

## NOTES

### DOUBLE JEOPARDY: DEFENSE IN RETRIAL FOR GREATER OFFENSE UPON REVERSAL OF CONVICTION OF LESSER OFFENSE

IN a new trial secured upon appeal from a conviction, it is clear that a defendant cannot assert a claim of double jeopardy.<sup>1</sup> Less clear, however, is the efficacy of such a plea if the defendant was originally convicted of a lesser included offense than that charged and is again faced, in the new trial, with a charge of the greater offense.<sup>2</sup>

This problem was pointedly raised in the recent case of *Green v. United States*.<sup>3</sup> There, the defendant, who had been indicted for murder in the first degree and convicted of murder in the second degree,<sup>4</sup> was accorded a new trial on appeal. Subsequently, he was retried

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<sup>1</sup> See *United States v. Ball*, 163 U.S. 662, 672 (1896); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). See also *McGinn v. State*, 46 Neb. 427, 441, 65 N.W. 46, 49 (1895), where it is stated that "To attempt an examination of the cases holding that the accused, in a criminal prosecution, by procuring a reversal of the conviction, waives his right to object to a second trial on the ground that he has once been put in jeopardy, would be a work of supererogation."

<sup>2</sup> Even the innocent defendant might hesitate to appeal a conviction where the penalty imposed was imprisonment, if the specter of a death penalty is present. Of course, there may be only the tactical question, and the major concern is whether the fundamental constitutional guarantee against double jeopardy is violated.

Somewhat similarly, it has been suggested that what is required is drastic legislative revision of the rules applicable to double jeopardy, in order to avoid the greatly increased danger to the defendant in a criminal case, that has resulted in the vastly increased number of penal statutes and the rise of the multiple count indictment. See Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 368 (1956).

<sup>3</sup> 236 F.2d 708 (D.C. Cir. 1956); *cert. granted*, 352 U.S. 915 (1956); *docketed* 25 U.S.L. WEEK 3164 (Nov. 27, 1956) (No. 589); *docketed for reargument*, 26 U.S.L. WEEK 3018 (July 23, 1957).

<sup>4</sup> The usual practice is that homicide is divided into various degrees of murder and manslaughter. MILLER, CRIMINAL LAW §§ 90-94 (1934). See N.C. GEN. STAT. § 14-17 to 19; N.Y. PEN. CODE § 1044 (first degree murder), § 1046 (second degree murder), § 1049 (manslaughter), § 1050 (manslaughter in first degree), § 1052 (manslaughter in second degree). See also 62 STAT. 756 (1948), 18 U.S.C. § 1111 (1952). To a lesser extent a similar practice has developed in other offenses such as robbery and rape.

In England, where no such classification is recognized by law, differentiation is made in practice by the jury. 117 JUST. P. 750 (1953).

on the same indictment, and again was convicted—but this time as charged.<sup>5</sup> A sharply divided Court of Appeals affirmed this second conviction,<sup>6</sup> rejecting the plea of double jeopardy<sup>7</sup> on the apparent authority of *Trono v. United States*,<sup>8</sup> where, in a similar situation, the Supreme Court, speaking through Mr. Justice Peckham, concluded that this defense had, in effect, voluntarily been waived by the appeal.<sup>9</sup>

Although recognizing that the conviction of the lesser offense might conceivably constitute an implied acquittal of the greater,<sup>10</sup> the Court

<sup>5</sup> Defendant was originally convicted of murder in the second degree under the second count of the indictment. He did not appeal from the conviction, under the first count, of arson. 218 F.2d 856 (1955). The basis of the reversal was that the court concluded that the trial judge had erred in giving an instruction on second degree murder, and that defendant was guilty of first degree murder or nothing.

<sup>6</sup> See note 3, *supra*.

<sup>7</sup> Judge Miller, with the concurrence of Judges Washington, Danaher, Bastian and Burger, said for the court that the defendant had not been subjected to double jeopardy (Judge Prettyman concurred also, basing his concurrence on the fact that he could see no escape from the *Trono* case, note 8 *infra*). 236 F.2d 708, 712 (1956).

