

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-1107
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Mahoning County
v.	:	Court of Appeals,
	:	Seventh Appellate District
CHRISTOPHER L. ANDERSON,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 2011 MA 0043
	:	

**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO**

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INTRODUCTION

The Due Process Clauses of the U.S and Ohio Constitutions are not all-purpose tools regulating every aspect of criminal procedure and practice. To the contrary, many more specific provisions of those Constitutions themselves frequently offer tailored tools for the particular circumstances in which they apply. The Sixth Amendment, for example, gives criminal defendants the right “to be confronted with the witnesses against” them, U.S. Const. Am. VI, and the Ohio Constitution prohibits “excessive fines,” Ohio Const. Art. I § 9. It would be a mistake to interpret the Due Process Clauses as providing “super” confrontation or excessive-fine protections over and above what these specific provisions otherwise guarantee. Yet this appeal asks the Court to do just that—ignore the specific tool intended for the relevant circumstance (the Double Jeopardy Clause) in favor of a general, subjective due-process right unmoored from the history and traditions of criminal procedure in this country. The Court should flatly decline the invitation—as the U.S. Supreme Court has already done in many related contexts.

The Double Jeopardy Clause is the specific constitutional provision applicable here, and that is the only question the Court needs to confront. Over and over, the U.S. Supreme Court has emphasized that the Due Process Clause poses the wrong framework when a more specific provision of the Constitution governs. *See, e.g., Medina v. California*, 505 U.S. 437, 443 (1992) (“[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation”) (citation omitted); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“generalized notion of ‘substantive due process’” is not a proper source of rights where the Constitution contains an “explicit textual source” of protection elsewhere). The U.S. Supreme Court has even applied this principle to the Double Jeopardy Clause. It has rejected the argument—an argument very similar to the one that Anderson makes here—that the “Due

Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause.” *Sattazahn v. Pennsylvania*, 537 U.S. 101, 116 (2003).

Only the Double Jeopardy Clauses (U.S. and Ohio) should be relevant here. Under those provisions, the judgment below should be affirmed. *First*, double jeopardy, not due process, is the relevant framework. *Second*, Anderson’s impending trial plainly comports with double-jeopardy guarantees. *Finally*, even framing this case in terms of due process, Anderson’s trials show an abundance of process *beyond* what is constitutionally required.

STATEMENT OF AMICUS INTEREST

As the State’s chief law officer, R.C. 109.02, the Ohio Attorney General is concerned with protecting the interests of the people of the State of Ohio in resolving criminal prosecutions with a final and just verdict. *See Wade v. Hunter*, 336 U.S. 684, 689 (1949). Furthermore, the Attorney General has original jurisdiction to investigate and prosecute certain crimes under the Ohio Revised Code and also serves as a Special Prosecutor in criminal prosecutions around the State. This Court’s decision could affect prosecutions handled by the Attorney General.

STATEMENT OF CASE AND FACTS

Following his arrest in 2002, Anderson was indicted for the murder of Amber Zurcher. *State v. Anderson*, 2006-Ohio-4618 ¶ 10 (7th Dist.). During Anderson’s first trial, the court sustained Anderson’s motion to exclude evidence relating to an incident in which Anderson had allegedly choked and bitten Donna Dripps. *Id.* However, during the trial, a witness referenced the Dripps incident, and the evening news highlighted this testimony. *Id.* ¶¶ 11, 37. On Anderson’s motion, the trial court declared a mistrial.

A second trial commenced in 2003. Prior to retrial, the trial court granted the State’s motion in limine to allow Donna Dripps to testify. *Anderson* ¶¶ 12, 38-44. The jury found Anderson guilty of murder, and the trial court sentenced him to 15 years to life. *Id.* ¶ 16. The

court of appeals found that the trial court erred in allowing Dripps to testify and reversed Anderson's conviction and remanded for retrial. *Id.* ¶¶ 1, 84.

