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Constitutional Law -- Dismissal of Jury after Judge Coerces Guilty Plea Constitutes Reversible Error -- Retrial thereafter Is Not Double Jeopardy

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ing Act to assure that the decisions are not illegal, arbitrary, capricious, or an abuse of discretion, but has gone further to say that it will assure that the process through which these decisions are formulated affords all parties procedural due process of law.

The extension of the scope of review made by *Bank of Smithfield* seems desirable in that conformance to procedural due process, including notice, hearing, and an opportunity for all parties to introduce and examine evidence, is necessary to formulate a complete record of the Comptroller's deliberations; and a complete record is the only adequate basis on which a court can subsequently review the decisions for arbitrariness, capriciousness, or abuse of discretion. By using the Administrative Procedure Act as authority for granting this new remedy to those deprived of procedural due process in proceedings of the Comptroller, the court seems to be applying the act in the spirit in which the United States Supreme Court has said it should be applied.[49]

RALPH JACOBS

Constitutional Law—Dismissal of Jury after Judge Coerces Guilty Plea Constitutes Reversible Error—Retrial thereafter Is Not Double Jeopardy

Tateo was brought to trial before a jury in a federal court on four counts of bank robbery and one of kidnaping. On the fourth day of the trial, the judge informed Tateo's counsel that if Tateo insisted on continuing with the trial through the jury verdict and was convicted, sentencing would be arranged so that Tateo would be imprisoned for the rest of his life.[1] Tateo was notified of these statements and warned by his counsel that the probability of conviction was high. Accordingly, he changed his plea to guilty. The plea was accepted, and the jury dismissed. The judge then sentenced Tateo to twenty-two years and six months in prison.[2]

[49] See Heikkila v. Barber, 345 U.S. 229, 232 (1953).

[1] Tateo's attorney later testified, unchallenged by the Government, that the trial judge had stated: "I think I ought to tell you this. If you finish the trial and your clients are found guilty, I'm going to start off by imposing a life sentence on the kidnapping charge and then I'm going to add consecutive maximum sentences on the other counts on which they are found guilty." United States v. Tateo, 214 F. Supp. 560, 563 (S.D.N.Y. 1963). At this later hearing, Tateo testified that he was unaware that the judge was unable to impose consecutive sentences. *Ibid.*

[2] At the time the sentence was imposed the prosecution agreed to defendant's motion of dismissal of the kidnaping count. *Id.* at 562.

Seven years later Tateo made a motion before another judge asking that the judgment of conviction be vacated. The judgment of conviction was set aside, and a new trial was granted[3] on the grounds that his guilty plea had not been freely rendered. At the new trial, a third judge found that Tateo's only consent to the dismissal of the jury by the original trial judge had been in the form of a coerced plea. No "exceptional circumstances" such as would permit a retrial were found to have motivated the jury release. Therefore, all counts against Tateo were dismissed.[4] The Government appealed,[5] and in *United States v. Tateo*,[6] the Supreme Court reversed. The Court held that the dismissal of the jury before verdict after coercion of a guilty plea constituted error and that retrial of the defendant under such circumstances did not amount to double jeopardy.

The concept of former, or double, jeopardy was recognized in the common law pleas of *autrefois acquit* and *autrefois convict*,[7] which were, said Blackstone, "grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."[8] These

[3] *Ibid.* At this hearing the judge said:

> No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty.

Id. at 567.

[4] United States v. Tateo, 216 F. Supp. 850 (S.D.N.Y. 1963), 63 COLUM. L. REV. 1329, 16 STAN. L. REV. 713 (1964).

[5] 18 U.S.C. § 3731 (1958) provides:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> . . . . From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

The Government may not appeal a jury verdict of acquittal. Kepner v. United States, 195 U.S. 100 (1904). A defendant may appeal a verdict of guilty, and if the conviction is set aside, the defendant may be tried again for the same offense. At the new trial the defendant takes the chance of receiving a more severe penalty. United States v. Ball, 163 U.S. 662 (1896). However, a charge more serious than the previous conviction cannot be brought. Green v. United States, 355 U.S. 184 (1957).

[6] 377 U.S. 463 (1964).

[7] 4 BLACKSTONE, COMMENTARIES *335-36. See generally Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963); Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. PA. L. REV. 602 (1934).

