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This article examines the Double Jeopardy Clause. Double jeopardy issues can be divided into two general categories. First, the meaning of the term "same offense" raises a number of issues, such as the dual sovereign doctrine and the criminal-civil law distinction. See 2 Katz & Giannelli, Ohio Criminal Law chs. 72 & 73 (1996). Second, the term "twice in jeopardy" raises another series of issues. This article focuses on these latter issues. A future article will examine the former issues.

OVERVIEW

Acquittals. The Double Jeopardy Clause bars a retrial if there has been a jury verdict of acquittal or its functional equivalent, such as a directed verdict (Criminal Rule 29) by the trial court or a reversal of a conviction by an appellate court for insufficient evidence. Implied acquittals involve situations where the accused is found guilty of a lesser included offense; this result precludes retrial on the greater offense.

Dismissals. In contrast, a dismissal on legal grounds unrelated to guilt or innocence will not preclude a retrial.

Mistrials. A reprosecution following a mistrial is permitted if (1) the defense requested the mistrial (unless the request was cause by the prosecution with the intent to provoke a mistrial), or (2) there is a "manifest necessity." The term "manifest necessity" is not a self-defining term and covers a wide gambit of circumstances, including hung juries, defective indictments, defense misconduct, and so forth.

ATTACHMENT OF JEOPARDY

When the United States Supreme Court applied the double jeopardy prohibition to the states in Benton v. Maryland, 395 U.S. 784 (1969), it did not specifically establish the point in time when jeopardy attaches. The Court had held in federal cases that jeopardy attached in jury trials when the jury is sworn and in bench trials when the first witness is sworn. Serfass v. United States, 420 U.S. 377 (1975). After *Benton,* it was unclear whether states would be free to select a different time in the proceedings.

In 1978, the Court confronted this issue in Crist v. Bretz, 437 U.S. 28, 38 (1978), holding that the federal rule — jeopardy attaches when the jury is sworn — is binding on the states. Thus, the Court reaffirmed the purpose of the prohibition, which is not simply to prevent double convictions and multiple punishments for the same offense but also multiple trials. The federal rule promotes "minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury." As Justice Blackmun pointed out in his concurring opinion, the federal rule also prevents "the possibility of prosecutorial overreaching in the opening statement" and minimizes the possibility that an innocent defendant may be convicted. *Id.* at 39.

Pretrial Rulings

Since jeopardy does not attach until the jury is sworn (or until evidence is introduced in a bench trial), the state is free to appeal all pretrial rulings, suppression motions, and dismissals favorable to the defendant. If these rulings are reversed on appeal, the prosecution may then proceed to trial. See Serfass v. United States, 420 U.S. 377, 393 (1975) ("an accused must suffer jeopardy before he can suffer double jeopardy"); State v. Larabee, 69 Ohio St.3d 357, 359, 632 N.E.2d 511 (1994) ("By applying *Serfass* to the case before us, we conclude that jeopardy did not attach when the trial court granted the appellee's [pretrial] motion to dismiss the indictment.").

Guilty Pleas

If the defendant pleads guilty, jeopardy generally attaches when the court accepts the plea unconditionally. 3 LaFave & Israel, Criminal Procedure § 24.1(c), at 64 (1984). Nevertheless, the Supreme Court's decision in Ohio v. Johnson, 467 U.S. 493 (1984), recognizes a limitation. Johnson was indicted for murder, involuntary manslaughter, aggravated robbery, and grand theft. At arraignment, the defendant offered to plead guilty to the manslaughter and theft counts. Over the prosecution's objection, the trial court accepted the pleas and dismissed the remaining counts on double jeopardy grounds, finding that manslaughter and theft were lesser included offenses of murder and robbery. The Ohio Supreme Court upheld this decision. The United States Supreme Court reversed. According to the Court, the multiple prosecution aspect of the Double Jeopardy

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Clause would not be violated in this context. The defendant had never been exposed to conviction on the more serious charges; the prosecution was not seeking a second chance at conviction; and the plea of guilty could not be considered an implied acquittal of the more serious charges.

