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# THE ARBITRATOR AND THE DOUBLE JEOPARDY CLAUSE: DOES THE POSTMAN ALWAYS RING TWICE?

*United States v. Reed*<sup>1</sup>

## I. INTRODUCTION

When an arbitrator's decision is adverse to one party, does the double jeopardy clause<sup>2</sup> prohibit further pursuit of the claim by the successful party? With the rising emphasis being placed on arbitration clauses in collective bargaining agreements, it was only a matter of time before this question arose in the workplace. In *United States v. Reed*<sup>3</sup> the Eleventh Circuit established the test for determining if an arbitrator's decision invokes the double jeopardy clause.

## II. FACTS AND HOLDING

This case arises out of a petty theft incident involving Ulysses Reed, Jr., a letter carrier for the United States Postal Service.<sup>4</sup> The postal service dismissed Reed for misappropriating \$364.58, which he received from postal customers for cash on delivery parcels.<sup>5</sup> Pursuant to the collective bargaining agreement between the National Association of Letter Carriers and the Postal Service, Reed filed a grievance challenging his dismissal and initiated binding arbitration to resolve the dispute.<sup>6</sup> The arbitrator found that, while Reed did not follow proper accounting procedures, evidence of misappropriation was weak and ordered him reinstated without loss of seniority.<sup>7</sup> However, the arbitrator mandated that he be placed on a thirty-day "disciplinary suspension."<sup>8</sup>

Charges were later brought against Reed in a criminal indictment.<sup>9</sup> The indictment cited three violations of title 18 U.S.C. section 1711, which prohibits

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1. 937 F.2d 575 (11th Cir. 1991).

2. U.S. CONST. amend. V.

3. *Reed*, 937 F.2d at 575.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 576.

8. *Id.*

9. *Id.*

the misappropriation of postal funds.<sup>10</sup> Reed moved to dismiss the indictment on grounds that any criminal charges stemming from the incident would violate the double jeopardy prohibition of the fifth amendment of the United States Constitution, since he had already received punishment in the form disciplinary suspension.<sup>11</sup>

The government conceded that the charges were derived from the same incident, but maintained that the arbitrator's decision did not rise to the level of punishment needed to invoke the double jeopardy prohibition.<sup>12</sup> The United States District Court for the Southern District of Alabama denied Reed's motion to dismiss and he appealed.<sup>13</sup>

On appeal, the Eleventh Circuit Court of Appeals held that an arbitrator's decision and any other civil sanction only implicates the double jeopardy clause if they "cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, then the sanction constitutes punishment."<sup>14</sup> The court of appeals determined that the arbitrator's decision in the instant case was a remedial measure designed to vindicate the rights of the Postal Service under the collective bargaining agreement and therefore could not be classified as punishment.<sup>15</sup> As a result, the court held that the district court properly denied Reed's motion to dismiss the indictment.<sup>16</sup>

### III. LEGAL BACKGROUND

#### A. Double Jeopardy

The concept of protection against double jeopardy is rooted in ancient law.<sup>17</sup> The Greeks and the Romans knew of the concept, even if they did not abide by it fully.<sup>18</sup> The canon law which developed near the close of the Roman Empire also contained a double jeopardy prohibition.<sup>19</sup> This was based on St. Jerome's reading of the Old Testament, which reads "[t]here shall not rise up a double

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10. *Id.*; 18 U.S.C. § 1711 (1988) (outlines the crime of misappropriation of postal funds). The statute provides for punishment in a fine equal to the amount or value of the money or property embezzled or imprisonment for not more than ten years, or both. *Id.* However, if the amount of value of the money or property is less than \$100, the punishment shall not exceed \$1,000 in fines or exceed one year in prison, but include a combination of the two penalties. *Id.*

11. *Reed*, 937 F.2d at 576.

12. *Id.*

13. *Id.*

14. *Id.* at 577-78.

15. *Id.* at 578.

16. *Id.*

17. J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 3 (1969).

18. *Id.*

19. *Id.*

affliction."<sup>20</sup> It appears that this principle was based on a belief that God does not punish twice for the same transgression and that man should do likewise.<sup>21</sup>

When looking at English history, the concept of protection against double jeopardy does not have a distinct and traceable lineage.<sup>22</sup> There is no mention of it in the Magna Carta or any English statute before the adoption of the United States Constitution.<sup>23</sup> However, both Coke and Blackstone, the two preeminent English jurists who are synonymous with the common law itself, wrote that double jeopardy protection was grounded on a universal maxim: *Nemo debet bis vexari pro una et eadem causa*.<sup>24</sup> Translated, this means: "It is a rule of law that a man shall not be twice vexed for one and the same cause."<sup>25</sup> There is speculation that Coke promoted a double jeopardy prohibition as just another way of limiting the power of the king, whom Coke distrusted.<sup>26</sup> Coke viewed any limitation upon the king's power of discretion as beneficial.<sup>27</sup>

