CRIST v. BRETZ
SUPREME COURT OF THE UNITED STATES
437 U.S. 28
June 14, 1978

OPINION: Mr. Justice STEWART…The precise issue is whether the federal rule governing the time when jeopardy attaches in a jury trial is binding on **Montana** through the Fourteenth Amendment. The federal rule is that jeopardy attaches when the jury is empanelled and sworn; a Montana statute provides that jeopardy does not attach until the first witness is sworn.

The appellees, Merrel Cline and L. R. Bretz, were brought to trial in a Montana court on charges of grand larceny, obtaining money and property by false pretenses, and several counts of preparing or offering false evidence. A jury was empanelled and sworn following a three-day selection process. Before the first witness was sworn, however, the appellees filed a motion drawing attention to the allegation in the false-pretenses charge that the defendants' illegal conduct began on January 13, 1974. Effective January 1, 1974, the particular statute relied on in that count of the information had been repealed. The prosecutor moved to amend the information, claiming that "1974" was a typographical error, and that the date on which the defendants' alleged violation of the statute had commenced was actually January 13, 1973, the same date alleged in the grand larceny count. The trial judge denied the prosecutor's motion to amend the information and dismissed the false-pretenses count. The State promptly but unsuccessfully asked the Montana Supreme Court for a writ of supervisory control ordering the trial judge to allow the amendment.

Returning to the trial court, the prosecution then asked the trial judge to dismiss the entire information so that a new one could be filed. That motion was granted, and the jury was dismissed. A new information was then filed, charging the appellees with grand larceny and obtaining money and property by false pretenses. Both charges were based on conduct commencing January 13, 1973. Other than the change in dates, the new false-pretenses charge described essentially the same offense charged in the earlier defective count.

After a second jury had been selected and sworn, the appellees moved to dismiss the new information, claiming that the Double Jeopardy Clauses of the United States and Montana Constitutions barred a second prosecution. The motion was denied, and the trial began. The appellees were found guilty on the false-pretenses count, and sentenced to terms of

imprisonment. **The Montana Supreme Court, which had previously denied appellees habeas corpus relief, affirmed the judgment as to Bretz on the ground that under state law jeopardy had not attached in the first trial.**

In the meantime, the appellees had brought a habeas corpus proceeding in a Federal District Court, again alleging that their convictions had been unconstitutionally obtained because the second trial violated the Fifth and Fourteenth Amendments guarantee against double jeopardy. The federal court denied the petition, holding that the Montana statute providing that jeopardy does not attach until the first witness is sworn does not violate the United States Constitution. The court held in the alternative that even if jeopardy had attached, a second prosecution was justified, as manifest necessity supported the first dismissal.

The Court of Appeals for the Ninth Circuit reversed [and] held that the federal rule governing the time when jeopardy attaches is an integral part of the constitutional guarantee, and thus is binding upon the States under the Fourteenth Amendment. The appellate court further held that there had been no manifest necessity for the Montana trial judge's dismissal of the defective count, and, accordingly, that a second prosecution was not constitutionally permissible.

Appellants appealed, seeking review only of the holding of the Court of Appeals that Montana is constitutionally required to recognize that, for purposes of the constitutional guarantee against double jeopardy, jeopardy attaches in a criminal trial when the jury is empanelled and sworn…The parties were asked to address the following two questions:

> "1. Is the rule heretofore applied in the federal courts that jeopardy attaches in jury trials when the jury is sworn constitutionally mandated?
>
> "2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial—state or federal, jury or nonjury—until the first witness is sworn?"

The unstated premise of the questions posed on reargument is that if the rule "that jeopardy attaches in jury trials when the jury is sworn" is "constitutionally mandated," then that rule is binding on Montana, since "the double jeopardy prohibition of the Fifth Amendment…applies to the States through the Fourteenth Amendment" and "the same constitutional standards" must apply equally in federal and state courts. *Benton v. Maryland*[1]. The single dispositive question, therefore, is whether the federal rule is an integral part of the constitutional guarantee…

The Supreme Court has supervisory authority (subject to Congressional action) over how the federal judiciary is run. That authority does not necessarily involve constitutional issues. For example, when various federal courts meet and where they meet is simply a question of administration. The issue being explored here is whether or not the Court's prior ruling dictating when jeopardy attaches is a supervisory matter or a constitutional matter. If the latter, perhaps states are bound to comply. We will see.