Judge Fahy, in an opinion accepted by Chief Judge Edgerton and Judge Bazelon, stated that the defendant should not be tried again for first degree murder, since such an action would violate his constitutional right not to be placed in jeopardy a second time. 236 F.2d 708, 718 (1956).

<sup>8</sup> 199 U.S. 521 (1905).

<sup>9</sup> The controlling decision, *Trono*, is thus fifty-two years old and, when decided, was a relatively weak pronouncement, with only four of the Justices concurring in the result and reasoning. The opinion was written by Justice Peckham with the concurrence of Justices Brewer, Brown and Day, with Justice Holmes concurring in the result. See 199 U.S. 521, 535 (1905). Mr. Justice McKenna wrote a dissenting opinion which was concurred in by Justice White and Justice Harlan, who also wrote a separate dissenting opinion. The Chief Justice, Fuller, also dissented, apparently without opinion. 199 U.S. 521, 540 (1905).

There was an effort on the part of counsel for Green to show that the *Trono* (Peckham) opinion was not that of the court, but this failed, and it is certain that the result was the opinion of the court as then constituted. 236 F.2d 708, 711 (1956).

<sup>10</sup> Strong support is found in many state courts for the view that the subsequent conviction is double jeopardy. See Annot. 59 A.L.R. 1160 (1929) for a collection of cases. See also, *Thomas v. State*, 255 Ala. 632, 53 So.2d 340 (1951), where the trial proceeded under a valid indictment for first degree murder and a verdict of guilty of murder in the second degree was returned, it was held to be a bar to trial for first degree murder in the new trial; *Hearn v. State*, 212 Ark. 360, 205 S.W.2d 477 (1947), where defendant, indicted for murder in first degree and found guilty of voluntary manslaughter, obtained a reversal because of judge's remark to jury, and where it was held that defendant, in the new trial, could not be convicted of any higher offense than voluntary manslaughter, as he was deemed acquitted of all greater degrees of homicide. A restriction of the rule is noted in cases such as *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950), where it was said that a conviction of assault would generally bar subsequent conviction of rape, but not in the case where defendant had pleaded guilty to assault before a mayor's court in order to escape trial for rape. The Virginia court,

in the *Trono* case had stated that "the better doctrine is . . . that the reversal of the judgment opens up the whole controversy and acts upon the original judgment as if it had never been."<sup>11</sup> And that it rationalized this conclusion upon a waiver theory was thus made unequivocally explicit:

[W]e do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. . . . [I]f the defendant chooses to appeal . . . he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense. . . .<sup>12</sup>

Nevertheless, in the *Green* case, the court, while ostensibly adhering

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in *Lee v. Commonwealth*, 188 Va. 360, 49 S.E.2d 608 (1948), said a defendant convicted of voluntary manslaughter could not, in the new trial, be found guilty of any higher degree of homicide, and, in *Leigh v. Commonwealth*, 191 Va. 583, 66 S.E.2d 586 (1951), that a conviction of second degree murder is an acquittal of first degree.

See ALI MODEL PENAL CODE, §§ 123-25 (April 1956 Draft) and *Trono v. United States*, 199 U.S. 521, 540 (1905) (dissenting opinion) for collections of cases.

California has a peculiar situation, in that there murder in the first degree and murder in the second degree are treated as one offense for the purpose of this rule. As to other offenses, the California courts follow the rule that would bar the subsequent conviction. See *People v. McNeer*, 14 Cal.App.2d 22, 57 P.2d 1018 (1936), where defendant was indicted for murder and convicted of second degree. He secured a new trial and was convicted of murder in the first degree. On appeal, the court said that defendant had not been *acquitted* of murder in the original trial, but, rather, he was *convicted* of murder as there was only one offense defined as murder. See also *People v. Spreckels*, 125 Cal.App.2d 507, 513, 270 P.2d 513, 517 (1954).

See *Jones v. State*, 144 Miss. 52, 109 So. 265 (1926), 59 A.L.R. 1146 (1929), for a statement of the view that the subsequent conviction is not double jeopardy. Cases are collected in Annot., 59 A.L.R. 1160 (1929). See also Notes, 71 U.S.L. REV. 421 (1937); 23 TUL. L. REV. 575 (1949); 2 VAND. L. REV. 701 (1949).

