No. 11,682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATTHEW WRUBLEWSKI,

Appellant,

vs.

CAPTAIN S. X. MCINERNEY, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and REAR ADMIRAL D. B. BEARY, United States Navy, Commandant 12th Naval District, San Francisco, California,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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No. 11682

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STATEMENT OF FACTS.

A detailed statement of the facts leading up to the filing of the petition for writ of habeas corpus is found in the transcript of record, pages 2-12. Briefly, those facts may be summarized as follows: On December 11, 1944, appellant was tried by a duly constituted

Naval General Court Martial at Pearl Harbor, Territory of Hawaii, on two charges: 1, *murder;* one specification thereunder alleging murder of one Lieutenant Roland S. Travis; 2, *assault with intent to commit murder;* with three specifications thereunder, the first specification of which alleges that appellant did assault with the intent to murder one Lieutenant Roland S. Travis. These charges are found in the transcript of record, pages 3, 4, and 5. This first Naval General Court Martial convicted appellant of the first charge, namely, murder, and acquitted appellant of the second charge, namely, assault with intent to commit murder, and each of the specifications thereunder were found not proved. Appellant was acquitted of all charges except the first one of murder. The Judge Advocate General's office in Washington, in reviewing the proceedings, recognized the fact that the Naval General Court Martial did not have jurisdiction over the charge of murder, as said alleged murder did not take place "without the continental limits of the United States". Therefore, said conviction was void and the proceedings as to this charge alone was a nullity.

Despite this realization that appellant stood convicted of nothing, appellant was nevertheless confined in a prisoner status until July 30, 1946, at which time he was brought to trial a second time before a Naval General Court Martial on charges of: 1, voluntary manslaughter, and 2, involuntary manslaughter, both alleging a homicide of Lieutenant Roland S. Travis, which specifications are found on pages 8 and

9 of the Transcript of Record. This second trial was opposed by appellant in that he duly entered a plea in bar of trial establishing that he had previously been acquitted of assault with intent to commit murder by a court of competent jurisdiction, a lesser included offense of manslaughter; that such acquittal was a bar to any subsequent trial of any greater offense, which includes the offense of assault. This plea in bar was denied and the trial resulted in conviction of appellant of the crime of voluntary manslaughter and he was eventually sentenced to serve five years at hard labor. It was following this conviction and sentence as approved by the U. S. Navy Department in Washington, D. C., that appellant sought relief in the District Court of the United States, Northern District of California, Southern Division. Appellant filed his petition for writ of habeas corpus in the District Court contending that in the first trial by a competent Naval General Court Martial at Pearl Harbor, that court, although lacking jurisdiction over the crime of murder, nevertheless had jurisdiction over the second charge of assault with intent to commit murder, of which charge appellant was acquitted and therefore the invalidity of proceedings as to the first charge did not affect the validity of the court's findings in the second charge. It was contended that the Fifth Amendment to the Constitution; namely that portion which states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", applied to the appellant. It is alleged that the Navy Department ignored this constitutional right of

appellant and therefore this question was one for consideration of the District Court. After filing of briefs and arguments, the District Court issued an order dismissing petition for writ of habeas corpus. Appellant now seeks an interpretation of the above-quoted clause of the Federal Constitution.

ASSIGNMENT OF ERRORS.

The opinion of the District Court is found in the transcript of record, pages 16-20. The statement of facts found on pages 16 and 17 are not disputed by appellant. However, objection is raised to the following statements contained in the court's opinion:

1. "To resolve the jurisdictional issue, it is not necessary to decide whether a court martial conviction of the crime of manslaughter, where there has been a previous trial of the crime of assault to commit murder, amounts to double jeopardy. This is for the reason that the specific guaranties of the Fifth Amendment to the Constitution relating to criminal prosecution may not be invoked in 'cases arising in the land or naval forces of the United States' ". It will be contended in appellant's argument and supported by authorities that the portion of the Fifth Amendment to the Constitution relating to "double jeopardy" may be invoked in cases arising in the naval forces of the United States.