[The] deceptively plain language [of the Double Jeopardy Clause] has given rise to problems both subtle and complex, problems illustrated by no less than eight cases argued here this very Term. This case, however, presents a single straightforward issue concerning the point during a jury trial when a defendant is deemed to have been put in jeopardy, for only if that point has once been reached does any subsequent prosecution of the defendant bring the guarantee against double jeopardy even potentially into play.

The Fifth Amendment guarantee against double jeopardy derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has been put in jeopardy only when there has been a conviction or an acquittal—after a complete trial. A primary purpose served by such a rule is…to preserve the finality of judgments. And it is clear that in the early years of our national history the constitutional guarantee against double jeopardy was considered to be equally limited in scope. As Mr. Justice Story explained:

> **"[The Double Jeopardy Clause] does not mean, that [a person] shall not be tried for the offence a second time, if the jury shall have been discharged without giving any verdict;…for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy."**

But this constitutional understanding was not destined to endure. Beginning with this Court's decision in *United States v. Perez*, it became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal…*Arizona v. Washington*.[2]

The basic reason for holding that a defendant is put in jeopardy even though the criminal proceeding against him terminates before verdict was perhaps best stated in *Green v. United States*[3]*:*

[1] Case 5A-DJ-3 on this website.
[2] Case 5A-DJ-5 on this website.
[3] Case 5A-DJ-2 on this website.

> "…[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in *Downum v. United States*. There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial when jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empanelled and sworn.

The reason for holding that jeopardy attaches when the jury is empanelled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. That interest was described in *Wade v. Hunter* as a defendant's "valued right to have his trial completed by a particular tribunal."…Throughout…history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.

Regardless of its historic origin, however, the defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, since it is that "right" that lies at the foundation of the federal rule that jeopardy attaches when the jury is empanelled and sworn. *United States v. Martin Linen Supply…*

[T]he federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns—the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury—have combined to produce the federal law that in a jury trial jeopardy attached when the jury is empanelled and sworn.

We agree with the Court of Appeals that the time when jeopardy attaches in a jury trial "serves as the lynchpin for all double jeopardy jurisprudence." In *Illinois v. Somerville*, a case involving the application of the Double Jeopardy Clause through the Fourteenth Amendment, the Court said that "jeopardy attached when the first jury was selected and sworn." Today we explicitly hold what *Somerville* assumed: **The federal rule that jeopardy attaches when the jury is empanelled and sworn is an integral part of the constitutional guarantee against double jeopardy.** The judgment is Affirmed.

CONCURRENCE: Mr. Justice BLACKMUN…Although I join the Court's opinion, I write to emphasize the fact that I am not content to rest the result, as the Court seems to be, solely on the defendant's "valued right to have his trial completed by a particular tribunal," a factor mentioned by Mr. Justice Black, speaking for the Court, in *Wade v. Hunter*. That approach would also support a conclusion that jeopardy attaches at the very beginning of the jury selection process.

Other interests are involved here as well: repetitive stress and anxiety upon the defendant; continuing embarrassment for him; and the possibility of prosecutorial overreaching in the opening statement.

It is perhaps true that each of these interests could be used, too, to support an argument that jeopardy attaches at some point before the jury is sworn. I would bring all these interests into focus, however, at the point where the jury is sworn because it is then and there that the defendant's interest in the jury reaches its highest plateau, because the opportunity for prosecutorial overreaching thereafter increases substantially, and because stress and possible embarrassment for the defendant from then on is sustained.

Zero concern for the "stress and anxiety upon the **victim**." But, I forgot, the "continuing embarrassment for the defendant" is of paramount importance. Sorry.

