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Folder Title:

Constitutionality of Evidence Provision in Crime Bill [1]

Stack:

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Row:

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Section:

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Shelf:

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Position:

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403 - more protective than
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Please
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See p. 689

HUDDLESTON *v.* UNITED STATES

681

Syllabus

HUDDLESTON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 87-6. Argued March 23, 1988—Decided May 2, 1988

Federal Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove a person's character, but may be admissible for other purposes, such as proof of knowledge. Petitioner was charged under federal law with the knowing possession and sale of stolen videocassette tapes. At his trial, the District Court allowed the Government to introduce as evidence of "similar acts" under Rule 404(b) evidence of petitioner's involvement in a series of sales of allegedly stolen televisions and appliances from the same suspicious source as the tapes, concluding that such evidence had clear relevance as to petitioner's knowledge that the tapes were stolen. The jury convicted petitioner on the possession count only, and the Court of Appeals ultimately affirmed, declaring that it could not say that the District Court had abused its discretion in admitting the "similar acts" evidence under *United States v. Ebens*, 800 F. 2d 1422 (CA6), which authorized courts to admit such evidence if the proof showed by a preponderance of the evidence that the defendant did in fact commit the prior bad act.

Held: The district court need not itself make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits "similar acts" and other Rule 404(b) evidence to the jury. The requirement of such a preliminary finding would be inconsistent with the structure of Article IV of the Rules, which allows the admission of relevant evidence for a proper purpose subject only to general strictures, with Rule 404(b)'s plain language, and with the legislative history behind that Rule. Rather, "similar" acts evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act. Here, petitioner does not dispute that the evidence of the appliance sales was properly admitted. Moreover, the trial court properly allowed the evidence of the television sales to go to the jury, since the jury reasonably could have concluded that the televisions were stolen in light of the low price sought by petitioner, the large quantity of televisions he offered for sale, his inability to produce a bill of sale, and his involvement in the sales of the stolen tapes and appliances. Pp. 685-692.

511 F. 2d 974, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Don Ferris argued the cause and filed briefs for petitioner. *Deputy Solicitor General Bryson* argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Weld*, *Jeffrey P. Minear*, and *Thomas E. Booth*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Evidence 404(b) provides:

"Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits the evidence to the jury. We hold that it need not do so.

Petitioner, Guy Rufus Huddleston, was charged with one count of selling stolen goods in interstate commerce, 18 U. S. C. §2315, and one count of possessing stolen property in interstate commerce, 18 U. S. C. §659. The two counts related to two portions of a shipment of stolen Memorex videocassette tapes that petitioner was alleged to have possessed and sold, knowing that they were stolen.

The evidence at trial showed that a trailer containing over 32,000 blank Memorex videocassette tapes with a manufacturing cost of \$4.53 per tape was stolen from the Overnight Express yard in South Holland, Illinois, sometime between April 11 and 15, 1985. On April 17, 1985, petitioner contacted Karen Curry, the manager of the Magic Rent-to-Own

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Opinion of the Court

in Ypsilanti, Michigan, seeking her assistance in selling a large number of blank Memorex videocassette tapes. After assuring Curry that the tapes were not stolen, he told her he wished to sell them in lots of at least 500 at \$2.75 to \$3 per tape. Curry subsequently arranged for the sale of a total of 5,000 tapes, which petitioner delivered to the various purchasers—who apparently believed the sales were legitimate.

There was no dispute that the tapes which petitioner sold were stolen; the only material issue at trial was whether petitioner knew they were stolen. The District Court allowed the Government to introduce evidence of “similar acts” under Rule 404(b), concluding that such evidence had “clear relevance as to [petitioner’s knowledge].” App. 11. The first piece of similar act evidence offered by the Government was the testimony of Paul Toney, a record store owner. He testified that in February 1985, petitioner offered to sell new 12” black and white televisions for \$28 apiece. According to Toney, petitioner indicated that he could obtain several thousand of these televisions. Petitioner and Toney eventually traveled to the Magic Rent-to-Own, where Toney purchased 20 of the televisions. Several days later, Toney purchased 18 more televisions.

The second piece of similar act evidence was the testimony of Robert Nelson, an undercover FBI agent posing as a buyer for an appliance store. Nelson testified that in May 1985, petitioner offered to sell him a large quantity of Amana appliances—28 refrigerators, 2 ranges, and 40 icemakers. Nelson agreed to pay \$8,000 for the appliances. Petitioner was arrested shortly after he arrived at the parking lot where he and Nelson had agreed to transfer the appliances. A truck containing the appliances was stopped a short distance from the parking lot, and Leroy Wesby, who was driving the truck, was also arrested. It was determined that the appliances had a value of approximately \$20,000 and were part of a shipment that had been stolen.

Petitioner testified that the Memorex tapes, the televisions, and the appliances had all been provided by Leroy Wesby, who had represented that all of the merchandise was obtained legitimately. Petitioner stated that he had sold 6,500 Memorex tapes for Wesby on a commission basis. Petitioner maintained that all of the sales for Wesby had been on a commission basis and that he had no knowledge that any of the goods were stolen.

In closing, the prosecution explained that petitioner was not on trial for his dealings with the appliances or the televisions. The District Court instructed the jury that the similar acts evidence was to be used only to establish petitioner's knowledge, and not to prove his character. The jury convicted petitioner on the possession count only.

A divided panel of the United States Court of Appeals for the Sixth Circuit initially reversed the conviction, concluding that because the Government had failed to prove by clear and convincing evidence that the televisions were stolen, the District Court erred in admitting the testimony concerning the televisions. 802 F. 2d 874 (1986).¹ The panel subsequently granted rehearing to address the decision in *United States v. Ebens*, 800 F. 2d 1422 (CA6 1986), in which a different panel had held: "Courts may admit evidence of prior bad acts if the proof shows by a preponderance of the evidence that the defendant did in fact commit the act." *Id.*, at 1432. On rehearing, the court affirmed the conviction. "Applying the preponderance of the evidence standard adopted in *Ebens*, we cannot say that the district court abused its discretion in admitting evidence of the similar acts in question here." 811 F. 2d 974, 975 (1987) (*per curiam*). The court noted that the evidence concerning the televisions was admitted for a proper purpose and that the probative value of this evidence was not outweighed by its potential prejudicial effect.

¹ "[T]he government's only support for the assertion that the televisions were stolen was [petitioner's] failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." 802 F. 2d, at 876, n. 5.

We granted certiorari, 484 U. S. 894 (1987), to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before "similar act" and other Rule 404(b) evidence is submitted to the jury.² We conclude that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

Federal Rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. The actor in the instant case was a criminal defendant, and the act in question was "similar" to the one with which he was charged. Our use of these terms

²The First, Fourth, Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. *United States v. Ingraham*, 832 F. 2d 229, 235 (CA1 1987); *United States v. Martin*, 773 F. 2d 579, 582 (CA4 1985); *United States v. Beechum*, 582 F. 2d 898, 914 (CA5 1978) (en banc), cert. denied, 440 U. S. 920 (1979); *United States v. Dothard*, 666 F. 2d 498, 502 (CA11 1982). Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. *United States v. Leonard*, 524 F. 2d 1076, 1090-1091 (CA2 1975). The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act. *United States v. Leight*, 818 F. 2d 1297, 1302 (CA7), cert. denied, 484 U. S. 958 (1987); *United States v. Weber*, 818 F. 2d 14 (CA8 1987); *United States v. Vaccaro*, 816 F. 2d 443, 452 (CA9), cert. denied *sub nom. Alvis v. United States*, 484 U. S. 914 (1987); *United States v. Larelle*, 243 U. S. App. D. C. 47, 57, 751 F. 2d 1266, 1276, cert. denied, 474 U. S. 817 (1985).

is not meant to suggest that our analysis is limited to such circumstances.

Before this Court, petitioner argues that the District Court erred in admitting Toney's testimony as to petitioner's sale of the televisions.³ The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character. The Government's theory of relevance was that the televisions were stolen, and proof that petitioner had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of these items, including the Memorex tapes, was stolen.⁴ As such, the sale of the televisions was a "similar act" only if the televisions were stolen. Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen. He asserts, however, that the evidence should not have been admitted because the Government failed to prove to the District Court that the televisions were in fact stolen.

Petitioner argues from the premise that evidence of similar acts has a grave potential for causing improper prejudice. For instance, the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law. Because of this danger, petitioner maintains, the jury ought not to be exposed to similar act evidence until the trial court has heard the evidence and made a determination under Federal Rule of Evidence 104(a) that the defendant

³Petitioner does not dispute that Nelson's testimony concerning the Amana appliances was properly admitted under Rule 404(b).

⁴The Government also argues before this Court that the evidence concerning the televisions is relevant even if the jury could not conclude that the sets were stolen. We have found nothing in the record indicating that this theory was suggested to or relied upon by the courts below, and in light of our ruling, we need not address this alternative theory.

485 U. S.
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committed the similar act. Rule 104(a) provides that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." According to petitioner, the trial court must make this preliminary finding by at least a preponderance of the evidence.³

We reject petitioner's position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be

³ In his brief, petitioner argued that the Government was required to prove to the trial court the commission of the similar act by clear and convincing proof. At oral argument, his counsel conceded that such a position is untenable in light of our decision last Term in *Bourjaily v. United States*, 483 U. S. 171 (1987), in which we concluded that preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard. Tr. of Oral Arg. 12. Petitioner now asserts that although the Sixth Circuit correctly held that the Government must prove the similar act by preponderant evidence before it is admitted, the court erred in applying that test to these facts. We consider first what preliminary finding, if any, the trial court must make before letting similar acts evidence go to the jury.

introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.

Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any "mechanical solution" to the admission of evidence under 404(b). Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Ibid.*; see also S. Rep. No. 93-1277, p. 25 (1974) ("[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, *i. e.* prejudice, confusion or waste of time").

Petitioner's suggestion that a preliminary finding is necessary to protect the defendant from the potential for unfair prejudice is also belied by the Reports of the House of Representatives and the Senate. The House made clear that the version of Rule 404(b) which became law was intended to "plac[e] greater emphasis on admissibility than did the final Court version." H. R. Rep. No. 93-650, p. 7 (1973). The Senate echoed this theme: "[T]he use of the discretionary word 'may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge." S. Rep. No. 93-1277, *supra*, at 24. Thus, Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence

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as it was with ensuring that restrictions would not be placed on the admission of such evidence.

We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a).⁶ This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 688. In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. See *United States v. Beechum*, 582 F. 2d 898, 912-913 (CA5 1978) (en banc). In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.

Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). *Beechum*, *supra*, at 912-913; see also E. Imwinkelried, *Uncharged Misconduct Evidence* § 2.06 (1984). Rule 104(b) provides:

⁶Petitioner also suggests that in performing the balancing prescribed by Federal Rule of Evidence 403, the trial court must find that the prejudicial potential of similar acts evidence substantially outweighs its probative value unless the court concludes by a preponderance of the evidence that the defendant committed the similar act. We reject this suggestion because Rule 403 admits of no such gloss and because such a holding would be erroneous for the same reasons that a preliminary finding under Rule 104(a) is inappropriate. We do, however, agree with the Government's concession at oral argument that the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing. Tr. of Oral Arg. 26.

"When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence. See 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5054, p. 269 (1977). The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding.⁷ If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.

We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all

⁷ "When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and 'connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the preliminary fact. It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition." 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5054, pp. 269–270 (1977) (footnotes omitted).

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as introduced sufficient evidence in the trial court neither the Government nor the evidence in the case reasonably find the evidence stolen—by a Wright & K. Gra- 54, p. 269 (1977). the broadest sort of fact at trial, and we would change this to allow the prom- ilar act, and at efficient evidence ke the requisite eet this minimal ruct the jury to

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evidence presented to the jury. “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.” *Bourjaily v. United States*, 483 U. S. 171, 179–180 (1987). In assessing whether the evidence was sufficient to support a finding that the televisions were stolen, the court here was required to consider not only the direct evidence on that point—the low price of the televisions, the large quantity offered for sale, and petitioner’s inability to produce a bill of sale—but also the evidence concerning petitioner’s involvement in the sales of other stolen merchandise obtained from Wesby, such as the Memorex tapes and the Amana appliances. Given this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury.

We share petitioner’s concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States*, 335 U. S. 469, 475–476 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice,* see Advisory Committee’s Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691; S. Rep. No. 93–1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to

*As petitioner’s counsel conceded at oral argument, petitioner did not seek review of the Rule 403 balancing performed by the courts below. Tr. of Oral Arg. 14. We therefore do not address that issue.

Opinion of the Court

485 U. S.

be considered only for the proper purpose for which it was admitted. See *United States v. Ingraham*, 832 F. 2d 229, 235 (CA1 1987).

Affirmed.

NAYS—165

Allard	Grandy	Nussle
Archer	Gunderson	Orton
Armey	Hancock	Oxley
Bachus (AL)	Hansen	Packard
Baker (LA)	Hartert	Paxon
Ballenger	Hefley	Petri
Barrett (NE)	Hobson	Porter
Bartlett	Hoekstra	Portman
Barton	Hoke	Pryce (OH)
Bentley	Horn	Quillen
Bereuter	Huffington	Quinn
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Bliley	Hutchinson	Ravenel
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Bonilla	Jacobs	Rohrabacher
Brown (CA)	Johnson (CT)	Roe-Lehtinen
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Buyer	King	Royce
Calvert	Kingston	Saxton
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Canady	Knollenberg	Schiff
Castle	Kolbe	Schroeder
Clayton	Kyl	Sensenbrenner
Coble	Lazio	Shaw
Collins (GA)	Leach	Shays
Cox	Levy	Shuster
Crapo	Lewis (CA)	Skeen
Cunningham	Lewis (FL)	Smith (MI)
DeLay	Lewis (KY)	Smith (OR)
Diaz-Balart	Lightfoot	Smith (TX)
Diokey	Linder	Solomon
Doolittle	Livingston	Spence
Dornan	Lloyd	Stearns
Dreier	Lucas	Stokes
Duncan	Machtley	Stump
Dunn	Manzullo	Sundquist
Ehlers	McCandless	Talent
Emerson	McCollum	Tauzin
Ewing	McCrery	Taylor (NC)
Fawell	McHugh	Thomas (CA)
Fields (TX)	McInnis	Thomas (WY)
Fowler	McKeon	Torkildsen
Franks (CT)	McMillan	Upton
Franks (NJ)	Meehan	Vucanovich
Gallagher	Meyers	Walker
Gekas	Mica	Walsh
Gillchrest	Michel	Weldon
Gingrich	Miller (FL)	Wolf
Goodlatte	Molinar	Young (AK)
Goodling	Moorhead	Young (FL)
Goss	Morella	Zeliff
Grams	Murphy	Zimmer

NOT VOTING—21

Applegate	Frank (MA)	Reynolds
Baker (CA)	Gallo	Rose
Callahan	Herger	Rowland
Crane	McDade	Tucker
Engel	Moran	Valentine
Flake	Murtha	Washington
Ford (MD)	Rangel	Whitten

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So the Journal was approved.

The result of the vote was announced as above recorded.

PLEDGE OF ALLEGIANCE

The SPEAKER. Will the gentleman from Texas [Mr. GENE GREEN] please come forward and lead the House in the Pledge of Allegiance.

Mr. GENE GREEN of Texas led the Pledge of Allegiance as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands one nation under God, indivisible, with liberty and justice for all.

A WELCOME BACK TO THE HONORABLE TOM LANTOS AND AN EXPRESSION OF SYMPATHY TO THE HONORABLE SONNY CALLAHAN

(Mr. FOLEY asked and was given permission to address the House for 1

minute and to revise and extend his remarks.)

Mr. FOLEY. Mr. Speaker, I take the floor for two purposes: One, a happy one and one sad one.

The happy one is to welcome back to our midst our distinguished colleague, fit, ready for duty and restored to health, the gentleman from California [Mr. LANTOS].

The sad duty, Mr. Speaker, is to call the attention of this House to the tragic death of Cameron Callahan, the fifth child of our colleague, the gentleman from Alabama, SONNY CALLAHAN. The 23-year-old young man at Auburn University was killed yesterday in an automobile accident. His father is not with us, but I am sure I can speak for every Member of this House in expressing to him and to his family our heartfelt condolences and sympathy.

Mr. Speaker, may I suggest a moment of silence by the House to express to our colleague our sympathy to him and his wife, Karen, and the family and our concern and our support. Our thoughts are with them now.

CONFERENCE REPORT ON H.R. 3355, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1993

Mr. BROOKS submitted the following conference report and statement on the bill (H.R. 3355) to amend the Omnibus Crime Control and Safe Streets Act of 1968 to allow grants to increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety:

CONFERENCE REPORT (H. REPT. 103-711)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the amendment of the Senate to the bill (H.R. 3355), to amend the Omnibus Crime Control and Safe Streets Act of 1968 to allow grants to increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Violent Crime Control and Law Enforcement Act of 1994".

SEC. 2. TABLE OF CONTENTS.

The following is the table of contents for this Act:

Sec. 1. Short title.

Sec. 2. Table of contents.

TITLE I—PUBLIC SAFETY AND POLICING

Sec. 10001. Short title.

Sec. 10002. Purposes.

Sec. 10003. Community policing; "Cops on the Beat".

TITLE II—PRISONS

Subtitle A—Violent Offender Incarceration and Truth in Sentencing Incentive Grants

Sec. 20101. Grants for correctional facilities.

