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Double Jeopardy--Ashe v. Swenson, 397 U.S. 436 (1970)

stances surrounding a search are no longer necessary to justify the warrantless search of an automobile.[41]

While *Chambers* may appear to be a questionable decision when viewed from a position subscribing to the absolute dictates of the fourth amendment,[42] it is significant to note that an almost unanimous Court found the search justifiable under the reasonability approach.[43] Mr. Justice Harlan, dissenting in part, retained the absolute approach:

> "The Court's endorsement of a warrantless invasion of privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of 'adherence to the judicial process'." [44]

The decisions which have echoed Justice Harlan's philosophy have apparently been emasculated by the decision in *Chambers*.[45]

The rationalization of the two ostensibly conradictory positions taken by the Court in *Vale* and *Chambers* depends on the object being searched. The sanctity of the home demands that police obtain a warrant before conducting a search unless the prosecution can prove that exceptional circumstances justified dispensing with the warrant. However, the eyes of the fourth amendment may blink at a warrantless search of an automobile if the police act within the elusive bounds of reasonability.

924 (7th Cir. 1960); People v. McGhee, 35 Ill. 2d 302, 220 N.E. 2d 205 (1966); Wilson v. State, 2 Md. App. 210, 233 A.2d 817 (1967).

[41] *Compare* United States v. Barton, 282 F.Supp. 785, 788 (D. Mass 1967), where the court held that "there was no immediacy about the situation which would have prevented the police from obtaining a search warrant" *with* Sisk v. Lane, 219 F.Supp. 507 (N.D. Ind. 1963), where the lapse of time was justified on the ground that the officers felt that the suspect must be taken to the police station immediately.

[42] See Justice Jackson's observation in Johnson v. United States, 333 U.S. 10, 14 (1947):

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Cf. Aguilar v. Texas, 378 U.S. 108 (1964)

[43] Mr. Justice Stewart, concurring, reiterated his view that fourth amendment issues should not be susceptible to collateral attack. *Compare* Kaufman v. United States, 394 U.S. 217, 242 (1969) (dissenting opinion) *with* Note, *Wax Fruit: The Cognizability of Fourth Amendment Claims in Collateral Attacks Upon Convictions*, 61 J. CRIM L. C. & P.S. 51 (1970).

[44] 399 U.S. at 64 (Harlan, J., concurring and dissenting).

[45] The following cases have held a warrantless search of an auto at the police station after the occupants of the auto have been arrested as violative of the fourth amendment: Wood v. Crouse, 417 F.2d 394 (8th Cir. 1969); United States v. Harvey, 397 F.2d 526 (7th Cir. 1968); Collins v. United States, 289 F.2d 129 (5th Cir. 1961); Petty v. State, 241 Ark. 911, 411 S.W. 2d 6 (1967); Eyrich v. People, 423 F.2d 582 (Colo. 1967); People v. Gates, 35 Ill. 2d 584, 221 N.E. 2d 285 (1966); Coston v. State, 252 Miss. 257, 172 So. 2d 764 (1965); People v. Beamon, 44 Misc. 2d 336, 253 N.Y.S. 2d 674 (1964); State v. Bernius, 177 Ohio St. 155, 203 N.E. 2d 241 (1964).

DOUBLE JEOPARDY

Ashe v. Swenson, 397 U.S. 436 (1970)

The recent Supreme Court decision in *Ashe v. Swenson*[1] expanded the fifth amendment protection against double jeopardy afforded defendants in criminal trials. The Court held that the collateral estoppel doctrine,[2] which bars re-litigation of issues already decided in a case, was incorporated in the fifth amendment's protection against double jeopardy.[3] The decision represented

[1] 397 U.S. 436 (1970).

[2] Collateral estoppel is defined in the RESTATEMENT OF JUDGMENTS, section 68 (1942):

> Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .

In United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961), the Court dealt with the manner in which collateral estoppel is applied:

> Application of the principle inevitably has two phases. The first is to determine what the first judgment determined, a process in which, as the Sealfon case makes plain, the court must look not simply to the pleadings but to the record in the prior trial. The second is to examine how that determination bears on the second case.

[3] 397 U.S. at 445. The Supreme Court and federal courts have often applied collateral estoppel, sometimes referring to it as *res judicata*, in federal criminal cases. The leading case is United States v. Oppenheimer, 242 U.S. 85 (1916). In *Oppenheimer*, defendant was charged with conspiracy to conceal assets from a trustee in bankruptcy. His defense was that the issue in the conspiracy case had already been litigated, while the government contended that *res judicata* was not available to defendants in criminal trials. Justice Holmes made it clear that *res judicata* was available and he concluded that the fifth amendment applied not only by its terms, but it also included at least the

a departure from the Court's position in *Hoag v. New Jersey*,[4] a case factually similar to *Ashe*, where it had expressed "grave doubts whether collateral estoppel can be regarded as a constitutional requirement." [5]

