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CRIMINAL PROCEDURE—DOUBLE JEOPARDY—RETRIAL FOR GREATER DEGREE OF OFFENSE CHARGED AFTER REVERSAL OF CONVICTION FOR LESSER DEGREE OF SAME OFFENSE CONSTITUTES DOUBLE JEOPARDY

In a second degree murder trial, the jury was charged as to second degree murder, and first and second degree manslaughter. The jury found defendant Ressler guilty of first degree manslaughter. Defendant appealed this conviction to the Appellate Division, which remanded for a Huntley-type hearing.¹ At the hearing Ressler's confession was found voluntary.² Ressler appealed from this finding, obtained a reversal on the law, and a new trial.³ From the order of retrial both parties appealed. In affirming and setting guidelines for the new trial, the Court of Appeals *held*, "Inasmuch as defendant was tried on an indictment for murder in the second degree, but was convicted of first degree manslaughter . . . he cannot again be tried on a more serious charge than manslaughter in the first degree based on the same indictment." *People v. Ressler*, 17 N.Y.2d 174, 216 N.E.2d 582, 269 N.Y.S.2d 414 (1966).

Prior to 1888 the general rule in New York was, "[I]f the jury finds the prisoner guilty on one count and says nothing in their verdict concerning the other counts [in the indictment], it will be equivalent to a verdict of not guilty on such counts."⁴ If the defendant appealed, "the reversal of the conviction did not disturb the verdict of acquittal" with regard to the charges upon which the jury remained silent.⁵ However, the defendant was considered to have waived his constitutional protection against double jeopardy,⁶ as to those charges which he had been deemed acquitted.⁷ This rule was changed in 1888 when the Code of Criminal Procedure⁸ was interpreted by the New York Court of Appeals in *People v. Palmer*.⁹ The question presented by *Palmer* was,

whether . . . the defendant, having been found guilty . . . of a lower degree of the crime than charged in the indictment [and having] succeeded in reversing the judgment . . . can be tried again under the indictment without regard to the former trial and conviction.¹⁰

1. *People v. Ressler*, 23 A.D.2d 514, 256 N.Y.S.2d 95 (3d Dep't 1965) (Hearing to determine voluntariness of confession, by county court without a jury, in accord with procedure prescribed in *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965); also called Jackson-Denno hearing).

2. *People v. Ressler*, 45 Misc. 2d 995, 258 N.Y.S.2d 532 (Rennesalear County Ct. 1965).

3. *People v. Ressler*, 24 A.D.2d 7, 261 N.Y.S.2d 823, *modified*, 24 A.D.2d 727, 262 N.Y.S.2d 1022 (3d Dep't 1965).

4. *Guenther v. People*, 24 N.Y. 100, at 101 (1861).

5. *People v. Dowling*, 84 N.Y. 478, at 483 (1881).

6. N.Y. Const. art. I, § 6: "No person shall be subject to be twice put in jeopardy for the same offence. . . ."

7. *People v. Dowling*, 84 N.Y. 478, at 484 (1881).

8. N.Y. Code Crim. Proc.

§ 464. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument. . . .

§ 544. When a new trial is ordered it shall proceed in all respects as if no trial had been had.

9. 109 N.Y. 413, 17 N.E. 213 (1888).

10. *Id.* at 416, 17 N.E. at 213.

The Court answered this question in the affirmative, reasoning that section 36 of the Penal Code,¹¹ which provided that "where a prisoner is . . . convicted . . . for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree," applies only where judgment of conviction remains unreversed,¹² and that sections 464 and 544 of the Code of Criminal Procedure dictate that:

The effect of defendant's appeal is merely to continue the trial under the indictment in the appellate court; and if reversal of the . . . conviction follows . . . the record of the former trial, has been annulled and expunged . . . and [the proceedings] are as though they never had been; while the indictment is left to stand as to the crime . . . charged . . . as though there had been no trial.¹³

The United States Supreme Court in *Kring v. Missouri*¹⁴ was confronted with a Missouri constitutional provision similar to the New York Code¹⁵ relied on in *Palmer*.¹⁶ The Court held this provision unconstitutional as an ex post facto law, but in its dicta indicated that it would not so hold under the double jeopardy clause of the fifth amendment, as applied to the states through the due process clause of the fourteenth amendment.¹⁷ After *Palmer*,¹⁸ taking an appeal from a criminal conviction became a "gamble" for the defendant. In order to correct a legal error at trial, the defendant had to subject himself to a new trial for the greater degree of the crime for which he had previously been acquitted, in order to gain a reversal of the lesser charge upon which he had been convicted.¹⁹ This rule differs from the federal rule, applied in similar situations, as set forth in *Green v. United States*.²⁰ In *Green* the Supreme Court²¹ held that,

the law should not . . . place the defendant in such an incredible dilemma; [for] conditioning an appeal of one offence on a coerced surrender of a valid plea of former jeopardy on another offence exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.²²

Of the thirty-five states, other than New York, which have passed on this question, seventeen hold in accord with the federal rule and eighteen hold

11. Now N.Y. Pen. Law § 32.

12. *People v. Palmer*, 109 N.Y. at 419, 17 N.E. at 215 (1888).

