



Double Jeopardy

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Background

The [DOUBLE JEOPARDY](#) clause in the Fifth Amendment to the U. S. Constitution prohibits the government from prosecuting individuals more than one time for a single offense and from imposing more than one punishment for a single offense. It provides that "No person shall . . . be subject for the same offence to be twice put in [JEOPARDY](#) of life or limb." Most state constitutions also guarantee this right to defendants appearing in state court. Even in states that do not expressly guarantee this right in their laws, the protection against double jeopardy must still be afforded to criminal defendants because the Fifth Amendment's Double Jeopardy Clause has been made applicable to state proceedings via the doctrine of incorporation.

Under this doctrine, the Supreme Court has ruled in a series of cases that the Due Process and [EQUAL PROTECTION](#) Clauses of the Fourteenth Amendment guarantee to the citizens of every state the right to exercise certain fundamental liberties. These liberties include, but are not limited to, every liberty set forth in the [BILL OF RIGHTS](#), except the Second Amendment right to bear arms, the Third Amendment right against quartering soldiers, the Seventh Amendment right to trial by jury in civil cases, and the Fifth Amendment right to [INDICTMENT](#) by [GRAND JURY](#).

The concept of double jeopardy is one of the oldest in Western civilization. In 355 B. C. Athenian statesmen Demosthenes said that the "law forbids the same man to be tried twice on the same issue." The Romans codified this principle in the Digest of Justinian in 533 A. D. The principle also survived the Dark Ages (400-1066 A.D.) through the [CANON LAW](#) and the teachings of early Christian writers, notwithstanding the deterioration of other Greco-Roman legal traditions.

In England the protection against double jeopardy was considered a universal maxim of the [COMMON LAW](#) and was embraced by eminent jurists Henry de Bracton (1250), Sir Edward Coke (1628), Sir Matthew Hale (1736), and Sir William Blackstone (1769). However, the English double jeopardy doctrine was extremely narrow. It afforded protection only to defendants [ACCUSED](#) of capital felonies and applied only after [CONVICTION](#) or [ACQUITTAL](#). It did not apply to cases dismissed prior to final judgment and was not immune to flagrant abuse by the British Crown.

The American colonists were intimately familiar with the writings of Bracton, Coke, and Hale. Copies of Blackstone's Commentaries on English law were available in most of the colonies, and Blackstone's teachings were often quoted by the colonists in support of their claims that Parliament was exceeding its lawful authority.

The colonists were also familiar with how narrowly the right against double jeopardy had been defined in England. During the constitutional convention James Madison sought to enlarge the definition by making the right against double jeopardy applicable to all crimes not just capital felonies. Yet Madison's original draft of the Double Jeopardy Clause was perceived by some as too restrictive. It provided that "No person shall be subject . . . to more than one punishment or one trial for the same offense" (*United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 [1989]). Several House members objected to this wording, arguing that it could be misconstrued to prevent defendants from seeking a second trial on appeal following conviction. Although the language of the Fifth Amendment was modified to address this concern, the final version ratified by the states left other questions for judicial interpretation.

Policy Considerations Underlying the Right Against Double Jeopardy

Five policy considerations underpin the right against double jeopardy, sometimes known as the right against former jeopardy: (1) preventing the government from employing its superior resources to wear down and erroneously convict innocent persons; (2) protecting individuals from the financial, emotional, and social consequences of successive prosecutions; (3) preserving the finality and integrity of criminal proceedings, which would be compromised were the government allowed to arbitrarily ignore unsatisfactory outcomes; (4) restricting prosecutorial discretion over the charging process; and (5) eliminating judicial discretion to impose cumulative punishments that are otherwise not clearly prohibited by law.

The Common Law Development of the Right Against Double Jeopardy

Double jeopardy [LITIGATION](#) revolves around four central questions: In what type of legal proceeding does double jeopardy protection apply? When does jeopardy begin, or, in legal parlance, attach? When does jeopardy terminate? What constitutes successive prosecutions or punishments for the same offense? Although courts have answered the second and third questions with some clarity, they continue struggling over the first and last questions.