Anderson was tried for a third time in 2008. The trial resulted in a hung jury, and the court declared a mistrial. *State v. Anderson*, 2012-Ohio-4390 ¶ 6 (7th Dist.).

A fourth trial began in 2010. *Id.* ¶ 7. During voir dire, a potential juror observed one of Anderson's trial counsel sleeping and commented on this fact in front of the venire. The trial court dismissed the prospective jurors, continued the case, and removed the attorney from the case. *Id.* The fourth trial was continued later in 2010, but it ended in a hung jury. *Id.* ¶ 8.

In 2011, Anderson filed a Motion to Dismiss Indictment and for Discharge, in which he argued that another trial would violate his due process and double jeopardy rights. *Id.* ¶ 9. The trial court overruled the motion, and Anderson appealed. *Id.*

After a trip to this court over the question whether the trial court's decision not to dismiss was appealable (yes, see *State v. Anderson*, 138 Ohio St. 3d 264, 2014-Ohio-542), the court of appeals affirmed the trial court's ruling. *State v. Anderson*, 2015-Ohio-2029 (7th Dist.). After noting that Anderson's due process and double jeopardy arguments "intertwined," *id.* ¶ 7, the court pointed out that "nothing in the record . . . suggest[ed]" that the State acted in bad faith during the whole history of the case and that "at every step," the case "moved as quickly as possible," *id.* ¶ 40.

Anderson appealed to this Court, which accepted review on a single proposition of law, *State v. Anderson*, 144 Ohio St. 3d 1407, 2015-Ohio-4947.

ARGUMENT

Amicus Ohio Attorney General's Proposition of Law:

The Due Process Clause does not provide any greater double-jeopardy protections than does the Double Jeopardy Clause.

There is no question that a defendant has the right to a fair process. One guarantee of that process is the double-jeopardy protection of the Fifth Amendment. Ohio's similar clause is "coextensive with the federal clause." *State v. Broom*, ___ Ohio St. 3d ___, 2016-Ohio-1028 ¶ 21; *State v. Miranda*, 138 Ohio St. 3d 184, 2014-Ohio-451 ¶ 6. Anderson now concedes that the Double Jeopardy Clauses do not support his arguments (or at least that he does not raise any double-jeopardy claims now). *See* Apt. Br. 16. Anderson argues instead that the Due Process Clauses of the Fourteenth Amendment and Article I, § 16 of the Ohio Constitution bar his impending trial based on his having been put in jeopardy on several prior occasions. Like any double-jeopardy analysis, Anderson's due-process claim would proceed identically under federal or state guarantees. *See State v. Gardner*, 118 Ohio St. 3d 420, 2008-Ohio-2787 ¶ 76 (due process clauses "virtual mirror" of each other; "analysis of similar constitutional provisions should not be driven simply by disagreement with the result reached by the federal courts' interpretation"); *State v. Thompkins*, 75 Ohio St. 3d 558, 560 (1996) (state and federal due process are "similar"); *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 544 (1941) (clauses are "equivalent") (If anything, the Ohio Constitution's process protections for criminal defendants fall within Article I, § 10. Article I, § 16's plain language, by contrast, addresses the "remedy" and associated process for civil plaintiffs who have had an "injury done [them] in [their] land, goods, person, or reputation.")

Anderson's argument that due process bars his retrial—even though the Double Jeopardy Clauses would not—is wrong for three reasons. *First*, the Due Process Clauses do no

independent work in the face of an explicit constitutional provision that bears on the precise question at issue. Questions about subsequent trials are the province of the Double Jeopardy Clauses, not the Due Process Clauses. *Second*, Anderson is right to concede his double-jeopardy argument because abundant precedent rejects it. *Third*, Anderson’s multiple trials have been the product of process exceeding the constitutional floor; several retrials resulted from affording him *more* process than constitutional due process. In no sense can that fact show a denial of due process. *Finally*, Anderson offers no argument that should lead this Court to adopt, in the name of due process, a “super” Double Jeopardy Clause over and above what the clause protects.