Sec. 20102. Truth in sentencing incentive grants.

Sec. 20103. Violent offender incarceration grants.

Sec. 20104. Matching requirement.

Sec. 20105. Rules and regulations.

Sec. 20106. Technical assistance and training.

Sec. 20107. Evaluation.

Sec. 20108. Definitions.

Sec. 20109. Authorization of appropriations.

Subtitle B—Punishment for Young Offenders

Sec. 20201. Certain punishment for young offenders.

Subtitle C—Alien Incarceration

Sec. 20301. Incarceration of undocumented criminal aliens.

Subtitle D—Miscellaneous Provisions

Sec. 20401. Prisoner's place of imprisonment.

Sec. 20402. Prison impact assessments.

Sec. 20403. Sentences to account for costs to the Government of imprisonment, release, and probation.

Sec. 20404. Application to prisoners to which prior law applies.

Sec. 20405. Crediting of "good time".

Sec. 20406. Task force on prison construction standardization and techniques.

Sec. 20407. Efficiency in law enforcement and corrections.

Sec. 20408. Amendments to the Department of Education Organization Act and the National Literacy Act of 1991.

Sec. 20409. Appropriate remedies for prison overcrowding.

Sec. 20410. Congressional approval of any expansion at Lorton and congressional hearings on future needs.

Sec. 20411. Awards of Pell Grants to prisoners prohibited.

Sec. 20412. Education requirement for early release.

Sec. 20413. Conversion of closed military installations into Federal prison facilities.

Sec. 20414. Post-conviction release drug testing—Federal offenders.

Sec. 20415. Reporting of cash received by criminal court clerks.

Sec. 20416. Civil rights of institutionalized persons.

Sec. 20417. Notification of release of prisoners.

Sec. 20418. Correctional job training and placement.

Subtitle D—Family and Community Endeavor Schools Grant Program

Sec. 30401. Community schools youth services and supervision grant program.

Sec. 30402. Family and Community Endeavor Schools Grant Program.

TITLE III—CRIME PREVENTION

Subtitle A—Ounce of Prevention Council.

Sec. 30101. Ounce of Prevention Council.

Sec. 30102. Ounce of prevention grant program.

Sec. 30103. Definition.

Sec. 30104. Authorization of appropriations.

Subtitle B—Local Crime Prevention Block Grant Program

Sec. 30201. Payments to local governments.

Sec. 30202. Authorization of appropriations.

Sec. 30203. Qualification for payment.

Sec. 30204. Allocation and distribution of funds.

Sec. 30205. Utilization of private sector.

Sec. 30206. Public participation.

Sec. 30207. Administrative provisions.

Sec. 30208. Definitions.

Subtitle C—Model Intensive Grant Programs

Sec. 30301. Grant authorization.

Sec. 30302. Uses of funds.

Sec. 30303. Program requirements.

Sec. 30304. Applicants.
 Sec. 30305. Reports.
 Sec. 30306. Definitions.
 Sec. 30307. Authorization of appropriations.
 Subtitle D—Family and Community Endeavor Schools Grant Program
 Sec. 30401. Community schools youth services and supervision grant program.
 Sec. 30402. Family and community endeavor schools grant program.
 Sec. 30403. Authorization of appropriations.
 Subtitle G—Assistance for Delinquent and At-Risk Youth
 Sec. 30701. Grant authority.
 Sec. 30702. Authorization of appropriations.
 Subtitle H—Police Recruitment
 Sec. 30801. Grant authority.
 Sec. 30802. Authorization of appropriations.
 Subtitle J—Local Partnership Act
 Sec. 31001. Establishment of payment program.
 Sec. 31002. Technical amendment.
 Subtitle K—National Community Economic Partnership
 Sec. 31101. Short title.
 CHAPTER 1—COMMUNITY ECONOMIC PARTNERSHIP INVESTMENT FUNDS
 Sec. 31111. Purpose.
 Sec. 31112. Provision of assistance.
 Sec. 31113. Approval of applications.
 Sec. 31114. Availability of lines of credit and use.
 Sec. 31115. Limitations on use of funds.
 Sec. 31116. Program priority for special emphasis programs.
 CHAPTER 2—EMERGING COMMUNITY DEVELOPMENT CORPORATIONS
 Sec. 31121. Community development corporation improvement grants.
 Sec. 31122. Emerging community development corporation revolving loan funds.
 CHAPTER 3—MISCELLANEOUS PROVISIONS
 Sec. 31131. Definitions.
 Sec. 31132. Authorization of appropriations.
 Sec. 31133. Prohibition.
 Subtitle O—Urban Recreation and At-Risk Youth
 Sec. 31501. Purpose of assistance.
 Sec. 31502. Definitions.
 Sec. 31503. Criteria for selection.
 Sec. 31504. Park and recreation action recovery programs.
 Sec. 31505. Miscellaneous and technical amendments.
 Subtitle Q—Community-Based Justice Grants for Prosecutors
 Sec. 31701. Grant authorization.
 Sec. 31702. Use of funds.
 Sec. 31703. Applications.
 Sec. 31704. Allocation of funds; limitations on grants.
 Sec. 31705. Award of grants.
 Sec. 31706. Reports.
 Sec. 31707. Authorization of appropriations.
 Sec. 31708. Definitions.
 Subtitle S—Family Unity Demonstration Project
 Sec. 31901. Short title.
 Sec. 31902. Purpose.
 Sec. 31903. Definitions.
 Sec. 31904. Authorization of appropriations.
 CHAPTER 1—GRANTS TO STATES
 Sec. 31911. Authority to make grants.
 Sec. 31912. Eligibility to receive grants.
 Sec. 31913. Report.
 CHAPTER 2—FAMILY UNITY DEMONSTRATION PROJECT FOR FEDERAL PRISONERS
 Sec. 31921. Authority of the Attorney General.
 Sec. 31922. Requirements.
 Subtitle T—Substance Abuse Treatment in Federal Prisons
 Sec. 32001. Substance abuse treatment in Federal prisons.

Subtitle U—Residential Substance Abuse Treatment for State Prisoners
 Sec. 32101. Residential substance abuse treatment for State prisoners.
 Subtitle V—Prevention, Diagnosis, and Treatment of Tuberculosis in Correctional Institutions
 Sec. 32201. Prevention, diagnosis, and treatment of tuberculosis in correctional institutions.
 Subtitle X—Gang Resistance Education and Training
 Sec. 32401. Gang resistance education and training projects.
 TITLE IV—VIOLENCE AGAINST WOMEN
 Sec. 40001. Short title.
 Subtitle A—Safe Streets for Women
 Sec. 40101. Short title.
 CHAPTER 1—FEDERAL PENALTIES FOR SEX CRIMES
 Sec. 40111. Repeat offenders.
 Sec. 40112. Federal penalties.
 Sec. 40113. Mandatory restitution for sex crimes.
 Sec. 40114. Authorization for Federal victim's counselors.
 CHAPTER 2—LAW ENFORCEMENT AND PROSECUTION GRANTS TO REDUCE VIOLENT CRIMES AGAINST WOMEN
 Sec. 40121. Grants to combat violent crimes against women.
 CHAPTER 3—SAFETY FOR WOMEN IN PUBLIC TRANSIT AND PUBLIC PARKS
 Sec. 40131. Grants for capital improvements to prevent crime in public transportation.
 Sec. 40132. Grants for capital improvements to prevent crime in national parks.
 Sec. 40133. Grants for capital improvements to prevent crime in public parks.
 CHAPTER 4—NEW EVIDENTIARY RULES
 Sec. 40141. Sexual history in criminal and civil cases.
 CHAPTER 5—ASSISTANCE TO VICTIMS OF SEXUAL ASSAULT
 Sec. 40151. Education and prevention grants to reduce sexual assaults against women.
 Sec. 40152. Training programs.
 Sec. 40153. Confidentiality of communications between sexual assault or domestic violence victims and their counselors.
 Sec. 40154. Information programs.
 Sec. 40155. Education and prevention grants to reduce sexual abuse of runaway, homeless, and street youth.
 Sec. 40156. Victims of child abuse programs.
 Subtitle B—Safe Homes for Women
 Sec. 40201. Short title.
 CHAPTER 1—NATIONAL DOMESTIC VIOLENCE HOTLINE
 Sec. 40211. Grant for a national domestic violence hotline.
 CHAPTER 2—INTERSTATE ENFORCEMENT
 Sec. 40221. Interstate enforcement.
 CHAPTER 3—ARREST POLICIES IN DOMESTIC VIOLENCE CASES
 Sec. 40231. Encouraging arrest policies.
 CHAPTER 4—SHELTER GRANTS
 Sec. 40241. Grants for battered women's shelters.
 CHAPTER 5—YOUTH EDUCATION
 Sec. 40251. Youth education and domestic violence.
 CHAPTER 6—COMMUNITY PROGRAMS ON DOMESTIC VIOLENCE
 Sec. 40261. Establishment of community programs on domestic violence.

CHAPTER 7—FAMILY VIOLENCE PREVENTION AND SERVICES ACT AMENDMENTS
 Sec. 40271. Grantee reporting.
 Sec. 40272. Technical amendments.
 CHAPTER 8—CONFIDENTIALITY FOR ABUSED PERSONS
 Sec. 40281. Confidentiality of abused person's address.
 CHAPTER 9—DATA AND RESEARCH
 Sec. 40291. Research agenda.
 Sec. 40292. State databases.
 Sec. 40293. Number and cost of injuries.
 CHAPTER 10—RURAL DOMESTIC VIOLENCE AND CHILD ABUSE ENFORCEMENT
 Sec. 40295. Rural domestic violence and child abuse enforcement assistance.
 Subtitle C—Civil Rights for Women
 Sec. 40301. Short title.
 Sec. 40302. Civil rights.
 Sec. 40303. Attorney's fees.
 Sec. 40304. Sense of the Senate concerning protection of the privacy of rape victims.
 Subtitle D—Equal Justice for Women in the Courts Act
 Sec. 40401. Short title.
 CHAPTER 1—EDUCATION AND TRAINING FOR JUDGES AND COURT PERSONNEL IN STATE COURTS
 Sec. 40411. Grants authorized.
 Sec. 40412. Training provided by grants.
 Sec. 40413. Cooperation in developing programs in making grants under this title.
 Sec. 40414. Authorization of appropriations.
 CHAPTER 2—EDUCATION AND TRAINING FOR JUDGES AND COURT PERSONNEL IN FEDERAL COURTS
 Sec. 40421. Authorizations of circuit studies; education and training grants.
 Sec. 40422. Authorization of appropriations.
 Subtitle E—Violence Against Women Act Improvements
 Sec. 40501. Pre-trial detention in sex offense cases.
 Sec. 40502. Increased penalties for sex offenses against victims below the age of 16.
 Sec. 40503. Payment of cost of testing for sexually transmitted diseases.
 Sec. 40504. Extension and strengthening of restitution.
 Sec. 40505. Enforcement of restitution orders through suspension of Federal benefits.
 Sec. 40506. National baseline study on campus sexual assault.
 Sec. 40507. Report on battered women's syndrome.
 Sec. 40508. Report on confidentiality of addresses for victims of domestic violence.
 Sec. 40509. Report on recordkeeping relating to domestic violence.
 Subtitle F—National Stalker and Domestic Violence Reduction
 Sec. 40601. Authorizing access to Federal criminal information databases.
 Sec. 40602. Grant program.
 Sec. 40603. Authorization of appropriations.
 Sec. 40604. Application requirements.
 Sec. 40605. Disbursement.
 Sec. 40606. Technical assistance, training, and evaluations.
 Sec. 40607. Training programs for judges.
 Sec. 40608. Recommendations on intrastate communication.
 Sec. 40609. Inclusion in national incident-based reporting system.
 Sec. 40610. Report to Congress.
 Sec. 40611. Definitions.
 Subtitle G—Protections for Battered Immigrant Women and Children
 Sec. 40701. Alien petitioning rights for immediate relative or second preference status.

Sec. 40702. Use of credible evidence in spousal waiver applications.

Sec. 40703. Suspension of deportation.

TITLE V—DRUG COURTS

Sec. 50001. Drug courts.

Sec. 50002. Study by the General Accounting Office.

TITLE VI—DEATH PENALTY

Sec. 60001. Short title.

Sec. 60002. Constitutional procedures for the imposition of the sentence of death.

Sec. 60003. Specific offenses for which death penalty is authorized.

Sec. 60004. Applicability to Uniform Code of Military Justice.

Sec. 60005. Death penalty for murder by a Federal prisoner.

Sec. 60006. Death penalty for civil rights murders.

Sec. 60007. Death penalty for the murder of Federal law enforcement officials.

Sec. 60008. New offense for the indiscriminate use of weapons to further drug conspiracies.

Sec. 60009. Foreign murder of United States nationals.

Sec. 60010. Death penalty for rape and child molestation murders.

Sec. 60011. Death penalty for sexual exploitation of children.

Sec. 60012. Murder by escaped prisoners.

Sec. 60013. Death penalty for gun murders during Federal crimes of violence and drug trafficking crimes.

Sec. 60014. Homicides and attempted homicides involving firearms in Federal facilities.

Sec. 60015. Death penalty for the murder of State or local officials assisting Federal law enforcement officials and State correctional officers.

Sec. 60016. Protection of court officers and jurors.

Sec. 60017. Prohibition of retaliatory killings of witnesses, victims, and informants.

Sec. 60018. Death penalty for murder of Federal witnesses.

Sec. 60019. Offenses of violence against maritime navigation or fixed platforms.

Sec. 60020. Torture.

Sec. 60021. Violence at airports serving international civil aviation.

Sec. 60022. Terrorist Death Penalty Act.

Sec. 60023. Weapons of mass destruction.

Sec. 60024. Enhanced penalties for alien smuggling.

Sec. 60025. Protection of jurors and witnesses in capital cases.

Sec. 60026. Appointment of Counsel.

TITLE VII—MANDATORY LIFE IMPRISONMENT FOR PERSONS CONVICTED OF CERTAIN FELONIES

Sec. 70001. Mandatory life imprisonment for persons convicted of certain felonies.

Sec. 70002. Limited grant of authority to Bureau of Prisons.

TITLE VIII—APPLICABILITY OF MANDATORY MINIMUM PENALTIES IN CERTAIN CASES

Sec. 80001. Limitation on applicability of mandatory minimum penalties in certain cases.

TITLE IX—DRUG CONTROL

Subtitle A—Enhanced Penalties and General Provisions

Sec. 90101. Enhancement of penalties for drug trafficking in prisons.

Sec. 90102. Increased penalties for drug-dealing in "drug-free" zones.

Sec. 90103. Enhanced penalties for illegal drug use in Federal prisons and for smuggling drugs into Federal prisons.

Sec. 90104. Clarification of narcotic or other dangerous drugs under RICO.

Sec. 90105. Conforming amendments to recidivist penalty provisions of the controlled substances act and the controlled substances import and export act.

Sec. 90106. Advertising.

Sec. 90107. Violent crime and drug emergency areas.

Subtitle B—National Narcotics Leadership Act Amendments

Sec. 90201. Implementation of National Drug Control Strategy.

Sec. 90202. Report on reprogramming; office personnel restriction.

Sec. 90203. National Drug Control Strategy outcome measures.

Sec. 90204. Counter-Drug Technology Assessment Center.

Sec. 90205. Special Forfeiture Fund amendments.

Sec. 90206. Authorization of appropriations.

Sec. 90207. Adequate staffing of the Office of National Drug Control Policy.

Sec. 90208. Termination of Office of National Drug Control Policy.

TITLE X—DRUNK DRIVING PROVISIONS

Sec. 100001. Short title.

Sec. 100002. State laws applied in areas of Federal jurisdiction.

Sec. 100003. Driving while intoxicated prosecution program.

TITLE XI—FIREARMS

Subtitle A—Assault Weapons

Sec. 110101. Short title.

Sec. 110102. Restriction on manufacture, transfer, and possession of certain semiautomatic assault weapons.

Sec. 110103. Ban of large capacity ammunition feeding devices.

Sec. 110104. Study by attorney general.

Sec. 110105. Effective date.

Sec. 110106. Appendix a to section 922 of title 18.

Subtitle B—Youth Handgun Safety

Sec. 110201. Prohibition of the possession of a handgun or ammunition by, or the private transfer of a handgun or ammunition to, a juvenile.

Subtitle C—Licensure

Sec. 110301. Firearms licensure and registration to require a photograph and fingerprints.

Sec. 110302. Compliance with State and local law as a condition to license.

Sec. 110303. Action on firearms license application.

Sec. 110304. Inspection of firearms licensees' inventory and records.

Sec. 110305. Reports of theft or loss of firearms.

Sec. 110306. Responses to requests for information.

Sec. 110307. Notification of names and addresses of firearms licensees.

Subtitle D—Domestic Violence

Sec. 110401. Prohibition against disposal of firearms to, or receipt of firearms by, persons who have committed domestic abuse.

Subtitle E—Gun Crime Penalties

Sec. 110501. Enhanced penalty for use of a semiautomatic firearm during a crime of violence or a drug trafficking crime.

Sec. 110502. Enhanced penalty for second offense of using an explosive to commit a felony.

Sec. 110503. Smuggling firearms in aid of drug trafficking.

Sec. 110504. Theft of firearms and explosives.

Sec. 110505. Revocation of supervised release after imprisonment.

Sec. 110506. Revocation of probation.

