North Carolina Central Law Review

Volume 5
Number 2 *Volume 5, Number 2*

Article 17

4-1-1974

Double Jeopardy: Chase v. Oklahoma & (and) Smith v. Missouri

Donnie Hoover

school system. If municipalities are not "persons" under § 1983, then city officials must pay this cost. The absurdity of the decision is more than evident.

PARIS FAVORS

Double Jeopardy: Chase v. Oklahoma & Smith v. Missouri

On November 12, 1973, the United States Supreme Court denied petitions for writs of cert. in both *Chase v. State of Oklahoma*,[1] and *Smith v. State of Missouri*.[2] In both cases, the petitioners were contending that their constitutional protection against double jeopardy, as embodied in the Fifth Amendment, and applicable to the states through the Fourteenth Amendment,[3] had been violated. In both cases, there was a rigorous dissent by Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall joined. The basis of the dissents was that in both cases, petitioners had been prosecuted by their respective states in separate proceedings for crimes which arose out of the same transaction or episode, in violation of the Supreme Court's ruling in *Ashe v. Swenson*.[4]

In *Chase*, the petitioner and his passengers overpowered a Deputy Sheriff and took his .38 caliber pistol after having been stopped for a routine traffic violation. Afterwards, the deputy was forced to drive to several different locations where he was further beaten. Before he was released, his wallet was taken. Chase was tried and convicted by a jury in Muskegee County, Oklahoma, for Kidnapping for Extortion and received a sentence of 35 years. Later, the state brought separate charges against petitioner for the possession of the deputy's gun. Petitioner was also convicted this second time for the offense of Carrying a Firearm, and sentenced to 10 years imprisonment. The Oklahoma Court of Criminal Appeals modified petitioner's term of imprisonment to five years, but rejected petitioner's claim that the second prosecution violated his constitutional protection against double jeopardy.

In the case of *Smith*, an apartment which was occupied by Mrs. Hermine Rohs, her son Willy Rohs, and his wife Marilyn, was forcefully entered by petitioner and one Edward Johnson. The aforementioned residents were robbed; both women were raped; and finally, all three were stabbed to death. The petitioner, Smith, was indicted on three separate charges of

[1] Frank Chase v. State of Oklahoma, 509 P.2d. 171, cert. denied, —U.S.—, 94 S.Ct. 458 (1973).

[2] Willie J. Smith v. State of Missouri, 491 S.W. 2d. 257, cert. denied, —U.S.—, 94 S.Ct. 460 (1973).

[3] Benton v. Maryland, 395 U.S. 784, (1969).

[4] Ashe v. Swenson, 399 F.2d. 40, rev'd per curiam, 397 U.S. 436, (1970).

murder in the first degree. (Edward Johnson, who was also indicted, tried, and convicted for first-degree murder, did not petition the Supreme Court to review his case.) Petitioner was first tried for the murder of Marilyn Rohs, with the death penalty being sought. He was convicted by the jury of first-degree murder, but punishment was assessed at life imprisonment. Then, the state tried petitioner for the murder of Willy Rohs, again seeking the death penalty. Once again, the jury found him guilty of first-degree murder and sentenced him to life imprisonment. The judge indicated that the two life sentences were to run consecutively. Thereafter, the state entered a plea of *nolle prosequi* on the third indictment. Both convictions were affirmed by the Missouri Supreme Court which rejected petitioner's claim that the second prosecution violated his constitutional protection against double jeopardy.

As alluded to by Mr. Justice Brennan in his dissenting opinion in the two cases at bar, the leading case in this area of law is *Ashe v. Swenson.* In *Ashe*, three or four masked gunmen robbed six men who were engaged in a poker game. Petitioner was acquitted in a state trial for the robbery of one of the poker players. Six weeks later, the defendant was tried again for the robbery of another one of the players. This time, he was convicted. The witnesses in both of the trials were basically the same and the state's evidence establishing the facts of the robbery was uncontradicted, but the testimony identifying the defendant as one of the robbers was much stronger at the second trial. The conviction was affirmed by the Supreme Court of Missouri, which held that the plea of former jeopardy must be denied. Five years later, a collateral attack upon the conviction in the state courts was also unsuccessful. Then, based on the claim that the second prosecution had violated his right not to be twice put in jeopardy, the defendant brought a habeas corpus proceeding in the United States District Court for the Western District of Missouri. The District Court denied the writ, and the United States Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court of the United States granted cert, and reversed the lower court decisions. In an opinion by Mr. Justice Stewart, expressing the view of seven members of the court, it was held that since the single rationally conceivable issue in dispute before the jury was whether the defendant was one of the robbers, the federal rule of collateral estoppel, which is embodied in the Fifth Amendment's guaranty against double jeopardy, made the second trial wholly impermissible.

Mr. Justice Brennan, joined by Mr. Justice Douglas, and Mr. Justice Marshall, concurred, adding that even if the rule of collateral estoppel had been inapplicable to the facts of the case, the double jeopardy clause nevertheless barred the second prosecution because it grew out of the same criminal episode as the first.

The phrase "collateral estoppel," admittedly awkward, stands for the

principle that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. The court further added that the federal decisions had made it clear that in criminal cases the rule of collateral estoppel was not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.

In both *Chase* and *Smith*, each state was able to distinguish its case from the case of *Ashe*, on the lower level. In *Chase*, the State contended that Kidnapping for Extortion was an entirely different offense, requiring different evidence, proof, etc., than the offense of Carrying a Firearm.

