

# Double Jeopardy

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Double Jeopardy, or “Jeopardy” as it is sometimes referred, means the prosecution of a person twice for the same offense.

*-Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed.*

If Double Jeopardy attaches, the person may not be retried for the same offense.

The Double Jeopardy clause in the Fifth Amendment of the Constitution states: “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”

The underlying idea is that the State with all its resources and power should not be alleged to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*-Green v. United States, 355 U.S. 184 (1957).*

## When does, Double Jeopardy attach?

1. Jury Trial: When the jury is sworn, jeopardy attaches.

*-Crist v. Bretz, 437 U.S. 28 (1978).*

2. Bench Trial: When the first witness is sworn.

## How can we determine whether two crimes from the same act are the “same offense?”

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*-Blockburger v. United States, 284 U.S. 299 (1932).*

## What are the examples of the “same offense?”

1. Joyriding and auto theft (Retrial for “greater offense”)

Joyriding is the lesser included offense of auto theft, the greater offense. The greater offense is therefore by definition the “same” for purposes of double jeopardy as any lesser offense included in it. The fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.

*-Brown v. Ohio, 432 U.S. 161 (1977).*



## 2. Felony murder and robbery with firearms (Retrial for “lesser included offense”)

The Double Jeopardy clause bars prosecution for the lesser crime, robbery with firearms, after conviction of the greater crime, felony murder.

*-Harris v. Oklahoma, 433 U.S. 682 (1977).*

### What are the examples of the “Distinct Offense”, which is not the same offense?

#### 1. Selling drugs

While selling drugs without their original packaging and selling drugs without a written order Two distinct offenses are created from one sale. Each of offenses created requires proof of a different element.

*-Blockburger v. United States, 284 U.S. 299 (1932).*

#### 2. Murder of multiple victims

Defendant killed his wife and three children. Each of the murders, although apparently taking place at the same time, constituted a separate crime.

*-Ciucci v. Illinois, 356 U.S. 571 (1958).*

#### 3. Drug-making activity and conspiracy

A conspiracy to commit a crime is a separate offense from the crime itself.

*-United States v. Felix, 503 U.S. 378 (1992).*

#### 4. Battery and murder

Defendant was convicted of assault and battery. A few days later, the victim died and defendant was convicted of murder. Murder charged against defendant and assault and battery in the first trial were distinct offenses because, at the time of the trial for assault and battery, the death had not ensued.

*-Diaz v. United States, 223 U.S. 442 (1912).*

### What are the exceptions permitting retrial?

#### 1. Hung jury

When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. Consequently, the Double Jeopardy clause does not stand in the way of a second trial on the same offenses.

*-Blueford v. Arkansas, 132 S. Ct. 2044 (2012).*

#### 2. Mistrial for Manifest Necessity

When there is a manifest necessity to discontinue the first trial, the Double Jeopardy clause did not bar retrial.

*-Illinois v. Somerville, 410 U.S. 458 (1973).*

Where the defendant himself seeks to have, the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred.

*-United States v. Scott, 437 U.S. 82 (1978).*





### 3. Retrial after successful appeal by defendant

A defendant can be retried to correct “trial error.”

*-Burks v. United States, 437 U.S. 1 (1978).*

#### Do “Cumulative Punishments” violate the Double Jeopardy clause?

Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the “same” conduct under *Blockburger*, a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishments under such statutes in a single trial.

Cumulative punishments can be imposed on defendant for both the first-degree robbery and armed criminal action.

*-Missouri v. Hunter, 459 U.S. 359 (1983).*

#### Is the Double Jeopardy clause violated when a person is indicted for a crime to “enhance the sentence” for another crime?

In 1992, another grand jury returned a two-count indictment against Witte and Pokorny for conspiring and attempting to import cocaine in 1990. Witte moved to dismiss, arguing that he had already been punished for the cocaine offenses in 1990 because the cocaine involved in the 1990 transactions had been considered as “relevant conduct” at sentencing for the 1991 marijuana offense.

Because consideration of relevant conduct in determining a defendant’s sentence within the legislatively authorized punishment range does not constitute punishment for that conduct, the instant prosecution does not violate the Double Jeopardy clause’s prohibition against the imposition of multiple punishments for the same offense.

*-Witte v. United States, 515 U.S. 389 (1995).*

#### Does the Double Jeopardy clause bar the subsequent “civil” actions?

The Double Jeopardy clause bars only the subsequent criminal prosecutions, not the subsequent civil actions. Thus, after the criminal trial, the state can bring a civil action against the defendant.

#### May the defendant be tried for the same conduct by both “a federal and a state court” or by “two states?” (Separate Sovereignities Doctrine)

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment.

A defendant may be tried for the same conduct by both a federal and a state court. “Double Jeopardy” protections were not violated.

*-United States v. Lanza, 260 U.S. 377 (1922).*





### **For Example:**

Petitioner hired two men to kill his wife. The two men kidnaped the wife. The car, with the wife's body inside, was later found in Georgia. The cause of death was a gunshot wound in the head. The estimated time of death and the distance from the couple's residence to the spot where the wife's body was found are consistent with the theory that the murder took place in Georgia. On February 10, 1982, petitioner pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment. On May 5, 1982, the grand jury of Russell County, Alabama, returned an indictment against petitioner for the capital offense of murder during a kidnaping.

A defendant may be tried for the same conduct by two states. It does not violate the Double Jeopardy clause.

*-Heath v. Alabama, 474 U.S. 82 (1985).*

### **When are “the appeals by prosecution” allowed?**

Where the defendant himself seeks to have, the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred.

*-United States v. Scott, 437 U.S. 82 (1978).*

When a judge rules in favor of the defendant after a verdict of guilty by jury, the Government may appeal from that ruling without violating the Double Jeopardy clause.

*-United States v. Wilson, 420 U.S. 332 (1975).*

### **What is the “Collateral Estoppel” case?**

“Collateral Estoppel” means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. As all ultimate issues were decided at the first trial where defendant was acquitted, the subsequent murder and assault charges against defendant were barred by collateral estoppel.

*-Harris v. Washington, 404 U.S. 55 (1971).*

*Credit to Kaye Klapper*

