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# Constitutional Law -- Double Jeopardy -- Conviction of Murder in the First Degree After Reversal of Conviction of Murder in the Second Degree

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when asked and not "looking backwards from the events that transpired";<sup>37</sup> and (4) a witness being fully apprised of the way in which the questions are pertinent. If the main emphasis of *Watkins* is not placed on the requirement of explicit congressional authorization, then that case tells us nothing new other than listing five ways by which a witness may be informed of the subject under inquiry.<sup>38</sup> The requirements of pertinency of questions to subject matter<sup>39</sup> and of pertinency of subject matter to congressional authorization<sup>40</sup> have long been declared to be essential. To read the *Watkins* decision in any other light removes from that case the vital impact the case was expected to have<sup>41</sup> on the entire practice of congressional investigations.<sup>42</sup>

JOEL L. FLEISHMAN

### Constitutional Law—Double Jeopardy—Conviction of Murder in the First Degree After Reversal of Conviction of Murder in the Second Degree

In *Green v. United States*<sup>1</sup> the petitioner had been indicted in the District of Columbia for first degree murder. Upon a verdict of guilty of murder in the second degree, he appealed and obtained a new trial.<sup>2</sup> On remand he was again tried for first degree murder, and this time convicted of that charge and sentenced to death. The United States Supreme Court held that the second trial for first degree murder put the petitioner in jeopardy twice for the same offense in violation of the Federal Constitution.<sup>3</sup>

The reasoning of the Court was that the petitioner was not required to waive former jeopardy as to the charge of first degree murder in order to have a new trial of his conviction for second degree murder. The effect of this decision is that when an accused is tried for first degree

<sup>37</sup> *Ibid.*

<sup>38</sup> See note 18 *supra*.

<sup>39</sup> *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927).

<sup>40</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>41</sup> As Justice Clark says in his dissent in *Watkins*, "As I see it the chief fault in the majority opinion is its mischievous curbing of the informing function of the Congress." 354 U.S. at 217.

<sup>42</sup> *Cf. United States v. Brewster*, 154 F. Supp. 126 (D.C.D.C. 1957) (in convicting the President of Western Teamsters Conference for refusal to produce union records subpoenaed by the Investigations Subcommittee of the Senate Government Operations Committee, the court sustained the Committee's power to see the records in order to check the truthfulness of reports filed by the union with the Department of Labor); *Federal Communications Comm'n v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957) (court held that the F.C.C. had been given sufficient power by Congress to subpoena financial records of television finances in an investigation of radio and television networks).

<sup>1</sup> 355 U.S. 184 (1957).

<sup>2</sup> 218 F.2d 856 (D.C. Cir. 1955).

<sup>3</sup> U.S. CONST. amend. V provides in part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

murder, but is convicted only of second degree murder or manslaughter and obtains a new trial, that trial must be limited to the offense of which he was convicted in the first trial. A second trial of the higher offense of first degree murder places him in double jeopardy.<sup>4</sup>

Although the cases are distinguishable, the Court had previously reached the opposite conclusion in *Trono v. United States*,<sup>5</sup> saying that when a defendant at his own request "has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case."<sup>6</sup> This holding had been regarded as binding by the lower federal courts.<sup>7</sup>

North Carolina has an interesting history regarding this question.<sup>8</sup> Prior to 1948, there were eight instances in which a defendant in such a situation appealed to the North Carolina Supreme Court.<sup>9</sup> In only one of these, *State v. Groves*,<sup>10</sup> was the appeal successful and a new trial granted. In that case the defendant made no objection on the ground of double jeopardy, and the court simply said, "The case goes back for

<sup>4</sup> This fact situation must be distinguished from one where the defendant has been convicted of the *same* offense for which he was indicted. In the latter case it is conceded that he waives his defense of former jeopardy if he is granted a new trial. *United States v. Ball*, 163 U.S. 662 (1896). This situation must also be distinguished from one where the defendant, charged under an indictment with two or more counts, is only convicted on one count. In that case North Carolina holds that if he is granted a new trial, he may be retried on all the counts. *State v. Beal*, 202 N.C. 266, 162 S.E. 561 (1932). As to mutually exclusive counts, see Note, 36 N.C.L. Rev. 84 (1957).

<sup>5</sup> 199 U.S. 521 (1905). The *Trono* case arose in the Philippine Islands shortly after they were annexed by the United States. On a charge of first degree murder the defendants had been convicted of assault. They appealed to the Supreme Court of the Philippines. That court, exercising the jurisdiction possessed by it at the time, reversed the judgment of the trial court and convicted the defendants of second degree murder.

