

# CHAPTER 21

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## *Double Jeopardy*

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## § 21.1 INTRODUCTION

One of the oldest of the procedural protections that form a part of the American criminal justice system is the concept of double jeopardy.<sup>1</sup> The Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” This provision of federal law is also applicable to state criminal prosecutions.<sup>2</sup> Although the Massachusetts Constitution Declaration of Rights contains no explicit reference to a double-jeopardy protection, the common law of Massachusetts has long incorporated such a provision into our law.<sup>3</sup>

The principle of double jeopardy serves to protect a number of interests. One value that it serves is finality, the idea that once a proceeding has determined an issue the matter should be laid to rest. Thus, double jeopardy protects defendants who have undergone a complete criminal trial from having to run the gauntlet of prosecution for the same offense a second time. When a defendant who has already been convicted faces a second trial on charges that concern the same transaction, this finality interest is implicated.

Double jeopardy also addresses the balance of power between the state and the individual, by limiting the ability of the prosecutor to gain a conviction. Jeopardy requires the state to marshal and present its evidence in one complete trial rather than subjecting the defendant to multiple proceedings that would give the prosecutor the opportunity to hone his case until it resulted in a guilty verdict. Thus jeopardy protects a defendant who has been acquitted from having to stand trial a second time for the same offense.

Jeopardy also comes into play when the state seeks to subject the defendant to multiple punishments. Thus, the law controls the prosecutor's ability to seek duplicative convictions and consecutive sentences in one trial for charges that are the same for the purpose of double jeopardy.

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<sup>1</sup> See Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

<sup>2</sup> See *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>3</sup> See *Commonwealth v. Forte*, 423 Mass. 672, 674 (1996) (double-jeopardy concepts “no doubt” embraced within Massachusetts Constitution's due process guarantee, and are part of state common law, but latter protections inapplicable to penalties imposed under statutory authorization); *Berry v. Commonwealth*, 393 Mass. 793, 798 (1985) (in multiple prosecutions case, noting possibility that common law principles may provide greater protection than does either federal or state constitution), *distinguished in Commonwealth v. Vieira*, 41 Mass. App. Ct. 927, 928 (1996) (in multiple punishments cases, state double jeopardy law not more protective than federal counterpart). *Commonwealth v. Brusgalis*, 398 Mass. 325, 332 n. 14 (1986) (undecided whether double-jeopardy protection is part of art. 12 of Declaration of Rights); *Aldoupolis v. Commonwealth*, 386 Mass. 260, 271 (1982). See also MASS. GEN. LAWS ch. 263, § 7 (jeopardy bar after acquittal).

The last value that jeopardy serves is to protect the defendant's interest in having a trial end in a verdict once it has begun. Thus, jeopardy is implicated when the state seeks to retry a defendant on a case where the first trial ended in a dismissal or a mistrial.

## § 21.2 WHEN JEOPARDY APPLIES

The protections afforded by the principle of double jeopardy apply only to certain proceedings: (1) the concept is limited to criminal cases; (2) even if the defendant is involved in a criminal case, he cannot claim a jeopardy bar as a consequence of an earlier criminal case unless the earlier proceeding had advanced to the point where jeopardy attached; (3) the federal constitutional jeopardy prohibition (but not the state prohibition) requires that the second prosecution be on behalf of the same sovereign; and (4) the second trial or punishment is barred only if it involves the same offense as the prior proceeding.

### § 21.2A. DEFINITION OF CRIMINAL CASE

In order for a defendant to be able to avail himself of jeopardy's protection, he must face a criminal sanction. Proceedings that charge the defendant with a crime or juvenile proceedings that subject a juvenile to the possibility of a finding of delinquency based on conduct that would be criminal if committed by an adult, are subject to the limits placed on the power of the state by the concept of double jeopardy.<sup>4</sup>

Jeopardy, however, does not apply to civil proceedings.<sup>5</sup> The purpose of the proceedings must be punishment in order to fall under the scope of jeopardy.<sup>6</sup> Although in most cases the distinction between “criminal” and “civil” proceedings and sanctions is clear, the courts have experienced difficulty applying the distinction to civil penalties and forfeitures. In 1997 the Supreme Court in *Hudson v. United States*,<sup>7</sup> set forth a two-

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<sup>4</sup> See *Stokes v. Commonwealth*, 368 Mass. 754 (1975), *habeas corpus granted sub nom.* *Stokes v. Genakos*, 441 F. Supp. 147 (D. Mass. 1977); *Breed v. Jones*, 421 U.S. 519 (1975).

<sup>5</sup> See *United States v. Ward*, 448 U.S. 242 (1980); *Custody of a Minor*, 375 Mass. 733 (1978).

<sup>6</sup> The Supreme Court has held that, consistent with double jeopardy, a sentencing court could consider a defendant's conduct underlying charges of which he had been acquitted; “sentencing enhancements do not punish defendant for crimes of which he was not convicted, but . . . increase his sentence because of the manner in which he committed the crime of conviction.” *United States v. Watts*, 519 U.S. 148 (1997) (despite defendant's acquittal of using firearm in relation to drug offense, sentencing judge found by preponderance of evidence that he had possessed the guns) (quoting *Witte*, 115 S. Ct. 2199, 2207–08 (1995) (consideration of uncharged cocaine dealing to enhance sentence for marijuana conviction did not bar subsequent prosecution for same cocaine dealing; enhanced sentence was “punishment” only for charged offense)). See also *Commonwealth v. Burstson*, 35 Mass. App. Ct. 355 (1993) (habitual offender statute does not offend double jeopardy prohibition). But see *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Pimental*, 367 F.Supp.2d 143 (D. Mass. 2005) (calling into question the continued vitality of *Watts*).

<sup>7</sup> *Hudson v. United States*, 522 U.S. 93 (1997) (double jeopardy clause does not bar criminal prosecution of individuals against whom the Office of the Comptroller of the Currency

part test for deciding whether civil sanctions constitute criminal punishment for double jeopardy purposes. The Supreme Judicial Court, while leaving open the possibility that “[c]ommon law principles may provide greater protections [against double jeopardy] than either the State or the Federal Constitution requires,”<sup>8</sup> has also adopted this test.<sup>9</sup> In part one of the test, the courts asks whether the legislature, in establishing the penalizing mechanism, indicated “either expressly or impliedly” a preference for a

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had imposed monetary penalties and occupational disbarment). The Court anticipated the *Hudson* analysis in *Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of convicted sex offender on ground of sexual dangerousness due to “mental abnormality” constitutes neither successive “prosecution” nor “punishment”). The Court in *Hudson* “disavowed” its earlier doctrinal approach in *United States v. Halper*, 490 U.S. 435 (1989), and reaffirmed the analysis in two older cases, *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See also* *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) (high state “property tax” on harvested marijuana motivated by penal intent constitutes “punishment”); *United States v. Marquardo*, 149 F.3d 36 (1st Cir. 1998) (sequential civil and criminal contempt proceedings, even if they arise out of the same factual setting and even though the defendant had been incarcerated for seventeen months on the civil contempt charge, not barred by double jeopardy); *Commonwealth v. Bogannam*, 50 Mass. App. Ct. 913, 914-915 (2001) (tax on income received by defendant from illegal activity no double jeopardy bar to prosecution for illegal activity, though tax on illegal activity itself would be punitive so as to implicate double jeopardy clause).

<sup>8</sup> *Commonwealth v. Vieira*, 41 Mass. App. Ct. 927 (1996) (quoting *Berry v. Commonwealth*, 393 Mass. 793, 798 (1985)); *Luk v. Commonwealth*, 421 Mass. 415, 416 n.3 (1995); *Commonwealth v. Woods*, 414 Mass. 343, 346 (1993). In *Vieira* the court noted that a more protective state law doctrine, if it exists, would not apply to a forfeiture absent a “disparity between remedial costs and the value of the forfeiture.” *Vieira*, 41 Mass. App. Ct. at 928.

<sup>9</sup> *Powers v. Commonwealth*, 426 Mass. 534 (1998) (criminal charges arising out of motor vehicle accident, subsequent to indefinite administrative revocation of driver's license, not barred by double jeopardy). *Powers* cites *Luk v. Commonwealth*, 421 Mass. 415, 422 (1995) (OUI prosecution subsequent to license suspension for refusal to take a breathalyzer does not violate double jeopardy; suspension is primarily designed to protect society, not punish), and *Leduc v. Commonwealth*, 421 Mass. 433 (1995) (adopting *Luk* analysis in case involving license suspension for defendant who took and failed breathalyzer test). *See also* *U.S. v. Peel*, 595 F.3d 763 (2010); *U.S. v. Dupes*, 513 F.3d 338 (2006); *U.S. v. Battle*, 289 F.3d 661 (2002); *Doe v. Sex Offender Registry Bd.* 450 Mass. 780 (2008); *Greenberg v. Com.* 442 Mass. 1024 (2004) (Supreme Judicial Court held that commitment for alcohol treatment was civil and remedial in nature, not punitive, and thus, there was no double jeopardy bar to prosecuting the patient for operating a motor vehicle while under the influence of alcohol, and other offenses); *Commonwealth v. Tate*, 424 Mass. 236, 238–39 (1997) (despite repeal of statute allowing commitment for treatment as sexually dangerous person, continued commitment is remedial, and not “punishment”) (citing *Hill, Petitioner*, 422 Mass. 147, 153 (1996), cert. denied, 519 U.S. 867 (1996); *Cepulonis v. Commonwealth*, 426 Mass. 1010 (1998) (no bar to prosecution for escape from correctional institution after D.O.C. fine of \$10,000; fine was motivated by civil deterrent and remedial purposes as well as punishment); *Commonwealth v. Forte*, 423 Mass. 672 (1997) (no bar to imposition of prison discipline and criminal prosecution for same conduct; confinement in departmental disciplinary unit serves both “punitive” and “remedial” (i.e., deterrent) purposes); *Commonwealth v. Bloom*, 53 Mass. App. Ct. 476, 478 (2001) (imposition of prison discipline on defendant for crime committed in prison does not create double jeopardy bar to prosecution of same crime, unless penalty imposed is so extreme as to be equivalent to criminal proceeding).

“civil” or “criminal” label.<sup>10</sup> A legislative intention to establish a civil penalty is not dispositive, but the test gives greater deference than earlier tests to this factor.<sup>11</sup> Part two of the test asks “whether the statutory scheme [is] so punitive either in purpose or effect” as to “transform what was clearly intended as a civil remedy into a criminal penalty.” “[O]nly the ‘clearest proof’ ” will establish this.<sup>12</sup> As “useful guideposts” in determining this, the *Hudson* court announced a multifactor test drawn from *Kennedy v. Mendoza-Martinez*.<sup>13</sup>

The Supreme Judicial Court has also followed U.S. Supreme Court precedents in holding that civil forfeiture does not constitute punishment for double jeopardy purposes.<sup>14</sup>

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<sup>10</sup> “Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction.” *Hudson v. United States*, 522 U.S. 93 (1997). The legislature’s intent may be shown by an explicit label like “civil penalty” (*see Hudson*) by a legislative purpose to promote incapacitation, rather than deterrence or retribution (*see Powers v. Commonwealth*, 426 Mass. 534 (1998) (purpose to promote “public safety”)), or by inclusion of the statute in the state’s civil code. *See Kansas v. Hendricks*, 521 U.S. 346 (1997) (placement in Probate Code).

<sup>11</sup> *Compare* *United States v. Halper*, 490 U.S. 435 (1989) (civil penalty which is completely disproportionate to actual damages and expenses to the government occasioned by the defendant’s conduct may constitute criminal punishment). Disproportionality is just one of the seven factors in the *Kennedy v. Mendoza-Martinez* test, *infra*.

<sup>12</sup> *Hudson v. United States*, 522 U.S. 93 (1997). *See* *Roe v. Farwell*, 999 F. Supp. 174, 182–91 (D. Mass. 1998) (registration provisions of Massachusetts sex offender registration law do not constitute “punishment” but § 178I public access provisions, lacking remedial purpose, violate double jeopardy) (citing *Doe v. Attorney General*, 425 Mass. 217, 220 (1997)), affirming preliminary injunction enjoining release of sex offender registry information under MASS. GEN. LAWS ch. 6, § 178I, on claim that release serves no remedial purpose, is not designed to protect public, and is likely to further punish offender in violation of double jeopardy; “[t]he harsher the measure bears on a person, the more urgent and ‘the more soundly rooted in fact rather than prejudice and conjecture must be the [regulatory] concern’ ” (citing *Opinion of the Justices*, 423 Mass. 1201, 1224 (1996)). *Compare* *Commonwealth v. Stone S.*, 45 Mass. App. Ct. 259 (1998) (permanent school expulsion for assault on teacher is not punishment for purposes of double jeopardy, and does not bar delinquency finding for same conduct); *Doe v. Weld*, 954 F. Supp. 425, 431–36 (D. Mass. 1996) (juvenile sex offender did not show likelihood of success on claim that requirements of sex offender registration and disclosure law amounted to punishment for purposes of double jeopardy).

<sup>13</sup> *Hudson v. United States*, 522 U.S. 93 (1997) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). The seven factors are whether: (1) the sanction involves an affirmative disability or restraint; (2) it has historically been regarded as a punishment; (3) it comes into play only on a finding of scienter; (4) its operation will promote the traditional aims of punishment-retribution and deterrence; (5) the behavior to which it applies is already a crime; (6) an alternative purpose to which it may rationally be connected is assignable for it; and (7) it appears excessive in relation to the alternative purpose assigned. The Court in *Hudson* noted that the *Kennedy* factors “must be considered in relation to the statute on its face.” *Hudson, supra* (quoting *Kennedy v. Mendoza-Martinez, supra*, 372 U.S. at 169).

<sup>14</sup> *Commonwealth v. Penta*, 423 Mass. 546, 554 (1996) (civil forfeiture of automobile used in drug trafficking did not constitute “punishment” for double jeopardy purposes, so as to bar criminal prosecution) (citing *United States v. Ursery*, 518 U.S. 267 (1996) (civil in rem forfeitures are remedial civil sanctions and do not constitute punishment for double jeopardy purposes)). *Compare* *Austin v. United States*, 509 U.S. 602 (1993) (civil forfeiture is punishment for purpose of Eighth Amendment excessive fines provision; despite some remedial purpose, “forfeiture can only be explained as serving in part to punish”).