Plea Agreements

The defendant in Ricketts v. Adamson, 483 U.S. 1 (1987), was charged with first degree murder. He pleaded guilty to second degree murder pursuant to a plea bargain, in which he agreed to testify against two other defendants. The agreement provided that "[s]hould the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and the original charge will be automatically reinstated." *Id.* at 4. The trial court accepted the plea but withheld sentencing. Adamson testified against the other defendants, who were convicted of first degree murder. He was then sentenced. The convictions of the other defendants, however, were reversed on appeal, and Adamson refused to testify at the retrial. He claimed that his obligation to testify under the agreement ended when he was sentenced. The prosecution considered his refusal to testify as a breach of the agreement, and Adamson was subsequently tried, convicted of first degree murder, and sentenced to death. In a federal habeas proceeding, the federal appellate court ruled that his double jeopardy rights had been violated.

The United States Supreme Court reversed. The Court acknowledged that absent special circumstances, the Double Jeopardy Clause would bar prosecution for first degree murder because second degree murder was a lesser included offense. According to the Court, the special circumstances were Adamson's waiver of his double jeopardy claim. The Court believed that the agreement was clear; should Adamson not testify after pleading guilty to second degree murder, the agreement was void, and he could be tried for first degree murder. This agreement necessarily involved a waiver of double jeopardy rights.

MISTRIALS: IN GENERAL

The earliest justification for the development of a double jeopardy doctrine in England and in this country was the premise that defendants should be protected against multiple convictions and punishments. American law has incorporated into the Double Jeopardy Clause the right to a verdict from the first tribunal to hear the case. However, this right is not absolute; unforeseen circumstances sometimes prevent a trial from being completed fairly. In an 1824 case, United States v. Perez, 22 U.S. 579, 580 (1824), the United States Supreme Court stated, "We think . . . the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

Similarly, in Wade v. Hunter, 336 U.S. 684, 689 (1949), the Court stated that "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Even the Warren Court opposed a rigid rule that would automatically bar retrial whenever a jury is discharged without a defendant's consent. The Court recognized that a rigid rule "would be too high a price to pay for the added assurance of personal security and freedom from government harassment." United States v. Jorn, 400 U.S. 470, 480 (1971).

For more than a century after *Perez*, appellate courts seemed to affirm trial judges' findings of manifest necessity without close scrutiny. For example, in Gori v. United States, 367 U.S. 364 (1961), the Supreme Court affirmed a conviction obtained at a second trial after the judge at the first trial had declared a mistrial sua sponte when he determined that the prosecutor's questioning of a witness was calculated to inform the jury of the defendant's prior convictions. The Court was unwilling to review the mistrial ruling because it had been granted solely in the defendant's interest.

A decade later, in United States v. Jorn, 400 U.S. 470 (1971), the Court scrutinized the trial court's decision more carefully, finding that the trial judge abused his discretion when he made a sua sponte decision to declare a mistrial. That case involved prosecution for willful assistance in the preparation of fraudulent income tax returns. The government's witnesses were taxpayers who had been assisted by the defendant in preparing these returns. The trial judge advised the first witness, upon suggestion of defense counsel, of his privilege against self-incrimination. The witness indicated a willingness to testify and informed the trial judge that he had been advised of his rights by the IRS. The trial judge did not believe that the witness had been properly informed of his rights and, after learning that the other four witnesses were likewise uninformed, immediately declared a mistrial so that the witnesses could confer with attorneys. The trial court provided no opportunity for the prosecutor to suggest a continuance for the legal consultations, nor was the defendant given an opportunity to object to the mistrial. The Supreme Court held that the judge must consider alternatives before aborting a trial. Only in the absence of alternatives can there be a manifest necessity for a mistrial.

The court of appeals found that there were alternatives in Cleveland v. Walters, 98 Ohio App.3d 165, 648 N.E.2d 37 (1994), when it became clear during the reading of the jury's verdict that the jury had physically delivered the wrong verdict to the court. As the verdict was read, the members of the jury called out. The defense attorney asked that the jury be polled, and the jurors unanimously announced that the verdict read was not theirs. The trial court found that the jurors' statement of an unanimous verdict in open court before delivering a proper written verdict created a manifest necessity for a mistrial because no one should be aware of their actions during deliberations. The appellate court concluded that there was no manifest necessity for a mistrial because the court should have sent the jury back to resolve the apparent error.

There are two types of mistrials: (1) defense requested mistrials and (2) all others (those requested by the prosecution or declared by the judge).