[8] 4 BLACKSTONE, COMMENTARIES *335.

pleas did not lie unless the defendant had been either convicted or acquitted by a jury, and they were usually available only in capital felony cases.[9] However, a defendant who had once been before a jury always had one of these pleas available because the juries at early common law were never discharged until a verdict was rendered.[10] By Blackstone's day, however, it was recognized that a jury could be released before it had reached a verdict and that the defendant could be retried again if the jury dismissal was for reasons of "evident necessity."[11]

The common law concept of double jeopardy was carried over and embodied in the fifth amendment to the Constitution, which provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[12] Jeopardy is held to

[9] See *id.* at *335-36.

[10] COKE, THIRD INSTITUTES *110: "To fpeak it here once for all, if any person be indicted of treafon, or of felony, or larceny, and plead not guilty, and thereupon a jury is retorned, and fworn, their verdict must be heard, and they cannot be difcharged . . . ."

[11] 4 BLACKSTONE, COMMENTARIES *360.

[12] U.S. CONST. amend. V. All state constitutions have provisions against double jeopardy except those of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont. In the states without a constitutional provision, the plea of double jeopardy is part of the common law. See ALI, ADMINISTRATION OF THE CRIMINAL LAW § 6, comment (Proposed Final Draft 1935). For a complete list of the state constitutional provisions, see *ibid.*

It is imperative to note the distinction between the double jeopardy protection provided in federal proceedings and that provided in state proceedings. *Compare* Downum v. United States, 372 U.S. 734 (1963), where retrial after a mistrial had been declared because of the unpreparedness of the prosecution was held improper under the fifth amendment, *with* Brock v. North Carolina, 344 U.S. 424 (1953), where retrial after a mistrial had been declared because of the unpreparedness of the prosecution was held proper under the fourteenth amendment. *Compare* Green v. United States, 355 U.S. 184 (1957), where the defendant's conviction of first degree murder following his successful appeal from a conviction of second degree murder was held to violate the fifth amendment, *with* Palko v. Connecticut, 302 U.S. 319 (1937), where defendant's conviction of first degree murder following the state's successful appeal from a conviction of second degree murder was held proper under the fourteenth amendment.

State courts sometimes apply stricter standards of double jeopardy than do federal courts. *Compare* Stroud v. United States, 251 U.S. 15 (1919), where the Court held that the fifth amendment provided no protection against a more severe sentence on retrial after a successful appeal from a former conviction, *with* People v. Henderson, 29 Cal. 2d 297, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), where the court held that a defendant who had his prior sentence of life imprisonment overturned on appeal could not be sentenced to death for the same offense on retrial.

attach when the jury is impaneled and sworn[13] or, in a nonjury trial, when the court commences to take evidence.[14] The question of the effect of the constitutional provision against double jeopardy on retrial after the dismissal of a jury that has been impaneled and sworn was first considered by the Supreme Court in *United States v. Perez*.[15] There, a judge discharged a jury because the jurors were unable to agree on a verdict. The Court held that a jury dismissal before verdict in this "hung jury" situation did not bar retrial. *Perez* formulated the standard that a defendant's criminal trial may be validly terminated short of a verdict, rendering retrial not violative of the double jeopardy clause, where *"there is a manifest necessity for the act,* or *the ends of public justice would otherwise be defeated."*[16]

Most of the cases involving jury dismissals before verdict since *Perez* have been held to fall within one or the other of these exceptions to the retrial prohibition. Termination of the trial before verdict has been held justified where the judge released the jury because of an improper line of questions pursued by the prosecution after warnings by the judge,[17] the illness of the judge,[18] the trial

[13] *E.g.,* Downum v. United States, 372 U.S. 734 (1963); United States v. Oppenheimer, 242 U.S. 85 (1916); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

[14] *E.g.,* Lovato v. New Mexico, 242 U.S. 199 (1916); McCarthy v. Zerbst, 85 F.2d 640 (10th Cir.), *cert. denied,* 299 U.S. 610 (1936). The MODEL PENAL CODE § 1.08(4) (Proposed Official Draft 1962) provides that jeopardy attaches when the first witness is sworn.

[15] 22 U.S. (9 Wheat.) 579 (1824).