## § 21.2B. JEOPARDY MUST HAVE “ATTACHED”

Even if a defendant is faced with a criminal prosecution, jeopardy does not arise as a protection against future action by the state until jeopardy “attaches.” In a jury trial, jeopardy attaches when the jury is impaneled and sworn.<sup>15</sup> In a bench trial, jeopardy attaches when the court begins to hear evidence.<sup>16</sup> Jeopardy also attaches when the court accepts a guilty plea,<sup>17</sup> or if the defendant “admits to sufficient facts,” when the court swears a witness.<sup>18</sup>

If a proceeding in the district court is a probable-cause hearing and not a trial, then jeopardy does not attach.<sup>19</sup> Because some complaints brought in the district court can be treated as either a probable-cause hearing or a trial, it is important to establish at the outset whether the proceeding is the former, and jeopardy is inapplicable, or the latter, and jeopardy has attached. If the judge makes no announcement, the matter will be treated for jeopardy purposes as a trial.<sup>20</sup>

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<sup>15</sup> *Commonwealth v. Vaidulas*, 433 Mass. 247, 252 (2001); *Commonwealth v. Super*, 431 Mass. 492, 496 (2000); *Commonwealth v. Johnson*, 426 Mass. 617, 624 (1998) (citing *Richardson v. United States*, 468 U.S. 317, 325 (1984), *Serfass v. United States*, 420 U.S. 377, 388 (1975), and *Lovett v. Commonwealth*, 393 Mass. 444, 447 (1984)). However, double jeopardy protection applies “only if there has been some event, such as an acquittal, which terminates the original jeopardy.” *Johnson*, 426 Mass. at 625 (quoting *Richardson*, 468 U.S. at 325 (after jury panel sworn and impaneled, and indictments read, no bar to excuse two jurors and impanel three additional jurors, swear those jurors, and read indictments again, especially since defense counsel approved procedure)).

<sup>16</sup> *See Commonwealth v. Ludwig*, 370 Mass. 31 (1976); *Commonwealth v. Love*, 452 Mass. 498 (2008), (jeopardy attaches in proceedings before a district court that combine a motion to suppress with a jury-waived trial); *Commonwealth v. Love*, 452 Mass. 498 (2008) (although judicial error for judge to hear motion to suppress and conduct trial simultaneously, jeopardy attached once oral testimony was introduced in the proceeding) *But see Commonwealth v. Elizondo*, 428 Mass. 322, 325 (1998) (jeopardy attaches in jury-waived trial when first witness is sworn, but trial begins when defendant is placed at bar); *Commonwealth v. Gonzalez*, 437 Mass. 276, 281-284 (2002) (defendant not actually placed in jeopardy where he was never in danger of conviction. In cases commencing before January 1, 1994, defendant's appeal from a bench trial conviction vacates the judgment, and jeopardy next attaches at the commencement of the trial de novo. *Department of Revenue v. Sorrentino*, 408 Mass. 340, 343 (1990).

<sup>17</sup> *See Commonwealth v. Aldrich*, 21 Mass. App. Ct. 221, 224–26 (1985); *Commonwealth v. Therrien*, 359 Mass. 500 (1971). However, “[a]fter a judge accepts a plea to a lesser included offense over the prosecutor's objection, double jeopardy does not bar prosecution of the greater offense.” *Commonwealth v. Gordon*, 410 Mass. 498, 501 (1991).

<sup>18</sup> *See* discussion regarding the utility of admissions in assuring jeopardy and district court jurisdiction, *supra*.

<sup>19</sup> *See Commonwealth v. Gonzalez*, 388 Mass. 865 (1983).

<sup>20</sup> *Commonwealth v. Graham*, 388 Mass. 115 (1983); *Commonwealth v. Maloney*, 385 Mass. 87, 89–90 (1982); *Commonwealth v. Mesrobian*, 10 Mass. App. Ct. 355, 356–58 (1980) (unless concurrent jurisdiction is declined “unambiguously” before hearing, it is a trial and jeopardy attaches); *Commonwealth v. Crosby*, 6 Mass. App. Ct. 679 (1978); *Commonwealth v. Clemmons*, 370 Mass. 288 (1976); *Corey v. Commonwealth*, 364 Mass. 137 (1973). *Cf. Commonwealth v. Friend*, 393 Mass. 120 (1984) (where defendant is on notice that court is considering declining jurisdiction, no permissible inference that trial has commenced); *Commonwealth v. DeFuria*, 400 Mass. 485, 487 (1987) (admission and prosecutor's recital of

### § 21.2C. IDENTITY OF THE SOVEREIGN

The scope of federal and state protection against double jeopardy differs with respect to the identity of the sovereign bringing each criminal case. Under the federal constitution, jeopardy does not prevent different sovereigns from each punishing a defendant for violating their own laws, although the conduct punished in each case may be identical.<sup>21</sup> Thus, a defendant can be punished for the same conduct by two different states,<sup>22</sup> by the federal government and a state,<sup>23</sup> by the federal government and another country,<sup>24</sup> or by the federal government and a tribal court.<sup>24.5</sup> However, federal jeopardy does prevent cumulative punishment by different levels of the same sovereign — for example, a municipality and the state in which it is located.<sup>25</sup>

Under the Commonwealth's common law of jeopardy, however, a state prosecution following conviction in another state or federal court for essentially the same crime will be barred, as long as the earlier proceedings subjected the defendant to the risk of a sentence similar to the one he faces in the Massachusetts court.<sup>26</sup>

### § 21.2D. DEFINITION OF SAME OFFENSE

Double jeopardy's protection against multiple trials or punishments depends on how one determines whether the two proceedings involve the “same offense.” Take the case of a defendant facing two indictments, one for armed robbery and one for assault with a dangerous weapon, both arising out of an incident with a victim named Jones. Can the defendant be convicted or sentenced in a single trial for committing both offenses? If the defendant was convicted or acquitted of the armed robbery of Jones, can the Commonwealth bring a new indictment charging him with the armed robbery of

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facts followed by judge's decision to decline jurisdiction did not constitute trial since no witness sworn).

DISTRICT COURT ADMINISTRATIVE OFFICE, STANDARDS OF JUDICIAL PRACTICE: TRIALS AND PROBABLE CAUSE HEARINGS 1:03 (Nov. 1981) requires the court to “announce its decision, if it intends to conduct a probable cause hearing, before taking any evidence.” The rule applies only to concurrent jurisdiction cases, since otherwise the hearing can only be a probable-cause hearing. *Commonwealth v. Gonzales*, 388 Mass. 865, 869 n. 8 (1983).

<sup>21</sup> See *Heath v. Alabama*, 474 U.S. 82 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978); *Waller v. Florida*, 397 U.S. 387 (1970).

<sup>22</sup> See *Heath v. Alabama*, 474 U.S. 82 (1985).

<sup>23</sup> See *United States v. Wheeler*, 435 U.S. 313 (1978); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

<sup>24</sup> An exception to the dual sovereign rule bars multiple prosecutions if one sovereign dominated the other's acts. *United States v. Guzman*, 85 F.3d 823 (1st Cir. 1996) (defendant's trial for related offense in Netherlands Antilles did not raise double jeopardy bar to trial in U.S. District Court).

<sup>24.5</sup> *United States v. Lara*, 541 U.S. 193 (2004).

<sup>25</sup> See *Heath v. Alabama*, 474 U.S. 82 (1985). Cf. *Commonwealth v. Medina*, 64 Mass. App. Ct. 708 (2005) (two counties prosecuting defendant for separate acts in continuous chain of events does not violate double jeopardy clause).

<sup>26</sup> *Commonwealth v. Angiulo*, 401 Mass. 71 (1987); *Commonwealth v. Cepulonis*, 374 Mass. 487 (1978).

Jones's son, who was standing next to him during the commission of the original crime? In both situations, the answer depends on the definition of “the same offense.”

While the question of providing a definition for the concept of “the same offense” has constitutional implications, most of the S.J.C. cases considering the issue have treated it under the concept of duplicity rather than dealing directly in terms of the double-jeopardy clause of the United States Constitution or its Massachusetts common law counterpart.<sup>27</sup> The results reached by the Supreme Judicial Court, though, are consistent with the results of a traditional double-jeopardy analysis.<sup>28</sup>

No single comprehensive definition determines when two offenses are the same for the purpose of double jeopardy. The different ways to define the concept depend on two factors: (1) whether the two offenses arise under different statutes or both allege violations of the same statute and (2) whether the defendant faces successive trials or multiple offenses joined in one trial.

### 1. Different Statutes In A Single Trial

Double jeopardy bars multiple convictions and punishments for the same offense, even if arising out of a single trial.<sup>28.5</sup> The classic test for determining whether charges under two different statutes joined in a single trial allege the “same offense” for the purpose of double jeopardy originated in the 1871 case of *Morey v. Commonwealth*.<sup>29</sup> The *Morey* test states that “a single act may be an offence against two statutes; and if each statute requires proof of an additional fact that the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”<sup>30</sup> The U.S. Supreme Court adopted the *Morey* test as the standard for determining the same question under the double-jeopardy clause of the Fifth Amendment.<sup>31</sup> As detailed *infra*, it is a major but not dispositive factor in determining the scope of jeopardy protection in state prosecutions.

The *Morey* test is not satisfied unless each offense requires proof of a fact that the other does not. Thus, for example, it would consider possession of marijuana and possession of marijuana with intent to sell to be the same offense, because only one offense, the latter, requires proof of an element not shared by the other.<sup>32</sup> On the other

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<sup>27</sup> See *Shabazz v. Commonwealth*, 387 Mass. 291, 294 (1982); *Commonwealth v. Crocker*, 384 Mass. 353, 359 n. 8 (1981).

<sup>28</sup> See *Shabazz v. Commonwealth*, 387 Mass. 291, 294 (1982); *Commonwealth v. Crocker*, 384 Mass. 353, 359 n. 8 (1981). See *Luk v. Commonwealth*, 421 Mass. 415, 430–32 (1995) (even if administrative license suspension for refusal to take a Breathalyzer is punishment, subsequent OUI prosecution arising out of the same incident is for a separate offense).

<sup>28.5</sup> See *Commonwealth v. Hammond*, 50 Mass. App. Ct. 171, 173 (2000) (appellate court may consider claim of duplicative convictions violative of defendant’s right to be free from double jeopardy even though claim not raised at trial).

<sup>29</sup> 108 Mass. 433 (1871).

<sup>30</sup> *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871).

<sup>31</sup> See *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>32</sup> See *Kuklis v. Commonwealth*, 361 Mass. 302 (1972); *but see Commonwealth v. Johnson*, 75 Mass. App. Ct. 903 (2009) (modified rule in *Kuklis* so that, if not expressly authorized by the Legislature, the presumptive remedy for improper duplicative convictions is reversal of the conviction for the lesser offense as determined by penalty, but not necessarily the included offense, as a remedy for duplicative convictions); *see also Commonwealth v. Lopez*,

hand, possession of heroin and being present where heroin is kept are not the same offense, because the former requires proof of dominion and control that the latter does not, and the latter requires proof of actual physical presence, which the former does not.<sup>33</sup> Another way of conceptualizing the *Morey* test is by asking whether one of the offenses is a lesser included offense of the other.<sup>34</sup>

The *Morey* test is often described as a “same evidence” test and discussed in terms of whether the same evidence would suffice to convict the defendant of both crimes.<sup>35</sup> This description can be misleading, however, because it invites one to focus on the evidence that is actually introduced at trial rather than on what the elements of each statute require. The *Morey* test contemplates the latter, not the former.<sup>36</sup> Take, for

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31 Mass. App. Ct. 547, 548 (1991) (cannot be convicted of both trafficking in cocaine and possession of cocaine, because lesser included); *Commonwealth v. Poole*, 29 Mass. App. Ct. 1003 n. 1 (1990).

<sup>33</sup> See *Commonwealth v. Buckley*, 76 Mass. App. Ct. 123 (2010); *Commonwealth v. Vick*, 454 Mass. 418 (2009); *Commonwealth v. Woods*, 414 Mass. 343 (1993); *Commonwealth v. Rodriguez*, 11 Mass. App. Ct. 379 (1981). For other examples of offenses that the *Morey* test considers not the same, see *Commonwealth v. Gallarelli*, 372 Mass. 573 (1977); *Salemme v. Commonwealth*, 370 Mass. 421 (1976).

<sup>34</sup> See *Commonwealth v. Vick*, 454 Mass. 418 (2009); *Commonwealth v. Niels N.* 73 Mass. App. Ct. 689, 706 (2009); *Commonwealth v. Jones*, 441 Mass. 73 (2004); *Commonwealth v. Santos*, 440 Mass. 281 (2003); *Commonwealth v. Martin*, 425 Mass. 718, 721 (1997); *Salemme v. Commonwealth*, 370 Mass. 421 (1976); *Commonwealth v. Rodriguez*, 11 Mass. App. Ct. 379, 380 (1981). For examples of offenses that the *Morey* test considers the same, see *Commonwealth v. Crocker*, 384 Mass. 353, 358 n. 6 (1981); *Kukils v. Commonwealth*, 361 Mass. 302, 307 n. 3 (1972).

There can be some difficulty in applying the test when dealing with an offense one of whose elements incorporates another offense. For example, the elements of *felony murder* require that the victim's death be a result of conduct arising out of the commission of a felony. Any type of felony can serve as the predicate for felony murder. If a defendant faced both a charge of felony murder, with the underlying felony being armed robbery, and of the armed robbery itself, a question arises as to how one should apply the *Morey* test. Should one simply look at the elements of felony murder in the abstract, or should one focus on the actual theory on which the prosecution will proceed? Under the former view, the two offenses would be separate because in the abstract proof of armed robbery is not a necessary element of felony murder. Proof of any other felony would suffice. Both the S.J.C. and the U.S. Supreme Court, however, have held that in a circumstance like this, the statutes are the same for the purpose of double jeopardy. See *Grady v. Corbin*, 495 U.S. 508 (1990); *Harris v. Oklahoma*, 433 U.S. 682 (1977). *But see* *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993) (in 5–4 split, overruling *Grady* and narrowly construing *Harris v. Oklahoma*); *Commonwealth v. Gunter*, 427 Mass. 259, 275–76 (1998) (convictions of both felony-murder and underlying felony are always duplicative). Compare *Commonwealth v. Raymond*, 424 Mass. 382, 396–97 (1997) (where jury convicted defendant of rape, and, in special verdict, of first-degree murder based on extreme atrocity of cruelty and premeditation as well as felony murder, convictions for rape and murder not duplicative, and consecutive sentences upheld).

<sup>35</sup> *But see* *Commonwealth v. Woods*, 414 Mass. 343, 347ff. (1993) (rejecting “same evidence” label: “the critical inquiry is what *conduct* the State will prove, not the *evidence* the State will use to prove that conduct”) (quoting *Grady v. Corbin*, 495 U.S. 508 (1990), and citing *United States v. Felix*, 112 S. Ct. 1377, 1382 (1992); *United States v. Dixon*, 113 S. Ct. 2849, 2856 (1993) (referring to the federal *Blockburger* test, based on *Morey* as the “same-elements” test)); *Commonwealth v. Gallarelli*, 372 Mass. 573, 578 (1977).