Sec. 110507. Increased penalty for knowingly making false, material Statement in connection with the acquisition of a firearm from a licensed dealer.

Sec. 110508. Possession of explosives by felons and others.

Sec. 110509. Summary destruction of explosives subject to forfeiture.

Sec. 110510. Elimination of outmoded language relating to parole.

Sec. 110511. Prohibition against transactions involving stolen firearms which have moved in interstate or foreign commerce.

Sec. 110512. Using a firearm in the commission of counterfeiting or forgery.

Sec. 110513. Enhanced penalties for firearms possession by violent felons and serious drug offenders.

Sec. 110514. Receipt of firearms by nonresident.

Sec. 110515. Theft of firearms or explosives from licensee.

Sec. 110516. Disposing of explosives to prohibited persons.

Sec. 110517. Increased penalty for interstate gun trafficking.

Sec. 110518. Firearms and explosives conspiracy.

Sec. 110519. Definition of armor piercing ammunition.

TITLE XII—TERRORISM

Sec. 120001. Extension of the statute of limitation for certain terrorism offenses.

Sec. 120002. Jurisdiction over crimes against United States nationals on certain foreign ships.

Sec. 120003. Counterfeiting United States currency abroad.

Sec. 120004. Sentencing guidelines increase for terrorist crimes.

Sec. 120005. Providing material support to terrorists.

TITLE XIII—CRIMINAL ALIENS AND IMMIGRATION ENFORCEMENT

Sec. 130001. Enhancement of penalties for failing to depart, or reentering, after final order of deportation.

Sec. 130002. Criminal alien tracking center.

Sec. 130003. Alien witness cooperation and counterterrorism information.

Sec. 130004. Deportation procedures for certain criminal aliens who are not permanent residents.

Sec. 130005. Expedited deportation for denied asylum applicants.

Sec. 130006. Improving border controls.

Sec. 130007. Expanded special deportation proceedings.

Sec. 130008. Authority to accept certain assistance.

Sec. 130009. Passport and visa offenses penalties improvement.

Sec. 130010. Asylum.

TITLE XIV—YOUTH VIOLENCE

Sec. 140001. Prosecution as adults of certain juveniles for crimes of violence.

Sec. 140002. Commencement of juvenile proceeding.

Sec. 140003. Separation of juvenile from adult offenders.

Sec. 140004. Bindover system for certain violent juveniles.

Sec. 140005. Amendment concerning records of crimes committed by juveniles.

Sec. 140006. Increased penalties for employing children to distribute drugs near schools and playgrounds.

Sec. 140007. Increased penalties for travel act crimes involving violence and conspiracy to commit contract killings.

Sec. 140008. Solicitation of minor to commit crime.

TITLE XV—CRIMINAL STREET GANGS

Sec. 150001. Criminal street gangs.

- Sec. 150002. Adult prosecution of serious juvenile offenders.
- Sec. 150003. Addition of anti-gang Byrne grant funding objective.
- Sec. 150006. Mentoring program.
- Sec. 150007. Juvenile anti-drug and anti-gang grants in federally assisted low-income housing.
- Sec. 150008. Gang investigation coordination and information collection.
- Sec. 150009. Multijurisdictional gang task forces.

TITLE XVI—CHILD PORNOGRAPHY

- Sec. 160001. Penalties for international trafficking in child pornography.
- Sec. 160002. Sense of Congress concerning State legislation regarding child pornography.
- Sec. 160003. Confirmation of intent of Congress in enacting sections 2252 and 2256 of title 18, United States code.

TITLE XVII—CRIMES AGAINST CHILDREN

Subtitle A—Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act

- Sec. 170101. Establishment of program.
- Subtitle B—Assaults Against Children
- Sec. 170201. Assaults against children.
- Subtitle C—Missing and Exploited Children
- Sec. 170301. Short title.
- Sec. 170302. Purpose.
- Sec. 170303. Establishment of task force.

TITLE XVIII—RURAL CRIME

- Subtitle A—Drug Trafficking in Rural Areas
- Sec. 180101. Authorizations for rural law enforcement agencies.
- Sec. 180102. Rural crime and drug enforcement task forces.
- Sec. 180103. Rural drug enforcement training.
- Sec. 180104. More agents for the Drug Enforcement Administration.
- Subtitle B—Drug Free Truck Stops and Safety Rest Areas
- Sec. 180201. Drug free truck stops and safety rest areas.

Subtitle C—Sense of Congress Regarding Funding for Rural Areas

- Sec. 180301. Funding for rural areas.

TITLE XIX—FEDERAL LAW ENFORCEMENT

- Sec. 190001. Federal judiciary and Federal law enforcement.

TITLE XX—POLICE CORPS AND LAW ENFORCEMENT OFFICERS TRAINING AND EDUCATION

Subtitle A—Police Corps

- Sec. 200101. Short title.
- Sec. 200102. Purposes.
- Sec. 200103. Definitions.
- Sec. 200104. Establishment of office of the police corps and law enforcement education.
- Sec. 200105. Designation of lead agency and submission of State plan.
- Sec. 200106. Scholarship assistance.
- Sec. 200107. Selection of participants.
- Sec. 200108. Police corps training.
- Sec. 200109. Service obligation.
- Sec. 200110. State plan requirements.
- Sec. 200111. Assistance to States and localities employing police corps officers.
- Sec. 200112. Authorization of appropriations.
- Sec. 200113. Reports to congress.

Subtitle B—Law Enforcement Scholarship Program

- Sec. 200201. Short title.
- Sec. 200202. Definitions.
- Sec. 200203. Allotment.
- Sec. 200204. Establishment of program.
- Sec. 200205. Scholarships.
- Sec. 200206. Eligibility.
- Sec. 200207. State application.
- Sec. 200208. Local application.

- Sec. 200209. Scholarship agreement.
- Sec. 200210. Authorization of appropriations.

TITLE XXI—STATE AND LOCAL LAW ENFORCEMENT

Subtitle A—Byrne Program

- Sec. 210101. Extension of Byrne Grant funding.
- Subtitle B—Law Enforcement Family Support
- Sec. 210201. Law enforcement family support.
- Subtitle C—DNA Identification

- Sec. 210301. Short title.
- Sec. 210302. Funding to improve the quality and availability of DNA analyses for law enforcement identification purposes.
- Sec. 210303. Quality assurance and proficiency testing standards.
- Sec. 210304. Index to facilitate law enforcement exchange of DNA identification information.
- Sec. 210305. Federal Bureau of Investigation.
- Sec. 210306. Authorization of appropriations.
- Subtitle D—Police Pattern or Practice
- Sec. 210401. Cause of action.
- Sec. 210402. Data on use of excessive force.
- Subtitle E—Improved Training and Technical Automation

- Sec. 210501. Improved training and technical automation.

Subtitle F—Other State and Local Aid

- Sec. 210601. Reauthorization of Office of Justice Programs.
- Sec. 210602. Federal assistance to ease the increased burdens on State court systems resulting from enactment of this act.
- Sec. 210603. Availability of violent crime reduction trust fund to fund activities authorized by the Brady Handgun Violence Prevention Act and the National Child Protection Act of 1993.

TITLE XXII—MOTOR VEHICLE THEFT PREVENTION

- Sec. 220001. Short title.
- Sec. 220002. Motor vehicle theft prevention program.
- Sec. 220003. Altering or removing motor vehicle identification numbers.

TITLE XXIII—VICTIMS OF CRIME

Subtitle A—Victims of Crime

- Sec. 230101. Victim's right of allocution in sentencing.
- Sec. 230102. Sense of the Senate concerning the right of a victim of a violent crime or sexual abuse to speak at an offender's sentencing hearing and any parole hearing.

Subtitle B—Crime Victims' Fund

- Sec. 230201. Allocation of funds for costs and grants.
- Sec. 230202. Relationship of crime victim compensation to certain Federal programs.
- Sec. 230203. Administrative costs for crime victim compensation.
- Sec. 230204. Grants for demonstration projects.
- Sec. 230205. Administrative costs for crime victim assistance.
- Sec. 230206. Maintenance of effort.
- Sec. 230207. Change of due date for required report.
- Sec. 230208. Amendment of the Victims of Crime Act.

TITLE XXIV—PROTECTIONS FOR THE ELDERLY

- Sec. 240001. Missing Alzheimer's Disease Patient Alert Program.
- Sec. 240002. Crimes against the elderly.

TITLE XXV—SENIOR CITIZENS AGAINST MARKETING SCAMS

- Sec. 250001. Short title.
- Sec. 250002. Enhanced penalties for telemarketing fraud.

- Sec. 250003. Increased penalties for fraud against older victims.
- Sec. 250004. Rewards for information leading to prosecution and conviction.
- Sec. 250005. Authorization of appropriations.
- Sec. 250006. Broadening application of mail fraud statute.
- Sec. 250007. Fraud and related activity in connection with access devices.
- Sec. 250008. Information network.

TITLE XXVI—COMMISSION MEMBERSHIP AND APPOINTMENT

- Sec. 260001. Commission membership and appointment.
- Sec. 260002. Conforming amendment.

TITLE XXVII—PRESIDENTIAL SUMMIT ON VIOLENCE AND NATIONAL COMMISSION ON CRIME PREVENTION AND CONTROL

- Sec. 270001. Presidential summit.
- Sec. 270002. Establishment; committees and task forces; representation.
- Sec. 270003. Purposes.
- Sec. 270004. Responsibilities of the commission.
- Sec. 270005. Administrative matters.
- Sec. 270006. Staff and support services.
- Sec. 270007. Powers.
- Sec. 270008. Report; termination.
- Sec. 270009. Authorization of appropriations.

TITLE XXVIII—SENTENCING PROVISIONS

- Sec. 280001. Imposition of sentence.
- Sec. 280002. Technical amendment to mandatory conditions of probation.
- Sec. 280003. Direction to United States Sentencing Commission regarding sentencing enhancements for hate crimes.
- Sec. 280004. Authorization of probation for petty offenses in certain cases.
- Sec. 280005. Full-time vice chairs of the United States Sentencing Commission.
- Sec. 280006. Cocaine penalty study.

TITLE XXIX—COMPUTER CRIME

- Sec. 290001. Computer Abuse Amendments Act of 1994.

TITLE XXX—PROTECTION OF PRIVACY OF INFORMATION IN STATE MOTOR VEHICLE RECORDS

- Sec. 300001. Short title.
- Sec. 300002. Prohibition on release and use of certain personal information from State motor vehicle records.
- Sec. 300003. Effective date.

TITLE XXXI—VIOLENT CRIME REDUCTION TRUST FUND

- Sec. 310001. Creation of Violent Crime Reduction Trust Fund.
- Sec. 310002. Conforming reduction in discretionary spending limits.
- Sec. 310003. Extension of authorizations of appropriations for fiscal years for which the full amount authorized is not appropriated.
- Sec. 310004. Flexibility in making of appropriations.

TITLE XXXII—MISCELLANEOUS

Subtitle A—Increases in Penalties

- Sec. 320101. Increased penalties for assault.
- Sec. 320102. Increased penalties for manslaughter.
- Sec. 320103. Increased penalties for civil rights violations.
- Sec. 320104. Penalties for trafficking in counterfeit goods and services.
- Sec. 320105. Increased penalty for conspiracy to commit murder for hire.
- Sec. 320106. Increased penalties for arson.
- Sec. 320107. Increased penalties for drug trafficking near public housing.
- Sec. 320108. Task force and criminal penalties relating to the introduction of nonindigenous species.
- Sec. 320109. Military medals and decorations.
- Subtitle B—Extension of Protection of Civil Rights Statutes
- Sec. 320201. Extension of protection of civil rights statutes.

Subtitle C—Audit and Report

- Sec. 320301. Audit requirement for State and local law enforcement agencies receiving Federal asset forfeiture funds.
- Sec. 320302. Report to Congress on administrative and contracting expenses.

Subtitle D—Coordination

- Sec. 320401. Coordination of substance abuse treatment and prevention programs.

Subtitle E—Gambling

- Sec. 320501. Clarifying amendment regarding scope of prohibition against gambling on ships in international waters.

Subtitle F—White Collar Crime Amendments

- Sec. 320601. Receiving the proceeds of extortion or kidnapping.
- Sec. 320602. Receiving the proceeds of a postal robbery.
- Sec. 320603. Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce.
- Sec. 320604. Miscellaneous amendments to title 18, United States Code.
- Sec. 320605. Federal Deposit Insurance Act amendment.
- Sec. 320606. Federal Credit Union Act amendments.
- Sec. 320607. Addition of predicate offenses to financial institutions rewards statute.
- Sec. 320608. Definition of "savings and loan association" for purposes of the offense of bank robbery and related offenses.
- Sec. 320609. Definition of 1-year period for purposes of the offense of obstruction of a Federal audit.

Subtitle G—Safer Streets and Neighborhoods

- Sec. 320701. Short title.
- Sec. 320702. Limitation on grant distribution.

Subtitle H—Recreational Hunting Safety

- Sec. 320801. Short title.
- Sec. 320802. Obstruction of a lawful hunt.
- Sec. 320803. Civil penalties.
- Sec. 320804. Other relief.
- Sec. 320805. Relationship to State and local law and civil actions.
- Sec. 320806. Regulations.
- Sec. 320807. Rule of construction.
- Sec. 320808. Definitions.

Subtitle I—Other Provisions

- Sec. 320901. Wiretaps.
- Sec. 320902. Theft of major artwork.
- Sec. 320903. Addition of attempted robbery, kidnapping, smuggling, and property damage offenses to eliminate inconsistencies and gaps in coverage.
- Sec. 320904. Gun-free school zones.
- Sec. 320905. Interstate wagering.
- Sec. 320906. Sense of Congress with respect to violence against truckers.
- Sec. 320907. Sense of the Senate regarding a study on out-of-wedlock births.
- Sec. 320908. Sense of the Senate regarding the role of the United Nations in international organized crime control.
- Sec. 320909. Optional venue for espionage and related offenses.
- Sec. 320910. Undercover operations.
- Sec. 320911. Misuse of initials "DEA".
- Sec. 320912. Definition of livestock.
- Sec. 320913. Asset forfeiture.
- Sec. 320914. Clarification of definition of a "court of the United States" to include the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands.
- Sec. 320915. Law enforcement personnel.
- Sec. 320916. Authority to investigate violent crimes against travelers.

- Sec. 320917. Extension of statute of limitations for arson.
- Sec. 320918. Sense of Congress concerning child custody and visitation rights.
- Sec. 320919. Edward Byrne Memorial Formula Grant Program.
- Sec. 320920. Sense of the Senate regarding Law Day U.S.A.
- Sec. 320921. First time domestic violence offender rehabilitation program.
- Sec. 320922. Display of flags at half-staff.
- Sec. 320923. Financial institution fraud.
- Sec. 320924. Definition of parent for the purposes of the offense of kidnapping.
- Sec. 320926. Hate Crime Statistics Act.
- Sec. 320927. Exemption from Brady background check requirement of return of handgun to owner.
- Sec. 320928. Amendment of the National Child Protection Act of 1993.
- Sec. 320929. Tennessee Valley Authority law enforcement personnel.
- Sec. 320932. Assistant United States attorney residency.
- Sec. 320933. Labels on products.
- Sec. 320934. Non-dischargeability of payment of restitution order.
- Sec. 320935. Admissibility of evidence of similar crimes in sex offense cases.

TITLE XXXIII—TECHNICAL CORRECTIONS

- Sec. 330001. Amendments relating to Federal financial assistance for law enforcement.
- Sec. 330002. General title 18 corrections.
- Sec. 330003. Corrections of erroneous cross references and misdesignations.
- Sec. 330004. Repeal of obsolete provisions in title 18.
- Sec. 330005. Correction of drafting error in the Foreign Corrupt Practices Act.
- Sec. 330006. Elimination of redundant penalty provision in 18 U.S.C. 1116.
- Sec. 330007. Elimination of redundant penalty.
- Sec. 330008. Corrections of misspellings and grammatical errors.
- Sec. 330009. Other technical amendments.
- Sec. 330010. Correction of errors found during codification.
- Sec. 330011. Problems related to execution of prior amendments.
- Sec. 330012. Amendment to section 1956 of title 18 to eliminate duplicate predicate crimes.
- Sec. 330013. Amendments to part V of title 18.
- Sec. 330014. Update of cross reference.
- Sec. 330015. Correction of error in amendatory language.
- Sec. 330016. Correction of misleading and outmoded fine amounts in offenses under title 18.
- Sec. 330017. Technical corrections to title 31 crimes.
- Sec. 330018. Repeal of superfluous statute of limitation and transfer of child abuse statute of limitation.
- Sec. 330019. Technical errors in section 1956.
- Sec. 330020. Technical error.
- Sec. 330021. Conforming spelling of variants of "kidnap".
- Sec. 330022. Margin error.
- Sec. 330023. Technical corrections relating to section 248 of title 18, United States Code.
- Sec. 330024. Technical amendments necessitated by the enactment of the Domestic Chemical Diversion Control Act of 1993.
- Sec. 330025. Victims of Crime Act.

TITLE I—PUBLIC SAFETY AND POLICING

SEC. 10001. SHORT TITLE.

This title may be cited as the "Public Safety Partnership and Community Policing Act of 1994".

SEC. 10002. PURPOSES.