The *Ashe* case arose when six men, playing a friendly game of poker in the basement of a house, were surprised and robbed by three or four masked gunmen.[6] One of the robbers was allegedly Ashe, the petitioner in this case. Following his arrest, Ashe was charged with six separate counts of robbery but was first brought to trial on a charge of robbing only one of the poker players. At the trial, the state introduced evidence establishing the complainant's loss of money,[7] and also called the robbery victims as witnesses to identify Ashe. The victims' testimony, however, did not clearly indicate the number of robbers nor did it positively identify Ashe as one of them.[8] After the trial court instructed the jury that theft of "any money" would sustain a conviction and that Ashe could be found guilty even if he had not personally taken the complainant's money, the jury found Ashe "not guilty due to insufficient evidence." [9]

Six weeks later, Ashe was tried for the robbery of another of the poker players. At the second trial, he was convicted and sentenced to 35 years in prison. The difference in result in the two trials apparently stemmed from stronger testimony offered at the second trial on the issue of Ashe's identity as one of the robbers.[10] Although it is true that the robbery victims testified at both trials and that the prosecution in both cases showed that the robbers took money and valuables from each complainant, the witnesses in the second trial were better able to identify Ashe as the robber.[11]

The Supreme Court of Missouri subsequently affirmed Ashe's conviction, denying his contention that the constitutional prohibition against double jeopardy prohibited the second trial.[12] The Missouri court found that in cases involving the robbery of numerous victims, nothing prevented the state from framing the same number of indictments as victims.[13] The court reasoned that the robbery of each person is a separate offense and, as a result, separate trials for each of these offenses technically does not violate the prohibition against double jeopardy.[14]

In his appeal to the Missouri Supreme Court, Ashe also maintained that his second trial was prohibited because the first jury had already determined that he was not one of the robbers, and that therefore, under the doctrine of collateral estoppel, the court was prevented from further consideration of the issue.[15] The Missouri court, however, dismissed this argument by challenging both its premise and the policy urged on its behalf. The petitioner had argued that the jury acquitted him only because they believed that he was not one of the robbers. This assumed that the state proved all elements of its case except the identity issue, and therefore, that the basis for the verdict was the lack of proof as to identity. The court rejected this premise, however, and suggested an alternative ground; namely, that the jury may have acquitted Ashe because it did not believe any prop-

basic civil law principle of *res judicata*. In Sealfon v. United States, 332 U.S. 575 (1948), the Court found that issues resolved at the first trial could not be relitigated at the second and reversed petitioner's conviction. In Cosgrove v. United States, 224 F.2d 146, 155 (9th Cir. 1955), the court cited *Sealfon* as controlling. The Court in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568–69, noted that collateral estoppel was an established criminal law principle, then permitted plaintiff to introduce at the second trial those issues necessarily determined in the first. In the conspiracy trial in United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943), the government was barred from re-litigating those issues already decided in a previous trial. Similarly, the court in United States v. Kramer, 289 F.2d 909 (2d Cir. 1961), held that the issue decided in defendant's favor at his robbery trial precluded the government from seeking to prove the same issue at a conspiracy trial.

[4] 356 U.S. 464 (1958).

[5] *Id.*

[6] 367 U.S. at 437.

[7] 397 U.S. at 438; State v. Johnson, 347 S.W.2d 220, 221 (Mo. 1961).

[8] 397 U.S. at 438.

[9] *Id.* at 439.

[10] *Id.* at 440. Regarding the existence of stronger testimony on the identity issue at the second trial, the Court said:

> The witnesses were for the most part the same, though this time their testimony was substantially stronger on the issue of petitioner's identity. For example, two witnesses who at the first trial had been wholly unable to identify the petitioner as one of the robbers, now testified that his features, size, and mannerisms matched those of one of their assailants. Another witness who before had identified the petitioner only by his size and actions now also remembered him by the unusual sound of his voice. The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative. The case went to the jury on instructions virtually identical to those given at the first trial. 397 U.S. at 439–40.

[11] *Id.*

[12] State v. Ashe, 350 S.W.2d 768 (Mo. 1961); State v. Ashe, 403 S.W.2d 589 (Mo. 1966).

[13] 350 S.W.2d at 770.

[14] *Id.*

[15] *Id.*

erty had been stolen.[16] Second, the court rejected Ashe's argument that application of the collateral estoppel doctrine was necessary to protect defendants from prosecutorial harassment through multiple trials.[17] The court was confident that "the prosecutors will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes." [18]

In the United State District Court,[19] Ashe again raised double jeopardy and collateral estoppel arguments. The district court, however, rejected both arguments, relying on the United States Supreme Court decision in *Hoag v. New Jersey*.[20] The *Hoag* case was factually similar to *Ashe*, each involving the alleged robbery of several victims followed by an acquittal at the first trial and a conviction at the second. In *Hoag*, which was decided before the Supreme Court held in *Benton v. Maryland* that the double jeopardy provision of the fifth amendment applied to the states,[21] the Court considered the objections to a second trial within the context of due process. Under that approach, multiple prosecutions were considered unconstitutional only if so frequent as to violate the "fundamental fairness" required by the due process provision of the fourteenth amendment.[22] The Court found no violation of due process because the state had not attempted to wear out the accused with numberous prosecutions.[23] The *Hoag* Court also dismissed petitioner's collateral estoppel argument by simply failing to reach the issue. Instead, the Court accepted a New Jersey state court ruling which held that collateral estoppel was not available to Hoag because it was impossible to know upon which issue the jury's verdict was based.[24]