Although the *Green* case does not expressly overrule *Trono*, but limits it to its facts, certainly it overrules it in effect, for in the *Trono* opinion the Court said, "We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country . . ." *Id.* at 530.

<sup>6</sup> *Id.* at 534.

<sup>7</sup> *Carbonell v. People of Porto Rico*, 27 F.2d 253 (1st Cir. 1928); *United States v. Gonzales*, 206 Fed. 239 (W.D. Wash. 1913).

<sup>8</sup> Although there is no express double jeopardy provision in the North Carolina Constitution, it is prohibited under the "law of the land" clause. N.C. CONST. art. I, § 17, *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954).

<sup>9</sup> *State v. Davis*, 175 N.C. 723, 95 S.E. 48 (1918); *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706 (1899); *State v. Freeman*, 122 N.C. 1012, 29 S.E. 94 (1898); *State v. Groves*, 121 N.C. 563, 28 S.E. 262 (1897); *State v. Craine*, 120 N.C. 601, 27 S.E. 72 (1897); *State v. Bridgers*, 87 N.C. 562 (1882); *State v. Grady*, 83 N.C. 643 (1880). In connection with these cases it should be noted that in North Carolina it is not necessary that the indictment specifically allege first degree murder in order that the accused may be convicted of that offense. N.C. GEN. STAT. § 15-144 (1953), *State v. Kirksey*, 227 N.C. 445, 42 S.E.2d 613 (1947). Rather, he is indicted for murder, and the jury determines in its verdict whether it is in the first or second degree. N.C. GEN. STAT. § 15-172 (1953), *State v. Bagley*, 158 N.C. 608, 73 S.E. 995 (1912).

<sup>10</sup> 121 N.C. 563, 28 S.E. 262 (1897).

trial *de novo* for the offense charged in the bill of indictment."<sup>11</sup> In five of the seven cases in which the appeal was unsuccessful, the court expressed the opinion by way of dicta that had a new trial been awarded, the defendant could be lawfully convicted of first degree murder.<sup>12</sup> Finally in 1948 the issue was for the first time put squarely before the North Carolina court. In *State v. Correll*<sup>13</sup> the defendant had been convicted of manslaughter on an indictment for murder and had obtained a new trial. In the second trial he was convicted of second degree murder, and again he appealed, this time on the theory that he was put in double jeopardy. Relying on assorted dicta in its previous cases and the *Groves* case (in which the defendant had not raised the question), the court said, "It appears . . . from former decisions of this Court that it is an accepted principle of law in this State that when on appeal by defendant from judgment on a verdict of guilty in a criminal prosecution a new trial is ordered, the case goes back to be tried on the bill of indictment as laid."<sup>14</sup> Thus there has evolved in North Carolina a holding which is directly opposed to that of the *Green* case.<sup>15</sup>

There is no clear majority rule regarding the question presented by the *Green* and *Correll* cases.<sup>16</sup> One of the earliest decisions in-

<sup>11</sup> *Id.* at 568, 28 S.E. at 264. The court relied on *State v. Craine*, 120 N.C. 601, 27 S.E. 72 (1897). In that case the defendant was not granted a new trial, but there was dictum that had he been, it could have been for the greater offense.

<sup>12</sup> *State v. Davis*, 175 N.C. 723, 95 S.E. 48 (1918) (concurring opinion); *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706 (1899); *State v. Freeman*, 122 N.C. 1012, 29 S.E. 94 (1898); *State v. Craine*, 120 N.C. 601, 27 S.E. 72 (1897).

<sup>13</sup> 229 N.C. 640, 50 S.E.2d 717 (1948).

<sup>14</sup> *Id.* at 641, 50 S.E.2d at 718. The court cited *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706 (1899); *State v. Freeman*, 122 N.C. 1012, 29 S.E. 94 (1898); *State v. Craine*, 120 N.C. 601, 27 S.E. 72 (1897). But in none of these was a new trial awarded. The court also cited *State v. Bridgers*, 87 N.C. 562 (1882), and *State v. Grady*, 83 N.C. 643 (1880). In these two cases, not only was a new trial not granted but the court expressly refused to state an opinion on this question. Finally, the court cited *State v. Beal*, 202 N.C. 266, 162 S.E. 561 (1932), and *State v. Stanton*, 23 N.C. 424 (1841). These two cases involved the situation where a defendant, indicted on several counts, is convicted on one or more but not all of them. Therefore they are distinguishable. See note 4 *supra*.