[16] *Id.* at 580. (Emphasis added.) Most of the states agreed that a defendant's criminal trial may be terminated short of a verdict where there is a "manifest necessity" or in the interests of "public justice." *E.g.,* Baker v. Commonwealth, 280 Ky. 165, 132 S.W.2d 766 (1939); State v. Tyson, 138 N.C. 627, 50 S.E. 456 (1905). North Carolina, which derives its double jeopardy protection from the common law, classifies the types of necessity warranting discharge of a jury into "physical necessity" and "necessity of doing justice." "Physical necessity" has been defined as "physical and absolute," such as a juror's illness or insanity of the defendant during the trial. State v. Wiseman, 68 N.C. 203, 205 (1873). "Necessity of doing justice" has been defined as a duty of the court "to guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution, by the prisoner." *Id.* at 205-06. *Accord,* State v. Crocker, 239 N.C. 446, 450, 80 S.E.2d 243, 246 (1954), 32 N.C.L. REV. 526. See generally 31 N.C.L. REV. 313 (1953).

[17] Gori v. United States, 367 U.S. 364 (1961), 36 N.Y.U.L. REV. 730.

[18] Freeman v. United States, 237 Fed. 815 (2d Cir. 1916).

judge's belief that his own remarks had been prejudicial,[19] the apparent insanity of a juror,[20] the illness of a juror,[21] a hung jury,[22] the disqualification of a juror,[23] a prejudiced juror,[24] an erroneous admission by counsel of the defendant and his subsequent withdrawal from the case,[25] the consent of the defendant,[26] a military movement during time of war,[27] or prejudicial articles in newspapers.[28] Thus, where the judge discharges the jury to protect the interests of the defendant or under circumstances where the continuation of the trial would be likely to result in an unfair trial, the jury release has been held proper.

On the other hand, dismissal of a jury has been held improper, and a retrial has been barred where the jury dismissal is for reasons other than to safeguard the interests of the defendant or the circumstances did not justify the conclusion that a continuation of the trial would likely result in unfairness. Thus, discretionary termination of a trial by a judge before a jury verdict has been rendered has been held improper where the prosecution was unable to continue because of the absence of its witnesses,[29] the prosecutor entered a *nolle prosequi* because his evidence appeared insufficient,[30]

[19] United States v. Giles, 19 F. Supp. 1009 (W.D. Okla. 1937).

[20] Lynch v. United States, 189 F.2d 476 (5th Cir.), *cert. denied,* 342 U.S. 831 (1951).

[21] United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied,* 313 U.S. 584 (1941).

[22] *E.g.,* Keerl v. Montana, 213 U.S. 135 (1909); Logan v. United States, 144 U.S. 263 (1892); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[23] *E.g.,* Thompson v. United States, 155 U.S. 271 (1894) (member of the grand jury).

[24] *E.g.,* Simmons v. United States, 142 U.S. 148 (1891) (letter written by defendant's counsel could have influenced a juror); United States v. Cimino, 224 F.2d 274 (2d Cir. 1955) (per curiam) (juror stated he had an opinion prejudicial to the accused).

[25] Scott v. United States, 202 F.2d 354 (D.C. Cir.) (per curiam), *cert. denied,* 344 U.S. 879 (1952).

[26] Blair v. White, 24 F.2d 323 (8th Cir. 1928).

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

[28] United States v. Montgomery, 42 F.2d 254 (S.D.N.Y. 1930).

[29] Downum v. United States, 372 U.S. 734 (1963); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931); United States v. Watson, 28 Fed. Cas. 499 (No. 16,651) (C.C.S.D.N.Y. 1868). *But see* United States v. Coolidge, 25 Fed. Cas. 622 (No. 14,858) (C.C.D. Mass. 1815), upholding retrial where a mistrial was declared when a witnesses refused to testify on religious grounds.

