REVERSAL OF CONVICTION ON LESSER INCLUDED OFFENSE DOES NOT PERMIT RETRIAL OF FIRST DEGREE MURDER CHARGE.

Green v. United States, 355 U.S. 184 (1957)

The defendant was charged under an indictment of arson and first degree murder[1] in the Federal District Court for the District of Columbia. He was convicted of arson and second degree murder. The Court of Appeals for the District of Columbia reversed the conviction for second degree murder and remanded. At the second trial the defendant was convicted of first degree murder.

The Supreme Court of the United States heard the appeal from the first degree murder charge and by a five to four decision reversed on the ground that the retrial on the first degree charge was a violation of the double jeopardy provision of the fifth amendment to the Federal Constitution.[2]

The majority refused to extend *Trono v. United States*[3] beyond its factual setting. The *Trono* case held that by an appeal of a conviction of a lesser included offense the defendant waived any implied acquittal of the more serious offense. That case arose from a statute governing the Philippine Islands, but the majority made it clear that they considered it of like effect with the fifth amendment. The Court had ruled the same way on this precise point the year before.[4]

Considering the *Trono* case still good law the dissent in the principal case contends the defendant should be held to have appealed at his own risk of conviction on the more serious charge. Apparently this contention is bottomed on the premise that a retrial on the whole indictment is a necessary conclusion from the decisions culminating in *United States v. Ball*,[5] which declare that a retrial may be ordered when the defendant obtains a reversal of a conviction.[6]

Two dominant themes permeate federal double jeopardy: (1) only

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[1] 35 STAT. 1143, 1152 (1909), 18 U.S.C. §1111 (1952), in part provides, murder "committed in perpetration of, or attempt to perpetrate any arson . . . is murder in the first degree."

[2] Green v. United States, 355 U.S. 184 (1957).

[3] 199 U.S. 521 (1905). Four justices dissented. Mr. Justice Holmes concurred in result only. See Mr. Justice Holmes' dissent in Kepner v. United States, 195 U.S. 100, 134 (1904).

[4] Kepner v. United States, 195 U.S. 100 (1904).

[5] 163 U. S. 662 (1896). See also, *Hopt v. Utah* 104 U.S. 631 (1881).

[6] The *Ball* court rejected the theory that defendant could not be retried after a reversal because ". . . such a wooden interpretation would distort the purposes of the constitutional provision to the prejudice of society's legitimate interest in convicting the guilty. . . ." *Supra* note 2, at 204 (dissent).

the defendant may appeal, the right being his,[7] and (2) if the defendant exercises this right, the appellate courts have the power to remand for a new trial on the same indictment.[8]

The United States' statutes list first and second degree murder as separate offenses.[9] But are they functionally separable when they are submitted to a jury under an indictment charging first degree murder only? Can there be a retrial of only the less serious crime?

It is not unlikely that a jury may think of these two crimes as varying only in the degree of punishment accorded, and find the lesser degree out of compassion and not because of any basis in fact. This may have been what happened at the first trial of Green. The court's charge as to second degree murder was erroneous since there was no evidence in the record to support it. There was ample evidence to sustain a first degree murder conviction. Yet, the jury convicted Green of second degree murder.[10]

The considerations of the government's right to retrial, mentioned above, have been discarded. The court considered of first importance the defendant's right to capitalize on an error in the trial. Having thus capitalized it is now held that he cannot be retried for the higher offense. The constitution does not forbid a new trial if the case were reversed at the defendant's urging since the right to appeal is coupled with the possibility of a new trial.[11] Yet the effect of the majority ruling here is to cut off the government's right to a new trial except on terms not hitherto suspected.

The defendant has a choice of accepting the trial outcome or upsetting it at the risk of a new trial.[12] This is the basic philosophy of double jeopardy. The question here is shall this new trial be on the whole original indictment or limited only to the offense of which convicted and any lesser included offenses? The state decisions go both ways, nineteen of the thirty-six states which have considered the problem permitting retrial of the more

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[7] Kepner v. United States, *supra* note 4.

[8] United States v. Ball, *supra* note 5.

[9] Murder is defined as "the unlawful killing of a human being with malice aforethought." Murder committed in perpetration of arson is first degree murder. Second degree murder is any killing with malice aforethought not constituting first degree murder. 35 STAT. 1143, 1152 (1909), 18 U.S.C. §1111(a) (1952).

[10] Green was indicted for arson and felony-murder at the first trial. There was no evidential basis for any murder conviction except that of first degree. That there was sufficient evidence for a first degree conviction is attested by the jury's conviction on that count at the second trial.

[11] United States v. Ball, *supra* note 5, Hopt. v. United States, *supra* note 5. For lower federal court decisions see Mr. Justice Frankfurter's dissent in principal case.

[12] The English rule is different. Rex v. Mawbey, 101 Eng. Rep. 736 (1796). The English appellate courts may not generally order a retrial even after a reversal of conviction. Criminal Appeals Act, 1908, 7 EDW. 7 c. 23, §4(2).

serious offense.[13] But the practical considerations of a trial on varying degrees of murder plus the precedent of the *Trono* case make the result of this case startling.

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[13] For an exhaustive collection of the cases see Mr. Justice Frankfurter's dissent in the principal case, *supra* note 2, 216-18.