Where Jeopardy Applies

Only certain types of [LEGAL PROCEEDINGS](#) invoke double jeopardy protection. If a particular proceeding does not place an individual in jeopardy, then subsequent proceedings against that individual for the same conduct are not prohibited. The text of the Fifth Amendment suggests that the protection against double jeopardy extends only to proceedings threatening "life or limb." Nevertheless, the Supreme Court has established that the right against double jeopardy is not limited to capital crimes or corporeal punishment but extends to all felonies, misdemeanors, and juvenile delinquency adjudications, regardless of the punishments they prescribe.

In *Benton v. Maryland*, 39 U.S. 784, 89 S. Ct. 2056, 23 L. Ed.2d 707 (1969), the U. S. Supreme Court ruled that the Fifth Amendment's Double Jeopardy Clause is applicable to both state and federal proceedings. Prior to this ruling, an individual accused of violating state law could rely only on that particular state's protection against double jeopardy. Some states offered greater protection against double jeopardy than did others, and frequently the level of protection offered was less than that offered under the federal Constitution. The Supreme Court said this was impermissible.

Relying on the doctrine of incorporation described above, the Court held that the right against double jeopardy is so important that each state must afford criminal defendants at least the same amount of protection from multiple prosecutions and punishments that is afforded by the federal government under the Fifth

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Amendment. Consequently, state courts cannot provide their residents with less protection against double jeopardy than is offered by federal courts, though variations in the level of protection offered can still arise when states offer their residents more protection under their state constitutional provisions than is provided under the federal Constitution.

The Supreme Court has also ruled that the right against double jeopardy precludes only subsequent criminal proceedings. It does not preclude subsequent civil proceedings or administrative proceedings (e.g., a license revocation [HEARING](#)) against a person who has already been prosecuted for the same act or omission, even if that person is fined in the later civil or administrative proceeding. Nor is prosecution barred by double jeopardy if it is preceded by a final civil or administrative determination on the same issue.

Courts have drawn a distinction between criminal proceedings on the one hand and civil or administrative proceedings on the other, based on the different purposes served by each. Criminal proceedings are punitive in nature and serve the purposes of deterrence and retribution. Civil and administrative proceedings are more remedial in nature. Civil proceedings, for example, seek to compensate injured persons for any losses they have suffered, while administrative proceedings can serve various remedial functions (e.g., license revocation) unrelated to deterrence or retribution. Because civil, administrative, and criminal proceedings serve different objectives, a single course of conduct can give rise to multiple trials in different types of courtrooms.

The multiple legal proceedings brought against O. J. (Orenthal James) Simpson over the death of Nicole Brown Simpson and Ronald Lyle Goldman illustrate these various objectives. The state of California prosecuted Simpson for the murders of his former wife and her friend. Despite Simpson's acquittal in criminal court, the families of the two victims filed three civil suits against him. The criminal proceedings had been instituted to punish Simpson, incarcerate him, and deter others from similar behavior. The civil suits were designed in part to make the victims' families whole by compensating them with money damages for the losses they suffered.

When Jeopardy Attaches

While the differences between civil, criminal, and administrative proceedings are not always perfectly clear, courts have done a much better job of explaining when jeopardy begins, or attaches. This question is crucial because any action taken by the government before jeopardy attaches, such as dismissing the indictment, will not prevent later proceedings against the same person for the same offense. Once jeopardy has attached, the full array of Fifth Amendment protections against multiple prosecutions and multiple punishments takes hold.

The U. S. Supreme Court has held that jeopardy attaches during a jury trial when the jury is sworn. In criminal cases tried by a judge without a jury, also called a bench trial, jeopardy attaches when the first witness is sworn. Jeopardy begins in juvenile delinquency adjudications when the court first hears [EVIDENCE](#). If the [DEFENDANT](#) or juvenile enters a [PLEA](#) agreement with the prosecution, jeopardy does not attach until the plea is accepted by the court.