The purposes of this title are to—

- (1) substantially increase the number of law enforcement officers interacting directly with members of the community ("cops on the beat");
- (2) provide additional and more effective training to law enforcement officers to enhance their problem solving, service, and other skills needed in interacting with members of the community;
- (3) encourage the development and implementation of innovative programs to permit members of the community to assist State, Indian tribal government, and local law enforcement agencies in the prevention of crime in the community; and
- (4) encourage the development of new technologies to assist State, Indian tribal government, and local law enforcement agencies in reorienting the emphasis of their activities from reacting to crime to preventing crime,

by establishing a program of grants and assistance in furtherance of these objectives, including the authorization for a period of 6 years of grants for the hiring and rehiring of additional career law enforcement officers.

SEC. 10003. COMMUNITY POLICING; "COPS ON THE BEAT".

(a) IN GENERAL.—Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended—

- (1) by redesignating part Q as part R;
- (2) by redesignating section 1701 as section 1801; and
- (3) by inserting after part P the following new part:

"PART Q—PUBLIC SAFETY AND COMMUNITY POLICING; 'COPS ON THE BEAT'"

"SEC. 1701. AUTHORITY TO MAKE PUBLIC SAFETY AND COMMUNITY POLICING GRANTS.

"(a) GRANT AUTHORIZATION.—The Attorney General may make grants to States, units of local government, Indian tribal government, other public and private entities, and multi-jurisdictional or regional consortia thereof to increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety.

"(b) REHIRING, HIRING, AND INITIAL REDEPLOYMENT GRANT PROJECTS.—

"(1) IN GENERAL.—Grants made under subsection (a) may be used for programs, projects, and other activities to—

"(A) rehire law enforcement officers who have been laid off as a result of State and local budget reductions for deployment in community-oriented policing;

"(B) hire and train new, additional career law enforcement officers for deployment in community-oriented policing across the Nation; and

"(C) procure equipment, technology, or support systems, or pay overtime, if the applicant for such a grant demonstrates to the satisfaction of the Attorney General that expenditures for such purposes would result in an increase in the number of officers deployed in community-oriented policing equal to or greater than the increase in the number of officers that would result from a grant for a like amount for the purposes specified in subparagraph (A) or (B).

"(2) GRANTS FOR EQUIPMENT, TECHNOLOGY, AND SUPPORT SYSTEMS.—Grants pursuant to paragraph (1)(C)—

"(A) may not exceed—

"(i) 20 percent of the funds available for grants pursuant to this subsection in fiscal year 1995;

"(ii) 20 percent of the funds available for grants pursuant to this subsection in fiscal year 1996; or

"(iii) 10 percent of the funds available for grants pursuant to this subsection in fiscal years 1997, 1998, 1999, and 2000; and

"(B) may not be awarded in fiscal years 1999, or 2000 unless the Attorney General has certified that grants awarded in fiscal years 1995, 1996, and 1997 pursuant to subparagraph

SEC. 320934. NON-DISCHARGEABILITY OF PAYMENT OF RESTITUTION ORDER.

Section 523(a) of title 11, United States Code, is amended—

(1) by striking "or" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (12) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(13) for any payment of an order of restitution issued under title 18, United States Code."

SEC. 320935. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases"

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, 'offense of sexual assault' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases"

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, 'child' means a person below the age of fourteen, and 'offense of child molestation' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation"

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule."

(b) IMPLEMENTATION.—The amendments made by subsection (a) shall become effective pursuant to subsection (d).

(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

(d) CONGRESSIONAL ACTION.—

(1) If the recommendations described in subsection (c) are the same as the amendments made by subsection (a) then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments.

TITLE XXXIII—TECHNICAL CORRECTIONS**SEC. 330001. AMENDMENTS RELATING TO FEDERAL FINANCIAL ASSISTANCE FOR LAW ENFORCEMENT.**

(a) CROSS REFERENCE CORRECTIONS.—Section 506 of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3756) is amended—

(1) in subsection (a) by striking "Of" and inserting "Subject to subsection (f), of";

(2) in subsection (c) by striking "subsections (b) and (c)" and inserting "subsection (b)";

(3) in subsection (e) by striking "or (e)" and inserting "or (f)"; and

(4) in subsection (f)(1)—
(A) in subparagraph (A)—

(i) by striking "taking into consideration subsection (e) but"; and

(ii) by striking "this subsection," and inserting "this subsection"; and

(B) in subparagraph (B) by striking "amount" and inserting "funds".

(b) CORRECTIONAL OPTIONS GRANTS.—(1) Section 515(b) of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(A) by striking "subsection (a)(1) and (2)" and inserting "paragraphs (1) and (2) of subsection (a)"; and

(B) in paragraph (2) by striking "States" and inserting "public agencies".

(2) Section 516 of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(A) in subsection (a) by striking "for section" each place it appears and inserting "shall be used to make grants under section"; and

(B) in subsection (b) by striking "section 515(a)(1) or (a)(3)" and inserting "paragraph (1) or (3) of section 515(a)".

(3) Section 1001(a)(5) of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3793(a)(5)) is amended by inserting "(other than chapter B of subpart 2)" after "and E".

(c) DENIAL OR TERMINATION OF GRANT.—Section 802(b) of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3783(b)) is amended by striking "M," and inserting "M,".

(d) DEFINITIONS.—Section 901(a)(21) of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3791(21)) is amended by adding a semicolon at the end.

(e) PUBLIC SAFETY OFFICERS DISABILITY BENEFITS.—Title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796) is amended—

(1) in section 1201—

(A) in subsection (a) by striking "subsection (g)" and inserting "subsection (h)"; and

(B) in subsection (b)—
(i) by striking "subsection (g)" and inserting "subsection (h)";

(ii) by striking "personal"; and
(iii) in the first proviso by striking "section" and inserting "subsection"; and

(2) in section 1204(3) by striking "who was responding to a fire, rescue or police emergency".

(f) HEADINGS.—(1) The heading for part M of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797) is amended to read as follows:

"PART M—REGIONAL INFORMATION SHARING SYSTEMS".

(2) The heading for part O of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797) is amended to read as follows:

"PART O—RURAL DRUG ENFORCEMENT".

(g) TABLE OF CONTENTS.—The table of contents of title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(1) in the item relating to section 501 by striking "Drug Control and System Improvement Grant" and inserting "drug control and system improvement grant";

(2) in the item relating to section 1403 by striking "Application" and inserting "Applications"; and

(3) in the items relating to part O by redesignating sections 1401 and 1402 as sections 1501 and 1502, respectively.

(h) OTHER TECHNICAL AMENDMENTS.—Title 1 of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(1) in section 202(c)(2)(E) by striking "crime," and inserting "crime,";

(2) in section 302(c)(19) by striking a period at the end and inserting a semicolon;

(3) in section 602(a)(1) by striking "chapter 315" and inserting "chapter 319";

(4) in section 603(a)(6) by striking "605" and inserting "606".

DOWLING v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 88-6025. Argued October 4, 1989—Decided January 10, 1990

Petitioner Dowling was convicted of robbing a Virgin Islands bank while wearing a ski mask and carrying a small pistol. Relying on Federal Rule of Evidence 404(b)—which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence—the Government introduced at trial the testimony of one Henry, who stated that a similarly masked and armed Dowling had been one of two intruders who had entered her home two weeks after the bank robbery. Although Dowling had been acquitted of charges in the Henry case, the Government believed that Henry's description of him strengthened its identification of him as the bank robber and that her testimony linked him to another individual thought to be implicated in the bank robbery. The District Court permitted the introduction of the testimony and twice instructed the jury about Dowling's acquittal and the limited purpose for which the testimony was being admitted. The Court of Appeals affirmed the conviction, ruling that, although the Government was collaterally estopped by the acquittal from offering Henry's testimony at trial and the testimony was inadmissible under the Federal Rules of Evidence, its admission was harmless because it was highly probable that the error did not prejudice Dowling. The court declined to apply the more stringent standard of *Chapman v. California*, 386 U. S. 18, 24, applicable to constitutional errors because the District Court's error was evidentiary and not of constitutional dimension.

Held:

1. The admission of the testimony did not violate the collateral-estoppel component of the Double Jeopardy Clause. The collateral-estoppel doctrine prohibits the Government from relitigating an issue of ultimate fact that has been determined by a valid and final judgment. *Ashe v. Swenson*, 397 U. S. 436, but does not bar in all circumstances the later use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. Here, the prior acquittal did not determine the ultimate issue in the bank robbery case because in the second trial the Government was not required to show beyond a reasonable doubt that Dowling was the man who entered Henry's house. This decision is consistent with other cases where this Court has held that an

acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof, *United States v. One Assortment of 89 Firearms*, 465 U. S. 354, 361-362; *One Lot Emerald Cut Stones v. United States*, 409 U. S. 232, 235. Even if the lower burden of proof at the second trial did not serve to avoid the collateral-estoppel component of the Double Jeopardy Clause, Dowling failed to satisfy his burden of demonstrating that the first jury determined that he was not one of the men who entered Henry's home. Pp. 347-352.

2. The introduction of the evidence did not violate the due process test of "fundamental fairness." Especially in light of the trial judge's limiting instructions, the testimony was not fundamentally unfair, since the jury was free to assess the truthfulness and significance of the testimony, since the trial court's authority to exclude potentially prejudicial evidence adequately addresses the possibility that introduction of such evidence will create a risk that the jury will convict a defendant based on inferences drawn from the acquitted conduct, since inconsistent verdicts are constitutionally tolerable, and since the tradition that the Government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding is amply protected by the Double Jeopardy Clause. Pp. 352-354.

855 F. 2d 114, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 354.

Robert L. Tucker argued the cause and filed briefs for petitioner.

Stephen L. Nightingale argued the cause for the United States. With him on the brief were Solicitor General Starr, Assistant Attorney General Dennis, Deputy Solicitor General Bryson, and Joseph C. Wyderko.*

JUSTICE WHITE delivered the opinion of the Court.

At petitioner's trial for various offenses arising out of a bank robbery, testimony was admitted under Rule 404(b) of the Federal Rules of Evidence, relating to an alleged crime

*Steven E. M. Hartz filed a brief for the National Association of Criminal Lawyers as *amicus curiae* urging reversal.

that the defendant had previously been acquitted of committing. We conclude that neither the Double Jeopardy Clause nor the Due Process Clause barred the use of this testimony.

I

On the afternoon of July 8, 1985, a man wearing a ski mask and armed with a small pistol robbed the First Pennsylvania Bank in Frederiksted, St. Croix, Virgin Islands, taking over \$7,000 in cash from a bank teller, approximately \$5,000 in cash from a customer, and various personal and travelers' checks. The culprit ran from the bank, scurried around in the street momentarily, and then commandeered a passing taxi van. While driving away from the scene, the robber pulled off his ski mask. An eyewitness, who had slipped out of the bank while the robbery was taking place, saw the maskless man and at trial identified him as petitioner, Reuben Dowling. Other witnesses testified that they had seen Dowling driving the hijacked taxi van outside of Frederiksted shortly after the bank robbery.

Following his arrest, Dowling was charged with the federal crimes of bank robbery, 18 U. S. C. § 2113(a), and armed robbery, § 2113(d), and with various crimes under Virgin Islands law. Dowling pleaded not guilty to all charges. Dowling's first trial ended with a hung jury. He was tried again and convicted, but the Third Circuit reversed this conviction on appeal. *Government of Virgin Islands v. Dowling*, 814 F. 2d 134 (1987). After a third trial, Dowling was convicted on most of the counts; the trial judge sentenced him to 70 years' imprisonment.

During petitioner's third trial, the Government, over petitioner's objection, called a woman named Vena Henry to the stand. Ms. Henry testified that a man wearing a knitted mask with cutout eyes and carrying a small handgun had, together with a man named Delroy Christian, entered her home in Frederiksted approximately two weeks after the First Pennsylvania Bank robbery. Ms. Henry testified that

a struggle ensued and that she unmasked the intruder, whom she identified as Dowling. Based on this incident, Dowling had been charged under Virgin Islands law with burglary, attempted robbery, assault, and weapons offenses, but had been acquitted after a trial held before his third trial in the bank robbery case.

The Government assertedly elicited Henry's testimony for two purposes. First, it believed that Henry's description of Dowling as wearing a mask and carrying a gun similar to the mask worn and the gun carried by the robber of the First Pennsylvania Bank strengthened the Government's identification of Dowling as the bank robber. Second, the Government sought to link Dowling with Delroy Christian, the other man who entered Henry's home. The day before the bank robbery, Dowling had borrowed a white Volkswagen from a friend. At Dowling's trial for the First Pennsylvania Bank robbery, a police officer testified that, shortly before the bank robbery, she and her partner had come upon Christian and another man parked in a white Volkswagen in front of the bank with the car door open into the street; Christian was in the backseat. The officers told the two men to close the door, and the men drove away to the north. The police followed the Volkswagen for about a mile and, shortly thereafter, received a radio message that the bank had been robbed. The Government's theory was that Christian and his friend were to drive the getaway car after Dowling robbed the bank.

Before opening statements, the Government disclosed its intention to call Ms. Henry and explained its rationale for doing so, relying on Rule 404(b) of the Federal Rules of Evidence, which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence. After a hearing, the District Court characterized the testimony as highly probative circumstantial evidence and ruled that it was admissible under Rule 404(b). App. 24-25. When Henry left the stand, the

District Court instructed the jury that petitioner had been acquitted of robbing Henry, and emphasized the limited purpose for which Henry's testimony was being offered. *Id.*, at 28. The court reiterated that admonition in its final charge to the jury. *Id.*, at 29.

On appeal, the Third Circuit determined that the District Court should not have admitted Henry's testimony, but nevertheless affirmed Dowling's conviction. 855 F. 2d 114 (1988). Relying on its decision in *United States v. Keller*, 624 F. 2d 1154 (1980), the court held that petitioner's acquittal of the charges arising out of the incident at Henry's home collaterally estopped the Government from offering evidence of that incident at petitioner's trial for the First Pennsylvania Bank robbery.

Alternatively, the Court of Appeals ruled that the evidence was inadmissible under the Federal Rules of Evidence. The court noted that we had recently held in *Huddleston v. United States*, 485 U. S. 681 (1988), that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.*, at 689. The Third Circuit found Henry's testimony inadmissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor.'" 855 F. 2d, at 122. The court also relied on Rule 403 of the Federal Rules of Evidence because, in the Third Circuit's opinion, the danger of unfair prejudice outweighed the probative value of Henry's testimony. 855 F. 2d, at 122.

The Third Circuit, however, held that the admission of Henry's testimony was harmless because it was highly probable that the error did not prejudice the petitioner. *Id.*, at 122-124. The Court of Appeals explicitly declined to apply the more stringent standard, see *Chapman v. California*, 386 U. S. 18, 24 (1967), applicable to constitutional errors be-

cause, according to the court, the District Court's mistake was merely evidentiary and not of constitutional dimension. 855 F. 2d, at 122-123. Having rejected petitioner's other objections, the court affirmed the conviction. *Id.*, at 124.

Dowling claims that the Third Circuit was wrong when it found that the admission of Henry's testimony did not offend the Constitution and therefore declined to apply the *Chapman v. California*, *supra*, harmless-error standard.¹ We granted certiorari to consider Dowling's contention that Henry's testimony was inadmissible under both the Double Jeopardy and the Due Process Clauses of the Fifth Amendment. 489 U. S. 1051 (1989).

II

A

There is no claim here that the acquittal in the case involving Ms. Henry barred further prosecution in the present case. The issue is the inadmissibility of Henry's testimony.

In *Ashe v. Swenson*, 397 U. S. 436 (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. *Id.*, at 445-446. We defined the collateral-estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*, at 443. Ashe's acquittal in the first trial foreclosed the

¹ Dowling does not challenge the holding that the error was harmless under the less strict standard applied by the Court of Appeals.

second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion. See *id.*, at 445.

Dowling contends that, by the same principle, his prior acquittal precluded the Government from introducing into evidence Henry's testimony at the third trial in the bank robbery case. We disagree because, unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case. This much Dowling concedes, and we decline to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, as Dowling would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

For present purposes, we assume for the sake of argument that Dowling's acquittal established that there was a reasonable doubt as to whether Dowling was the masked man who entered Vena Henry's home with Delroy Christian two weeks after the First Pennsylvania Bank robbery.² But to introduce evidence on this point at the bank robbery trial, the Government did not have to demonstrate that Dowling was the man who entered the home beyond a reasonable doubt: the Government sought to introduce Henry's testimony under Rule 404(b), and, as mentioned earlier, in *Huddleston v. United States*, *supra*, at 689, we held that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Because a jury might

² It is not clear from the record that this finding formed the basis for the jury's verdict. See the discussion *infra*, at Part II-B.

reasonably conclude that Dowling was the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite.

Our decision is consistent with other cases where we have held that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. In *United States v. One Assortment of 89 Firearms*, 465 U. S. 354 (1984), for example, we unanimously agreed that a gun owner's acquittal on a charge of dealing firearms without a license did not preclude a subsequent *in rem* forfeiture proceeding against those firearms, even though forfeiture was only appropriate if the jury in the forfeiture proceeding concluded that the defendant had committed the underlying offense. Because the forfeiture action was a civil proceeding, we rejected the defendant's contention that the Government was estopped from relitigating the issue of the defendant's alleged wrongdoing:

"[The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. . . . [T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business. . . . It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel." *Id.*, at 361-362.

In *One Lot Emerald Cut Stones v. United States*, 409 U. S. 232, 235 (1972), it was also held that the Double Jeopardy Clause did not bar a forfeiture action subsequent to acquittal on the underlying offense because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel." *Helvering v. Mitch-*

ell, 303 U. S. 391, 397 (1938), likewise observed that "[t]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*."

