CONSTITUTIONAL LAW: IMPOSITION OF DEATH PENALTY AFTER SUCCESSFUL APPEAL FROM SENTENCE TO LIFE IMPRISONMENT HELD TO VIOLATE DOUBLE JEOPARDY PROVISION OF CALIFORNIA CONSTITUTION

THE Supreme Court of California has recently limited the extent to which a criminal defendant who obtains a reversal of an erroneous conviction thereby exposes himself to further jeopardy. In *People v. Henderson*[1] it was held that the California constitutional provision against double jeopardy forbids the later imposition of the death penalty upon a defendant who has once been sentenced to life imprisonment and has appealed from that judgment.

After a plea of guilty to a charge of murder in the first degree, defendant Henderson was sentenced to life imprisonment by a judge. Following a reversal of the conviction, a plea of not guilty was entered at the second trial. Henderson was again convicted, but this time was sentenced to death by a jury. The California Supreme Court, in reversing the conviction, became the first American court to hold that a sentence to life imprisonment constitutes an implied acquittal of a crime sufficiently atrocious to justify the death penalty and is therefore a bar to the subsequent imposition of that penalty.[2]

The court based its decision on *Green v. United States*,[3] in

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[1] 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

[2] *Id.* at 686, 35 Cal. Rptr. at 86. This decision reversed the prior California decision of People v. Grill, 151 Cal. 592, 91 Pac. 515 (1907). See note 8 *infra*.

[3] 355 U.S. 184 (1957).

Prior to the *Green* case, the rights of a defendant in a federal court were determined by the "waiver" theory, under which the defendant was deemed to have waived his right to plead former jeopardy by appealing his conviction. Although early adopted by many state and lower federal courts, *e.g.*, United States v. Harding, 26 Fed. Cas. 131 (No. 15301) (C.C.E.D. Pa. 1846); State v. Terreso, 56 Kan. 126, 42 Pac. 354 (1895); People v. Dowling, 84 N.Y. 478 (1881), this doctrine was not expressly adopted by the Supreme Court until 1896. United States v. Ball, 163 U.S. 662, 671-72 (1896); Trono v. United States, 199 U.S. 521, 533-34 (1905).

Under this theory a defendant, on retrial, could be prosecuted as if no trial had previously taken place, and thus could be convicted of a greater offense after a reversed conviction of a lesser offense. Trono v. United States, *supra*.

Moreover, a defendant could be subjected to the imposition of a greater penalty on retrial after a successful appeal. Stroud v. United States, 251 U.S. 15 (1919); Murphy v. Massachusetts, 177 U.S. 155 (1900) (sentence increased from minimum of ten years to twelve years, six months).

which the United States Supreme Court held that a conviction for second degree murder, upon an indictment for first degree murder, constituted an implied acquittal of the greater charge and precluded a subsequent prosecution for that offense.[4] Even though the *Green* case involved two separate and distinct offenses, whereas the present case was concerned with only different penalties for the same offense, the California court concluded that it would be unrealistic to draw any distinction on that basis. The court found that the dichotomy of punishments made the crime so similar to two separate offenses that the defendant should be treated as if he had been convicted of a greater offense on retrial.[5] This, in effect, divided the crime of first degree murder into two subdegrees. The court concluded that a contrary holding would unreasonably impair the right of appeal by forcing the defendant to make the difficult choice of accepting an erroneous conviction or bringing an appeal which would again place his life in jeopardy.[6]

Federal interpretations of the double jeopardy provisions of the fifth amendment are clearly not binding on the California courts. They are persuasive, however, as the wording of the guarantees against double jeopardy in the Federal and California constitutions is

In Stroud v. United States, *supra*, the Supreme Court considered the very point brought up in the *Henderson* case. It held that a sentence to life imprisonment could be increased to death upon retrial after a successful appeal by the defendant. With Trono v. United States, *supra*, as authority that a defendant could be convicted of a lesser offense, the Court could hardly hold otherwise. However, the decision was not based on that point, but on a holding that "the fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." Stroud v. United States, *supra* at 18. Thus it does not appear, as the present court felt, that the overruling of the *Trono* case necessarily vitiated the *Stroud* decision.