2. "The Naval Court's decision denying the plea of double jeopardy may have been erroneous. But,

such errors of law by court martials are not of themselves reviewable or correctible in the civil court."

3. The language of the District Court is contradictory in stating (a) "they (errors of general court) may be reviewed here only if they are of such a nature to amount to a breach of the basic doctrine of fairness under the due process clause of the Constitution and thus oust the naval court of jurisdiction" and (b) "and to those in the military services or naval services of the United States, the military law is due process". This part of the opinion states that only under the due process laws of the Constitution may a Federal Court review errors of Naval Court and then it states that military law is due process to those in the services.

4. The opinion states "No claim is made of any unfairness in the conduct of his trial." Reference is made to the transcript of record, page 10, paragraph 5, which is a specific objection to the fairness in the conduct of the second general court martial trial in that the Judge Advocate General of the Navy dictated the decision of the court in its ruling on the plea in bar prior to the presentation of evidence in the case.

5. The opinion reiterates its statement that "But we may correct them here only if the errors amount to a denial of due process". This statement is found on page 19 of the transcript of record, on the same page on which it is stated by the court "The military law is due process".

6. The matters presented to the District Court and the petition for writ of habeas corpus involves only a jurisdictional question and a question of law and it was error on the part of the court to indulge in the possible reasonings of the first General Court Martial in reaching a decision of "not guilty" on the assault with intent to commit murder charge. It was further error on the part of the court in failing to recognize that the conviction of the murder charge was an absolute nullity and deserving of no consideration whatsoever; that further, the only proceedings which were valid under the first General Court Martial trial was the acquittal of appellant on the charge of assault with intent to commit murder. The Court's reasoning in arriving at an acquittal is not a question for the Federal Court.

ARGUMENT.

Summary.

It is urged by appellant that he was tried by a court of competent jurisdiction on the charge of assault with intent to commit murder and was duly acquitted of this charge and three specifications thereunder. There was no question of the validity of that acquittal even though in the same trial, the trial court found him guilty of the charge of murder, which is a charge over which that court had no jurisdiction and therefore the proceedings as to that charge of murder alone were void, and the sentence a nullity. This jurisdictional mistake on the part of the Government in no way affected the validity of appellant's acquittal of

the charge of assault with intent to commit murder. It is urged by appellant that having been once acquitted of this charge, he could not thereafter be prosecuted for the same charge or any degree thereof.

> "An acquittal or a conviction under an indictment for a crime consisting of different degrees is a bar to a prosecution for another degree, the finding of one degree being deemed to operate as an acquittal and bar to prosecution on the other degrees".
>
> *Grafton v. U. S.*, 206 U. S. 333, 51 L. Ed. 1084, 27 S. Ct. 749.

Following the acquittal of appellant of the charge of assault with intent to commit murder and at the outset of a second trial charging him with manslaughter of the same victim under the same circumstances and state of facts, a plea in bar was duly entered but was denied and a second trial resulted in conviction of appellant which is the Government's reason for holding him in custody at present. In holding appellant in custody by virtue of the sentence of the second trial appellant contends that this is in violation of that part of the Fifth Amendment to the Constitution which states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". U.S.C.A. Const. 5.

The double jeopardy clause of the Fifth Amendment applies to Naval Personnel.

The principal objection to the opinion of the District Court is the statement that the specific guaranties of the Fifth Amendment to the Constitution

