Loyola University Chicago Law Journal

Volume 1
Issue 1 *Winter 1970*

Article 8

1970

State Double Jeopardy After *Benton v. Maryland*

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STATE DOUBLE JEOPARDY AFTER BENTON v. MARYLAND

In 1965, John Dalmer Benton was tried for burglary and larceny in a Maryland state court. Although acquitted on the larceny charge, he was convicted on the burglary count and sentenced to ten years in prison. While his appeal was pending, the Maryland Court of Appeals struck down that portion of the Maryland Constitution which required jurors to swear their belief in the existence of God.[1] Due to the fact that both Benton's grand and petit juries had been chosen under this invalid provision, he was given the option of accepting his confinement or seeking reindictment and retrial. He chose the latter, and, upon retrial on both charges, was convicted and sentenced to fifteen years imprisonment for burglary and five years for larceny, the sentences running concurrently.[2]

At his second trial, Benton had objected to the retrial of the larceny charge, claiming that as he had been acquitted at the first trial, a retrial would violate the double jeopardy provision of the fifth amendment to the United States Constitution.[3] The Maryland Court of Special Appeals rejected this claim on the merits, and the court of appeals denied discretionary review.

The Supreme Court of the United States granted certiorari on two issues:[4]

> (1) Is the double jeopardy clause of the Fifth Amendment applicable to the State through the Fourteenth Amendment?
>
> (2) If so, was the petitioner "twice put in jeopardy" in this case?[5]

The Supreme Court answered both questions in the affirmative. It held that the double jeopardy clause of the fifth amendment applied to the states through the fourteenth amendment, and overruled its 1937 landmark decision to the contrary in *Palko v. Connecticut*.[6]

In *Palko*, the defendant had been indicted for first degree murder in

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1. Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).
2. The concurrent sentence issue, disposed of in the first one-half of the Court's opinion thus enabling a decision on the double jeopardy issue, is omitted from the discussion of this case.
3. "(N)or shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . ."
4. 392 U.S. 925 (1968).
5. Benton v. Maryland, 395 U.S. 784, 786 (1969).
6. 302 U.S. 319 (1937).

a Connecticut state court and convicted of second degree murder. Pursuant to a state statute which permitted an appeal of this nature, the State appealed to the Supreme Court of Errors which reversed the judgment and ordered a new trial. At the second trial, the defendant argued that his retrial violated the double jeopardy clause of the fifth amendment, and that the fifth amendment should be applied to the states through the fourteenth amendment due process clause. The trial court overruled the defendant's objections, convicted him of first degree murder, and sentenced him to death. Affirming the conviction, the Supreme Court rejected the petitioner's contentions, denied the inclusion argument, and substituted in its stead a due process standard:

> Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civilized political institutions"?[7]

Palko allowed the states to develop their own individual doctrines to determine the extent to which each would allow a defendant to be placed in "double joepardy", subject only to the "fundamental fairness" test which the Supreme Court had enunciated. This approach led to a confusing multiplicity of answers to double jeopardy questions and made uniformity of decision throughout the states all but impossible of attainment. As a result of the Court's decision in *Benton*, it is now clear that the obstructions on the road to the imposition of federal double jeopardy standards upon the states have been swept away:

> Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice", the same constitutional standards apply against both the State and Federal Governments. . . . The validity of petitioner's larceny conviction must be judged not by the watered-down standards enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provisions.[8]

Because of the decision in *Benton*, it seems timely at this point to review the federal law as to double jeopardy, with a particular view to noting changes which the federal standards will necessitate in state law. Because of the diverse nature of the federal double jeopardy law, it will be necessary in order to avoid confusion and to facilitate effective analysis, to divide the area into categories.

Although the instances of overlap are plentiful, most double jeopardy

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7. *Id.* at 328.
8. Benton v. Maryland, 395 U.S. 784, 795-96 (1969).

cases tend to fall into one of five categories:[9]

(1) The trial may be stopped short of its final termination point, in which case, the question arises as to whether or not the defendant has undergone a sufficient risk to justify attachment of the defense.

(2) The trial may end in an acquittal, and the prosecution may attempt to subject the defendant to retrial on another indictment.

