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Criminal Procedure: Double Jeopardy: Double Jeopardy Clause Not Offended by Appeal of Dismissal on Defendant's Motion if Dismissal Requires No Determination of Guilt. (United States v. Scott)

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power cannot constitutionally be delegated to the Congress beyond the mark established in *Katchen* and *Atlas*.[119]

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CRIMINAL PROCEDURE—Double Jeopardy—Double Jeopardy Clause Not Offended by Appeal of Dismissal on Defendant's Motion if Dismissal Requires No Determination of Guilt. *United States v. Scott*, 437 U.S. 82 (1978). Until 1970 the government's right to appeal a criminal case was limited by a number of jurisdictional provisions which greatly reduced the need to decide issues regarding the government's right to appeal on constitutional grounds.[1] However, the Omnibus Crime Control Act of 1970[2] eliminated these jurisdictional restrictions and allowed government appeals of decisions, judgments and orders except "where the double jeopardy clause of the United States Constitution[3] prohibits further prosecution."[4] Since 1971 there has been a resurgence of interest in the double jeopardy protection as a result of this change, and a number of Supreme Court cases have focused specifically upon its scope.[5]

These and earlier cases interpreting the clause have generally held that acquittals are not appealable by the government while, absent prosecutorial misconduct or judicial overreaching, mistrials generally are appealable.[6] Problems in interpreting the scope of the clause arise, however, in instances of dismissals which can be characterized neither as mistrials nor as acquittals. The general rule which had been followed in such

119. *See* Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 655 (1979) (Rehnquist, J., dissenting) (forcefully stating the "preservation" aspect of the seventh amendment).

1. *See* United States v. Wilson, 420 U.S. 332, 339 (1975).

2. Pub. L. No. 91-644, 84 Stat. 1880 (codified at 18 U.S.C. § 3731 (1976)).

3. U.S. CONST. amend. V reads in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

4. 18 U.S.C. § 3731 (1976) (footnote added).

5. *See, e.g.*, Swisher v. Brady, 98 S. Ct. 2699 (1978); United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Arizona v. Washington, 434 U.S. 497 (1978); United States v. Sanford, 429 U.S. 14 (1976); Serfass v. United States, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).

6. *See* text accompanying notes 27-55 *infra*.

cases was that appeal is barred where retrial would result upon remand should the government prevail upon appeal.[7] Such was the rule specifically relied upon by the seven member majority[8] in *United States v. Jenkins,*[9] a 1975 decision authored by Justice Rehnquist. In *United States v. Scott,*[10] a 1978 decision also authored by Justice Rehnquist, *Jenkins* is specifically overruled.[11] The five member *Scott* majority[12] now holds that it does not offend the double jeopardy clause to subject an accused to a second trial on a criminal count which had been dismissed on his own motion at the close of the evidence, if such dismissal requires no determination of factual guilt or innocence. Following *Scott,* the dispositive issue in determining whether the double jeopardy clause is offended by a government appeal, is not whether retrial will result on remand, but rather whether a motion to dismiss was made by the defendant without submission to the factfinder of the question of guilt or innocence.[13]

I. HISTORICAL DEVELOPMENT OF THE DOUBLE JEOPARDY PROTECTION

A. The Early Precedent

Although the roots of double jeopardy can be traced to ancient Greece and Rome,[14] its development in English law matured only after prosecutions for criminal violations became a function of the state. Blackstone wrote that the pleas of former acquittal and former conviction were both valid defenses. These special pleas in bar were based on matters not apparent on the face of the charging document and went to the merits of a subsequent indictment. The principle of "jeopardy," applicable to both pleas, was grounded on the "universal maxim

7. United States v. Wilson, 420 U.S. 332 (1975).

8. Justice Rehnquist wrote the majority opinion in which Chief Justice Burger and Justices Stewart, White, Marshall, Blackmun and Powell joined. Justice Douglas filed a concurring opinion in which Justice Brennan joined.

9. 420 U.S. 358 (1975).

10. 437 U.S. 82 (1978).

11. *Id.* at 87.

12. Justice Rehnquist delivered the opinion in which Chief Justice Burger and Justices Stewart, Blackmun and Powell joined. Justice Brennan filed a dissenting opinion in which Justices White, Marshall and Stevens joined.

13. 437 U.S. at 101.