Apparently, there have been some changes in position by several state courts. See *Ex parte Byrd*, 157 Tex. Crim. App. 595, 251 S.W.2d 537 (1952). The general theory is often stated to be that upon the new trial, it is as if no trial had ever been held. *State v. Higgins*, 252 S.W.2d 641 (Mo. 1952); *Anglin v. Patterson*, 121 Okla. 106, 248 Pac. 632 (1926). See also *District of Columbia v. Huffman* (D.C. Mun. Ct. App.) 42 A.2d 502 (1945) (and cases cited in n. 9, at 504).

<sup>11</sup> "It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party . . ." *Trono v. United States*, 199 U.S. 521, 534 (1905). See also Notes, 71 U.S.L. REV. 421, 424 (1937); 23 TUL. L. REV. 575, 576, (1949); 2 VAND. L. REV. 701, 702 (1949). And see, more recently, Note, 66 YALE L.J. 592 (1957) where the cases are categorized as "limited" waiver cases, as opposed to "absolute" waiver. (This note contains an analysis of the general jeopardy problem raised in the *Green* case.)

<sup>12</sup> 199 U.S. 521, 533 (1905).

to<sup>13</sup> and quoting exclusively from the *Trono* case, conspicuously avoided the use of similar "waiver" language.<sup>14</sup> Instead, it seemed, rather, principally to stress the fact of Mr. Justice Holmes' concurrence in that case as the basis of its precedential value.<sup>15</sup> It is significant, therefore, that while Mr. Justice Holmes, indeed, perceived no double jeopardy in the *Trono* case, he had expressly rejected the waiver doctrine propounded there by the Court only a few months earlier in *Kepner v. United States*.<sup>16</sup> In fact, it was probably for this reason that he felt compelled to enter a separate concurrence in the *Trono* case. More appealing to Mr. Justice Holmes than the theory of waiver was one of "single jeopardy"—*i.e.*, that jeopardy attaches and remains unaffected until final disposition of the case. Accordingly, despite the explicit formulation of the waiver theory in the *Trono* case, on which nominal reliance was placed, the *Green* case, viewed in the respect mentioned, suggests the possible adoption of this single jeopardy theory in its stead.<sup>17</sup>

<sup>13</sup> 236 F.2d 708, 711 (1956). "Thus the Peckham holding which is applicable here. . . ."

<sup>14</sup> The significance of the omissions is best illustrated by a presentation of the statements used in *Green* with the omissions included: (Omissions italicized) "In our opinion the better doctrine . . . (see text to note 11 *supra*). The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. *We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. . . . No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense. . . .*

" . . . And this is generally put upon the ground that by appeal he waives his right to the plea. . . . This holding shows that there can be a waiver of the defense by reason of the action of the accused. As there is, therefore, a waiver in any event . . . the accused waives the right. . . . When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment." Compare 236 F.2d 708, 710, 711 (1956) with 199 U.S. 521, 533, 534 (1905).

<sup>15</sup> 236 F.2d 708, 711 (1956). The court in *Green* made the effort, saying that "the distinguished Holmes had affirmatively asserted that [the Peckham (*Trono*) doctrine] to be the better doctrine," but this conclusion stems from a fundamental misconception of the view of Mr. Justice Holmes in *Kepner*. See note 17 *infra*.

<sup>16</sup> *Trono v. United States*, 199 U.S. 521, 535 (1905). In *Kepner v. United States*, 195 U.S. 100, 134 (1904) (dissenting opinion), Justice Holmes said (195 U.S. at 135): "It cannot matter that the prisoner procures the second trial. In a capital case . . . a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights." And again (195 U.S. at 136): "I have seen no other, except the suggestion of waiver, and that I think cannot stand."

<sup>17</sup> This idea is re-enforced by the omissions, note 14 *supra*, and the obvious effort to

The dissenters in the *Green* case, on the other hand, urged that conviction of second degree murder constituted acquittal of first degree murder, that the appeal did not bring this acquittal before the court, and that there was not, accordingly, any waiver of the double jeopardy defense with respect to the first degree murder charge.<sup>18</sup> They distinguished the *Trono* case on the basis of a *sui generis* procedure employed there, which permitted the whole case to be reviewed and tried *de novo* in the appellate court,<sup>19</sup> but did not address themselves at all to the single jeopardy theory.