We thus cannot agree that the Government was constitutionally barred from using Henry's testimony at the bank robbery trial, and for the same reasons we find no merit in the Third Circuit's holding that the common-law doctrine of collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct which the Government failed to prove violated a criminal law.

B

Even if we agreed with petitioner that the lower burden of proof at the second proceeding does not serve to avoid the collateral-estoppel component of the Double Jeopardy Clause, we agree with the Government that the challenged evidence was nevertheless admissible because Dowling did not demonstrate that his acquittal in his first trial represented a jury determination that he was not one of the men who entered Ms. Henry's home. In *Ashe v. Swenson*, we stated that where a previous judgment of acquittal was based on a general verdict, courts must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration." 397 U. S., at 444 (citation omitted). The Courts of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. *United States v. Citron*, 853 F. 2d 1055, 1058 (CA2 1988); *United States v. Ragins*, 840 F. 2d 1184, 1194 (CA4 1988); *United States v. Gentile*, 816 F. 2d 1157, 1162 (CA7 1987); *United States v. Baugus*, 761 F. 2d 506, 508 (CA8 1985); *United States v. Mock*, 640 F. 2d 629, 631, n. 1 (CA5

1981); *United States v. Hewitt*, 663 F. 2d 1381, 1387 (CA11 1981); *United States v. Lasky*, 600 F. 2d 765, 769 (CA9), cert. denied, 444 U. S. 979 (1979). We see no reason to depart from the majority rule in this case.³

The only clue to the issues in the earlier case was a discussion between the prosecutor, Dowling's attorney, and the District Judge that took place during the District Court's hearing on the admission of Henry's testimony under Rule 404(b). App. 18-25. Arguing against the admission of Henry's testimony, Dowling's lawyer pointed out that Dowling had been acquitted of breaking into Ms. Henry's home. The trial judge, who had also presided at Dowling's first trial, recalled that Dowling "was not acquitted on the issue of identification." *Id.*, at 21. The prosecutor then contended that Dowling had not disputed identity, but rather had claimed that a robbery had not taken place because he and Christian allegedly "merely came to retrieve . . . money from an individual in the house." *Ibid.* The court then made the statement that "Mr. Dowling's presence in the house was not seriously contested in the case but he stated the general defense. Mr. Dowling, I don't think took the stand." *Ibid.*

³ Dowling notes that the party introducing evidence carries the burden of demonstrating the evidence's relevance. He argues that this duty, in the context of the collateral-estoppel component of the Double Jeopardy Clause, requires the Government to establish that a previous acquittal did not resolve a question at issue in a second trial. We disagree. Relevancy is a threshold inquiry. That the burden is on the introducing party to establish relevancy does not also require the introducing party to anticipate and rebut possible objections to the offered evidence.

Dowling also suggests that we should place the burden on the Government in this instance because, as opposed to the situation in *Ashe v. Swenson*, 397 U. S. 436 (1970), for example, he does not seek to terminate the prosecution but merely hopes to exclude evidence. This is a distinction without a difference. If anything, the equities weigh in the other direction: in this case, Dowling only faces the risk of the introduction of prejudicial evidence, whereas, in *Ashe v. Swenson*, the defendant was threatened with an illegitimate conviction.

There are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial. As the record stands, there is nothing at all that persuasively indicates that the question of identity was at issue and was determined in Dowling's favor at the prior trial: at oral argument, Dowling conceded as much. Tr. of Oral Arg. 16. As a result, even if we were to apply the Double Jeopardy Clause to this case, we would conclude that petitioner has failed to satisfy his burden of demonstrating that the first jury concluded that he was not one of the intruders in Ms. Henry's home.

III

Besides arguing that the introduction of Henry's testimony violated the Double Jeopardy Clause, petitioner also contends that the introduction of this evidence was unconstitutional because it failed the due process test of "fundamental fairness." We recognize that the introduction of evidence in circumstances like those involved here has the potential to prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial. The question, however, is whether it is acceptable to deal with the potential for abuse through nonconstitutional sources like the Federal Rules of Evidence,⁴ or whether the introduction of this type of evidence is so extremely unfair that its admission violates "fundamental conceptions of justice." *United States v. Lovasco*, 431 U. S. 783, 790 (1977).

Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. As we observed in *Lovasco*, *supra*, at 790:

⁴The Third Circuit, as noted above, found Henry's testimony inadmissible under both Rule 404(b) and Rule 403. 855 F. 2d 114, 122 (1988). The United States urges that this was error, but in affirming we need not pass on the validity of the Court of Appeals' judgment in this respect.

"Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' *Rochin v. California*, 342 U. S. 165, 170 (1952). . . . [They] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' *Mooney v. Holohan*, 294 U. S. 103, 112 (1935), and which define 'the community's sense of fair play and decency,' *Rochin v. California*, *supra*, at 173."

Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of Henry's testimony merits this kind of condemnation. Plainly Henry's testimony was at least circumstantially valuable in proving petitioner's guilt.

Petitioner lists four reasons why, according to him, admission of Henry's testimony was fundamentally unfair. First, petitioner suggests that evidence relating to acquitted conduct is inherently unreliable. We disagree: the jury in this case, for example, remained free to assess the truthfulness and the significance of Henry's testimony, and petitioner had the opportunity to refute it. Second, Dowling contends that the use of this type of evidence creates a constitutionally unacceptable risk that the jury will convict the defendant on the basis of inferences drawn from the acquitted conduct; we believe that the trial court's authority to exclude potentially prejudicial evidence adequately addresses this possibility.

Third, petitioner claims that the exclusion of acquitted conduct evidence furthers the desirable goal of consistent jury verdicts. We, however, do not find any inconsistency between Dowling's conviction for the First Pennsylvania Bank robbery and his acquittal on the charge of robbing Ms. Henry for the obvious reason that the jury's verdict in his second trial did not entail any judgment with respect to the offenses charged in his first. In any event, inconsistent verdicts are

constitutionally tolerable. See *Standefer v. United States*, 447 U. S. 10, 25 (1980).

Fourth, petitioner argues that the introduction of Henry's testimony in this case contravenes a tradition that the government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding. We acknowledge the tradition, but find it amply protected by the Double Jeopardy Clause. We decline to use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend.

IV

Because we conclude that the admission of Ms. Henry's testimony was constitutional and the Court of Appeals therefore applied the correct harmless-error standard, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

At petitioner's trial for bank robbery, the prosecutor introduced the testimony of Vena Henry that petitioner had attempted to rob her in her home approximately two weeks after the bank robbery. Petitioner, however, had already been tried in connection with that incident and had been acquitted of burglary, attempted robbery, assault, and weapons offenses. Because the introduction of this testimony effectively forced petitioner to defend against charges for which he had already been acquitted, the doctrine of criminal collateral estoppel grounded in the Double Jeopardy Clause should have prohibited the Government from introducing the testimony. I would reverse the judgment of the Court of Appeals for the Third Circuit and remand for consideration whether the admission of this testimony was harmless error under the standard enunciated in *Chapman v. California*, 386 U. S. 18, 24 (1967). Therefore, I respectfully dissent.

I

"The law 'attaches particular significance to an acquittal.'" *United States v. DiFrancesco*, 449 U. S. 117, 129 (1980) (quoting *United States v. Scott*, 437 U. S. 82, 91 (1978)). The core protection of the Double Jeopardy Clause attaches to an acquittal and prohibits retrial for the "same offense" after an acquittal. *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977). Two offenses are considered the "same offense" for double jeopardy purposes unless each offense requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U. S. 299, 304 (1932). An acquittal on a greater or lesser included offense, for example, bars prosecution on the other offense. *Brown v. Ohio*, 432 U. S. 161, 168 (1977). This protection applies even if the acquittal is based on an "egregiously erroneous foundation." *Fong Foo v. United States*, 369 U. S. 141, 143 (1962) (*per curiam*); *Sanabria v. United States*, 437 U. S. 54, 68-69 (1978).

According to such significance to an acquittal reflects both an institutional interest in preserving the finality of judgments and a strong public interest in protecting individuals against governmental overreaching. See *Brown v. Ohio*, *supra*, at 165 ("Where successive prosecutions are at stake, the [Double Jeopardy Clause] serves 'a constitutional policy of finality for the defendant's benefit'" (quoting *United States v. Jorn*, 400 U. S. 470, 479 (1971) (plurality opinion))). The overriding concern is that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant, so that 'even though innocent he may be found guilty.'" *Scott*, *supra*, at 91 (quoting *Green v. United States*, 355 U. S. 184, 188 (1957)). The rule also protects a defendant against being compelled "to live in a continuous state of anxiety and insecurity" about whether he will be retried and from the

Dissent.

"embarrassment, expense and ordeal" of an actual reprosecution. *Green, supra*, at 187.

These concerns are most clearly implicated when the defendant is retried for the "same offense" after an acquittal. In *Ashe v. Swenson*, 397 U. S. 436 (1970), however, the Court significantly expanded the protection to which a defendant is constitutionally entitled after an acquittal by holding that the Double Jeopardy Clause incorporates the doctrine of criminal collateral estoppel. *Id.*, at 445-446. The doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*, at 443. In a criminal case, collateral estoppel prohibits the Government from relitigating any ultimate facts resolved in the defendant's favor by the prior acquittal. *Id.*, at 445-446. Thus, in addition to being protected against retrial for the "same offense," the defendant is protected against prosecution for an offense that requires proof of a fact found in his favor in a prior proceeding.

The question in this case is whether the criminal collateral-estoppel doctrine should apply when the Government seeks to introduce in a subsequent trial evidence relating to another criminal offense for which the defendant has been acquitted. Before a jury can consider facts relating to another criminal offense as proof of an element of the presently charged offense, the jury must conclude by a preponderance of the evidence "that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U. S. 681, 689 (1988). To the extent that the prior acquittal of the other offense determined either of those factual issues in the defendant's favor, the introduction of this evidence imposes on the defendant the burden of relitigating those facts and thereby increases the likelihood of an erroneous conviction on the charged offense. Thus, I would extend the collateral-estoppel doctrine to preclude the Government from introduc-

ing evidence which relies on facts previously determined in the defendant's favor by an acquittal.¹

The Court refuses to apply the collateral-estoppel doctrine in this case for two reasons. First, it asserts that petitioner failed to carry his burden of proving that the issue on which he sought to foreclose relitigation was decided in his favor by the first acquittal. More importantly, the Court refuses to apply the collateral-estoppel doctrine when facts underlying a prior acquittal are used as evidence of another offense. Both of the Court's conclusions are inconsistent with the purposes of the collateral-estoppel rule.

A

The Court first asserts that petitioner did not prove that the issue on which he sought to foreclose relitigation "was actually decided in the first proceeding." *Ante*, at 350. The Court's summary conclusion that the defendant should bear the burden of proof when invoking the collateral-estoppel doctrine fails to serve the purposes of the doctrine and the Double Jeopardy Clause in general. Since the doctrine serves to protect defendants against governmental overreaching, the Government should bear the burden of proving that the issue it seeks to relitigate was *not* decided in the defendant's favor by the prior acquittal. As we noted in *Ashe*, because criminal verdicts are general verdicts, it is usually difficult to determine the precise route of the jury's reasoning and the basis on which the verdict rests. See 397 U. S., at

¹ The cases often refer to this situation as collateral estoppel with respect to an "evidentiary fact" in order to distinguish it from the situation present in *Ashe v. Swenson*, 397 U. S. 436 (1970). See, e. g., *United States v. Keller*, 624 F. 2d 1154, 1159 (CA3 1980). In *Ashe*, the prior acquittal determined facts which were a necessary element of the second offense. 397 U. S., at 445-446 (since issue of identity determined in trial for robbery of one victim, collateral estoppel precluded prosecution for robbery of second victim). In this situation, by contrast, the previously litigated facts are introduced only as evidence of an element of another offense.

444. By putting the burden on the defendant to prove what issues were "actually decided," the Court essentially denies the protection of collateral estoppel to those defendants who affirmatively contest more than one issue or who put the Government to its burden of proof with respect to all elements of the offense. This result is inconsistent with our admonition in *Ashe* that an excessively technical approach to collateral estoppel "would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Ibid.* Indeed, forcing defendants to choose between forgoing the protections of the Double Jeopardy Clause and abandoning the defense of a general denial raises grave due process concerns.

Even assuming that petitioner was properly required to bear the burden of proof, I conclude that petitioner carried it in this case. Vena Henry testified that petitioner had entered her home wearing a mask and carrying a gun but that, after a struggle in which she pulled off the mask, he ran away. There is every reason to believe that the jury rested its verdict on the belief that petitioner was not present in the Henry home. Petitioner was charged with such a wide array of offenses relating to the Henry incident that no other conclusion is "rationally conceivable." *Id.*, at 445. For example, if the jury had acquitted petitioner of attempted robbery because he lacked the requisite intent, it would still have found him guilty of a weapons offense. Neither the comments of the trial judge in this trial that petitioner had not "seriously contested" the issue of identity in the Henry trial but had stated a general defense, App. 21, nor the prosecutor's statement in this case that petitioner's codefendant in the Henry trial had admitted being in the house, *ibid.*, provides a sufficient basis on which to conclude that the issue of identity was not resolved in petitioner's

favor by the acquittal.² Thus, if collateral estoppel applies to the evidentiary use of facts, the Government should not have been allowed to introduce Henry's testimony.

B

The Court holds, however, that collateral estoppel does not apply when facts previously found in a defendant's favor are later introduced as evidence of a second offense. The Court excepts from the normal rule of criminal collateral estoppel those situations when the jury can consider the facts under a lower standard of proof in the second proceeding than in the first trial. The Court endorses this exception without any consideration of the purposes underlying the collateral-estoppel doctrine; it is not surprising that the Court's holding reflects an unrealistic view of the risks and burdens imposed on the defendant when facts relating to a prior offense for which he has been acquitted are introduced in a subsequent criminal proceeding.

As the Court notes, we have held that an acquittal in a criminal case does not bar subsequent civil forfeiture actions for the same transaction because the acquittal "merely

² In fact, in this case, the acquittal alone should have been sufficient to estop the Government from introducing the Henry evidence. Henry's testimony was introduced not as direct proof but as circumstantial evidence that petitioner was also the masked bank robber, because the mask worn by the intruder in Henry's home was not the same as the mask worn by the bank robber. App. 27. Thus, the jury was invited to infer from the fact that petitioner had allegedly once before worn a different mask and carried a gun that he was the masked bank robber. The jury was instructed that it was to consider the testimony only "to the extent that it helps you in determining the identity of the person who committed the [bank robbery].... Mr. Dowling was found not guilty of the crime of robbery in connection with that." *Id.*, at 29. Nothing in the instructions ensured that the jury did not consider the fact that petitioner had worn a mask and carried a gun during a prior attempted robbery as evidence that petitioner was the masked bank robber. Since the acquittal at least determined that petitioner had not committed an attempted robbery, the acquittal should have been enough to preclude the Government from asking the jury to draw that inference.

proves the existence of a reasonable doubt as to [the defendant's] guilt." *United States v. One Assortment of 89 Firearms*, 465 U. S. 354, 361 (1984); see also *One Lot Emerald Cut Stones v. United States*, 409 U. S. 232, 235 (1972); *Helvering v. Mitchell*, 303 U. S. 391, 397 (1938). However, those forfeiture cases involved civil remedial measures rather than criminal punishment. *89 Firearms*, *supra*, at 362-366; *Helvering*, *supra*, at 397-398. We have never before applied such reasoning to a successive criminal prosecution in which the Government seeks to punish the defendant and hinges that punishment at least in part on a criminal act for which the defendant has been acquitted.³ Indeed, in *Ashe* we indicated to the contrary: "It is much too late to suggest that [collateral estoppel] is not fully applicable to a former judgment in a criminal case, . . . because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole" 397 U. S., at 443 (quoting *United States v. Kramer*, 289 F. 2d 909, 913 (CA2 1961)). We have always recognized a distinction between governmental action intended to punish and that which is not, see, e. g., *United States v. Halper*, 490 U. S. 435, 446-448 (1989) (Double Jeopardy Clause implicated when civil fine is punitive); *United States v. Salerno*, 481 U. S. 739, 746-747 (1987) (upholding Bail Reform Act of 1984 as regulatory rather than punitive measure). Thus, it would be consistent to hold that

³The Government cites *Standefer v. United States*, 447 U. S. 10 (1980), as support for its argument that the doctrine of collateral estoppel should not apply to the evidentiary use of facts. In *Standefer*, the Court held that a defendant could not invoke the acquittal of the principal as a bar to his prosecution as an accomplice. *Id.*, at 24. Although the Court noted that collateral estoppel should be applied sparingly against the Government, *id.*, at 22-24, the defendant in *Standefer* had not yet been tried. Thus, the concerns which protect a defendant against relitigation were not implicated. When those concerns are implicated, they outweigh any need to apply collateral estoppel cautiously against the Government.

the collateral-estoppel doctrine applies in the criminal (or quasi-criminal) context and not in the civil; when the Government seeks to punish a defendant, the concern for fairness is much more acute.⁴

Whenever a defendant is forced to relitigate the facts underlying a prior offense for which he has been acquitted, there is a risk that the jury erroneously will decide that he is guilty of that offense. That risk is heightened because the jury is required to conclude that the defendant committed the prior offense only by a preponderance of the evidence. Cf. *In re Winship*, 397 U. S. 358, 363 (1970) (reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error"). The fact that the prior offense is used as evidence of the presently charged offense raises concerns about the reliability of the jury's ultimate conclusion that the defendant committed the presently charged offense. These concerns stem in large part from the inherent danger of evidence relating to an extrinsic criminal offense. First, "[o]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrin-

⁴The higher reasonable-doubt standard is employed in the criminal context to ensure the accuracy of convictions and thereby protect defendants, not to permit introduction of evidence of crimes for which the defendant has been acquitted. *In re Winship*, 397 U. S. 358, 363 (1970). By definition, when the Government fails to prove a defendant guilty beyond a reasonable doubt, the defendant is considered legally innocent. Unlike the majority of the Court, I believe that at least with respect to subsequent criminal prosecutions, "the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime." *State v. Wakefield*, 278 N. W. 2d 307, 308 (Minn. 1979). It is ironic that petitioner would have been better off, in his second trial, if he had not been represented by counsel at the first trial and had been convicted because uncounseled convictions may not be used in any capacity in subsequent trials. See *Loper v. Beto*, 405 U. S. 473, 483 (1972) (impeachment); *United States v. Tucker*, 404 U. S. 443, 447 (1972) (sentencing enhancement); *Burgett v. Texas*, 389 U. S. 109, 115 (1967) (substantive evidence).

sic offense. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged." *United States v. Beechum*, 582 F. 2d 898, 914 (CA5 1978) (en banc) (citations omitted). Alternatively, there is the danger that the evidence "may lead [the jury] to conclude that, having committed a crime of the type charged, [the defendant] is likely to repeat it." *Ibid.* Thus, the fact that the defendant is forced to relitigate his participation in a prior criminal offense under a low standard of proof combined with the inherently prejudicial nature of such evidence increases the risk that the jury erroneously will convict the defendant of the presently charged offense.