14. *See* 1 DEMOSTHENES AGAINST ARISTOGEITON 589 (Vince trans. 1962); 11 S. SCOTT, THE CIVIL LAW 17 (1932). An indepth analysis of the history of the double jeopardy clause can be found in United States v. Sisson, 399 U.S. 267 (1970). *See also* L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968).

of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."[15] English law at the time of the adoption of the Constitution, however, held that nothing short of a final judgment would bar further prosecution.[16]

B. *Jurisdictional Considerations*

The first Supreme Court case to deal with the government's right to appeal, *United States v. Sanges*,[17] distinguished common-law restrictions on the right to appeal from constitutional restrictions. Relying on state court decisions, it held that absent clear statutory authorization, the government had no right to appeal in "a criminal case of any grade after judgment below in favor of the defendant."[18] While Congress conferred jurisdiction for appeals in the first Criminal Appeals Act of 1907,[19] the jurisdictional grant both as originally and subsequently[20] enacted was limited. In 1970 this provision was replaced by the Criminal Appeals Act, a part of the Omnibus Crime Control Act.[21] According to Justice Marshall, writing for the majority in *United States v. Wilson*,[22] the legislative history of the Appeals Act made it clear that Congress intended to remove all statutory barriers to government appeals and allow them whenever the Constitution would permit.[23] The relevant statutory language now reads:

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15. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1019 (Chase ed. 1890).

16. In the course of ratification proceedings, representatives of Maryland and New York suggested that a double jeopardy clause be included in the first amendments. As a result, James Madison proposed such a clause that failed to survive the Senate, which chose language that had greater similarity to Blackstone's statement of the jeopardy principles. In relevant part, the version adopted by the Senate read as follows, "nor shall any person be subject to be put in jeopardy of life or limb, for the same offence." 1 ANNALS OF CONG. 77,434 (1789) (Gales & Seaton ed. 1849).

17. 144 U.S. 310 (1892).

18. *Id.* at 323.

19. Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246, provided in pertinent part that an appeal could be taken by the United States in all criminal cases "[f]rom the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

20. Act of June 25, 1948, ch. 645, 62 Stat. 844; Act of May 9, 1942, ch. 295, § 1, 56 Stat. 271; Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.

21. *See* note 2 *supra*. The recent amendments of the Omnibus Act were not considered to be controversial by the Senate and it was felt that the legislation posed no threat to the constitutional rights of defendants, but did rectify jurisdictional problems which the government faced in criminal appeals. 116 CONG. REC. 35659-60 (1970).

22. 420 U.S. 332 (1975).

23. *Id.* at 337.

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.[24]

Once Congress removed the statutory limitations to appeal and the relevant inquiry turned on the reach of the double jeopardy clause itself, it became "necessary to take a closer look at the policies underlying the Clause."[25] This closer look has resulted in eight Supreme Court double jeopardy decisions in the last term alone.[26]

II. THE MEANING OF DOUBLE JEOPARDY IN THE MISTRIAL AND THE ACQUITTAL CONTEXTS

A. *In the Mistrial Context*

Since *United States v. Perez,*[27] retrial after mistrial has oftentimes been allowed regardless of whether the mistrial was declared in response to a motion of the defendant or a motion of the court. Nevertheless, the tests as to the permissibility of retrial vary depending upon the position of the party who makes the mistrial motion. In *Perez,* the trial judge had made a discretionary declaration of mistrial after the jury was unable to reach a verdict. The Court concluded that double jeopardy does not bar retrial where the trial judge, after "taking all the circumstances into consideration," decides that "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[28] The *Perez* holding was affirmed as late as 1976 in *United States v. Sanford.*[29] *Sanford* also involved a declaration of mistrial because a jury was unable to reach a verdict. During the government's preparations to reprosecute, the district court granted defendant's motion to dismiss. While the Court of Appeals for the Ninth Circuit dis-

24. 18 U.S.C. § 3731 (1976).

25. 420 U.S. at 339.

26. *See* note 5 *supra.*

27. 22 U.S. (9 Wheat.) 194 (1824).

28. *Id.* at 194. The *Perez* Court emphasized the limited scope of this exception by adding, "To be sure, the power [to declare a mistrial and subject the defendant to retrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . ." *Id. See generally* 26 RUTGERS L. REV. 682 (1973); 8 WAKE FOREST L. REV. 453 (1972).