<sup>36</sup> See *Commonwealth v. Crocker*, 384 Mass. 353, 359 (1981).

example, a defendant charged with both uttering a forged instrument and larceny by false pretenses arising out of the same incident. The proof the prosecutor introduces to prove the larceny must include the proof of the uttering, but the two statutes do not charge the same offense under *Morey* because each requires an element that the other does not.<sup>37</sup>

The *Morey* test is not dispositive, however; legislative intent is. If the two offenses are the same under the *Morey* test, then there is a presumption that the legislature did not intend separate punishment.<sup>38</sup> “Only when there is such a clear expression of intent would the common law rule, and perhaps any constitutional bar to multiple punishments, not apply.”<sup>39</sup> The U.S. Supreme Court has held that the double-jeopardy clause of the federal Constitution does not prohibit multiple punishment in the same trial for two offenses that are considered the same under the federal version of the *Morey* test, because the legislative intent to allow consecutive punishment was clear, and similarly the Supreme Judicial Court has held that in cases in which the legislature manifests this intent, a statute allowing multiple punishment does not violate the Declaration of Rights.<sup>40</sup>

Because legislative intent is the guide to the scope of jeopardy's protection in this area, even if the *Morey* test is satisfied it does not definitively answer the question. Two offenses may be different under *Morey*, but there can still be an indication that the legislature did not intend multiple punishment. For example, although being present where marijuana was kept and possession of marijuana are distinct under the terms of *Morey*, the Supreme Judicial Court has held that multiple punishment for both crimes in the same trial is not allowed because the legislature did not intend this result.<sup>41</sup>

Ordinarily, a defendant may be tried in one proceeding on charges that double jeopardy would consider the same.<sup>42</sup> However, the Commonwealth may not impose a conviction on the defendant for more than one of the duplicative offenses.<sup>42.5</sup> If the offenses are the same for jeopardy purposes, the prosecution is entitled to have all the

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<sup>37</sup> Commonwealth v. Crocker, 384 Mass. 353, 359 (1981).

<sup>38</sup> See Commonwealth v. Niels N., 73 Mass. App. Ct. 689 (2009); Commonwealth v. Woods, 414 Mass. 343, 348 n. 7 (1993); Commonwealth v. Crocker, 384 Mass. 353, 360–61 (1981); Kuklis v. Commonwealth, 361 Mass. 302, 306 (1972),

<sup>39</sup> Shabazz v. Commonwealth, 387 Mass. 291, 294 (1982); Commonwealth v. Oliveira, 53 Mass. App. Ct. 480, 484-486 (2002).

<sup>40</sup> See Missouri v. Hunter, 459 U.S. 359 (1983); Commonwealth v. Alvarez, 413 Mass. 224, 231–33 (1992) (MASS. GEN. LAWS ch. 94C, § 32J, requires two consecutive sentences; one for predicate offense of possession of cocaine with intent to sell, and second for doing so within 1000 feet of a school).

<sup>41</sup> See Kuklis v. Commonwealth, 361 Mass. 302, 308 (1972). See also Commonwealth v. Jones, 382 Mass. 387, 394 (1981); Commonwealth v. Oliveira, 53 Mass. App. Ct. 480, 485 (2002); Commonwealth v. Morin, 52 Mass. App. Ct. 780, 787 (2001). But see Commonwealth v. Buckley, 76 Mass. App. Ct. 123 (2010) (where motor vehicle homicide is not a lesser included offense of manslaughter, multiple punishments are permitted even when the offenses arise from the very same criminal event.); Commonwealth v. Boyd 73 Mass. App. Ct. 190 (2008) (convictions for kidnapping and assault and battery each included elements absent from the other and therefore did not merge).

<sup>42</sup> See Commonwealth v. Enos, 26 Mass. App. Ct. 1006 (1988).

<sup>42.5</sup> Commonwealth v. Santos, 440 Mass. 281 (2003); Commonwealth v. Jones, 441 Mass. 73 (2004);

charges submitted to the jury, but if the defendant is convicted on duplicitous charges the judge should dismiss the less serious charge and enter a conviction only for the more serious one.<sup>43</sup>

## 2. Different Statutes in Consecutive Trials<sup>44</sup>

Double jeopardy does not require the prosecution to present and prosecute all the charges that arise out of the same transaction in one trial.<sup>45</sup> Where the defendant's conduct is divisible into discrete crimes, the Commonwealth may seek multiple punishment and try the charges separately as long as they constitute separate offenses for the purpose of double jeopardy. It is the defendant's burden to establish that he is entitled to the protection of double jeopardy as a result of a previous conviction for the same offense.<sup>46</sup> However, once a defendant makes a nonfrivolous showing that an indictment charges him with an offense to which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses.<sup>47</sup>

If the second prosecution arises under a different statute, double jeopardy bars the second trial if it charges the defendant with a crime that is defined as the same offense under the *Morey* test. Double jeopardy will prevent a second trial for the same offense whether the lesser included offense is tried first<sup>48</sup> or the greater offense is tried first.<sup>49</sup>

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<sup>43</sup> See *Commonwealth v. Clermy*, 421 Mass. 325 (1995) (violation to convict defendant of both possession of cocaine and possession of same cocaine with intent to distribute); *Commonwealth v. Jones*, 382 Mass. 387 (1981). At one time, the S.J.C. took the position that no double-jeopardy violation occurred by multiple convictions for the same offense in the same trial as long as the defendant received concurrent sentences. However, recognizing that the mere fact of conviction can have adverse consequences, the Court has construed the Massachusetts law of double jeopardy to prevent multiple convictions. *Jones*, 382 Mass. at 395–96. *But see* *Rutledge v. United States*, 517 U.S. 292 (1996) (defendant tried for conducting continuing criminal enterprise and lesser included offense of conspiracy to distribute controlled substances may be convicted of only one of these “same offenses”).

<sup>44</sup> The application of double jeopardy doctrine to bench trials followed by trial de novo in the district courts, which was abolished more than two decades ago, is available in earlier editions of this book.

<sup>45</sup> See *Commonwealth v. Woods*, 414 Mass. 343, 349–50 (1993); *Commonwealth v. Johnson*, 406 Mass. 533, 536 (1990); *Commonwealth v. Gallarelli*, 372 Mass. 573, 578 (1977).

<sup>46</sup> See *Commonwealth v. Gonzalez*, 388 Mass. 865, 869 (1983); *Commonwealth v. Lovett*, 374 Mass. 394, 397 (1978).

<sup>47</sup> *Grady v. Corbin*, 495 U.S. 508, 522, n. 14 (1990), *overruled in* *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993).

<sup>48</sup> See *Bynum v. Commonwealth*, 429 Mass. 705, 709 n. 4 (1999); *Brown v. Ohio*, 432 U.S. 161 (1977). However, when the prior conviction for the lesser offense has previously been vacated on the defendant's own motion, there is no double jeopardy bar to trial for the greater offense. *Commonwealth v. Gardner*, 67 Mass. App. Ct. 744, 747 (2006); *Jackson v. Commonwealth*, 430 Mass. 260, 261–262 (1999). *But see* *Commonwealth v. Jarvis*, 68 Mass. App. Ct. 538 (2007) (subjecting defendant to a sentence enhancement after the imposition of sentence on primary offense in bifurcated trial did not subject defendant to double jeopardy).

<sup>49</sup> See *Commonwealth v. D'Amour*, 428 Mass. 725, 748–749 (1999); *Harris v. Oklahoma*, 433 U.S. 682 (1977).

Even if the *Morey* test is not satisfied, however, jeopardy may still bar the subsequent trial.<sup>49.5</sup> Although it is not appropriate to view *Morey* as establishing a “same evidence” test, there is one situation where focusing on the actual evidence offered at trial does define the scope of double-jeopardy protection. That is where the two offenses come not in the same trial but in successive prosecutions. The Supreme Judicial Court has stated that “determining whether such cases involve re prosecution for the ‘same offense’ may require consideration of the actual facts developed at trial in support of the charge tried first, as different problems are presented when multiple prosecutions are involved.”<sup>50</sup>

This broader view of double jeopardy in successive prosecutions was briefly adopted by the U.S. Supreme Court in *Grady v. Corbin*.<sup>51</sup> *Grady* recognized that a subsequent prosecution must do more than meet the *Morey* test to survive a double-jeopardy challenge. The Court held that even if the second trial is for a charge that would not be barred by the *Morey* test, the double-jeopardy clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Three years later in *United States v. Dixon*<sup>52</sup> the Supreme Court overruled *Grady* by a narrow majority, abandoning the “same conduct” test and leaving the *Blockburger-Morey* “same elements” test as the sole definition of “same offense” in the federal double-jeopardy clause. But the *Grady* approach still survives in the Massachusetts courts.<sup>53</sup>

There is a sound justification for using a different definition of “the same offense” depending on whether the charges are combined into one trial or the charges follow each other in consecutive trials. Where only one trial is involved, the double-jeopardy issue is essentially one of legislative intent. Because the legislature determines

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<sup>49.5</sup> See *Commonwealth v. Arriaga*, 44 Mass. App. Ct. 382, 383-386 (1998). See also *Commonwealth v. Diaz*, 53 Mass. App. Ct. 209, 212 (2001).

<sup>50</sup> *Commonwealth v. Crocker*, 384 Mass. 353, 359 n. 7 (1981).

<sup>51</sup> *Grady v. Corbin*, 495 U.S. 508, 522, n. 14 (1990) (*overruled in United States v. Dixon*, 509 U.S. 688 (1993)). *Grady* involved a defendant who had pled guilty to drunk driving and failing to keep to the right, and was subsequently indicted for negligent homicide. In a bill of particulars, the prosecution alleged that the negligent acts of the defendant on which the homicide indictment was based were his driving drunk and on the wrong side of the road. The Court held that double jeopardy barred the second trial because the prosecution's case necessarily required it to prove beyond a reasonable doubt that the defendant engaged in conduct for which he had already been placed in jeopardy.

<sup>52</sup> *United States v. Dixon*, 509 U.S. 688 (1993).

<sup>53</sup> The S.J.C. applied *Grady* in *Commonwealth v. Woods*, 414 Mass. 343, 349–50 (1993) (evidence of defendant's prior drinking was admissible in trial de novo for vehicular homicide by negligent operation, despite defendant's first-tier acquittal of OUI; drinking before driving was “not conduct that constitutes an offense for which [defendant] had been prosecuted”). See also *Commonwealth v. Arriaga*, 44 Mass. App. Ct. 382, 390–92 (1997) (“Massachusetts . . . enforces precisely the same double jeopardy rule as that adopted . . . in *Grady*”); *Commonwealth v. Bennett*, 52 Mass. App. Ct. 905, 906 (2001) (defendant pleading guilty who acknowledges that other charges based on same incident may be brought against him waives double jeopardy claim with respect to such charges). While the S.J.C. has not revisited the issue since *Dixon*, counsel should draw on arguments by the dissenting Justices in that case against adoption of a similarly constricted interpretation of the Commonwealth's common law rule. See opinions by Justices White, concurring in part and dissenting in part, *United States v. Dixon*, 113 S. Ct. at 2868–79 (1993), and Souter, dissenting, *id.* at 2881.

the maximum punishment for each individual crime, it has great leeway in authorizing cumulative punishment under two statutes meted out in the same proceeding.<sup>54</sup> However, where the government already has tried the defendant once, a second trial raises the possibility that the prosecutor was simply dissatisfied with the verdict or sentence.<sup>55</sup> In order to protect against this danger, where consecutive trials are at issue the definition of “the same offense” is broader. This doctrine may also be understood in terms of common law principles of collateral estoppel.<sup>56</sup>

### 3. The Same Statute in the Same Trial

Where the charges the defendant faces both arise under the same statute, the *Morey* test, described above, is not the appropriate way to analyze whether double jeopardy considers them the same offense.<sup>57</sup> Here the issue is the legislature's intent with regard to the appropriate unit of prosecution.<sup>58</sup> In other words, one must determine whether the prosecutor fragmented the defendant's alleged criminal conduct into more components than the legislature intended in enacting the statute. If so, ordinarily the defendant is not entitled to relief until after multiple convictions, when the less serious charge should be dismissed.<sup>59</sup>

For example, it is a crime to be in a place with apparatus for registering bets on the results of races involving beasts.<sup>60</sup> In *Gallinaro v. Commonwealth*,<sup>61</sup> the Supreme Judicial Court held that two indictments alleging a violation of this statute that differed only in that one specified that the object of the bets was horse racing and the other was dog racing were duplicitous because the legislature did not intend for the crime to be fragmented into the specific type of animal.

A number of factors are relevant in determining the appropriate unit of prosecution that the legislature intended for a particular offense. The language of the statute, the history of its application, the policy behind it, and the evil to which it was directed are all indicative of the limits the legislature intended.<sup>62</sup>

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<sup>54</sup> See *United States v. Halper*, 490 U.S. 435, 451 & n. 10 (1989).

<sup>55</sup> *United States v. Halper*, 490 U.S. 435, 451 & n. 10 (1989).

<sup>56</sup> See *infra* § 21.5B (collateral estoppel); *Commonwealth v. Arriaga*, 44 Mass. App. Ct. 382, 392 & n. 8 (1997).

<sup>57</sup> See *Commonwealth v. Gurney*, 13 Mass. App. Ct. 391, 401 (1982).

<sup>58</sup> See *Commonwealth v. Donovan*, 395 Mass. 20, 28 (1985).

<sup>59</sup> *Commonwealth v. Sumner*, 18 Mass. App. Ct. 349, 353 (1984); *Commonwealth v. Jones*, 382 Mass. 387, 394–95 (1981) (noting at n. 10 that “if necessary to protect the substantial rights of the defendant,” the Commonwealth would be required before trial to choose on which charge it wished to proceed). See discussion of duplicity *supra*, at § 20.4D.

<sup>60</sup> See MASS. GEN. LAWS ch. 271, § 17.

<sup>61</sup> 362 Mass. 728 (1973).

