February 1966

Constitutional Law--Double Jeopardy

John I. Rogers II
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr
Part of the Constitutional Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol68/iss2/26

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
Yet under local law in Illinois some source of authority is necessary before the consular agent can exercise the election privilege of his national to avoid a will. In the principal case there was no showing that the beneficiary was incompetent so as to justify appointment of the consul as guardian. Nor could the consular agent communicate with his national; thus he could receive no personal authorization as a power of attorney. There were no treaty provision giving the Lithuanian consul the power to act for his national in electing to avoid a will. The only possible source of authority would have been the inherent powers of a consul under principles of international law. However, the Illinois court in the instant case dismissed this possible source of authority by saying no right of election cases were found in which the consul’s authority was recognized without (1) a treaty or (2) an express power of attorney from his national. Apparently, the Illinois court found inapplicable the principles set forth in *The Bello Corrune, supra* and later cases applying these principles. Moreover, the Illinois court considered the relations between the de facto and the de jure governments and the fact that the consular agent of the de jure government would probably be unable to distribute the beneficiary's share if he were allowed to recover it. Considerations which distinguish between de facto and de jure governments are said to be political rather than judicial. Briggs, *The Law of Nations* 129 (2d ed. 1952). Later cases indicate a tendency to distinguish between acts political in nature and those personal in nature in situations involving de jure and de facto governments. The courts will consider cases of a personal nature but state those involving political questions to be beyond their reach. *In re Alexandrovicus*, 83 N.J. Super. 303, 199 A.2d 662 (1964). Whether equitable considerations will override considerations based on principles of international law is in the court’s discretion. The court in the principal case leaned toward equitable considerations.

_Hazel Armenta Straub_

---

**Constitutional Law—Double Jeopardy**

*D* was indicted in New York for murder in the first degree and was thrice tried in the state courts on the same indictment. The jury in the first trial found *D* guilty of second degree murder. Following a reversal, *D* was tried under the same indictment and found guilty
of murder in the first degree. D obtained a reversal and was tried for the third time for first degree murder under the original indictment and was found guilty of second degree murder. D contended it was unconstitutional for the state to prosecute him for first degree murder subsequent to the first trial, and that the prosecution for first degree murder so tainted the third trial as to render it constitutionally inadequate. The lower court denied D's application for a writ of habeas corpus. Held, reversed. The due process clause of the fourteenth amendment imposes some limitations on the power of the states to reprosecute an individual for the same crime. *United States v. Wilkins*, 348 F.2d 844 (2d Cir. 1965).

The decision in the principal case charts a new area of law involving the double jeopardy provision of the fifth amendment. The Supreme Court has not invalidated any conviction obtained in state courts on grounds that the state has transgressed the federal constitutional limitations on its power to reprosecute an individual for the same crime. But the instant case relates the fifth amendment's double jeopardy prohibition to similar prohibitions derived from state laws. Implicit is the holding that the fourteenth amendment entrusts the federal courts with a responsibility and power to decide which reprosecutions by a state violate basic notions of justice.

The court in the principal case drew its authority for the existence of federal constitutional limitations on a state's power to reprosecute an individual from two sources: (1) the premises and presumptions revealed in those Supreme Court cases in which a double jeopardy claim was interposed against a state and (2) from the doctrine of selective incorporation. The selective incorporation doctrine involves the absorption of the fundamental guarantees of the Bill of Rights by the due process clause of the fourteenth amendment, and thus makes the guarantee applicable to the states.

The Supreme Court for years avoided the question of whether the due process clause of the fourteenth amendment curbed the powers of the states to reprosecute. *Graham v. West Virginia*, 224 U.S. 616 (1912); *Shoener v. Pennsylvania*, 207 U.S. 188 (1907); *Dreyer v. Illinois*, 187 U.S. 71 (1902). However, in *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court was unable to avoid the question any longer. The complainant in *Palko* challenged the power of a state to appeal from a judgment of conviction for a lesser degree of homicide than that charged in the indictment and
to reprosecute him for the greater degree upon obtaining a reversal. The *Palko* opinion said that the fourteenth amendment does not guarantee against state action all that would be a violation of the original Bill of Rights if done by the federal government, and that the fourteenth amendment is not to be taken as embodying the double jeopardy prohibitions of the fifth amendment. Therefore, since the double jeopardy provision was not included within the meaning of the due process clause of the fourteenth amendment, it did not bind the states. Other cases following the holding of the *Palko* case. *Bartkus v. Illinois*, 360 U.S. 907 (1958); *Brack v. North Carolina*, 344 U.S. 424 (1952); *Gryger v. Burke*, 344 U.S. 728 (1948).

By the doctrine of selective incorporation the Supreme Court has held in effect that certain guarantees of the Bill of Rights have been absorbed by the fourteenth amendment and are thereby made applicable to the states. Among decisions in point are: *Pointer v. Texas*, 85 Sup. Ct. 1065 (1965) (confrontation clause of the sixth amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (the first amendment); *Mallory v. Hogan*, 378 U.S. 1 (1964) (self-incrimination clause of the fifth amendment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (the eighth amendment's prohibition against cruel and unusual punishments); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the fourth amendment); *Chicago, B. & O. R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (the just compensation clause of the fifth amendment).

The court in the principal case suggested three alternative standards for determining which state reprosecutions transgress the limitations imposed by the due process clause of the fourteenth amendment. Two of these, the federal standard and the hard core standard, would make the double jeopardy provision of the fifth amendment applicable to the states by absorption under the doctrine of selective incorporation. The third standard suggested is the fundamental fairness standard, which does not require reference to the fifth amendment, and which presumably would impose some restrictions on state reprosecutions even if there were no federal Bill of Rights.