29. 429 U.S. 14 (1976).

missed the government's appeal on double jeopardy grounds, the Supreme Court reversed the Ninth Circuit's dismissal observing that the trial court's act met the manifest necessity test of *Perez.*

On the other hand, if a mistrial is declared sua sponte in the absence of manifest necessity as discussed in *United States v. Jorn,*[30] the double jeopardy clause sometimes does afford protection. *Jorn* involved a charge of willfully assisting in the preparation of fraudulent tax returns. After the jury had been impaneled, the government called a taxpayer witness whom Jorn had allegedly aided. Learning that warnings to this and all other government witnesses had been given only by the Internal Revenue Service and that none had counsel, the trial court discharged the jury and aborted the trial sua sponte in order to permit the witnesses to obtain legal advice. Prior to the new trial, Jorn successfully moved for dismissal on grounds of former jeopardy and, upon direct appeal by the government to the Supreme Court, the dismissal was affirmed. The *Jorn* Court concluded that the trial judge had abused his discretion, thereby failing to meet the manifest necessity test of *Perez.*[31]

In contrast to *Perez, Sanford* and *Jorn,* the situation in *United States v. Dinitz*[32] involved the declaration of a mistrial on motion of the defendant. *Dinitz* held that, absent bad faith conduct by the court or prosecution intended to provoke a mistrial request or harass or prejudice the defendant, the double jeopardy clause does not bar retrial in such circumstances.[33] In *Dinitz,* defendant's chief counsel was expelled from court during his opening statement. After the court had given the defendant several options as to when and how the trial would proceed, he chose to move for a mistrial to allow himself time to obtain new counsel. Prior to his second trial, the defendant's motion to dismiss on double jeopardy grounds was denied. Subsequently, he represented himself and was convicted. The

30. 400 U.S. 470 (1971).

31. *Id.* at 487. *Cf.* Gori v. United States, 367 U.S. 364 (1961) (where retrial was constitutionally permissible even though the judge's declaration of mistrial had been overcautious and premature). *See generally* Schulhofer, *Jeopardy and Mistrials,* 125 U. PA. L. REV. 449 (1977).

32. 424 U.S. 600 (1976).

33. *Id.* at 606, 611. The Court described the circumstance as judicial "error," without further elaboration and stated that only if error occurred in bad faith was retrial barred, citing United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion) and Downum v. United States, 373 U.S. 734 (1963). It should be noted that in *Dinitz* both parties and the bench clearly contemplated retrial.

Fifth Circuit reversed, but the Supreme Court reinstated the conviction emphasizing the limited double jeopardy protection afforded where a mistrial has been declared at defendant's request:

> The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal.". . . Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.[34]

Thus, a defendant who moved for mistrial because of error during trial can be retried if the mistrial has not been required by judicial or prosecutorial conduct constituting bad faith.[35]

In *Lee v. United States,*[36] the Court considered the issue of whether the denomination of a decision as a mistrial or a dismissal was of critical significance. It concluded that it was not:

> The distinction . . . does not turn on whether the District Court labels its action a "dismissal" or a "declaration of mistrial." The critical question is whether the order contemplates an end to all prosecution of the defendant for the

34. 424 U.S. at 608.

35. Other types of situations where retrial was not barred upon mistrial occurred in Wade v. Hunter, 336 U.S. 684 (1949) (military court martial discharged due to tactical necessities in the field); Thompson v. United States, 155 U.S. 271 (1894) (jury discharged where one juror had served on grand jury indicting defendant); Logan v. United States, 144 U.S. 263 (1892) (jury discharged for inability to reach a verdict after forty hours of deliberation); Simmons v. United States, 142 U.S. 148 (1891) (letter published in newspaper rendered juror's impartiality doubtful).

36. 432 U.S. 23 (1977).

> offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution . . . while a dismissal may or may not do so.[37]

In *Lee,* immediately after the prosecutor's opening statement, counsel for the defendant moved for dismissal on the ground that the information failed to allege all of the statutory requisites. It is noteworthy that the defense had made no pretrial motion to this effect. At the close of the evidence, the trial judge granted the motion even though he thought that the defendant's guilt had been proven beyond any reasonable doubt. Because the proceedings were not "terminate[d] . . . in the defendant's favor"[38] and the defective information did not constitute bad faith conduct by the prosecution, the Court upheld Lee's retrial, describing the dismissal of his original trial as "functionally indistinguishable from a declaration of mistrial."[39]

Clearly, the term "mistrial" in its usual context relates to a device employed when uncontrollable and unforeseen circumstances preclude trial before a given factfinder in the balanced and fair framework anticipated by the parties. In such instances, since termination arises because of procedural problems rather than as a result of determinations regarding general issues of the case, it is felt that it is neither unreasonable nor unfair to subject the accused to a second trial. Implicit in this view is the assumption that, while the accused has an interest in having a final decision from the initial tribunal, this interest must be weighed against the public's right to retribution.[40]

B. In the Acquittal Context

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, with-

37. *Id.* at 30.

