

**IN THE HUALAPAI COURT OF APPEALS  
HUALAPAI NATION  
PEACH SPRINGS, ARIZONA 86434**

Hualapai Tribe, Petitioner

Appellate Court Case: 2011-AP-10

v.

Tribal Court, Respondent

Thomas Grover, Real Party in Interest

Before CHIEF JUSTICE WES WILLIAMS and JUSTICES CAROLE GOLDBERG and ROBERT CLINTON

**OPINION AND ORDER**

The Hualapai Tribe (Tribe or Petitioner) seeks a writ of mandamus to vacate the Tribal Court opinion and order dismissing with prejudice the case of Hualapai Tribe v. Thomas Grover, HTC No. 2010-CR-487, and denying the Tribe's motion for reconsideration. We deny the petition because the Hualapai judiciary may not issue a writ of mandamus when doing so would result in a violation of a criminal defendant's constitutional right against double jeopardy.

**Statement of Relevant Facts and Procedural History**

On November 22, 2010, Thomas Grover (Grover) was arrested for two counts of battery (Hualapai Law and Order Code § 6.87). The first count ("Count A") pertained to the alleged battery of Tammy Querta; the second count ("Count B") pertained to the alleged battery of Richard Mahone. Grover entered a plea of not guilty as to each count. A jury trial was held on March 30, 2011. The jury was impaneled and sworn, and each side presented testimony. The jury then received instructions from the judge and proceeded with its deliberations.

After the jury concluded deliberations, the jury foreman announced a verdict of "guilty" as to Count A and "not guilty" as to Count B, with the jury verdict form confirming these verdicts as having been properly read. After the verdicts were announced, the judge conducted a poll of the individual members of the jury as to the Count A guilty verdict. Hualapai Law and Order Code § 5.17 states that in order for a defendant to be found guilty, the jury must reach a unanimous verdict.<sup>1</sup> The jury polling revealed a split among the jurors as to the Count A guilty

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<sup>1</sup> Hualapai Law and Order Code § 5.17 states: "In every criminal case tried to a jury, the jury must reach a unanimous verdict of guilty or not guilty. If the jury in a criminal case is unable to reach a unanimous verdict after due deliberation, the Tribal Court shall declare a mistrial and the

verdict, with three jurors voting guilty and three others voting not guilty for this particular charge. The jury had not reached a unanimous verdict.

Subsequently, Grover moved for a mistrial, but immediately withdrew that motion and moved for a directed verdict of “not guilty” as to Count A. After this motion was made, a juror suffered a medical emergency that momentarily stopped the proceedings. After a few moments passed, the judge stated that she would make the ruling in the case and ruled in favor of Grover, ordering that the case against him be dismissed with prejudice.

On March 31, 2011, the Tribe filed a Motion for Reconsideration and Request to Have the Case Re-set for Trial. The Tribe argued that the Tribal Court’s decision to dismiss with prejudice was contrary to Hualapai Law and Order Code § 5.17. The Tribe asked the Tribal Court to vacate its order of dismissal and declare a mistrial, pursuant to section 5.17 of the Code. In response, the Tribal Court’s April 4, 2011 Opinion and Order denied the Tribe’s Motion for Reconsideration and Request to Have Case Reset for Trial. In its opinion, the Tribal Court stated that section 5.17 “is not applicable to this case as the section references a ‘hung’ jury, in the jury trial heard on March 30, 2011, the case was given to the jury, the jury deliberated then rendered a verdict of Guilty to Count A and Not Guilty to Count B.” The opinion further explained that the “dismissal was with prejudice based on Hualapai Law and Order Code Section 6.5 Double Jeopardy...”<sup>2</sup> The Tribal Court denied the Tribe’s motion and ordered that the dismissal with prejudice stand.

The Tribe filed a timely petition for a writ of mandamus on April 8, 2011, arguing that a Writ of Mandamus is appropriate in this situation to direct the Tribal Court to vacate both (1) the order of dismissal with prejudice and (2) the order denying the motion for reconsideration.

## Issue

This Court must determine whether it may issue a writ of mandamus at the request of the prosecution in a criminal case, where the effect of the writ would be to require reprosecution of a criminal defendant. If the Tribe were seeking to appeal the orders dismissing the criminal case against Grover and denying reconsideration, the answer to the question of this Court’s jurisdiction would be a simple “no.” The Hualapai Constitution and the Hualapai Law and Order Code grant the right of appeal in a criminal case only to the defendant. *See* Hualapai Constitution Art. VI § 12 and Hualapai Law and Order Code § 10.3; *Hualapai Tribe v. Elwynn Havatone*, 2010-AP-008 (Hualapai Ct. App. 2011). This limitation on the Tribe’s right to appeal in a

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case may be re-tried at the option of the Tribal Prosecutor upon written request to the Tribal Court within 90 days of the Tribal Court’s declaration of mistrial.”