DISSENT: Mr. Chief Justice BURGER…As a "rulemaking" matter, the result reached by the Court is a reasonable one; it is the Court's decision to constitutionalize the rule that jeopardy attaches at the point when the jury is sworn—so as to bind the States—that I reject. This is but another example of how constitutional guarantees are trivialized by the insistence on mechanical uniformity between state and federal practice. There is, of course, no reason why the state and federal rules must be the same. In the period between the swearing of the jury and the swearing of the first witness, the concerns underlying the constitutional guarantee against double jeopardy are simply not threatened in any meaningful sense even on the least sanguine of assumptions about prosecutorial behavior. **We should be cautious about constitutionalizing every procedural device found useful in federal courts, thereby foreclosing the States from experimentation with different approaches which are equally compatible with constitutional principles.** All things "good" or "desirable" are not mandated by the Constitution. States should remain free to have procedures attuned to the special problems of the criminal justice system at the state and local levels. Principles of federalism should not so readily be compromised for the sake of a uniformity finding sustenance perhaps in considerations of convenience but certainly not in the Constitution. Countless times in the past 50 years this Court has extolled the virtues of allowing the States to serve as "laboratories" to experiment with procedures which differ from those followed in the federal courts. Yet we continue to press the States into a **procrustean** federal mold. The Court's holding will produce no great mischief, but it continues, I repeat, the business of trivializing the Constitution on matters better left to the States. Accordingly, I join Mr. Justice POWELL'S dissent.

Procrustean: "designed to produce conformity by arbitrary means"

DISSENT: Mr. Justice POWELL/BURGER/REHNQUIST…The rule that jeopardy attaches in a jury trial at the moment the jury is sworn is not mandated by the Constitution. It is the product of historical accident, embodied in a Court decision without the slightest consideration of the policies it purports to serve. Because these policies would be served equally well by a rule fixing the attachment of jeopardy at the swearing of the first witness, I would uphold the Montana statute. Even if one assumed that the Fifth Amendment now requires the attachment of jeopardy at the swearing of the jury, I would view that rule as incidental to the purpose of the Double

Jeopardy Clause and hence not incorporated through the Due Process Clause of the Fourteenth Amendment and not applicable to the States. I therefore dissent.

As the Court correctly observes, it is clear that in the early years of our national history the constitutional guarantee against double jeopardy was restricted to cases in which there had been **a complete trial**—culminating in acquittal or conviction…This remains the English rule.

But there existed a separate rule of English practice…based upon a dictum of Lord Coke, that once the "jury is returned and sworn, their verdict must be heard, and they cannot be discharged…"

…Notwithstanding its origin as an aspect of jury practice, the rule against discharge of the jury became a useful defense against Crown oppression in the 17th century. Reaction to the "tyrannical practice" of discharging juries and permitting reindictment when acquittal appeared likely was so strong that the common-law judges declared "that in all capital cases, a juror cannot be withdrawn, though the parties consent to it; that in criminal cases, not capital, a juror may be withdrawn, if both parties consent, but not otherwise…" *King v. Perkins*. Whether or not this strict rule was ever stringently applied, it was modified soon after it was announced…[I]t was viewed as a matter committed to the discretion of the trial judge, from which no writ of error would lie nor any plea in bar of a future prosecution would be allowed. Thus, while the English judges had adapted Lord Coke's rule to the protection of interests later recognized in this country as within the sphere of the Double Jeopardy Clause,…they refused to import the rule into the realm of pleas in bar, and it was the latter which informed the framing of the Double Jeopardy Clause.

But it was the common-law rule of jury practice—a rule that we well might have come to regard as an aspect of due process if it had not been absorbed in this country by the Double Jeopardy Clause—with which this Court concerned itself in *United States v. Perez*. Sitting on the *Perez* Court was Mr. Justice Washington, who one year earlier had written that "the jeopardy spoken of in [the Fifth Amendment] can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon." *United States v. Haskell*. Mr. Justice Story authored the opinion of the Court in *Perez*. Nine years later he would explain in his treatise on the Constitution that the meaning of the Double Jeopardy Clause is "that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him." It seems most unlikely that either of these Members of the *Perez* Court thought that the decision was interpreting the Fifth Amendment when it declared that the discharge of a jury, before verdict, on grounds of "manifest necessity" was not a bar to a retrial. As both Justices Washington and Story believed that the Double Jeopardy Clause embraced only actual acquittal and conviction, they must have viewed *Perez* as involving the independent rule barring needless discharges of the jury. The decisions of this Court throughout the 19th and early 20th centuries dealing with discharges of the jury are ambiguous, but can be read merely as reaffirming the principle of *Perez* that discharges before verdict may be justified by manifest necessity, without adding a Fifth Amendment gloss.