This waiver theory was severely limited by the Supreme Court in the *Green* case, in which the Court held that waiver of a constitutional right by a defendant in order to appeal was impossible—the defendant could not be deemed to have voluntarily relinquished a constitutional right when the only alternative was to suffer an erroneous judgment. Green v. United States, *supra* at 191-92. Since the *Trono* case was limited to its facts, it was effectively overruled.

[4] The Court reasoned that the defendant had a valid defense to a second prosecution for first degree murder because the jury at the first trial either acquitted him of that crime or was discharged without his consent without reaching a verdict on it. The fact that he initiated an appeal from his conviction for second degree murder did not deprive him of the right to plead former jeopardy as to the greater charge because a defendant cannot be deemed to forego a valid defense to a charge of first degree murder in order to secure a reversal of an erroneous conviction of a lesser offense. Green v. United States, *supra* note 3.

[5] 386 P.2d at 686, 35 Cal. Rptr. at 86.

[6] *Ibid.*

almost identical.[7] California law has, in fact, closely paralleled the developments of the federal law.[8] The California Supreme Court, in *Gomez v. Superior Court*,[9] had already adopted the *Green* rationale and even recognized the application of the doctrine of implied acquittal to a conviction of a lesser included offense.[10]

Implied acquittal is based on the assumption that the finder of fact has, through its silence as to the greater crime charged, found the defendant innocent of that crime.[11] Although this doctrine has

[7] Gomez v. Superior Court, 50 Cal. 2d 640, 649, 328 P.2d 976, 982 (1958).

The United States Constitution provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. The California constitution states that "no person shall be twice put in jeopardy for the same offense." CAL. CONST. art. I, § 13, cl. 4. CAL. PEN. CODE § 687 states that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

[8] In California, a conviction of a lesser degree of a crime than that charged was not considered an acquittal of the greater charge. People v. McNeer, 14 Cal. App. 2d 22, 57 P.2d 1018 (Dist. Ct. App. 1936); People v. Keefer, 65 Cal. 232, 3 Pac. 818 (1884). This line of authority was overruled in Gomez v. Superior Court, *supra* note 7. *Compare McNeer, Keefer,* and *Gomez, with* cases cited in note 3, *supra.*

In People v. Grill, 151 Cal. 592, 91 Pac. 515 (1907), the court considered the issue which was before the court in the instant case. Although the case could have been decided on the authority of People v. Keefer, *supra,* the court chose not to base its decision on that point. Instead, it held that "the discretion given to the jury to mitigate the punishment upon a conviction of murder in the first degree, and inflict imprisonment for life only, does not, after such a verdict, divide that degree of murder into two degrees, but merely reduces the punishment. . . . The former conviction was not an acquittal of the first degree of murder nor of any degree thereof." 151 Cal. at 598, 91 Pac. at 517.

The court in the *Henderson* case, however, stated that the overruling of *Keefer* by Gomez v. Superior Court, *supra,* vitiated the rationale of *Grill.* 386 P.2d at 686, 35 Cal. Rptr. at 86. This conclusion does not seem to be warranted since the court in that case deliberately chose not to decide the case on the basis of the *Keefer* decision.

[9] 50 Cal. 2d 640, 328 P.2d 976 (1958).

[10] *Id.* at 693, 328 P.2d at 977.

This has been established law in California for over one hundred years. See *In re* Hess, 45 Cal. 2d 171, 288 P.2d 5 (1955); People v. Greer, 30 Cal. 2d 589, 184 P.2d 512 (1947); People v. Gordon, 99 Cal. 227, 33 Pac. 901 (1893); People v. Gilmore, 4 Cal. 376 (1854). The rationale behind these decisions is that the greater and lesser offenses are different crimes with different facts to be proven, and retrial of one offense does not necessarily demand retrial of the other offense. People v. Gordon, *supra* at 232, 33 Pac. at 902.