13. *Id.* at 419-20, 17 N.E. at 215.

14. 107 U.S. 221 (1882).

15. N.Y. Code Crim. Proc. §§ 464, 544, quoted *supra* note 8.

16. 109 N.Y. 413, 17 N.E. 213 (1888).

17. *Kring v. Missouri*, 107 U.S. 221 (1882).

18. 109 N.Y. 413, 17 N.E. 213 (1888).

19. See, e.g., *People v. Erocle*, 4 N.Y.2d 617, 152 N.E.2d 77, 176 N.Y.S.2d 649 (1958); *People v. McGrath*, 202 N.Y. 445, 96 N.E. 92 (1911); *People v. McCarthy*, 110 N.Y. 309, 18 N.E. 128 (1888); *People v. Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888).

20. 355 U.S. 184 (1957).

21. Mr. Justice Black delivered the opinion for the majority of five, Mr. Justice Frankfurter for the four dissenters.

22. 355 U.S. at 193-94.

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in accord with New York,²³ *i.e.*, that on a reversal of a conviction for a lesser degree of the crime than charged in the indictment, a new trial on the original indictment is permitted.²⁴ The United States Supreme Court has said in the past that this type of re prosecution by a *state* is not prohibited by the double jeopardy clause of the fifth amendment as applied to the states by the fourteenth amendment.²⁵ However,

the Court has not hesitated to re-examine past decisions according to the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme.²⁶

In the instant case, the majority of the Court reasoned that the federal rule had been made mandatory upon the states. The Court was led to this conclusion by the trend of the recent United States Supreme Court decisions. These decisions indicate that an increasing number of the guarantees of the Bill of Rights are being selectively incorporated into the due process clause of the fourteenth amendment and thus are made applicable to the states.²⁷ The Court also relied heavily on the decision of the Second Circuit Court of Appeals in *United States ex rel. Hetenyi v. Wilkins*.²⁸ In *Hetenyi*,²⁹ the defendant was convicted in a New York court and placed in a situation similar to that of Ressler in the instant case. The United States Court of Appeals in reaching its decision as to whether this type of re prosecution by a state violates the due process clause of the fourteenth amendment considered three alternative standards, in applying the concept of selective incorporation:³⁰ the Federal, the Basic Core and that of Fundamental Fairness.³¹ It held that "under any of the three alternative standards the conclusion is unavoidable that New York transgressed the federal constitutional limitations on its power to re prosecute an individual for the same crime."³²

The concurring opinion in the instant case reasons that this change, from the state to the federal rule, should be based upon the double jeopardy provision of the New York State Constitution³³ rather than the due process clause of the fourteenth amendment of the United States Constitution. This opinion fails to take into account the approval of the state rule on constitutional grounds, prior to the instant case, by the New York Court of Appeals in a long line of decisions.³⁴ The dissenting opinion contends that it is for the legislature

23. *Id.* at 216 n.4.

24. *People v. Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888).

25. *Brantley v. Georgia*, 217 U.S. 284, at 285 (1910).

26. *Malloy v. Hogan*, 378 U.S. 1, at 5 (1964).

27. See cases cited in *Malloy v. Hogan*, 378 U.S. 1, at 4-6 (1964); *accord*, *Pointer v. Texas*, 380 U.S. 400 (1965); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

28. 348 F.2d 844 (2d Cir. 1965).

29. *Ibid.*

30. *Cf. Twining v. New Jersey*, 211 U.S. 78 (1908).

31. *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, at 855 (2d Cir. 1965).

32. *Id.* at 856. *But see Comment*, 41 N.Y.U.L. Rev. 821 (1966).

33. N.Y. Const. art. I, § 6.

34. See *People v. Erocle*, 4 N.Y.2d 617, 176 N.Y.S.2d 649 (1958); *People v. Bellows*,

to change this law, if any change is to be made, and not the Court. However, if the United States Supreme Court holds that this form of re prosecution by the states is prohibited by the United States Constitution,³⁵ as the majority in the instant case reasoned it eventually would, the New York rule as to the applicability of the defense of double jeopardy in this form of re prosecution will be supplanted by the federal rule. In this event, neither the New York Court of Appeals nor its legislature will be the lawmaking body.