relating to criminal prosecutions may not be invoked in "cases arising in the land or naval forces" of the United States. Before citing cases which show that a naval officer is entitled to derive benefit from that part of the Fifth Amendment to the Constitution relating to double jeopardy, it is desired to point out wherein the cases cited in the court's opinion do not apply to the case at bar. *Ex parte Quirin,* 317 U.S. 43 and *Ex parte Milligan,* 71 U.S. 2, 123, cited in the court's opinion are found on page 18 of the transcript of record. Both have to do with the exception which does not require a presentment or indictment of a Grand Jury. It is not questioned that one in the military service may be tried by the regular prescribed *procedure* of the military without a presentment or indictment of a Grand Jury. Therefore the holdings in *Ex parte Quirin* and *Ex parte Milligan* have no bearing on that portion of the amendment which pertains to double jeopardy. The other cases cited by the court in support of its contention that the Fifth Amendment relating to criminal prosecutions may not be invoked in cases arising in the land or naval forces; namely, *U. S. ex rel. Innes v. Crystal* (2 Cir.), 131 Fed. (2d) 576 and *Ex parte Benton,* 63 Fed. Supp. 808; relate to facts foreign to the question at bar. The case of *U. S. ex rel. Innes v. Crystal* (supra) as well as the case of *Ex parte Benton,* involved questions of whether or not the accused was properly represented by counsel, and whether the lack of competent counsel, if proved, would be a denial of due process. Appellant is in agreement with the holdings in the above cases as cited by the District Court, but

desires to point out that in none of those cases was the clause of the Fifth Amendment which is relied upon by appellant, discussed.

It is most necessary in this case to examine the Fifth Amendment to the Constitution and dwell on that clause which is applicable to the present facts. The facts in this case have to do with double jeopardy. The pertinent clause is "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". As further evidence to the fact that it was intended by the framers of the amendment that each clause should be construed separately, attention is called to that clause which immediately follows the one relied upon by appellant, "nor shall be compelled in any criminal case to be a witness against himself * * *". Clearly, if in a Naval General Court Martial an accused were forced to be a witness against himself, this would be a violation of one part of the Fifth Amendment and relief should be granted by the Federal Courts. It cannot be said that a person on account of his military status may, in violation of the above-cited clause of the Constitution, be forced to testify against himself. It is conceded that the first part of the Fifth Amendment does make an exception to members of the military in stating "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger". This is a complete statement and the exception noted applies only to that

which is contained in that complete statement and does not apply to the separate guaranties which follow, among which is that guarantee against twice being prosecuted for the same offense. In this connection, appellant refers to the case of *U. S. v. Haitt* (3 Cir.), 141 Fed. (2d) 664, which is also cited in the District Court's opinion, page 19, and appellant respectfully calls the court's attention to the following language used in this case:

> "We think that the basic guarantee of fairness afforded by the due process clause of the Fifth Amendment applies to a defendant in criminal proceedings in a Federal military court as well as in a Federal civil court. An individual does not cease to be a person within the protection of the Fifth Amendment to the Constitution because he has joined the nation's armed forces and has taken the oath to support that constitution with his life, if need be. The guarantee of the Fifth Amendment that 'no person shall * * * be deprived of life, liberty or property without due process of law' makes no exceptions in the case of persons who are in the armed forces. *The fact that the framers of the Amendment did specifically except such persons from the guarantee of the right to a presentment or indictment by a Grand Jury which is contained in the earlier part of the Amendment makes it even clearer that persons in the armed forces were intended to have the benefit of the due process clause.*" (Emphasis supplied.)

If we may rely on the same cases as cited by the District Court, it becomes clear that only the first part of the Fifth Amendment, that having to do with pre-

sentment or indictment by a Grand Jury, affects members of the naval forces. If, according to this case, members of the armed service are entitled to due process of law, clearly they are also entitled to that guarantee against double jeopardy to which no exception is mentioned in the amendment itself. Citing this case further as to the question of whether or not habeas corpus proceedings are the proper remedy for violation of the Fifth Amendment, the court said, "We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of the due process of law, and if it so finds to declare that the relator has been deprived of his liberty in violation of the Fifth Amendment and to discharge him from custody." The court in the *Hiatt* case indulged in the question of whether or not the accused was deprived of his constitutional rights because the trial court conferred with the judge advocate not in the presence of the accused, and further, that the trial court postponed the deliberation on a verdict. Appellant is in agreement with the case as cited by the District Court in its opinion and urges that if the court in the *Hiatt* case had found a violation of the Fifth Amendment, the relator would have been discharged from custody by order of that Federal Court. Similarly, it is urged here that if the District Court found that appellant in fact had been acquitted of assault with intent to commit murder and

subsequently denied a plea in bar and was convicted on the second trial of manslaughter, which said charge includes assault, then that portion of the Constitution, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" had been violated and the District Court was in error in stating that this particular guaranty of the Constitution was not applicable to cases arising in the naval forces.