[11] The cases are not clear as to whether it is the conviction of the lesser offense or the silence as to the greater charge which constitutes the acquittal of that charge. See Annot., 61 A.L.R.2d 1141 (1958). However, it was noted in the *Green* case that "Green's claim of former jeopardy is not based on his previous conviction for second degree murder but instead on the original jury's refusal to convict him of first degree murder." 355 U.S. at 190 n.11.

Moreover it is the general rule that when a verdict is silent as to some of the offenses charged, the accused is deemed to have been acquitted of them. See, *e.g.,* Bolton v. State, 24 Ala. App. 473, 137 So. 903 (1931); People v. Gessinger, 238 Mich.

been criticized on the ground that a conviction of the lesser charge more accurately reflects jury leniency than any finding of innocence,[12] it is followed by a majority of American jurisdictions.[13]

Prior to the present case, however, no jurisdiction had gone so far as to subdivide any offense and find an implied acquittal based on the different punishments possible.[14] Since the jury is faced with such clear cut alternatives of life or death, however, such a division, at least with respect to first degree murder, appears to have much validity. It may well be true that a sentence to life imprisonment will to some extent reflect the leniency of the judge or jury. Nevertheless, implicit in such a sentence is a finding that the crime is not sufficiently atrocious to demand the death penalty. This is the same type of finding of fact as that in a conviction for second degree murder on an indictment charging first degree murder. In each instance, the judge or jury determines that the defendant's act is not such as to warrant the maximum penalty.[15] This fact finding nature

625, 214 N.W. 184 (1927); Commonwealth v. Day, 114 Pa. Super. 511, 174 Atl. 646 (1934).

[12] See Comment, 7 BUFFALO L. REV. 461 (1958); 56 MICH. L. REV. 1192 (1958); 15 WASH. & LEE L. REV. 276 (1958).

[13] It now appears that the *Green* doctrine is followed in twenty jurisdictions, while the *Trono* doctrine is followed in nineteen jurisdictions. In addition to jurisdictions listed in Green v. United States, 355 U.S. 184, 216 n.4 (1957), New Jersey and Washington, along with the federal courts, have adopted the *Green* rule. State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481 (1959). Arizona and Alaska have adopted the *Trono* rule that the defendant may he tried again for the greater offense. United States v. Frank, 8 Alaska 436 (1933); State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

[14] The question of an implied acquittal based on the different punishments possible for a crime has apparently never arisen in other than first degree murder cases.

However, with respect to first degree murder it has been decided in seven jurisdictions. The leading case in the federal courts is Stroud v. United States, 251 U.S. 15 (1919), and that in California was People v. Grill, 151 Cal. 592, 91 Pac. 515 (1907); Mann v. State, 23 Fla. 610, 3 So. 207 (1887); State v. Kneeskern, 203 Iowa 929 210 N.W. 465 (1926); Commonwealth v. Alessio, 313 Pa. 537, 169 Atl. 764 (1934); Grcer v. State, 62 Tenn. 321 (1874). All held that the death penalty could be imposed on retrial, and all were decided in jurisdictions in which a conviction of a lesser offcnse than the one charged constituted an implied acquittal and a bar to further prosecution for the greater offense.

[15] The present holding would appear to apply equally to sentences imposed by judge and jury, whether on guilty or not guilty pleas. In each instance the life of the defendant is in jeopardy and either the court or jury must, after a consideration of evidence relating to the character of the defendant and his crime, decide between life and death. It is immaterial to the defendant whether a judge determining sentence or a jury determining guilt has ruled that his crime is not so atrocious as to warrant the death penalty. In either case there is an implied acquittal meeting the requirements of the *Green* rationale.

