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Criminal Law - Double Jeopardy - Benton v. Maryland, 89 S. Ct. 2056 (1969)

Lawrence J. Lipka

was the initial step in the removal of arbitrary limitations, though recognizing the need for some guidelines in the area of bystander recovery. *Archibald*, in liberally construing these guidelines, has accelerated the trend. With the possibility of New York supplying additional momentum,[22] one might look forward to the gradual acceptance of this more equitable though challenging approach in the area of recovery for emotional and mental distress.

ROBERT L. WALKER

Criminal Law—DOUBLE JEOPARDY—*Benton v. Maryland*, 89 S. Ct. 2056 (1969).

The defendant was tried in a Maryland state court on charges of burglary and larceny. He was acquitted of larceny, but convicted of burglary. Due to a defect in the composition of the grand and petit juries, the defendant was forced to waive the former jeopardy of larceny, and was retried and convicted on both counts.[1] Upon appeal the Supreme Court in reversing the larceny conviction held that freedom from double jeopardy is a fundamental constitutional right[2] that is imposed upon the states through the fourteenth amendment.[3]

The underlying rationale of double jeopardy is that the state should not be permitted to make repeated attempts to convict an individual to embarrass him and compel him to live in a continuous state of anxiety and insecurity.[4] Prior to adoption of the fourteenth amendment, the Supreme Court in *Fox v. Ohio* held that double jeopardy was largely a federal concern, and in no way applied to the states.[5] While the Bill of Rights already contained the double-jeopardy clause, many states never-

22. *See supra* note 17.

1. Benton v. Maryland, 89 S.Ct. 2056 (1969). Because the grand and petit juries had been unconstitutionally selected under a section of the state constitution that demanded jurors to swear their belief in the existence of God, the Maryland Court of Appeals remanded the case to the trial court where defendant was given the "option" of serving his ten-year sentence for burglary, or demanding reindictment and a new trial.

2. U.S. CONST. amend. V ". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

3. Maryland argued one cannot be placed in jeopardy by a void indictment. The Supreme Court found that only by accepting a new trial could the former indictment and sentence be set aside. There was really no choice or option involved and one cannot be forced to waive his rights of former jeopardy.

4. Green v. United States, 355 U.S. 184, 187-88 (1957).

5. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).

theless inserted a similar protection in their state constitutions,[6] but with varied interpretations.[7]

After the adoption of the fourteenth amendment,[8] the Court in *Palko v. Connecticut*,[9] placed some double jeopardy limitations upon the states through the due-process clause. Subject to their constitutional provisions the states were still generally free to apply their own unique double-jeopardy meaning to determine when jeopardy attached.[10] Both the municipality and the state could prosecute when jurisdiction overlapped, and if the defendant appealed for a new trial he was generally held to have "waived" former jeopardy.[11] Furthermore, the state prosecution could appeal and continue the case until it culminated in one error-free trial.[12] A denial of due process occurred only when the jeopardy was "so acute and shocking that our polity will not endure it." [13]

In recent years, certain privileges and immunities of the Bill of Rights have been incorporated in the fourteenth amendment by a process of "selective incorporation." [14] In *Benton* the Supreme Court said, "For the same reasons, we today find that the double jeopardy prohibition . . . represents a fundamental idea in our constitutional heritage, [and that]

6. J. SIGLER, DOUBLE JEOPARDY 78, 79 n.6 (1969). All but five states have constitutional provisions against double jeopardy: Maryland, Connecticut, Massachusetts, North Carolina, and Vermont.

7. *Id.* at 79. Thirty-seven states have the same terminology as in the Fifth Amendment, but apply their own meaning and exceptions.

8. U.S. CONST. amend. XIV § I. "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."

9. 302 U.S. 319 (1937) (the crux of *Palko* was a case-by-case determination of fundamental fairness considering the totality of circumstances).