On appeal to the United States Court of Appeals,[25] Ashe's robbery conviction was again affirmed. Subsequently, the United States Supreme Court granted certiorari[26] and reversed Ashe's conviction.[27] The Court's opinion stressed the importance of *Benton v. Maryland*,[28] in which the Court had held the fifth amendment applicable to the states through the fourteenth amendment. The Court noted that because of *Benton*, the collateral estoppel issue had been transformed:

> The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy.[29]

The Court then traced the background of collateral estoppel and found it to be "an established rule of federal criminal law." [30] Further, the Court found that if the federal rule of collateral estoppel were applied to *Ashe*, the second prosecution in that case would be barred.[31] The Court then addressed itself to its earlier question of whether this established rule of federal law was embodied in the fifth amendment guarantee against double jeopardy.[32] After concluding that it was, the Court accordingly found Ashe's second trial constitutionally impermissible.

The reasoning of the majority opinion in *Ashe* is presented in two parts. The Court first stated its reliance on *Benton*, then welded an established rule of federal criminal law, namely collateral estoppel, onto the structure provided by the fifth amendment. Were it not for the addition of the

[16] *Id.* The Missouri Supreme Court refers to State v. Johnson, 347 S.W.2d 220 (Mo. 1961) as setting forth a detailed statement of facts. That account indicates that uncontroverted evidence was introduced to prove money was stolen from Knight. 347 S.W.2d at 221. The Supreme Court in *Ashe* termed the evidence "unassailable" that property had been taken from Knight. 397 U.S. at 438.

[17] *Id.* at 770, 771.

[18] *Id.* at 771.

[19] Ashe v. Swenson, 289 F.Supp. 871 (W.D. Mo. 1967).

[20] *Id.* at 873. In Hoag v. New Jersey, 356 U.S. 464 (1958), the petitioner, Hoag, was originally tried for the robbery of three men. The three men were robbed, as were others, while visiting a bar. After Hoag was acquitted at the first trial, he was again indicted, this time on a charge of robbing a fourth victim in the same bar. A jury found Hoag guilty at his second trial.

[21] Benton v. Maryland, 395 U.S. 784 (1969).

[22] In *Hoag*, the Court relied on the "fundamental fairness" test to determine whether a given course of prosecutions had violated due process. In approving two prosecutions where Hoag had allegedly robbed several persons in a bar, the Court could not say that more than one prosecution would always be unfair, nor could any formula be used to determine whether multiple trials violated the constitutional guarantee. 356 U.S. at 467–469.

[23] 356 U.S. at 467.

[24] *Id.* The Court deferred to the state court's resolution of the collateral estoppel issue, and added its "grave doubts" that collateral estoppel could be regarded as a constitutional requirement. 356 U.S. at 471.

[25] Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968).

[26] 393 U.S. 1115 (1969).

[27] 397 U.S. at 437. *Ashe* was a 7–1 decision with Justice Stewart writing the Court's opinion. Justices Black and Harlan concurred in separate opinions, and Justice Brennan also concurred in an opinion joined by Justices Douglas and Marshall. Chief Justice Burger wrote the lone dissenting opinion.

[28] 395 U.S. 784 (1969).

[29] 397 U.S. at 442.

[30] *Id.* at 443.

[31] *Id.* at 445.

[32] *Id.*

collateral estoppel rule to the fifth amendment, the Court would have been unable to reach its double jeopardy finding in *Ashe*. That is because by itself the fifth amendment prohibits multiple prosecutions for the "same offense," [33] and the meaning of "same offense" has traditionally been interpreted by the "same evidence" test. Under the "same evidence" test, if a second charge is hypothetically provable by evidence different from that submitted at the first trial, the defendant is not placed in double jeopardy.[34] Applying the "same evidence" test to the facts of the *Ashe* case, the second charge involved different evidence than the first with regard to stolen property, thereby constituting a separate offense. Therefore, as it is usually interpreted, the fifth amendment's double jeopardy clause would not prevent Ashe's second trial.

Given the limited scope of protection afforded the defendant by the "same evidence" test and the need to conform with the spirit of the double jeopardy clause, the Court faced two choices. Either it could discard the "same evidence" test in favor of a test that would more effectively maintain the double jeopardy protection, or it could retain the test but with the addition of the collateral estoppel rule. In adopting the latter approach, the Court relied heavily upon its observance that collateral estoppel was a firmly established principle of federal criminal law.[35]

Justice Brennan, however, who wrote a concurring opinion, would have taken the other alternative available to the Court and discarded the "same evidence" test in favor of the "same transaction" test.[36] Under the "same transaction" test, all charges arising from a single criminal transaction would have to be joined at one trial.[37] Applying the test to the situation in *Ashe*, all of the six possible indictments against Ashe would have had to be disposed of at the first trial. Hence, under the "same transaction" test, the second prosecution of Ashe would have been barred.