In further support of applicant's argument that the District Court erred in its statement that the guaranties of the Fifth Amendment do not apply to cases arising in the naval forces, appellant respectfully submits the case of *Sanford v. Robbins,* 115 Fed. (2d) 435 (5 Cir.), 1940. This case is believed to answer the question of whether or not a Federal Court may review a question involving double jeopardy in a naval military court and the opinion states without equivocation that the navy, contrary to the army, recognizes that the members of its forces shall not be deprived of that portion of the Fifth Amendment relating to double jeopardy. In this case the accused was tried and sentenced to life imprisonment by a naval general court martial. The President of the United States gave the accused a new trial due to certain irregularities in the first trial. This administrative action was for the benefit of the accused and in no way under this particular circumstance could be considered as an acquittal, the court saying that in light of such consideration of the accused's rights it could be assumed that the accused would ask for a new trial and accept one if granted, as he could be in no worse posi-

tion as the result of a new trial. The court said "we have no doubt that the provision of the Fifth Amendment 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb' is applicable to courts martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment abundantly shows that such cases were in contemplation but not excepted from the other provisions."

In the case of *Ex parte Costello,* 8 Fed. (2d) 386, the accused was tried and convicted by a Naval General Court Martial, then requested a new trial of the Secretary of the Navy which was granted. At the second trial, the accused argued that the setting aside of the first proceedings and granting a new trial was tantamount to an acquittal and therefore he could not be tried again. The trial court erroneously sustained his plea in bar, which action was disapproved by the judge advocate general, and the accused again ordered to trial. The Federal Court in this case did not deny that the guaranties of the Fifth Amendment were available to relator, but quite the contrary, the court examined the facts in order to determine whether or not there had been double jeopardy. The court's examination of these facts recognized the constitutional rights of the accused contrary to the opinion of the District Court in the instant case. The court said "The single question for determination is the effect of the disapproval of the sentence and the order thereon by the Secretary of the Navy". The court held that the appearance of the accused in entering a

plea in bar did not place him in jeopardy. "This appearance was not a trial putting him in jeopardy so as to require his release from custody on writ of habeas corpus." From this language it may be inferred that if the second trial had progressed as far as an arraignment and the reviewing authorities disapproved of the proceedings of its own volition, not by request of the accused, this would be jeopardy and would bar a subsequent trial. It may also be inferred that "his release from custody on writ of habeas corpus" would be appropriate. In recognizing the specific guaranty of the Fifth Amendment relating to double jeopardy, the court in the *Costello* case said "The 102nd Article of War (Comp. St. 2308A) provides that no person shall be tried a second time for the same offense. Section 649 of 'Naval Courts and Boards' (now section 408) issued by the Navy Department and approved by the President for the government of persons attached to the naval service which seeks to carry out this provision of the Articles of War reads as follows 'The Fifth Amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". This provision is the authority for the principle that no person shall be tried a second time for the same offense' ".

The case of *Ex parte Quirin* (supra) which is cited by the District Court in its opinion considers the question of whether or not an enemy of the government may be tried by a military commission and not afforded the guaranty of a presentment or indictment

by a Grand Jury. It holds that such persons are not afforded this specific guaranty but the entire case makes no reference whatsoever to that provision of the Fifth Amendment relating to double jeopardy. It refers specifically to the first provision as follows: "The exception of cases arising in the land or naval forces from the operation of the *provision* of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury applies to offenders against the law of war". It is contended that this case is in no way pertinent to the present facts.