38. United States v. Jenkins, 420 U.S. 358, 365 n.7 (1975) (contrasts proceedings terminating with mistrial with proceedings terminating in the defendant's favor).

39. 432 U.S. at 31 (footnote omitted).

40. It is interesting to note that it is this balancing test—the defendant's right to trial by initial tribunal versus public's right to retribution which is referred to throughout the majority opinion. The dissent, on the other hand, refers to the balancing of the government's right to have one full opportunity to convict against the defendant's right to avoid the anxiety of multiple prosecutions. The choice of values to be balanced, of course, reflects the interest which the parties see the double jeopardy clause as designed to protect. *See* text accompanying notes 45-55 & 84-85 *infra.*

out putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' "[41] The Supreme Court has refused, however, to be bound by terminology, in the acquittal, as in the mistrial context, and, in determining whether there has been an acquittal, it had directed that a court ought not to be controlled by the form of the judge's action.[42]

The analysis to be utilized in making the decision whether a ruling, for the purposes of the double jeopardy clause, had the characteristics of an acquittal was developed in *United States v. Sisson*[43] and *Serfass v. United States*[44] as discussed below. That test, in turn, was grounded not in technical distinctions between motions, but rather in what was considered to be the basic purpose of the double jeopardy clause itself:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[45]

Viewed from this standpoint the question became whether the state had been given a full chance to convict in the first trial. The measure of whether there had been a full chance to convict turned upon whether the dismissal was based on facts brought out at trial. This wording, in fact grew out of *Sisson*, a pre-1971 case which it should be noted, rests on an interpretation of statutory wording, and made no reference to the double jeopardy clause itself. Sisson, the defendant, moved for arrest of judgment after the jury had found him guilty of willfully failing to report for induction. While the arrest of judgment motion

41. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

42. *See* Sanabria v. United States, 437 U.S. 54 (1978); United States v. Jorn, 400 U.S. 470 (1971); Fong Foo v. United States, 369 U.S. 141 (1962); Green v. United States, 355 U.S. 184 (1957); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896). *See generally* 12 COLUM. J.L. & SOC. PROB. 295 (1970); 87 HARV. L. REV. 1822 (1974).

43. 399 U.S. 267 (1970).

44. 420 U.S. 377 (1975).

45. Green v. United States, 355 U.S. 184, 187-88 (1957). *See also* Breed v. Jones, 421 U.S. 519 (1975); Serfass v. United States, 420 U.S. 377 (1975); United States v. Jorn, 400 U.S. 470 (1971).

was jurisdictional, it can be argued that the trial court's opinion did not go to the jurisdictional question but rather went to the willfulness of the act. On review, the Court held that because the disposition below was based on facts inferred by the court "on the basis of evidence adduced at the trial"[46] rather than a flawed indictment, the decision amounted to a directed acquittal, and the jurisdictional requirements of the Appeals Act were not met.[47] The Court in *Serfass* cited *Sisson* to the effect that the order of the district court was a legal determination on the basis of facts brought out at trial relating to the general issue of the case.[48] Thus, *Sisson* and *Serfass* held that, if the trial judge's action in terminating the trial was based on facts adduced at trial, and not merely on facts found on the face of the indictment or information, the termination had the effect of an acquittal.

United States v. Martin Linen Supply Co.[49] was a criminal contempt case where a judgment of acquittal, entered upon a Rule 29(c) motion,[50] was made after the discharge of a deadlocked jury. The trial judge had determined that the evidence was legally insufficient to sustain conviction. Since this ruling was based on evidence adduced at trial that went to the general

46. 399 U.S. at 288.

47. The Court noted that:

> Thus, three requirements must be met for this Court to have jurisdiction under this provision. First, the decision of the District Court must be one "arresting a judgment of conviction." Second, the arrest of judgment must be for the "insufficiency of the indictment or information." And third, the decision must be "based upon the invalidity or construction of the statute upon which the indictment or information is founded."
>
> Because the District Court's decision rests on facts not alleged in the indictment but instead inferred by the court from the evidence adduced at trial, we conclude that neither the first nor second requirement is met.

399 U.S. at 279-80 (footnotes omitted).

48. 420 U.S. at 393.

49. 430 U.S. 564 (1977).

