**Ciuzio Vs. U.S**

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**Court** : US Supreme Court

**Decided On :** 1974

**Appeal No.** : 416 U.S. 995

**Appellant** : Ciuzio

**Respondent** : U.S

**Judgement** :

CIUZIO v. U.S - 416 U.S. 995 (1974)
U.S. Supreme Court CIUZIO v. U.S , 416 U.S. 995 (1974)

416 U.S. 995

Eugene Robert CIUZIO
v.
UNITED STATES.
No. 73-5842.

Supreme Court of the United States

May 13, 1974

Rehearing Denied June 17, 1974.

See 417 U.S. 978.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petition for writ of certiorari is denied.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL, join, dissenting.

Successive prosecutions of petitioner and one Cioffi

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resulted from an alleged agreement to sell an undercover agent $500,000 worth of counterfeit 6-cent stamps and an alleged delivery to the agent of a sample sheet of four hundred of the stamps. The first prosecution was upon a two-count indictment that charged the pair in the first count with having attempted to sell stamps known to be falsely made, forged and counterfeited, in violation of 18 U.S.C. 472, and, in the second count, with conspiracy to violate the same section. The trial on that indictment ended with a directed verdict of acquittal on the first count as to Cioffi, a dismissal of the first count as to petitioner and a mistrial on the second count when the jury could not agree upon a verdict.

Instead of proceeding to a retrial on the second count, the Government abandoned its efforts under 472 and procured a second indictment under 18 U.S.C. 501 based upon the very same course of conduct. The second indictment was also a two-count indictment, the first count charging that the pair 'knowingly did possess with intent to use and sell, approximately four hundred forged and counterfeited postage stamps . . .,' in violation of 501, and count 2 charging conspiracy to violate that section. The overt acts alleged were the same as in the first indictment and the evidence at the trials was much the same.

I

Petitioner and Cioffi unsuccessfully claimed that, since the second prosecution grew out of the same transaction, the Double Jeopardy Clause of the Fifth Amendment barred the second prosecution. In my view the rejection of this claim

was error. I adhere to the position that the Double Jeopardy Clause requires the prosecution, except in most limited circumstances not present here, 'to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction.' Ashe v. Swenson, 397 U.S. 436 ,

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453-454 (1970) (concurring opinion); see Mullin v. Wyoming, 414 U.S. 940 (1973) ( dissenting opinion); Grubb v. Oklahoma, 409 U.S. 1017 , 34 L. Ed.2d 309 (1972) (dissenting opinion); Miller v. Oregon, 405 U.S. 1047 (1972) (dissenting opinion); Harris v. Washington, 404 U.S. 55, 57 (1971) ( concurring opinion).

II

I would grant certiorari in any event to decide another Double Jeopardy claim argued by petitioner based upon the action of the Court of Appeals for the Second Circuit in remanding for a new trial after reversing the conviction of petitioner and Cioffi under the second indictment, 487 F.2d 492 (1973).

The substantive 501 first count alleged possession of the stamps 'with intent to use and sell.' Shortly before submission of the case to the jury, the indictment was redacted to delete all references to 'sell.' The redaction was acquiesced in by the prosecution when sought by the defense, apparently because the Government's evidence was insufficient to support the charge of possession with intent to 'sell.' The case thus went to the jury under instructions limited to the charge of possession with intent to 'use.' The Court of Appeals held, however, that the instructions defining 'use' were erroneous because not confined to use for postal purposes. Instead of remanding for a new trial limited to the 'use' charge, as was proper although the Government's evidence at the first 501 trial may have been insufficient, Bryan v. United States, 338 U.S. 552 (1950), the Court of Appeals remanded for a trial on the 'sell' charge finding that the Government's evidence on that charge was sufficient to present a jury question of possession with intent to 'sell'. The Court of Appeals stated:

> 'There was no evidence in this case that defendants had any intention to use the counterfeited

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stamps for large scale mailing of letters; the evidence was rather that they were intent on a sale. In short, when the judge redacted the indictment, he cut out the wrong word; the case should have been submitted to the jury on the basis of possession with intent to sell rather than possession with intent to use. If the judge's action was based on a belief of insufficiency of the evidence to show possession with intent to sell, he was mistaken. From the evidence presented at trial, the jury could permissibly infer that defendants intended to sell the sheet of 400 counterfeit stamps . . ..' 487 F.2d, at 500.

The Court of Appeals recognized that a double jeopardy question was raised by the remand for a trial of the 'sell' charge:

> 'There remains the question whether defendants can be tried again under the same indictment, with the jury this time instructed that it can convict on proof of intent to sell, a charge which the judge erroneously removed from the indictment at the defendants' request and which we direct him to restore. Plainly they can be. It is settled that when a defendant has his conviction reversed on appeal, the double jeopardy clause does not prevent his retrial for the same offense . . .. We see no tenable distinction between a case like this where defendants have procured a reversal because the judge submitted the indictment to the jury on a wrong theory and one where they procured reversal because the judge submitted a defective indictment , . . .' 487 F.2d, at 501.

The question, however is whether the trial judge's redaction of the 'sell' charge was a directed verdict of acquittal on that charge. The lack of a formal direction

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of acquittal is not determinative. United States v. Sisson, 399 U.S. 267 , 279, n. 7 (1970). '[T]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . .." United States v. Jorn, 400 U.S. 470 , 478, n. 7 (1971); cf. United States v. Oppenheimer, 242 U.S. 85 (1916); Downum v. United States, 372 U.S. 734 (1963). If it was an acquittal, petitioner did not forego his constitutional defense of former jeopardy on that charge by successfully appealing his erroneous conviction on the 'use' charge. 'Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.' Green v. United States, 355 U.S. 184 , 193-194 (1957). See also Price v. Georgia, 398 U.S. 323 ( 1970); Benton v. Maryland, 395 U.S. 784 , 796-797d 707 (1969).

The Court of Appeals held this principle inapplicable in denying a petition for rehearing. It based its decision on a reading of 501 as establishing a single offense, 487 F.2d, at 501. This conclusion itself presents an important question even under Chief Justice Shaw's formulation in Morey v. Commonwealth, 108 Mass. 433, 434 (1871), that the test of a single offense is whether 'the evidence required to support a conviction upon one of [the charges] would have been sufficient to warrant conviction upon the other.' See, e. g., Gavieres v. United States, 220 U.S. 338, 342 (1911); Blockburger v. United States, 284 U.S. 299, 304 (1932). Under that test, there is clearly a question whether the evidence required to support a conviction upon one of the charges would have been sufficient to warrant conviction upon the other, since proof of possession with intent to sell seems to require

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proof of a different element than possession with intent to use.

I would grant the petition for certiorari and set the case for oral argument.