Justice Brennan supported his suggested approach by noting that the modern legislative tendency to increase the number of statutory offenses enables imaginative prosecutors to bring many charges for a single criminal act.[38] He argued that the "same transaction" test would lessen the chances of a vexatious succession of trials, while at the same time decreasing the burden on overcrowded courts.[39]

Another argument for the same transaction test is that it will encourage well-prepared prosecutions.[40] Prior to *Ashe*, a prosecutor could afford to try a case without maximum preparation and care, knowing full well that if he lost, he could, under the same evidence test, try the case again on another charge. This was particularly true in cases involving uncertain witnesses. For example, in *Ashe* the prosecution discovered that one witness performed poorly on the stand and, accordingly, he was not called to testify at the second trial.[41] Under the "same transaction" test, the prosecution would be unable to refine its case through numerous trials, and therefore would be required to give special attention to the first trial.

Brennan, however, did not consider the various arguments forwarded in opposition to the "same

[33] The relevant section of the Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

[34] Kirchheimer, *The Act, Offense and Double Jeopardy*, 58 YALE L. J. 513, 515 (1949). The original formulation of the same evidence rule appeared in Rex v. Vandercomb & Abbott, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (1796):

> Unless the first indictment was such as the prisoner might have been convicted upon the proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.

The dissenting opinion in *Ashe* stated the same evidence test used by the Court in Blockburger v. United States, 284 U.S. 299, 304 (1932):

> [T]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

For the criticisms of the same evidence test, see Jones, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L.C. & P.S. 379 (1947); Case Comment, 43 NOTRE DAME LAWYER 1017 (1968).

[35] 397 U.S. at 443–45.

[36] *Id.* at 453–54.

[37] *Id.*

[38] *Id.* at 452. One commentator has noted the same historical trend:

> The doctrine of collateral estoppel was historically of little significance in the criminal law, probably because of the scarcity, until about a century ago, of situations ripe for its application. . . . In the last century, however, the tendency among scholars and legislators to favor specificity in the drafting of statutory offenses—a tendency which no doubt originated from a desired to protect defendants—made it possible for a single act or a group of acts with a common motivation to constitute multiple statutory violations.

Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 29 (1960).

[39] *Id.* at 454.

[40] This additional argument in favor of the same transaction test is mentioned in Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 32–33 (1960).

[41] 397 U.S. 440.

transaction" test.[42] One such objection relates to the inability of the state to appeal from a verdict for the defendant.[43] The argument is that since the state cannot appeal from even a clearly erroneous jury verdict, it should not be compelled to join all of its charges at one trial and thereby risk an acquittal on every charge.[44] To allow the state to appeal criminal verdicts, however, would itself diminish the area of protection extended by the double jeopardy clause.[45] Chief Justice Burger raised an additional argument in opposition to the "same transaction" test in his dissent in *Ashe*.[46] In his view of the *Ashe* case, there was not a single robbery, but rather six robberies of six separate individuals. He argued that this "personal view" of criminal conduct is inconsistent with a requirement that several offenses be joined together for trial as if they were one transaction.[47] He raised the important point that the "same transaction" test would apply to situations in which the "separateness" of the crimes would be more apparent than in the Ashe situation, which involved the robbery of several persons in one place. For example, the Chief Justice pointed out that in cases involving serious crimes such as murder,

> unless all the crimes are joined in one trial the alleged killers cannot be tried for more than one of the killings even if the evidence is that they personally killed two, three, or more of the victims.[48]

In his dissent, Chief Justice Burger also criticized what he interpreted as a move by the Court "to superimpose on the same-evidence test a new and novel collateral estoppel gloss." [49] The dissent characterized collateral estoppel as a civil law doctrine with limited applicability in the criminal law context.[50] The Chief Justice noted that for two centuries the courts had failed to include collateral estoppel as an "ingredient" of the fifth amendment. Hence, he did not believe that it was the province of the Court to make any change at this time.[51]

The Chief Justice was concerned with the constitutional aspects of the Court's decision and also questioned whether the majority had correctly analyzed the jury verdict. By applying its self-labeled approach of "realism and rationality," [52] the Court had determined that there was only one disputed issue for the jury at Ashe's trial:

> The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers.[53]

In dismissing the Court's analysis as mere "guesswork," [54] the Chief Justice set up an alternative theory to explain the jury verdict. He suggested that the jury may have been confused as to Ashe's location in the house at the time of the robbery, particularly, whether he was in the basement or upstairs. Second, he theorized that if such confusion existed, the jurors could have misunderstood the court's instruction and found Ashe not guilty simply because they believed he had not participated in the actual taking, when all that was required to convict was a common intent among the robbers.[55]

The first problem with the Chief Justice's theory is that it cannot be reconciled with the statement of facts offered by the Missouri Supreme Court, which clearly indicates that Ashe was in the basement during the robbery.[56] Therefore, a rational

[42] For discussions of proposals to meet objections to the "same transaction" test, see Kirchheimer, *The Act, Offense and Double Jeopardy*, 58 YALE L. J. 513, 534 (1949); Jones, *What Constitutes Double Jeopardy?* 38 J. CRIM. L.C. & P.S. 379, 387 (1947).

[43] This argument is suggested in Jones, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L.C. & P.S. 379, 390 (1947).

[44] The same argument is made in Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 37 (1960), but the argument is promptly rejected:

> On the other hand, the policies of conservation of judicial energy and public funds and of protection against harassment should be determinative.