This case is now before the Supreme Court,<sup>20</sup> and its resolution may have a significance broader than is readily apparent on the prosecution of appeals in criminal cases. If the Court either reverses the circuit court or, in upholding it, reaffirms its adherence to the *Trono*—or waiver—doctrine, prosecution appeals in federal cases will, apparently, continue to be regarded unconstitutional.<sup>21</sup> If, however, the Court should affirm

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put Justice Holmes with the majority. The single jeopardy doctrine is succinctly stated by Justice Holmes: “. . . it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same case, however often he may be tried. *The jeopardy is one continuing jeopardy* from its beginning to the end of the cause.” *Kepner v. United States*, 195 U.S. 100, 134 (1904) (dissenting opinion) (emphasis added).

<sup>18</sup> 236 F.2d 708, 711 (1956).

<sup>19</sup> 236 F.2d 708, 718 (1956) (dissenting opinion). But this seems to be a rather forced distinction since the *Trono* (Peckham) opinion stated that the case was being considered “as if it arose in one of the Federal courts in this country.” 199 U.S. 521, 530 (1905).

It should be noted that under the procedure rules of the Philippine Islands, the Supreme Court of the Philippines had the power to review both questions of law and fact, and the power to reverse a judgment, in effect retrying the whole matter. See the statement of the Solicitor General for the United States, 199 U.S. 521, 525 (1905).

Actually, the claim was that the conviction of homicide, by the Supreme Court of the Philippine Islands, placed them in double jeopardy in “violation of the Declaration of Rights in section 5 of the Civil Government Act of July 1, 1902, 32 STAT. 691.” *Id.* at 522. The language of the Act is substantially that of the Bill of Rights set forth in the amendments to the Constitution of the United States.

<sup>20</sup> See note 3 *supra*.

<sup>21</sup> For general studies of this topic see Miller, *Appeals by State in Criminal Law Cases*, 36 YALE L.J. 486 (1927); Horack, *Prosecution Appeals in West Virginia*, 41 W. VA. L.Q. 50 (1934). See also Notes, 10 MISS. L.J. 284 (1938) (commenting on *Palko v. Connecticut*, 302 U.S. 319 (1937), which upheld a state statute granting the right of appeal to the state as not being a violation of the Constitution of the United States); 24 IND. L. REV. 547 (1949); 12 CRIM. L. REV. 385 (1938); 3 S.C. L.Q. 162 (1950); 7 MONTANA L. REV. 56 (1946) (discussing the *Palko* case and also *Kepner v. United States*, 195 U.S. 100 (1904), where the constitutionality of such a federal statute was denied); 12 MD. L. REV. 68 (1951); 22 U. CIN. L. REV. 463 (1953) (containing a criticism of the fact that the state does not have the right to

the lower decision and, in so doing, expressly adopt the single jeopardy theory of Mr. Justice Holmes,<sup>22</sup> prosecution appeals would, thereafter, be constitutional—indeed, it was to this end that this rationale originally was articulated.

Apparently, the jaundiced view widely taken toward prosecution appeals is an outgrowth of ancient conditions. To mitigate the prejudicial treatment to which the defendant commonly was subjected,<sup>23</sup> countervailing safeguards such as this were gradually developed. Thus, too, for example, in the absence of a right of appeal by the prosecution,<sup>24</sup> or where such right is narrowly restricted,<sup>25</sup> errors of the defense cannot be raised in the appellate courts.<sup>26</sup> Since the underlying policy justifications no longer have great validity, however, the considerations

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appeal and concluding (at 467) that "no harm could possibly come from a statute which gave the state the right to appeal".

For an analysis of the narrow right of appeal by the government in federal cases, see Note, 21 GEO. WASH. L. REV. 631 (1953).

<sup>22</sup> Described as "more desirable" but not having much support in the cases. Note, 2 VAND. L. REV. 701, 703 (1949). The only case there cited in *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894), which involved an appeal by the state in a criminal case, but in *State v. Witte*, 243 Wis. 423, 10 N.W.2d 117 (1943), the single jeopardy view of Justice Holmes is expressly adopted. See also Note, 22 U. CIN. L. REV. 463 (1953), for a favorable analysis of the doctrine and, more recently, a careful study of the problem and state constitutional provisions in Note, 45 Ky. L.J. 628 (1957).

