THE STRANGE CASE OF TIMOTHY HENNIS: HOW SHOULD IT BE RESOLVED

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In 1985, Kathryn Eastburn, the wife of an Air Force captain away in Alabama, and two of her three daughters were brutally murdered.[1] Timothy Hennis, an enlisted soldier living in Fayetteville, North Carolina, was at the site of the murders and was suspected of being the perpetrator.[2] The reason for the suspicion was that Hennis had been to the Eastburn home in response to an ad offering the sale of the Eastburns' dog.[3]

There was substantial evidence linking Hennis to the crime.[4] A witness saw a tall, white man with blonde hair and a mustache leaving the Eastburn residence in the early morning hours in a white Chevette, which was the type of car Hennis was known to drive.[5] In addition, another witness saw a man who looked like Hennis using Ms. Eastburn's bank card to withdraw just enough money to pay his overdue rent.[6]

Without boring you with details, Hennis was tried for the murders despite the lack of forensic evidence, and he was subsequently convicted and sentenced to death.[7] The North Carolina Supreme Court reversed the holding on the ground that the prosecution used an excessive number of photographs of the victims, which the court thought was more prejudicial than probative.[8]

On retrial, Hennis's attorneys introduced evidence that the blood and hair found at the scene did not match Hennis.[9] DNA was in its infancy at that time, and neither the State nor the defense was able to use it.[10] The jury found Hennis not guilty, and he was released to return to his family and the Army, where he enjoyed a long and successful career.[11] Finally, in 2004, he retired from the Army with the rank of Master Sergeant.[12]

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1. State v. Hennis, 372 S.E.2d 523, 524 (N.C. 1988).
2. *Id.* at 525.
3. Thom Patterson, *Triple Murder Suspect Goes From Guilty to Innocent and Back to Guilty*, CNN: DEATH ROW STORIES (July 18, 2014, 6:39 PM), https://www.cnn.com/2014/07/18/us/death-row-stories-hennis/index.html.
4. *Hennis*, 372 S.E.2d at 525.
5. *Id.*
6. *Id.*
7. *See generally id.*
8. *Id.* at 528.
9. *Id.* at 525.
10. Patterson, *supra* note 3.
11. *See generally Hennis*, 372 S.E.2d 523; Patterson, *supra* note 3.
12. Nicholas Schmidle, *Three Trials for Murder*, NEW YORKER (Nov. 14, 2011), https://www.newyorker.com/magazine/2011/11/14/three-trials-for-murder.

In 2006, the State finally sent the semen found in Ms. Eastburn's vaginal cavity for DNA testing, and it came back as a match for Hennis.[13] Well what could the State do? Since Hennis had already been acquitted, he couldn't be retried.[14] Perhaps if these events had occurred in England, retrial would be possible because, under English law, the discovery of new damning evidence not available at the time of trial permits a retrial of a person previously found not guilty.[15]

Hennis's case still has ambiguities in it. Although the DNA was convincing evidence of his guilt, there was issue with the handling of the DNA, and, of course, the hair and blood found at the crime scene belonged to someone else.[16] But none of this mattered since the State couldn't retry him.

Enter the United States Army: It recalled the retired Sergeant Hennis, not to help defend our country, but to be subject to a court martial for the murder.[17] Of course, the *Gamble v. United States* case allows for the Federal Government to prosecute a case for the same conduct that a state court already addressed.[18] There are, however, problems with this analysis. The main problem is that there was a federal interest only because the Army had recalled Hennis from retirement, and they only did that so they could try him.[19] Thus, the federal interest was extremely attenuated.

Notwithstanding, as soon as Hennis was called back into the Army, he was court martialed for the 1985 murders.[20] The court martial convicted Hennis, and he was sentenced to death.[21] How should his case be resolved?

On the one hand, it is known that he is guilty, so it is repulsive to let him off on what might seem like a technicality. On the other hand, double jeopardy is not a mere technicality. The Clause was placed in the Constitution to tell prosecutors that they only get one bite at the apple, and to tell defendants that once they are acquitted, they are free from subsequent prosecution for the same offense.[22]

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13. *Id.*

14. *See* Sanabria v. United States, 437 U.S. 54, 64 (1978) (stating that "when a defendant has been acquitted at trial he may not be retried on the same offense").

15. The English exception to double jeopardy protection requires (1) the retrial must be approved by the Director of Public Prosecutions; (2) the Court of Appeal (the highest court within England and Wales, outranked only by the Supreme Court of the United Kingdom) must agree to quash the previous acquittal due to "new and compelling evidence"; and (3) the crime is one of those listed as a "qualifying offence," including murder, manslaughter, kidnapping, rape, armed robbery, and serious drug crimes. Criminal Procedure and Investigations Act 1996, c. 25, pt. VII, § 54, https://www.legislation.gov.uk/ukpga/1996/25/section/54; *see also* CROWN PROSECUTION SVC., *Retrial of Serious Offences*, https://www.cps.gov.uk/legal-guidance/retrial-serious-offences (last visited Nov. 7, 2020).

16. *Hennis*, 372 S.E.2d at 525.

17. United States v. Hennis, 75 M.J. 796, 803 (A. Ct. Crim. App. 2016); Schmidle, *supra* note 12.

18. Gamble v. United States, 139 S. Ct. 1960, 1966–68 (2019).

19. Schmidle, *supra* note 12.

20. *Hennis*, 75 M.J. at 802; Schmidle, *supra* note 12.

21. *Hennis*, 75 M.J. at 802.

