RECENT TRENDS

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THE USE OF CIVIL LIABILITY TO AID CRIME VICTIMS

Our legal system is beginning to take note of the problems encountered by victims of crimes, whose rights until now have been largely overlooked.1 The general focus of this concern has been the provision of adequate financial compensation for crime victims through the use of insurance, restitution, state-funded compensation programs or civil actions.2 Crime insurance and court-ordered restitution have been considered insubstantial in many cases, and also have been criticized because of the extent of their dependence on the individual discretion of insurance adjusters and judges.3 Although nearly one-third of the states have enacted victim compensation programs,4 such programs also have been criticized as ineffective because of their restrictions on recoveries for victims of violent crimes.5 Civil actions to compensate crime victims also have been generally ignored because of the difficulty of obtaining civil recovery from the perpetrator of the criminal act.6

However, several recent cases indicate that victims of crime have been successful in suits against common carriers for the criminal actions of third parties.7 These suits have been aided by the increasing tendency of courts to find defendant carriers in violation of a duty to prevent crime against passengers and others. Similarly, victims also have found success in suits against other entities for the criminal acts of third parties, if a special legal relationship between the victim and the potential defendant is successfully pleaded. Such a special relationship giving rise to a duty to protect another from a criminal attack by a third person may exist, for example, in innkeeper-guest, landowner-invitee and custodian-ward situations.8 Yet, the major source of litigation in the area of third person criminal attacks, and hence the prime focus of this article, still appears to arise from common carrier-passerenger situations.

Recently, the Court of Appeals for the Third Circuit in Kenny v. Southeastern Pennsylvania Transportation Authority,9 imposed civil liability on a common carrier for failing to protect adequately its passenger against criminal violence. In Kenny, a woman who was raped in a transit station sued the Southeastern Pennsylvania Transportation Au-
tority\textsuperscript{11} (hereinafter SEPTA) and the City of Philadelphia. The evidence showed that the plaintiff was attacked by another patron while awaiting the arrival of a train at an inadequately lighted station platform. The SEPTA employee on duty allegedly paid insufficient attention to platform conditions,\textsuperscript{12} although SEPTA had previously acknowledged the existence of a crime problem on its transit system.

At trial, the jury concluded that the transit system had knowledge of the dangerous condition of the platform, and had negligently failed to provide adequate protection against such danger. This negligence was found to have been the proximate cause of the plaintiff's injuries. The jury also decided that the City of Philadelphia was not liable.\textsuperscript{13} Nevertheless, the district court\textsuperscript{14} entered judgment notwithstanding verdict in favor of SEPTA, finding that SEPTA had no reason to anticipate the criminal conduct of the assailant at the particular station involved.\textsuperscript{15} The district court also rejected the plaintiff's alternative argument that the lack of adequate lighting and an adequate system of security devices, such as closed circuit TV coverage of the platform or telephone and warning devices, were the proximate cause of the assault.

On appeal, the Third Circuit reinstated the jury verdict in favor of the plaintiff. The court held that in view of SEPTA's knowledge that crime had been increasing on the transit system, the possibility of such an assault on the station platform should have been foreseeable. The court then applied Section 344 of the Restatement (Second) of Torts\textsuperscript{16} in finding that SEPTA had a duty to protect the plaintiff from foreseeable criminal acts. Under Section 344, a landholder is liable to its business invitees for physical harm caused by the intentional acts of third persons and the failure of the landholder reasonably to protect the invitee from foreseeable harm.\textsuperscript{17} The court held that this duty was violated by SEPTA when it failed to provide adequate lighting at its transit station and when its employee failed to hear the plaintiff's screams and call the police.

Furthermore, the court claimed that the district court had erroneously narrowed the scope of SEPTA's potential liability by emphasizing the probability of the specific offense occurring at the particular location involved. The appellate court instead held that the duty to protect its patrons is to be determined, in such cases, by "whether the authority could have reasonably expected criminal activity from anyone at its station."\textsuperscript{18} This statement of the scope of the carrier's duty may significantly increase the chances of proving that a carrier has been negligent in failing to provide adequate safe-


\textsuperscript{12} The carrier's attendant who had been in the cashier's booth testified that he knew nothing of the attack and had not heard the plaintiff's screams. He admitted that he had a portable radio playing in the booth, but said that the radio was permitted by his employer. A telephone in the booth was connected with dispatches and security units but was not used that evening until after police had come to investigate the incident. 581 F.2d at 353.

\textsuperscript{13} Id. at 354. Apparently, the jury did not agree with the plaintiff's argument that the Philadelphia Police Department, who were relied on by the transit system to provide protection for its patrons, were negligent in failing to protect the station platform or in responding to her cries for help. The jury awarded damages of $18,000 against SEPTA alone. Id. at 353.

\textsuperscript{14} Id. Federal jurisdiction in this case was based upon diversity of citizenship. The federal court applied Pennsylvania law.

\textsuperscript{15} Id. at 354.

\textsuperscript{16} Section 344 of the Restatement (Second) of Torts (1965) states that:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

See also Comment E to Section 344, which as pointed out by the Kenney Court, states that:

it may not be enough for the servants of [a] public utility to give a warning, which might be sufficient if it were merely a possessor holding its land open to the public for its private business purposes. The utility may then be required to take additional steps to control the conduct of the third person, or otherwise to protect the patron against it.

Section 344 of the Restatement Second of Torts (1965) had been cited with approval in Pennsylvania. See Moran v. Valley Forge Drive-In Theater, Inc., 431 Pa. 432, 246 A.2d 875 (1968) (a patron recovered from a theater for injuries received when rowdy teenagers exploded a firecracker near him).

\textsuperscript{17} Section 344, Restatement (Second) of Torts (1965).

\textsuperscript{18} 581 F.2d at 354 (emphasis added).
guards against criminal activities. The court’s emphasis on the evidence which showed a high crime rate on Philadelphia’s mass transit system also indicates that this standard may prove to be an effective tool for the plaintiff who is criminally assaulted in an area with a large volume of prior crime.19

The Kenny court has not been the only court to hold a carrier liable for the foreseeable criminal acts of non-related parties. Civil liability was also imposed on a common carrier for the criminal act of a third party by the Illinois Supreme Court in McCoy v. Chicago Transit Authority.20 In that case, the plaintiff was injured when he was assaulted by a fellow passenger while riding a Chicago elevated train. Although the plaintiff obtained a jury verdict in his favor, the state appellate court held that verdict to be against the manifest weight of the evidence. On appeal, the Illinois Supreme Court reinstated the trial court’s verdict holding the common carrier liable, under Illinois law, for a breach of its duty to prevent the commission of a foreseeable criminal act against a passenger.21 The court looked to the case facts and noted that a Chicago Transit Authority (CTA) conductor had been aware of the presence of three loud and troublesome men on his train. The conductor had seen that these men were bothering the plaintiff but had failed to take any action. Later, it was these men who assaulted the plaintiff. Centering on the conductor’s failure to take preventive action, as well as on the fact that this particular CTA transit line was in an area having a high incidence of onboard crime,22 the court held that the verdict of liability must be sustained.