(3) The trial may end with a conviction, later reversed, with the defendant on subsequent retrial convicted of a greater offense than he had been originally.

(4) Overlapping jurisdictional boundaries may result in a second trial for the same offense merely because both jurisdictions have the power to proscribe and punish such conduct.

(5) Finally, one act may violate several criminal statutes or injure several persons, giving rise to the question whether each statute violated or each person injured represents a criminally punishable act.

Attachment of Double Jeopardy and Its Exceptions

Although there is some doubt as to when it finally became settled in the federal courts, the bar of double jeopardy has been held not to refer exclusively to a prior conviction or acquittal.[10] As a result, when a trial is stopped at some point short of its final termination, the plea of double jeopardy is not automatically foreclosed, and the question becomes whether the defense has attached, and perhaps more significantly, is not barred by the application of an exception.

In the federal courts, it is generally agreed that jeopardy attaches when the jury has been impaneled and sworn, and that, in the absence of a jury, jeopardy does not attach until the production of evidence has begun.[11] Prior to this point the defendant is not deemed to have suffered a sufficient risk to constitute jeopardy, and if the prosecution is stopped for some reason, it is as if it had never begun. Termination of proceedings after this mark has been passed provides the defendant with a valid former jeopardy plea upon retrial on another indictment for the same offense, unless some exception is applicable.

Recognizing that in some instances a trial should be allowed to terminate without affording the defendant the benefit of a former

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9. *See* J. Sigler, Double Jeopardy, The Development of a Legal and Social Policy 40 (1969).

10. *Compare* Commonwealth v. Cook, 6 S. & R 577 (1822), *with* United States v. Haskell, 26 F. Cas. 207 (No. 15,321) (C.C.E.D. Pa. 1823).

11. Downum v. United States, 372 U.S. 734 (1963).

jeopardy defense on retrial, the federal courts have developed a series of exceptions to the attachment situation. Such instances, subsumed under the heading "manifest necessity", include a mistrial because the jury is unable to agree,[12] discovery that a member of the jury is biased,[13] the sudden illness of a juror,[14] irregularity of the indictment,[15] and the absence of witnesses because of military reasons,[16] among others.

While many of these exceptions may be justified on the ground that they are the unavoidable accidents of life for which the state should not be penalized, nor the defendant unduly benefitted, other instances of the operation of the "manifest necessity" doctrine present other justifications. Thus, in *Gori v. United States*,[17] the defendant was brought to trial on an indictment charging that he knowingly received and possessed goods stolen in interstate commerce. After the jury had been impaneled and sworn, the trial judge withdrew a juror and declared a mistrial on his own motion in order to protect the defendant from the prosecution's attempted disclosure of prejudicial information. Upon retrial, the defendant was convicted, and this conviction was upheld by the Supreme Court:

> Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial.[18]

Thus it appears, that in addition to those recognized situations where a defendant may be retried after jeopardy has formally attached, the same result will follow if, for some other reason, the trial is prematurely terminated for the sole benefit of the defendant.

The pattern among the states regarding the attachment of jeopardy has been varied and infinitely more confusing than the federal courts. Although the general rule has been much like that of its federal counterpart, in that jeopardy can be said to attach after a jury has been impaneled and sworn, a canvass of the states provides examples of other views.[19] However, with the advent of *Benton*, it is obvious

12. United States v. Perez, 22 U.S. (9 Wheat.) 379 (1824).
13. Thompson v. United States, 155 U.S. 271 (1894).
14. United States v. Potash, 118 F.2d 54 (2d Cir. 1941).
15. Lovato v. New Mexico, 242 U.S. 199 (1916).
16. Wade v. Hunter, 336 U.S. 684 (1949).
17. 367 U.S. 364 (1961).
18. *Id.* at 369.
19. Some states have required, as is the English rule, that jeopardy attach only to a final judgment of acquittal or conviction. Hoffman v. State, 20 Md. 425 (1863). Others have found attachment only upon an acquittal. Smith v. State, 158 Miss. 355, 128 So. 891 (1930). Even others, notably New York, have required that evidence must have been introduced against the defendant. People v. Zendano, 136 N.Y.S.2d

that such substantive variations must at least comply with the requirements of the fifth amendment.