The Supreme Court has not, to this day, invalidated any convictions obtained in the state courts on the ground that the state has transgressed the federal constitutional limitations on its power to re prosecute an individual for the same crime.³⁶ The Court has dealt with these situations on a case by case basis, ruling that there was no violation of double jeopardy when a retrial was had after: (1) discharge of a hung jury;³⁷ (2) reversal of a conviction although part of the sentence had been served;³⁸ (3) an appeal by the state from a conviction for second-degree murder;³⁹ (4) a grant of mistrial after an unexpected refusal of co-defendant to testify for the prosecution;⁴⁰ (5) defendant was convicted of one of the two offences charged which were statutorily treated as one offence with two different penalties, and retrial was had on both charges;⁴¹ and (6) different offences occurring on the same occasion were prosecuted at different trials.⁴² Although the Court has refused to accept the contention of a person in a state court, that he has been subjected to treatment in violation of the double jeopardy provision of the fifth amendment, it has not precluded the existence of a situation in which such allegation would be accepted.⁴³ Just such a situation was present in the instant case. Ressler was forced to abandon his constitutional protection against double jeopardy (to a charge of which he had already been acquitted) in order to obtain a new trial on the charge upon which he was convicted. The trend of the United States Supreme Court decisions, referred to above, the treatment by that Court of these double jeopardy

281 N.Y. 67, 22 N.E.2d 238 (1939); *People v. McGrath*, 202 N.Y. 445, 96 N.E. 92 (1911); *People v. Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888); *People v. Fiorillo*, 20 A.D.2d 899, 248 N.Y.S.2d 958 (2d Dep't 1964); *People v. Wheeler*, 79 App. Div. 396 (4th Dep't 1903).

35. U.S. Const. amend. V: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"

U.S. Const. amend. XIV: "No state shall deprive any person of life, liberty, or property, without due process of law"

36. United States *ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, at 850 (2d Cir. 1965).

37. *Dreyer v. Illinois*, 187 U.S. 71 (1902).

38. *Murphy v. Massachusetts*, 177 U.S. 155 (1900).

39. *Palko v. Connecticut*, 302 U.S. 319 (1937).

40. *Brock v. North Carolina*, 344 U.S. 424 (1953).

41. See *Chichos v. Indiana*, 35 U.S.L. Week 4003 (U.S. Nov. 14, 1966). Mr. Justice Fortas, dissenting, noted, "This is a State case. But the Fourteenth Amendment's requirement of due process includes a prohibition of this kind of heads-you-lose, tails-you-lose trial and appellate process." *Id.* at 4005.

42. *Hoag v. New Jersey*, 356 U.S. 464 (1958) (Warren, Ch.J., dissenting, considered the situation violative of double jeopardy protection. *Id.* at 473); see also *Ciucci v. Illinois*, 356 U.S. 571 (1958) (dissenting opinion to same effect; *id.* at 573).

43. United States Constitution Annotated, Doc. No. 758, 88th Cong., 1st Sess., at 1273 (1963).

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questions on a case by case basis, the refusal of the Court to deny the applicability of the double jeopardy clause of the fifth amendment to the states, and the dissents lodged in *Williams v. Oklahoma*,⁴⁴ *Ciucci v. Illinois*,⁴⁵ and *Chichos v. State*⁴⁶ indicate that the United States Supreme Court, when confronted with this issue, will decide in accord with the prediction made by the New York Court of Appeals in the instant case.

JEFFREY SELLERS

CRIMINAL PROCEDURE—MIRANDA: THE APPLICATION OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION TO CONFESSIONS—A CHANGE IN APPROACH.

Ernesto Miranda was arrested on suspicion of kidnapping and raping an eighteen year old girl. After being identified by the victim, he was escorted to a special interrogation room to be questioned by police officers. Miranda was not advised of his right to have an attorney present, nor made aware of his privilege against self-incrimination. Though at first denying his guilt, within two hours Miranda gave a detailed confession, admitting and describing the crime. At his trial before a jury, the confession was admitted into evidence over the objection of defense counsel. Subsequently, Miranda was found guilty as charged. On appeal, the Supreme Court of Arizona affirmed the conviction, holding that Miranda's constitutional rights were not violated in obtaining the confession.¹ The United States Supreme Court, in a 5-4 decision, reversed the conviction. *Held*, the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation² of the defendant, unless it demonstrates the use of procedural safeguards which effectively protect the defendant's privilege against self-incrimination. Unless equally effective safeguards are adopted, the following procedures must be employed: prior to any questioning, the person must be informed in clear and unequivocal terms that he has the right to remain silent, and that anything said can and will be used against him in court. He must be clearly informed that he has the right to consult with a lawyer and to have the lawyer present during the interrogation. Also, it is necessary to inform him that if he is indigent, a lawyer will be appointed to represent him. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Similarly, the opportunity to exercise his right

44. 358 U.S. 576, 587 (1959).

45. 356 U.S. 571, 573 (1958).

46. 35 U.S.L. Week 4003, 4004 (Nov. 14, 1966).

1. *State v. Miranda*, 98 Ariz. 18, 401 P.2d 721 (1965).

2. Custodial interrogation is defined by the Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).