *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676 (1959). See also Newman, *supra* note 5.

14. *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192 (1896); *Mayers & Yarbrough*, *supra* note 2.

15. *Forman v. United States*, 361 U.S. 416, 80 S.Ct. 481 (1960) (Mr. Justice Harlan concurring).

viewed as a continuation of the first jeopardy, not a second and distinct jeopardy. On the theory of waiver the Supreme Court held that it would violate the Fifth Amendment to permit the federal government to appeal.¹⁶ Some state courts have held that appeals by the state do not violate state prohibitions against double jeopardy,¹⁷ and state appeals do not deny defendant due process of law as required by the Fourteenth Amendment.¹⁸

The principal case raises the novel question as to the limitations placed on the judge or jury in fixing punishment at a second trial for the same conviction which had been previously set aside by the defendant's appeal. Prior to this decision all cases which dealt with the issue held that imposition of the more severe sentence at the second trial was not a violation of the prohibition against double jeopardy. However, in the principal case the majority of the California Supreme Court held that the imposition of the death penalty at the second trial was a violation of the double jeopardy prohibition. The reasoning of the court was that the decision of the United States Supreme Court in *Green v. United States*¹⁹ and its own decision in *Gomez v. Superior Court*²⁰ vitiated the rationale of *Stroud v. United States*²¹ and *People v. Grill*,²² previous decisions of the respective courts which held that imposition of the more severe sentence after a second conviction did not operate to place the defendant twice in jeopardy. *Green* and *Gomez* both held that a conviction of a lesser included offense operates as a bar to a second prosecution for the greater offense, even when the defendant has that conviction set aside, because by its verdict the fact-finder impliedly acquits a defendant of crimes for which he might have been convicted.²³

The underlying reasoning of both *Green* and *Gomez* is that a defendant should not be forced into the dilemma of either challenging an erroneous conviction and thereby place himself in danger of being convicted of a greater crime, or of letting the erroneous conviction stand. The defendant in the instant case faces a similar choice; he must either risk a more severe penalty at the second trial, or suffer the erroneous conviction to stand. The facts of the *Stroud* and *Grill* cases are similar to the principal case. In *Stroud*, the Court held that since the protection afforded by the Constitution is only against a second trial for the same offense, after a verdict without a recommendation of mercy in the second trial, the court had to

16. *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797 (1904). Mr. Justice Holmes dissented, urging the continuing jeopardy theory.

17. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894); *State v. Felch*, 92 Vt. 477, 105 Atl. 23 (1918); *State v. Witte*, 243 Wis. 423, 10 N.W.2d 117 (1943).

18. *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937).

19. 355 U.S. 184, 78 S.Ct. 221 (1957).

20. 50 Cal. 2d 640, 328 P.2d 976 (1958).

21. 251 U.S. 15, 40 S.Ct. 50 (1919).

22. 151 Cal. 592, 91 Pac. 515 (1907).

23. There is a division of authority among the states on this question; approximately half of which have passed on the issue reach the *Green* result, while the remainder permit retrial for the greater offense on the theory that when a verdict is set aside, every implication resting upon it must be set aside. For a compilation of the jurisdictions which have passed on the question and their respective positions see *Green v. United States*, 355 U.S. 184, 216 n.4, 78 S.Ct. 221, 238 n.4 (1957) (Mr. Justice Frankfurter dissenting). 3 ARIZ. L. REV. 287, 290 n.27 (1961).

impose the death penalty. It was held in the *Grill* case that the discretion given to the jury to mitigate punishment does not subdivide first degree murder into two subdegrees. A determination that defendant should not be put to death is not a determination that any element of first degree murder is lacking, nor was the former conviction in any sense an acquittal of first degree murder.

While it is true that the dilemmas faced by the defendants in *Green* and in the principal case are similar, the crucial question is whether the defendant can plead former jeopardy in a situation where he is faced with the possibility of a more severe sentence when he is reconvicted of the *same* crime. The underlying policy of the prohibition against double jeopardy is that the state should not be permitted to make repeated attempts to convict a person for an alleged *offense* subjecting him to the ordeal and expense of defending himself over and over. Allowing repeated attempts at conviction makes the person insecure, while enhancing the possibility that he may be found guilty even though he is innocent.²⁴ In *Green* the basis of the holding was that when a defendant is convicted of a lesser included offense he is impliedly acquitted of the greater offense. By fundamental double jeopardy principles an acquittal is an absolute bar to further prosecution for the offense. But in the principal case the defendant was not acquitted of first degree murder; he was convicted. It has been argued that by giving the jury the power to impose the death penalty or life imprisonment, the legislature has, in effect, divided first degree murder into two subdegrees and that imposition of a life sentence bars a subsequent death penalty.²⁵ Yet this argument is fallacious, because in both cases all the elements necessary to reach the verdict of guilty are identical, and the punishment to be meted out is decided upon only after a verdict is reached. The cases which have dealt with this problem readily recognize this distinction. In *Greer v. State*²⁶ a statute giving the jury power to recommend leniency on conviction of first degree murder was held not to divide that crime into two separate grades. Moreover, a recommendation of mercy does not change the nature or grade of the crime,²⁷ and the degree of the crime and the sentence are two independent determinations.²⁸ Therefore, the rationale of implied acquittal is inappropriate.²⁹ In the principal case the defendant was convicted of the very crime for which he was to be retried. In cases where implied acquittal is an appropriate rationale the danger of greater punishment arises from the possibility of conviction of a *greater* offense; in the principal case the source of the danger is a reconviction for the *identical* offense, a reconviction which is not forbidden by

24. *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223 (1957).