50. FED. R. CRIM. P. 29(c) states:

> (c) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Guidelines for use of the rule are found in 4A L. FRUMER & I. HALL, BENDER'S FEDERAL PRACTICE FORMS 56 (Cum. Supp. 1978).

issue of the case, the Court reasoned that the acquittal fell squarely within the language of *Sisson* and *Serfass,* thus barring review.[51]

The rule of law enunciated in *United States v. Wilson*[52] is also grounded in a recognition that the purpose of the double jeopardy provision is to bar second prosecutions. In *Wilson,* it was held that appeal of a post verdict dismissal did not offend the fifth amendment since a new trial would not be necessary should the government prevail upon appeal. The sole test of constitutionality in instances where the government had had one full chance to try the defendant and failed, is, according to *Wilson,* the necessity upon remand of a new trial amounting to a harassing multiple prosecution.[53]

United States v. Jenkins,[54] decided the same day as *Wilson,* relies on the *Wilson* test in its finding that the double jeopardy clause is offended by appeal following dismissal on motion of the defendant at the close of the evidence. Jenkins was charged with knowingly refusing to submit to induction on February 24, 1971. After receiving the notice to report, he had applied for conscientious objector status but he did not receive a response to this application prior to his reporting date. Though as of that date the law of the circuit, as enunciated in *United States v. Gearey,*[55] required that a local draft board reopen an individual's classification in such instances, this position was subsequently overruled by the Supreme Court. At the time of Jenkin's trial, *Gearey* did not govern.

Jenkins had filed a pretrial motion for dismissal based on *Gearey* which was denied. However, at the close of the evidence, the trial court dismissed the indictment holding that equity would be offended if the defendant were convicted for acting in compliance with, what at the time of his act, was

51. Justice Stevens, in a concurring opinion in *Martin Linen Supply,* reasoned that appeal was barred because the plain language of the act authorized appeals only from dismissals, not from acquittals. 430 U.S. at 577. He also traced the legislative history of the statute and noted that while the Senate bill authorized appeal from any decision or order "terminating a prosecution in favor of a defendant," the enacted Conference Committee version deleted this portion, leaving only dismissals appealable. Since acquittal was omitted from the list of actions appealable, Stevens concluded that there could be no government appeal of this case.

52. 420 U.S. 332 (1975).

53. *Id.* at 352.

54. 420 U.S. 358 (1975).

55. 368 F.2d 144 (2d Cir. 1966).

controlling law. *United States v. Scott* involved a trial court holding made in an almost identical procedural context.

III. THE *Scott* DECISION

John Arthur Scott was an undercover officer for the Central Narcotics Unit of Muskegon County, Michigan, who was arrested on January 22, 1975, for selling narcotics to a paid informant in violation of 21 U.S.C. § 841(a)(1).[56] An alleged sale on September 24, 1974, served as the basis of count II of the indictment which was returned on March 5, 1975, and an alleged sale on January 22, 1975, served as the basis of count III. The grand jury also added a third count, count I, alleging a sale of narcotics September 20, 1974.[57] Prior to trial, Scott filed a motion to dismiss counts I and II because of pre-indictment delay. The court denied the motion without prejudice. The motion was renewed and denied at the conclusion of the government's case, and again renewed at the close of all the evidence. At that time the district court ruled on the motion and dismissed counts I and II.[58] Mr. Scott was acquitted by the jury

56. (1970). The statute provides in part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 841(a)(1) (1970).

57. Brief for Petitioner at 4.

58. Although the decision to dismiss count I was clearly based on intentional, prejudicial pre-indictment delay, the court's reasons for dismissing count II are less clear. The trial judge noted:

> I do not decide whether the degree of prejudice shown here would be sufficient for dismissal if the reason for delay was neutral. I hold only that since the delay resulted primarily from an attempt to gain a tactical advantage, this Defendant has presented sufficient proof of prejudice with respect to Count I.
>
> . . .
>
> I am still a little concerned about September 24th because of some of the totalities of the circumstances in this case. Here is a black officer, the only black officer ever to serve in the unit. He was denied help when again and again he asked for help. That is a jungle out there. The Defendant's theory is that he was left alone, and being left alone he had to devise his own means of surviving in that jungle, and that he was in the process of trying to eliminate what he contended was a big operator, the Government's informant Jordan.
>
> There is evidence in the record from which the jury can conclude that the Defendant's evidence was correct.
>
> One of the problems is, in this case, as I see it, is the very heavy burden which the Defendant had to carry when he was in that jungle; And what—here was an officer. He was brought up from the patrol and tossed into the thicket of a highly sophisticated area of activities. And of all of the things he had to try to

as to count III. The government appealed the dismissal of counts I and II to the Sixth Circuit[59] which denied the appeal for lack of jurisdiction.[60] The government then sought certiorari for its appeal of the dismissal of count I.[61]

The majority opinion in *Scott* is difficult to analyze for, in this author's view, it does not evidence the characteristics of serious and principled adjudication. Marred by miscitation of authority[62] and based upon a questionable analogy,[63] *Scott* concluded by offering a test which—if honestly applied to the facts before it—could easily have resulted in a contrary holding. The Court began by acknowledging that the decision to overrule *Jenkins* stemmed from policy considerations:

> If *Jenkins* is a correct statement of the law, the judgment of the Court of Appeals relying on that decision, as it was

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remember in that kind of a circumstance he may have forgotten crucial testimony essential to his defense.

