

A defendant was charged with attempted murder. At the preliminary hearing, the presiding judge heard the testimony of four prosecution witnesses and found that the prosecution had failed to establish probable cause that the defendant had committed any offense. Accordingly, she dismissed the charge.

The prosecutor then called the same four witnesses before a grand jury. The grand jury indicted the same defendant for attempted murder.

The defendant has moved to quash the indictment on the ground of double jeopardy.

How should the court proceed?

- A. Deny the motion, because the defendant has not yet been in jeopardy of conviction on the attempted murder charge.
- B. Deny the motion, because the protection of the double jeopardy clause does not come into play until there has been a conviction or an acquittal.
- C. Grant the motion, because the dismissal of the first charge on the merits, whether correct or incorrect, bars any further prosecution.
- D. Grant the motion, unless the prosecution has evidence that was not presented in the first case.

Explanation:

An indictment should be quashed (ie, dismissed) if it violates the Fifth Amendment double jeopardy clause. **Double jeopardy** protects criminal defendants from undue harassment and expense by forbidding multiple punishments and a second prosecution for the same offense. This protection **attaches** once the defendant is in jeopardy of a conviction—ie:

when the **jury is impaneled and sworn** (jury trial) *or*

when the **judge begins to hear evidence** (bench trial).

But if a criminal charge is **dismissed before** the defendant is put on trial before a trier of fact (judge or jury), then jeopardy does **not attach** and the prosecution can later prosecute the offense.

Here, the defendant was charged with attempted murder. But the charge was dismissed at the preliminary hearing—a *pretrial* hearing where the judge determines if there is probable cause to believe that the defendant committed the charged offense and should stand trial—so double jeopardy protections did not attach. The prosecution was therefore free to pursue a grand jury indictment for the same offense, and the court should deny the motion to quash that indictment.

(Choice B) Double jeopardy protections are triggered as soon as the defendant is put on trial—*before* a conviction or acquittal. Therefore, an indictment can be quashed on double jeopardy grounds even though the defendant has not been convicted or acquitted of the offense.

(Choice C) The dismissal of the first charge on the merits for lack of probable cause, whether correct or incorrect, does *not* bar further prosecution for this offense since jeopardy has not yet attached.

(Choice D) Jeopardy does not attach at preliminary hearings, so the prosecution can pursue charges for the same offense and use the same evidence to do so (eg, the prosecutor can use the same witnesses at the preliminary hearing and the grand jury proceeding)—new evidence is not required. But once jeopardy attaches, the prosecutor cannot pursue a second prosecution even if he/she has evidence that was not presented in the first case.

Educational objective:

Fifth Amendment double jeopardy protections attach when a jury is impaneled and sworn (jury trial) OR a judge begins to hear evidence (bench trial). But if a criminal charge is dismissed before trial, jeopardy does not attach and the prosecution can later prosecute the offense.

References

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

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

Double jeopardy (second prosecution for same offense)