DEFENSE REQUESTED MISTRIALS

The United States Supreme Court has never been willing to accept a rigid rule that would automatically bar retrial under any circumstance following a mistrial, holding, instead, that in most instances a mistrial granted with the consent or on the motion of a defendant does not bar retrial under the Double Jeopardy Clause. In United States v. Dinitz, 424 U.S. 600 (1976), the Court recognized that this created a Hobson's choice for the defendant between giving up the first jury or continuing a tainted trial. That choice was deemed acceptable, however, because the defendant retains primary control over the course of events — continuing

a trial that may be tainted by prejudicial error or having a new trial with another jury. This assumes, of course, that the trial court is willing to consider alternatives for curing an error before the defendant is forced to seek a mistrial.

Exception

In *Dinitz* and *Jorn*, the Court recognized an exception to this rule. A retrial would be barred when the prosecutor's conduct is in bad faith or for the purpose of harassing the defendant. Later, in Oregon v. Kennedy, 456 U.S. 667, 676 (1982), the Court rejected this standard as too amorphous. In its place, the majority adopted a standard which bars retrial only when the prosecutorial conduct which gives rise to a defendant's motion for mistrial is intended to provoke the defendant into moving for a mistrial.

On cross-examination of the state's expert witness in *Kennedy*, the defense attempted to establish the witness's bias by questioning him about an unrelated criminal complaint he had filed against the defendant. The prosecutor sought to rehabilitate the witness on redirect by asking whether the witness had ever done business with the defendant. When the witness responded in the negative, the prosecutor asked, "Is that because he is a crook?" *Id.* at 667. At that moment, the defense attorney had to choose between the possibility of a prejudiced jury or waiver of his client's right to a verdict from that jury. The Oregon Court of Appeals agreed with the trial court's finding that it was not the intent of the prosecutor to cause a mistrial. Nevertheless, the Oregon court held that retrial was barred because the prosecutor's conduct, "a direct personal attack on the general character of the defendant," was "overreaching." The Court, per (then) Justice Rehnquist, held that "overreaching" is an overly expansive standard and reversed. The Court felt that allowing double jeopardy to act as a bar would not necessarily aid the defendant. Justice Rehnquist declared, "Knowing that the granting of the defendant's motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial." *Id.* at 676.

In State v. Loza, 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994), cert. denied, 514 U.S. 1120 (1995), the Ohio Supreme Court applied this rule: "Only where the prosecutorial conduct in question is intended to 'goad' the defendant into moving for a mistrial may defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." The Court went to find that there "is no indication that the state engaged in an intentional act of deception, or that the state intentionally withheld exculpatory evidence."

MANIFEST NECESSITY

Hung Juries

Hung juries are the most common cause of mistrials. The standards governing reprosecution following a mistrial were set forth in an 1824 hung jury decision, United States v. Perez, 22 U.S. 579, 580 (1824). See also Logan v. United States, 144 U.S. 263, 297-98 (1892). The Court in *Perez* stated, "We think . . . the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.* at 580.

The jury in Richardson v. United States, 468 U.S. 317 (1984), acquitted the defendant of one count but could not agree on other counts. The trial court therefore declared a mistrial, and the defendant claimed that a second trial on the remaining counts would violate the Double Jeopardy Clause because the evidence on the remaining counts was insufficient for conviction. The defendant relied on Burks v. United States, 437 U.S. 1 (1978), in which the Supreme Court had held that if a defendant obtained an appellate ruling that the evidence introduced at trial was insufficient to convict, a second trial was precluded by the Double Jeopardy Clause. In short, a finding of insufficient evidence is equivalent to an acquittal. The Supreme Court, however, refused to extend *Burks* to the defendant's case. Instead, the Court adhered to its long established rule that a retrial following a hung jury does not violate the Double Jeopardy Clause. See also State v. Lovejoy, 79 Ohio St. 3d 440, 683 N.E. 2d 1112 (1997).

Unavailable Witnesses

In Downum v. United States, 372 U.S. 734 (1963), the Supreme Court, in a 5-4 decision, reversed a conviction at a second trial where the judge at the first trial had granted the government's motion for a mistrial when it was discovered, after the jury had already been impaneled, that a key prosecution witness had not been located. The trial court discharged the jury over the objection of the defendant, and a second jury was impaneled two days later, after the prosecution located the witness.