A. The Due Process Clause provides no greater double-jeopardy protection than the Double Jeopardy Clause.

The Due Process Clause is often regarded as having two components, one procedural and one substantive. *See, e.g., Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (noting both strands). Regardless of which lens is used to view this case, the Double Jeopardy Clause is the only thing in view. The clause, not any amorphous element of due process, governs whether a retrial violates the Constitution.

The U.S. Supreme Court has repeatedly cautioned about substituting due process for more specific provisions of the Constitution. In *Graham v. Connor*, 490 U.S. 386, 395 (1989), the Court held that the Fourth Amendment and its standards, not substantive due process, governed a claim about whether an officer used excessive force. The Court has said the same thing regarding procedural due process: “In the field of criminal law, we ‘have defined the category of infractions that violate fundamental fairness very narrowly’ based on the recognition that, ‘[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.’” *Medina v. California*, 505 U.S. 437, 443 (1992) (citations omitted). These decisions recognize the dangers of substituting the open-ended standards of due process

for the more tightly drawn standards of specific constitutional guarantees. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

Graham considered the Fourth Amendment, but the Supreme Court has also considered how the Due Process Clause intersects with the Double Jeopardy Clause. In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), the Court rejected the argument that imposing a death sentence at a second trial infringed due process when the jury deadlocked on whether to impose the death penalty after the first trial. *Id.* at 115-116. The Court had already concluded that the second trial did not pose a double jeopardy problem. Drawing on cases like *Medina*, the Court reasoned that the criminal defendant's due-process claim was "nothing more than [a] double-jeopardy claim in different clothing." *Id.* at 116.

Many courts have followed *Sattazahn* and rejected due process claims in light of compliance with double-jeopardy protections. *See United States v. Faulkenberry*, 461 Fed. App'x 496, 503 (6th Cir. 2012) (Cook, J.); *U.S. v. Neto*, 659 F.3d 194, 201 (1st Cir. 2011); *United States v. Andrews*, 2 F. Supp. 3d 847, 853 (N.D.W.V. 2014); *Wallin v. Sinclair*, No. C12-1339, 2013 WL 2338259, at * 7 n.5 (W.D. Wash. May 29, 2013) (denying habeas relief); *Whiteside v. Warden, S. Ohio Corr. Facility*, No. 2:10-cv-816, 2011 WL 5551598 (S.D. Ohio Nov. 15, 2011) (same), *report and recommendation adopted*, 2012 WL 3637369 (Aug. 22, 2012); *see also United States v. Jones*, No. 96-1667, 1997 WL 416957, at *1-2 (2d Cir. 1997) (predating *Sattazahn*); *cf. United States v. Hall*, 551 F.3d 257, 273 (4th Cir. 2009) ("no authority" for the argument that close call on several constitutional guarantees adds up to due process violation).

Many state supreme courts have also refused to look to due-process guarantees when double-jeopardy guarantees have been satisfied. Most recently, the Supreme Court of

Mississippi affirmed four counts of capital murder after a defendant's sixth trial. *Flowers v. State*, 158 So. 3d 1009 (Miss. 2014), *petition for cert. filed June 23, 2015*. Much like Anderson's case, in the Mississippi case, the first three trials resulted in convictions reversed on appeal, and the fourth and fifth trials produced hung juries. *Id.* at 1022-23. The Mississippi Supreme Court concluded that the due-process claim was a mistaken attempt to supplement the protections of the Double Jeopardy Clause and, seeing no double jeopardy violation, rejected the due process claim. 150 So.3d at 1069-70; *see also People v. Sierb*, 581 N.W. 2d 219, 221-25 (Mich. 1998); *People v. Cummings*, 47 Ill. App. 3d 578, 581 (1977) ("the logical conclusion is that the number of trials is not a violation of due process unless it also places the defendant in double jeopardy").