The state court exceptions to the attachment of jeopardy have included those mentioned in connection with the federal cases as well as others peculiar to their own jurisdictions.[20] While some attempts have been made to codify in statutory form some of these exceptions,[21] it has generally been recognized to be in the discretion of the trial judge to determine when a "manifest necessity", sufficient to terminate the proceedings, exists. This situation derived from the Supreme Court's application of the *Palko* doctrine upholding retrial even in cases where the federal law as to double jeopardy would have been contrary.

Thus, in *Brock v. North Carolina*,[22] the trial judge declared a mistrial on the motion of the prosecution after two of the state's witnesses refused to give any testimony before the jury.[23] The defendant was later convicted of the same offense in a second trial and his plea of double jeopardy overruled. Applying the principles of due process enunciated in *Palko*, the Supreme Court held that the defendant could be presented for trial before a second jury for the same offense, without violating the fourteenth amendment.[24]

With the advent of *Benton*, and the concurrent demise of *Palko*, this constitutional base was swept away. The mandate of the Court directs that state conduct violative of fifth amendment standards of double jeopardy must cease. Therefore, at a minimum, state courts must now recognize the attachment of the double jeopardy defense in those situations in which the federal courts have held the defense available. Thus, it is possible that *Brock* would be decided differently today because it fails to fit within a recognized exception, and the trial was not terminated for the sole benefit of the defendant.

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106 (1954). Yet some have found attachment with the charging of the jury. State v. Crook, 16 Utah 212, 51 P. 1091 (1898). Some have used commencement of trial. Gillespie v. State, 168 Ind. 298, 180 N.E. 829 (1907). Some have found attachment also on the sustaining of a demurrer to an indictment. State v. Reinhard, 202 Iowa 168, 209 N.W. 419 (1926).

20. *See* United States v. Perez, *supra* note 12.

21. MISSISSIPPI CODE, 1930, § 1289.

22. 344 U.S. 424 (1952).

23. These witnesses refused to testify on advice of counsel as their appeals were pending from a former prosecution involving the same crime.

24. "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. (Citations omitted). As said in *Wade v. Hunter*, 336 U.S. 684, 690, 'a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.' Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in

TRIAL AFTER ACQUITTAL

When an accused is indicted and tried for an offense, and subsequently acquitted on that charge, it is beyond dispute that if the prosecution begins another trial upon another indictment for the same offense, the plea of double jeopardy will afford a valid defense so long as the first court had jurisdiction and the proceedings were regular in every way:

> Where a man is found not guilty, on an indictment or appeal, free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime.[25]

While this has been the rule in both the federal and the state courts, the *Palko* case allowed the state to appeal after an acquittal and, if reversible error was found, retry the defendant as long as this procedure was permitted by state law. Although not relevant to a decision there, the Court in *Palko* cited *Kepner v. United States*[26] as representing the controlling federal position:

> The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion.[27]

Now that *Palko* has been overruled, the *Benton* decision would seem to prohibit appeal of a criminal case by the state after an acquittal on the merits. Furthermore, because of the "lesser included offense" doctrine, under which a person can be convicted of any lesser offenses included in the offense for which he was indicted,[28] an outright acquittal will also bar retrial on these lesser offenses. Moreover, if the lesser offense is tried first, this will also be a bar to a subsequent indictment on the greater charge.[29]

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all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. The pattern here, long in use in North Carolina, does not deny the fundamental essentials of a trial, 'the very essence of a scheme of ordered justice', which is due process." Brock v. North Carolina, 344 U.S. 424, 427 (1952).

25. Kepner v. United States, 195 U.S. 100, 126 (1904).
26. Kepner v. United States, 195 U.S. 100 (1904).
27. 302 U.S. at 322-23.
28. Re Nielsen, 131 U.S. 176 (1889).
29. Some federal courts have apparently applied this test. Goodall v. United States, 180 F.2d 397 (D.C. Cir. 1950). Although there is a split, over one-half of the states which have considered the question have adopted it. *See* Frankfurter, J. in Green v. United States, 355 U.S. 184 (1957) (dissenting opinion).