Mr. Justice Frankfurter, dissenting in the *Green* case, stated: "As a practical

of sentencing is well illustrated by the California Penal Code provisions for a separate trial on the issue of penalty after the guilt of the accused is determined.[16] In this trial the jury hears evidence relating to sentence, and implicit in the penalty imposed is a finding of fact as to the character of the crime.[17]

The basic purpose of the prohibition against double jeopardy is to prevent the state from making repeated attempts to convict an individual for an alleged offense.[18] Although such governmental action was only in response to the defendant's appeal in the *Green* case, the Court stated that the constitutional provision should be

matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment." 355 U.S. at 213.

[16] CAL. PEN. CODE § 190.1 (Supp. 1963) provides that if a defendant has been found guilty of an offense punishable in the alternative by life imprisonment or death, "there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty."

This trier of fact may be a jury or, if the defendant waives his right to a jury, a judge. In either case the trier of fact has absolute discretion in determining the penalty, and, in the absence of error, the appellate court has no power to overturn the determination. People v. Cash, 52 Cal. 2d 841, 345 P.2d 462 (1959).

[17] "Evidence may be presented at the further proceedings on the issue of penalty. . . . The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented." CAL. PEN. CODE § 190.1 (Supp. 1963). Thus the jury is bound to make its choice of penalty conform to a finding of fact on the evidence presented. See 31 So. CAL. L. REV. 200 (1958).

In California the provision for a bifurcated trial applies equally to defendants who plead guilty and those who plead not guilty. Even if, as in the present case, the defendant pleads guilty, he is entitled to a jury trial on the issue of penalty. CAL. PEN. CODE § 190.1 (Supp. 1963). If he waives the right to a jury trial on penalty after pleading gnilty, the judge will impose the sentence after a consideration of the evidence. People v. Jones, 52 Cal. 2d 636, 343 P.2d 577 (1959).

In the federal courts the jury in a capital case may make a binding recommendation for imprisonment when they return the verdict. 18 U.S.C. § 1111 (1958). See Andres v. United States, 333 U.S. 740 (1948). If no such recommendation is made, or if the defendant pleads guilty, the sentence is determined by the judge after hearing evidence presented by the defendant and by an impartial presentence commission. FED. R. CRIM. P. 32.

The majority of the states allow the jury to determine the penalty in capital cases unless the defendant pleads guilty, in which case the judge does the sentencing after hearing evidence as to penalty. See Andres v. United States, *supra*. See generally MORELAND, MODERN CRIMINAL PROCDEURE 283-94 (1959); Comment, 1 TEXAS L. & LEG. 124 (1947).

In the remaining states either the death penalty is abolished or mandatory, or the jury may make only a recommendation. See Andres v. United States, *supra* at 767.

[18] Green v. United States, 355 U.S. 184, 187 (1957). See Wade v. Hunter, 336 U.S. 684, 688 (1949); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170-71 (1873).

given wide application in order to protect the right to appeal.[19] In so holding, the Court alleviated the situation in which the defendant's right to appeal would be conditioned on placing his life in jeopardy for a second time. As stated by the Court, "the law should not, and in our judgment does not, place the defendant in such an incredible dilemma."[20]

Moreover, it is in the interest of the state to eliminate error from trials, and the encouraging of appeals from possibly erroneous convictions tends to accomplish this end. Yet, appeals will be discouraged in capital cases if the defendant, sentenced to life imprisonment, must risk his life in order to appeal. Indeed, the great value placed on human life by our society demands that the greatest protection of the right to appeal be afforded to a defendant on trial for his life.[21]

The language of *Henderson*, if taken literally, does not limit its application to capital cases. The court stated that it makes no difference whether the legislature divided a crime into degrees or allowed the court to impose different punishments for the same crime.[22] The double jeopardy effect is the same. Carried to its logical extreme, this rationale would prevent any increase in punishment on retrial in all criminal cases. Such extension does not seem desirable.[23]

Any distinction between application of the doctrine of implied

[19] Green v. United States, 355 U.S. 184, 193 (1957).