At bottom, the inquiry into due process in criminal cases is rooted in history, not in subjective abstractions about "fundamental fairness." A practice fails the guarantee of due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445 (1992) (internal quotation marks omitted). When the question concerns successive trials, moreover, the relevant tradition is the history and interpretation of the Double Jeopardy Clause. The proper due process test thus points to the Double Jeopardy Clause. Indeed, an appeal to "fundamental fairness" divorced from that clause would trade the specific language of the Bill of Rights for judicial impressionism. That is a recipe for unfairness between different defendants who find themselves before different judges. As the Fifth Circuit has noted in another context, "a free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his [case] . . . denied fundamental fairness, while another, less imaginative, may be denied relief" *Derden v. McNeel*, 978 F.2d 1453, 1457-58 (5th Cir. 1992) (en banc). And as the Michigan Supreme Court has noted,

“[i]f recognized, guidelines for responsible decision making in applying the new [due-process] remedy would be scarce and open-ended. If three trials are too many under substantive due process, why are not two? It could follow that either any retrial after a mistrial is barred as a violation of substantive due process, or that the theory as applied would result in arbitrary assertion of judicial authority.” *Sierb*, 581 N.W.2d at 224. Instead, the Court should look to the provisions that apply here—the Double Jeopardy Clauses—and not create new rights out of vague due-process notions.

B. Under the relevant constitutional standard for double jeopardy, Anderson’s case passes muster.

Anderson now seems to concede that he has no double jeopardy claim. Apt. Br. 16. That is consistent with settled precedent. The Double Jeopardy Clause does not bar retrial following a properly declared mistrial, including after a hung jury. *Oregon v. Kennedy*, 456 U.S. 667, 672-73 (1982) (defendant moved for mistrial); *Richardson v. United States*, 468 U.S. 317, 324 (1984) (hung jury); *United States v. Perez*, 22 U.S. 579, 580 (1824) (Story, J.) (same). In addition, a second prosecution for the same offense does not violate the Double Jeopardy Clause when the prior conviction has been set aside on appeal. *United States v. Tateo*, 377 U.S. 463, 466 (1964); *Ball v. United States*, 163 U.S. 662, 672 (1896).

Applying these principles, courts have routinely rejected double-jeopardy claims that four or even six trials were unconstitutional. *Flowers*, 150 So.3d 1009 (six); *State v. Williams*, 277 S.E. 2d 546 (N.C. App. 1981) (four); *Jones*, 122 F.3d 1058 (four); *Kirby v. Senkowski*, 141 F. Supp. 2d 383 (S.D.N.Y. 2001) (four, after three deadlocked juries). Also notable are the trials of Frederick Hopt in the then-territory of Utah. The U.S. Supreme Court affirmed his death sentence in a fourth appeal after having reversed it on three prior occasions. *Hopt v. People*, 120 U.S. 430 (1887); *see* 104 U.S. 631 (1882); 110 U.S. 574 (1884); 114 U.S. 488 (1885). The

Court's opinion affirming in the fourth appeal did not mention the Fifth Amendment. *See also United States v. Persico*, 425 F.2d 1375 (2d Cir. 1970) (five trials, after two appellate reversals and two mistrials; no mention of double jeopardy), *cert. denied*, 400 U.S. 869.

What these cases teach is that each retrial must be evaluated on its own merits. There is no cumulative-error principle in the Double Jeopardy Clause. Anderson advances no argument that any one of his retrials trespassed the ground protected by the Double Jeopardy Clause.