[45] *See* Case Comment, 44 NOTRE DAME LAWYER 293, 295 (1968).

[46] 397 U.S. at 468–69.

[47] *Id.* at 469.

[48] *Id.* at 464.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 466–67.

[52] *Id.* at 444. Regarding its rational approach, the Court stated:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

[53] *Id.* at 445.

[54] *Id.* at 468.

[55] *Id.* at 467.

[56] 350 S.W.2d at 769. The court cites a more detailed

jury would not be confused on that point. Second, the theory assumes that the jury misconstrued an instruction which clearly authorized a guilty verdict simply upon a finding of common intent among the robbers.[57] The Chief Justice's analysis, in contrast to the Court's, rests upon the hypothesis that the jury acted irrationally and chose an unlikely ground for its verdict.[58] The criticism of his approach is that it makes impossible any findings as to what a general jury verdict determined, even in relatively simple cases involving a single contested issue. And without any conclusions as to what the jury verdict determined, the collateral estoppel doctrine cannot apply.

The *Ashe* holding, in which the collateral estoppel rule becomes a constitutional requirement, adds breadth to the fifth amendment protection extended to criminal defendants in state trials. Specifically, it frees the defendant from the burden of re-litigating issues already decided in his favor at a trial. It should be noted, too, that *Ashe* is only one of two recent Supreme Court decisions which have significantly expanded the protection afforded by the fifth amendment's protection against double jeopardy. In *Waller v. Florida*,[59] the Court ruled that the double jeopardy provision will be violated when an accused is tried on the same charge in both a state and municipal court.[60] Hence, as in *Ashe*, the Court significantly reduced the instances in which government might circumvent the letter and spirit of the fifth amendment by reprosecuting a defendant.[61]

The Court's holding in *Ashe*, however, will have limited applicability. Collateral estoppel will only be available to the defendant who has once been acquitted on a charge, but then faces a second trial on another charge involving the same issue or issues already decided. For example, if Ashe had been convicted instead of acquitted at his first trial, collateral estoppel would have provided no protection if, for reasons such as dissatisfaction with the length of his sentence, the state decided to prosecute him on the other robbery charges.[62] Further, if the trial or review court is simply unable to reach a conclusion as to what issues the acquittal verdict determined, then the collateral estoppel rule will not apply.[63] The most important effect of the *Ashe* decision may be to encourage

statement of facts in State v. Johnson, 347 S.W.2d 220 (1961). That account reads in part:

> [One of Ashe's] companions first went to Mrs. Gladson's bedroom, awakened her, tied her with a telephone cord, and took her ring. In the meantime, the three other men [including Ashe] entered the basement. 347 S.W.2d at 221.

[57] The instruction appears in the majority opinion, 397 U.S. at 439:

> The Court instructs the jury that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting.
>
> The Court instructs the jury that when two or more persons knowingly act together in the commission of an unlawful act or purpose, then whatever either does in furtherance of such unlawful act or purpose is in law the act and deed of each of such persons.

[58] The argument was presented to the Court in *Sealfon* that there were a number of possibilities as to what the jury might have thought, or perhaps the jury compromised or decided wrongly. The Court dismissed this argument, noting: "The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." 332 U.S. at 575.

One commentator has observed that there must be a presumption of jury rationality before any conclusions as to its verdict can be reached:

> For before it can be argued that a court should search the record of a previous trial to determine what specific issues were decided by a general verdict, it must be presumed that juries base verdicts upon logical inferences drawn solely from the evidence in the record. Comment, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142, 146 (1960).

[59] 397 U.S. 387 (1970). The decision was announed on the same day as *Ashe*.

[60] The court rejected the state's argument that the double prosecutions were permissible under the dual sovereignity rationale of Bartkus v. Illinois, 359 U.S. 121 (1959).

[61] The state still has the ability to circumvent the double jeopardy protection where the defendant's act violates both state and federal statutes. Bartkus v. Illinois, 359 U.S. 121 (1959). *See* Comment, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967).

[62] However, collateral estoppel may apply in the case where defendant is found guilty. See *Emich Motors Corp. v. General Motors Corp.*, where at a second trial, plaintiffs were allowed "to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction. . . ." 558 U.S. at 569. Also, there is a possibility that collateral estoppel can be utilized by a defendant found guilty of a crime:

> Although the doctrine of collateral estoppel is applicable in a criminal case regardless of whether the defendant was found guilty or innocent, the doctrine will not avail the defendant if he is found guilty unless the former conviction was based upon facts which negative the possibility of guilt in the second prosecution. United States v. J. R. Watkins Co., 127 F.Supp. 97, 103 (D. Minn. 1954).

It should also be noted that the "same transaction" test would prohibit successive prosecutions in the *Ashe* case even if he had been convicted at the first trial.