Under the federal standard, the state would be held to the same minimum standards as is the central government in similar federal
prosecutions. To test the propriety of a state reprosecution, the courts would look to the entire body of federal case law interpreting and applying the double jeopardy provision of the fifth amendment and be guided accordingly.

Under the hard core standard, the states still would be prohibited from subjecting a person to double jeopardy, but the states' practices and procedures would not have to conform precisely with federal practices and procedure, so long as the state's practices were designed to accomplish substantially the same end result.

The concept of the hard core standard is at first rather difficult to grasp. Indeed, as the court observed in the principal case, "there is a serious question as to whether the doctrine of selective incorporation permits two levels of selection—absorption of only those provisions of the Bill of Rights that are fundamental, and then absorption of only that part of the provision that is fundamental, its basic core." Nevertheless, there can be found language in previous Supreme Court opinions suggesting that certain technical ramifications may in some instances justify such a double standard. E.g., *Brock v. North Carolina*, 344 U.S. 424, 435 (1953) (Dissenting opinion of Vinson, C. J.).

The third alternative suggested by the principal case is the fundamental fairness standard. Here the courts would not necessarily concern themselves with whether the double jeopardy provision of the fifth amendment had been absorbed through the fourteenth amendment. The sole test would be the application of the court's somewhat vague and shifting definitions of due process to the particular case at hand. Phrases such as "concepts of ordered justice," "conduct which shocks the conscience," and "fundamentally unfair" would be employed to guide the court. Federal cases applying the double jeopardy provision of the fifth amendment would not be binding precedent, but like those cases applying double jeopardy provisions derived from state law, would be entitled to weighty consideration.

The court in the principal case found it both undesirable and unnecessary to choose among these alternative standards, as this dimension of constitutional law is being reconsidered and refashioned by the Supreme Court, and the only advantage from choosing among the standards would be to serve as a guide for other lower courts. The court's ruling, however, in effect held that under any
of the three alternative standards the conclusion was unavoidable that New York transgressed the federal constitutional limitations on its power to reprosecute an individual for the same crime.

In a 1957 case with a factual pattern readily comparable to the principal case, except that it involved reprosecution under federal law by the District of Columbia, the Supreme Court held that such a reprosecution violated the double jeopardy provision of the fifth amendment. *Green v. United States*, 355 U.S. 184 (1957); see 60 W. Va. L. Rev. 281 (1958). Incident to successive reprosecutions for first degree murder, the *Green* case by way of the federal standard would be ample viable precedent to support the constitutional challenge of the principal case.

The court in the principal case is suggesting that the *Palko* case may no longer be the law, even though *Palko* has not yet been repudiated by the Supreme Court. The principal case has set forth some suggested bases to answer whether the fourteenth amendment limits a state's power to reprosecute an individual, but the final decision to the question remains to be answered by the Supreme Court.

West Virginia forbids double jeopardy by article III, section 5 of its constitution, which provides that no person shall "... be twice put in jeopardy of life or liberty for the same offense." The phrasing of West Virginia's double jeopardy provision is the same as in the states of Texas, South Carolina, Oklahoma, Louisiana and Mississippi; it is quite similar to that of the federal constitution which provides: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

If the decision and reasoning of the principal case are later adopted by the United States Supreme Court, the question may arise as to whether West Virginia's double jeopardy provision will satisfy the due process clause of the fourteenth amendment. In 1953 the West Virginia Supreme Court was faced with a situation similar to the principal case. In the West Virginia case the defendant was indicted for rape but was convicted of attempted rape. The court held that in a new trial, the defendant could not be found guilty of rape as charged in the original indictment because the jury had in effect acquitted him of that offense. The defendant therefore could not be tried for a crime greater than that of attempted rape. *State v. Franklin*, 139 W. Va. 43, 79 S.E.2d 629
In *State v. Wisman*, 98 W. Va. 250, 126 S.E. 703 (1925), it was held error to refuse the instruction that one cannot be found guilty of any offense higher or greater than that offense found by the first jury. This same principle was applied in *Green v. United States*, 355 U.S. 184 (1957), principally the case from which the reasoning was drawn in reaching the decision in the instant case. The *Green* case followed the view that is most consistent with the philosophy of the criminal law in not subjecting the defendant to repeated abuse and embarrassment, and compelling him to live in a continuing state of insecurity and anxiety.

The principal case illustrates the growing concern of the federal judiciary with the standards of criminal practice and procedure in the state courts. In view of the Supreme Court's present disposition to broaden the scope of the federal Bill of Rights so as to embrace more and more state actions, it would appear prudent for all state courts, prosecutors and law enforcement officials to follow closely the established federal procedures. The failure to do so carries with it the strong possibility of future reversals and the unnecessary release of hardened criminals.

...John I. Rogers, II

**Constitutional Law—Voluntary Confession**

D had confessed to being guilty of rape. At his trial the determination of the voluntariness of his confession was made by the jury. He appealed on the ground that this procedure violated the due process clause of the fourteenth amendment. *Held*, affirmed. The Supreme Court of the United States has interpreted the due process clause as requiring the judge to make a determination of the voluntariness of the confession. However, Georgia law, which vests the trial judge with unquestionable power to review the case after conviction and to set aside the verdict if he is not satisfied with it, completely fulfills this requirement. Justice Almand, dissenting, stated that the procedure followed in this case is exactly the same as the procedure held unconstitutional by the Supreme Court of the United States. *Sims v. State*, 144 S.E.2d 103 (Ga. 1965).

It is clear under the fourteenth amendment that a conviction cannot stand if it was based on evidence which included an involuntary confession. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).