<sup>62</sup> For examples of how the courts analyze different statutes to determine the appropriate unit of prosecution, see *Commonwealth v. Santos*, 440 Mass. 281 (2003) (assault by means of a dangerous weapon); *Commonwealth v. Ortiz*, 431 Mass. 134, 138–139 (2000) (possession of controlled substances); *Commonwealth v. Rabb*, 431 Mass. 123, 128 (2000) (same); *Commonwealth v. DeCicco*, 44 Mass. App. Ct. 111, 126–28 (1997) (arson); *Commonwealth v. Donovan*, 395 Mass. 20 (1985) (larceny); *Commonwealth v. Boyd*, 73 Mass. App. Ct. 190 (2008) (kidnapping); *Commonwealth v. Cerveny*, 387 Mass. 280 (1982) (conspiracy); *Commonwealth v. Mahoney*, 68 Mass. App. Ct. 561 (2007) (embezzlement);

#### 4. The Same Statute in Consecutive Trials

If the defendant faces a subsequent prosecution charging him with a violation of the same statute as that involved in his original trial, the issue is whether each trial involves a separate unit of prosecution as intended by the legislature, as discussed immediately above. Prosecutors, however, cannot bring successive charges, even when allowed by double jeopardy, to harass or oppress the defendant.<sup>63</sup>

### § 21.3 MISTRIALS

A mistrial is a ruling by the judge that ends the defendant's trial but contemplates re prosecution. Mistrials are necessary because of some occurrence that has made a sound verdict impossible — for example, when the jury is unable to agree or some error in the proceedings has fatally flawed the process. A judge ordinarily orders a mistrial prior to the verdict, but he may defer action on a mistrial motion until after the verdict.<sup>64</sup>

Whether a mistrial comes before or after a verdict, it raises a double-jeopardy concern. As the Supreme Court has stated: “Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.”<sup>65</sup>

#### § 21.3A. MISTRIALS GRANTED WITH THE CONSENT OF THE DEFENDANT

Where the defendant has requested a mistrial, or has consented to the judge's ordering one, double jeopardy does not bar a retrial unless the mistrial was brought about by deliberate prosecutorial overreaching.<sup>65.5</sup>

A defendant ordinarily requests a mistrial because some judicial or prosecutorial error has occurred which seriously prejudices his cause. If a guilty verdict is almost a foregone conclusion, it may not be worthwhile for the defendant to suffer a

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*Commonwealth v. Antonmarchi*, 70 Mass. App. Ct. 463 (2007) (home invasion); *Commonwealth v. Gallant*, 65 Mass. App. Ct. 409 (2006) (attempted kidnapping); *Commonwealth v. Cerveny*, 387 Mass. 280 (1982) (conspiracy); *Commonwealth v. Gurney*, 13 Mass. App. Ct. 391 (1982) (perjury); *Commonwealth v. Levia*, 385 Mass. 345 (1982) (armed robbery); *Commonwealth v. Gordon*, 42 Mass. App. Ct. 601 (1997) (armed burglary).

<sup>63</sup> See *Commonwealth v. Levia*, 385 Mass. 345, 351 (1982); *Commonwealth v. St. Pierre*, 377 Mass. 650, 662 (1979); *Commonwealth v. Gallarelli*, 372 Mass. 575, 579 (1977). *But see* *Commonwealth v. Buckley*, 76 Mass. App. Ct. 123 (2010).

<sup>64</sup> See *Commonwealth v. Murchison*, 392 Mass. 273, 275 (1984).

<sup>65</sup> *Arizona v. Washington*, 434 U.S. 497, 503–05 (1978). But a judge's erroneous jury instructions, amounting to a directed verdict of guilty, are not ordinarily the functional equivalent of a declaration of a mistrial, and do not bar retrial. *Commonwealth v. Stracuzzi*, 30 Mass. App. Ct. 161, 163-64 (1991).

<sup>65.5</sup> See *Commonwealth v. Cousin*, 449 Mass. 809 (2007); *Commonwealth v. Merry*, 453 Mass. 653 (2009).

conviction in the hopes that she can win a reversal on appeal only at that point to have to face a second prosecution. The defendant may feel she is better off simply aborting the trial and starting over as soon as possible. Double jeopardy does not bar reprosecution in such a case.<sup>66</sup>

A mistrial motion does not need to meet the standard of a knowing and intelligent waiver of a defendant's constitutional right not to be placed twice in jeopardy in order to allow reprosecution. The Supreme Court has held that a waiver model is not the appropriate way to determine the issue.<sup>67</sup> Rather, the question is whether the defendant consented to terminating the trial.

It is the Commonwealth's burden to establish that the defendant consented to a mistrial.<sup>68</sup> The issue is ordinarily straightforward: (1) *Where the defendant originates the request or expresses agreement* with the idea, double jeopardy will not prevent a retrial. As long as the mistrial has not already been granted, however, the defendant is free to withdraw the motion and be treated for double jeopardy purposes as if he had never agreed to a mistrial in the first place.<sup>69</sup> (2) *If the defendant remains silent* without making his position known, the Commonwealth may establish that the defendant consented to the mistrial by drawing an inference from the totality of the circumstances.<sup>70</sup> Therefore, if the judge indicates that he is going to declare a mistrial, the soundest course of action for a defendant who wishes to assert a double-jeopardy claim to bar a retrial is to object on the record. The defendant should make his position known to the judge as soon as possible.

There are two situations when the rule that double jeopardy allows a second trial after the defendant has consented to a mistrial does not apply: (1) when prosecutorial or judicial misconduct has deliberately goaded the defense into the mistrial request<sup>71</sup> and (2) when the government conduct that gave rise to the mistrial

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<sup>66</sup> See *United States v. Dinitz*, 424 U.S. 600, 608 (1976); *Pellegrine v. Commonwealth*, 446 Mass. 1004 (2006).

<sup>67</sup> *United States v. Dinitz*, 424 U.S. 600, 609 (1976). See also *Poretta v. Commonwealth*, 409 Mass. 763, 766–67 & n. 4 (1991) (neither defendant's personal consent was necessary, nor did counsel's failure to consult with defendant about counsel's mistrial motion invalidate "consent" so long as defendant did not express his opposition).

<sup>68</sup> See *Commonwealth v. Donovan*, 8 Mass. App. Ct. 313, 317 (1979).

<sup>69</sup> See *Jones v. Commonwealth*, 379 Mass. 607, 620–21 (1980).

<sup>70</sup> *Jones v. Commonwealth*, 379 Mass. 607, 620–21 (1980). See *Commonwealth v. Horrigan*, 41 Mass. App. Ct. 337 (1996) ("unwise" to equate counsel's silence with "consent" when declaration of mistrial comes abruptly and unexpectedly, such that defendant could not reasonably have prepared herself for event; also, where judge ordered mistrial in preemptory terms, defendant not obliged to make "futile gesture" of objection). See also *Commonwealth v. Phetsaya*, 40 Mass. App. Ct. 293 (1996) (consent may be inferred from silence where defendant had opportunity to object and failed to do so; in view of trial judge's intimidating conduct, inference of consent improper).

<sup>71</sup> See *Commonwealth v. Merry*, 453 Mass. 653, 666 (2009) (defendant may show that prosecutors intentionally withheld exculpatory evidence to prove prosecutorial misconduct); *Commonwealth v. Cousin*, 449 Mass. 809 (2007); *Commonwealth v. Nolan*, 427 Mass. 541, 542–543 (1998); *Commonwealth v. Cobb*, 45 Mass. App. Ct. 271, 274 (1998); *Commonwealth v. Lam Hue To*, 391 Mass. 301 (1984); *Commonwealth v. Pintero*, 49 Mass. App. Ct. 397, 399 n. 3 (2000); *Oregon v. Kennedy*, 456 U.S. 667 (1982). See also *Commonwealth v. Ellis*, 432 Mass. 746, 752 (2000) (defendant must show judge provoked mistrial motion by committing error in bad faith).

resulted in such irreparable harm that a fair trial of the charges is no longer possible.<sup>72</sup> The critical issue for the first basis is the “*intent* on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.”<sup>73</sup> Without the specific intent to goad the defendant into requesting a mistrial, prosecutorial misconduct does not prevent a second trial.<sup>74</sup> The second basis contemplates a situation where no new trial would be free of the taint that required the first trial to be aborted. For example, if the prosecutor withheld exculpatory evidence with the result that the defendant lost forever the opportunity to investigate effectively the circumstances surrounding the crime, a mistrial granted because of the prosecutor's action would bar any retrial.<sup>75</sup>

### **§ 21.3B. MISTRIALS OVER THE DEFENDANT'S OBJECTION: THE MANIFEST NECESSITY STANDARD**

In the seminal decision of *United States v. Perez*, the Supreme Court held that mistrials granted without the consent of the defendant do not raise a jeopardy bar to reprosecution when “there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.”<sup>76</sup> The Court gave further detail to the “manifest necessity” standard in *Illinois v. Somerville*:

A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve “the ends of public justice” to require that the Government proceed with its proof, when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.<sup>77</sup>

If the defendant raises a double-jeopardy claim before being placed on trial a second time,<sup>78</sup> the prosecutor must meet a heavy burden to establish that the mistrial was required by manifest necessity.<sup>79</sup> However, the judge has broad discretion to

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<sup>72</sup> See *Commonwealth v. Lam Hue To*, 391 Mass. 301, 312–13 (1984); *Commonwealth v. Murchison*, 392 Mass. 273 (1984); *but see Choy v. Commonwealth*, 456 Mass. 146, 152 (2010) (trial court's erroneous answer to jury question did not preclude retrial on double jeopardy grounds).

<sup>73</sup> *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982) (emphasis added); *Commonwealth v. Smith*, 404 Mass. 1, 4–5 (1989) (record did not support contention that prosecutor's opening statement intended to “goad” mistrial request); *Commonwealth v. Andrews*, 403 Mass. 441, 448–49 (1988); *Commonwealth v. Patten*, 401 Mass. 20, 23 (1987).

<sup>74</sup> *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982); *Commonwealth v. Cousin*, 449 Mass. 809 (2007); *Commonwealth v. Merry*, 453 Mass. 653 (2009). See also *Donavan v. Commonwealth*, 426 Mass. 13 (1997) (refusing to extend rule to instances of prosecutorial negligence or inadvertence necessitating a mistrial).

<sup>75</sup> *Commonwealth v. Lam Hue To*, 391 Mass. 301, 312 (1984).

<sup>76</sup> *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

<sup>77</sup> *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

<sup>78</sup> See *infra* ch. 45, on interlocutory appeals in double jeopardy claims.

<sup>79</sup> See *Arizona v. Washington*, 434 U.S. 494 (1978); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (“To be sure, the power ought to be used in the greatest of caution, under urgent circumstances”); *Commonwealth v. Steward*, 396 Mass. 76 (1985); *Commonwealth v. Nicoll*, 452 Mass. 816 (2008); *Commonwealth v. Juliano*, 358 Mass. 465, 467 (1970) (“The power given to the court cannot be exercised arbitrarily or without good cause

determine whether this balancing process weighs in favor of aborting the trial.<sup>80</sup> If defense counsel has had a full opportunity to be heard on the issue,<sup>81</sup> and if the record reflects the trial judge's careful consideration of all of the factors, a reviewing court will give deference to a decision to declare a mistrial.<sup>82</sup>

The classic, and most common, situation of a manifest necessity is when the jury is deadlocked and cannot reach a unanimous verdict.<sup>83</sup> The only real issue is whether the judge acted precipitously in discharging the jury. As long as the judge makes adequate inquiries of the jury to support a determination that they would not be able to reach a verdict within a reasonable time, his decision to declare a mistrial because of a hung jury will be an appropriate exercise of discretion.<sup>84</sup> There is no time limit beyond which the jury must deliberate<sup>85</sup> nor is it necessary that the judge first give the jury a *Rodriquez* charge<sup>86</sup> designed to have them reconsider the views of those on the jury with whom they differ.

Where the defendant faces multiple charges, it is appropriate to declare a mistrial because of a hung jury as to some of the charges and to receive a verdict on those for which the jury is unanimous.<sup>87</sup> On the other hand, where the jury is given instructions to consider not only the charge contained in the complaint or indictment but a lesser included offense, a judge need not take a unanimous verdict on a lesser included offense if the jury is not unanimous on the original charge.<sup>88</sup>

Aside from the hung jury situation, the Supreme Court has noted that virtually all the other occasions that justify a mistrial “turn on the particular facts and thus escape meaningful categorization.”<sup>89</sup> There are, however, some common themes.

*First*, before granting a mistrial the judge should adequately explore the situation to determine that there is actual prejudice that would prevent a fair trial from

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and can only be used for the protection of the public and the security of the defendant and his right to an impartial trial”).

<sup>80</sup> See *Love v. Commonwealth*, 452 Mass. 498, 500 (2008); *Sullivan v. Commonwealth*, 383 Mass. 410, 413 (1981).

<sup>81</sup> See *Commonwealth v. Steward*, 396 Mass. 76 (1985). *Cf.* *Commonwealth v. Sanchez*, 405 Mass. 369, 373–74 (1989) (failure to discuss all possible alternatives to mistrial with defendant did not bar retrial).

<sup>82</sup> See *Commonwealth v. Cassidy*, 410 Mass. 174 (1991); *A Juvenile v. Commonwealth*, 392 Mass. 52, 55 (1984); *Barton v. Commonwealth*, 385 Mass. 517, 519 (1982); *Jones v. Commonwealth*, 379 Mass. 607, 622 (1980).

<sup>83</sup> *Commonwealth v. Andrews*, 403 Mass. 441, 448–49 (1988) (deadlocked jury is “prototypical example” of manifest necessity); *Commonwealth v. Cody*, 165 Mass. 133, 136 (1896) (other cases cited); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

<sup>84</sup> See *Thames v. Commonwealth*, 365 Mass. 477, 480 (1974).

<sup>85</sup> See *Thames v. Commonwealth*, 365 Mass. 477, 480 (1974) (mistrial for hung jury after only four and one-half hours of deliberation was valid).

<sup>86</sup> *Commonwealth v. Rodriquez*, 364 Mass. 87, 100–01 (1973). See *infra* § 36.4C.

<sup>87</sup> See *A Juvenile v. Commonwealth*, 392 Mass. 52, 55 n. 1 (1984); *Yeager v. United States*, 129 S. Ct. 2360 (2009) (an apparent inconsistency between a jury’s verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment).

<sup>88</sup> See *A Juvenile v. Commonwealth*, 392 Mass. 52, 55 n. 1 (1984).

<sup>89</sup> *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

reaching a just verdict.<sup>90</sup> Thus, if the question revolves around whether the petit jury is still impartial, the judge should question all the members of the jury to determine whether they are biased or have been improperly influenced, rather than relying on answers from just a few.<sup>91</sup> If the ability of an individual juror is at issue, the judge should resolve the issue after an interrogation that directly addresses the concern.<sup>92</sup>

*Second*, the trial judge should carefully examine the situation to make sure that there are no less drastic alternatives to a mistrial that would solve the problem.<sup>93</sup> For example, in the trial of codefendants, if the prejudice that occasioned a mistrial applied only to one defendant, the trial judge should seriously consider a severance before extending the mistrial to the remaining defendants.<sup>94</sup> In other circumstances granting a continuance,<sup>95</sup> sequestering the jury,<sup>96</sup> or giving curative instructions<sup>97</sup> rather than ordering a mistrial can serve the ends of justice. If the judge explores these options, though, a reasoned determination that they will not adequately solve the problem will be given deference in determining if double jeopardy bars a new trial.