Prior Illinois cases23 had indicated that two elements were necessary to support a finding of common carrier liability: (1) that the carrier knew or should have known that one of its passengers may be injured through the occurrence of a criminal act and (2) that the carrier had ample opportunity to take preventive measures to protect all passengers, but failed to do so. The court in McCoy found that these two elements were present in the plaintiff’s evidence. The court reasoned that the CTA motorman should have been aware of the potential misconduct of the three boisterous passengers on the train.24 The conduct of these passengers, who later assaulted the plaintiff, together with the existing high level of crime on the train’s route, made the criminal injury of the plaintiff foreseeable. Furthermore, the court noted that the conductor could have prevented the assault through radio communication with the motorman, who in turn could have established radio contact with CTA headquarters to obtain help.25

Both Kenny and McCoy avoid the recurring tort law problem of determining foreseeability by focusing on the occurrence of prior crimes on the respective transit lines. This is significant, especially in urban areas where transit crime is becoming commonplace. The use of evidence of prior assaults on persons using the defendant carrier’s facilities is crucial in establishing the defendant’s negligent breach of its duty to police its platform.26


In Letsos, the Illinois Supreme Court held that under the circumstances, the incident which caused the plaintiff’s injury occurred so quickly and unexpectedly that the driver of the carrier, acting with the highest degree of care consistent with the safe operation of the bus, could not have averted it. In Watson, the transit authority was held liable upon a showing that the driver drove the bus for several blocks while the plaintiff was struggling with his assailant for a gun. The plaintiff in Watson was then subsequently shot when the driver purposefully opened the bus doors to throw out the struggling pair.

In Blackwell, an Illinois Appellate Court affirmed a jury verdict finding the carrier liable. The facts showed that the streetcar conductor allowed an intoxicated and quarrelsome passenger aboard who subsequently knifed the plaintiff in the case.24

The conductor had admitted in prior deposition testimony that he had thought that these passengers were “apparently... bent on mischief.” 69 Ill. 2d at 284, 371 N.E.2d at 627.25

20 Id. at 282, 371 N.E.2d at 626.
21 See Miller v. CTA, 78 Ill. App. 2d 375, 223 N.E.2d 323 (1966). But see Sue v. CTA, 279 F.2d 416 (7th Cir.)
This evidence may also lay the basis for the establishment of the carrier's willful or gross negligence in failing to fulfill its duty to provide safe passage for its passengers. Such negligence can result in the recovery of exemplary or punitive damages.27

It should also be noted that *Kenny* and *McCoy* both reinstated jury verdicts which had been overturned by trial court judges. This could indicate a trend toward greater jury discretion in determining the scope of a common carrier's liability. Thus liability may depend upon the jury's prediction of the likelihood of criminal injury to the plaintiff together with the potential of the defendant carrier to prevent the criminal conduct.

Other recent cases which have dealt with the imposition of civil liability on common carriers for the criminal acts of third parties have also emphasized the concept of foreseeability. The court, in one prominent case, *MacPherson v. Tamiami Trail Tours*,28 held that a bus driver had not exercised a sufficient degree of care when he asked the plaintiff to move to the rear of the bus. The court stressed the fact that the bus driver knew that the plaintiff, who was black, had been threatened by some belligerent white passengers seated at the rear of the bus, so that the driver was sufficiently aware of the potential danger of a racially motivated attack on the plaintiff. Because of this knowledge, the court held the defendant carrier liable for the injuries which the plaintiff sustained during the ensuing criminal assault.29

In *Smith v. West Suburban Transit Lines*,30 a bus passenger sued a bus company to recover damages for personal injuries sustained when he was assaulted by a motorist who had become angry at the bus's obstruction of traffic. The state appellate court reversed a directed verdict in favor of the bus company and ruled that the evidence permitted a conclusion that the motorist's attack upon the plaintiff could have been anticipated and prevented by the bus driver, since the motorist had threatened the bus driver and all of his passengers before the attack. As the court noted, "[t]he carrier must exercise the care required to protect the passenger from violence even by a stranger. . . . The general rule is clear that, from whatever source the danger may arise, if it be known, care must be exercised to protect the passenger from that danger."31

The scope of a common carrier's duty to protect its passengers from the criminal acts of third parties may extend beyond the vehicle to the carrier's parking lot. In *Watson v. Adirondack Trailways*,32 a New York appellate court affirmed a judgment against a common carrier, where the plaintiff was assaulted by an intoxicated passenger in the defendant's parking lot while walking to the bus terminal.33

Recent cases have also held that a common carrier has a duty to protect its passengers from the foreseeable criminal acts of a mob. In *Campo v. George*,34 for instance, a Louisiana appellate court held that a bus driver must be aware of the possibility of gang violence when a group of rowdy people enter a bus. The court found that in such a situation a bus driver must "take such actions as may be practicable under the circumstances to prevent assault from being committed or to interfere with its execution."35 Furthermore, the court seemed to ease the plaintiff's proof requirements by holding that "[t]he mere showing of injury to a fare-paying passenger, and [the passenger's] failure to reach his destination safely, establishes a prima facie case of negligence."36

A Pennsylvania appellate court, in addition, has

1960) "Prior occurrence evidence must be such as would establish that the carrier had notice of danger to its passengers at the place of the accident." *Id.* at 418 (emphasis added).

28 383 F.2d 527 (5th Cir. 1967).
29 The court also held that it was the duty of a bus company to acquaint a passenger with any threat of danger known to it.
31 *Id.* at 223, 326 N.E.2d at 451 (quoting Neering v. Illinois Central R.R., 383 Ill. 366, 378, 50 N.E.2d 497, 502 (1943)).
33 It should be noted, however, that a person may lose passenger status if he leaves the premises of the carrier. See *Ortiz v. Greyhound Corp.*, 275 F.2d 770 (4th Cir. 1960).
34 The determination of passenger status does not turn solely on the payment of a fare. See *Suarez v. Trans-World Airlines, Inc.*, 498 F.2d 612 (7th Cir. 1974).
35 The matters to be considered in determining the status of passenger are: (1) place (a place under the control of the carrier and provided for the use of persons who are about to enter carrier's conveyance); (2) time (a reasonable time before the time to enter the conveyance); (3) intention (a genuine intention to take passage upon carrier's conveyance); (4) control (a submission to the directions, express or implied, of the carrier); and (5) knowledge (a notice to the carrier either that the person is actually prepared to take passage or that persons awaiting passage may reasonably be expected at the time and place).
37 *Id.* at 326.
38 *Id.*
advanced what may be the broadest duty to protect passengers from criminal mob action. In Mangini v. Southeastern Pennsylvania Transportation Authority, a bus driver opened a door of a trolley when a mob of boys were hurling objects against the trolley. The driver did not even attempt to get out of his seat to exert his influence when this mob boarded the trolley and attacked his passengers. In the resulting suit for damages, the court found that the driver had negligently failed to uphold his affirmative duty to protect, as best he could, his passengers from the criminal acts of third persons. The court maintained that a carrier must use every means at its command to protect its passengers and restrain, and if necessary remove, the disorderly parties. "If necessary, the employees of a carrier may enlist the assistance of willing passengers, police, or other authorities to quell a disturbance." The court noted that a failure to use these measures may lead to the imposition of liability on the carrier if the carrier knew of violent human behavior which gave rise to a reasonable apprehension of injury, prior to the time a passenger is in fact injured.

Despite the recent trend in cases holding common carriers liable, the carriers have escaped liability in some instances. Those cases which have absolved a common carrier of any liability for the criminal acts of third persons against its passengers have focused on two factors: the non-foreseeability of the criminal act and the inability of the carrier to have prevented the crime through reasonable means. For example, in Morris v. Chicago Transit Authority an Illinois appellate court relieved a carrier of liability because it was unable to reasonably foresee and avoid an injury to its passenger resulting from a brick being hurled into one of its buses. Similarly, in Martin v. Erie-Lackawanna Railroad, a federal district court applying Ohio law, reversed a judgment for a victim-passenger because the evidence failed to show that the carrier should have known that the plaintiff would be a victim of an abortive purse-snatching attempt that would result in her sustaining bodily injuries.

Two recent cases in Louisiana, Higgins v. New Orleans Public Service, Inc. and Orr v. New Orleans Public Service, Inc., also reflect the need to show foreseeability before the court will impose liability on common carriers for the criminal acts of third parties. In Higgins, a 67-year-old bus passenger was assaulted by a group of boys. The court held that the bus driver could not have anticipated this assault and therefore was not negligent. Furthermore, the court narrowly defined the duty of a carrier by noting that the driver did not have any affirmative obligation to intervene in the assault and had fulfilled his duty by summoning the police. In Orr, the court, as in Higgins, reversed a judgment for the plaintiff, holding that the evidence failed to show a reasonable foreseeability of the violence which was inflicted upon the plaintiff by a gang of youths. The court stated that the assault was so brief that the carrier could not have reasonably prevented it.