25. *Cf.* 38 DICK. L. REV. 276 (1934). This note criticizes *Commonwealth v. Alessio*, 313 Pa. 537, 169 Atl. 764 (1934), which reaches the *Stroud* and *Grill* results.

26. 62 Tenn. 321 (1874).

27. *Mann v. State*, 23 Fla. 610, 3 So. 207 (1887).

28. *State v. Kneeskern*, 203 Iowa 929, 210 N.W. 465 (1926).

29. The United States Supreme Court stated in *Green* that *Stroud* was clearly distinguishable from *Green*, 355 U.S. 184, 195 n.15, 78 S.Ct. 221, 227 n.15 (1957).

the double jeopardy prohibition.³⁰ Viewed from another aspect the rationale of *Green* is equally inapplicable. In that case the Court said that an appeal should not be conditioned on a coerced surrender of a valid plea of former jeopardy on another offense which defendant was not appealing.³¹ In the principal case the defendant has no valid plea of former jeopardy, and therefore, his appeal is not conditioned by any forced relinquishment. Another possible reason for the result of the principal case is that the prohibition against double jeopardy is applicable to the punishment as well as to the offense. This argument was laid to rest long ago when it was held that the prohibition is not against being twice punished, but against being twice put in jeopardy.³²

While prior case law furnishes no support for the holding in the instant case, there are none the less sound reasons for the decision. Recent cases like *Fay v. Noia*³³ and *Gideon v. Wainwright*³⁴ have charged and super-charged the judicial atmosphere making the courts far more sensitive and sympathetic to the plight of the criminally accused. This development makes the case for *Grill* and the virtues of stare decisis³⁵ exceedingly weak especially in light of the high stakes for which the defendant under indictment for murder must gamble. Previous case authority compels him to choose between an erroneous conviction and the possibility of a greater sentence if reconvicted. The court chose to eliminate the fear factor at the cost of calling upon the state to defend more criminal appeals. The result

30. *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192 (1896).

31. *Green v. United States*, 355 U.S. 184, 193, 78 S.Ct. 221, 227 (1957).

32. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192 (1896); *Mann v. State*, 23 Fla. 610, 3 So. 207 (1887); *Commonwealth v. Alessio*, 313 Pa. 537, 169 Atl. 764 (1934). Cf. *Hicks v. Commonwealth*, 345 Mass. 89, 185 N.E.2d 739 (1962), where by way of dicta the court said, "Had petitioner been convicted and sentenced and if on his appeal the conviction had been reversed, a subsequent conviction followed by a longer sentence would not be objectionable." 185 N.E.2d at 740. Massachusetts, however, has not yet decided what would be the result in a *Green* or a *Gomez* situation. New York has reached the same result as *Stroud* and *Grill*, *People v. MacKenna*, 298 N.Y. 494, 84 N.E.2d 795 (1949), cert. denied, 336 U.S. 969, 69 S.Ct. 933 (1949). The *Green* decision, however, has not "vitiated" the rationale of the *MacKenna* case because New York has reached a result contrary to *Green*, *People v. Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888), and has recently affirmed that position, *People ex rel. Hetenvi v. Johnston*, 10 App. Div. 2d 121, 198 N.Y.S.2d 18 (3d Dept. 1960). All of the other courts whose opinions have been cited as following the *Stroud* decision also follow the *Green* rule, yet these courts did not think that the rule "vitiated" the rationale of permitting a defendant to be subject to the possibility of a more severe sentence. Cf. note 22 *supra*.

33. 372 U.S. 391, 83 S.Ct. 822 (1963); 9 VILL. L. REV. 168 (1963). It is worth noting that had *Noia* appealed and received a new trial, he, like the defendant in the principal case, would have faced the possibility of being sentenced to death. See *People v. MacKenna*, 298 N.Y. 494, 84 N.E.2d 795 (1949), as referred to in note 32 *supra*. The Supreme Court characterized this as a "grisly choice" likening it to playing Russian roulette, and held that failure to appeal under these circumstances could not be deemed a mere tactical litigation step or in any way a deliberate circumvention of state procedures requiring denial of federal habeas corpus.

34. 372 U.S. 335, 83 S.Ct. 729 (1963).

35. One wonders about the vitality of stare decisis in California, judging from some of that court's recent decisions. See, e.g., *Self v. Self*, 58 Cal. 2d 692, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (overrules line of cases beginning in 1909 which supported the rule of interspousal immunity for intentional torts). See also *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1963).