The Court's only response is that the defendant is free to introduce evidence to rebut the contention that he committed the prior offense. This response, of course, underscores the flaw in the Court's reasoning: introduction of this type of evidence requires the defendant to mount a second defense to an offense for which he has been acquitted. That the facts relating to the prior offense are used only as evidence of another crime does not reduce the burden on the defendant; he is still required to defend against the prior charges. Moreover, because of the significance a jury may place on evidence of a prior criminal offense, presenting a defense against that offense may be as burdensome as defending against the presently charged offense. Finally, since the lower standard of proof makes it easier for the jury to conclude that the defendant committed the prior offense, the defendant is essentially forced to present affirmative evidence to rebut the contention that he committed that offense.⁵

⁵The fact that the trial judge may instruct the jury that the defendant was acquitted does not sufficiently protect the defendant from the need to present evidence. There is no guarantee that the jury will give any weight to the acquittal; the jury may disregard it or even conclude that the first jury made a mistake.

The Court today adds a powerful new weapon to the Government's arsenal. The ability to relitigate the facts relating to an offense for which the defendant has been acquitted benefits the Government because there are many situations in which the defendant will not be able to present a second defense because of the passage of time, the expense, or some other factor. Indeed there is no discernible limit to the Court's rule; the defendant could be forced to relitigate these facts in trial after trial. Moreover, the Court's reasoning appears to extend even further than the facts of this case and seems to allow a prosecutor to rely on a prior criminal offense (despite an acquittal) as evidence in a trial for an offense which is part of the *same transaction* as the prior offense. For example, a prosecutor could introduce facts relating to a substantive offense as evidence in a trial for conspiracy, *even though* the defendant had been acquitted of the substantive offense. Cf. *Ashe*, 397 U. S., at 445, n. 10 (the question whether collateral estoppel was a constitutional requirement was of little concern until modern statutes gave prosecutors the ability to "spin out a startlingly numerous series of offenses from a single alleged criminal transaction"). Indeed, the Court's reasoning could apply even more broadly to justify the introduction of evidence of a prior offense for which the defendant had been acquitted in order to enhance a defendant's sentence under a sentencing scheme that requires proof by less than a reasonable doubt. See, e. g., *McMillan v. Pennsylvania*, 477 U. S. 79, 91-93 (1986) (upholding constitutionality of sentencing scheme requiring proof of additional facts by preponderance of evidence). Only by ignoring the principles upon which the collateral-estoppel doctrine is based is it possible for the Court to tip the scales this far in the prosecution's favor.

II

The Court's holding today deprives an acquitted defendant of his rightful end to the "blight and suspicious aura which surround an accusation that he is guilty of a specific crime."

Wingate v. Wainwright, 464 F. 2d 209, 215 (CA5 1972). Because the Court's holding is based on a hypertechnical view of an acquittal and reflects a naive view of the defendant's burden in a criminal trial, I respectfully dissent.

GUIDRY v. SHEET METAL WORKERS NATIONAL PENSION FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88-1105. Argued November 29, 1989—Decided January 17, 1990

Petitioner Guidry, a former official of respondent union and trustee of one of respondent pension plans, pleaded guilty to embezzling funds from the union in violation of § 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Since his union employment had made him eligible for benefits from respondent plans, he filed suit in the District Court against two of the plans when they determined that he had forfeited his right to benefits as a result of his criminal activity. The union intervened, joined the third plan as a party, and stipulated with Guidry to the entry of a money judgment in its favor. The court rejected the funds' contention that Guidry had forfeited his right to benefits. It ruled, however, that a constructive trust in the union's favor should be imposed on Guidry's pension benefits until the judgment was satisfied. Reading the Employee Retirement Income Security Act of 1974 (ERISA) *in pari materia* with, *inter alia*, the LMRDA—which seeks to combat union officials' corruption and to protect membership interests—the court concluded that a narrow exception to ERISA's prohibition on assignment or alienation of pension benefits, § 206(d)(1), is appropriate where “the viability of a union and the members' pension plans was damaged by the knavery of a union official.” The Court of Appeals affirmed. Relying on ERISA § 409(a)—which makes a faithless plan fiduciary personally liable for losses to the plan resulting from his breach and subjects him to other appropriate equitable or remedial relief—the court concluded that § 206(d)(1) did not preclude the imposition of the constructive trust, deeming it unlikely that Congress intended to ignore equitable principles by protecting individuals such as Guidry from the consequences of their misconduct.

Held: The constructive trust violates ERISA's prohibition on assignment or alienation of pension benefits. Pp. 371-377.

(a) The constructive trust remedy is prohibited by § 206(d)(1) unless some exception to the general statutory ban is applicable. Cf. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 836-837. Pp. 371-372.

(b) It is unnecessary to decide whether § 409(a)'s remedial provisions supersede § 206(d)(1)'s bar, since Guidry has not been found to have

401

202

ANNOTATION

ADMISSIBILITY OF EVIDENCE AS TO OTHER OFFENSE AS
AFFECTED BY DEFENDANT'S ACQUITTAL OF THAT
OFFENSE

by

Christopher Bello, J.D.

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29 Am Jur 2d, Evidence § 332

Annotations: See the related matters listed in the annotation, *infra*.

7 Am Jur Trials 477, Homicide § 167.7

28 USCS, Rules of Evidence, Rule 404(b)

US L Ed Digest, Evidence §§ 826-829

ALR Digests, Evidence §§ 1134-1349

L Ed Index to Annos, Criminal Law, Evidence

ALR Quick Index, Acquittal; Exclusion or Suppression of Evidence;
Former Jeopardy; Intent; Motive; Similar Act or Facts

Federal Quick Index, Acquittal; Double Jeopardy; Exclusion of Evi-
dence; Intent; Motive; Similar Acts and Facts

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**Admissibility of evidence as to other offense as affected by
defendant's acquittal of that offense****I. PRELIMINARY MATTERS**

- § 1. Introduction:
 - [a] Scope
 - [b] Related matters
- § 2. Summary and comment:
 - [a] Generally
 - [b] Practice pointers

II. VIEW THAT EVIDENCE IS NEVER ADMISSIBLE

- § 3. Rationale of fundamental fairness
- § 4. Rationale that prejudice necessarily outweighs probative value

III. VIEW THAT EVIDENCE MAY BE ADMISSIBLE

- § 5. Rule of relevance
- § 6. Collateral estoppel test

IV. UNSETTLED JURISDICTIONS ON RULE FOR DETERMINING ADMISSIBILITY

- § 7. Ninth Circuit cases
- § 8. Washington cases

V. DEFENDANT'S RIGHT TO PROVE ACQUITTAL IF EVIDENCE ADMITTED

- § 9. Where collateral estoppel test applied
- § 10. Where rule of relevance followed:
 - [a] View that defendant entitled to prove acquittal
 - [b] View that defendant not entitled to prove acquittal
 - [c] Admission of proof of acquittal apparently approved

INDEX

- | | |
|---|--|
| Abduction, § 5 | Child, lewd acts towards, §§ 5, 6 |
| Alcoholic beverage law violations, §§ 5, 6, 8 | Cocaine possession, § 6 |
| Alcoholic beverage truck hijacked, § 5 | Collateral estoppel doctrine, §§ 3 et seq. |
| Alibi testimony, §§ 5, 6 | Comment, § 2 |
| Armed robbery, § 5 | Common scheme or plan, §§ 3 et seq. |
| Assault and battery, §§ 5, 7, 10[a] | Concealment of government property, § 7 |
| Attempted rape, § 3 | Conspiracy, §§ 5-7 |
| Automobile, manslaughter by, § 6 | Counterfeit money, possession, § 5 |
| Bank bill, forgery, § 5 | Denial by defendant, § 6 |
| Bank officer's fraud, § 5 | Distillery possession, § 6 |
| Battery and assault, §§ 5, 7, 10[a] | Doctor practicing without license, § 5 |
| Bribery, §§ 5, 6, 8 | Driving while intoxicated, §§ 6, 8 |
| Burglary, §§ 6, 8 | Driving without license, § 6 |
| Character of defendant, § 4 | Drug offenses, §§ 6, 7 |
| | Extortion and bribery, §§ 5, 6, 8 |

- | | |
|--|-------------------------------------|
| Fellatio, § 5 | Mexican court prosecution, § 5 |
| Fingerprint evidence, § 5 | Money orders stolen from mails, § 6 |
| Firearms and weapons offenses, §§ 5, 6, 8, 10[a] | Motor vehicular manslaughter, § 6 |
| Foreign court prosecution, § 5 | Murder, §§ 5-7, 9, 10[a] |
| Forgery, § 5 | Narcotics offense, §§ 6, 7 |
| Fraud, §§ 5, 7 | Post Office burglary, § 6 |
| Fundamental fairness rationale, generally, § 3 | Practice pointers, § 2[b] |
| Government property, concealment, § 7 | Protection racket conspiracy, § 6 |
| Heroin offenses, §§ 6, 7 | Rape, §§ 3, 5-7, 10 |
| Hijacking, § 5 | Receiving stolen property, §§ 6, 7 |
| Homicide, §§ 5-7, 9, 10[a] | Related matters, § 1[b] |
| Identification of defendant, § 5 | Relevancy, generally, § 5 |
| Income tax evasion, § 7 | Robbery, §§ 3, 5, 6 |
| Intent, §§ 3 et seq. | Scope of annotation, § 1[a] |
| Intoxicating liquor law violations, §§ 5, 6, 8 | Sex offense, §§ 3, 5-7, 10[a] |
| Intoxicating liquor truck hijacked, § 5 | Single transaction theory, § 5 |
| Kidnapping, § 5 | Smuggling, § 7 |
| Larceny, §§ 3, 5, 6, 8 | Statutory rape, § 6 |
| Liquor delivery truck hijacked, § 5 | Stolen property, receipt, §§ 6, 7 |
| Liquor law violations, §§ 5, 6, 8 | Summary, § 2 |
| Mail theft, § 6 | Tampering with witnesses, § 8 |
| Manslaughter, § 6 | Tax evasion, § 7 |
| Marijuana distribution, §§ 6, 7 | Theft, §§ 3, 5, 6, 8 |
| Medical practice without license, § 5 | Vehicular manslaughter, § 6 |
| | Weapons offenses, §§ 5, 6, 8, 10[a] |
| | Whiskey possession, § 5 |
| | Witnesses, tampering, § 8 |

TABLE OF JURISDICTIONS REPRESENTED
Consult POCKET PART in this volume for later cases

- | | |
|--|-------------------------------|
| US: §§ 2[a, b], 3, 5-7, 9, 10[a, b] | Minn: §§ 3 |
| Ala: §§ 5, 6, 10[a] | Mo: §§ 5, 10[a, c] |
| Alaska: §§ 5 | Mont: §§ 6, 10[a] |
| Ariz: §§ 4 | Neb: §§ 2[b], 5, 10[a] |
| Cal: §§ 2[b], 5, 6, 10[a] | NJ: §§ 5, 6, 10[b, c] |
| Colo: §§ 6 | NY: §§ 5, 6, 10[a] |
| Conn: §§ 10[a] | NC: §§ 5, 6, 10[a] |
| Del: §§ 6 | ND: §§ 5, 10[b] |
| DC: §§ 6 | Ohio: §§ 5 |
| Fla: §§ 2[b], 3 | Or: §§ 5, 6, 10[a] |
| Ga: §§ 5, 6, 10[a] | Pa: §§ 5, 10[a] |
| Ill: §§ 5, 6 | SC: §§ 5, 10[a] |
| Ind: §§ 5, 10[b] | Tenn: §§ 4 |
| Iowa: §§ 5, 10[a] | Tex: §§ 4, 6, 10[a] |
| Kan: §§ 5, 6 | Va: §§ 5, 6, 10[a, c] |
| Ky: §§ 5 | Wash: §§ 8, 10[a, b] |
| Md: §§ 5, 6, 10[a] | Wis: §§ 5, 10[b] |
| Mich: §§ 4-6, 10[b, c] | |

I. Preliminary matters**§ 1. Introduction****[a] Scope**

This annotation¹ collects and analyzes the state and federal cases in which the courts have discussed or decided whether, or under what circumstances, evidence of another criminal offense committed by a defendant, otherwise admissible on the issue of the defendant's guilt or innocence under some exception to the general rule excluding evidence of other crimes, is rendered inadmissible by the fact of the defendant's previous acquittal of the other offense, and whether the defendant is entitled to prove his acquittal.²

Not considered in the present annotation are the related questions whether evidence of an offense of which the defendant has previously been acquitted, not otherwise relevant to the charged offense, may be shown, if the defendant takes the stand, to impair his general credibility as a witness,³ and whether such evidence may be considered, after conviction, relative to a sentencing determination.⁴

No distinction is made for the purposes of this annotation between cases in which the other offense at issue arose from the same transaction as the charged offense or was otherwise closely related in time and cir-

cumstances, and cases in which the other offense is unrelated except for the factor of similarity giving rise to its possible admissibility.

To bring a case within the scope of this annotation, the contested evidence must show another, uncharged, offense allegedly committed by the defendant, and not merely an act, not in itself an offense, evidence of which was admitted at a previous trial of the defendant for another offense.

A related question, not considered in the present annotation, is whether the jury may consider, in connection with the other counts of the same indictment, evidence received relative to a count of which they have voted to acquit or which has been dismissed by the court. In this situation the evidence is properly admitted and hence the question under annotation does not arise.

A question distinguishable from that discussed in the present annotation is the question whether acquittal of one offense completely bars, under the doctrines of *res judicata* or collateral estoppel, prosecution for another offense—for instance, whether acquittal of a substantive offense bars prosecution for conspiracy to commit such offense. Cases in which the court applies the doctrine of collateral estoppel are included only where the court specifically addresses the effect of the acquittal on the admissibility of evi-

show that a witness has been arrested, charged, or prosecuted for a criminal offense, for the purpose of impairing his credibility, where no conviction is shown.

4. See 29 Am Jur 2d, Evidence § 328, discussing the admissibility of the fact of a defendant's conviction or acquittal of another crime for the purpose of fixing punishment or penalty.

1. The present annotation supersedes the one at 86 ALR2d 1132.

2. Cases are included only where there was an actual acquittal, not where the earlier charges were dismissed, not pressed, or otherwise not brought to trial.

3. See 81 Am Jur 2d, Witnesses §§ 587 et seq., discussing the general rule, and its exceptions, that it is not permissible to

dence and where its discussion is not limited merely to the related question as to whether the acquittal presents a bar to the prosecution as a whole.

Since relevant statutes are included only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the latest enactments of pertinent jurisdictions.

[b] Related matters

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 6 ALR4th 802.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place. 92 ALR3d 545.

Acquittal as bar to a prosecution of accused for perjury committed at trial. 89 ALR3d 1098.

Acquittal in criminal proceeding as precluding revocation of parole on same charge. 76 ALR3d 578.

Modern status of doctrine of res judicata in criminal cases. 9 ALR3d 203.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales. 93 ALR2d 1097.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 ALR2d 622.

Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed 781.

Admissibility, under Rule 404(b) of

Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed 497.

Acquittal or conviction in state court as bar to federal prosecution based on same act or transaction. 18 ALR Fed 393.

Supreme Court's views of Fifth Amendment's double jeopardy clause pertinent to or applied in federal criminal cases. 50 L Ed 2d 830.

Vestal, Issue Preclusion and Criminal Prosecutions. 65 Iowa L Rev 281 (January 1980).

Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted. 2 Fla St U L Rev 511 (Summer 1974).