When Jeopardy Terminates

Determining when jeopardy terminates is no less important than determining when it begins, but it is a little more complicated. Once jeopardy has terminated, the government cannot detain someone for additional court proceedings on the same matter without raising double jeopardy questions. If jeopardy does not terminate at the conclusion of one proceeding, jeopardy is said to be "continuing," and further criminal proceedings are permitted. Jeopardy can terminate in four instances: 1) after acquittal; 2) after [DISMISSAL](#); 3) after a [MISTRIAL](#); and 4) on appeal after conviction.

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A jury's verdict of acquittal terminates jeopardy, and verdicts of acquittal cannot be overturned on appeal even if there is overwhelming proof of a defendant's guilt or even if the trial judge committed reversible error in ruling on an issue at some point during the proceedings. This fundamental maxim of double jeopardy [JURISPRUDENCE](#) entrusts the jury with the power to nullify criminal prosecutions tainted by egregious misconduct on the part of the police, the [PROSECUTOR](#), or the court, a tremendous bulwark against tyranny in a democratic society.

A jury can also implicitly [ACQUIT](#) a defendant. If a jury has been instructed by the judge on the elements of a particular crime and a lesser-included offense, and the jury returns a guilty verdict as to the lesser offense but is silent as to the greater offense, re-prosecution for the greater offense is barred by the Double Jeopardy Clause. For example, a jury that has been instructed as to the crimes of first- and second-degree murder will implicitly acquit the defendant of first-degree murder by returning a guilty verdict only as to murder in the second degree. A not guilty verdict as to the greater offense is inferred from the jury's silence.

Dismissals are granted by the trial court for miscellaneous procedural errors and defects that operate as an absolute barrier to prosecution. For example, the prosecution must establish that a court has [JURISDICTION](#) over a defendant before prosecution may commence. Failure to establish jurisdiction will normally result in a dismissal upon an objection raised by the defendant. Dismissals may be entered before a jury has been impaneled, during trial, or after conviction. But jeopardy must attach before a dismissal implicates double jeopardy protection.

Once jeopardy attaches, a dismissal granted by the court for insufficient evidence terminates jeopardy and bars further prosecution with one exception. The prosecution may appeal a dismissal entered after the jury has returned a guilty verdict. If the [APPELLATE COURT](#) reverses the dismissal, the guilty verdict can be reinstated without necessitating a second trial. A dismissal granted for lack of evidence after a case has been submitted to a jury, but before a verdict has been reached, may not be appealed by the state.

Re-prosecution is permitted and jeopardy continues against the defendant when a case is dismissed by the court at the defendant's request for reasons other than sufficiency of the evidence. For example, courts may dismiss a case when the defendant's right to a speedy trial has been denied by prosecutorial pretrial delay. The Supreme Court has held that no double jeopardy interest is triggered when defendants obtain a dismissal for reasons unrelated to their guilt or innocence (see *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 [1978]).

Mistrials are granted when it has become impracticable or impossible to finish a case. Courts typically declare mistrials when jurors fail to unanimously reach a verdict. Like dismissals, mistrials declared at the defendant's behest will not terminate jeopardy or bar re-prosecution. Nor will a mistrial preclude re-prosecution when it is declared with the defendant's consent. Courts disagree whether a defendant's mere silence is tantamount to consent.

A different situation is presented when a mistrial is declared over the defendant's objection. Re-prosecution will be allowed only if the mistrial resulted from "manifest necessity," a standard more rigorous than "reasonably necessary" and less exacting than "absolutely necessary." A mistrial that could have been reasonably avoided will terminate jeopardy, but jeopardy will continue if the mistrial was unavoidable.

The manifest necessity standard has been satisfied where mistrials have resulted from defective indictments, disqualified or deadlocked jurors, and procedural irregularities willfully occasioned by the defendant. Manifest necessity is not present when mistrials result from prosecutorial or judicial manipulation. In each of these cases, courts balance the defendant's interests in finality against society's interest in a fair and just legal system.