I am going to dismiss Count II, as well.

I am not setting a precedent in that regard. I am doing it solely out of the peculiar circumstances of this case. The defendant in this case should not have been out there in that jungle alone. And what I am concerned about is a compromise verdict which may result if he were to be—had to stand trial all the way on the three counts.

Petition for a Writ of Certiorari, app. D, at 8a-10a. *See* text accompanying notes 79-81 *infra*.

59. The appeal was pursuant to 18 U.S.C. § 3731 (1976).

60. 544 F.2d 903 (6th Cir. 1976).

61. The government chose not to appeal the dismissal of count II but did "not concede . . . that a second trial on count II would have violated the Double Jeopardy Clause." Brief for Petitioner at 6 n.4. It chose not to appeal the dismissal of count II because of the lack of clarity surrounding that dismissal. *Id.* Following remand, the Sixth Circuit affirmed the district court's decision to dismiss counts I and II. Letter from Attorney William C. Marietti, Muskegon, Michigan, counsel for Scott, to Larry L. Shupe (August 11, 1978).

62. *E.g.*, Burks v. United States, 437 U.S. 1 (1978) is cited in support of the proposition that "[s]uccessful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution . . . ." *Scott*, 437 U.S. at 90-91. *Burks*, in fact, did not define the set of all appeals that did not offend double jeopardy, but only defined one instance when the clause is offended: after successful appeal by a defendant, the "Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Burks*, 437 U.S. at 18. Again the opinion cites Crist v. Bretz, 437 U.S. 28, 33 (1978), as the basis of a fundamental postulate of its reasoning, that is that "[t]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment . . . ." *Scott*, 437 U.S. at 92. In fact, while *Crist* recognizes that *"a* primary purpose" of the Clause is to protect finality of judgment, it recognizes that *"[t]he basic* reason for holding that defendant is not in jeopardy" is the *Green* rationale, the basic unfairness of multiple uses of the state's extensive resources against a single individual. *Crist*, 437 U.S. at 35 (emphasis added).

63. *See* text accompanying notes 64-67 *infra*.

> bound to do, would in all likelihood have to be affirmed. Yet, though our assessment of the history and meaning of the Double Jeopardy Clause in *Wilson, Jenkins,* and *Serfass v. United States* . . . occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided. It placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him . . . .[64]

The opinion then moves to the core of its reasoning: that the dismissal of the indictment in *Scott* because of pre-indictment delay was more akin to a declaration of mistrial than to an acquittal.

Unfortunately, the *Scott* dismissal did not have any of the characteristics of a declaration of mistrial. Not only did it not result from procedural issues, but also, at the time of dismissal, there could have been no contemplation of a second prosecution. *Scott* relied on *Downum v. United States*[65] for support of its position that, "The fact that the trial judge contemplates that there will be a new trial is not conclusive on the issue of double jeopardy. . . ."[66] However, the Court neglected to point out that the trial court's conclusions as to reprosecution had been decisive in all instances except where the trial court had erred in the prosecution's favor—in cases such as *Jorn* where the judge had abused his discretion in declaring a mistrial sua sponte.

The Court's willingness to equate the *Scott* dismissal with a declaration of mistrial stems, it seems, from a generally negative view of the protections afforded criminal defendants as a result of relatively recent decisions of the Court: "Part of the difficulty arises from the development of other protections for criminal defendants in the years since the adoption of the Bill of Rights."[67] Thus any actions by defendants designed to take advantage of these protections are denominated "situations in which the defendant is responsible for the second prosecution."[68] They become equated with motions for mistrial made by a defendant and then the onus for the retrial is transferred

64. 437 U.S. at 86-87.
65. 372 U.S. 734 (1963).
66. 437 U.S. at 92.
67. *Id.* at 87-88.
68. *Id.* at 96.

from the government to the defendant and made to appear his deliberate choice.