Throughout the 19th century, however, many state courts began to blend the rule against needless discharges of juries into the guarantee against double jeopardy contained in the Federal

and State Constitutions. It was recognized that the discharge rule provided significant protection against being twice vexed:

> "The right of trial by jury is of but little value to the citizen in a criminal prosecution against him if [the guarantee against double jeopardy] can be violated and the accused left without remedy. **If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right?**" *O'Brian v. Commonwealth.*

Thus, the state courts were putting Lord Coke's rule to a use similar to that of the 17th-century English judges, but they did so—with no apparent awareness of the novelty of their action—under the rubric of the Double Jeopardy Clause. Given this rather unreflective incorporation of a common-law rule of jury practice into the guarantee against double jeopardy, it is not surprising that the state courts also generally fixed the attachment of jeopardy at the swearing of the jury. Because the state courts do not appear to have been aware that they were adapting a separate rule to a different area of individual rights, they perceived no need to examine all the trappings of the rule in light of the new uses to which it was being put.

It was after more than a century of development in state courts that the "defendant's valued right to have his trial completed by a particular tribunal" appeared in the decisions of this Court for the first time, also without analysis, as an element of the Double Jeopardy Clause. *Wade v. Hunter*. The policies underlying this "valued right" were not spelled out in *Wade*, but the rationale expressed in *Green v. United States*—a case not involving midtrial discharge of the jury—appears to echo the state courts of a century earlier:

> "…The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a possibility that even though innocent he may be found guilty."

Although neither *Wade* nor *Green* confronted the question of when jeopardy attached, the *Green* Court declared that "this Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

Having accepted almost without articulated thought the doctrine that the Double Jeopardy Clause protects against needless discharge of the jury, this Court proceeded to adopt with a similar lack of reason or analysis the implementing rule that jeopardy attaches when the jury is sworn. In *Downum v. United States*, the trial court declared a mistrial after the jury had been sworn but before any witnesses had been called. Finding an absence of "imperious necessity," the Court held that the Fifth Amendment barred reprosecution. The *Downum* opinion contains no discussion of the point of jeopardy's attachment or of the policies underlying the selection of the swearing of the jury as the determinative moment. Nevertheless, the swearing of the jury has

been accepted since *Downum* as the constitutional line of demarcation for the attachment of jeopardy, even though no case before this Court has presented a contest over that issue.

This Court, following the lead of the state courts, simply enlisted the doctrine concerning needless discharge of juries in the service of double jeopardy principles, largely without analysis and apparently with little awareness of history. In view, however, of the consistency with which federal courts have assumed without question that the swearing of the jury triggers jeopardy, I would accept this as the established supervisory rule within the federal system. **But the acceptance of a supervisory rule, primarily on grounds of long tenure and convenience, is no justification for elevating it to constitutional doctrine. We should be hesitant to constitutionalize a rule that derives no support from the Framers' understanding of the English practice from which the Double Jeopardy Clause was derived, and which is supported by no doctrinal reasoning that reaches constitutional dimension.** Restraint is doubly indicated with respect to this rule since it is applied only in jury trials. Where a criminal case is tried to the court, jeopardy does not attach until "the court begins to hear evidence." *Serfass v. United States*. No compelling reason has been suggested today, or in earlier decisions of this Court, why the time when jeopardy attaches should be different depending upon whether the defendant's "valued right" is asserted in a jury trial rather than a bench trial.

I turn next to an examination of the jury trial rule in light of the double jeopardy policies it is now belatedly thought to advance.

Three aspects of criminal process ordinarily precede the initial introduction of evidence in a jury trial: motions, jury selection, and opening statements. Defendants are vitally interested in each, yet it is far from clear that any should trigger the attachment of jeopardy.

Defendants may, and sometimes must, move for various rulings on the indictment and the admissibility of evidence before trial. These motions, in practical terms, may decide the defendant's case. They sometimes may require a devotion of time, energies, and resources exceeding that necessary for the trial itself. Yet it has never been held that jeopardy attaches as of the making or deciding of pretrial motions…It is clear, then, that the central concern of the Double Jeopardy Clause cannot be regarded solely as protecting against repeated expenditures of the defendant's efforts and resources.