To further substantiate the contention that the guaranty against double jeopardy as set forth in the Fifth Amendment applies to naval personnel, court martial order 141-1918 P 18 states "so far as concerns the administration of justice in the navy the legal bar to a second trial for the same offense is founded upon the Fifth Amendment of the Constitution of the United States, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb'. There is no law expressly applying the benefit of this constitutional provision to persons tried by naval courts martial, but the Fifth Amendment applies to them of its own force without requiring expression in an Act of Congress". This court martial order cites *Grafton v. United States,* 206 U.S. 333. The court martial order further provides "with relation to persons subject to trial by army courts martial it is provided by article 40 of the

Articles of War (39 Stat. 657) that 'no person shall be tried a second time for the same offense'. The article clearly defines the meaning of the constitutional provision, which, while its main purpose is to prevent a second punishment for the same offense, has been repeatedly construed to prohibit a second trial where the accused has been previously acquitted or convicted of the same offense except with his consent or at his own request. *Ex parte Lange,* 18 Wall. 163; *In re Nielsen,* 131 U.S. 176, 188; *Kepner v. U. S.,* 195 U.S. 100; 1 *Op. Atty Gen.* 233." This court martial order clearly recognizes the distinction between double jeopardy arising in the military forces and double jeopardy arising in the naval forces. The members of the military service are protected by the Articles of War. The Fifth Amendment to the Constitution relates to members of the naval service. "Under the practice of both the army and navy it seems to be long settled that where the accused has once been convicted or acquitted he has been tried in the sense of the Articles of War and the Fifth Amendment to the Constitution".

Habeas corpus is the proper remedy by which a member of the naval service may be released from custody when he has been tried and acquitted of a charge and is kept in custody following a second trial on the same issues. This was recognized in court martial order 8, 1929, pages 14 and 15.

On pages 18 and 19 of the Transcript of Record, the District Court in its opinion states "the naval court's decision denying the plea of double jeopardy may have

been erroneous but such errors of law by courts martial are not of themselves reviewable or correctible in the civil courts. They may be reviewed here only if they are of such a nature as to amount to a breach of the basic doctrine of fairness under the due process clause of the Constitution and thus oust the naval court of jurisdiction." The District Court apparently recognizes that at least one guaranty under the Fifth Amendment to the Constitution is available to members of the U.S. Navy. The opinion does not refer to "cases arising in the land or naval forces" in concluding that *if* there is a showing of lack of due process by a breach of the basic doctrine of fairness then the Federal Court can apply the Fifth Amendment to the Constitution to cases in which due process of law is denied. In other words, the court concedes that the due process clause of the Constitution is not excepted from cases arising in land or naval forces as is the first clause of that amendment pertaining to indictment of a Grand Jury. Why then would not other parts of the Fifth Amendment apply to naval personnel unless excepted?

The language of the opinion of the court, page 19, states that only under the due process clause of the Constitution could relief be sought in the civil court and that "the military law is due process" which leaves us with not even a hypothetical case reviewable by the civil court. If the civil court can only attack the action of a naval court for violation of due process and "military law is due process" then military law stands alone and no civil court could interfere

with any of its actions despite any violations of other provisions of the Fifth Amendment. For example, the property of a sailor could be taken without due process of law or his life may be taken without a trial as "military law is due process" and would not, according to the opinion, be subject to any supervision of the Federal Courts. Likewise, a sailor who may be forced to testify against himself and convicted on such testimony would have no recourse to the civil courts by way of the great writ of habeas corpus.

The case of *Reaves v. Ainsworth,* 219 U.S. 304 as cited on page 19 of the Transcript of Record in the District Court's opinion, had to do with the question of the findings of a board of medical examiners, determining the rights of an army officer. In so far as the constitutional guaranty against double jeopardy is concerned, this case does not appear to be in point. It does not raise the question of whether a naval officer is entitled to that specific guaranty of the Constitution against double jeopardy. It is more of a discussion of the procedure of retiring army officers on medical discharges.

The case of *Ex parte Benton,* 63 Fed. Supp. 808, was a case involving the qualifications of a defense counsel in a general court martial trial, which, as the opinion stated, was little more than a criticism of counsel. Nowhere in the case is there found any reference to the question presented by the facts at hand. The *Benton* case did not pertain to double jeopardy or the specific guaranty against double jeopardy as provided for in the Fifth Amendment to

the Constitution. This and the *Reeves* case considered the question of fairness of the military whereas in the case at bar, reliance is solely upon the law, as we are not permitted to indulge in the reasoning for the first acquittal but must confine our arguments to the fact that there was an acquittal and a subsequent trial on the same facts, which it is contended, constitutes double jeopardy.