For an extremely critical view of the result of the *Kepler* decision and the resulting problems in the Philippine Republic, see Maurico, *The Need for a New Approach to the Doctrine of Double Jeopardy*, 29 PHIL. L.J. 481 (1954).

<sup>23</sup> WIGMORE, EVIDENCE (2d ed. 1923) 994. See also 3 CHITTY, ENGLISH STATUTES 212 n. (2) (6th ed. 1912); *People v. Fochtman*, 226 Mich. 53, 197 N.W. 166 (1924). See also 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) at 222, 447 (torture); at 223, 377, 422 (unjudicial conduct of magistrates); at 418 (political interest of government in trials); at 415 (oppression of accused persons generally), all cited in Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 491 (1927). See also, Horack, *Prosecution Appeals in West Virginia*, 41 W. VA. L.Q. 50 (1934); 10 MISS. L.J. 284, 288 (1938).

<sup>24</sup> Illinois, Massachusetts, and Texas do not allow the state any appeal. Until recently, Georgia, Florida and Minnesota likewise allowed no appeal to the prosecution, but the legislatures in those states have adopted provisions similar to that embodied in the American Law Institute's Code of Criminal Procedure. In effect these provisions state that the state is entitled to appeal from various rulings of the court, not in such a manner as to effect an acquittal. ALI CODE OF CRIM. PRO., § 440 (1930).

<sup>25</sup> *Commonwealth v. Prall*, 146 Ky. 109, 142 S.W. 202 (1912). In Michigan and Pennsylvania, the state is allowed the right of review of a judgment in favor of defendant if it is rendered prior to the verdict of the jury. *People v. Swift*, 59 Mich. 529, 26 N.W. 694 (1886); *Commonwealth v. Capp*, 48 Pa. 53 (1864).

<sup>26</sup> See Horack, *Prosecution Appeals in West Virginia*, 41 W. VA. L. REV. 50 (1934), for an analysis of the views of a number of prosecutors on the problems presented by the absence of a right of appeal in the prosecution.

usually urged today in support of these defense-oriented restrictions tend to emphasize the right to trial by jury,<sup>27</sup> the increased hardship that would otherwise be visited on the defendant,<sup>28</sup> and the already excessive volume of appeals which would thereby be greatly augmented.<sup>29</sup>

Adamant objections to prosecution appeals has, nevertheless, occasioned sharp criticism in some quarters.<sup>30</sup> The most cogent, perhaps, is that, albeit unconsciously, it may induce a judge, in close questions, to decide invariably in favor of the defendant, to the consequent impairment of the sound administration of justice.<sup>31</sup> There has, however, been no significant deviation from this rule in the federal courts,<sup>32</sup> although statutes permitting prosecution appeals in state courts have been upheld

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<sup>27</sup> 3 BL. COMM. 379 states the somewhat hallowed doctrine, but as recently as 1954, this view was echoed by the late Rt. Hon. Sir Travers Humphreys who wrote, "I cannot bring myself to believe that there are any persons other than the inmates of a lunatic asylum who would vote in favour of the abolition of trial by jury in serious criminal cases." CRIM. L. REV. 457, 459 (July, 1956).

However, there is much dissenting opinion as to the significance of jury trials, and it is stated that during a particular period eighty-six percent of convictions in trial courts were on guilty pleas, six percent on findings of the court acting as a jury, and only eight percent by a jury determination of guilt. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 289 (4th ed. 1947).

For more recent analyses of the right to jury trial, see Notes, 46 J. CRIM. L. (Eng.) 512 (1955); 32 L.A. BAR BULL. 35 (1956); 29 CONN. BAR J. 229 (1955).

For a scholarly, practical, experienced view of jury trials, see FRANK, COURTS ON TRIAL (1949), especially p. 110 ("It will not do . . . to make Fourth-of-July speeches about the glorious jury system, to conceal its grave defects, or merely to palliate them . . ."). Apparently Judge Frank would abandon jury trials save in certain grave criminal cases.