*Third*, however thorough a procedure the judge uses to explore options, there is a concern that the prosecutor not use a request for a mistrial as a means of gaining a tactical advantage. The mere fact that some midtrial development makes it difficult for the prosecutor to obtain a valid conviction should not be grounds for a mistrial. For example, mistrials are not appropriate to allow a prosecutor to serve a witness with a

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<sup>90</sup> *Commonwealth v. Phetsaya*, 40 Mass. App. Ct. 293 (1996) (judge's belief that defendant would be convicted and have good appeal based on ineffective assistance of counsel did not constitute manifest necessity); *Cf. Elder v. Commonwealth*, 385 Mass. 128 (1982) (mistrial granted because of possible public perception of bias on part of judge as opposed to actual bias was not proper).

<sup>91</sup> *See Barton v. Commonwealth*, 385 Mass. 517 (1982). *Compare Commonwealth v. Cassidy*, 410 Mass. 174 (1991) (questioning of jurors unnecessary where judge decided that entire jury had been "irretrievably tainted" by one juror's misconduct, and questioning would have intruded into deliberative processes of jury); *Commonwealth v. Reinstein*, 381 Mass. 555 (1980) (individual questioning of jury not necessary because mistrial granted on basis of concern about future exposure of jury to prejudicial publicity).

<sup>92</sup> *See Sullivan v. Commonwealth*, 383 Mass. 410 (1981).

<sup>93</sup> *See Commonwealth v. Rodriguez*, 60 Mass. App. Ct. 1121 (2004) (no manifest necessity despite prosecutor's inadvertently belated disclosure of a supplemental police report and statement by the complainant that were arguably helpful to the defense); *Commonwealth v. Horrigan*, 41 Mass. App. Ct. 337 (1996) (no manifest necessity when trial judge became unavailable due to family emergency, and court declared mistrial without considering alternatives such as continuance or replacement with new judge); *Commonwealth v. Phetsaya*, 40 Mass. App. Ct. 293 (1996) (inadequate consideration of alternatives to mistrial); *Collins v. Commonwealth*, 412 Mass. 349 (1992) (retrial barred where, after prosecutor became unavailable because of death in family, trial judge refused to inquire into feasibility of suspending trial for one week).

<sup>94</sup> *See Barton v. Commonwealth*, 385 Mass. 517 (1982); *Jones v. Commonwealth*, 379 Mass. 607 (1980).

<sup>95</sup> *See Commonwealth v. Steward*, 396 Mass. 76 (1985); *United States v. Jorn*, 400 U.S. 470 (1971).

<sup>96</sup> *See Commonwealth v. Reinstein*, 381 Mass. 555 (1980).

<sup>97</sup> *See Picard v. Commonwealth*, 400 Mass. 115 (1987); *Commonwealth v. Fullerton*, 12 Mass. App. Ct. 985 (1981).

subpoena that could have been served before trial,<sup>98</sup> or to amend a complaint that charged a less serious crime than the trial shows was committed.<sup>99</sup> However, if a complaint or indictment is so defective that it is not an adequate basis for a conviction, for example where it omits a necessary element, a mistrial is permitted.<sup>100</sup> In such a circumstance, if the trial resulted in a conviction, it would inevitably have to be reversed on appeal, and there would be little purpose in allowing the case to proceed that far.

### § 21.3C. MISTRIALS AND INSUFFICIENT EVIDENCE OF GUILT

If a judge grants a mistrial after the close of the prosecution's evidence on a ground that meets the manifest necessity test, there is still one double-jeopardy concern that a defendant in state court may raise to prevent a new trial. Jeopardy will prevent a new trial if the Commonwealth had one full and fair opportunity at the original trial to produce sufficient evidence of the defendant's guilt and failed to do so.<sup>101</sup> In order to preserve this claim, the defendant must move in his original trial for a required finding of not guilty on the ground that the evidence does not provide proof of each of the elements of the charge. The motion can come either at the close of the Commonwealth's case or at the conclusion of all the evidence. The defendant may then move to dismiss the second prosecution, with interlocutory appeal of a denial to the S.J.C. single justice pursuant to MASS. GEN. LAWS ch. 211, § 3.<sup>102</sup>

This application of the law of double jeopardy is applicable only to state court trials,<sup>103</sup> because the U.S. Supreme Court has interpreted the double-jeopardy clause of the Fifth Amendment to allow re prosecution under this circumstance.<sup>104</sup>

## § 21.4 DISMISSALS

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<sup>98</sup> See *Downum v. United States*, 372 U.S. 734 (1963).

<sup>99</sup> See *Commonwealth v. Clemmons*, 370 Mass. 288 (1976).

<sup>100</sup> See *Illinois v. Somerville*, 410 U.S. 458 (1973).

<sup>101</sup> The test looks at sufficiency of the evidence actually admitted at trial, including material held on appellate review to have been erroneously admitted. *Commonwealth v. Kirk*, 39 Mass. App. Ct. 225, 233 (1995). In *Berry v. Commonwealth*, 393 Mass. 793, 798 (1985), the SJC held that “when the Commonwealth has failed to present evidence legally sufficient to support a conviction, and the defendant has moved for a required finding of not guilty, jeopardy terminates when a judge declares a mistrial after the jury fails to agree on a verdict. Furthermore, because double jeopardy principles prohibit trying a defendant twice for the same offense, see *Lydon v. Commonwealth*, 381 Mass. 356, 360 n. 7, *cert. denied*, 449 U.S. 1065 (1980); *Costarelli v. Commonwealth*, 374 Mass. 677, 680 (1978), the defendant is entitled to a review of the legal sufficiency of the evidence before another trial takes place.”

<sup>102</sup> *Kater v. Commonwealth*, 421 Mass. 17 (1995); *Commonwealth v. Chatfield-Taylor*, 399 Mass. 1, 2–3 (1987). The defendant may not petition the single justice before bringing, and losing, a motion to dismiss the second prosecution in the trial court. *Pena v. Commonwealth*, 426 Mass. 1015, 1016 & n. 2 (1998) (rescript).

<sup>103</sup> See *Berry v. Commonwealth*, 393 Mass. 793 (1985) (interpreting common law of jeopardy applicable to criminal prosecutions in Massachusetts state courts). See also *Luk v. Commonwealth*, 421 Mass. 415, 416 & n. 3 (1995) (noting possibility that common law principles may provide greater protection than do federal or state constitutions).

<sup>104</sup> See *Richardson v. United States*, 468 U.S. 317 (1984).

A dismissal is the other type of order terminating a trial short of a verdict. If the dismissal is *without prejudice*, it contemplates reprosecution for the same offense, but unlike a mistrial would require a new complaint or indictment.<sup>104.5</sup> The same jeopardy principles that apply to mistrials apply to dismissals without prejudice. If a dismissal is *with prejudice*, on the other hand, it contemplates no reprosecution for the same offense. Dismissals with prejudice are granted because the judge concludes that some error or defect presents an absolute barrier to convicting the defendant of the charges that he faces, such as prejudicial pretrial delay,<sup>105</sup> prosecutorial misconduct,<sup>106</sup> or evidentiary insufficiency.<sup>107</sup> Unlike mistrials, in the case of a dismissal with prejudice, the prosecutor cannot proceed on the original complaint or indictment unless he can overturn the dismissal order by appeal to a higher court.

While dismissals with prejudice differ from mistrials in their intended effect, the label the judge puts on his ruling does not necessarily determine how double jeopardy will view his action. One must look at the underlying ground for the judge's ruling to determine its character for jeopardy purposes.<sup>108</sup>

The significance of a dismissal for double-jeopardy purposes turns on two factors: the timing of the dismissal and the grounds on which it was based.

1. *Timing of the dismissal*: If the dismissal occurs prior to the start of the trial, before jeopardy has attached, then it raises no jeopardy bar at all. If the dismissal comes after a guilty verdict has already been entered, then the consequence of an appellate court reversal is simply to reinstate the conviction, and no jeopardy interest is sufficiently implicated to prevent a prosecution appeal.<sup>109</sup> If, on the other hand, the dismissal comes during trial, the defendant would face a second trial in the event of a reversal and jeopardy interests play an important role.<sup>110</sup>

2. *Ground for the dismissal*: If the dismissal is based on the judge's evaluation that the evidence is insufficient to convict the defendant, then jeopardy bars a new trial. This guards against the "unacceptably high risk that the Government, with its vast superior resources, might wear down the defendant so that even though innocent, he may be found guilty."<sup>111</sup> The principle holds even if the judge erroneously excluded some of the prosecutor's evidence and then ruled that the prosecution's case had not met the standard necessary to convict.<sup>112</sup> Thus, if a judge dismissed a case after the

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<sup>104.5</sup> See *Commonwealth v. Jenkins*, 431 Mass. 501, 503-504 (2000).

<sup>105</sup> See *United States v. Scott*, 437 U.S. 82 (1978).

<sup>106</sup> See *Commonwealth v. Lam Hue To*, 391 Mass. 301 (1984).

<sup>107</sup> See *United States v. Martin Linen Supply*, 430 U.S. 564 (1977).

<sup>108</sup> See *Gonzalez v. Justices Municipal Court of Boston*, 420 F.3d 5 (2005); *United States v. Alvarez*, 351 F.3d 126 (2003); *Commonwealth v. Hosmer*, 49 Mass. App. Ct. 188, 189-190 (2000); *Commonwealth v. Brusgulis*, 398 Mass. 325 (1986); *Commonwealth v. Babb*, 389 Mass. 275, 281 (1983); *Lee v. United States*, 432 U.S. 23 (1977).

<sup>109</sup> See *Commonwealth v. Magnuson*, 39 Mass. App. Ct. 903 (1995) (rescript); *United States v. Scott*, 437 U.S. 82 (1978); *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Wilson*, 420 U.S. 332 (1975).

<sup>110</sup> Cf. *Commonwealth v. Babb*, 389 Mass. 275 (1983) (judge in bench trial ordered dismissal after hearing all the evidence, jeopardy not implicated after reversal of dismissal order because all that remained was entry of judgment and not retrial).

<sup>111</sup> *United States v. Scott*, 437 U.S. 82 (1978).

<sup>112</sup> See *Sanabria v. United States*, 437 U.S. 54 (1978).

defendant moved for a required finding of not guilty at the close of the Commonwealth's evidence, jeopardy would bar a new trial.<sup>113</sup>

If, however, the dismissal is based on some legal ground other than sufficiency of the evidence, the application of jeopardy will depend on the weight of the defendant's interest in having his original trial proceed to judgment.<sup>114</sup> This is exactly the same issue as in the mistrial situation. The ordinary rule is that if the defendant has requested the dismissal, double jeopardy is not offended by a second prosecution.<sup>115</sup> For example, if the defendant requested in the middle of trial that the judge dismiss an indictment because of prejudicial preindictment delay, there would be no bar to a prosecution appeal because the defendant's voluntary choice to terminate the first trial would allow a second trial consistent with jeopardy principles.<sup>116</sup> However, as in the mistrial area, if the dismissal was based on prosecutorial misconduct, jeopardy will prevent a second trial.<sup>117</sup>

## § 21.5 ACQUITTALS

### § 21.5A. PROTECTION AGAINST PROSECUTION FOR THE SAME OFFENSE AFTER ACQUITTAL

It is a central tenet of the double-jeopardy clause and its Massachusetts counterpart that once a defendant has been acquitted of a crime, she cannot again be placed in jeopardy for the same offense.<sup>118</sup> This protects the defendant's interest in

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<sup>113</sup> See *Costarelli v. Commonwealth*, 374 Mass. 677 (1978).

<sup>114</sup> See, e.g., *Commonwealth v. Aldrich*, 21 Mass. App. Ct. 221 (1985) (where dismissal improperly ordered after guilty plea, remanded for sentencing); *Commonwealth v. Babb*, 389 Mass. 275 (1983) (dismissal based on violation of time limits established in no "fix" traffic ticket law does not deal with elements of offense and therefore jeopardy does not prevent prosecution appeal and defendant's retrial on reversal).

<sup>115</sup> See *Commonwealth v. Brusgulis*, 398 Mass. 325, 333 (1986); *Commonwealth v. Lam Hue To*, 391 Mass. 301, 311 (1984); *United States v. Scott*, 437 U.S. 82, 93 (1978).

<sup>116</sup> See *United States v. Scott*, 437 U.S. 82, 91 (1978).

<sup>117</sup> See *Commonwealth v. Brusgulis*, 398 Mass. 325, 333 (1986).

<sup>118</sup> *Commonwealth v. Lowder*, 432 Mass. 92, 98-101, 104 (2000) (where judge properly exercised inherent power to direct verdict of not guilty after prosecutor's opening statement to jury, retrial barred on ground of double jeopardy); *Commonwealth v. Super*, 431 Mass. 492, 499-500 (2000) (where prosecutor refused to present evidence after jury was empanelled and sworn, defendant's motion for required finding of not guilty was properly granted and his retrial was barred on ground of double jeopardy); *Commonwealth v. LaCaprucia*, 429 Mass. 440, 445-448, 453 (1999) (impossibility of determining, after reversal of convictions, on which of certain identically worded charges defendant was acquitted was double jeopardy bar to retrial); *Commonwealth v. Hyrcenko*, 417 Mass. 309, 313 (1994) (double jeopardy barred retrial of defendant on two rape indictments after reversal of convictions on appeal and after first jury acquitted him on four other identically worded indictments; impossible to determine whether defendant was being retried for rapes of which he had been acquitted).

See *Commonwealth v. Riberio*, 49 Mass. App. Ct. 7, 12-13 (2000) (when it was impossible to determine which specific act was basis of defendant's conviction, judge's dismissal of two identically-worded indictments, though erroneous, could not be vacated under

laying the matter to rest and not having to face the power of the state arrayed against her a second time in the same matter. Society also has an interest in not allowing successive efforts to convict someone who has already been vindicated. Even if subsequent evidence is discovered that was not part of the original case, preventing a second trial encourages the prosecutor to marshal the most persuasive evidence the first time around.