It is believed to be error on the part of the District Court to indulge in speculation as to how the first trial court reached its decision in acquitting the accused of the charge of assault to commit murder. It was further error on the part of the District Court to take into consideration a conviction of the murder charge. The conviction of the murder charge was an absolute nullity, deserving of no consideration for the reason that the naval court in Hawaii did not have jurisdiction over this particular crime as the alleged murder was committed within the territorial jurisdiction of the United States, 34 U.S.C. 1200, Art. 6. The naval trial court in Hawaii did have jurisdiction of the crime of assault with intent to commit murder. Its findings were final as the court acquitted the accused. This judicial act by a competent court cannot be ignored. The error on the part of the navy in erroneously preferring the charge of murder cannot nullify an acquittal of the accused on a charge over which it had jurisdiction. In the case of *Rosborough v. Rossell,* CMO 9, 1945, page 399, the United States Circuit Court of Appeals for the First Circuit on July 26, 1945, rendered an opinion which is believed to set

forth one of the principles involved in the present case. In the *Rosborough* case, the accused was tried on one single charge, that of murder. Under circumstances similar to appellant's case, it was held that the general court martial lacked jurisdiction over the charge and the court could not find the accused guilty of even a lesser included offense as there was no jurisdiction whatsoever to proceed to a trial on the single charge of murder. The court said, however, "Rosborough might have been brought to trial on a charge of murder and a specification thereunder and a separate charge of manslaughter and a specification thereunder. In such a case the court martial would have had no jurisdiction of the murder charge but that would not have rendered the proceedings wholly void since it would have had jurisdiction of the charge of manslaughter since a finding of guilty of manslaughter only and sentence therefor would have been valid." This is analogous to our case in that appellant was tried on two charges, (1) murder, over which the court had no jurisdiction, and therefore proceedings as to this charge were void, and (2), assault with intent to commit murder of the same victim, of which charge he was acquitted. This acquittal, it is urged, is a bar to any subsequent trial of this offense or any included or greater offenses. Were this not so, appellant could have been tried a second time, not only for manslaughter of Lieutenant Travis, but tried for assault or assault with a deadly weapon of the two other officers named in the two other specifications under the assault with intent to commit

murder charge. These specifications are found on pages 4 and 5 of the Transcript of Record. It was not contended by the Navy Department that appellant should be tried a second time for assault against Lieutenant Robert M. Nason and Lieutenant Joseph A. Osborn, although the evidence adduced at the first trial was necessarily the same as adduced at the second trial. Obviously the Navy Department recognized appellant's acquittal of these two specifications under the assault charge but by insisting upon a second trial for manslaughter has failed to recognize the acquittal of the assault alleged in the first specification.

The District Court's opinion beginning on page 19 states "The entire record of petitioner's case negatives the assumption that he may have been acquitted of assault with intent to commit murder due to a lack of the required degree of proof to establish the commission by him of any assault upon the deceased at all or of an intent to kill. Indulgence in this assumption would require complete disregard of the fact that the court martial believed and found him guilty of the greater crime of murder". It is contended that the Federal Court may look at the trial court's decision only and not speculate on how the court reached its decision. In this case there was an acquittal of assault with intent to commit murder. It is not disputed that the court was one of competent jurisdiction, had jurisdiction of the person and the charge. Therefore its decision—acquittal—cannot be questioned. It is not disputed that the same court had absolutely no

jurisdiction over the greater crime of murder. It is further not disputed that any finding on this charge is a nullity and it is beyond the scope of inquiry by any court to condone such an error in preferring this charge by then permitting the Navy to try the accused on a more appropriate charge despite the final act of acquittal in the previous proceedings. The Federal Court case of *Grafton v. The United States* (supra) in considering whether or not the double jeopardy clause of the Fifth Amendment to the Constitution applied to "cases arising in the land or naval forces", did not question Grafton's right to have the Federal Court determine the question of double jeopardy. In this case Grafton was acquitted by a Military Court Martial, then tried by the Philippine Civil Court for the same offense. The Federal Court held that Grafton had once been in jeopardy when tried by the Military Court Martial, was acquitted and could not be tried by the Philippine Court. The act of Grafton was an offense against one Government, the United States Government, and since both the military court and the Philippine court derived their authority from the United States Government there was but one offense and that against the same Government. Similarly, in the case at bar there were two trials both by military courts. There is no question of the alleged act being an offense against both the Navy and State Government. The *Grafton* case recognized the constitutional guaranty against double jeopardy to members of the Military.