RETRIAL AFTER SUCCESSFUL APPEAL BY DEFENDANT

When a trial ends with a conviction, and the defendant successfully appeals, the prosecution may attempt to convict him of a greater offense than he was originally indicted for, or to convict him of the same offense as well as others not contained in the original indictment. This raises the question of what limitations may be placed upon a reindictment and retrial.

It was established at an early date that if the defendant appealed his first conviction, he had waived any objection to a retrial on the charge for which he was convicted.[30] Whether justified on the grounds of waiver or a continuing jeopardy theory,[31] this result has been consistently reached by the federal courts. Some courts, however, sought to apply the "waiver rule" to authorize a retrial for a greater crime than that for which the defendant was convicted in the first trial.[32] Although that was the rule in the federal courts for some time,[33] the case of *Green v. United States*[34] states the modern federal position.

In *Green*, the defendant was found guilty of second degree murder upon a first degree murder charge; the jury making no mention of the higher charge. The Court of Appeals reversed and remanded the case for a new trial upon defendant's appeal. On retrial, Green was tried once again for first degree murder, his plea of double jeopardy being overruled, and he was convicted of this crime and sentenced to death. The Court of Appeals affirmed. Rejecting the Government's contention that the defendant had waived his double jeopardy defense by appealing his first conviction, the Supreme Court reversed the lower court's decision. The Court recognized that after his original conviction, prior to appeal, Green could not have been retried for the greater offense, and that, if his appeal had been unsuccessful, he still could not have been tried a second time. Characterizing the jury's silence as an implied acquittal of the higher charge, the Court concluded that conditioning an appeal of one offense on a coerced surrender of a valid

30. Trono v. United States, 199 U.S. 521 (1905).
31. Justice Holmes attempted to justify the same result on different grounds. According to him, the defendant was under a continuing jeopardy until his cause was finally settled. *See* Holmes, J. in Kepner v. United States, 195 U.S. 100 (1904) (dissenting opinion).
32. There is a wide divergence of opinion among the states. Some states have permitted retrial on crimes of a higher degree. Jones v. State, 144 Miss. 52, 109 So. 265 (1926). Some have prohibited such a procedure. State v. Naylor, 28 Del. 99, 90 A. 880 (1914). Others have held that retrial is barred on a higher degree of the "same offense". Barnett v. People, 54 Ill. 325 (1870).
33. Trono v. United States, 199 U.S. 521 (1905).
34. 355 U.S. 184 (1957).

plea of former jeopardy on another, conflicted with the constitutional bar against double jeopardy. Thus today under *Benton*, it is clear that, in both the state and the federal courts, the "waiver rule" may not be used to retry a defendant on a greater charge than he was convicted of originally. Nor can the "waiver rule" be used to justify on the retrial, additional counts barred under the "lesser included offense" doctrine.

Overlapping Jurisdictional Boundaries

Overlapping jurisdictional boundaries, particularly those of the states and the federal government, have produced a situation in which a criminal defendant can be tried and punished by both jurisdictions for one criminal act.[35] The much criticized leading case of *United States v. Lanza*[36] set the precedent for this result. The defendant in *Lanza* was indicted in a federal court for violation of the federal prohibition law after a state proceeding for violation of a state law of a similar nature had terminated. Overruling Lanza's double jeopardy plea, the Supreme Court squarely held that the fifth amendment did not prohibit consecutive prosecutions by state and federal governments. The Court bottomed its decision on the dual sovereignty concept of federalism, holding that each separate government retained the power to prosecute and punish conduct violative of the laws of each without the interference of the other. The fifth amendment double jeopardy provision applied only to successive federal prosecutions while the *Palko* doctrine applied to successive trials by the same state. While the fact situation in *Lanza* involved a federal prosecution following a completed state proceeding, the Court, in *Bartkus v. Illinois*[37] reached the same conclusion when faced with the problem of a state prosecution following a federal acquittal.

In addition to the dual sovereignty concept of federalism, each Court was also apparently troubled with the possibility that a conviction or acquittal of some relatively minor offense in one jurisdiction would bar prosecution for a greater offense in the other:

> Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave and infraction of state law, the result would be shocking and untoward deprivation of the historic

35. There is also a problem between the states and the municipalities residing within their borders which has usually been settled by denominating the municipal ordinances as not penal in nature and thereby avoiding the conflict. A discussion has been omitted.
36. 260 U.S. 377 (1922).
37. 359 U.S. 121 (1959).