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Every defendant has the right to at least one appeal after conviction. If the conviction is reversed on appeal for insufficient evidence, it is treated as an acquittal, and further prosecution is not permitted. However, a defendant may be re-prosecuted when the reversal is not based on lack of evidence. The grounds for such reversals include defective search warrants, unlawful seizure of evidence, and other so-called "technicalities." Retrials in these instances are justified by society's interest in punishing the guilty. Defendants' countervailing interests are subordinated when a conviction rendered by 12 jurors is overturned for reasons unrelated to guilt or innocence.

The interests of the accused are also subordinated when courts permit prosecutors to seek a more severe sentence during the retrial of a defendant whose original conviction was thrown out on appeal. Defendants who appeal their conviction assume the risk that a harsher sentence will be imposed during re-prosecution. However, in most circumstances, courts are not permitted to impose a death sentence on a defendant during a second trial when the jury recommended life in prison during the first. The recommendation of life [IMPRISONMENT](#) is construed as an acquittal on the issue of [CAPITAL PUNISHMENT](#).

What Constitutes the Same Offense

The final question courts must resolve in double jeopardy litigation is determining whether successive prosecutions or punishments are for the "same offense." Jeopardy may have already attached and terminated in a prior criminal proceeding, but the state may bring further criminal action against a person so long as it is not for the same offense. Courts have analyzed this question in several ways, depending on whether the state is attempting to re-prosecute a defendant or impose multiple punishments.

At common law a single episode of criminal behavior produced only one prosecution, no matter how many wrongful acts may have been committed during that episode. But over the last fifty years the proliferation of overlapping and related offenses has made it possible for the government to [PROSECUTE](#) someone for several different crimes stemming from the same set of circumstances. For example, an individual who has stolen a car to facilitate an abduction resulting in attempted rape could be separately prosecuted and punished for auto theft, [KIDNAPPING](#), and molestation. This development has significantly enlarged prosecutors' discretion over the charging process.

The Supreme Court curbed this discretion in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Court said that the government may prosecute an individual for more than one offense stemming from a single course of conduct only when each offense requires proof of a fact the other does not. Blockburger requires courts to examine the elements of each offense as they are delineated by [STATUTE](#), without regard to the actual evidence that will be introduced at trial. The prosecution has the burden of demonstrating that each offense has at least one mutually exclusive element. If any one offense is completely subsumed by another, such as a lesser included offense, the two offenses are deemed the same, and punishment is allowed only for one.

Blockburger is the exclusive means by which courts determine whether cumulative punishments pass muster under the Double Jeopardy Clause. But several other methods have been used by courts to determine whether successive prosecutions are for the same offense. **COLLATERAL ESTOPPEL**, which prevents the same parties from relitigating ultimate factual issues previously determined by a valid and final judgment, is one such method. In *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), the Supreme Court collaterally estopped the government from prosecuting an individual for robbing one of six men at a poker game when a jury had already acquitted him of robbing another one of the six. Although the second prosecution would have been permitted under Blockburger because two different victims were involved, the government here was not allowed to rehearse its case and secure a conviction against a person already declared not guilty of essentially the same crime.

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The "same transaction" analysis is another means by which courts determine whether successive prosecutions will survive constitutional scrutiny. It requires the prosecution to join all offenses committed during a continuous interval that share a common factual basis and display a single goal or intent. The same transaction test is used by many state courts to bar successive prosecutions for the same offense. However, no federal court has ever adopted it.

Both state and federal courts have employed the "actual evidence" test to preclude successive prosecutions for a single offense. Unlike Blockburger, which examines the [STATUTORY](#) elements of proof, the "actual evidence" test requires courts to compare the evidence "actually" introduced during the first trial with the evidence sought to be introduced by the prosecution at the second trial. Criminal offenses are characterized as the same when the evidence necessary to support a conviction for one offense would be sufficient to support a conviction for the other.