The view has been expressed that a cut-off point is a necessary limitation on the state right of appeal, and that that point is where there has been a jury determination not acting under instruction. Under this view, state appeals would be allowed, but curtailed because of the right to jury trial. See Note, 9 RUTGERS L. REV. 545, 553 (1955), where the whole problem as related to New Jersey decisions, statutes and constitutional provisions is discussed.

<sup>28</sup> See Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 500 (1927); see also Note, 32 J. CRIM. L., C. & P.S. 87, 89 (1941).

<sup>29</sup> See Notes, 1 TEXAS LAW & LEGIS. 152 (1947). But cf. Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 500 (1927) at 500, where an analysis of a case in Connecticut illustrates that this is not always true.

<sup>30</sup> See Miller, *id.*; Horack, *Prosecution Appeals in West Virginia*, 41 W. VA. L. REV. 50 (1934); 10 MISS. L.J. 284 (1938); 24 IND. L. REV. 547 (1949); 32 J. CRIM. L., C. & P.S. 87 (1941); 12 U. CIN. L. REV. 385 (1938); 3 S.C.L.Q. 162 (1950); 12 MD. L. REV. 68 (1950); 22 U. CIN. L. REV. 463 (1953).

<sup>31</sup> See Note, 10 MISS. L.J. 284, 289-90 (1938); Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 511 (1927).

<sup>32</sup> See note 19, *supra*.

as meeting the due process requirements of the fourteenth amendment.<sup>33</sup>

The result in cases such as *Green* and *Trono* has been said to rest on such tacit policy considerations as jury leniency and the fact that, under certain circumstances, a reversal would be tantamount to complete acquittal.<sup>34</sup> So compelling are these considerations believed to be that the Court has been forced to devise techniques effectively to circumvent the double jeopardy barrier. If, however, the injunction against double jeopardy will yield to such considerations, then it would seem to be even more vulnerable to the more significant demands that prosecution appeals be permitted in the interest of effective judicial administration. The traditional doctrine of waiver by reason of appeal, it is true, cannot be used by the Court to justify this result. But there is available a respectable and at least equally persuasive alternative rationale in the single jeopardy view of Justice Holmes.<sup>35</sup> Adoption of this thesis would satisfy the underlying policy considerations in the *Trono* and *Green* situations,<sup>36</sup> avoid the dubious waiver argument,<sup>37</sup> and, moreover, enable the federal courts considerably to further the more effective administration of justice.

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<sup>33</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937). The Supreme Court held that there was nothing in the United States Constitution that prohibited the State of Connecticut from granting the right of appeal, after a trial on the merits, to the prosecution when there was dissatisfaction with the verdict rendered by the trial court. This appeal might be from an acquittal or an unsatisfactory conviction. The federal bill of rights, including the double jeopardy clause, was held not to apply to state action of this kind. Thus, if the state has no prohibition of its own against double jeopardy, it can provide for what would amount to double jeopardy in the federal courts.

<sup>34</sup> These policy factors are most recently discussed in a rather perceptive analysis of the jeopardy problem raised by the *Green* case. See Note, 66 *YALE L.J.* 592, 597 & n. 27 (1956). Defendant *Green* was originally convicted of arson and second degree murder.

The Government's case was based on the felony murder doctrine [under D.C. CODE ANN. § 22-2401 (1951)], which does not require proof of a specific intent to kill, and, thus, in a retrial on the first degree murder count, the prosecution would not likely be able to secure a conviction since it would be unable to show intent. The arson conviction was not appealed and would not be at issue in the new trial. But *cf.* Note, 66 *YALE L.J.* 427 (1956), pointing up the anachronistic nature of felony murder as a first degree offense and urging its abolition, suggesting that malice aforethought of the felony committed could sustain a conviction of second degree murder. It is, however, suggested in this same Note that even in the absence of the felony murder doctrine, the felon who sets fire to an occupied building might be said to have premeditated and deliberated.

<sup>35</sup> See notes 15 and 16, *supra*, and text thereto.

<sup>36</sup> See note 29, *supra*, and text thereto.

<sup>37</sup> See generally introductory paragraphs hereto.