[63] Justice Brennan's concurring opinion described Ashe as "fortunate" because there is some doubt that collateral estoppel would have been available if the jury had more than one contested issue to resolve. 397 U.S. at 459.

prosecutors to combine charges in cases involving several offenses arising from a single transaction. If charges are tried singly, the risk taken by the prosecution is that collateral estoppel will apply to prevent further trials. This tendency to join charges would promote the policy behind a "same transaction" test, principally the elimination of a harassing series of trials,[64] while leaving the prosecution enough flexibility to try charges either singly or all at once.[65]

Because it occupies a middle ground between the "same transaction" and "same evidence" tests, collateral estoppel does not completely relieve defendants from the strictures of the "same evidence" test. The concurring opinions, however, add a hopeful note in that some Justices are prepared to shed the "same evidence" test in favor of the "same transaction" test. At best, the concurring opinions will urge the Court to thoroughly reappraise the validity of the interpretation usually given to the constitutional phrase, "same offense."

Finally, the vitality of the collateral estoppel doctrine will depend on the approach taken by the courts in analyzing jury verdicts. In adopting the approach of "realism and rationality," the Supreme Court carefully examined Ashe's trial record, considered evidence and jury instructions, and then isolated the only issue in dispute. The danger is that review courts may effectively eliminate the protection of collateral estoppel by assuming that juries are irrational, and therefore capable of deciding cases in opposition to, not in accord with, the weight of the evidence. Unless the courts adopt the same approach utilized by the Supreme Court in the delicate job of analyzing the meaning of jury verdicts, the collateral estoppel doctrine will remain as little more than an academic curiosity.

[64] 397 U.S. at 454.

[65] Chief Justice Burger's dissent argues against the "same transaction" test that it would leave prosecutors inflexible and unable to try multiple crimes in some circumstances. 397 U.S. at 468–469.

Price v. Georgia, 398 U.S. 323 (1970)

In *Price v. Georgia*,[1] the Supreme Court held that after a successful appeal, the fifth amendment[2] precluded retrial of a defendant for murder if that defendant was convicted of the lesser included offense of manslaughter at the first trial. In arriving at this decision, Chief Justice Burger, writing for the majority, relied on the historical foundation for the double jeopardy prohibition,[3] but was forced to overrule several past decisions in his attempt to raise the status which the double jeopardy prohibition should occupy in our legal system.

The defendant in *Price* was tried for murder. The jury returned a verdict of guilty to the lesser crime of voluntary manslaughter. It made no reference in the verdict to its resolution of the murder charge. After a successful appeal,[4] the defendant was reindicted for murder. Price contended[5] that this second trial for murder placed him in double jeopardy in light of his first conviction on the lesser charge of manslaughter and therefore should be barred by the fifth amendment. The trial judge rejected this contention and the jury in this second trial rendered another verdict of voluntary manslaughter.

Price then made a direct post-conviction appeal[6]

[1] 398 U.S. 393 (1970).

[2] U.S. CONST. amend. V states (in part):

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

[3] The prohibition against placing a person in double jeopardy for any one crime emanated from the common law. In Green v. United States, 355 U.S. 184, 187 (1957), the Court cited Blackstone:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, Blackstone recorded: . . . the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.

But the Anglo-American legal tradition is not unique in its prohibition of double jeopardy. The Spanish also prohibited a retrial of a defendant for the same offense.

> After a man, accused of a crime, has been acquitted by the court, no one can afterwards accuse him of the same offense, (except in certain specified cases). FUERO REAL, lib. iv, tit. xxi. 1, 13 (1255).

[4] Price v. State, 108 Ga. App. 581, 133 S.E. 2d 916 (1963).

[5] *See* note 3 *supra*. Price pleaded the writ of *autrefoits acquit*, or former acquittal.

[6] The Georgia Constitution operates to provide direct review by the Georgia Supreme Court of all cases which require construction of either the Constitution of the United States or the Constitution of Georgia. GA. CONST. art VI, §2(4).

to the Georgia Supreme Court. That court transferred the case[7] to the Georgia Court of Appeals which, relying on *Brantley v. State*,[8] rejected the appeal.[9] After the Georgia Supreme Court denied certiorari, the petitioner sought review in the United States Supreme Court. Certiorari was granted [10] to consider the issue of whether a state has the power

> to retry an accused for murder after an earlier guilty verdict on the lesser included offense of voluntary manslaughter had been set aside because of trial error.[11]

Chief Justice Burger, choosing among seemingly contradictory precedents, analyzed the issue posed by *Price* in a manner which accentuated the underlying rationale for the double jeopardy prohibition. He emphasized that the prohibition against double jeopardy embodied in the fifth amendment[12] prohibited not only double punishment, but went further to prohibit a defendant from twice being put on trial for the same offense.[13] Justice Black, writing for the Court in *Green v. United States*[14] explained this concept.

> 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.* (emphasis added)[15]

However, the prohibition against double jeopardy does not go so far as to insulate a defendant from retrial on the *same* charge if he has, since his conviction on that charge, pursued a successful appeal.[16] The courts have sanctioned a second trial in these instances under the doctrine of continuing jeopardy.[17] In *Ball v. United States*,[18] however, the Court held that a finding of acquittal, even if based on a defective indictment which may be appealed to reverse the convictions of co-defendants, could not be reviewed without putting the defendant into jeopardy a second time, thereby violating his constitutional rights. Therefore, the Court rejected the idea that the doctrine of continuing jeopardy could be used to avoid the prohibition against double jeopardy.