10. J. SIGLER, DOUBLE JEOPARDY 77-117 (1969).

11. *Id.*

12. Palko v. Connecticut, 302 U.S. 319, 328 (1937).

13. *Id.*

14. Note, *The Incorporation Doctrine: Sixth Amendment Trial by Jury*, 15 How. L.J. 164 (1968). *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (the right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (the right to speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (the right to confrontation of opposing witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (the fifth amendment right to self-incrimination); Gideon v. Wainwright, 372, U.S. 335 (1963) (the sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1964) (the fourth amendment right against unreasonable searches and seizures); *In re* Oliver, 333 U.S. 257 (1948) (the right to a public trial); Fiske v. Kansas, 274 U.S. 380 (1927) (the first amendment right of free speech, press, and religion); Chicago B & Q Co. v. Chicago, 166 U.S. 226 (1897) (the right to compensation for property taken by the state).

the same constitutional standards apply against both the state and federal governments." [15]

Benton appears to be a logical step in the Court's recent trend of making the individual guarantees of the Bill of Rights the standard in determining whether due process requirements have been met. It is another step towards incorporating all of the Bill of Rights into the fourteenth amendment. States must conform to the federal standard of double jeopardy that prohibits an appeal at the instance of the prosecution[16] once jeopardy has attached.[17] The *Palko* approach is abrogated and federal concepts will apply to the states under one uniform law. *Benton*, however, creates a need for legislative and judicial action to establish a clear rule for the states in the areas of competing jurisdictions,[18] multiple prosecutions[19] and where a single illegal act violates both state and federal laws.[20] *Benton* overrules a double standard of

15. 89 S.Ct. at 2062.

16. Kepner v. United States, 195 U.S. 100 (1904). Congress has granted federal courts "limited" right to appeal to the Court of Appeals or to the United States Supreme Court under the Criminal Appeals Act of 1948, 62 Stat. 844, *as amended*, 18 U.S.C. § 3731 (1964). The appeal must be based upon the validity or construction of the statute upon which the indictment or information is founded, or when the defendant has not been put in jeopardy.

17. A person is put in jeopardy, by federal standards, when he is regularly charged with a crime before a tribunal properly organized and competent to try him, and if trial by jury, when the jury has been called and charged with the deliverance of the accused. Kepner v. United States, 195 U.S. 100, 128 (1904); Clawens v. Rives, 104 F.2d 240 (D.C. Cir. 1939) (when any evidence is heard, or testimony received, but before opening argument). In cases of "manifest necessity" an exception is made to the rule of attachment, and the trial judge is permitted at his discretion to order a new trial. *See, e.g.*, Lovato v. New Mexico, 242 U.S. 199 (1916) (irregularity in the indictment); Thompson v. United States, 155 U.S. 271 (1894) (termination of a court term, other emergencies or unusual circumstances); Simmons v. United States, 142 U.S. 148 (1891) (jurors acquaintaince with the accused); United States v. Perez, 22 U.S. (9 Wheat) 579 (1824) (if the jury cannot agree); United States v. Potash, 118 F.2d 54 (2d Cir. 1941) (illness of a juror); *See* Note, *Double Jeopardy and the Doctrine of Manifest Necessity*, 20 N.Y.U. INTRA. L. REV. 189 (1965).

18. In Hoag v. New Jersey, 356 U.S. 464, 466-67 (1958) the Court approved the state's version of double jeopardy thereby permitting separate trials and multiple convictions arising from the "same criminal transactions" holding that the jeopardy determination must be "picked out in the facts and circumstances of each case." *See* Biglow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487 (1957).

19. Ciucci v. Illinois, 356 U.S. 571 (1958). The Court deferred to the state double jeopardy policy and permitted four murders occurring simultaneously to be tried separately, declaring if there were no showing of "fundamental unfairness" in the state's procedure due process would not be violated.

20. In United States v. Lanza, 260 U.S. 377 (1922) the defendant illegally transported liquor violating both state and federal laws. The Court upheld separate prosecutions

jeopardy protection that existed in America since the time of the Bill of Rights. It is today "fundamental to the American scheme of justice." [21]

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by each authority and held the double jeopardy clause inapplicable since it only restricted federal prosecutions. *See* Bartkus v. Illinois, 359 U.S. 121 (1959). The defendant was acquitted in a federal court but subsequently convicted in a state court for the same offense. The Court held, in a five-to-four decision, that there was no double jeopardy bar to such a threat of double punishment.

21. 89 S. Ct.2056 (1969).