Where the second trial is based on a different statute, the test for defining whether it is the same offense is whether the prosecutor must rely on proof that the defendant engaged in the same conduct at the subsequent trial.<sup>119</sup> Jeopardy will prevent the second trial whether the acquittal in the first trial was for the lesser included offense<sup>120</sup> or for the greater offense.<sup>121</sup> Further, if the evidence was insufficient validly to put the lesser-included offense before the jury, and the defendant was convicted of the lesser offense only, he may not be retried for the lesser offense after the conviction has been reversed on appeal.<sup>121.5</sup> If the second trial charges a violation of the same statute, the test for purposes of jeopardy in this situation, as with convictions, looks to the legislatively defined unit of prosecution. The defendant has the burden of

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*Hrycenko* double jeopardy rule); *Price v. Vincent*, 538 U.S. 634 (2003) (context and substance of the trial judge's comments were not sufficiently final to constitute a judgment of acquittal terminating jeopardy despite having claimed to have granted a directed verdict in favor of defendant); *United States v. Alvarez*, 351 F.3d 126 (2003) (District Court did not base its judgment of acquittal on the insufficiency of the evidence to establish factual guilt and therefore its judgment is not in fact a judgment of acquittal that would bar a new trial under the Double Jeopardy Clause); *Smith v. Massachusetts*, 543 U.S. 462 (2005) (midtrial acquittal by judge on charge attached jeopardy even if later reconsidered by judge in same trial); *Gonzalez v. Justices Municipal Court of Boston*, 420 F.3d 5 (2005) (*Smith* did not alter definition of an acquittal in *Martin Linen* and that a judge labeled what was and should have been a dismissal for want of prosecution as a required finding of not guilty manufactured a pseudo-acquittal and court refused to accord that pseudo-acquittal preclusive effect for double jeopardy purposes); *United States v. Pacheco*, 434 F.3d 106 (2006) (jeopardy had attached when partial directed verdict was entered but did not constitute a complete acquittal, for double jeopardy purposes); *Commonwealth v. Carlino*, 449 Mass. 71 (2007) (jury silence absent affirmative action will not serve as an acquittal for double jeopardy purposes); *Commonwealth v. Zanetti*, 454 Mass. 449 (2009) (conviction on a joint venture theory, reversed on appeal for insufficient evidence, does not bar retrial on theory of principal liability); and *Yeager v. United States*, 129 S.Ct. 2360 (2009) (inability of jury to reach a verdict is a nonevent for purposes of determining issue-preclusive effect of acquittal).

<sup>119</sup> See *supra* § 21.2D(2), discussing *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled in United States v. Dixon*, 509 U.S. 688 (1993); *Commonwealth v. Arriaga*, 44 Mass. App. Ct. 382, 390–92 (1997).

<sup>120</sup> See *Commonwealth v. Mahoney*, 331 Mass. 510 (1954). *But see Adams v. Commonwealth*, 415 Mass. 360, 362–63 (1993) (substance, not form, of first trial judge's action determines whether double jeopardy principle applies; where defendant convicted at bench trial on lesser included offense but convicted of the greater and appealed, trial de novo of the greater charge not barred by lower court's "acquittal" of defendant on the lesser charge in order to avoid duplicity. Whatever its label, test is whether the judge's ruling actually resolved some or all factual elements of the offense charged).

<sup>121</sup> See *Costarelli v. Commonwealth*, 374 Mass. 677 (1978). Further, if the evidence was insufficient validly to put the lesser-included offense before the jury, and the defendant was convicted of the lesser offense only, he may not be retried for the lesser offense after the conviction has been reversed on appeal.

demonstrating that the offenses are the same.<sup>122</sup> The definition of “same offense” is more fully discussed *supra* at § 21.2D.

The trial judge has the inherent power to direct a verdict of acquittal after the prosecutor’s opening statement to the jury, on the standard that, assuming the prosecution will prove everything promised in the opening, its proof will nonetheless fall short of what is necessary to make out a case against the defendant sufficient to withstand a motion for required finding at the close of the Commonwealth’s case.<sup>122.1</sup> However, the judge may not commence a jury-waived trial for the predetermined purpose of entering a finding of not guilty. In such a situation, the Supreme Judicial Court has held that “jeopardy” cannot attach, and there is no double jeopardy bar to retrial of the defendant.<sup>122.2</sup>

### **§ 21.5B. PROTECTION AGAINST REDETERMINATION OF FACTS AFTER ACQUITTAL: COLLATERAL ESTOPPEL<sup>123</sup>**

An acquittal also gives a defendant protection in limited circumstances from having the prosecution relitigate facts that formed a necessary part of the earlier not guilty verdict. Even if the subsequent trial is for a separate offense and therefore can proceed to judgment, jeopardy may prevent the prosecutor from trying to prove certain facts. Double jeopardy, in this regard, provides some type of collateral estoppel protection to defendants who have been acquitted.

Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and full judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”<sup>124</sup> The U.S. Supreme Court has

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<sup>122</sup> See *Commonwealth v. Gonzalez*, 388 Mass. 865, 869 (1983).

<sup>122.1</sup> *Commonwealth v. Lowder*, 432 Mass. 92, 98-101 (2000). The judge must give the prosecutor a full opportunity to correct any omission in the opening, and must carefully consider alternatives to acquittal, including the declaration of a mistrial. *Id.* at 102-103. The judge must state on the record her reasons for making an early decision to order an acquittal. *Id.* at 103. If the judge follows these procedures, her entry of a finding of not guilty following the prosecutor’s opening, no matter how erroneously it may have been made, will be a double jeopardy bar to retrial of the defendant. *Id.* at 104 (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

<sup>122.2</sup> *Commonwealth v. Gonzalez*, 437 Mass. 276, 277, 282-284 (2002) and *Gonzalez v. Justices Municipal Court of Boston*, 420 F.3d 5 (2005) (reaffirming *id.* in light of *Smith v. Massachusetts*, 543 U.S. 462 (2005), and finding that *Smith* did not alter definition of acquittal articulated in *Martin Linen*).

<sup>123</sup> See further discussion of collateral estoppel *infra* § 43.

<sup>124</sup> *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). See *Commonwealth v. Woods*, 414 Mass. 343, 353–54 (1993). Collateral estoppel has been used in state courts to exclude evidence in a conspiracy case that the defendant actively participated in the underlying crime, when he was previously acquitted of that crime. Under MASS. R. CRIM. P. 9(e), a joint trial of both offenses is forbidden. Acquittal of the substantive offense does not preclude trial of the conspiracy but limits proof. For example, the defendant’s acquittal of robbery precludes evidence of active participation in it at the subsequent conspiracy trial, but not evidence that the crime occurred, or that the defendant helped plan it and possessed fruits and instrumentalities related to it. *Commonwealth v. Royce*, 20 Mass. App. Ct. 221, 226–29 (1985). See also *Rossetti v. Curran*, 80 F.3d 1 (1996) (questioning the continued viability of the rule after *Dowling v. United States*, 493 U.S. 342 (1990), discussed *infra*); *Commonwealth v. Pero*, 402 Mass. 476 (1988) (acquittal of possession did not preclude trial on conspiracy to possess).

incorporated this concept into the protection afforded by the double-jeopardy clause in *Ashe v. Swenson*.<sup>125</sup> In that case, the defendant was placed on trial for the robbery of one of the six participants at a poker game. The only issue was the identity of the robber. Ashe was acquitted and subsequently indicted for armed robbery of a different member of the game. Under a conventional jeopardy analysis looking only to the appropriate unit of prosecution, these two indictments charged different offenses. However, the issue that the jury determined in the first trial in favor of the defendant was also a necessary part of the second trial, and the Court held that the double-jeopardy clause prevented the prosecutor from relitigating that fact.

The collateral estoppel effect of double jeopardy's protection, however, is not unlimited. The Supreme Court has held that a prosecutor may introduce evidence of a crime for which the defendant has been acquitted if the conduct the defendant was charged with in the trial where he was found not guilty is relevant as evidence of his guilt in a subsequent case as opposed to being an ultimate fact which is logically necessary to prove one of the elements of the subsequent charge. In *Dowling v. United States*<sup>126</sup> the Court ruled that evidence of the defendant's participation in a burglary for which he was acquitted was admissible in a later trial for an unrelated bank robbery because of the different burdens of proof in the two different contexts. In both cases, the criminal used a distinctive mask and associated with the same confederate, making the identity of the perpetrator of the burglary relevant to the identity of the bank robber. In the defendant's first trial, the jury's verdict meant only that there was a reasonable doubt about whether the defendant committed the burglary. In the bank robbery trial, the admissibility of evidence that the defendant committed the earlier burglary hinged not on the prosecution's being able to show he did it beyond a reasonable doubt, which it would have been foreclosed from doing by the collateral estoppel effect of double jeopardy, but only on whether it was reasonable to conclude that the defendant was the one wearing the mask. Thus, the relevant federal rule is that an acquittal does not bar the government from relitigating an issue previously resolved by an acquittal when it is presented in a different context governed by a standard of proof that is lower than beyond a reasonable doubt.<sup>127</sup> The Supreme Court applied this rule in *United States v.*

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Collateral estoppel has also been used to bar reprosecution of the defendant as the triggerman when he was previously acquitted of possession or use of the murder weapon. *Commonwealth v. Fickett*, 403 Mass. 194, 199 (1988) (may be foreclosed); *Commonwealth v. Mondile*, 403 Mass. 93, 95 n. 2, 98 n. 7 (1988) (theory of individual liability barred).

Akin to collateral estoppel is "direct estoppel," a doctrine relating to the "law of the case" which precludes relitigation of an issue determined by a judge's ruling in prior proceedings on an identical indictment charging the same criminal offense. The doctrine applies where the party against whom the ruling was made did not avail itself of available interlocutory appellate review. *See Commonwealth v. Williams*, 431 Mass. 71, 73–74 & n. 4 (2000).

<sup>125</sup> 397 U.S. 436 (1970); *see also* *Yeager v. United States*, 557 U.S. 110 (2009) (extending the reasoning of *Ashe v. Swenson* to trials involving multiple counts); *United States v. Dixon*, 509 U.S. 688 (1993) (reaffirming doctrine).

<sup>126</sup> 493 U.S. 342 (1990).

<sup>127</sup> *Dowling v. United States*, 493 U.S. 342 (1990); *Commonwealth v. Barboza*, 76 Mass. App. Ct. 241, 244 (2010). *But see* *Commonwealth v. Francis*, 432 Mass. 353, 359–360 n. 5 (2000) (undecided whether Massachusetts Constitution prohibits Commonwealth from introducing evidence against defendant from separate prosecution on unrelated charge of which defendant was acquitted).

*Watts* to permit a sentencing court to consider conduct underlying an acquitted charge, so long as that conduct is proved by a preponderance of evidence.<sup>128</sup> Although the Supreme Judicial Court took a similar approach in the context of probation revocation,<sup>129</sup> it has not abandoned the “well-settled principle . . . that a sentencing judge may not consider charges of which the defendant has been found not guilty.”<sup>130</sup>

In order for collateral estoppel to apply, the same parties must be involved in each proceeding.<sup>130.5</sup> Thus, a defendant cannot foreclose the prosecutor from litigating an issue on the ground that the same issue was decided against the Commonwealth in an earlier trial involving a codefendant.<sup>131</sup>

Additionally, there must be a determination that the original acquittal necessarily involved the determination of an issue of fact that is also presented in the second trial.<sup>132</sup> The defendant has the burden of proof on this issue,<sup>133</sup> and it requires the court to “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.”<sup>134</sup> If the original acquittal rationally could have been based on a claim not relevant to the second trial, then double jeopardy affords no collateral estoppel protection.

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<sup>128</sup> See *United States v. Watts*, 519 U.S. 148 (1997) (despite defendant's acquittal of using firearm in relation to drug offense, sentencing judge could enhance sentence for different offense based on finding by preponderance of evidence that he had possessed the guns). Compare *Commonwealth v. Garcia*, 48 Mass. App. Ct. 201, 204–205 (1999) (when defendant found not guilty of substantive offense, double jeopardy may bar trial for contributing to delinquency of minor by reason of that offense). But see *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Pimental*, 367 F.Supp.2d 143 (D. Mass. 2005) (calling into question the continued vitality of *Watts*).

<sup>129</sup> *Commonwealth v. Holmgren*, 421 Mass. 224 (1995) (owing to different burdens of proof at trial and probation revocation hearings, collateral estoppel does not bar revocation of probation based on evidence of offense of which probationer was acquitted); see also *Krochta v. Commonwealth*, 429 Mass. 711, 714–718 (1999) (because of difference in standards of proof, collateral estoppel does not bar trial of defendant after probation revocation proceedings in which same issue was determined in defendant's favor).

<sup>130</sup> CPCS Training Bulletin, at 31–32 (March 1997) by Andrew Silverman et al., citing *Commonwealth v. Goodwin*, 414 Mass. 88, 92 (1993) (relying on MASS. GEN. LAWS ch. 279, § 4A, which precludes a probation officer from informing a sentencing judge of “any information of prior criminal prosecutions . . . of the defendant wherein the defendant was found not guilty”), *Commonwealth v. LeBlanc*, 370 Mass. 217, 221 (1976) (“a sentencing judge may not undertake to punish a defendant for any conduct other than that for which the defendant stands convicted in the particular case”), and *Commonwealth v. Lewis*, 41 Mass. App. Ct. 910, 911 (1996) (same). “*Holmgren* does not purport to authorize what the S.J.C. barred in *Goodwin* and *LeBlanc*: the imposition of punishment for acquitted conduct.” CPCS Training Bulletin, *supra*, at 32.

<sup>130.5</sup> *Commonwealth v. Stephens*, 451 Mass. 370 (2003) (mutuality required for applicability of collateral estoppel doctrine to suppression orders, as it is for verdicts).

<sup>131</sup> See *Commonwealth v. Medeiros*, 73 Mass. App. Ct. 57 (2009); *Commonwealth v. Cerveney*, 387 Mass. 280, 284 (1983); *Standefer v. United States*, 447 U.S. 10 (1980).

<sup>132</sup> See *Commonwealth v. Lopez*, 383 Mass. 497, 499 (1981).

<sup>133</sup> *Commonwealth v. Lopez*, 383 Mass. 497, 499 (1981).

<sup>134</sup> *Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

Because criminal cases do not use special verdicts, where the jury specifically determines subsidiary issues of fact, it is often impossible to tell exactly what the jury based an acquittal on. This poses something of a strategic problem for defense counsel. The defendant bears the burden of proving that an issue is barred by collateral estoppel because it was actually the basis for a prior acquittal.<sup>135</sup> If future prosecution is a real possibility, it may be in the defendant's interest to restrict the issues she places before the jury in her first trial, so that if she is acquitted she will be able to meet the necessary burden to gain the benefit from the collateral estoppel effect. On the other hand, by restricting the issues in the first trial the defendant may be reducing the chance that she will in fact win an acquittal. To the extent that the defendant can require the prosecutor to join all existing related cases for trial, she can minimize the danger of this dilemma, although countervailing considerations may counsel against joinder in a particular case.<sup>136</sup>

## § 21.6 FAVORABLE DISPOSITIONS THAT ACT AS ACQUITTALS

Certain favorable dispositions have the effect of an acquittal for double-jeopardy purposes. They are (1) a dismissal short of the verdict on grounds that appear to rest on the strength of the evidence, (2) a nolle prosequi after jeopardy has attached, (3) an implied acquittal due to a verdict on a lesser included offense, and (4) a conviction overturned because of insufficient evidence.