Under the "same conduct" analysis the government is forbidden from twice prosecuting an individual for the same criminal behavior, regardless of the actual evidence introduced during trial and regardless of the statutory elements of the offense. For example, this analysis has been applied to prevent prosecuting someone for vehicular [HOMICIDE](#) resulting from drunk driving, when the defendant had been earlier convicted for driving while under the influence of alcohol. The second prosecution would have been permitted had the state been able to prove the driver's [NEGLIGENCE](#) without proof of his [INTOXICATION](#). The U. S. Supreme Court applied this analysis for three years before abandoning it in 1993. However, the "same conduct" analysis is still utilized by some state courts interpreting their own constitutions and statutes.

State Court Decisions Interpreting State Constitutional Provisions Governing Double Jeopardy

The U. S. Constitution and the Supreme Court cases interpreting it establish the minimum amount of protection that a state court must provide when it is interpreting a section of the Bill of Rights that has been made applicable to the states via the doctrine of incorporation, including instances that require a state court to interpret and apply the Double Jeopardy Clause of the Fifth Amendment. A state court interpreting the double jeopardy clause of its own constitution may provide more protection than is afforded by the federal constitution but not less. Below is a sampling of cases decided in part based on a state court's interpretation of its own state constitutional provision governing double jeopardy.

ALABAMA: Reintroduction of two prior convictions at re-sentencing of the defendant for the purpose of enhancement under the **HABITUAL FELONY** Offender Act did not violate the Double Jeopardy Clauses of the federal or state constitutions, even though the convictions were not certified at original sentencing hearing, where the defendant was put on notice at the original sentencing hearing of the state's intention to offer evidence of his prior felony convictions (see *Ex parte Randle*, 554 So.2d 1138 (Ala. 1989); AL Const. Art. I, § 9; Alabama Code 1975, §§ 13A-5-9, 13A-5-9(b)(2), (c)(2); U.S.C.A. Const. Amend. 5; Const. § 9).

ARKANSAS: Although both the United States and Arkansas constitutions provide that no person shall be subjected to two punishments based on same offense, remedial civil sanctions may be properly imposed without placing the person in jeopardy (see *Cothren v. State*, 344 Ark. 697, 42 S.W.3d 543 (Ark. 2001); Const. Amend. 5; AR CONST Art. 2, § 8).

ARIZONA: If a mistrial is granted as result of conduct that the prosecutor knew or should have known would prejudice the defendant and that could not be cured short of a mistrial, the double jeopardy clause of the Arizona Constitution bars a retrial (see *Beijer v. Adams ex rel. County of Coconino*, 196 Ariz. 79, 993 P.2d 1043, (Ariz.App. Div. 1 1999); AZ CONST Art. 2 § 10).

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CALIFORNIA: A court-ordered victim [RESTITUTION](#) imposed for the first time at re-sentencing following appeal and partial reversal of the defendant's murder convictions was not considered a "punishment" and was therefore not barred under California's constitutional double jeopardy provisions (see *People v. Harvest*, 84 Cal.App.4th 641, 101 Cal.Rptr.2d 135, (Cal.App. 1 Dist., Oct 31, 2000); West's Ann.Cal. Const. Art. 1, § 15; West's Ann.Cal.Penal Code § 1202.4).

FLORIDA: The state's constitutional double jeopardy provision does not prohibit a defendant's retrial when a prior trial has been concluded by mistrial because of a [HUNG JURY](#) (see *Lebron v. State*, 2001 WL 987233, 26 Fla. L. Weekly S553 (Fla. 30, 2001); West's F.S.A. Const. Art. 1, § 9).

GEORGIA: The double jeopardy clause of state constitution does not prohibit additional punishment for a separate offense that the legislature has deemed to [WARRANT](#) a separate [SANCTION](#) (see *Mathis v. State*, 273 Ga. 508, 543 S.E.2d 712 (Ga. 2001); GA Const. Art. 1, § 1, Par. 18).