One recent case, Hanback v. Seaboard Coastline Railroad, indicates that when a carrier's employee fails to respond adequately to a passenger's cries for help, the carrier may be held secondarily liable for the aggravation of injuries resulting from a criminal act even though the carrier was not primarily responsible for the occurrence of the act. In Hanback, the plaintiff was sexually assaulted on an Amtrak passenger train. The trial court found that the defendant carrier did not violate its duty to protect adequately the victim from the occurrence of an unpredictable criminal act. However, the court held that the victim could recover for the damages suffered when an Amtrak employee failed to respond adequately to her screams.

In sum, the trend to allow passenger victims to recover from carriers for third party criminal acts represents a response to the need to provide adequate remedies for persons who have been victimized. However, the courts are reluctant to allow crime victims to use such civil liability in the absence of special legal relationships.
nevertheless be emphasized that such legal relationships arise with great frequency in our social system. These relationships may effectively be used to provide a compensatory civil remedy for victims of criminal acts. The rising rate of crime on premises which are open to the public for business purposes is a factor which may be used by a court to facilitate a finding that the occurrence of a criminal act on those premises was foreseeable.

Such foreseeability can then in turn lead to the creation of a concurrent duty to protect one's business visitors from criminal actions.

If the plaintiff-victim can successfully allege the presence of a special legal relationship, as in the common carrier-passenger cases, he may be able to recover damages for his criminal injuries from a third party. The plaintiff need only show that the crime which resulted in his injury was foreseeable and could have been prevented by reasonable acts of the carrier.

46 See generally Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976); Carrington, supra note 2.
DEVELOPMENTS IN THE MANIFEST NECESSITY RULE

INTRODUCTION

In its last term, the Supreme Court opened yet another chapter in the interpretation of the “manifest necessity” rule, which permits a retrial of a criminal defendant following a mistrial if the facts of the first trial showed a manifest necessity for the mistrial declaration. The Court’s decision in Arizona v. Washington signaled a retreat from the Warren Court’s attempt to limit the application of the rule through strict appellate review of the trial judge’s determination. The Court held that a trial judge’s determination of manifest necessity based on his assessment of jury bias merits “special respect.” The Court also refused to impose a requirement of special hearings and explicit findings as a matter of constitutional law.

In 1824, the Court had held in United States v. Perez that the Double Jeopardy Clause does not bar retrial of a defendant where there was manifest necessity for a mistrial declaration in the first trial. As the Court said in Perez, a mistrial declaration is proper where “taking all the circumstances into consideration there is a manifest necessity for the act or the ends of public justice would otherwise be defeated.” In Perez, a retrial was allowed when the first trial ended in a hung jury.

While the manifest necessity rule itself has remained unquestioned, there has been much judicial debate in the last twenty years as to the degree of necessity to be required and the role of appellate review in such cases. The older view, to which Arizona is to some extent a return, maintained that appellate courts were so ill-suited to review the decision of a trial judge who witnessed the events in question and could best assess their impact, that the trial judge’s opinion deserved special deference. Courts adhering to this view seldom attempted to impose stricter standards of necessity on the trial judge. In 1963, however, the Supreme Court began to encourage a more active appellate scrutiny designed to limit the operation of the rule to cases of the most “imperious necessity.” To assess Arizona’s impact, therefore, it is necessary to examine the pre-1963 law and the changes that the Warren Court sought to effect in it. The focus of this note will then shift to the Arizona case and its initial reception in the federal courts of appeals.

BACKGROUND

Gori v. United States is illustrative of the Supreme Court’s pre-1963 attitude towards appellate review of mistrial determinations. There, a mistrial was declared in the defendant’s first trial and his plea of former jeopardy was rejected at his second trial. On appeal, the Court affirmed the defendant’s conviction. The record in Gori does not clearly reveal the reason for a mistrial in the first case, but the Court noted that “[a]pparently the trial judge inferred that the prosecuting attorney’s line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused, and took action to forestall it.” Even though there was no record clearly showing why the mistrial was declared, the Court rejected Gori’s plea of former jeopardy and cited the special respect due the trial judge’s determination. As the Court noted:

Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant’s consent and even over his objection, and he may be retried consistently with the Fifth Amendment. It is also clear that “[t]his Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will best be served.”

Justice Douglas, writing in dissent, disagreed with the Court’s analysis in language foreshadowing his opinion in Downum v. United States. Douglas would have limited the application of the Perez rule through a strict standard of appellate scrutiny designed to develop rules and categories not subjecting the accused to the exercise of uncontrolled judicial discretion. According to Douglas, “Once a

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3 Id. at 580.
jury has been impaneled and sworn, jeopardy attaches and a subsequent prosecution is barred, even if a mistrial is ordered, absent a showing of *imperious necessity*.

The *Gori* holding thus represents the ultimate in deference given to trial judge discretion. Both the court of appeals and the Supreme Court majorities were in doubt as to the reason for the mistrial. Nonetheless, they were willing to allow a retrial, apparently based on the mere fact that the trial judge had declared a mistrial. In addition, the Supreme Court was influenced in its decision by the fact that the mistrial was apparently declared for the defendant's benefit and that defense counsel had been silent when the mistrial was declared. This indicates that perhaps less deference would be due the trial court where it acts in the prosecution's interest or over defense objection.

The first case in which the Supreme Court reversed a trial court's determination was *Downum v. United States*.

Upon consideration of this mistrial, the Supreme Court acknowledged the governing *Perez* standard, but sought to limit its application to only the "most striking circumstances." With Justice Douglas acquiring a majority's adherence to his views and writing the opinion, the Court noted that:

> At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an *imperious necessity* to do so . . . . But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised "only in very extraordinary and striking circumstances." 

The Court went on to note that it would resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.

While announcing no new principle, *Downum* signaled a startling change in judicial attitude towards the weight to be given trial court findings of "manifest necessity." As the opinion indicated, manifest necessity was to mean "imperious necessity," and the accused was to have all doubts resolved in his favor.

Justice Clark, writing in dissent, would have applied the more traditional "abuse of discretion" standard characterized by *Gori*. Identifying several factors in favor of the trial judge's position, Clark noted that the mistrial was by far the most convenient course of action. Holding the jury for an indefinite and potentially lengthy period would not only have disrupted the court's calendar but might in itself have also been reversible error.

Nor did Clark think that the two-day suspension had resulted in any real harm to Downum of the sort the Double Jeopardy Clause was designed to prevent.

The course of opinions during the fifteen years after *Downum* reveals a new interventionist attitude towards trial judge determinations of manifest necessity. However, *Arizona v. Washington* decided in the 1977-78 term, signals a return to something resembling the *Gori* Court's deference to the trial court. Defendant Washington's first trial ended in mistrial when it was discovered that the prosecution had suppressed exculpatory evidence. A mistrial was declared in the second trial, over defense objection, based on defense counsel's improper reference to the termination of the first trial. There was no separate hearing, no express finding of manifest necessity, and no explicit consideration of alternatives to the mistrial. At his third trial, Washington unsuccessfully pleaded former jeopardy and the Arizona courts affirmed his subsequent conviction.

Washington then sought a federal writ of habeas corpus charging that his conviction had been secured in violation of the Double Jeopardy Clause.

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8 367 U.S. at 371 (Douglas, J., dissenting) (emphasis supplied.) The term "imperious necessity" is somewhat confusing as is the tendency to phrase the debate in terms of degree of necessity. By "imperious necessity" Justice Douglas mean to give the term its literal meaning. By confining the operation of the *Perez* rule to such cases, Justice Douglas hoped to limit judicial discretion in cases where this important fifth amendment right is involved.