<sup>15</sup> The *Correll* case was followed in *State v. Chase*, 231 N.C. 589, 58 S.E.2d 364 (1950).

<sup>16</sup> The opinion has been expressed that murder and manslaughter are different crimes. In *Weighorst v. State*, 7 Md. 442 (1855), the court said, "Although both are within the general term homicide, yet, legally speaking, they are not different degrees of the same offense, because one is not murder at all . . ." *Supra* at 451. The Maryland court seems to have missed the point. Homicide is not necessarily a crime. It may be justifiable, *Hammond v. State*, 147 Ala. 79, 41 So. 761 (1906), or excusable, *Gill v. State*, 134 Tenn. 591, 184 S.W. 864 (1916). The crime is felonious homicide, and it may be either murder or manslaughter, *People v. Austin*, 221 Mich. 635, 192 N.W. 590 (1923), the difference being that malice is an essential element for a killing to constitute murder, *State v. Baldin*, 152 N.C. 822, 68 S.E. 148 (1910). Blackstone put it, "Manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart." 4 *Blackstone, Commentaries* \*190.

volving this problem was a Louisiana case decided in 1845.<sup>17</sup> By dictum that court took the view represented by the *Green* case; a year later a federal court in *United States v. Harding*<sup>18</sup> took the side of the *Correll* case. Thus the question was weaned on conflict, and the situation is no different today. In at least sixteen states the holding of the *Green* case prevails,<sup>19</sup> but another sixteen are in accord with North Carolina.<sup>20</sup>

Of all the decisions adopting the North Carolina rule, perhaps the classic case is *Brantley v. State*.<sup>21</sup> There the defendant contended that the verdict in the first trial finding him guilty of manslaughter had the legal effect of finding him not guilty of murder, and that therefore he could not be tried for murder at the second trial without being put in double jeopardy. The court said that one may waive his constitutional protection against double jeopardy by obtaining a new trial, and that in this situation the waiver is not limited to the offense for which he was convicted, but extends to the entire offense for which he was indicted. A verdict, the court said, is single, and the defendant cannot divide it into that which favors him and that which does not. Had he allowed it to stand, he could have claimed any legal results flowing from it, including the implication that, as he was only convicted of manslaughter, he was not guilty of the higher offense of murder. But as the court pointed out, once he causes the conviction to be set aside, the implication is left without a basis and so must fall with the conviction.<sup>22</sup>

<sup>17</sup> *State v. Hornsby*, 8 Rob. 583, 41 Am. Dec. 314. (La. 1845).

<sup>18</sup> 26 Fed. Cas. 131, No. 15301 (C.C.E.D. Pa. 1846).

<sup>19</sup> *Rignell v. State*, 8 Ala. App. 46, 62 So. 977 (1913); *Hearn v. State*, 212 Ark. 360, 205 S.W.2d 477 (1947); *People v. Huntington*, 8 Cal. App. 612, 97 Pac. 760 (1908); *State v. Naylor*, 28 Del. 99, 90 Atl. 880 (1913); *McLeod v. State*, 128 Fla. 35, 174 So. 466 (1937); *People v. Newman*, 360 Ill. 226, 195 N.E. 645 (1935); *State v. Coleman*, 226 Iowa 968, 285 N.W. 269 (1939); *State v. Wooten*, 136 La. 560, 67 So. 366 (1915); *People v. Farrell*, 146 Mich. 264, 109 N.W. 440 (1906); *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933); *State v. Wilson*, 172 Ore. 373, 142 P.2d 680 (1943); *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (1908); *Reagen v. State*, 155 Tenn. 397, 293 S.W. 755 (1927); *Taylor v. Commonwealth*, 186 Va. 587, 43 S.E.2d 906 (1947); *State v. Foley*, 131 W. Va. 326, 47 S.E.2d 40 (1948); *Radej v. State*, 152 Wis. 503, 140 N.W. 21 (1913).