[20] *Ibid.*

[21] *Ibid.*

This is actually the paramount problem with which the *Green* and *Gomez* cases were concerned. The court in the *Henderson* case, like those in *Green* and *Gomez*, stresses this same policy consideration, and this would seem to be at least as much of a basis for the decision as a strict interpretation of the double jeopardy provision of the California constitution.

[22] 386 P.2d at 686, 35 Cal. Rptr. at 86.

[23] The dissenting justice in the instant case felt that if the present decision were limited to capital offenses the discrimination against defendants not on trial for their lives would be "grossly unfair" and "without rational foundation." 386 P.2d at 691, 35 Cal. Rptr. at 91.

However, this appears no more objectionable than other discriminations against defendants not on trial for their lives. Defendants on trial for their lives are not allowed to plead guilty without benefit of counsel. CAL. PEN. CODE § 1018. Defendants on trial for their lives have the right to be represented by two counsel, a right which may be restricted for other defendants. CAL. PEN. CODE § 1095. Defendants sentenced to death have the benefit of an automatic appeal. CAL. PEN. CODE § 1239. These protections are provided because of the importance of a trial in which a defendant's life is at stake.

acquittal in capital and non-capital cases appears to be one of degree rather than kind. The essence of the application of implied acquittal in capital cases is the fact that there are only two penalties—life and death. The grave significance of the taking of a life by the state has resulted in strong efforts to abolish capital punishment.[24] However, there is no such significance attached to long prison sentences. There is a profound distinction between the imposition of a sentence to a certain term in prison for an offense which might warrant a longer term, as compared to the imposition of a sentence to imprisonment for an offense for which the death penalty is also authorized. In the latter case there is a much stronger inference that there has been a finding that there were certain facts absent from the offense which, if present, would have justified the greater penalty. The more numerous the possible penalties there are for an offense and the less distinct the difference between them, the less likely it is that the choice of one represents a precise ruling on the character of the crime.

It is commonly accepted that a sentence can be increased on retrial.[25] As emphasized by the dissent in the instant case, many common sentencing practices, such as increasing punishment on retrial from fine to imprisonment or from probation to imprisonment, would be forbidden by an extension of the holding of this case to non-capital cases.[26] Moreover, if the *Henderson* doctrine were extended to include non-capital cases, the number of appeals would be greatly increased. Although the additional appellate burden forthcoming in capital cases would seem to be but a small price to pay for the intense social interest advanced, the interest furthered by the wholesale encouragement to appeal in all cases would appear to be overbalanced by the great burden which would be placed on the appellate courts. In addition, *Henderson* is based in part on the policy that a defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life in

[24] See generally JOHNSEN, CAPITAL PUNISHMENT (1939); SELLIN, MURDER AND THE PENALTY OF DEATH (Annals, vol. 284, 1952); WEIHOFEN, THE URGE TO PUNISH (1956); *Hearings Before Subcommittee No. Two of the House Committee on the Judiciary*, 86th Cong., 2nd Sess., ser. 21 (1960); REPORT OF THE CALIFORNIA SENATE COMMITTEE ON JUDICIARY ON CAPITAL PUNISHMENT (1960).

[25] See, *e.g.*, Murphy v. Massachusetts, 177 U.S. 155 (1900); King v. United States, 98 F.2d 291 (D.C. Cir. 1938); Kohlfuss v. Warden, 149 Conn. 692, 183 A.2d 626 (1962); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); Hichs v. Commonwealth, 185 N.E.2d 739 (Mass. 1962).

[26] 386 P.2d at 691, 35 Cal. Rptr. at 91.

order to invoke that right. *Henderson*, like the *Green* decision, was designed to prevent the defendant from being forced to take a "desperate chance" by appealing his conviction.[27] The relative insignificance of this consideration in a noncapital case is apparent.

[27] See note 21 *supra* and accompanying text.