UNFAIRNESS IN CONDUCT OF SECOND TRIAL.

As a separate and distinct argument of appellant, reference must be made to page 19 of the Transcript of Record in which the opinion of the District Court states "No claim is made of any unfairness in the conduct of his trials". Attention is respectfully called to page 10 of the Transcript of Record, paragraph five of the petition for writ of habeas corpus. In said paragraph of the petition it was complained that the Judge Advocate General of the Navy issued an opinion determining for itself the question of former jeopardy and this opinion which ruled that to try appellant a second time would not be double jeopardy, was an unfair way of dictating to the trial court its decision before evidence could be adduced. That such a written opinion was introduced into evidence at the second trial of the appellant has not been denied by the appellee. It was obvious that the Navy Department in Washington had a very complex situation in appellant's record of his trial at Hawaii. There was a conviction which was void. There was an acquittal which was valid. With this situation and particularly in light of the fact that at the time of the second trial, appellant had been imprisoned since August 7, *1944* without a valid conviction, the Judge Advocate General issued an opinion that it would be legal and proper to try appellant a second time for manslaughter. This opinion emanated from Washington only after appellant had sought relief in the Federal Court and the Navy Department had to show cause why appellant was still incarcerated, having had no

valid trial other than that which resulted in an acquittal.

The trial court at the second trial, in light of the written opinion from Washington, would certainly not take the initiative to consider the facts and render a decision contrary to their superior officer. This procedure shocks the sense of the basic doctrine of fairness and even under the conclusion reached by the District Court, such procedure in military law amounts to a denial of due process.

ACQUITTAL OF ASSAULT CHARGE BAR TO PROSECUTION FOR MANSLAUGHTER.

As to the question of whether an acquittal of the charge of assault with intent to commit murder will operate as a bar to a subsequent trial of manslaughter, the authorities are clear that manslaughter includes an assault and if not guilty of the assault then the accused cannot be guilty of a homicide as a result of said assault. The leading Supreme Court case of *Grafton v. United States* (supra) states "if not guilty of the lesser crime the accused could not for the same acts be guilty of the offense of higher grade. * * * The Government cannot legally for the same transaction put a person in jeopardy for the second time by simply calling the offense another name. * * * Does the result of the first prosecution negative the facts charged in the second? If so, double jeopardy lies". In this case we have to look at the *result* of the first prosecution. That result simply is an acquittal of

assault with intent to commit murder. This does negative the facts charged in the second trial for manslaughter. Again we look at the results of the trial for murder and find a nullity.

Section 119, Naval Courts and Boards, clearly states that the crime of assault is a lesser included offense of manslaughter.

Using the evidence test referred to in the *Graviers* case (*Graviers v. United States,* 220 U.S. 338), "The evidence required to support conviction upon one of them would have been sufficient to warrant a conviction upon the other". In considering evidence necessary to convict appellant of voluntary manslaughter and in proving the words of the specification under that charge of manslaughter, it becomes apparent that in proving such a charge it is necessary to at least prove that appellant assaulted deceased Travis with the 38 calibre pistol. The court's attention is respectfully called to the words of the two specifications as set forth in the petition. Further the trial court having found there was no assoult by appellant with a gun or anything else, then using this evidence test to determine double jeopardy, we cannot again try appellant under the manslaughter charge which will require a finding by the court that appellant did commit some of the acts of which he was previously acquitted.

In the case of *In re Nielsen,* 131 U.S. 176, the court states that

> "Whereas in this case a person has been tried and convicted for a crime which has various incidents

> included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense".