### § 21.6A. DISMISSALS AS ACQUITTALS

If a dismissal is entered after jeopardy has attached on the ground that the prosecution's evidence is insufficient as a matter of law to convict the defendant, then regardless of the label the judge attaches to his ruling, jeopardy will treat the matter as an acquittal and protect the defendant accordingly.<sup>137</sup>

### § 21.6B. NOLLE PROSEQUI AS AN ACQUITTAL

The Commonwealth may withdraw a prosecution at any time before pronouncement of sentence by filing a nolle prosequi and a written statement of

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<sup>135</sup> *Dowling v. United States*, 493 U.S. 342, n. 3 (1990).

<sup>136</sup> *See infra* § 22.

<sup>137</sup> *See Costarelli v. Commonwealth*, 374 Mass. 677 (1978); *United States v. Martin Linen Supply*, 430 U.S. 564 (1977); *see also Smith v. Massachusetts*, 543 U.S. 462 (2005) (trial judge's pre-verdict finding that Commonwealth's evidence was legally insufficient to sustain conviction on firearm charge qualified as "judgment of acquittal" for double jeopardy purposes, and therefore the "acquitted" defendant could not be required to defend against the charge even if the evidence was in fact sufficient and the "acquittal" erroneous); *United States v. Alvarez*, 351 F.3d 126 (2003); *Gonzalez v. Justices Municipal Court of Boston*, 420 F.3d 5 (2005).

reasons.<sup>138</sup> If the prosecutor enters a *nolle prosequi* *after* jeopardy has attached, and without the defendant's consent, it acts as an acquittal.<sup>139</sup>

### § 21.6C. IMPLIED ACQUITTALS AT TRIAL

In situations where the jury, or the judge in a bench trial, is given the option of convicting the defendant on a greater charge or on a lesser included offense, a conviction for the latter will operate as an implied acquittal of the former.<sup>140</sup> The practical advantage of the concept of an implied acquittal comes in the circumstance where the defendant is able to overturn his conviction, because the prosecution must then restrict its efforts to trying to convict him again on the lesser included offense.<sup>140.5</sup>

The implied acquittal doctrine applies only where the jury, or the judge in a bench trial, actually considered the greater offense and chose not to return a conviction on it. Thus, it does not offer protection to a defendant who enters a guilty plea to a lesser included offense.<sup>141</sup>

If more than one theory of the defendant's guilt is presented to the jury, and an ensuing conviction is reversed on appeal for evidentiary error, retrial is barred on any theory which the jury at the first trial rejected.<sup>141.5</sup>

### § 21.6D. APPELLATE REVERSALS AS ACQUITTALS

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<sup>138</sup> MASS. R. CRIM. P. 16(a).

<sup>139</sup> MASS. R. CRIM. P. 16(b); *Commonwealth v. Massod*, 350 Mass. 745, 748–50 (1966). A *nol prosequi* entered after the defendant appeals from a bench trial conviction, and before the commencement of a trial *de novo*, does not have this effect. *Department of Revenue v. Sorrentino*, 408 Mass. 340, 343 (1990).

<sup>140</sup> *See Commonwealth v. Berry*, 431 Mass. 326, 336 n. 13 (2000) (defendant charged with murder and convicted of manslaughter was impliedly acquitted of murder); *Commonwealth v. Ortiz*, 47 Mass. App. Ct. 777, 779 (1999) (jury's verdict of guilty of indecent assault and battery on rape indictment was implied acquittal of rape); *See Commonwealth v. Preston*, 393 Mass. 318, 325 n. 8, (1984) (retrial limited to second-degree murder rather than original charge of first degree because defendant impliedly acquitted of first-degree at initial trial); *Price v. Georgia*, 398 U.S. 323 (1970); *Green v. United States*, 355 U.S. 184 (1957).

<sup>140.5</sup> Retrial on the lesser included offense is barred by double jeopardy if the evidence is held to have been insufficient to put that offense before the jury at the defendant's first trial. *Commonwealth v. Ortiz*, 47 Mass. App. Ct. 777, 780 (1999).

<sup>141</sup> For example, when a court imposes a conviction on a guilty plea to second-degree murder, it does not make any decision about whether the prosecution's proof was sufficient to convict the defendant of first-degree murder. If the defendant overturns his guilty plea conviction, double jeopardy would not prevent the government from reinstating the original, more serious, charge. *See Commonwealth v. Therrien*, 359 Mass. 500 (1971).

<sup>141.5</sup> *See Commonwealth v. Crawford*, 429 Mass. 60, 70 n. 18 (1999) (where jury rejected "deliberate premeditation" theory of defendant's guilt of first degree murder, retrial of defendant on that theory barred on double jeopardy grounds). *Yeager v. United States*, 129 S.Ct. 2360 (2009) (inability of jury to reach a verdict is a nonevent for purposes of determining issue-preclusive effect of acquittal); *Commonwealth v. Carlino*, 449 Mass. 71 (2007) (jury silence absent any affirmative action will not serve as an acquittal for double jeopardy purposes); *Commonwealth v. Zanetti*, 454 Mass. 449 (2009) (jury finding of insufficient evidence that defendant participated in a joint venture which resulted in death of another does not preclude retrial of defendant as the principal, the shooter).

When a court on either direct or collateral review reverses a conviction on the ground of insufficient evidence,<sup>142</sup> double jeopardy treats the defendant as if he were acquitted at trial and bars a retrial.<sup>143</sup> As with an acquittal, the state has had one fair opportunity to marshal all the evidence it could of the defendant's guilt. The fact that the determination that the state's effort failed comes on review rather than at trial does not change the double-jeopardy interests at stake.

This principle applies also to cases where a sentence that must be based on proof of specific facts has been reversed for a failure of proof. Thus, for example, the Supreme Court has held that states with capital punishment may not seek to reimpose the death penalty on a defendant who has successfully appealed his sentence on the ground that there was insufficient evidence at the penalty phase of his trial to support the death sentence.<sup>144</sup>

This principle also comes into play in situations where more than one theory of the defendant's guilt, e.g., guilt as principal and guilt as joint venturer, were presented to the jury. If an ensuing conviction is reversed on appeal for evidentiary error, retrial is limited to the theory or theories which the evidence at the first trial supported on the standard required for overcoming a "required finding" motion<sup>144.5</sup> and which the jury accepted as supporting a verdict of guilty.<sup>144.7</sup>

If the defendant succeeds in reversing his conviction because evidence was admitted improperly, the double-jeopardy clause of the federal constitution does not bar a new trial on the ground that the remaining evidence would have been insufficient to

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<sup>142</sup> The due process clause requires a reversal where the appellate court finds that the prosecution's evidence was so weak that no rational person could have concluded that there was proof beyond a reasonable doubt of every element of the crime. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *Commonwealth v. Lattimore*, 378 Mass. 671 (1979).

<sup>143</sup> *See Burks v. United States*, 437 U.S. 1 (1978). *Cf. Tibbs v. Florida*, 457 U.S. 31, 39–47 (1982) (retrial permitted if reversal of verdict against weight of evidence, not sufficiency of evidence).

<sup>144</sup> *See Bullington v. Missouri*, 451 U.S. 430 (1981); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

<sup>144.5</sup> *See Commonwealth v. Berry*, 431 Mass. 326, 336 (2000) (evidence did not support defendant's guilt of manslaughter on theory of use of excessive force in self-defense; after reversal of manslaughter conviction, defendant could be retried only on theory of "heat of passion on reasonable provocation"); *Commonwealth v. Fickett*, 403 Mass. 194, 199 n. 4, 526 N.E.2d 1064 (1988) (stating, in dicta, that "as a matter of common law principle . . . if a defendant demonstrates on appeal that the evidence was insufficient to warrant his conviction of a crime on a particular theory, on retrial for the same crime the prosecutor may rely on other theories justifying his conviction that were supported by the evidence at the first trial but may not rely on a theory that should not have been given to the jury at the first trial.").

<sup>144.7</sup> *See Commonwealth v. Rendon-Alvarez*, 437 Mass. 40, 43-45 (2002) (when jury returned verdict of guilty against defendant as joint venturer, and did not check box on verdict slip indicating his guilt as principal, retrial of defendant as principal, after appellate reversal of conviction, was barred on double jeopardy grounds). *But see Commonwealth v. Santiago*, 425 Mass. 491, 501-502 & n. 5 (1997) (Commonwealth may proceed on retrial on different factual theory of defendant's guilt); *Commonwealth v. Zanetti*, 454 Mass. 449 (2009) (where jury convicted defendant in murder trial on joint venture liability and did not unanimously state on the verdict slip that defendant acted as principal, did not bar retrial of defendant as a principal); *Commonwealth v. Santiago*, 425 Mass. 491, 501-502 & n. 5 (1997) (Commonwealth may proceed on retrial on different factual theory of defendant's guilt).

convict.<sup>145</sup> However, where the exclusion of evidence makes it clear that the Commonwealth could never be able to prove its case, the Supreme Judicial Court has ordered the entry of judgment for the defendant.<sup>146</sup>

Protection against retrial following appellate reversal depends on the defendant's obtaining some judicial determination that the evidence at his original trial was insufficient as a matter of law. Ordinarily, if a defendant has preserved this question for review on appeal, he can present this issue to a reviewing court. However, in the former district court trial de novo system (which still governs pre-1994 arrests or complaints<sup>147</sup>), there was no way for a defendant to obtain review of the sufficiency of the evidence at a first-tier bench trial. The U.S. Supreme Court, however, held that the trial de novo process does not offend the double-jeopardy clause by offering such a defendant a second trial as the sole remedy for a conviction in the first tier.<sup>148</sup> The Court reasoned that the two tiers of the trial de novo system were parts of a continuing process that did not come to an end until the conclusion of the second-tier trial.<sup>149</sup>

## § 21.7 CONVICTIONS AND SENTENCES

The significance of a conviction for double-jeopardy purposes lies in the protection afforded to a defendant against both multiple prosecutions and multiple punishment.<sup>149.5</sup> As to the first of these limitations, unless the defendant successfully appeals his conviction and obtains a reversal on grounds other than insufficient evidence, the government cannot force the defendant to face a second trial on the same charge. The second limitation, on multiple punishment for the same offense, applies whether the state seeks to impose the punishment in two successive trials or as part of a single trial. For example, if the defendant was charged in a single trial with two counts which constitute the same offense,<sup>150</sup> he may not be sentenced on both.<sup>151</sup>

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<sup>145</sup> See *Commonwealth v. Campbell*, 60 Mass. App. Ct. 215 (2003); *Commonwealth v. DiBenedetto*, 414 Mass. 37, 45–46 (1993) (citing *Lockhart v. Nelson*, 488 U.S. 33 (1988)); *Commonwealth v. Taylor*, 383 Mass. 272 (1981).

<sup>146</sup> See *Commonwealth v. Funches*, 379 Mass. 283 (1979); *Commonwealth v. Silva*, 366 Mass. 402 (1974).

<sup>147</sup> For discussion of changes in the de novo system for district court cases originating after January 1, 1994, see *supra* ch. 3.

<sup>148</sup> See *Justices of the Boston Mun. Court v. Lydon*, 466 U.S. 294 (1984). See also *Commonwealth v. Woods*, 414 Mass. 343, 351–53 (1993) (acquittal at first tier bars second-tier trial for same offense).

<sup>149</sup> See also *Ariel A. v. Commonwealth*, 420 Mass. 281, 288. (1995) (endorsing reasoning of *Lydon* in context of juvenile court two-tier system).

<sup>149.5</sup> See *Commonwealth v. Connolly*, 49 Mass. App. Ct. 424, 427–428 (2000) (where defendant may have been erroneously convicted of both greater and lesser offenses on basis of same act, and both convictions are reversed on appeal, retrial of defendant on greater charge is barred on double jeopardy grounds).

<sup>150</sup> The definition of “same offense” is discussed *supra* in § 21.2D. Regarding a related area, the defendant may not be convicted of two crimes that are inconsistent, such as larceny and receiving stolen goods. See *infra* § 36.5D.

<sup>151</sup> Ordinarily the defendant must wait until verdict, and if convicted of both is entitled to dismissal of the less serious charge. Placing the less serious conviction “on file” will not suffice. See *Commonwealth v. Owens*, 414 Mass. 595, 608 (1993) (after conviction of both

Apart from its restrictions on multiple punishment, jeopardy provides only limited protection to the defendant's interest in the finality of the sentence.<sup>151.5</sup> The trial judge may increase a sentence the defendant has commenced serving within the sixty days allowed by MASS. R. CRIM. P. 29 for revision and revocation of sentence.<sup>152</sup> Moreover, double jeopardy allows a prosecutor to appeal a defendant's sentence and seek to have it increased.<sup>153</sup> An increased sentence at retrial following reversal is governed not by double-jeopardy principles but by the due process clause, which prohibits vindictive resentencings.<sup>154</sup> However, if the defendant has fully satisfied a sentence that the court could lawfully impose, jeopardy prevents the state from seeking additional punishment. Thus, for example, where a defendant is convicted of a crime that provides for a punishment of a fine *or* a jail sentence, receives a sentence of a fine *and* a jail sentence, and pays the fine in full, jeopardy bars vacating the sentence and imposing the jail portion instead.<sup>155</sup> Where the determination of the sentence requires a trial-like proceeding, as with capital cases, jeopardy does protect the defendant's interest in finality.<sup>156</sup>

## § 21.8 EXCEPTIONS TO THE JEOPARDY BAR

Ordinarily, jeopardy will protect a defendant from having to undergo separate trials for both a lesser included offense and its related greater offense. Thus, no matter whether the defendant is convicted or acquitted at his first trial, or whether he initially faced the lesser included offense or the greater offense, jeopardy will protect the defendant against the prospect of the second trial.

There are, however, three exceptions to this general rule. The three deal with situations where either the defendant was never in jeopardy of a conviction on the

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possession with intent to distribute heroin and trafficking in heroin, “filed” conviction for possession vacated and indictment dismissed). *See also* Commonwealth v. Sumner, 18 Mass. App. Ct. 349, 353 (1984); Commonwealth v. Berrios, 71 Mass. App. Ct. 750 (2008). *But see* Commonwealth v. Jones, 382 Mass. 387, 395 n. 10 (1981) (“if necessary to protect the substantial rights of the defendant,” the Commonwealth would be required before trial to choose on which charge it wished to proceed.) See discussion of duplicity at *supra* § 20.4D.