Shotwell, Exclusion of Prior Acquittals: Attack on the "Prosecutor's Delight." 21 UCLA L Rev 892 (February 1974).

§ 2. Summary and comment

[a] Generally

It is a well-established common-law rule that in a criminal prosecution proof which shows or tends to show that the accused has committed other offenses, even though they are of the same nature as the one charged in the indictment, is inadmissible for the purpose of showing the defendant's bad character or criminal disposition.⁵ Evidence of other crimes is admissible only when such evidence tends directly to establish the particular crime, and it is usually competent to prove motive, intent, absence of mistake and accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or the identity of

5. See 29 Am Jur 2d, Evidence § 320.

the person charged with the commission of the crime on trial.⁶

Proof of the other crime, and evidence that the accused was the perpetrator, must be—as the requirement has been variously formulated—substantial, clear, or clear and convincing.⁷

The decision whether to admit evidence of another crime, even where the requirements of relevance and substantial evidence are met, is generally held also to involve a process of balancing the probative value of the evidence against its unfairly prejudicial impact.⁸

The various jurisdictions are divided on the approach to be followed in determining the admissibility of evidence of another crime where the defendant has previously been acquitted of the other crime. A few jurisdictions follow the rule that such evidence is never admissible, basing such rule either on the concept of fundamental fairness (§ 3, *infra*), or on the rationale that the prejudicial effect of such evidence necessarily outweighs its probative value (§ 4, *infra*).

A second rule, historically followed in a majority of jurisdictions, is based

on the law of evidence without regard to any concept of estoppel, and states, in its most common formulation, that otherwise relevant and admissible evidence of another offense is not rendered inadmissible by the fact of the defendant's previous acquittal of that other offense, except to the extent that the acquittal may be a factor to be weighed in the discretionary balancing by the trial judge of the probative value of the evidence against its unfairly prejudicial effect, and in determining the threshold question of whether the evidence is sufficiently convincing to warrant its admission (§ 5, *infra*). This rule is ordinarily justified as serving to effectuate the important policy of presenting to the trier of fact all relevant evidence, and by the proposition that evidence of other crimes need never be proved beyond a reasonable doubt.

Since the United States Supreme Court, in *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189, held that the doctrine of collateral estoppel⁹ is an ingredient of the constitutional protection against double jeopardy, an increasing number of state and federal courts, including most of the federal circuits,¹⁰ have

6. See 29 Am Jur 2d, Evidence §§ 321 et seq.

In order to admit evidence of the commission of another crime in a criminal prosecution, it has been held that there must be substantial evidence that the accused committed such other crime, and, however expressed, that the proof of the other crime must be plain, clear, convincing, or the like. 29 Am Jur 2d, Evidence § 333. Beyond this threshold requirement, the decision whether to admit evidence of another crime, apart from the effect of an acquittal which is dealt with herein, seems to be universally regarded as involving a process of balancing the probative value of the evidence against its prejudicial impact. 29 Am Jur 2d, Evidence § 330. See

also 28 USCS, Federal Rules of Evidence, Rules 403 and 404.

7. 29 Am Jur 2d, Evidence § 333.

8. 29 Am Jur 2d, Evidence § 330. See also 28 USCS, Federal Rules of Evidence, Rules 403 and 404, and corresponding state statutes.

9. The court defined collateral estoppel as meaning that "... when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit."

10. As of the date of publication, the following federal circuits have adopted a collateral estoppel approach to the subject:

specific issue which he now seeks to foreclose.¹³ Where the previous judgment of acquittal was based on a general verdict, the collateral estoppel approach requires the trial judge to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and to conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.¹⁴ Counsel for the defendant must, therefore, provide the trial court with a record of the transcript of the prior trial, and also introduce the transcript into the current record in order to make possible appellate review of the trial court's ruling.¹⁵

In jurisdictions applying the relevance rule, generally admitting the other crimes evidence while allowing the defendant to prove his acquittal, defense counsel should be alert to the fact that it has been held that proof of the acquittal is only properly presented as a matter of defense, and not on cross-examination of the prosecution witness testifying to the other offense.¹⁶

Similarly, as in the case of evidence of other acts in general, evidence of the other offense is only properly presented as part of the prosecution's case, and not on cross-examination of the defendant.¹⁷

II. View that evidence is never admissible

§ 3. Rationale of fundamental fairness

In the following cases, it was held, on grounds of fundamental fairness, that evidence of an offense of which the defendant has previously been acquitted is never admissible.

Although earlier Florida cases had taken varying approaches in determining the admissibility of evidence of an uncharged offense of which the defendant had previously been acquitted,¹⁸ the Florida Supreme Court, in *State v Perkins* (1977, Fla) 349 So 2d 161, after noting initially that it had not previously been squarely presented with the issue as to whether evidence of a crime for which a de-

13. See, for example, *United States v King* (1977, CA2 NY) 563 F2d 559, 77-2 USTC ¶9717, cert den 435 US 918, 55 L Ed 2d 510, 98 S Ct 1476.

14. *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189.

15. *United States v Smith* (1971, CA4 Va) 446 F2d 200.

16. *People v Follette* (1925) 74 Cal App 178, 240 P 502; *Chippas v State* (1967, Fla) 194 So 2d 593.

17. *Williams v State* (1929) 118 Neb 281, 224 NW 286.

18. The following Florida cases had applied, or recognized, the collateral estoppel approach to the question under annotation: *Alvord v State* (1975, Fla) 322 So 2d 533, cert den 428 US 923, 49 L Ed 2d 1226, 96 S Ct 3234, reh den 429 US

874, 50 L Ed 2d 157, 97 S Ct 195; *Lane v State* (1975, Fla App D2) 324 So 2d 124, cert den (Fla) 336 So 2d 601. On the other hand, the following Florida cases had applied, or recognized, the rule of relevance rather than taking a collateral estoppel approach: *Chippas v State* (1967, Fla) 194 So 2d 593; *Blackburn v State* (1968, Fla App D3) 208 So 2d 625; *Wingate v State* (1970, Fla App D3) 232 So 2d 44, cert den (Fla) 237 So 2d 764 and cert den 400 US 994, 27 L Ed 2d 443, 91 S Ct 467; *State v Fisher* (1972, Fla App D3) 264 So 2d 857; *Davis v State* (1973, Fla App D4) 277 So 2d 311; *Johnson v State* (1973, Fla App D1) 285 So 2d 436, cert den (Fla) 294 So 2d 659; *Lawson v State* (1974, Fla App D3) 304 So 2d 522, cert den (Fla) 315 So 2d 181 and (disapproved) *State v Perkins* (Fla) 349 So 2d 161).

defendant has been tried and acquitted may be admitted at a subsequent trial, purported to adopt the Fifth Circuit collateral estoppel rule, set forth in *Wingate v Wainwright* (1972, CA5 Fla) 464 F2d 209, *infra* § 6, but in fact appeared to adopt a more absolute rule than that stated by the *Wingate* court, which, being based on the constitutional doctrine of collateral estoppel, had barred only such evidence as related to issues necessarily decided favorably to the defendant at the prior trial. The court appeared to go beyond the collateral estoppel principle, stating that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes, and holding flatly that evidence of such crimes is not admissible in a subsequent trial. Specifically, the court reversed an attempted rape conviction, holding that the trial court erred in admitting, for an unspecified purpose, the testimony of a prosecution witness that the defendant had on a different and prior occasion entered her room late at night and grabbed her, since the defendant had been charged with a crime stemming from that alleged incident and had been acquitted.

Overruling an earlier case¹⁹ which had held evidence of another offense admissible, on relevance grounds, despite an acquittal, the court, in *State v Wakefield* (1979, Minn) 278 NW2d 307, held that under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense. The court reversed a rape conviction obtained after the testimony of an alleged victim of a prior rape had been admitted even though the

defendant had been tried and acquitted for that offense. The court stated that it is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done; that the admission of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair.

Similarly, in *State v Burton* (1979, Minn) 281 NW2d 195, the court applied the rule that under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense, and reversed convictions for theft and robbery where the prosecution had been permitted to introduce evidence, to show common scheme or plan, method of operation, and intent, of a prior robbery for which the defendant had been tried and acquitted.

§ 4. Rationale that prejudice necessarily outweighs probative value

The probative value of evidence of an offense is necessarily outweighed by its prejudicial impact where there has been an acquittal of the other offense, and, accordingly, such evidence is never to be admitted, the court held in the following cases.

For Seventh Circuit cases, see *infra* § 6.

Evidence introduced by the prosecution at the trial of a charge of unlawful sale of narcotics, for the purpose of showing a common scheme or plan which encompassed the present sale, that the defendant had sold narcotics on occasions prior

19. *State v Lucken* (1915) 129 Minn 402, 152 NW 769 (ovrld *State v Wakefield* (Minn) 278 NW2d 307).

to the time alleged in the present indictment was held inadmissible in *State v Little* (1960) 87 Ariz 295, 350 P2d 756, 86 ALR2d 1120, where the former sale had been the subject of a criminal action in which the defendant had been acquitted. Noting that the question of the effect of an acquittal on the admissibility of evidence of a prior offense was of first impression in Arizona, the court held that the fact of an acquittal when added to the tendency of evidence of a prior offense to prove the defendant's bad character and criminal propensity necessarily lowers the scale to the side of inadmissibility of such evidence. The court observed that under the present facts, the doctrine of res judicata also barred the introduction of the contested evidence, but held that the necessity of excluding evidence of a former offense of which the defendant was acquitted rested on broader grounds, and did not depend on a strict application of the rules of res judicata or collateral estoppel.

For Michigan cases, see *infra* § 5.

Reversing a robbery conviction obtained after the prosecution had been allowed to introduce evidence, to show a common scheme or plan and the absence of mistake or accident, of a similar offense of which the defendant had previously been acquitted, the court, in *State v Holman* (1981, Tenn) 611 SW2d 411, 25 ALR4th 928, held that the effect of the acquittal was to render less than "clear and convincing" the proffered evidence that the defendant committed the prior crime, and that the probative value of such evidence could not therefore be said to have outweighed its prejudicial effect on the defendant. The court stated that for such evidence to have any relevance in the

case on trial, the jury would have to infer that, despite the acquittal, the defendant was nevertheless guilty of the prior crime, and that no such inference can properly be drawn from an acquittal, particularly from an acquittal based on evidence insufficient to sustain a guilty verdict. The court held that in order to avoid requiring a defendant to defend himself a second time against a charge of which he has been previously acquitted, it was necessary to adopt the rule that evidence that the defendant committed an alleged crime other than that for which he was on trial should not be admitted when he has been acquitted of such alleged other crime.

For Texas cases, see *infra* § 6.

III. View that evidence may be admissible

§ 5. Rule of relevance

The following cases apply the rule, either explicitly or by implication, that otherwise relevant and admissible evidence of another offense is not rendered inadmissible by the fact that the defendant was tried and acquitted of that offense, except to the extent that the acquittal may be a factor to be included in balancing the probative value of the evidence against its prejudicial impact, and in determining the threshold question as to whether the evidence of the other offense is sufficiently convincing to warrant its admission; and, with very few exceptions, the balance was found to weigh in favor of the probative value of the evidence.

US—*Holt v United States* (1968, CA10 Okla) 404 F2d 914, cert den 393 US 1086, 21 L Ed 2d 779, 89 S Ct 872, reh den 394 US 967, 22 L Ed 2d 570, 89 S Ct 1303 (prosecution for possession of counterfeit money; prior acquittal on similar charge; evi-

dence;²⁰ to show intent, admissible); *United States v Burkhart* (1972, CA10 Kan) 458 F2d 201 (recognizing rule); *United States v Addington* (1973, CA10 Kan) 471 F2d 560 (recognizing rule); *King v Brewer* (1978, CA8 Iowa) 577 F2d 435, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1238 (prosecution for robbery; prior acquittal of other robbery; evidence, to rebut alibi, admissible);²¹ *United States v Van Cleave* (1979, CA10 NM) 599 F2d 954 (prosecution for transportation in interstate commerce of stolen truck; prior acquittal of receipt and concealment of same truck; evidence, as part of *res gestae*, admissible).

For Fifth Circuit cases, see § 6, *infra*.

For Sixth Circuit cases, see § 6, *infra*.

Ala—*Ex parte Bayne* (1979, Ala) 375 So 2d 1239, on remand (Ala App) 375 So 2d 1244 (prosecution for assault with intent to commit murder; prior acquittal on same charge with respect to second victim on same occasion; evidence, as part of *res gestae*, admissible).

Robinson v State (1959) 40 Ala App 101, 108 So 2d 188 (prosecution for possession of gun after commission of crime of violence; prior acquittal of possession, "some time ago," of pistol; evidence, for unspecified purpose, admissible); *Smith v State* (1981, Ala App) 409 So 2d 455 (rape prosecution; prior acquittal of similar rape; evidence admissible to show defendant's identity).

20. For the sake of brevity, the exact nature of the contested evidence is not always specified in the parenthetical summaries, but in all cases the evidence referred to therein is evidence that showed or related to the other offense of which the defendant had pre-

For contrary, earlier, Alabama authority, see *infra*.

Alaska—*Ladd v State* (1977, Alaska) 568 P2d 960, cert den 435 US 928, 55 L Ed 2d 524, 98 S Ct 1498 and (ovrld on other grounds *Giacomazzi v State* (Alaska) 633 P2d 218) (prosecution for murder; prior acquittal of another murder; evidence, to show intent and motive, admissible); *Piesik v State* (1977, Alaska) 572 P2d 94 (retrial of charges of lewd acts toward child and assault and battery; acquittal at first trial on sodomy charge; evidence pertaining to sodomy admissible since also relevant to charged offenses).

Cal—*People v Griffin* (1963) 60 Cal 2d 182, 32 Cal Rptr 24, 383 P2d 432, revd on other grounds 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229, 5 Ohio Misc 127, 32 Ohio Ops 2d 437, reh den 381 US 957, 14 L Ed 2d 730, 85 S Ct 1797 (recognizing rule); *People v Griffin* (1967) 66 Cal 2d 459, 58 Cal Rptr 107, 426 P2d 507 (prosecution for murder; prior acquittal relating to similar attack on other victim; evidence, to show intent, admissible); *People v Vaughn* (1969) 71 Cal 2d 406, 78 Cal Rptr 186, 455 P2d 122 (recognizing rule); *People v Beamon* (1973) 8 Cal 3d 625, 105 Cal Rptr 681, 504 P2d 905 (prosecution for robbery and kidnapping; prior acquittal of similar hijacking of truck; evidence, for identity and intent, admissible).

People v Follette (1925) 74 Cal App 178, 240 P 502 (prosecution for perjury before grand jury; prior acquittal of uttering forged bail bonds;

viously been acquitted.

21. For an earlier state court decision relating to the same conviction, see *State v King* (1975, Iowa) 225 NW2d 337, *infra*.

For Eighth Circuit cases applying other rules, see *infra*.

evidence, to show motive, admissible); *People v Lachuk* (1935) 5 Cal App 2d 729, 43 P2d 579 (recognizing rule); *People v Spahn* (1938) 28 Cal App 2d 294, 82 P2d 474 (recognizing rule); *People v Raleigh* (1948) 83 Cal App 2d 435, 189 P2d 70 (recognizing rule); *People v Lewis* (1951) 105 Cal App 2d 208, 233 P2d 30 (recognizing rule); *People v Fox* (1954) 126 Cal App 2d 560, 272 P2d 832 (recognizing rule); *People v Simms* (1956, 1st Dist) 144 Cal App 2d 189, 300 P2d 898 (recognizing rule); *People v Lancaster* (1957, 1st Dist) 148 Cal App 2d 187, 306 P2d 626 (recognizing rule); *People v Huston* (1958, 2d Dist) 156 Cal App 2d 670, 320 P2d 175 (recognizing rule); *People v Brown* (1959, 4th Dist) 168 Cal App 2d 549, 336 P2d 1 (recognizing rule); *People v Crisafi* (1960, 2d Dist) 187 Cal App 2d 700, 10 Cal Rptr 155 (prosecution for rape and kidnapping; prior acquittal of similar rape; evidence, to show nonconsent and distinctive behavior pattern, admissible);²² *People v Massey* (1961, 1st Dist) 196 Cal App 2d 230, 16 Cal Rptr 402 (prosecution for burglary; prior acquittal of similar burglary; evidence, to show intent, admissible); *People v Douglas* (1966, 2d Dist) 246 Cal App 2d 594, 54 Cal Rptr 777 (recognizing rule).

For earlier California cases applying other rules, see *infra*.

Ga—*Taylor v State* (1932) 174 Ga 52, 162 SE 504 (ovrld on other grounds *Wood v State*, 219 Ga 509,

134 SE2d 8) (prosecution for bribery; prior acquittal of similar offenses; evidence, to show intent and method, admissible).

Lee v State (1910) 8 Ga App 413, 69 SE 310 (prosecution for illegal prescription of cocaine; prior acquittal of similar offenses; evidence, to show intent and state of mind, admissible); *Johnson v State* (1936) 54 Ga App 260, 187 SE 679 (prosecution for operating lottery; prior acquittal of similar offense; evidence, for unspecified purpose, admissible);²³ *Hodges v State* (1952) 85 Ga App 617, 70 SE2d 48, cert dismd 209 Ga 283, 71 SE2d 543 and cert den 344 US 903, 97 L Ed 698, 73 S Ct 283 (prosecution for operating criminal lottery; prior acquittal of similar offense; evidence, to show plan and knowledge, admissible); *Dandridge v State* (1964) 109 Ga App 33, 134 SE2d 814 (recognizing rule); *Rivers v State* (1978) 147 Ga App 19, 248 SE2d 31 (prosecution for rape; acquittal of similar rape; evidence, to show identity, admissible); *Jenkins v State* (1978) 147 Ga App 21, 248 SE2d 33 (prosecution for rape, burglary, and armed robbery; prior acquittal for similar attacks; evidence, to show identity, admissible).