[30] Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939).

or the judge was under an erroneous belief that the defense counsel had engaged in misconduct.[31]

The *Perez* standard applies only to termination-before-verdict cases and has no application to cases of final judgment. If final judgment has been rendered there can be no retrial, except where the defendant's conviction has been reversed on appeal, for he is then deemed to have waived his right not to be tried twice.[32]

A problem in *Tateo* is whether the case should be considered as a termination-before-verdict case or as a case of final judgment. If the guilty plea of the defendant is considered a conviction, then *Tateo* can be viewed as a judgment case. At least one writer is of the opinion that *Tateo* might be a case of final judgment because the jury was discharged without the judge exercising his discretion.[33] However, a consideration of *Tateo* as a judgment case disregards the overbearing role played by the judge. It was the judge who compelled the defendant to plead guilty. It was this same judge who accepted the guilty plea. Thus, it is difficult to understand how the actions of the judge—the prime mover in the events leading to the dismissal of the jury—were not discretionary, thereby making *Tateo* a mistrial case.

If *Tateo* is a case which can be classified as a mistrial, it would still be necessary to appraise the circumstances under the *Perez* stan-

[31] United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953).

[32] See, *e.g.*, Ball v. United States, 163 U.S. 662 (1896). The majority in *Tateo* equated the improprieties at the trial level to cases involving reversal due to error. See also Forman v. United States, 361 U.S. 416 (1959) (conviction overthrown due to erroneous instructions concerning the statute of limitations); Bryan v. United States, 338 U.S. 552 (1950) (conviction overthrown on grounds of insufficient evidence); United States v. Stroud, 251 U.S. 15 (1919) (conviction overthrown due to confession of error by Solicitor General). A second theory justifying retrial of a defendant after he is successful in an appeal from a conviction is that the first trial is a nullity. See Flynn v. United States, 217 F.2d 29 (9th Cir. 1954), *cert. denied*, 348 U.S. 930 (1955). A third theory, advocated by Mr. Justice Holmes but never accepted by the Supreme Court, is that the original jeopardy extends to the appeal *and* the new trial. See Kepner v. United States, 195 U.S. 100, 134 (1903) (dissenting opinion). See also Fong Foo v. United States, 369 U.S. 141 (1962), where an erroneous directed verdict was held to bar retrial, not because the trial was improperly terminated before verdict, but because the case was considered one of final judgment.

[33] 16 STAN. L. REV. 713, 718 (1964); *accord*, 63 COLUM. L. REV. 1329, 1333-34 (1963). Both of these notes were written on the district court opinion, which held that retrial was barred because the jury was improperly discharged before verdict. United States v. Tateo, 216 F. Supp. 850 (S.D.N.Y. 1963).

dard to determine whether the jury release was proper. The latest decision applying the *Perez* standard, *Downum v. United States*,[34] held that a jury dismissal due to unpreparedness of the prosecution was improper and a bar to retrial because it did not fall within the *Perez* exceptions. In *Tateo*, the Court was divided on the significance of *Downum*. The majority distinguished jury discharges due to prosecutorial negligence and jury discharges after coercion of the defendant by the trial judge. Mr. Justice Goldberg dissented and stated that the majority unjustifiably limited *Downum* to its particular facts. He was of the opinion that coercion by the trial judge is an even more severe abuse of a defendant's rights than is prosecutorial negligence.[35] The majority, however, found support for its decision to allow retrial on the questionable assumption that granting Tateo immunity from retrial because a trial judge coerced his guilty plea would necessarily result in similar immunity after all trial reversals due to error.[36]

It is submitted that *Tateo* should be considered a mistrial case—*i.e.*, one where the judge improperly chose to exercise his discretion and terminate the trial before the jury reached a verdict. The judge himself coerced the plea that resulted in dismissal of the jury. Such a termination before verdict is not within "manifest necessity" or in the interests of "public justice," the only circumstances justifying retrial under the *Perez* rule.

RAYMOND W. RUSSELL

Constitutional Law—Jury Selection—Defendant Not a Member of the Excluded Class

In *Allen v. State*,[1] the Georgia Court of Appeals was faced with the question of whether the constitutional rights of a white defendant were violated by the systematic exclusion of Negroes from

[34] 372 U.S. 734 (1963).

[35] "If anything, Tateo's deprivation is more serious. The *purpose* of the judicial coercion in his case was to deny him the right to have the impaneled jury decide his fate, whereas this was merely the effect of prosecutorial negligence in Downum." United States v. Tateo, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting).

[36] See *id.* at 466. In England, unlike the United States, reversal due to error means that the defendant goes free. Criminal Appeal Act, 1907 § 4. See generally KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND (1963).

[1] 137 S.E.2d 711 (Ga. Ct. App. 1964).