C. The courts have given Anderson more process than is constitutionally required.

Due process is the wrong framework for this case, but if it were the right one, Anderson would still lose. The retrials in this case *protected* rather than *thwarted* procedural fairness. Indeed, the retrials often flowed from protections not themselves constitutionally required. To start, the constitutional limits on structuring the criminal justice system leave wide latitude to the policy-making branch. “Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused have been left to the legislative branch.” *Patterson v. New York*, 432 U.S. 197, 210 (1977). “Among other things, it is normally ‘within the power of the State to regulate procedures under which its laws are carried out’” *Medina*, 505 U.S. 437, 445 (1992) (citation omitted). Here, Anderson *benefitted* from choices that protected him more than the Constitution requires.

Start with the hung juries. In Ohio, jury unanimity is the rule. Ohio R. Crim. P. 31(A). But it is not a *constitutional* rule. *See Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972); *State v. Gardner*, 118 Ohio St. 3d 420, 2008-Ohio-2787 ¶ 35. The hung juries that led to two of Anderson’s retrials were the result of a supra-constitutional process. By one estimate, if the juries could have been non-unanimous, they would have been 40-45% more likely to have convicted Anderson. Valorie P. Hans, et al., *The Hung Jury: The*

American Jury's Insights and Contemporary Understanding, 39 Criminal Law Bulletin 33-50 (2003).

Much the same can be said of the appellate reversal here. The Seventh District acknowledged that it reversed for an error of evidence, not an error of “constitutional significance.” *Anderson*, 2006-Ohio-4618 ¶ 30. Again, the process that Anderson now attacks, was a process that afforded him more than the Constitution requires.

Considered collectively for all of his trials, the Seventh District fairly described Anderson’s current due-process argument as one that “cuts both ways.” *Anderson*, 2015-Ohio-2029 ¶ 33. The series of trials here are not the “‘fault’” of the prosecutor or Anderson. *Id.* ¶ 35. The trials are instead a product of the exact “‘fundamental fairness’” that Anderson now says should halt the process. *Id.* In that respect, Anderson’s strict constitutional rule might only discourage policymakers from crafting these non-constitutional, procedural protections. If a criminal defendant who invokes these procedural protections can use that very invocation as the basis for preventing a further trial (in the name of due process no less), then those policymakers may be wary of providing the additional protections as an initial matter.

D. Anderson offers no reason to craft a special rule in his case.

Although Anderson hints at other constitutional provisions beyond due process, any argument on those points is forfeited. *See, e.g., In re Complaint of Toliver v. Vectren Energy Delivery of Ohio, Inc.*, ___ Ohio St. 3d ___, 2015-Ohio-5055 ¶ 30 (“Unsupported legal conclusions do not demonstrate error.”); *Doe v. Ronan*, 127 Ohio St. 3d 188, 2010-Ohio-5072 ¶ 7 n.4 (declining to address issue “not briefed”). As to the point Anderson has briefed, he cites no cases recognizing a new constitutional right barring retrial. He points to nine out-of-state cases, but none supports a blanket constitutional right against successive trials where each retrial

complies with double-jeopardy guarantees. Apt. Br. 18-19. More fundamentally, all of the cases predate *Sattazahn*.

Four of these cases did not involve retrials at all, but did discuss factors a trial court might consider in deciding whether to dismiss an indictment under a state *statute* or *rule* authorizing trial-court dismissals in “furtherance of justice” or in the “interest of justice.” In fact, in each of these cases a court either refused to dismiss a charge, or was reversed for doing so. See *State v. Lundeen*, 297 N.W. 2d 232, 235 (Iowa App. 1980) (vacating trial court’s dismissal) (appellate review of trial court dismissal subject to “limited,” not de-novo review); *People v. Andrade*, 86 Cal. App. 3d 963 (1978) (reversing trial court’s dismissal); *People v. Orin*, 533 P.2d 193 (Cal. 1975) (reversing trial court’s dismissal); *People v. Stern*, 83 Misc. 2d 935 (N.Y. Crim. Ct. 1975) (denying motion to dismiss).