Prior to the adoption of the Bill of Rights, many of the newly independent states developed double jeopardy prohibitions in their state laws.<sup>28</sup> However, incorporation into the federal constitution was, without a doubt, the most important event in the development of double jeopardy.<sup>29</sup> Nonetheless, as of 1789, the debate over what constituted double jeopardy had just begun.<sup>30</sup> In fact, there are few provisions of the Constitution that have been litigated more than the double jeopardy clause of the fifth amendment.<sup>31</sup>

### B. The Double Jeopardy Clause

The double jeopardy clause of the fifth amendment of the United States Constitution reads: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."<sup>32</sup> In 1969, in *North Carolina v. Pearce*,<sup>33</sup> the United States Supreme Court ruled that these words offer three separate constitutional protections: (1) protection against a second prosecution for the same

20. *Id.*; Nahum 1:9.

21. J. SIGLER, *supra* note 17, at 3.

22. *Id.* at 4.

23. *Id.*

24. *Id.* at 16.

25. *Id.* at 21.

26. *Id.* at 19.

27. *Id.*

28. *Id.* at 21-23. The Massachusetts Code of 1648, which was the first comprehensive statement of the duties and rights of the inhabitants of the colony, contained the double jeopardy concept, and similar provisions were adopted soon after in Connecticut, New York, Pennsylvania and New Jersey. *Id.* at 22.

29. *Id.* at 28.

30. *Id.* at 28-33.

31. *Id.* at v.

32. U.S. CONST. amend. V.

33. 395 U.S. 711 (1969).

offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense.<sup>34</sup> The court further stated that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."<sup>35</sup>

Twenty years after the *Pearce* decision, the question of what exactly constituted punishment was still very much undecided. In *United States v. Halper*,<sup>36</sup> a defendant was tried and convicted for filing false Medicare claims.<sup>37</sup> The court sentenced the defendant to two years in prison and fined him \$5,000.<sup>38</sup> Later, the government attempted to impose a statutorily authorized civil penalty that amounted to \$130,000.<sup>39</sup> The Supreme Court determined that the civil penalty was disproportional to the harm actually suffered by the government.<sup>40</sup> Therefore, the penalty rose to the level of "punishment" within the meaning of the fifth amendment and violated the double jeopardy clause.<sup>41</sup>

In *Halper*, the Supreme Court set forth a test to determine if civil sanctions rise to the level of punishment within the meaning of the fifth amendment.<sup>42</sup> The court stated that what constitutes punishment must not be determined from the defendant's perspective.<sup>43</sup> Rather, the key is to determine what purpose the civil sanction is attempting to serve.<sup>44</sup> If the civil sanction can be characterized as remedial, rather than as a deterrent or retributive, then it is not classified as punishment.<sup>45</sup> If the civil sanction is not "punishment," then it fails to invoke the double jeopardy clause.<sup>46</sup>

*Halper* dealt with imposing civil penalties upon a defendant after he was subject to a criminal prosecution.<sup>47</sup> In *United States v. Bizzell*,<sup>48</sup> the Tenth Circuit Court of Appeals dealt with the opposite situation. The Department of Housing and Urban Development (HUD) charged Bizzell with violation of mortgage regulations.<sup>49</sup> Bizzell entered into a settlement agreement wherein he would pay HUD \$30,000 and be suspended from participating in HUD programs

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34. *Id.* at 717.

35. *Id.* at 718.

36. 490 U.S. 435 (1989).

37. *Id.* at 437.

38. *Id.*

39. *Id.* at 439.

40. *Id.*

41. *Id.* at 440.

42. *Id.* at 448-49.

43. *Id.*

44. *Id.*

45. *Id.* at 449.

46. *Id.*

47. *Id.*

48. 921 F.2d 263 (10th Cir. 1990).

49. *Id.* at 265.

for two years.<sup>50</sup> The agreement specifically stated that the payment was solely for settlement of the administrative action and was *not* full restitution to HUD.<sup>51</sup>

Subsequently, Bizzell was indicted and charged with conspiracy to defraud the United States.<sup>52</sup> The district court relied upon *Halper* and dismissed the charges.<sup>53</sup> The court found that the \$30,000 sanction bore no relation to a remedial goal and therefore constituted punishment.<sup>54</sup> As a result, the court held that further prosecution would violate the double jeopardy clause.<sup>55</sup>

On appeal, the Court of Appeals for the Tenth Circuit reversed the district court.<sup>56</sup> Citing the HUD regulations providing for the sanction, the court found that the sanction was remedial and not punitive.<sup>57</sup> Therefore, due to the remedial nature of the sanction, further prosecution would not violate the double jeopardy clause.<sup>58</sup>

The *Bizzell* decision makes it clear that it does not matter which comes first, civil or criminal penalties.<sup>59</sup> If the civil sanction is not remedial, it constitutes punishment and invokes the double jeopardy protections.<sup>60</sup> However, if statutory authority suggests a remedial purpose for the sanction, double jeopardy protections are unavailable.<sup>61</sup>

### III. THE INSTANT DECISION

The Eleventh Circuit Court of Appeals determined that while the district court was correct in refusing to dismiss the criminal indictment against defendant, the district court's analysis under the test expounded in *Halper* was incorrect.<sup>62</sup> In the process of deciding to overrule the motion to dismiss the indictment, the district court concentrated on the disparity between the civil and the criminal penalties.<sup>63</sup> The court of appeals stated that a correct application of the *Halper* test required "a comparison between the civil penalty and the government's loss resulting from defendant's conduct."<sup>64</sup> The appellate court noted that while the

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 266.