10 *See Downum v. United States*, 300 F.2d 137 (5th Cir. 1962). The lower court opinion here displays exactly the same attitude as *Gori*.

11 372 U.S. at 736.

12 Id. at 738.

13 Id. at 742. Administrative convenience was the principal factor in favor of the court's decision.

14 Id. at 742-44.

The district court granted the writ and the Ninth Circuit Court of Appeals affirmed. The United States Supreme Court reversed and discharged the writ. Justice Stevens, writing for the majority, first noted the traditional high regard for the "valued right" not to be twice put in jeopardy for the same offense and acknowledged that the prosecution has a heavy burden when it attempts to show that there is manifest necessity to subordinate this right to the ends of public justice. Nonetheless, Stevens lightened the heavy burden in three significant ways.

Foremost, Justice Stevens backed away from the "imperious necessity" standard of *Downum*. He recognized the existence of degrees of necessity, but only required "a 'high degree' before concluding that a mistrial is appropriate." And, Stevens' "high degree" of necessity was clearly not the sort of literal necessity previously required by Justice Douglas in *Downum*. Having established this test, Stevens then frankly acknowledged that, under the facts of this case, there was no "high degree" of necessity and that there were viable alternatives to the declaration of a mistrial. According to Stevens:

[T]he District Court was quite correct in believing that some trial judges might have proceeded with trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

The Court ameliorated the prosecutor's burden in a second important respect. For the first time since *Gori*, the Court stressed the deference due the trial judge's determination. There is some inconsistency in stressing both the heavy burden of persuasion born by the prosecutor and the deference due the trial judge. To the extent that the appellate court refused to scrutinize strictly the trial judge's determination, the state has an especially easy time before an appellate tribunal. In *Arizona*, the Court seemed willing to give almost presumptive weight to the trial judge's determination.

Nonetheless, there is an important difference between the Court's new approach and that used in the pre-1963 cases. The Court in *Arizona* was unwilling to retreat entirely from "imperious necessity" in all categories of cases. Read literally, *Arizona* states only that "special respect" is due to the trial judge where the mistrial declaration was based on juror bias. In other categories of cases, the strict appellate review of the Warren Court's *Downum* case may still be appropriate. The Court expressly adopted a "sliding scale" approach to determine the appropriateness of appellate review of mistrial declarations. At one end of the scale are cases of hung juries where the trial judge's opinion is virtually conclusive. At the other end of the spectrum are cases where collusion between judge and prosecutor or other forms of prosecutorial overreaching are involved. This category includes mistrials declared because of the unavailability of prosecution evidence, or cases where there is "reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." The third regard in which the prosecution's heavy burden is ameliorated is largely procedural. The *Arizona* Court simply noted that where the record adequately disclosed the reason for the mistrial, special hearings and explicit findings of fact are not "constitutionally mandated."

While repudiating the *Downum* interventionist attitude in several important respects, *Arizona* is by no means a complete return to the laissez-faire *Gori* standard. It is true that the case lowers the level of necessity and allows judges greater leeway in their mistrial orders. In the lower scrutiny level it is perhaps accurate to say that the Court contemplates a return to pre-*Downum* attitudes. Yet in the small category of cases entitled to the strictest scrutiny, interventionism of the *Downum* type seems still to be the rule. But aside from the examples mentioned, the Court has given very little guidance on classifying cases. Since the examples given are all cases where the prosecution has obtained some advantage from the mistrial declaration, this may be the key. It is suggested that mistrials resulting from defense misconduct, as *Arizona*, innocent circumstances, or mistrials clearly declared for the benefit of the accused will be placed in the lower scrutiny category.

**LOWER COURT TREATMENT**

There have been several appellate decisions applying the manifest necessity standard since *Arizona*.

16 Arizona v. Washington, 546 F.2d. 829 (9th Cir. 1977).
17 See 434 U.S. at 503-05.
18 Id. at 506.
19 Id. at 511.
20 Id. at 508.
21 Id. at 517.
was decided. Included within these cases are United States v. Evers and United States v. Starling. One would expect that the first inquiry in each of these would be to determine the extent to which the lower courts followed the Arizona formulation. Interestingly, neither of these cases adopted the sliding scale approach of Arizona. Indeed, each case displayed a marked judicial reluctance to abandon the Downum-type intervention.

The first of these cases, United States v. Evers, was decided less than a month after Arizona and the court there simply ignored the new standard. In Evers, a government witness made irrelevant remarks to the effect that the probable source of the defendant's allegedly unreported income was embezzled campaign donations. The district court, after some discussion of alternatives, declared a mistrial over defense counsel's objection. The Fifth Circuit Court of Appeals reversed the trial court, dismissing the indictment and finding that the mistrial order rested on the trial judge's assessment of the effect to the trial judge's opinion. The mistrial order was undertaken at the government's mistrial motion. Apparently, client, the motion was withdrawn. Defense counsel objected to the government's mistrial motion. Apparently, defense counsel believed an acquittal was likely had the case gone to the jury.

Evers represents precisely the type of case that the Arizona Court believed required special deference to the trial judge's opinion. The mistrial order rested on the trial judge's assessment of the effect on the jury of prejudicial remarks. And, the appellate balancing between curative instructions and mistrial orders undertaken by the appellate court, is precisely what Arizona sought to avoid. In Arizona, too, curative instructions represented a viable and perhaps favored option. Even so, the decision of the trial judge there was upheld. The only possible distinguishing factor in Evers is the extraordinary lengths to which defense counsel went to avoid the mistrial. His willingness to waive the remarks as a ground of possible appeal meant that there was no necessity at all from the standpoint of judicial administrative efficiency. Nevertheless, the determination of whether or not a jury has been biased belongs to the trial judge and the Fifth Circuit's refusal to give his decision special weight runs contrary to the Arizona mandate.

United States v. Starling in some respects disregarded Arizona even more blatantly than Evers. Starling was another Fifth Circuit case decided shortly after Evers and it is probably not insignificant that two of the three judges deciding Starling also decided Evers. In the circumstances of Starling, the defendant's trial found the jury "hopelessly deadlocked," but still the trial judge sent them out for further deliberation. Somewhat later, a note from the foreman informed the judge that the defendant had tried to talk to the jurors during a recess, but the exact circumstances of the attempt was not brought out. The judge asked the foreman if any of the jurors had said that their judgment had been affected by these attempts, and the foreman replied, "Yes." Without further inquiry, the trial judge declared a mistrial. While mentioning the apparent deadlock, the trial judge based his order primarily on his opinion that the jurors appeared to "resent" the attempts at conversation.

The appellate court considered both the jurors' inability to agree and the possibility of juror bias, and concluded that the record did not justify the inferences that the trial judge drew. The court claimed that the jury did not "expressly profess an irreconcilable conflict as to the guilt or innocence" of the accused, although the jury had earlier reported itself "hopelessly deadlocked." On the jury bias issue, the court refused to believe that the trial judge could have legitimately referred bias without a more detailed questioning of the jury. Finally, the appellate court expressed strong disapproval of the trial judge's failure to consider alternatives explicitly in the context of the double jeopardy significance of his decision.

22 569 F.2d. 876 (5th Cir. 1978) (decided March 16, 1978).
23 571 F.2d. 934 (5th Cir. 1978) (decided April 21, 1978).
24 See 569 F.2d. at 878. Initially defense counsel had moved for the mistrial but after consultation with his client, the motion was withdrawn. Defense counsel objected to the government's mistrial motion. Apparently, defense counsel believed an acquittal was likely had the case gone to the jury.
25 Id. at 871.
Through its decision in Starling, the Fifth Circuit again ignored Arizona in precisely the context to which it was most clearly addressed. The Starling court was eager to substitute its factual judgment based solely on a cold record for that judgment of the trial judge who had actually observed the occurrence. It is difficult to see what "special respect" this court paid the trial court's determination. There was certainly evidence in the factual record of Starling which could have led a court following the Arizona guidelines reasonably to conclude either that the jury was hung or that they were improperly biased by the defendant's conversational forays.