The Court in *Downum* found a lack of manifest necessity to discontinue the first trial. The Court held that when a jury is impaneled and the prosecutor is aware or should be aware of the unavailability of a key prosecution witness, discharge of the jury — even if no evidence has been presented at that point — constitutes jeopardy. However, the Court declined to make an absolute rule, stating that each case must be decided on its own facts. The Court based its finding of lack of manifest necessity in *Downum* on the trial court's failure to consider available alternatives, such as a reasonable continuance until the key witness was located or granting the defense's motion to dismiss the two counts in the indictment for which the missing witness would have provided critical testimony.

Subsequent cases have read *Downum* to prohibit a retrial where the failure to produce the key witness can be attributed to faulty arrangements by the prosecution. However, where a properly subpoenaed witness fails to appear through no fault of the prosecution, and there are no viable alternatives, retrial will be allowed. See Schulhofer, Jeopardy and Mistrials, 125 U. Pa. L. Rev. 451 (1977).

Defective Indictment

In Illinois v. Somerville, 410 U.S. 458 (1973), the Supreme Court held that where an indictment suffers from a fatal defect and no other alternatives are present but to declare a mistrial, a second trial is not barred. After the jury was sworn but before any evidence was presented, the prosecutor realized the indictment was fatally defective for failing to allege the requisite intent, i.e., permanently deprive the owner of his property. Moreover, Illinois only permitted amending an indictment to cure formal defects, which this omission was not. Further proceedings under the defective indictment would have resulted in a reversal of any conviction on appeal. Faced with this prospect, the trial court granted the prosecution's motion and declared a mistrial. The defendant was re-indicted and convicted after the new trial.

At first glance, *Somerville* seemed to fall within the rule set forth in *Downum*. Both cases involved prosecutors who moved for a mistrial because of their own errors. However, the *Downum* error could have been corrected by granting a continuance to enable the prosecution to locate its witness, while a mistrial was the only alternative available in *Somerville*. The Court held that the "ends of public justice" outweighed the defendant's interest in proceeding to a verdict with the first jury. Therefore, under a showing of manifest necessity, the declaration of a mistrial was proper.

Defense Counsel Misconduct

In 1978, the Supreme Court decided that when a mistrial is declared due to defense counsel misconduct, a showing of manifest necessity is not an absolute requirement. In Arizona v. Washington, 434 U.S. 497 (1978), a defendant's first murder conviction was reversed because the prosecutor withheld exculpatory evidence from the defense. During defense counsel's opening statement at the second trial, he disclosed to the jury that the state's withholding of information had caused the new trial. The prosecutor objected and moved for a mistrial on the ground that the defense attorney's misconduct could not be remedied. The mistrial was granted, and the defendant was subsequently convicted at a third trial. The Supreme Court affirmed this conviction despite the failure of the trial judge to expressly find a manifest necessity for the mistrial or to consider other alternatives. According to the Court, it is within the trial judge's discretion to determine if a statement by defense counsel might have created juror bias. The Court made clear, however, that its relaxed review of the proceedings would be inappropriate in cases where the mistrial had been caused by the conduct of a prosecutor.

In State v. Widner, 68 Ohio St.2d 188, 190, 429 N.E.2d 1065 (1981), cert. denied, 456 U.S. 934 (1982), the Ohio Supreme Court held that a trial judge did not abuse his discretion by declaring a mistrial sua sponte. In *Widner*, the defendant's attorneys were found in contempt and removed from the courtroom after the jury had been sworn and opening statements had been made. When the defendant then stated that he no longer wished to appear in front of the judge, he was found in contempt, and the judge declared a mistrial. The case was tried subsequently before a new trial judge. The defendant entered a plea of no contest. On appeal, he claimed the second trial violated the Double Jeopardy Clause. The Ohio Supreme Court upheld the conviction on three grounds: (1) there was a "high degree of necessity" for the mistrial; (2) there were no viable alternatives; and (3) a mistrial would best serve the public interest in justice.

ACQUITTALS

The Double Jeopardy Clause bars reprosecution if a defendant has been acquitted. Ball v. United States, 163 U.S. 662, 671 (1896). Directed verdicts are treated the same as acquittals. An appellate court's decision to reverse for insufficient evidence is also the functional equivalent of an acquittal. Both of these issues are discussed below.

DIRECTED VERDICTS

Directed verdicts (Crim. R. 29) are treated the same as acquittals and bar reprosecution. As discussed in the next section, dismissals do not bar retrial. The label given to the trial court's decision is not determinative; rather, the basis of the decision controls.