> right and obligation of the States to maintain peace and order within their confines. . . . It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.[38]

Thus, the Court's decisions in this area are supported by the concept that federalism, or respect for the sovereignty of each jurisdiction, requires these results, and by judicial recognition of the possibility that conviction of criminal defendants on minor charges might foreclose prosecutions carrying substantially greater sentences.

In light of *Benton*, it would seem that the justification for the *Lanza* and *Bartkus* line of cases has been somewhat weakened. While admittedly the Supreme Court did not address itself to the constitutional issues raised by *Lanza* and *Bartkus*, the overruling of the *Palko* decision is significant as the most recent example of the Supreme Court's position on the dual sovereignty concept of federalism. As such, it is appropriate to examine the *Lanza* and *Bartkus* rationale in order to determine whether it still is compatible with the current trend of the Supreme Court's decisions in this area.

The most significant case, in terms of its impact on the *Lanza* and *Bartkus* rationale, is the Supreme Court's decision in *Murphy v. Waterfront Commission*,[39] which applied the holding of *Malloy v. Hogan*[40] to the effect that the fifth amendment privilege against self-incrimination is fully applicable to the states through the fourteenth amendment. The question in *Murphy* was whether one jurisdiction in the federal structure could constitutionally compel testimony by granting immunity to a witness while leaving the witness open to prosecution in the other jurisdiction on the basis of that testimony. The Court answered this question in the negative:

> We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.[41]

The *Murphy* court took judicial notice of the fact that this is an "age of cooperative federalism" and that the federal and state governments are not antagonistic toward each other but are in fact "waging a united front against many types of criminal activity."[42] Thus, the Court cast

38. *Id.* at 137.
39. 378 U.S. 52 (1964).
40. 378 U.S. 1 (1964).
41. 378 U.S. at 78.
42. *Id.* at 56.

doubt upon the continuing vitality of the concept that either a state or the federal government could retry, for the same offense, a defendant once placed in jeopardy by the other.

The evil in *Murphy* was that one jurisdiction could prosecute a defendant based on information received from another's grant of immunity. Just as this danger resulted in *Murphy* from grants of immunity, it may also be present in double jeopardy cases. One jurisdiction can stay its prosecution while the other trys the defendant. Should the first trial end in an acquittal, the second jurisdiction can then benefit by an error made in the first trial and more easily secure a conviction. Furthermore, the results in *Murphy* indicate that even if state and federal cooperation were not the case, this possibility would still not be sufficient to protect the defendant's interests.[43]

Thus, just as *Murphy* would allow state action to impede federal law enforcement by rendering broad areas of relevant information inadmissible, so too the state prosecution of a defendant for a state crime should prevent a like prosecution by the federal government and *vice versa*. In view of the Court's decision in *Murphy* which followed from the holding in *Malloy* that the full fifth amendment self-incrimination protections applied to the states, it does not seem totally inaccurate to suggest that the *Benton* decision, making the double jeopardy protections equally applicable, places the *Lanza* and *Bartkus* line of decisions upon shaky ground.[44]

Multiple Offenses and Multiple Injuries

Perhaps the issue of double jeopardy law which causes the most confusion occurs when the defendant's conduct constitutes a violation of more than one criminal statute. Closely related to this is the situation in which the defendant's one criminal act injures more than one person or piece of property. In fact, so closely related are these two problems that the courts, both federal and state, had adopted the same series of tests to determine whether a subsequent prosecution is prohibited.

The "same transaction" test prohibits the reprosecution of the defendant for any occurrence arising out of the same criminal transaction[45] and is a favorable test for the defendant, as it allows a second prosecution only when the proof indicates that the second case does not con-

43. *See also* Elkins v. United States, 364 U.S. 206 (1960).
44. The case of Waller v. Florida, 213 So. 2d 623 (Fla. 1968), *cert. granted*, 37 U.S.L.W. 3493 (U.S. June 23, 1969) (No. 846) may be significant.
45. Goetz v. United States, 39 F.2d 902 (5th Cir. 1930); Tritico v. United States, 4 F.2d 664 (5th Cir. 1925).

cern the same criminal acts as the first. Most courts, however, have held that the fact that two charges, which are defined by separate statutes, relate to and grow out of one transaction, does not make a single offense, and prosecution on both charges does not constitute double jeopardy.[46] These courts usually apply one or the other of the following two tests to resolve the question.