Unlike the court in Evers, the Starling court did attempt to distinguish Arizona. The court stressed the fact that the trial judge showed a "total lack of awareness of the double jeopardy consequences of the court's action or of the manifest necessity standard." Also, the court recognized that the trial judge had not adequately balanced the accused's "protected interest" in having one tribunal decide his case. Under these facts, the court believed that the reasons for appellate deference to the trial court diminished "beyond the point of significance." The court's rationale appears to be that the opinion of the trial judge is entitled to special deference only when he has actually exercised an informed discretion and has taken all of the relevant factors into account. The court found support for the position in footnote 28 of the Arizona opinion. There, the Supreme Court remarked:

If the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference to his opinion disappears. Thus if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.

The first sentence of the footnote apparently supports the result in Starling. Yet, read in context with the facts in Arizona and with the second sentence in the note, the attempt to distinguish Starling from Arizona becomes completely specious. It will be recalled that the explicit weighing of alternatives and thought about the double jeopardy consequences of the order which Starling seems to require, is not present in Arizona. The Arizona Court had remarked that such explicitness is not constitutionally mandated. Also, there was no evidence in the Arizona circumstances that the trial judge acted for reasons completely unrelated to the purported ground of the mistrial declaration. Indeed, his order clearly reveals the reasons for the order. Absent some compelling reason to doubt the trial judge's determination that the jurors had been adversely affected by the remarks, the appellate court ought simply to have accepted the trial judge's determination.

Conclusion

The initial reaction to the Arizona opinion has displayed a strong reluctance to curb the post-Downum tendency to hyper-critical examination of lower court manifest necessity determinations. The sliding-scale approach which Arizona sought to adopt thus has had no apparent effect in the earliest opinions. It is to be hoped that whatever their views on the wisdom of the decision, the appellate courts will shortly bring their attitudes into conformity with what ought to be binding precedent.
DEVELOPMENTS IN THE ATTACHMENT OF JEOPARDY

INTRODUCTION

The double jeopardy clause of the fifth amendment, although brief in length, has continually provoked strong judicial disharmony and a prodigious amount of litigation. While the actual language of the clause has remained unchanged for almost 200 years, the United States Supreme Court has "interpreted" that language in an amazing number of different ways. Perhaps the Supreme Court is not ready to abandon the doctrine of stare decisis in double jeopardy cases; however, three cases decided last term indicate that the Court has no qualms about altering or overruling even recent precedent.

Crist v. Bretz: Federal Rule Regarding Attachment of Jeopardy is Binding on the States

The Court in Crist v. Bretz was presented with the issue of whether the federal rule governing attachment of jeopardy in a jury trial was binding on the states through the fourteenth amendment.

1 "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.


4 See, e.g., United States v. Jenkins, 420 U.S. 358 (1976), which was overruled only three terms after it was decided. United States v. Scott, 437 U.S. 82 (1978).


7 In federal courts, jeopardy attaches when the jury is sworn and empaneled. In nonjury federal trials, jeopardy does not attach until the first witness is sworn. Serfass v. United States, 420 U.S. 377, 388 (1974).


9 437 U.S. at 32-33.

10 Appellants Cline and Bretz were charged with grand larceny, obtaining money and property by false pretenses and several counts of preparing or offering false evidence. Id. at 29.


12 After a second jury had been selected and sworn, appellants, claiming that the double jeopardy clauses of the United States and Montana constitutions had been violated, moved to dismiss the new information. After trial, appellants sought habeas corpus relief from the Montana Supreme Court, but it was denied. State ex. rel. Bretz v. Sheriff of Lewis & Clark County, 539 P.2d 1191 (Mont. 1975). The appellants then brought a habeas corpus proceeding in a federal district court again claiming that their convictions had been unconstitutionally obtained because the second trial had placed them in double jeopardy. The federal court denied the petition. Cunningham v. District Court, 406 F. Supp. 430 (D. Mont. 1975). The court upheld Montana's statute, which attached jeopardy at the swearing of the first witness. In the alternative, the court decided that even if jeopardy
the prosecutor to file a new information, the appellees claimed that further prosecution of the previously dismissed charges would violate their fifth and fourteenth amendment guarantees against being placed in double jeopardy. The federal district court denied the appellees' petition for habeas corpus relief.13 The Ninth Circuit Court of Appeals reversed,14 stating that the federal rule governing the time when jeopardy attaches (which is when the jury is empaneled and sworn) "is a constitutional requirement of the Fifth Amendment which is binding on the states as well as the federal government."15 It further held that there had been no manifest necessity for the Montana trial judge's dismissal of the defective count; therefore, a second prosecution of that count was not permissible.

The State of Montana appealed only that portion of the Ninth Circuit's opinion which held that the states were required to follow the federal rule concerning attachment of jeopardy. Thus, the narrow problem before the Supreme Court in Bretz was whether "the federal rule is an integral part of the constitutional guarantee."16 If it were, then the rule would be binding on Montana (and all of the states) because the same double jeopardy constitutional standards apply equally in federal and state courts.17

The federal rule that jeopardy attaches when a jury is empaneled and sworn was first formulated in Dowum v. United States.18 The reason for attaching jeopardy at this point "lies in the need to protect the interest of an accused in retaining a chosen jury."19 The Bretz Court decided that this interest—a defendant's valued right to have a trial completed by a particular tribunal—"is now within the protection of the constitutional guarantee against double jeopardy."20 It follows from Benton v. Maryland,21 that if the federal rule is "at the core" of the double jeopardy clause,22 the states had attached, a second prosecution was justified, because manifest necessity supported the first dismissal.

13 See text accompanying note 12 supra.
14 Bretz v. Crist, 546 F.2d 1336 (9th Cir. 1976).
15 Id. at 1343.
16 437 U.S. at 32 (emphasis added).
17 See note 8 supra.
18 372 U.S. 734 (1963). This point was not explicitly stated in Dowum, but later cases have understood it to be authority for the proposition that federal jeopardy attaches at the swearing and empaneling of the jury. 437 U.S. at 35.
19 Id.
20 Id. at 36.
22 The Court noted that if the attachment rule were are not permitted to attach jeopardy at a later point.23

Since one of the three major concerns which have shaped the development of federal double jeopardy law24 is the protection of a defendant's right to continue with a chosen jury25 (a concern which the federal rule reflects)26 the Court could not hold that the federal double jeopardy rule "is only at the periphery of double jeopardy concerns."27 With its explicit holding28 that the federal rule is an integral part of the constitutional guarantee against being placed in double jeopardy, the Bretz Court invalidated all state statutes and decisions which placed the attachment of jeopardy at a time later than the empaneling and swearing of the jury.