Once this shift of definition has been made, the Court can substitute a new test which is constructed from language found in *Martin Linen Supply*. Prior to *Scott, Wilson* had held that if retrial would not be required upon remand of a successful government appeal, the double jeopardy clause would not be offended. On the other hand, as in *Jenkins,* if successful appeal on reversal would require "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged," such appeal would be barred.[69]

Martin Linen Supply had utilized two phrases to define acquittal: the traditional definition utilized in *Serfass* and *Sisson*—" 'a legal determination on the basis of facts adduced at trial relating to the general issue of the case' "[70]—and the more narrow definition "a resolution, [in the defendant's favor] correct or not, or some or all of the factual elements of the offense charged."[71] According to Justice Brennan, author of the *Martin Linen Supply* decision,

> [The latter] definition, which is narrower than the traditional one, enjoys no significant support in our prior decisions. The language quoted from *Martin Linen Supply Co.* was tied to the particular issue in that case and was never intended to serve as an all-encompassing definition of acquittal for all purposes. Rather, *Martin Linen Supply* referred generally to "acquittal" as "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case."[72]

Nevertheless, the *Scott* Court builds on the narrower definition, and, since in the majority's view, the district court had not resolved any factual elements in the defendant's favor, the dismissal could not be deemed an acquittal. The problem, of course, is in determining whether factual elements had been resolved. The majority holds that defenses such as insanity or entrapment go to factual elements of the offense charged while defenses such as pre-indictment delay do not.[73] The dissent finds the majority's distinctions "incapable of principled appli-

69. 420 U.S. at 370.

70. 430 U.S. at 575 (quoting Serfass v. United States, 420 U.S. at 393).

71. 430 U.S. at 571.

72. 437 U.S. at 111-12 (Brennan, J., dissenting) (quoting Martin Linen Supply Co., 430 U.S. at 575).

73. 437 U.S. at 97-98.

cation."[74] In *Scott,* Justice Rehnquist dismissed the dissent's concern that in trials to the court, no clear line can be drawn between decisions relating to factual elements going to guilt or innocence and purely legal determinations.[75] However, in *Jenkins,* he himself had voiced that concern:

> A general finding of guilt by a judge may be analogized to a verdict of "guilty" returned by a jury. . . . In a case tried to a jury, the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived. In a bench trial, both functions are combined in the judge, and a general finding of "not guilty" may rest either on the determination of facts in favor of a defendant or on the resolution of a legal question favorably to him. . . .
>
> We are less certain than the Government, however, of the basis upon which the District Court ruled. It is, to be sure, not clear that the District Court resolved issues of fact in favor of respondent. But neither is it clear to us that the District Court, in its findings of fact and conclusions of law, expressly or even impliedly found against respondent on all the issues necessary to establish guilt under even the Government's formulation of the applicable law.[76]

Given the confusion surrounding the dismissal of counts I and II, it remains unclear whether the granting of Scott's motion of dismissal based on pre-indictment delay actually did involve the resolution of factual issues in the trial judge's mind or whether it actually did involve questions concerning the sufficiency of the evidence.

The defense of pre-indictment delay is of particular importance in cases, such as drug cases, when there is limited tangible evidence and the only defense available involves contradiction of the state's witnesses' testimony.[77] Since few people can recall the details of their conduct on a particular day six months or twelve months earlier, their defense is particularly prejudiced by prosecutorial postponement of the indictment. In a concurring opinion in *United States v. Marion*[78] an early understanding of the pre-indictment delay defense was cited:

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74. *Id.* at 111 (Brennan, J., dissenting).

75. *Id.* at 98 n.11.

76. 420 U.S. at 366-67 (footnotes omitted).

77. While prosecutorial delays occurring after criminal charges are filed implicate the right to a prompt trial under the sixth amendment, delays prior to charging generally involve due process under the fifth amendment. *See generally* United States v. Lovasco, 431 U.S. 783 (1977).

78. 404 U.S. 307 (1971).

> "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."[79]

Scott is an excellent example of the multiple considerations involved in a decision to dismiss on the basis of pre-indictment delay. As the defense attempted to bring out and as the trial judge noted, Scott was the only black officer ever to serve on this particular narcotics unit. He was brought up from patrol and given no particular training for this work either in terms of recordkeeping or with respect to the boundaries of behavior appropriate in these circumstances. Although Scott sought assistance and advice on many occasions, he was consistently denied it. He was then brought to trial for sale of narcotics on the basis of the testimony of an informer against whom he was a primary witness in an upcoming state trial. The trial judge's decision to dismiss does not appear to have been an abstract "legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation."[80] Rather it appears to have involved the finding of a constitutional violation which was a violation because it impacted both on the defendant's ability to challenge the sufficiency of the prosecution's evidence and his ability to demonstrate possibly "legally adequate justification for otherwise criminal acts."[81] A further serious criticism of the *Scott* decision is that it creates an artificial distinction between defenses. As stated by Justice Brennan:

> The whole premise for today's retreat from *Jenkins* and *Lee,* of course, is the Court's new theory that a criminal defendant who seeks to avoid conviction on a "ground unrelated to factual innocence" somehow stands on a different constitutional footing than a defendant whose participation in his criminal trial creates a situation in which a judgment of ac-

79. *Id.* at 328-29 (Douglas, J., concurring) (quoting Regina v. Robins, 1 Cox's C.C. 114 (Somerset Winter Assizes 1844)).