ILLINOIS: The protection against double jeopardy afforded by the Illinois Constitution is no greater than that provided by the U. S. Constitution (see *People v. Ortiz*, 196 Ill.2d 236, 752 N.E.2d 410, 256 Ill.Dec. 530 (Ill. 2001); U.S.C.A. Const.Amend. 5; S.H.A. Const. Art. 1, § 10).

MASSACHUSETTS: The double jeopardy provision of the state constitution was not implicated by reuse of evidence of drunk driving at the defendant's trial on the charge of vehicular homicide by negligent operation, even though the defendant was acquitted in the first-tier trial on drunk driving charges, since in the state's two-tier trial system the defendant remained in continuing jeopardy with regard to other offenses for which he was originally convicted (see *Commissioner v. Woods*, 414 Mass. 343, 607 N.E.2d 1024 (Mass. 1993); M.G.L.A. c. 218, § 26A).

MICHIGAN: Convictions and punishments for [INVOLUNTARY MANSLAUGHTER](#) and operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death do not violate the Double Jeopardy Clauses of the federal or state constitutions, since the offenses protect distinct societal norms, and the statute defining each offense requires proof of an element that the other does not (see *People v. Kulpinski*, 243 Mich.App. 8, 620 N.W.2d 537 (Mich.App. 2000); U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 1, § 15; M.C.L.A. §§ 257.625(4), 750.321).

MINNESOTA: **FORFEITURE** of a motorist's vehicle after he had been convicted and sentenced for [MISDEMEANOR](#) driving while intoxicated (**DWI**) was not double punishment in violation of the state constitution's double jeopardy clause, since the motorist provided no basis for reading the state double jeopardy clause more broadly than its federal counterpart in the context of DWI-related vehicle forfeitures (see *Johnson v. 1996 GMC Sierra*, 606 N.W.2d 455 (Minn.App. 2000); M.S.A. Const. Art. 1, § 7; M.S.A. § 169.1217).

NEW YORK: Defendant's re-prosecution for first-degree criminal [CONTEMPT](#) after being found guilty on the lesser charge of second-degree criminal contempt violated the Double Jeopardy Clauses of both the federal and state constitutions, where the defendant's trial was originally on both charges and the defendant was convicted on the second-degree charge only after a partial mistrial was declared as to the first-degree charge (*People v. Campbell*, 269 A.D.2d 460, 703 N.Y.S.2d 498 (N.Y.A.D. 2 Dept. 2000); U.S.C.A. Const.Amend. 5, 14; McKinney's Const. Art. 1, § 6).

TEXAS: A defendant's conviction for [ASSAULT](#) of a public servant did not violate the double jeopardy provisions of either the federal or state constitutions, even though the defendant had already received prison discipline for the same incident, since prison sanctions are not considered "punishment" for the purposes of double jeopardy analysis (see *Rogers v. State*, 44 S.W.3d 244 (Tex.App. 2001); U.S.C.A. Const.Amend. 5; Vernon's Ann.Texas Const. Art. 1, § 14).

Additional Resources

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Organizations

American Civil Liberties Union (ACLU)

1400 20th St., NW, Suite 119

Washington, DC 20036 USA

Phone: (202) 457-0800

E-Mail: info@aclu.org

URL: <http://www.aclu.org/>

Primary Contact: Anthony D. Romero, Executive Director

Association of Federal Defense Attorneys

8530 Wilshire Blvd., Suite 404

Beverly Hills, CA 90211 USA

Phone: (714) 836-6031

Fax: (310) 397-1001

E-Mail: AFD A2@AOL.com

URL: <http://www.afda.org>

Primary Contact: Gregory Nicolaysen, Director

National District Attorneys Association (NDAA)

99 Canal Center Plaza

Alexandria, VA 22314 USA

Phone: (703) 549-9222

Fax: (703) 836-3195

URL: <http://www.ndaa.org>

Primary Contact: Thomas J. Charron, Director

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