<sup>2</sup> Hualapai Law and Order Code § 6.5 states: “If a criminal defendant has been prosecuted in the Hualapai Tribal Court for one or more offenses, a subsequent prosecution in the Hualapai Tribal Court for the same conduct or for a different offense arising out of the same conduct as the former prosecution is barred. The former prosecution shall have been established in any proceeding in which the jury has been impaneled and sworn, or, in the matter was to be tried without a jury, once the first witness is sworn.”

criminal case furthers the defendant's right, under both the Hualapai Constitution and Hualapai Law and Order Code, not to be placed in jeopardy twice for the same offense. *See* Hualapai Constitution, Article VI, § 13 (a)<sup>3</sup> and Hualapai Law and Order Code § 6.5.

Rather than file an appeal, the Tribe has chosen to petition for a writ of mandamus. Under the Hualapai Constitution, the Hualapai judiciary is authorized to issue such writs. Hualapai Constitution, Art. VI, § 3(c). The Hualapai Rules of Appellate Procedure specify that this Court may issue a writ of mandamus "to compel a judge or judges of the Tribal Court to perform an act which Hualapai law or applicable federal law recognizes as a duty." Hualapai Rules of Appellate Procedure, Rule 16(a)(ii). In *Hualapai Tribe v. Gonzales*, 2010-AP-002 (Hualapai Ct. App. 2010), this Court explained that remedies such as mandamus "are necessary when lower courts exceed their jurisdiction, make fundamental legal errors, or when there is no other avenue for redress available to the petitioner. The power to hear these types of cases is consistent with this Court's power to decide issues of law and procedure." In *Hualapai Tribe v. Elwynn Havatone*, 2010-AP-008 (Hualapai Ct. App. 2011), this Court further recognized that the Tribe could potentially use a writ of mandamus under circumstances where an appeal would not be permissible. *Id.* at 6. The Tribe argues that in this case mandamus is called for because appeal is unavailable, a clear error was committed in the Tribal Court, and the error is likely to be repeated. However, a writ of mandamus may not issue where its consequence would be to place a defendant in jeopardy twice for the same offense, in violation of the Constitution and laws of the Hualapai Tribe. Thus, this Court must decide whether it would violate the double jeopardy provisions of Hualapai law to order the Tribal Court to vacate its order dismissing the criminal case against Grover and to order that the Tribal Court declare a mistrial.

## Discussion

Hualapai Law and Order Code § 5.17 states that if a jury in a criminal case is unable to reach a unanimous verdict after due deliberation, the Tribal Court must declare a mistrial and the case may be re-tried at the option of the Tribal Prosecutor upon written request to the Tribal Court within 90 days of the Tribal Court's declaration of mistrial. In Grover's case, the Tribal Court did not declare a mistrial as required by section 5.17 of the Code. Instead, the Tribal Court dismissed the case with prejudice and allowed Grover to go free.

When the jury polling revealed that the jurors were split as to the guilty verdict for Count A against Grover, the Tribal Court should have either declared a mistrial or asked that the jury continue with further deliberations as to the Count A charge as mandated by Law and Order Code section 5.17. Instead, the Tribal Court responded to the defendant's motion for a verdict of "not guilty" by taking the case away from the prosecutor and jury, and dismissing the case with prejudice. In this situation, despite the Tribal Court's error, we hold that a dismissal constitutes an acquittal for purposes of the double jeopardy provisions of Hualapai law, and prevents the Tribe from seeking to reprosecute Grover for the same acts.

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<sup>3</sup> The Hualapai Constitution, Art. VI, § 13(a) states: "Rights of Defendants: the Hualapai Tribe, in exercising its powers of self-government shall not subject any person for the same offense to be twice put in jeopardy."

Constitutional and statutory protections against double jeopardy protect defendants from multiple punishments or repeated prosecutions for the same offense; spare them the continuing state of anxiety and insecurity that would exist if there were no definitive resolution of the criminal charges against them; and reduce the risk of erroneous convictions that would otherwise exist from multiple prosecutions. In applying double jeopardy protections, a key question is when does “jeopardy” attach, triggering those protections? We hold that jeopardy attached in Grover’s case when the Tribal Court ordered an acquittal, after Grover indicated his opposition to a mistrial.

Our holding is consistent with decisions interpreting similar double jeopardy provisions in federal law and other tribal law. Though neither of these bodies of law is binding on this Court, we are permitted to turn to them for guidance if we find their reasoning persuasive. *See* Hualapai Law and Order Code § 3.1(D). In this case, we do. The United States Supreme Court has long held that retrial is barred by the double jeopardy clause of the United States Constitution, even in cases where judicial errors occur and benefit the criminal defendant. *See Sanabria v. United States*, 437 U.S. 54, 75 (1978) (holding that acquittal based on insufficient evidence bars reprosecution even if the insufficiency resulted from the trial court's erroneous exclusion of evidence that might establish guilt); *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (“The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though ‘the acquittal was based upon an egregiously erroneous foundation.’” (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam))); *Green v. United States*, 355 U.S. 184, 188 (1957) (asserting that “one of the elemental principles of our criminal law [is] that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous”).