Burks v. United States: Reversal by an Appellate Court Solely for Lack of Sufficient Evidence to Sustain the Jury's Verdict Bars Retrial of That Issue

The petitioner in Burks v. United States29 was tried for an attempted bank robbery. His principal defense was insanity. Before the case was submitted to the jury, petitioner sought a judgment of acquittal, which was denied by the trial judge. The jury then found petitioner guilty as charged. Subsequently, Burks filed a motion for a new trial, alleging among other things that the evidence was insufficient to support the verdict.

merely an arbitrary exercise of line-drawing, there would be a good argument for attaching jeopardy when the witness is sworn. Such a rule could apply both to jury and non-jury trials and would recommend itself on the basis of that consistency. 437 U.S. at 37.
23 There is no suggestion that jeopardy could not be attached at an earlier point, if a state so chose.
24 The three main concerns which have shaped the double jeopardy attachment rule are: (1) desire for a finality of judgments, (2) "the minimization of harassing exposure to the harrowing experience of a criminal trial," and (3) "the valued right to continue with the chosen jury." 437 U.S. at 38.
25 Id.
26 Id.
27 Id.
28 "Today we explicitly hold what Somerville assumed: the federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy." Id. at 2162. In Illinois v. Somerville, 410 U.S. 458, 469 (1973), the petitioner had argued that jeopardy attached when the jury is sworn and empaneled. Even though a state court was involved, the Supreme Court did not quarrel with this assertion. Rather, it held that the double jeopardy clause had not been violated because there had been "manifest necessity" for a retrial.
On appeal, United States Court of Appeals for the Sixth Circuit agreed with Burks' claim on the insufficiency of the evidence and reversed on that ground. Rather than terminating the case against the petitioner, the Sixth Circuit remanded the proceeding to the district court "for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered." The court assumed that it had the power to order the "either/or" remedy, since petitioner had explicitly requested a new trial.

The government did not appeal the Sixth Circuit's finding of insufficiency of evidence, so the Supreme Court was "squarely presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." The Court held that a defendant may not be tried a second time in this type of situation. Basically, the Court accepted the argument formulated by the petitioner, i.e., that by deciding that the government had failed to come forward with sufficient proof of petitioner's capacity, the appellate court was saying that petitioner's criminal culpability had not been established. "If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense." And, logically, it should not make a difference that a reviewing court rather than the trial court determined that the evidence was insufficient. "To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court."

The Court recognized that the rule it was enunciating in Burks was inconsistent with its prior Bryan-Forman line of cases. Those cases stood for the proposition that a defendant could be made to stand trial again after a reviewing court had reversed his conviction based on a lack of evidence, if the defendant himself had requested the new trial.

The failure of the Bryan-Forman line of cases to distinguish between reversals due to trial error and those due to insufficiency of evidence was seen by the Burks Court as a major reason for the confusion in this area of the law. The Court noted that a reversal for trial error implies nothing with respect to the guilt or innocence of a defendant. However, an appellate reversal for insufficiency of evidence means that the government's case was so inadequate that it should not even have been submitted to the jury. As the Court stated:

Since . . . [the Court] necessarily afford[s] absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Believing that the prior decisions were inconsistent with the spirit and command of the double jeopardy clause, the Supreme Court overruled them to the extent of their inconsistency with

30 United States v. Burks, 547 F.2d 968 (6th Cir. 1976). The court based its finding on the fact that Burks had raised a prima facie case of insanity and that the government produced insufficient evidence of Burks' sanity.
31 Id. at 970 (emphasis added). The district court was to choose the appropriate course "from a balancing of the equities." The Sixth Circuit adopted the procedure formulated in United States v. Bass, 490 F.2d 846, 852-53 (5th Cir. 1974), as a guide to be used on remand. "[U]nless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity," defendant would be entitled to a directed verdict of acquittal. "If the district court . . . is satisfied by the government's presentation, it may order a new trial."
33 28 U.S.C. § 2106 provides:
The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the case and direct entry of such appropriate judgment, decree, or order, or require such further proceedings as may be just under the circumstances.
34 437 U.S. at 5.
35 Id. at 10-11.
Burks. The Court concluded by stating that it makes no difference that a defendant has sought a new trial as one of his remedies (or even as his sole remedy). If a reviewing court finds the evidence insufficient to support a jury verdict, the only just remedy available for that court is the direction of a judgment of acquittal. The Court felt that it could not be said that a person "waives" his right to a judgment of acquittal by moving for a new trial.

United States v. Scott: Where Defendant Seeks and Is Granted Dismissal of an Indictment Before a Determination of Guilt or Innocence Has Been Made, the Government May Appeal.

In United States v. Scott, the respondent was charged in a three-count indictment. At the close of all of the evidence, the trial court granted respondent's motion to dismiss the first two counts because of prejudicial preindictment delay. The government sought to appeal the dismissals in the United States Court of Appeals for the Sixth Circuit. That court, relying on United States v. Jenkins, concluded that any further prosecution of defendant was barred by the double jeopardy clause and therefore the appeal had to be dismissed. Jenkins had held that:

whether or not a dismissal of an indictment after jeopardy had attached amounted to an acquittal on the merits, the Government had no right to appeal, because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand."

Clearly the Sixth Circuit was correct in applying Jenkins to the Scott case. The respondent had been placed in jeopardy (the jury had been empaneled and sworn), and further proceedings would have been needed to determine the pertinent factual issues. The Supreme Court did not attempt to distinguish Scott from Jenkins; rather, it noted that its "vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced ... [it] that Jenkins was wrongly decided" and should be overruled.

According to the Court, Jenkins placed an unwarrantedly great emphasis on the defendant's right to have his case decided by the first jury empaneled. Because of this overemphasis, even a defendant who was himself seeking to terminate a proceeding before the issue of guilt or innocence had been decided, on grounds unrelated to the issue of guilt or innocence, was considered sheltered by the double jeopardy clause. Under such circumstances, the Scott Court believed that a retrial would not deprive a defendant of his right to go to the first jury. In fact, the Court decided that it would be the public which would be deprived of its right to one complete opportunity to convict those who have violated its laws.

Thus, the Court concluded that the double jeopardy clause guards only against government oppression and "does not relieve a defendant from the consequences of his voluntary choice." The Court stressed that the respondent was neither acquitted nor convicted, because he himself chose to persuade the trial court not to submit the issue of guilt or innocence to the jury.

Believing that it had pressed too far in Jenkins, the Scott Court decided to backstep and concluded that: "where the defendant himself seeks to have his trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. § 3751 (1976 ed.)."

Conclusion

The Supreme Court's latest attempts to clarify the complexities of double jeopardy in Bretz, Burks and Scott yields some definite guidelines: (1) it is now clear that all states must place the attachment of jeopardy at the empaneling and swearing of the jury—or earlier; (2) a defendant may not be retried, even if he requests a new trial, once a reviewing court has determined that in the prior trial the evidence was insufficient to support the verdict;

42 Id. at 18.
43 Id. at 17.
45 Respondent was charged with distribution of various narcotics. Before his trial and twice during it, respondent moved to dismiss two counts of the indictment. The court granted the motion and submitted the third count to the jury which returned a verdict of not guilty. The government sought to appeal the dismissal of the first two counts.
47 544 F.2d 903 (6th Cir. 1976).
48 437 U.S. 86 (citation omitted).
and (3) when the defendant himself seeks to terminate his trial before submission to the judge or jury for a determination of guilt or innocence, the government is not precluded from appealing if the defendant is successful.

Burks would seem to be the least controversial of the three decisions. A contrary holding could lead to a very unfair result—two identically situated defendants might be treated differently simply because one defendant was fortuitously before a trial judge making an error-free ruling. Once an appellate court has reversed a verdict because of an insufficiency of evidence, it has ruled as a matter of law that the defendant could not have been convicted. Allowing a retrial gives the government, which clearly failed in its initial attempt to convict the defendant, a "second bite at the apple"—which is exactly what the double jeopardy clause was meant to prevent. There is something inherently inequitable in penalizing a defendant for the mistake made by a trial judge. Fortunately, Burks satisfactorily resolved that problem.

Separately, the holdings of Bretz and Scott are, at the least, rationally explainable. Even read together, the concrete law produced is acceptable: while jeopardy attaches as soon as a jury is sworn and empaneled, a defendant upon retrial is not placed in a second jeopardy, if he chose to terminate the initial proceeding before the jury had returned a verdict. Justice Rehnquist made a valid argument when he said that the public has a right to one complete opportunity to convict those who have violated its laws.