Quite similarly, the state, in *Smith*, contended that each of the three deaths constituted a separate offense. In addition, the state here contended that there was no violation of the principle of *Ashe* because they concluded that collateral estoppel does not come into play unless defendant has been acquitted in a prior trial. They based their findings on *State v. Moton*.[5] In the *Moton* case, defendant, Moton, and a companion were accused of armed robbery of two service station attendants. Even though the evidence indicated that Moton and his companion entered the station at the same time (his companion being the only one with a gun), and that each defendant obtained money from separate gas station attendants, the defendant's conviction of the robbery of one gas station attendant from whom defendant's companion had obtained money did not bar subsequent prosecution for robbery of the second gas station attendant from whom the defendant had obtained money, on the theory of double jeopardy, where property was taken from both attendants even though both robberies occurred almost simultaneously.

The Fifth Amendment provides that ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." There is no question about the applicability of this amendment to the states, through the Fourteenth Amendment. However, the main question for determination is "what is meant by the words—same offence?" As we have seen, there has been much disagreement on this point.

Justices Brennan, Douglas and Marshall contend that the words require the prosecution, except in extremely limited circumstances[6] not present in either of the cases at hand, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction."[7]

On the other hand, it has been successfully contended that offenses against different individuals, as well as offenses of different natures, although committed as near simultaneously as possible, constitute different offenses for the purpose of the double jeopardy clause.

[5] State v. Moton, 476 S.W. 2d. 785 (1972).

[6] Such circumstances may include, for example, crimes not completed or not discovered until after commencement of a prosecution for other crimes arising from the same transaction. Another example would be where no single court had jurisdiction of all the alleged crimes.

[7] 397 U.S. at 453-454.

It is the writer's contention that the view of Mr. Justice Brennan should be followed. That is, that the Fifth Amendment requires the prosecution to join at one trial all of the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction. There are several reasons for this mandate. First, it promotes justice, economy, and convenience. This is reflected by the modern rules of criminal and civil procedures. Second, as Mr. Justice Brennan argues in *Ashe*, the phrase "same offense" is not necessarily restricted to the "same evidence" test, but rather, includes the "same transaction" test. Under the same evidence test, only those crimes that require the exact same evidence are required to be joined. The truth is that the Supreme Court has rejected the idea that the same evidence test is the required construction of the Fifth Amendment in a case involving multiple trials.[9]

The case of *Smith* is a glaring example of the hazards of abuse of the criminal process inherent in the "same evidence" test and demonstrates the necessity for the "same transaction" test. The murders involved three individuals. The petitioner was indicted on three separate charges of murder, with the state admittedly seeking the death penalty. Petitioners first trial was under the indictment charging him with the murder of Marilyn Rohs. Since no justification was offered for not trying the other indictments at that trial, it is reasonable to infer that the other indictments were held in reserve to be tried if the state failed to obtain a conviction or the desired penalty. In addition to this, it was not until the trial judge had specified that the two life sentences would run consecutively that the prosecution entered a plea of *nolle prosequi* on the third indictment. As Mr. Justice Brennan says,

> ". . . one must experience a sense of uneasiness with any double jeopardy standard that would allow the State this second chance to plug up the holes in its case. The constitutional protection against double jeopardy is empty of meaning if the State may make 'repeated attempts' to touch up its case by forcing the accused to 'run the gantlet' as many times as there are victims of a single episode."[10]

Although the American Law Institute originally (1935) adopted the same evidence test, it has since been replaced with the same transaction test.[11] England has also discarded its rules against joinder of charges and has adopted the "same transaction" test.[12] The Federal Rules of Criminal Procedure liberally encourage the joining of parties and charges in a single trial. Rule 8(a) provides for joinder of charges that are similar in character,

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[8] United Mine Workers v. Gibbs, 383 U.S. 715, 724-726 ( ).
[9] In Re Nielsen, 131 U.S. 176 (1889). Ciucci v. Illinois, 356 U.S. 571 (1958).
[10] 397 U.S. at 459.
[11] ALI, Model Penal Code, Proposed Official Draft §§ 1.07(2), 1.09(1)(b)(1962).
[12] Connelly v. D.P.P. (1964) A.C. 1254.

or arise from the same transaction, or from connected transactions or form part of a common scheme or plan. Rule 8(b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information.

In concluding, a quotation from the last paragraph of Justice Brennan's concurring opinion in *Ashe* would be relevant

> Abuse of the criminal process is foremost among the feared evils that led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if "same offence" is construed to embody the "same transaction" standard. Then both federal and state prosecutors will be prohibited from mounting successive prosecutions for offenses growing out of the same criminal episode, at least in the absence of a showing of unavoidable necessity for successive prosecutions in the particular case.[13]

Thus, until the same transaction standard, as espoused by Mr. Justice Brennan, is adopted by all of the courts in our country, the Fifth Amendment protection against double jeopardy will remain devoid of meaning.

DONNIE HOOVER

The Affirmative Duty to Desegregate State Systems of Higher Education Without Eliminating Racially Identifiable Schools—

I. INTRODUCTION

In *Adams v. Richardson*, the appellees, citizens and taxpayers brought an action for declaratory and injunctive relief against appellants, Secretary of Health, Education and Welfare and the Director of HEW's Office of Civil Rights. They alleged that appellants had been derelict in their duty to enforce Title VI of the Civil Rights Act of 1964 because appellants had not taken suitable and timely action to end segregation in public educational institutions receiving federal funds. Title VI provides that discrimination in federally assisted programs must cease or those programs will no longer be federally assisted.[2] The United States Court of Appeals for the District

[13] 397 U.S. at 459-460.

[1] 480 F.2d 1159 (D.C. Cir. 1973).

[2] 42 U.S.C. § 200d (1964) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.