<sup>20</sup> *Young v. People*, 54 Colo. 293, 130 Pac. 1011 (1913); *Brantley v. State*, 132 Ga. 573, 64 S.E. 676 (1909); *State v. Killigrew*, 202 Ind. 397, 174 N.E. 808 (1931); *State v. Morrison*, 67 Kan. 144, 72 Pac. 554 (1903); *Hoskins v. Commonwealth*, 152 Ky. 805, 154 S.W. 919 (1913); *Jones v. State*, 144 Miss. 52, 109 So. 265 (1926); *State v. Stallings*, 334 Mo. 1, 64 S.W.2d 643 (1933); *Pembroke v. State*, 119 Neb. 417, 229 N.W. 271 (1930); *State v. Teeter*, 65 Nev. 584, 200 P.2d 657 (1948); *People v. McGrath*, 202 N.Y. 445, 96 N.E. 92 (1911); *State v. Robinson*, 100 Ohio App. 466, 137 N.E.2d 141 (1956); *Turner v. Territory*, 15 Okla. 557, 82 Pac. 650 (1905); *State v. Gillis*, 73 S.C. 318, 53 S.E. 487 (1906); *State v. Kessler*, 15 Utah 142, 49 Pac. 293 (1897); *State v. Bradley*, 67 Vt. 465, 32 Atl. 238 (1895); *State v. Hiatt*, 187 Wash. 226, 60 P.2d 71 (1936).

<sup>21</sup> 132 Ga. 573, 64 S.E. 676 (1909).

<sup>22</sup> There is another view which concurs in the result reached in the *Brantley* case, but which is based on different reasoning. In a dissenting opinion, Justice Holmes said, "It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end

In the *Green* case the Court said that if the waiver extends to the whole offense for which the defendant was indicted, then he is faced with a dilemma.<sup>23</sup> In order to gain a chance to have corrected what he considers an erroneous conviction of a lesser offense, he must run the risk of conviction of an offense which may be punishable by death. This gives him no meaningful choice. Accordingly, those decisions which are in line with the *Green* case limit the extent of the waiver to the offense of which he was convicted. He is deemed acquitted of any greater offense by the first verdict.<sup>24</sup>

From the foregoing it is seen that there are two opposing camps regarding the question presented by the *Green* case. The two are approximately equal in number and can possibly be equally well supported by logical argument. The danger is that well reasoned logic may obscure the point in conflict. Perhaps the answer to this problem is more a matter of policy than of logic. Justice Holmes said that "in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."<sup>25</sup> Yet, in the orderly administration of justice that balance is likely as equal as laws can devise. It is therefore submitted that the holding of the *Green* case exemplifies the spirit, if not clearly the letter, of the prohibition against double jeopardy.<sup>26</sup>

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### Criminal Law—Obstructing Justice—Interfering With a Police Officer

Statutes imposing criminal sanctions for obstructing justice<sup>1</sup> contain such descriptive words as obstruct, resist, oppose, assault, interfere, hinder, prevent, intimidate and impede. The question raised is should

of the cause." *Kepner v. United States*, 195 U.S. 100, 134 (1904). No cases in support of this theory have been found.

<sup>23</sup> 355 U.S. at 193.

<sup>24</sup> *Hearn v. State*, 212 Ark. 360, 205 S.W.2d 477 (1947); *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (1908).

<sup>25</sup> *Kepner v. United States*, 195 U.S. 100, 134 (1904) (dissenting opinion).

<sup>26</sup> The holding of the *Green* case will affect only the federal courts, as the double jeopardy prohibition contained in the fifth amendment of the Federal Constitution does not apply to the states. *Palko v. Connecticut*, 302 U.S. 319 (1937). However, an interesting sidelight of the *Green* case is the fact that the majority opinion was written by Justice Black, who has insisted that the fourteenth amendment due process clause incorporates the entire Bill of Rights so as to make its provisions binding on the states. *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion). The majority of the Court has always refused to accept this idea. For a discussion of the majority view, see Justice Frankfurter's concurring opinions in *Malinski v. New York*, 324 U.S. 401, 412 (1945), and *Adamson v. California*, *supra* at 59.

<sup>1</sup> ALA. CODE tit. 14, § 402 (1940); ARIZ. REV. STAT. ANN. § 13-541 (1956); IND. ANN. STAT. § 10-1005 (Burns 1956); ME. REV. STAT. ANN. c. 135, § 21 (1954); MINN. STAT. ANN. § 613.56 (1947); NEB. REV. STAT. § 28-729 (1948); N.C. GEN. STAT. § 14-223 (1953); N.J. REV. STAT. § 2A:99-1 (1953); TENN. CODE ANN. § 39-3104 (1955); W. VA. CODE ANN. § 6015 (1955).