The disturbing aspect about Bretz and Scott is their inconsistent underlying rationales. In Bretz, the Court held that "the valued right of a defendant to continue with the chosen jury" was at the "core" of the double jeopardy clause. Yet in Scott, decided the same day as Bretz, the Court announced that the concept of a defendant's valued right to have his trial completed by a particular tribunal had been pressed too far.

Regardless of whether the Court's historical analysis in Bretz was correct, once it had decided that attachment of jeopardy was of constitutional dimension, the Court should have consistently applied that reasoning to Scott. Conversely, a position that the right to be tried by a single tribunal is not of overriding importance would have been equally principled—if the Court had uniformly applied that doctrine to both Scott and Bretz.

Apparently even the Supreme Court recognizes that its double jeopardy decisions have not always been internally consistent. As Chief Justice Burger said in Bretz: "The Court's holdings in this [double jeopardy] area . . . can hardly be characterized as models of consistency and clarity." Yet, despite the almost evanescent quality of many double jeopardy opinions, the Court has not totally rectified the problem. Scott overruled Jenkins, a case decided only three terms earlier. Burks overruled the Bryan-Forman line of cases which had represented judicial thought through 1960. If the Court is continually going to reshape the parameters of the double jeopardy clause, it should at least try to ensure that during each double jeopardy "period," every case within that period is decided based upon a consistent rationale.

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57 It was an 8-0 decision by the Supreme Court.
58 See generally 437 U.S. 14–18.
59 According to the Burks Court, one of the main reasons against permitting a second prosecution after attachment of jeopardy is the inequality of power of the two parties. 437 U.S. 35. The Court cited Green v. United States, 355 U.S. 184, 187–88 (1957) as support for the assertion that: 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 embarrassment, 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.
CONCEALABLE FIREARMS AND EX-FELONS

For over half a century, California has statutorily proscribed the possession of concealable firearms by ex-felons.¹ Litigation arising under this statute, section 12021 of the Penal Code, has involved such issues as the status of the defendant as an ex-felon,² or such questions as whether the weapon was truly "concealable" within the meaning of the Act.³ It was not until late 1978, however, that the California Supreme Court had to consider squarely the issue of whether self-defense⁴ was a valid affirmative defense to a charge of possession of a firearm in violation of the statute. In *People v. King*,⁵ the court said that it is permissible to raise such a defense and thus reversed a conviction arising under the statute. The trial court's refusal to instruct the jury on self-defense as a defense to a charge of violating section 12021 was held erroneous.

The *King* case provided the court with a near perfect set of facts on which to decide the issue. Because these facts were so essential to the court's decision, they will be recounted in some detail herein.

On the night of August 9, 1975, Carrie Foster hosted a birthday party for Raymond Meggs in San Jose, California. Attendance was by invitation only and most of the guests were Foster's co-workers or students at San Jose State University. The party was held at Ms. Foster's apartment, which was located on the second floor of her building, and a balcony adjoined the single entrance to the apartment at the top of an outside staircase. The party was fairly large,⁶ and Ms. Foster was unable to attend to admitting all of the guests. Sometime between 11:00 p.m. and midnight, two uninvited persons, named Hart and Montgomery, arrived and attempted to "crash" the party. Shortly after their arrival, the pair became unruly,⁷ and, at Hart's instigation, a fight ensued between Hart and Meggs, the aforementioned guest of honor.

While this brouhaha was in progress on the porch, eight more persons, friends of Hart and Montgomery, arrived and helped create further excitement. Meanwhile, inside the apartment, Ms. Foster announced that the party was over and requested the guests to leave. Most of the guests complied. The result was that at approximately 2:00 a.m. on the morning of August 10, 1975, the apartment of Carrie Foster was virtually under siege, with Ms. Foster, Andrea Armstrong, Kenny Bolding, a disabled and wheelchair-bound Benny Irving, five other women, and the defendant, William Harris King, remaining inside. Outside, the attackers massed for another assault, and one managed to force the door partially ajar. With the assistance of Mr. Bolding, however, Ms. Foster managed to repel this attack, and the police were called.

At this point, the women were especially fearful for their safety.⁸ The men were also afraid, but the defendant was still a passive observer.⁹ The situation, however, was becoming ever more dangerous as the party-crashers escalated their violent attempts to enter the apartment. Finally, as the

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¹ What is now Penal Code Section 12021 (a) was originally enacted in 1923. The current version of the statute reads, in relevant part, as follows:

Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or who is addicted to the use of any narcotic drug, who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person, is guilty of a public offense. . . .


³ See, e.g., *People v. Boyd*, 79 Cal. App. 2d 90, 178 P.2d 797 (1947). The issues of concealability and status are, it should be noted, still unsettled.

⁴ For purposes of this article, defense of others and defense of habitation will be considered under the general rubric of "self-defense." While, strictly speaking, they are distinct defenses, the court saw fit to consider them together, and they will, for that reason, be so considered here. See 21 Cal. 3d 12, 20, 582 P.2d 1000, 1004-05, 148 Cal. Rptr. 409, 414.

⁵ 22 Cal. 3d 12, 582 P.2d 1000, 148 Cal. Rptr. 409 (1978).

⁶ "As many as 30 to 40 people were present in the apartment at times." *Id.* at 16, 582 P.2d at 1001, 148 Cal. Rptr. at 410.

⁷ The court stated: "They demanded condiments for the food that they had been given, and when told that the requested items were unavailable began ransacking the kitchen cabinets." *Id.* at 16, 582 P.2d at 1002, 148 Cal. Rptr. at 411.

⁸ The court recounted the personal concerns of several individual women, noting that one ran to hide in a closet, another contemplated jumping from the second floor, while a third collapsed in tears in a bedroom. *Id.* at 17, 582 P.2d at 1002, 148 Cal. Rptr. at 411.

⁹ *Id.*
attackers were "kicking and pounding" on the door.\footnote{10}

James Long, one of that group, picked up a double hibachi grill that was on the balcony in front of the neighboring apartment, and threw it through the window into the dining area where defendant was seated at a table with Benny Irving. The grill struck defendant and showered both defendant and Irving with glass, some particles of which lodged in defendant's eyes. As soon as he managed to wash the glass from his eyes with tears, and saw that Irving was having difficulty attempting to flee as the wheels of his chair were locked, defendant assisted Irving into the bedroom in which the women had just taken refuge. Ms. Armstrong was still attempting to obtain police assistance by telephone at that time.\footnote{11}

The scene was chaotic and, for those trapped inside the apartment, fraught with terror. As the defendant testified, "[P]eople were screaming. The women were crying for someone to 'do something,' and several people were still fighting on the porch."\footnote{12} It was in this context that Pam Burrell, one of the women imprisoned inside, gave to the defendant a .25 caliber Italian Buretta automatic pistol. Thus armed, and still without any aid from the police, the defendant stepped onto the porch and fired three times into the air. Instead of dispersing, however, the crowd decided that the gun was loaded with blanks and made a final charge on the apartment. The defendant fired again, and Montgomery, one of the original crashers, sustained "a relatively minor gunshot wound."\footnote{13} Consequently, King was charged with two counts of assault with a deadly weapon and one count of illegal possession of a concealable firearm by an ex-felon.\footnote{14}

At trial, the defendant pleaded self-defense to the two assault charges and was acquitted.\footnote{15} The judge refused, however, to submit to the jury the verdict requested instructions as to self-defense on the two assault charges and was subsequently acquitted.\footnote{5} The court did not indicate the nature of King's prior felony.\footnote{16}

The defense submitted two instructions on this charge. The first read:

If you find that William Harris King acted in self-defense, or in defense of another, then in order to find him guilty of a violation of Section 12021 of California Supreme Court framed the issue as follows: "[I]t is clear that if self-defense may be urged in defense of a charge of violating section 12021, the evidence in this case required that such instructions be given."\footnote{17}