The concept of continuing jeopardy received an exhaustive analysis by the Supreme Court in two cases arising in the Philippines during the period of U.S. ownership by virtue of the American victory in the Spanish-American War. These cases were *Kepner v. United States*[19] and *Trono v. United States*.[20] In *Kepner*, an attorney in Manila was accused of embezzling the funds of his client. Although the defendant was acquitted at trial, the government appealed and won a reversal. A second trial resulted in a conviction, but Kepner appealed, contending that he had twice been placed in jeopardy. After disposing of two preliminary considerations—jurisdiction and the applicability of the U.S. Constitution (especially the Bill of Rights)

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[7] Price v. State, 224 Ga. 306, 161 S.E.2d 825 (1968).
[8] 132 Ga. 573, 64 S.E. 676 (1909), *aff'd*, 217 U.S. 284.
[9] Price v. State, 118 Ga. App. 207, 163 S.E.2d 243 (1968).
[10] 395 U.S. 975 (1969).
[11] 398 U.S. 324 (1970).
[12] *See* note 2 *supra*.
[13] Chief Justice Burger states, 398 U.S. 324, 326 (1970):
> The 'twice put in jeopardy' language of the Constitution thus relates to a potential, *i.e.*, the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried.

[14] 355 U.S. 184 (1957).
[15] *Id.* at 188. *See also* United States v. Ball, 163 U.S. 662, 669 (1896), and *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873), in which the Court stated:
> The common law not only prohibited a second punishment for the same offense, but went further and forbid a second trial for the same offense, whether the accused suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

[16] Even in Price v. Georgia, the Court states, 398 U.S. at 326-27(1970).
> Petitioner sought and obtained the reversal of initial conviction for voluntary manslaughter by taking an appeal. Accordingly, no aspect of the bar on double jeopardy prevented his retrial for the crime.

[17] Courts have upheld the constitutionality of retrial after appeal. As Justice Black points out in Green v. United States, 355 U.S. 184, 189 (1957):
> Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had "waived" his plea of former jeopardy by asking that the conviction be set aside. Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final. But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for the same offense had been set aside on appeal.

[18] 163 U.S. 662 (1896). *See also* United States v. Sanges, 144 U.S. 310 (1892).
[19] 195 U.S. 100 (1904).
[20] 199 U.S. 521 (1905).

to the Philippines[21]—the Court reached the issue of double jeopardy. Following *Ball*, it resolved this issue in favor of the defendant-petitioner. The Court rejected the contention in Holmes' dissent[22] that continuing jeopardy would forestall the application of the principle of double jeopardy until all appeals and retrials had been completed on all charges. Holmes stated,

> It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case.[23]

Continuing, Holmes rejected the contention that a successful appeal by the government and a subsequent retrial would result in double jeopardy. In his view a man is not in jeopardy in a case of misdirection, whether he appeals or the government appeals, because, "... there can be but one jeopardy in one case," [24] and a second trial is merely a continuation of the jeopardy posed in the first.[25]

A year after *Kepner* was decided, the *Trono*[26] case came before the Court. Dealing with a fact situation which Holmes, in his *Kepner* dissent, found did not constitute an example of double jeopardy, a fact situation analogous to that presented in *Price*, the Court apparently reversed *Kepner* and affirmed the right of the government to retry the defendant on a more serious charge than the one on which he was convicted and from which he had appealed. In *Trono* the defendants, though charged with murder, were convicted of assault. That conviction was appealed and overturned by the Philippine Supreme Court. That court then found the defendants guilty of murder and increased their sentences. The United States Supreme Court affirmed in a decision marked by the failure of a majority of the Court to agree upon any opinion. Four justices took the approach that an appeal of the assault conviction constituted a waiver of the double jeopardy claim against the murder charge. Holmes concurred in the result,[27] and although he wrote no opinion, its seems probable that he would have found the waiver theory too narrow and would have preferred his definition of continuing jeopardy forwarded in his *Kepner* dissent. Four justices dissented in *Trono*.[28] Two of them, McKenna and White had only one year earlier concurred with Holmes' dissent in *Kepner*.[29] These dissenters found that Trono's claim was valid under the fifth amendment and that it constituted sufficient grounds for reversal of the case in favor of the petitioner.

Burger found himself unable to accept the Holmes theory of continuing jeopardy. He relied on *Green v. United States*[30] to solve the problem of conflicting precedents.posed by *Kepner* and *Trono* since it appeared that they could not be distinguished on their facts. As Burger stated in *Price*, "... there is no relevant distinction between this case [*Price*] and *Green v. United States*." [31] *Green* presented a situtation in which the petitioner had been tried and convicted of first degree murder. This occurred after an earlier guilty verdict on the lesser included offense of second degree murder had been set aside on appeal. The government in *Green* argued that a successful appeal of a conviction on a lesser included charge

[21] The Court had some difficulty in finding that the provisions of the United States Constitution applied to the Philippines. In a confused manner the Court first found that the American predecessor in ownership of the islands, the Spanish, also held double jeopardy violated their law. Then the Court stated that Spanish law was not applicable and the Philippines would be subject to the provisions of the United States Constitution, which also prohibited double jeopardy. Kepner v. United States, 195 U.S. 100, 120–123 (1904).

[22] 195 U.S. at 134–37 (Holmes, J., dissenting).

[23] *Id.* at 134.

