

A defendant was charged with manslaughter. At the preliminary hearing, the magistrate dismissed the charge on the ground that the evidence was insufficient. The prosecutor then brought the case before a grand jury. After hearing the evidence presented by the prosecutor, the grand jury refused to return an indictment.

The prosecutor waited a few months until a new grand jury had been impaneled and brought the case before that grand jury, which returned an indictment charging the defendant with manslaughter. The defendant has moved to dismiss the indictment on double jeopardy grounds.

Should the motion be granted?

- A. No, because jeopardy had not attached before either grand jury was impaneled.
- B. No, because there has been no conviction or acquittal.
- C. Yes, because any proceeding after the preliminary hearing would violate double jeopardy.
- D. Yes, because bringing the case before the second grand jury violated the double jeopardy clause.

Explanation:

A court should dismiss an indictment—a written statement by a grand jury that formally charges a person with a criminal offense—that violates the Fifth Amendment double jeopardy clause. **Double jeopardy** prohibits (1) multiple punishments for the same offense and (2) a second prosecution for the same offense following a conviction or an acquittal. This prohibition only applies after **jeopardy attaches**—ie:

in a jury trial when the **jury is impaneled and sworn** *or*

in a bench trial when the **judge begins to hear evidence** (eg, when the first witness is sworn).

Jeopardy does not attach at preliminary hearings or grand jury proceedings because a defendant is not yet on trial before a trier of fact (judge or jury). Therefore, the magistrate's dismissal of the defendant's manslaughter charge at a preliminary hearing and the grand jury's refusal to return an indictment did not trigger double jeopardy protections. As a result, the prosecution did not violate double jeopardy when it presented the same manslaughter case to a new grand jury that returned an indictment. The court should therefore deny the defendant's motion to dismiss the indictment (**Choices C & D**).

(Choice B) Double jeopardy protections attach as soon as a jury has been sworn or a judge has heard evidence—not when the defendant has been convicted or acquitted. Therefore, had jeopardy attached in this case, the indictment could have been dismissed on double jeopardy grounds even though the defendant had not been convicted or acquitted of manslaughter.

Educational objective:

The Fifth Amendment double jeopardy protections attach when a jury has been impaneled and sworn OR a judge has begun to hear evidence—not at preliminary hearings or grand jury proceedings.

References

U.S. Const. amend. V (prohibition against double jeopardy).

Serfass v. United States, 420 U.S. 377, 388 (1975) (explaining when jeopardy attaches).

Copyright © 2014 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