In Fong Foo v. United States, 369 U.S. 141 (1962), the trial judge, in the middle of the trial, directed the jury to return verdicts of acquittal. The Supreme Court held that even if the judge's decision was erroneous, it nevertheless was a final judgment and could not be reviewed without subjecting the defendants to double jeopardy. Similarly, in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), the Court ruled that if the judge enters a judgment of acquittal under Federal Criminal Rule 29(c) before the jury reaches a verdict, the government may not retry the defendant. *Martin Linen* was distinguished from an earlier case, United States v. Sanford, 429 U.S. 14 (1976), in which a trial judge had declared a mistrial because of a hung jury. The Court in *Martin Linen* distinguished the two cases on the ground that *Sanford* did not involve a judgment of acquittal under Rule 29(c). In sum, when a lower court makes a determination on the merits, retrial is barred by the Double Jeopardy Clause.

New Trial Motion

In Hudson v. Louisiana, 450 U.S. 40 (1981), the Supreme Court held that the Double Jeopardy Clause had been violated when Louisiana reprosecuted a defendant for first-degree murder after the defendant's new trial motion had been granted. The Court stated that when a new trial is granted because the state has failed to prove its case beyond a reasonable doubt, the new trial is barred. The Court, however, indicated that the result would have been different if the trial judge had granted the motion as a "13th juror" because he entertained personal doubts about the verdict.

Demurrer

In Smalis v. Pennsylvania, 476 U.S. 140 (1986), the defense filed a demurrer to several counts, and the trial judge sustained the demurrer. The prosecutor appealed the trial judge's decision. The Pennsylvania Supreme Court ruled that the appeal was not barred by the Double Jeopardy Clause because a demurrer involves a pure question of law, unrelated to factual guilt or innocence. The United States Supreme Court disagreed, holding that a demurrer was the functional equivalent of an acquittal and therefore barred a prosecution appeal or any other further proceedings. The key point is not the name of the motion or ruling, but whether the trial court is making a directed-verdict- insufficiency ruling.

Appeals of Directed Verdicts

The Court has indicated, however, that there can be an appeal from a judgment of acquittal entered *post*-trial. In United States v. Scott, 437 U.S. 82, 92 n. 7 (1978), the Court stated: "In *Jenkins* we had assumed that a judgment of acquittal could be appealed where no retrial would be needed on remand .... Despite the Court's heavy emphasis on the finality of an acquittal in *Martin Linen* and *Sanabria*, neither decision explicitly repudiates this assumption." In this situation, the critical point is that a retrial is not necessary; if the appellate court disagrees with the trial court, the original verdict can be reinstated without a new trial.

DISMISSALS

Dismissals on grounds unrelated to factual guilt or innocence after jeopardy has attached have proved troublesome, with the United States Supreme Court changing its position. Originally, in 1975, the Court in United States v. Jenkins, 420 U.S. 358 (1975), held that a dismissal differs from a mistrial because, in essence, a dismissal represents

a termination in favor of a defendant. *Jenkins* was charged with refusing to submit to induction in the armed forces. The trial court dismissed the indictment because the selective service board had failed to consider the defendant's application for conscientious objector status. The Supreme Court did not determine whether the trial court's judgment constituted a resolution of the factual issues against the government and would not consider the correctness of the ruling. In the Court's view, double jeopardy barred further proceedings after a dismissal favorable to the defendant.

Several years later, the Court modified *Jenkins*. In Lee v. United States, 432 U.S. 23 (1977), the Court said that a retrial was not barred where the trial judge, after a two-hour bench trial, dismissed the indictment for failure to allege the specific intent required by statute, even though the judge felt the defendant's guilt had been proven. The Court pointed out that, as in Illinois v. Somerville, 410 U.S. 458 (1973), the only reason a conviction could not be permitted in *Lee* was because the indictment had been improperly drafted. The Court stressed that "the order entered by the District Court was functionally indistinguishable from a declaration of mistrial .... The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided — absent any double jeopardy bar — by beginning anew the prosecution of the defendant." 432 U.S. at 30-31.

The final demise of *Jenkins* occurred in 1978 in United States v. Scott, 437 U.S. 82, 87 (1978). There, at the close of the evidence, the trial court dismissed two of three counts because of prejudicial preindictment delay. The jury acquitted the defendant on the third count. The Supreme Court, in a 5-4 decision, overruled *Jenkins* and held that the Double Jeopardy Clause does not bar appeal or reprosecution "where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence." Thus, *Scott* limited double jeopardy protection to favorable judgments on the merits, while *Jenkins* had enunciated a broader rule that any termination favorable to a defendant after jeopardy attached barred reprosecution.