[24] *Id.* at 136.

[25] *Id.* at 135–36.
It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions, he will keep it and can be retried only for the less offense, so that the jeopardy is only continued to the extent that it has already been determined against him, and is continued with a chance of escape. I believe these decisions ... to be wrong.

[26] *See* note 20 *supra*.

[27] 199 U.S. 521, 535 (1905).

[28] The justices' rationale for this divergence was that *Kepner* was not overruled by *Trono*, was not distinguishable from it, and should therefore be followed. Thus they conformed to stare decisis. White and McKenna saw no distinction, as the other justices did, in the rationale that the two cases differ because in one, *Kepner*, the government appealed, and in the other, the defendant appealed. To them, the decision in *Trono* obstructed the right of appeal. 199 U.S. at 537.

[29] 195 U.S. 100, 134 (1904).

[30] Green v. United States, 355 U.S. 184 (1957).

[31] Price v. Georgia, 398 U.S. 323, 329 (1970).

constituted a waiver of the defendant's constitutional defense of double jeopardy. Black, writing for the 5 to 4 majority, denied the efficacy of this argument, and implicitly overruled *Trono*.[32] He so ruled on two grounds. First, he deemed the waiver theory a "paradoxical contention" because a waiver must be voluntary to be constitutionally permissible. To attach a waiver theory to the constitutional right of appeal, he argued, leaves the convicted defendant no meaningful choice.[33] If he appeals, he waives his fifth amendment right against double jeopardy. If he does not appeal, he retains his right, but it is of little comfort since he has given up a possible chance to have his conviction overturned.

Second, Black advanced a theory which appears to be as much of a legal fiction as the waiver theory he discredited. He argued that the jury finding that the defendant was guilty of the lesser charge constituted an affirmative finding that he was not guilty of the greater offense.

> When given the choice between finding him guilty of either first or second degree murder it [the jury] chose the latter.... Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for the offense.[34]

Frankfurter, in his dissent,[35] attacked the apparent fiction developed by Black.

> Surely the silence of the jury is not, contrary to the Court's suggestion, to be interpreted as an express finding that the defendant is not guilty of the greater offense. All that can with confidence be said is that the jury was in fact silent.[36]

Ignoring the logic of Frankfurter's strong dissent and accepting Black's theories of implicit acquittal and jury determination, Burger concluded that the case against Price should be reversed. However, he faced one more problem case, that of *Brantley v. State*,[37] relied on by the Georgia courts to affirm the trial court decision in *Price*. The fact situation in *Brantley* is analogous to that in *Price*, except that the defendant was convicted of murder on retrial.[38] Burger contended that *Green* overruled *Brantley*, and that *Brantley* was no longer viable. He reasoned:

> In Palko v. Connecticut[39] this Court refused to overturn a first degree murder conviction obtained after the State had successfully appealed from a conviction of second-degree murder which was the product of a trial on first-degree murder charges. The Court ruled that federal double jeopardy standards were not applicable to the States.
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> *Palko* was overruled by *Benton v. Maryland*,[40] where this Court determined that the double jeopardy prohibition of the Fifth Amendment should be applied to the States.... *Brantley* and *Palko* were of the same genre, and *Brantley* necessarily shared *Palko*'s fate in *Benton*.[41]

The Court also felt compelled in *Price* to combat the argument of the State of Georgia that, since Price was convicted of manslaughter in both trials, the claim of double jeopardy constituted harmless error. Burger held that the outcome of the second trial was irrelevant. The mere fact that such a trial commenced was prohibited by the fifth amendment.

> The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of conviction, not of the ultimate legal consequences of the verdict.[42]

In Burger's view, the jury, confronted by the choice of convicting the defendant of murder or manslaughter, may have found him guilty of the lesser charge rather than prolong their debate on his true innocence or guilt.[43] This compromise

[32] Green v. United States, 355 U.S. 184, 197 (1957).

[33] Even Justice Holmes observed this fact in Kepner v. United States, 195 U.S. at 135 (dissenting opinion):

> Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisioner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

In Green v. United States, 355 U.S. 184, 193 (1957), the Court calls this argument of waiver, and act of "barter" and states: "the law should not and in our judgement does not, place the defendant in such an incredible dilemma."

[34] Green v. United States, 355 U.S. 184, 190–91 (1957). *Cf.* Wade v. Hunter, 336 U.S. 684 (1949).

[35] 355 U.S. 184, 198 (dissenting opinion). In his dissent, Mr. Justice Frankfurter was joined by Justices Burton, Clark and Harlan.

[36] *Id.* at 214.

[37] *See* note 8 *supra*.

[38] The factual context of Green v. United States, 355 U.S. 184 (1957) and Brantley v. State, 132 Ga. 573, 64 S.E. 676 (1909), *aff'd*, 217 U.S. 284 (1910), are identical. It appears that the Georgia courts followed their own state decisions rather than resort to those of the federal courts. *See* notes 37 and 38 *infra* and accompanying text.

[39] 302 U.S. 319 (1937).

[40] 395 U.S. 784 (1969).

[41] 398 U.S. at 330–31 n. 9.

[42] 398 U.S. at 331.

[43] The acceptance of Black's logic in Green v. United