Some of these courts apply the "same offense" test, holding that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.[47] Thus, where it is necessary in proving one offense to prove every essential element of another, a conviction of the former is a bar to prosecution for the latter. Still other courts hold that for double jeopardy purposes, the test of identity of charges is whether the "same evidence" is required to sustain them. If additional evidence is required, the fact that several charges relate to and grow out of one transaction or occurrence does not make it the same act.[48] The distinction between these two tests is probably a nebulous one, for, they seem to produce the same results in practice. Thus, while the "same offense" test requires proof of an additional fact over and above that required for the first offense, invariably new evidence will be introduced to prove that fact.[49]

The fact situation in *Gore v. United States*[50] may be utilized to illustrate the difference between the first and the latter two tests. There the defendant was prosecuted for narcotics offenses under an indictment of six counts, three for each of two separate sales of heroin. The first count charged a sale not in pursuance of a written order, the second, a sale not in the original stamped package, and the third charged facilitating concealment and sale of drugs unlawfully imported. The defendant was convicted, and sentences of one to five years imposed for each count, the first three running consecutively, and the remaining

46. Young v. United States, 288 F.2d 398, 109 U.S. App. D.C. 414, *cert. denied*, 372 U.S. 919 (1963).

47. Morey v. Commonwealth, 108 Mass. 433 (1871); State v. Pianfetti, 79 Vt. 236, 65 A. 84 (1906). This test appears to find its authority in the early case of Carter v. McClaughry, 183 U.S. 365 (1901).

48. Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961); Montgomery v. United States, 146 F.2d 142 (4th Cir. 1945).

49. This is at least the case when viewed as the evidence required to be submitted at the first trial to prove the facts alleged. However, when looked upon as the evidence actually introduced at the first trial, there may be some basis for the distinction. While the courts have not been particularly lucid on this point, the former is apparently the construction adopted.

50. 357 U.S. 386 (1958).

three concurrently. The defendant appealed the sentence, contending that for each set of three counts only one sentence could be imposed. This motion was denied, and the Court of Appeals affirmed. The Supreme Court granted certiorari and affirmed.

Applying the "same offense" test, the Court determined that, with respect to each sale, the petitioner had violated three separate and distinct statutes and could be validly tried and punished for each, stating:

> The fact that an offender violates by a single transaction several regulatory controls devised by Congress as a means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic.[51]

Yet, if the "same transaction" test were applied, the result would be different as all three of the counts relating to each sale were concerned with one sale of narcotics or one separate and distinct criminal transaction. The test applied in the *Gore* decision and the rationale employed to reach that decision is, however, the latest ruling of the United States Supreme Court and thus constitutes the federal rule, binding on the lower federal courts. Prior to the decision in *Benton*, the due process clause did not impose this test upon the state courts. Since that decision, however, the state must comply with the double jeopardy standards of the fifth amendment, and it seems clear that the varying tests at the state level must comply with the minimum requirements of this federal standard.

Conclusion

The Supreme Court's decision in *Benton v. Maryland*, applying the double jeopardy clause of the fifth amendment to the states through the fourteenth amendment, will supply a unifying influence on state treatment of double jeopardy problems. Variances will, nevertheless, continue to exist, at least where an individual state elects to afford protections which exceed those guaranteed by the applicable federal decisions. On the whole, though, greater protections will be afforded to state criminal defendants after *Benton* than was the case under the *Palko* doctrine.

Benton may also be significant in that it may foreshadow a re-examination by the Supreme Court of some of its past decisions interpreting the provisions of the fifth amendment double jeopardy clause. The *Lanza-*

51. *Id.* at 389.

Bartkus line of decisions seem particularly vulnerable in this respect. In any event, it seems probable that in the future double jeopardy problems will be viewed by the Court with increasing awareness, and that this is likely to result in greater protection for criminal defendants.

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