RETRIALS AFTER APPELLATE REVERSALS

With the exception of reversals based on the insufficiency of evidence, the Double Jeopardy Clause does not bar reprosecution of defendants who have successfully appealed their convictions. Ball v. United States, 163 U.S. 662 (1896); United States v. Tateo, 377 U.S. 463 (1964). Two theories have been advanced to support this rule: (1) the defendant by appealing waives the double jeopardy protection; or (2) the defendant is in "continued jeopardy" until the trial is finalized.

For example, in Montana v. Hall, 481 U.S. 400 (1987), the defendant was convicted of incest of his stepdaughter. During the appellate process, the State discovered that the incest statute had not applied to stepchildren at the time of the crime. An amendment to the statute, which included stepchildren, became effective three months after the incident in question. The Montana Supreme Court reversed Hall's conviction on ex post facto grounds and also concluded that a retrial for sexual assault was precluded because incest and sexual assault were the "same offense" for double jeopardy purposes. The United States Supreme Court reversed. The successful appeal of a judgment of conviction, on any ground other than the sufficiency of the evidence, does not bar further proceedings for the same offense. Since Hall's conviction was reversed on ex post facto grounds, rather than for insufficient evidence, a retrial on the sexual assault charge was permissible.

Disparate Verdicts

If the accused is tried on two criminal charges, one resulting in a verdict of not guilty and the other a verdict of guilty, a reversal of the guilty verdict does not nullify the favorable judgment on the other offense. The not guilty verdict is untouchable; only the charge on which the conviction was reversed may be retried. Benton v. Maryland, 395 U.S. 784 (1969).

Implied Acquittals; Lesser Included Offenses

By returning a guilty verdict to a lesser offense, the jury has acquitted the defendant of the greater offense, and his appeal of the lesser conviction does not constitute a waiver of double jeopardy on the greater offense. Green v. United States, 355 U.S. 184 (1957); Price v. Georgia, 398 U.S. 323 (1970). Accordingly, if the conviction on the lesser offense is reversed, the defendant may be retried for the lesser, but not the greater, offense.

Insufficient Evidence

In Burks v. United States, 437 U.S. 1 (1978), and Greene v. Massey, 437 U.S. 19 (1978), the Supreme Court held that reversal on appeal because of the insufficiency of the evidence is, in effect, an acquittal and bars retrial. Reversal under such circumstances means that the trial court erred in submitting the case to the jury because the prosecution failed, as a matter of law, to present sufficient evidence to justify a guilty verdict.

In Lockhart v. Nelson, 488 U.S. 33 (1988), the defendant was sentenced to an enhanced prison term under a state habitual offender statute. The statute became operative if a defendant had been convicted of four prior offenses. In a later habeas proceeding, the defendant was able to show that one of the prior convictions had been the subject of a pardon, and thus could not be used for enhancement. The State, however, announced that it would introduce a different conviction, which it had not previously used, to bring the defendant within the recidivist statute. The defendant objected on double jeopardy grounds, arguing that without the pardoned conviction, there was insufficient evidence — in effect, an acquittal on the recidivist count.

The United States Supreme Court ruled that a retrial is not barred when a conviction is set aside because certain evidence was erroneously admitted, even when the reviewing court determines that without the erroneously admitted evidence there is insufficient evidence to support the conviction — provided that the sum of the trial evidence, whether erroneously admitted or not, would have been sufficient to sustain a guilty verdict. *Burks* was based on a distinction between reversals involving trial errors and those involving insufficient evidence. In *Nelson*, the reversal was based on a trial error, and a retrial would afford the accused the opportunity to obtain a fair readjudication of guilt free from error. Moreover, had he successfully objected to the inadmissible evidence at trial, the prosecutor would have had the opportunity to introduce a different prior conviction to support the recidivist charge.