57. *Id.*

58. *Id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *Reed*, 937 F.2d at 577.

63. *Id.*

64. *Id.*

facts of *Halper* made the instant case easily distinguishable, they found *Halper* helpful in framing their analysis.<sup>65</sup>

The court held that the arbitrator's decision to impose a thirty-day disciplinary suspension upon Reed was not disproportional to the harm caused to the government by his conduct.<sup>66</sup> Rather, the court stated that "we think the sanction of suspension from employment for defendant's on-the-job conduct is best characterized as an attempt by the arbitrator to vindicate the contract rights of the government—and of the defendant—under the collective bargaining agreement between them."<sup>67</sup> Furthermore, the court stated that any sanction the arbitrator imposed "as long as it was within the framework provided by an employment contract, serves legitimate nonpunitive governmental objectives and is by its nature remedial."<sup>68</sup>

The court then looked to the purpose served by the arbitrator's decision to suspend Reed.<sup>69</sup> Judge Edmondson, writing for the majority, stated that even though the suspension may seem like punishment to Reed, the goal of the suspension was to vindicate the government's rights under the collective bargaining agreement and thereby "make the government whole."<sup>70</sup>

In determining that the suspension handed down by the arbitrator was remedial in nature and did not rise to the level of punishment under the fifth amendment, the court held that the subsequent criminal indictment did not violate the double jeopardy clause.<sup>71</sup> As such, the decision of the district court in refusing to dismiss the indictment was affirmed.<sup>72</sup>

#### IV. DISCUSSION AND ANALYSIS

The *Reed* court conducted a thorough analysis of the application of the *Halper* test.<sup>73</sup> If the Eleventh Circuit Court of Appeals had considered what results an opposite decision would have rendered, the court could have saved itself time. By reaching a different result, the court would have allowed every employee covered by a collective bargaining agreement that contains an arbitration clause an immunity from prosecution. The only requirement needed to invoke such protection would be that the criminal activity take place in the workplace.<sup>74</sup> If a collective bargaining agreement offered arbitration as a forum for grievance resolution, all an employee would have to do to avoid criminal prosecution would

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65. *Id.*

66. *Id.*

67. *Id.* at 578.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *See id.*

be to exercise his right to a hearing before an arbitrator. The hearing would then invoke the double jeopardy protections of the fifth amendment.

The court did give cursory treatment to this possibility near the end of the opinion.<sup>75</sup> Judge Edmondson stated "we will not offer up the double jeopardy clause as a forum-shopping tool for government employees who have violated the law."<sup>76</sup> However, there is nothing in the opinion that indicates non-governmental employees would be treated differently. It seems absurd to think that an employee under a collective bargaining agreement containing an arbitration clause would be given free reign to engage in any criminal activity in the workplace, answering only to the arbitrator. But, if the court had reached any other decision, that would be the result.

Judge Edmonson's opinion stated that any sanction imposed by the arbitrator was not punishment if it met three requirements.<sup>77</sup> Those requirements are: (1) the sanction must be within the framework provided by the employment contract; (2) it must serve legitimate nonpunitive governmental objectives; and (3) it must by its nature be remedial.<sup>78</sup> Given these requirements the court has effectively eliminated the employee from ever claiming that the arbitrator's decision is punishment. First, if the collective bargaining agreement calls for binding arbitration, the sanction will be within the framework provided by the employment contract. Judge Edmonson stated that the arbitrator's decision served to vindicate the employer's rights under the bargaining agreement.<sup>79</sup> He went even further by stating that "where an individual and the government enter into an employment relationship governed by a collective bargaining agreement, arbitration awards against the employee made pursuant to that agreement can only serve as remedies for breach of the contract, and necessarily do no more than make the government whole."<sup>80</sup> It would seem that the Eleventh Circuit has established a set of guidelines to determine whether an arbitrator's sanction is "punishment" that could only have one result.

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*



## V. CONCLUSION

The question of what constitutes punishment within the meaning of the double jeopardy clause will surely arise again. However, the Eleventh Circuit has answered the question concerning arbitrator's sanctions for the meantime. The court undoubtedly reached the proper resolution. Any other conclusion would allow employees under collective bargaining agreements to use binding arbitration as a forum-shopping device to avoid criminal punishment for the crimes they commit in the workplace.

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