Appellant claims that the "incident" common to both charges for which he was tried is assault.

Quoting from the case of *Tritico v. U. S.*, 4 F. (2d) 664, in which the court uses Mr. Bishop's test of double jeopardy,

> "The test of what is the same offense is stated to be 'whether if what is set out in the second indictment had been proved under the first there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be' ".

Appellant alleges that the evidence necessary to convict on manslaughter if brought out in the previous trial for an aggravated assault which caused this homicide would necessarily have been sufficient to convict the accused of assault and therefore applying Mr. Bishop's test to the facts, the second prosecution for manslaughter should not have been maintained.

In court martial order 2, 1928, page 20, accused was tried for manslaughter and acquitted. It is most interesting to note the language used by the Judge Advocate General dealing with lesser included offenses of which the trial court should have found the accused guilty, to-wit: "But even had the evidence supported the court's finding that the accused was not guilty of voluntary manslaughter, for example that death resulted from some intervening cause and not

directly arising as a result of the accused's act of striking the deceased, and the evidence is uncontroverted that he was struck by the accused, *the court still possessed ample authority which it did not exercise to find the specification proved in part, that is, of finding that the accused willfully and without justifiable cause struck another person in the navy, and the accused guilty in a less degree than charged,* since mere words will not justify an assault or the act of striking another." Of course the accused in the above case having been acquitted of manslaughter was not again tried for assault or striking as it failed to find him guilty of these elements of manslaughter in the first trial, this acquittal amounting to a bar to further prosecution for these acts.

Citing Naval Courts and Boards, Sections 408-410:

> "When a person has been once convicted or acquitted by a court of a certain offense, he is not subject to trial subsequently for a minor offense included therein. Likewise when once tried for a minor offense an accused cannot later be tried for a major offense of which it is a part, because to do so would be to place him twice in jeopardy for the minor offense."

A simple assault is a lesser included offense of an aggravated assault, "assault with intent to commit murder". An assault is a lesser included offense of manslaughter whether voluntary or involuntary. This is set forth in Section 119, Naval Courts and Boards.

Quoting from the leading case of *Grafton v. United States* (supra):

> "It is not in all cases necessary that the two charges should be precisely the same in point of degree for it is sufficient if an acquittal of one will show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge of an indictment of manslaughter upon the same person because the latter charge was included in the former and if it had so appeared on the trial the defendant might have been convicted of the inferior offense an acquittal of manslaughter will preclude a further prosecution for murder, for if he were innocent of the modified crime he could not be guilty of the same fact with addition of malice and design."

In the case of *Doggert v. State,* 93 S.W. 399, it was pointed out:

> "When a person has been convicted or acquitted the state cannot upon the same evidence again convict him for the same act even though the crime is designated by another name."

The court in *State v. Hoot,* 120 Iowa 238, said:

> "It must be conceded that a charge of assault with intent to commit murder includes an assault with intent to commit manslaughter, an assault with intent to do great bodily harm, and also a simple assault."

In 26 *American Jurisprudence* 279, it was said:

> "It is rather difficult to conceive of a prosecution for homicide resulting from an assault where the defendant has been found innocent of committing the assault."

CONCLUSION.

From the foregoing, it is respectfully submitted that: (1) The District Court of the United States for the Northern District of California, Southern Division, erred in concluding that the civil court could not enforce appellant's constitutional right of protection afforded him by that provision of the Fifth Amendment to the Constitution, to-wit: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". (2) That the facts of this case show a valid acquittal of appellant on a charge of assault with intent to commit murder and that this acquittal by a court of competent jurisdiction precludes any second prosecution for the same offense or any offense of which the previous charge was a part. That the United States Navy erred in prosecuting appellant a second time under these circumstances and that therefore the sentence under which appellant is now being held in custody is void for lack of jurisdiction.

Therefore, it is prayed that this Honorable Court reverse the opinion of the District Court and order the release of appellant from custody.

Dated, San Francisco,
October 2, 1947.

Respectfully submitted,
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Attorney for Appellant.