In *United States v. Gaytan*, 115 F.3d 737 (9th Cir. 1997), the United States Court of Appeals for the Ninth Circuit held that retrial of defendants after a dismissal was barred by double jeopardy considerations because the defendants had not consented to a mistrial. In that case, the defendants were charged with conspiracy to possess with intent to distribute marijuana. The federal trial court dismissed the case with prejudice, during trial, based on discovery violations by the government. The government appealed, arguing that there was no due process violation in the conduct of discovery, and that the dismissal was not a proper exercise of the trial court's supervisory power. Although the Ninth Circuit agreed that the trial court had erred in dismissing the case with prejudice rather than granting a continuance to remedy any discovery violations or ordering a mistrial, it nevertheless upheld the dismissal because of double jeopardy. The Ninth Circuit observed,

Jeopardy attaches when the jury is empaneled and sworn. Once this occurs, the defendant has a right to have his case presented to that jury. In particular circumstances however, his right may be "subordinated to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Specifically, while the Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal," *Id.* at 505, when a mistrial is declared the rules are more complex. The principle that is controlling here may, however, be stated relatively simply. If a judge declares a mistrial after the proceedings have commenced, retrial will be permitted

only if the defendant consented to the mistrial or if the mistrial was justified by manifest necessity.... *Gaytan*, 115 F.3d at 742.

As in the case before us, the trial court in *Gaytan* had dismissed the case with prejudice instead of ordering a mistrial. Likewise, in both cases the appellate court found that the dismissal was based on an erroneous view of the applicable law, and a mistrial should have been ordered rather than a dismissal. In *Gaytan*, the Ninth Circuit found that retrial would be allowable only if the defendant expressly consented to a mistrial, and that consent could not be inferred. In the case before this Court, it is apparent that Grover likewise did not consent to a mistrial, as indicated by his withdrawal of the motion for mistrial and submission of the motion for a directed verdict. In the absence of express consent to a mistrial, federal law would treat a dismissal the same as an acquittal for double jeopardy purposes, and so do we.

Though also not binding on this court, Hopi Tribal law also offers useful guidance on the issue of double jeopardy and the significance of a dismissal for double jeopardy analysis. In *Hopi Tribe v. Sahmea*, No. 97AC000005 (Hopi Ct. of App. 1998), the Hopi Appellate Court held that the Hopi Tribe does not have the right to appeal a criminal dismissal. In that case, the trial court dismissed a criminal charge against the defendant and denied a subsequent motion for reconsideration. The *Sahmea* court stated, “the [Double Jeopardy] doctrine thus serves the purpose of allowing the general population to feel secure from government oppression, increases confidence in the courts, and provides a form of finality to individual defendants.” *Sahmea* at 18. *Sahmea* went on to state that “[f]or Double Jeopardy purposes, a dismissal will be treated as functionally equivalent to an acquittal.” *Id.*

Despite the Tribal Court’s erroneous decision to dismiss Grover’s case with prejudice instead of declaring a mistrial or directing the jurors to deliberate further, jeopardy did in fact attach, thereby precluding any future attempts by the Tribe to prosecute Grover for the same acts. Had the Tribal Court declared a mistrial, according to section 5.17 of the Code, the “case [could have been] re-tried at the option of the Tribal Prosecutor upon written request to the Tribal Court within 90 days of the Tribal Court’s declaration of mistrial.” Yet Grover’s withdrawal of his motion for a mistrial and subsequent motion for a directed verdict of “not guilty” indicate his express discontent with the ordering of a mistrial. Grover was once put in jeopardy and his case was dismissed with prejudice. The Constitution and laws of the Hualapai Tribe therefore preclude the granting of a writ of mandamus, the sole purpose of which would be to secure a retrial of the same charges against Grover.

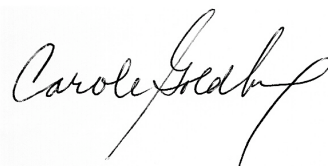
A writ of mandamus may not be sought to re prosecute a defendant after a defendant has already once been placed in jeopardy. Given that Grover did not consent to a mistrial, the dismissal of charges against him must serve as the equivalent of an acquittal for double jeopardy purposes. Even if the Tribal Court erred in dismissing the charges against Grover rather than ordering a mistrial, that error cannot be used as the basis for placing Grover twice in jeopardy for the same offense.

## **Conclusion**

The Tribe’s petition for a writ of mandamus is denied.

IT IS SO ORDERED.

Entered this 16th day of December, 2011, on behalf of the entire panel.

A handwritten signature in black ink, appearing to read "Carole Goldberg", written over a light gray rectangular background.

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Justice Carole Goldberg

VERIFICATION OF SERVICE

SERVED TO: \_\_\_\_\_

SERVED BY: \_\_\_\_\_

DATE/TIME: \_\_\_\_\_