After tracing the history of section 12021, the court considered the fact that several other statutes conferred a right to use force, even deadly force, in self-defense.\footnote{18} These provisions do not distinguish felons and other classes of persons, and the court "presumed" that the legislature was aware of them while enacting section 12021.\footnote{19} The court stated, moreover, that although section 12021 is explicit in its terms, it "does not expressly conflict with any of these provisions and thus does not demonstrate a legislative intent to supersede or repeal them with respect to a felon's right to self-defense."\footnote{20}

Furthermore, the court noted, section 12021 is not a blanket prohibition against possession of firearms by felons, but rather it is by its terms limited to concealable firearms. "Thus," said the court, we cannot infer that the Legislature intended absolutely to deny felons the rights declared in sections 692, 693, 694, and 197 and in Civil Code section 50. In construing section 12021, therefore, we must reconcile its prohibition of possession of a concealable firearm with those statutes declaring the right of any person to use even deadly force in self-defense.\footnote{21}

the Penal Code (possession of a concealable firearm by a felon) you must find that he had possession, custody or control of such firearm prior to the transaction or occurrence in which he acted in self-defense.

\begin{itemize}
  \item Id. at 20 n.4, 582 P.2d at 1004 n.4, 148 Cal. Rptr. at 413 n.4. The second read:
  \begin{itemize}
    \item If a person, as a reasonable man, has grounds for believing and does believe that he is about to suffer bodily harms [sic], and he grabs a weapon to defend himself, and uses this weapon only as would appear necessary to a reasonable person to prevent injury which appears to be imminent, then his person is not guilty of being a felon in possession of a concealed [sic] weapon as prohibited by Penal Code Section 12021.
  \end{itemize}
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\begin{itemize}
  \item Id. at n.5, 582 P.2d at 1004 n.5, 148 Cal. Rptr. at 413 n.5.
  \item Id. at 20, 582 P.2d at 1004, 148 Cal. Rptr. at 413.
  \item See CAL. PENAL CODE §§ 692-94 (West 1970) and CIVIL CODE § 50 (West 1954). These provisions basically authorize the use of force to defend against the commission of a "public offense" or injury to oneself, family or habitation.
  \item 22 Cal. 3d at 22, 582 P.2d at 1005, 148 Cal. Rptr. at 414.
  \item Id. at 23, 582 P.2d at 1006, 148 Cal. Rptr. at 415.
\end{itemize}
Because felons are not denied the right to use deadly force in appropriate circumstances, the court was forced to infer the basis for the legislative distinction between concealable firearms and other weapons or means of violence. Without substantial analysis, the court determined that the legislature believed that these firearms should not be "readily available lest the weapons be used for crimes of violence or other purposes." 22

Since the mere possession and use of a concealable firearm is not in itself unlawful, and since the State conceded that felons may lawfully possess and use nonconcealable weapons in self-defense, 23 the court held that the purposes of the statute would not be furthered by denying felons the right to use such weapons in situations which would otherwise give rise the need for self-defense. Indeed, the court reasoned,

It would be unreasonable and would lead to absurd results to construe section 12021 as permitting the use of a shotgun, but proscribing the use of a small caliber pistol in self-defense, and thus forcing the felon to use only a weapon capable of inflicting greater injury if he is forced by circumstances to use deadly force in self-defense. . . . Thus, when a [felon] is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, has temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021. 24

It is important to note that the court carefully worded its holding so that the legislative distinction between non-concealable firearms and concealable firearms is preserved. The court merely held that in a situation which allows for the use of deadly force in self-defense, a felon may, for the minimum necessary amount of time, possess a concealable firearm for the purpose of self-defense, provided that his possession is not by "preconceived design."

Of crucial importance to the court's opinion was the premise that section 12021 was not enacted to provide felons with temporary possession of concealable weapons or means of violence. Without substantial analysis, the court determined that the purpose of the provision have not been undermined.

The court found support for this reasoning by referring to its earlier holding in People v. Satchell. 25 There, where the defendant had admitted to four prior felony convictions, the charge was second degree felony murder arising out of the defendant's unpremeditated slaying of the victim with a sawed-off shotgun. The underlying felony for the felony murder charge was the violation of section 12021. After the trial court had convicted the defendant in accordance with section 12021, the California Supreme Court reversed the conviction on appeal. In its reversal, the court claimed that the purpose of felony-murder is to provide a separate category of crime for inherently dangerous acts resulting in death. However, the court held that the possession of a concealable firearm by a felon, in violation of section 12021, was not inherently dangerous. 26

Despite the existence of the Satchell precedent, the State in King argued that the issue presented in that case had been settled in favor of the state as recently as 1974 in People v. Evans. 27 In the Evans case, the defendant, a trainee dispatcher for the Yellow Cab Company, took a call for a taxi and gave it to one driver rather than the driver next in line, because the latter was asleep. When the sleeping driver awoke, the defendant dispatcher called him a "lazy bastard" and said, "I'll beat your ass, punk." 28 The tired driver, apparently unaccustomed to such verbal abuse, approached the defendant in a threatening manner, prompting the defendant, an ex-felon, to retrieve a pistol from a desk drawer and shoot the driver in the cheek. Rejecting a plea of self-defense, the court of appeals held that "[a]n ex-felon's right to defend himself remains, but he is prevented from the use of firearms." 29 In King, however, the California Supreme Court referred to that statement as mere dictum, because the defendant in Evans, unlike the defendant in King, had armed himself prior to the shooting

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22 Id. The court did, however, cite two appellate court cases, People v. Booker, 77 Cal. App. 3d 223, 143 Cal. Rptr. 482 (1978), and People v. Dubose, 42 Cal. App. 3d 847, 117 Cal. Rptr. 235 (1974), which tended to support its position.

23 22 Cal. 3d at 24, 582 P.2d at 1006-07, 148 Cal. Rptr. at 415-16.

24 Id. at 24, 582 P.2d at 1007, 148 Cal. Rptr. at 416.


26 Id. at 40, 489 P.2d at 1369, 98 Cal. Rptr. at 41.


28 Id. at 584, 115 Cal. Rptr. at 305.

29 Id. at 587, 115 Cal. Rptr. at 307.
incident. As the King court noted, “To the extent that dictum in Evans suggests that a felon may not in any circumstances use firearms in exercising his right to self-defense, it is disapproved.”

Justice Clark, dissenting in King,31 disagreed with the majority’s reasoning and focused on the fact that the legislature did not provide an exception to section 12021 for self-defense. Justice Clark inferred that this failure to provide a self-defense exception indicated a legislative judgment not to recognize one. Clark believed that felons cannot be expected “to exercise sound judgment and self-restraint in the necessarily explosive situations giving rise to the right of self-defense.” Furthermore, said Clark, the majority’s ruling will encourage felons to “abuse” the self-defense right and to have “ready access” to concealable weapons “in anticipation of their use.”

Both of these observations by Justice Clark, however, are flatly contradicted by the court’s holding. The “sound judgment” question is a question of fact for the jury, and if a felon designs to have “ready access” to a concealable weapon for purposes of self-defense, the defense would not be available to him under the terms of King.

Thus, the California Supreme Court in King has recognized that it makes little sense to allow felons to possess non-concealable weapons and to use such weapons in self-defense, while prohibiting the possession and use of smaller, and presumably less lethal, concealable weapons under identical circumstances. In arriving at its decision, the court not only gave a practical reading to the language of section 12021, but the standards created also gave broad deference to juries in making their factual determinations. Whether a person was in fact in imminent danger or had armed himself prior to the immediate necessity of using the weapon will be a question for juries to decide. It should not be any more difficult than other matters routinely submitted to a jury.

30 22 Cal. 3d at 25, 582 P.2d at 1008, 148 Cal. Rptr. at 417.
31 Id. at 27, 582 P.2d at 1009, 148 Cal. Rptr. at 418.
32 Id. at 28, 582 P.2d at 1009, 148 Cal. Rptr. at 418.
33 Id.