22. U.S. CONST. amend. V; Legal Info. Inst., *Reprosecution Following Conviction*, CORNELL L.

Of course, this does mean that even where there is a very strong belief that an acquitted defendant is actually guilty—as in the O.J. Simpson case—there is nothing the prosecutor can do about it.[23] Fortunately, in that case a subsequent civil suit brought some solace to the victim's family, but the criminal law could do nothing about it.[24]

Is there a good reason for the *Hennis* case to be any different? It does not seem that his tangential connection to the military should be enough.[25] Had he not been a soldier at the time of the crime, it is clear that he could not have been tried by the Federal Government after his acquittal by the State.[26] Further, since he was a civilian at the time the DNA match was found, double jeopardy should have kicked in at that point.[27] The only reason that it didn't is because the military recalled civilian Hennis for the very purpose of circumventing the salutary protection the Double Jeopardy Clause offers.[28]

There are several things about this case that are bothersome. For one, the apparent inconsistency between the DNA taken from Ms. Eastburn's body and the other blood and hairs left in the home.[29] Second, it is troubling that a person who lived an exemplary life for twenty-five years can be sentenced to death for something that he did twenty-five years earlier.[30] Of course, the most troubling thing is for the Army to take advantage of the separate sovereignties doctrine for the sole purpose of circumventing the Double Jeopardy Clause.[31]

So, imagine that this case gets to the United States Supreme Court. How should it be resolved? The Court could say that the separate sovereignties doctrine doesn't apply here because the federal interest is ephemeral and manufactured. This would not require questioning or rethinking the recently decided *Gamble* case, but it would say that *Gamble* is limited to a real federal interest and not to one manufactured to help a state circumvent the salutary strictures of the Double Jeopardy Clause.[32]

Or, perhaps the Court could borrow from English law and hold that double jeopardy does not apply when newly-discovered evidence significantly undermines the integrity of the acquittal.[33] There is some difficulty with that. First, it seems inconsistent with basic principles of double

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SCH., https://www.law.cornell.edu/constitution-conan/amendment-5/reprosecution-following-conviction (last visited Nov. 7, 2020).

23. *See* Rufo v. Simpson, 86 Cal. App. 4th 573, 582 (2001).
24. *Id.* at 613–14.
25. *See* State v. Hennis, 372 S.E.2d 523 (N.C. 1988).
26. *See id*.
27. *See id.*
28. *See id.*
29. *Id.* at 525.
30. *See generally id.*
31. *Id.*
32. *See* Gamble v. United States, 139 S. Ct. 1960 (2019).
33. *See* Patterson, *supra* note 3.

jeopardy, which the Constitution seems to forbid absolutely.[34] Secondly, even if a rule were to be adopted that when newly-acquired evidence establishes the certainty of a defendant's guilt, it would likely not apply here because of the possibility of cross-contamination and the blood and hair that did not match Hennis.[35]

Obviously, a third option would be to simply affirm the conviction and death sentence, assuming that the death sentence was obtained under standards that meet the Court's capital punishment jurisprudence.

The preference would be a variant of the first option. There is sympathy to the idea that a federal interest sufficient to warrant a second jeopardy should be a real interest and not one made up as a subterfuge to circumvent the strictures of double jeopardy.

Another factor in favor of this solution is that frankly, it is not convincing that *Gamble* deals with a prior state acquittal as opposed to a conviction.[36] It is one thing to say that just because the State successfully prosecuted a defendant and got its pound of flesh does not mean that the Federal Government might not have its own interest. The theory of *Gamble* was that the Federal Government might have its own interest which is not vindicated by the State conviction.[37]

But a defendant can be acquitted, which means that the defendant did not do it, or at least that the State did not prove beyond a reasonable doubt that the defendant did.[38] Where the Federal Government's prosecution is for the exact behavior, and really the exact crime, for which the defendant had previously been acquitted, *Gamble* should not apply.[39]

Well, if *Gamble* doesn't apply, should adopting the British law be considered so that a vicious triple murderer doesn't get away with the crime? To be sure for the Eastburn family, this is justice postponed, but surely that is better than no justice at all. Apart from the conflicting ambiguity of the crime scene, this seems like a solution that resonates with our sense of justice.

Nevertheless, it cannot be supported. Double jeopardy is a bedrock principle of this country.[40] Even though the thought of Timothy Hennis getting away with such a horrific crime is offending, it is really no different than the feeling of O.J. Simpson's acquittal.[41] Sometimes a guilty person will go free as collateral damage from a system designed to protect the innocent.[42]

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34. *See id.*; U.S. CONST. amend. V.
35. *Hennis*, 372 S.E.2d at 525.
36. *See generally Gamble*, 139 S. Ct. 1960.
37. *Id.*
38. Legal Info. Inst., *Acquit*, CORNELL L. SCH., https://www.law.cornell.edu/wex/aquit (last visited Nov. 7, 2020).
39. *See generally Gamble*, 139 S. Ct. 1960.
40. *See, e.g.*, U.S. CONST. amend. V (discussing double jeopardy).
41. *See generally* State v. Hennis, 372 S.E.2d 523 (N.C. 1988).
42. *See, e.g.*, *id.* at 528; Rufo v. Simpson, 86 Cal. App. 4th 573, 582 (2001).

In this case, the good news would be that after twenty-five years of exemplary behavior, it is unlikely that a free Timothy Hennis would be any sort of threat to society.[43] Of course, this answer will not satisfy the Eastburn family, but it is a necessary cost of minimizing the chance of an innocent person being convicted with the prosecutor's second bite of the apple.[44]

So, a recommendation for the United States Supreme Court, should it ever get this case, is to hold that the federal interest is too attenuated to justify trying Timothy Hennis again.[45]

43. *See generally Hennis*, 372 S.E.2d 523.
44. *Id.*
45. *Id.*