The other five cases did involve retrials after multiple mistrials, but none reached a holding that helps Anderson. See *State v. Gonzales*, 49 P.3d 681 (N.M. App. 2002); *State v. Abbati*, 493 A.2d 513 (N.J. 1985); *State v. Moriwake*, 647 P.2d 705 (Haw. 1982); *State v. Witt*, 572 S.W. 2d 913 (Tenn. 1978); *United States v. Ingram*, 412 F. Supp. 384 (D.D.C. 1976).

In *Gonzales*, the appeals court *reversed* a dismissal and noted that the trial court seemed to have grounded the decision to bar further prosecution on “prosecutorial misconduct” “rising ‘into the realm of perjury.’” 49 P.3d at 685 & 682. In *Abbati*, the court found an inherent right for a *trial court* to dismiss, but reversed the dismissal ordered there. 493 A.2d at 518, 522. In *Moriwake*, the court found no abuse of discretion when a trial court dismissed an indictment, but recognized that no *constitutional* right posed a “bar” to the retrial. 647 P.2d at 713. The Tennessee Supreme Court’s ruling in *Witt* is similar; it found no constitutional barrier under double-jeopardy or due-process principles, but found no abuse of discretion when the trial court

barred retrial. 572 S.W. 2d at 917. And in *Ingram*, the trial court denied the government's motion to reconsider a dismissal entered after two hung juries voted 10-2 and 11-1 to acquit. 412 F. Supp. at 385. Not one of these cases supports a *constitutional* right prohibiting Anderson's retrial. Nor do any of these cases support a rule that *appellate courts* can bar retrial when the trial court allows it. In short, these cases are "distinguishable . . . because they involve a review of a trial judge's finding that justice demanded that further prosecution be terminated." *Aguilera v. Walsh*, No. 01-civ-2151, 2001 WL 1231524, at *7 n.6 (S.D.N.Y. Oct. 17, 2001). Because the trial court here agrees that a retrial could proceed, Anderson argues that the U.S. and state Constitutions, and nothing else, bar his retrial. Cf. Ohio R. Crim. P. 48(B) (authorizing trial court to dismiss); *State v. Busch*, 76 Ohio St. 3d 613 (1996) (discussing rule).

Anderson makes three other points, but none is persuasive.

He first contends that the State has no new evidence against him. Apt. Br. 13. But that gets the law exactly backwards. The Double Jeopardy Clause, *where it applies*, "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). The retrials here protected the *process*; they are not second chances for the prosecution to make a better case after an *acquittal*. If they were, that would violate the Double Jeopardy Clause. Anderson's own argument shows that the right lens here is the Double Jeopardy Clause.

Anderson then cites *Thomas v. Mills*, 117 Ohio St. 114 (1927) as an example of this Court looking to "fair play" instead of a specific constitutional provision. Br. 23. But *Thomas* predates incorporation to the States of the Sixth Amendment, *see Powell v. State of Ala.*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963), and long predates *Medina* and

Sattazahn. Cf. *Neto*, 659 F.3d at 201 (argument that due process is more expansive than double jeopardy “foreclosed” by “more recent” cases such as *Sattazahn*).

Finally, Anderson highlights his continual incarceration during the history of his case. Apt. Br. 14, 27. Apparently he has been unable to post bond. The remedy for this confinement lies elsewhere; it is not in a new right against multiple trials merely because remedies for pretrial release have failed. Ohio Criminal Rule 46(E) allows the court to amend the type, amount, or conditions of bail at any time, so Anderson could again request a change in bond. Both the federal and state constitutions prohibit excessive bail, U.S. Const., Am. VIII; Ohio Const., Art. I, § 9, and a defendant can seek a writ of habeas corpus to attack an excessive bail amount. *Chari v. Vore*, 91 Ohio St.3d 323, 325 (2001); *State v. Bevacqua*, 147 Ohio St. 20 (1946).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Seventh District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine was served via ordinary mail this 12th day of April, 2016 upon the following counsel:

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