Opening statements may be made in both bench and jury trials. In either type of trial, statements by counsel or questions by the court may prompt the prosecutor to abort—by dismissing the indictment or otherwise—the proceedings with the view to reindicting the defendant and commencing anew. The prosecutor also may simply request a continuance to gain time to meet some unexpected defense stratagem, although such a motion rarely would prevail. In any event, delay or postponement occasioned during or as a result of the opening-statement phase of a trial would be equally adverse to the defendant without regard to whether he were being tried by the court or a jury. The Due Process Clause would protect such a defendant in either case against prosecutorial abuse. Thus, with respect to the opening-statement phase of a criminal trial, there appears to be no difference of substance between jury and bench trials in terms of serving double jeopardy policies.

The situation does differ in some respects where a jury is selected, and the defendant—by voir dire and challenges participates in the selection of the factfinder. It is not unusual for this process to entail a major effort and extend over a protracted period. But, as in the case of pretrial motions, expenditure of effort alone is not sufficient to trigger the attachment of jeopardy. The federal rule of attachment in jury trials offers no basis for a double jeopardy claim if the prosecutor—dissatisfied by the jury selection process—is successful in dismissing the prosecution before the last juror is seated, or indeed before the whole panel is sworn. A defendant's protection against denial or abuse of his rights in this respect lies in the Due Process Clause.

Moreover, the Double Jeopardy Clause cannot be viewed as a guarantee of the defendant's claim to a factfinder perceived as favorably inclined toward his cause. That interest does not bar pretrial reassignment of his case from one judge to another, even though he may have waived jury trial on the belief that the original judge viewed his case favorably. Thus, the Double Jeopardy Clause interest in having his "trial completed by a particular tribunal" must refer to some interest other than retaining a factfinder thought to be disposed favorably toward defendant.

The one event that can distinguish one factfinder from another in the eyes of the law in general, and the Double Jeopardy Clause in particular, is the beginning of the factfinder's work. As the Court stated in *Green*, "a defendant is placed in jeopardy once he is put to trial before" a factfinder. When the Court or jury has undertaken its constitutional duty—the hearing of evidence—the trial quite clearly is under way, and the prosecution's case has begun to unfold before the trier of fact. As testimony commences, the evidence of the alleged criminal conduct is presented to the factfinder and becomes a matter of public record. Then, retrial will mean repeating painful and embarrassing testimony, together with the possibility that the earlier "trial run" will strengthen the prosecution's case. At a retrial, for example, prosecution witnesses may be better prepared for the rigors of cross-examination. Thus, the defendant has a strong interest in taking his case to the first jury, once witnesses testify. The rationale of the Double Jeopardy Clause is implicated once this threshold is crossed, but not before.

That this is the crucial time for Double Jeopardy Clause purposes is evident from the attachment rule in bench trials. **Once the judge has embarked upon his factfinding mission, the defendant is justified in concluding that his ordeal has begun; he is in the hands of his judge and may expect the matter to proceed to a finish. This same principle should apply in jury trials.**

Thus, Montana's rule fixing the attachment of jeopardy at the swearing of the first witness is consonant with the central concerns of the Double Jeopardy Clause. It furnishes a clear line of demarcation for the attachment of jeopardy, and it places that line in advance of the point at which real jeopardy—in Fifth Amendment terms—can be said to begin.

Even if I were to conclude that the Fifth Amendment—merely by virtue of long, unreasoned acceptance—required attachment of jeopardy at the swearing of the jury, I would not hold that the Fourteenth Amendment necessarily imposes that requirement upon the States. This issue would turn on the answer to the question whether jeopardy's attachment at that point is fundamental to the guarantees of the Double Jeopardy Clause. *Apodaca v. Oregon*. As the

previous discussion makes clear, the jury trial rule accorded constitutional status by the Court today implicates no rights that have been identified as fundamental in a constitutional sense. There is no basis for incorporating it "jot-for-jot" into the Fourteenth Amendment…

I perceive no reason for this Court to impose what, in effect, is no more than a supervisory rule of practice upon the courts of every State in the Union.