<sup>151.5</sup> *See* Commonwealth v. Jarvis, 68 Mass. App. Ct. 538 (2007) (having found defendant guilty of a subsequent offense, subjecting defendant to a sentence enhancement after original sentence was imposed for the primary offense did not subject defendant to double jeopardy although procedurally improper).

<sup>152</sup> Commonwealth v. Layne, 25 Mass. App. Ct. 1 (1987); Aldoupolis v. Commonwealth, 386 Mass. 260 (1982).

<sup>153</sup> *See* United States v. DiFrancesco, 449 U.S. 117 (1980); *see also* Gavin v. Commonwealth, 367 Mass. 331 (1975) (superior court appellate division may increase sentence).

<sup>154</sup> Mann v. Commonwealth, 359 Mass. 661 (1971); Blackledge v. Perry, 417 U.S. 21 (1974); Colten v. Kentucky, 407 U.S. 104 (1972); North Carolina v. Pearce, 395 U.S. 711 (1969). *See infra* § 24 (vindictive treatment).

<sup>155</sup> *See* Ex parte Lange, 85 U.S. 163 (1873).

<sup>156</sup> *See* Bullington v. Missouri, 451 U.S. 430 (1981); Sattazahn v. Pennsylvania, 537 U.S. 101 (2003); Bobby v. Bies, 129 S. Ct. 2145 (2009).

greater offense in the first place, or where the defendant is responsible for the separation of the prosecutions.

### § 21.8A. LACK OF JURISDICTION

There was until recently a rule in the Commonwealth that where a defendant relies on the previous adjudication of a lesser included offense, jeopardy will not prevent a subsequent trial of the greater offense if the first trial took place in a court of limited jurisdiction that did not have the power to render a verdict on the greater charge.<sup>157</sup> The doctrinal basis for this concept, however, was placed in doubt by two U.S. Supreme Court cases,<sup>158</sup> and in 1989 the Massachusetts Supreme Judicial Court, in *Commonwealth v. Norman*,<sup>159</sup> held that when a defendant is convicted of a lesser included offense in a district court he may not thereafter be placed on trial for a greater offense in superior court, even if the greater offense was beyond the jurisdiction of the district court.<sup>160</sup> From the defendant's point of view, the court reasoned, the ordeal of consecutive trials and cumulative punishment was just as oppressive whether or not the first court lacked jurisdiction over the greater offense.<sup>161</sup>

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<sup>157</sup> See, e.g., *Commonwealth v. Nazzaro*, 7 Mass. App. Ct. 859 (1979); *Commonwealth v. Lovett*, 374 Mass. 394, 397–98 (1978) (“[W]here a defendant has been convicted or acquitted of a minor statutory offense in an inferior court, he may be prosecuted for a higher crime of which the inferior court lacks jurisdiction”); *Commonwealth v. Clemmons*, 370 Mass. 288, 291 (1976); *Kuklis v. Commonwealth*, 361 Mass. 302 307 n. 3 (1972); *Commonwealth v. Vanetian*, 350 Mass. 491, 493–94 (1966); *Commonwealth v. Mahoney*, 331 Mass. 510, 514 (1954); *Commonwealth v. Jones* 288 Mass. 150, 152 (1934). Cf. *Commonwealth v. Gonzalez*, 388 Mass. 865, 870 n. 9 (1983) (the court noted but did not address a contention that *Brown v. Ohio* abrogated the well-established rule the jeopardy does not extend to an offense beyond a court's jurisdiction).

<sup>158</sup> The first, *Waller v. Florida*, 397 U.S. 387 (1970), established that double jeopardy prevented successive prosecutions of a defendant first in a municipal court and then in a state court. The fact that different levels of the same government were involved did not remove the limitation double jeopardy places on the power of the state to bring a defendant to trial. The second case, *Brown v. Ohio*, 432 U.S. 161 (1977), held that whatever the sequence in which the prosecutions are brought, the double-jeopardy clause forbids successive prosecution and cumulative punishment for a greater and lesser included offense.

<sup>159</sup> 406 Mass. 1001 (1989) (*affirming and adopting the reasoning of* 27 Mass. App. Ct. 82 (1989)).

<sup>160</sup> In *Norman*, the defendant was first convicted of larceny of a motor vehicle in district court, and then indicted for armed robbery of the same vehicle in superior court, the latter offense being beyond the district court's jurisdiction.

<sup>161</sup> *But see* *Commonwealth v. Gosselin*, 365 Mass. 116 (1974). In *Gosselin*, the defendant was convicted on an indictment charging her with escape from a penal institution. On appeal, the conviction was reversed for lack of sufficient evidence but the court noted that double jeopardy would not prevent retrying the defendant on a charge of attempted escape. The original indictment failed to allege an essential element of attempt, an overt act taken in contemplation of the completed offense. The court held that if an indictment alleging the greater offense was not sufficient to support a conviction for the lesser included offense, the prosecution is free to charge the defendant with the latter even if the first trial ends in an acquittal. The reasoning behind this result, that because the defendant was not placed in jeopardy on the attempt charge, she could be tried for attempted escape (*Gosselin*, 365 Mass. at 122), is inconsistent with the decision in *Norman*.

It is not clear that the result the Supreme Judicial Court reached in *Norman* would be accepted by the U.S. Supreme Court. In 1985 the Court affirmed in an evenly divided decision a New Mexico decision that a conviction of a lesser included offense in a court of limited jurisdiction did not prevent the trial of the defendant for the greater offense.<sup>162</sup> Of course, the Supreme Court's ultimate view of this issue does not necessarily foreclose the state courts from reaching the same result as in *Norman* on the ground of the Massachusetts common law of jeopardy.

#### **§ 21.8B. NONEXISTENCE OF ESSENTIAL ELEMENT**

Ordinarily, after a trial on a lesser included offense the prosecution is not permitted to bring the defendant before the court a second time on the greater offense simply because it has discovered new evidence that cast him in a less favorable light than was the case originally. However, when an essential element of the greater offense does not come into existence until after the defendant has been convicted of the lesser included offense, the prosecution may still place him on trial.

The classic example is illustrated by the Supreme Court case of *Diaz v. United States*.<sup>163</sup> There, the defendant was convicted of assault and battery and only after the conclusion of the trial did the victim die as a consequence. Although the defendant had already been convicted of the lesser included offense, the Court held that jeopardy did not prevent the government from trying him for murder.

#### **§ 21.8C. DEFENSE ACTION: APPEALS AND REQUESTS FOR SEPARATE TRIALS**

Where the need for multiple trials is brought about by action on the part of the defendant, jeopardy will not prevent the retrial.

The first and most common example of this principle is a reversal on appeal for grounds other than insufficient evidence. The U.S. Supreme Court held in 1896 that retrials after appellate reversal did not violate the double-jeopardy clause.<sup>164</sup> This principle does not apply in the special case of a conviction reversed on the ground that the evidence the prosecutor introduced at trial was insufficient as a matter of law to establish the guilt of the defendant. Double jeopardy treats such a ruling as the equivalent of an acquittal at trial, and further proceedings are barred.<sup>165</sup>

The second example of the principle arises as a consequence of a defendant's request for a severance. If the government tried to join two offenses for trial and the defendant's request for a severance brought about the necessity for one trial to follow another, jeopardy will not prevent the trial of lesser included and greater offenses serially.<sup>166</sup>

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<sup>162</sup> See *Fugate v. New Mexico*, 470 U.S. 904 (1985).

<sup>163</sup> 223 U.S. 442 (1912).

<sup>164</sup> See *Ball v. United States*, 163 U.S. 662 (1896).

<sup>165</sup> See *Burks v. United States*, 437 U.S. 1 (1978).

<sup>166</sup> *Jeffers v. United States*, 432 U.S. 137 (1977). The Court held that the appropriate way to analyze this situation is in terms of the defendant's responsibility for creating the serial trials, and not by casting the severance motion as a waiver of the defendant's rights under the double-jeopardy clause. Without the need for finding a knowing, intelligent, and voluntary waiver, the jeopardy problem is easily overcome. *Id.*; see also *Commonwealth v. D'Amour*,

## § 21.9 PROCEDURE FOR RAISING DOUBLE-JEOPARDY CLAIMS

### § 21.9A. RAISING THE ISSUE IN THE TRIAL COURT<sup>167</sup>

A defendant should raise a double-jeopardy claim in the trial court by filing a pretrial motion to dismiss the charges against him.<sup>167.5</sup> MASS. R. CRIM. P. 13 requires objections to a prosecution that can be determined without a trial of the general issue be raised by a pretrial motion. Ordinarily, the failure to comply with a procedural requirement like this one results in a forfeiture of the right to raise the issue at a subsequent stage of the proceedings. In *Commonwealth v. Spear*, the Appeals Court applied this rule to bar a defendant, who failed to assert the defense of double jeopardy before his second trial, from raising the defense for the first time on appeal.<sup>168</sup> This holding may be in tension with the Supreme Judicial Court's ruling in *Commonwealth v. Norman*<sup>169</sup> which appeared to hold that double jeopardy is the sort of claim that can be raised at any stage of the proceeding. In *Norman*, the Supreme Judicial Court considered the appeal of a defendant convicted in a superior court who claimed his conviction violated double jeopardy because he had previously been convicted of the same crime in a district court. In reasoning adopted by the Supreme Judicial Court, the Appeals Court in *Norman* noted that, “[w]hen a case involves successive prosecution in separate courts, the prohibition against double jeopardy touches on ‘the very power of the State to bring the defendant into court to answer the charge’ and therefore is very much like a claim based on lack of jurisdiction — which has never been subject to procedural waiver requirements.<sup>170</sup> In *Spear* the Appeals Court confined the jurisdictional theory to cases, like *Norman*, involving successive prosecutions in different courts.<sup>171</sup> By contrast, the defendant in *Spear* was both tried and retried in the same court. Pending future clarification by the Supreme Judicial Court, therefore,

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428 Mass. 725, 749 (1999) (defendant protected against subsequent trial for lesser offense unless defendant expressly requested separate trials on greater and lesser offenses).

<sup>167</sup> See further discussion *supra* at § 15 (pretrial motions generally).

<sup>167.5</sup> *Commonwealth v. Green*, 52 Mass. App. Ct. 98, 102 (2001) (failure to raise double jeopardy claim at time of trial is waiver of it).

<sup>168</sup> *Commonwealth v. Spear*, 43 Mass. App. Ct. 583, 586, 587 & n. 5 (1997) (even absent knowing and intelligent waiver by pro se defendant, “the constitutional immunity from double jeopardy is waived if not affirmatively pleaded by a defendant prior to a second trial”). However, the *Spear* court expressly avoided ruling that defendant would be barred from challenging future violations of double jeopardy in the event of a retrial. *Spear*, 43 Mass. App. Ct. at 587, n. 6.

<sup>169</sup> 406 Mass. 1001, *affirming and adopting the reasoning of* 27 Mass. App. Ct. 82 (1989).

<sup>170</sup> *Commonwealth v. Norman*, 27 Mass. App. Ct. 82, 87–88 (1989) (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1975)).

<sup>171</sup> *Commonwealth v. Spear*, 43 Mass. App. Ct. 583, 586 (1997) (defendant tried in superior court where acquitted on some charges and mistrial declared on others; retrial on latter charges in same court).

*Norman* must be regarded as a narrow exception to the rule that the defendant's failure to assert a double-jeopardy defense before trial will result in loss of the right.

### § 21.9B. RAISING THE ISSUE ON REVIEW

If the trial judge grants a motion to dismiss based on a double-jeopardy claim, the prosecution may appeal pursuant to MASS. R. CRIM. P. 15. If the judge denies the motion, the defendant has no similar right to appeal. However, because one of the interests that jeopardy protects is the defendant's right to be free from even having to stand trial a second time, the value of the right would be lost if there were no means of pretrial review.<sup>171.5</sup> The Supreme Judicial Court has therefore routinely accepted petitions under MASS. GEN. LAWS ch. 211, § 3, to exercise its powers of superintendence and review denials of motions to dismiss based on double-jeopardy claims.<sup>172</sup>

If the Supreme Judicial Court denies relief under MASS. GEN. LAWS ch. 211, § 3, the defendant may petition the U.S. Supreme Court for certiorari to review the decision, because the claim would be based on a federal ground and the Court has recognized that double-jeopardy presents the type of issue that the Constitution requires to be reviewed on an interlocutory basis.<sup>173</sup>

Whether or not the defendant seeks certiorari, he can obtain federal review of his double-jeopardy claim prior to the trial in a Massachusetts court by filing a petition in federal district court for a writ of habeas corpus. Because jeopardy implicates the defendant's right not to have to face a trial at all, a federal court must entertain a habeas petition prior to the state trial as long as the defendant is in custody and he has exhausted his state remedies.<sup>174</sup> The custody requirement is met if the defendant is either released on bail or his own recognizance or is being held awaiting trial.<sup>175</sup> The exhaustion requirement is met by the defendant's having petitioned the Supreme Judicial Court for relief. Counsel must be careful; however, that the federal issue that is the basis for the habeas petition was actually presented to the state courts. A defendant convicted twice for the same offense is entitled to relief despite failing to preserve his appellate rights, even if he did not raise the issue on appeal.<sup>176</sup>

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<sup>171.5</sup> In *Commonwealth v. Sim*, 39 Mass. App. Ct. 212, 213 n. 1 (1995), the Appeals Court noted that no argument had been raised there “that failure to pursue that [interlocutory] procedure constitutes waiver of the sufficiency of the evidence issue in the first trial.”

<sup>172</sup> See, e.g., *Corson v. Commonwealth*, 428 Mass. 193, 196 & n. 4 (1998) (summarizing procedure); *Cepulonis v. Commonwealth*, 426 Mass. 1010 (1998) (rescript); *Carrasquillo v. Commonwealth*, 422 Mass. 1014 (1996) (when single justice denies petition under MASS. GEN. LAWS ch. 211, § 3, and does not report the ruling to the full bench, appeal lies under S.J.C. Rule 2:21) (rescript); *Thames v. Commonwealth*, 365 Mass. 477 (1974). Petitions under MASS. GEN. LAWS ch. 211, § 3 are discussed *infra* at § 45.4.

<sup>173</sup> See *Abney v. United States*, 431 U.S. 651 (1977).

<sup>174</sup> See *Justices of the Boston Mun. Court v. Lydon*, 466 U.S. 294 (1984); *Clarke v. Spencer*, 585 F.Supp.2d 196 (2008).

<sup>175</sup> *Justices of the Boston Mun. Court v. Lydon*, 466 U.S. 294 (1984).

<sup>176</sup> *Commonwealth v. Gagnon*, 37 Mass. App. Ct. 626 (1994) (*modified on other grounds* 419 Mass. 1009 (1995)) (duplicative conviction and concurrent sentence vacated by way of motion for new trial, more than 10 years after conviction).