Weight of the Evidence

In Tibbs v. Florida, 457 U.S. 31, 42 (1982), the Supreme Court, in a 5-4 decision, distinguished between reversals based on insufficient evidence and reversals based on the "weight of the evidence." Reversal of a conviction based on the weight of the evidence does not preclude retrial on double jeopardy grounds. A reversal for legal insufficiency is

like an acquittal because it means that no rational fact-finder could have voted to convict the defendant, and that the state should not have a second chance to prove what it had failed to prove at the first trial. In contrast, a reversal on the weight of the evidence signifies only the appellate court's disagreement with the verdict. The Court suggested that the appellate court be viewed as a "thirteenth juror" and its disagreement with the jurors' weighing of the evidence is no different from a disagreement among the jurors themselves. The Court reasoned, "A reversal based on the weight of evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict." In that instance, the "reversal simply affords the defendant a second opportunity to seek a favorable judgment." *Id.* 43.

RESENTENCING AT RETRIAL

In North Carolina v. Pearce, 395 U.S. 711, 721 (1969), the Supreme Court held that neither the Double Jeopardy nor Equal Protection Clauses precluded an increased sentence on retrial following a successful appeal. In other words, the "slate has been wiped clean" by the reversal. The Court, however, also held that due process precludes increased sentences when the increase is motivated by vindictiveness on the part of the sentencing judge:

> Due Process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge . . . .
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Id.* at 725-26.

Thus, an increased sentence on retrial is presumptively vindictive, but this presumption may be rebutted by reasons set forth in the record.

The defendant in Wasman v. United States, 468 U.S. 559 (1984), was convicted of making a false statement in a passport application and sentenced to a 2-year partially suspended sentence with probation. After his conviction was overturned, he was retried and convicted. This time he was sentenced to two years imprisonment, none of which was suspended. The Supreme Court found the presumption of vindictiveness applicable. It also found, however, that the record contained reasons that rebutted the presumption — namely, an intervening conviction. The increased punishment resulted from a conviction for a different crime, which was adjudged after the first trial.

The defendant in Texas v. McCullough, 475 U.S. 134 (1986), was convicted of murder and sentenced to 20 years imprisonment. The trial court granted the defendant's motion for a new trial due to prosecutorial misconduct. He was tried again and convicted. This time he received a 50-year prison term. The Court held that *Pearce* was not violated in this case. Two additional witnesses at the retrial provided information concerning the defendant's participation in the crime. Evidence of a prior conviction, unknown at the first trial, also supported the imposition of an increased sentence.

If the possibility of vindictiveness is absent, as where the second sentence is imposed by a jury that is unaware of the first sentence, the higher sentence is permissible. Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

Capital Cases

The United States Supreme Court has treated the death penalty differently from other sentences. In Bullington v. Missouri, 451 U.S. 430, 438 (1981), the Court refused to allow a retrial to impose the death penalty when the first trial jury sentenced the defendant to life imprisonment at a separate presentence hearing. The Court reasoned: "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." Allowing the state in *Bullington* to have a second chance to prove the aggravating circumstances necessary to invoke the death penalty would have been the equivalent of allowing reprosecution for the same offense.

See also Arizona v. Rumsey, 467 U.S. 203 (1984); Poland v. Arizona, 476 U.S. 147 (1986); Schiro v. Farley, 510 U.S. 222 (1994).

PROSECUTION APPEALS

In 1907, Congress authorized government appeals in limited circumstances, e.g., where an indictment is dismissed on the basis of the invalidity or construction of a statute. That authority was expanded by the Criminal Appeals Act of 1971, 18 U.S.C 3731, permitting government appeals from any decision dismissing an indictment, except where the Double Jeopardy Clause prohibits further prosecution. In United States v. Scott, 437 U.S. 82 (1978), the Supreme Court held that the government may appeal a dismissal of a federal prosecution without offending the Double Jeopardy Clause, except when the dismissal is a judgment of acquittal relating to the defendant's factual innocence. A successful appeal by the government of a dismissal can now result in reprosecution or in reinstatement of a verdict of guilty if the dismissal followed such a verdict. United States v. Wilson, 420 U.S. 332 (1975).

APPEALS OF SENTENCES

Increasing a sentence on review poses different double jeopardy considerations. Unlike acquittals, criminal sentences are not final judgments and, therefore, double jeopardy does not bar an increase of a sentence on review. In United States v. DiFrancesco, 449 U.S. 117 (1980), a divided Supreme Court allowed the government to appeal a sentence it perceived as too lenient against a defendant found to be a "dangerous special offender" under the Organized Crime Control Act. According to the Court, double jeopardy protections prevent reprosecution after a final judgment of acquittal has been reached. Therefore, government appeal of a sentence does not violate the Double Jeopardy Clause, since it poses no threat of reprosecution for the same offense.