80. 437 U.S. at 98 (footnote omitted).

81. *Id.* at 97-98 (footnote omitted). This is the language which the majority used to describe the defenses of entrapment and insanity and to distinguish these defenses from that of pre-indictment delay.

> quittal has to be entered. This premise is simply untenable. . . .
>
> It is manifest that the reasons that bar a retrial following an acquittal are equally applicable to a final judgment entered on a ground "unrelated to factual innocence." The heavy personal strain of the second trial is the same in either case. So too is the risk that, though innocent, the defendant may be found guilty at a second trial.[82]

The practical consequences of *Scott* may well be that courts will have to struggle with its requirement of "true acquittal."[83] This, in turn, could easily produce rather strained interpretations that inevitably decrease the scope of double jeopardy protection for an increasing number of defendants.

And, it would seem, this is what *Scott* is intended to do. At least since *Green,* the double jeopardy clause has been seen as the expression of "society's . . . willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws"[84] because of the recognition of the gross unfairness of requiring the accused to undergo the strain and agony of more than one trial for any single offense. But the majority in *Scott* minimized this tradition and concluded that "the primary purpose of the Double Jeopardy Clause . . . [is] to protect the integrity of a final judgment. . . ."[85] Their insistence on a true acquittal follows, and the right of the defendant to avoid multiple prosecutions is then easily subordinated to the rights of the state.

IV. Conclusion

In framing its opinion, the Court in *Scott* had before it two seemingly overlapping but, in fact, divergent bodies of law. On one hand was the position of Blackstone and of English law which held that nothing short of a final judgment would bar further prosecution. Lacking such final judgment, appeal which may result in a second trial was not barred. In stark

82. *Id.* at 108 (Brennan, J., dissenting).

83. The majority's restrictive definition of "acquittal" is the focal point of Justice Brennan's dissent, in which he contends that the term's definition "is incapable of principled application." In his criticism of the majority's definition of acquittal, he stated that "in terms of the practical operation of the adversary process, there is actually no difference between a so-called 'true acquittal' and the termination in this case favorably to respondent." *Id.* at 104.

84. 400 U.S. at 479.

85. 437 U.S. at 92.

contrast is the double jeopardy clause itself with its protections against multiple prosecutions. *Scott* has the effect of substantially narrowing the scope of such double jeopardy protections, shifting this scope more closely to the position of English law.

LARRY L. SHUPE

INSURANCE—Subrogation—Accident and Health Insurance Policy Still Characterized as "Investment" Contract. *Rixmann v. Somerset Public Schools*, 83 Wis. 2d 571, 266 N.W.2d 326 (1978). In the recent decision of *Rixmann v. Somerset Public Schools*[1] the Wisconsin Supreme Court attempted to eliminate some of the confusion that has surrounded the subrogation and collateral source rules in Wisconsin ever since the Delphic case of *Heifetz v. Johnson*.[2] The *Rixmann* decision purports to establish simple rules for the treatment of payments under accident and health insurance policies in personal injury cases. It is submitted, however, that the decision's continued characterization of such insurance policies as "investment" contracts, for which there is no automatic subrogation, does not reflect changes that have taken place since the issue was originally decided.

The plaintiffs, Ronald Rixmann and his father, brought an action for damages from injuries Ronald suffered while participating in a high school chemistry class experiment. They had been reimbursed for all but $656.33 of Ronald's medical expenses by his father's health insurer, Guardian Life Insurance Company. However, Guardian Life had executed a document purporting to assign any interest it had from payments under the policy back to the plaintiffs.

The trial court had ruled that Guardian Life was not subrogated as a result of its payments and, therefore, had no interest to assign to the plaintiffs. Furthermore, the trial court had held that the plaintiffs could not recover expenses for which they had been reimbursed.[3] Both rulings were contested on appeal.

With respect to the first ruling, the plaintiffs argued that

1. 83 Wis. 2d 571, 266 N.W.2d 326 (1978).
2. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).
3. 83 Wis. 2d at 574, 266 N.W.2d at 328.