For Georgia cases applying other rules, see *infra*.

Ill—For Illinois cases, see § 6, *infra*.

Ind—*McCartney v State* (1852) 3 Ind 353 (prosecution for forgery;

22. In later proceedings relating to the same conviction, the Ninth Circuit Court of Appeals, in *Crisafi v Oliver* (1968, CA9 Cal) 396 F2d 293, cert den 393 US 889, 21 L Ed 2d 167, 89 S Ct 208, *infra* § 7, affirmed the denial of the defendant's application for a writ of habeas corpus.

23. This case was distinguished by the court, in *Vaughn v State* (1950) 83 Ga

App 124, 62 SE2d 573, cert dismd 207 Ga 583, 63 SE2d 357, an isolated Georgia case apparently out of line with the current Georgia rule, which applied the doctrine of *res judicata* to the question under annotation, emphasizing that the facts before it involved a charged and uncharged offense which had both arisen from a single transaction.

prior acquittal of passing counterfeit bills; evidence, to show guilty knowledge, admissible).

Iowa—*State v Pierson* (1927) 204 Iowa 837, 216 NW 43 (prosecution for receiving deposits while bank insolvent; prior acquittal of embezzlement; evidence, to show knowledge, admissible); *State v Thompson* (1949) 241 Iowa 16, 39 NW2d 637 (prosecution for conspiracy to defraud; prior acquittal on similar charge based on other specific claims; evidence, to show knowledge and intent, admissible); *State v Leahy* (1952) 243 Iowa 959, 54 NW2d 447 (prosecution for assault with intent to commit great bodily injury; prior acquittal relating to shooting incident; evidence, as part of *res gestae*, admissible); *State v King* (1975, Iowa) 225 NW2d 337 (recognizing rule);²⁴ *State v Sunclades* (1981, Iowa) 305 NW2d 491 (recognizing rule).

Kan—For Kansas cases, see *infra* § 6.

Ky—*Bingham v Commonwealth* (1948) 308 Ky 737, 215 SW2d 845 (prosecution for unlawful possession of whiskey for sale; prior acquittal of other sales; evidence, to show knowledge and consent, admissible).

Md—For Maryland cases, see § 6, *infra*.

Mich—*People v Johnston* (1950) 328 Mich 213, 43 NW2d 334, 20 ALR2d 1001 (prosecution for accepting bribe; prior acquittal of accepting other bribes; evidence, to show intent, admissible); *People v Oliphant* (1976) 399 Mich 472, 250 NW2d 443 (prosecution for rape; prior acquittal

of similar rapes; evidence, to show plan or scheme and intent, admissible).²⁵

People v Corbeil (1977) 77 Mich App 691, 259 NW2d 193 (prosecution for delivery of amphetamines and possession with intent to deliver of marijuana; prior acquittal of similar deliveries to same police agents; evidence, to show intent, inadmissible); *People v Bolden* (1979) 92 Mich App 421, 285 NW2d 210 (prosecution for armed robbery; prior acquittals of two sexual assaults and robberies; evidence, to show identity, admissible); *People v Bolden* (1980) 98 Mich App 452, 296 NW2d 613 (prosecution for criminal sexual conduct and armed robbery; prior acquittal of similar offense; evidence, to show identity, admissible).

For Michigan cases applying other rules, see *infra*.

Mo—*State v Millard* (1922, Mo) 242 SW 923 (prosecution for murder; prior acquittal of other murder; evidence, as part of *res gestae*, admissible); *State v Varner* (1959, Mo) 329 SW2d 623, cert den 365 US 803, 5 L Ed 2d 460, 81 S Ct 468 (prosecution for murder; prior acquittal of another murder, same occasion; evidence, to show deliberation and as part of *res gestae*, admissible); *State v Cooksey* (1973, Mo) 499 SW2d 485 (recognizing rule).

Neb—*Koenigstein v State* (1917) 101 Neb 229, 162 NW 879 (prosecution for accepting bribes; acquittal of accepting other bribes; evidence, to show system or plan, admissible);

24. For the decision relating to the defendant's federal habeas corpus application, see *King v Brewer* (1978, CA8 Iowa) 577 F2d 435, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1238, *supra*.

25. For later proceedings in this same

case, relative to the defendant's application for federal habeas corpus relief, see *Oliphant v Koehler* (1979, CA6 Mich) 594 F2d 547, cert den 444 US 877, 62 L Ed 2d 105, 100 S Ct 162, *supra*.

Williams v State (1929) 118 Neb 281, 224 NW 286 (recognizing rule).

NJ—*State v Yormark* (1971) 117 NJ Super 315, 284 A2d 549, vacated, in part on other grounds 61 NJ 202, 293 A2d 668 (prosecution for conspiracy to obtain money under false pretenses and for substantive crime; prior acquittal on similar charges; evidence, to show knowledge, common scheme, motive, and intent, admissible); *State v Schlue* (1974) 129 NJ Super 351, 323 A2d 549 (prosecution for obstruction of justice; prior acquittal of bribery; evidence, to show motive, admissible); *State v Slocum* (1974) 130 NJ Super 358, 327 A2d 244 (prosecution for robbery and assault and battery; prior acquittal of breaking and entering victim's store on earlier occasion; evidence, to show motive, admissible); *State v Zarinsky* (1976) 143 NJ Super 35, 362 A2d 611, affd 75 NJ 101, 380 A2d 685 (prosecution for murder; prior acquittal relating to other instances when defendant tried to lure girls into car; evidence, to show identity and to negate other explanations of victim's disappearance, admissible).

For New Jersey cases applying other rules, see *infra*.

NY—For New York cases, see § 6, *infra*.

NC—For North Carolina cases, see § 6, *infra*.

ND—*State v Heaton* (1927) 56 ND 357, 217 NW 531 (prosecution for making false entries in bank's books; prior acquittal of embezzlement; evidence, to show knowledge, motive, and intent, admissible).

Ohio—*Patterson v State* (1917) 96 Ohio St 90, 117 NE 169 (prosecution for grand larceny of automobile; prior acquittal of larceny of other automobile; evidence, to show common scheme or plan, admissible).

Or—*State v Smith* (1975) 271 Or

294, 532 P2d 9 (prosecution for robbery; prior acquittal of other robbery; evidence, to show identity and intent, admissible).

For Oregon cases applying other rules, see *infra*.

Pa—*Commonwealth v Manuszak* (1944) 155 Pa Super 309, 38 A2d 355 (prosecution for various gambling offenses; prior acquittal on other gambling charges; evidence, to show course of conduct, admissible).

SC—*State v Houston* (1829) 17 SCL 300 (prosecution for uttering and publishing forged promissory note; prior acquittal on same charge with respect to different note; evidence, to prove scienter, admissible).

Va—For Virginia cases, see § 6, *infra*.

Wis—*State v Feela* (1981, App) 101 Wis 2d 249, 304 NW2d 152 (prosecution for armed robbery, attempted murder, and conspiracy to commit armed robbery; prior acquittal of theft of van; evidence, to show overt act of conspiracy, admissible).

In a prosecution for possession of counterfeit money, the trial court did not err in admitting fingerprint evidence from the record of a previous trial of a similar charge, the court held, in *Holt v United States* (1968, CA10 Okla) 404 F2d 914, cert den 393 US 1086, 21 L Ed 2d 779, 89 S Ct 872, reh den 394 US 967, 22 L Ed 2d 570, 89 S Ct 1303, notwithstanding the fact that the previous trial had resulted in a directed verdict of acquittal. It is well settled, the court said, that in a counterfeiting case evidence of the passing of similar counterfeit notes on other occasions is admissible on the question of criminal intent, such evidence not being admitted to establish or disestablish the existence of a criminal violation based

solely on the previous acts. The court held that since the directing of a verdict is a negative sort of conclusion based on a finding of the failure of the prosecution to sustain its burden of proof, it does not preclude using evidence to assist in demonstrating intent as to a subsequent independent act. The court emphasized that the jury had been correctly instructed as to the limited consideration to be given the other crime evidence. The conviction was affirmed.

Although an earlier decision of a district court within the Eighth Circuit had applied the judicial doctrine of collateral estoppel to resolve a similar question,²⁶ the court, in *King v Brewer* (1978, CA8 Iowa) 577 F2d 435, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1238, apparently rejecting the application of collateral estoppel where only the evidentiary rather than the ultimate use of previously litigated facts is involved, held that the collateral estoppel doctrine, as embodied in the constitutional protection against double jeopardy, was not violated when, at the trial for one of two armed robberies, evidence of the other robbery of which the defendant had previously been acquitted, was introduced in rebuttal of the defendant's alibi testimony which had covered the time period of both robberies. The court went on to say that even under the "expanded" doctrine of collateral estoppel, barring even the merely evidentiary use of previously litigated facts, the evidence was admissible since the jury could have based its earlier acquittal on issues other than the ones the defendant sought to foreclose, but the court did not explain clearly what such other

issues might have been. The court affirmed the summary denial of the defendant's application for a writ of habeas corpus, after the affirmance by the state supreme court of his armed robbery conviction.²⁷

Although earlier Alabama authority had appeared to recognize the applicability of the doctrine of collateral estoppel to the question of the admissibility of evidence of another offense of which the defendant had been acquitted,²⁸ the court, in *Robinson v State* (1959) 40 Ala App 101, 108 So 2d 188, stated that the fact that a defendant in a criminal prosecution has been acquitted of another offense does not render evidence of such prior offense inadmissible if such evidence is otherwise competent. Although the defendant had been acquitted some time ago of a charge of possessing a pistol, his cross-examination—at his trial for owning or possessing a pistol after conviction of a crime of violence—was held admissible over his counsel's objection. The court's decision was rested on the additional ground that the defendant's counsel, after raising the objection, waived it by admitting that the defendant had been tried and acquitted in the former case.

The court, in *Piesik v State* (1977, Alaska) 572 P2d 94, held that the trial court, during the retrial of charges of lewd acts towards a child (fellatio) and assault and battery, did not err in permitting testimony which, the defendant contended, pertained to a sodomy charge of which he had been acquitted at the first trial. The disputed testimony, concerning the lowering of the 9-year-old victim's underpants and the presence of

26. *United States v Halbrook* (1941, DC Mo) 36 F Supp 345.

27. See *State v King* (1975, Iowa) 225

NW2d 337, *supra*.

28. See *Mitchell v State* (1903) 140 Ala 118, 37 So 76.

sperm on them was, the court held, also directly relevant to the fellatio charge, and its prejudicial impact was outweighed by its probative value. The court stated, moreover, that the evidence was not barred by the doctrine of collateral estoppel since the facts testified to had not necessarily been determined in the defendant's favor at the first trial. The court noted, however, that it was reserving the issue of collateral estoppel's application to foreclose proof of evidentiary as well as ultimate facts for a case involving an attempt to "broadly relitigate" a charge to which a verdict of acquittal had been returned and where the issue was, therefore, appropriately raised.

Stating that evidence concerning previous crimes relevant to the proof of a material fact other than the criminal disposition of the defendant is not rendered inadmissible by the fact that the defendant was acquitted of the prior offense, the court, in *Ladd v State* (1977, **Alaska**) 568 P2d 960, cert den 435 US 928, 55 L Ed 2d 524, 98 S Ct 1498 and (ovrld on other grounds *Giacomazzi v State* (Alaska) 633 P2d 218), held that under the circumstances, and in light of the factual complexity of the case, the probative value of evidence of a prior murder of which the defendant had been acquitted, which tended to show the defendant's possible intent and motive with respect to the charged murder, outweighed its potential prejudicial impact, and that there had been no abuse of discretion by the trial judge in admitting the evidence.

Although earlier California authority had recognized the applicability of the doctrine of collateral estoppel to the question under annotation,²⁹ the court, in *People v Griffin* (1967) 66

Cal 2d 459, 58 Cal Rptr 107, 426 P2d 507, held that, in accordance with the settled rule that competent and otherwise admissible evidence of another crime is not rendered inadmissible by reason of the defendant's acquittal of that crime, there was no error, in a murder prosecution, in the admission of evidence of a subsequent attack by the defendant on another victim even though that attack had been the subject of a rape prosecution in a Mexican court resulting in acquittal. The similarities between the two crimes had made the evidence of the subsequent attack relevant to prove that the defendant had intended to commit rape, and that the victim's injuries had not been received accidentally. But the court held that the trial court had erred prejudicially in excluding evidence that the defendant had been acquitted of the subsequent crime, and the court accordingly reversed the defendant's murder conviction.

In a prosecution for robbery and kidnapping for purposes of robbery, arising out of the hijacking of a liquor delivery truck, the mere fact that the defendant had been acquitted of a prior hijacking suffered by the same victim did not render evidence of the prior hijacking inadmissible, the court held, in *People v Beamon* (1973) 8 **Cal** 3d 625, 105 Cal Rptr 681, 504 P2d 905, where evidence of the acquittal was also received and where the jury was instructed as to the limited use for which that evidence was available. The court held that the evidence was material on the issue of identification of the defendant, in light of the victim's recognition of the defendant as the perpetrator of the prior hijacking, and where the common mark of the identical perpetrator and identical victim in both events

29. See *People v Frank* (1865) 28 **Cal** 507.

was so distinctive as to add support to the inference that the defendant was the person who perpetrated both hijackings. The court further held that the probative value of the evidence outweighed any undue prejudice.

While one Georgia decision has taken the view that the doctrine of res judicata is applicable, under some circumstances, to the question under annotation,³⁰ the Georgia rule appears to be, as expressed in *Jenkins v State* (1978) 147 Ga App 21, 248 SE2d 33, that otherwise admissible evidence of another offense is not rendered inadmissible by the fact of an acquittal. In the *Jenkins* Case, involving a prosecution for rape, burglary, and armed robbery, the testimony of two female witnesses other than the prosecutrix as to like attacks on them by the defendant was properly admitted on the issue of the perpetrator's identity, the court held, notwithstanding the fact that the defendant had been acquitted of a charge brought by one of the other victims. The author of the opinion stated that this conclusion was required by the decision in *Taylor v State* (1932) 174 Ga 52, 162 SE 504 (ovrld on other grounds *Wood v State*, 219 Ga 509, 134 SE2d 8), supra, even though he continued to disagree with the reasoning of that case, referring to his dissent in *Rivers v State* (1978) 147 Ga App 19, 248 SE2d 31, supra, for a discussion of the grounds of that disagreement.

In *McCartney v State* (1852) 3 Ind

353, the court held that the admissibility of evidence of similar offenses at a trial on charges of forging a bank bill was not affected by the fact that the defendant had been acquitted of such offenses.

The theory of res judicata is confined to ultimate facts and does not extend to evidentiary ones, the court held, in *State v Thompson* (1949) 241 Iowa 16, 39 NW2d 637, and there was therefore no error in the admission, at the trial of the defendant, a county officer, for conspiracy to obtain money from the county by false pretenses and with intent to defraud, of evidence concerning certain claims approved for payment which had been the basis of a previous similar charge of which the defendant had been acquitted. The jury at the second trial was instructed to consider the evidence at issue only as bearing on the defendant's knowledge and intent in making the alleged misrepresentation as to the specific claim on which the indictment was predicated. The defendant's conviction was reversed on other grounds.

Noting that at a trial for unlawfully possessing whiskey for sale evidence as to other sales was introduced and that the defendant had been acquitted of charges involving these other sales, the court, in *Bingham v Commonwealth* (1948) 308 Ky 737, 215 SW2d 845, stated that the fact of acquittal would not bar the introduction of testimony as to the other sales in the present trial to show that the defen-

30. In *Vaughn v State* (1950) 83 Ga App 124, 62 SE2d 573, cert dismd 207 Ga 583, 63 SE2d 357, it was held that the doctrine of res judicata operated to render inadmissible, at the trial of a charge that the defendant had uttered a forged instrument, expert handwriting testimony showing that the defendant had been the forger, where at the first trial under what

had originally been a two-count indictment the defendant had been acquitted of forgery of the instrument. The court distinguished the facts in the case before it from those under consideration in *Johnson v State* (1936) 54 Ga App 260, 187 SE 679, on the ground that here the two offenses had arisen from a single transaction.

dant had knowledge that liquor was being sold on the premises and that he was consenting to such sales, but deemed it unnecessary to elaborate on that phase of the case since the defendant's conviction was reversed for lack of proof as to the sale charged.

Although it was held in one Michigan intermediate appellate court decision³¹ that an acquittal made it impossible for the prosecution to establish the first requirement of the similar acts statute, a showing of substantial evidence that the defendant committed the other crime, the Michigan rule appears to be represented by the decision in *People v Oliphant* (1976) 399 Mich 472, 250 NW2d 443, in which the court held that evidence of prior acts to show the scheme, plan, or system of the defendant in raping the complainant in a manner and under circumstances which gave the appearance of consent was both relevant and material and was not rendered inadmissible by the fact that the defendant had been acquitted of rape with respect to the prior incidents. The court stated, as a general rule, that otherwise competent evidence of other crimes is not rendered inadmissible by the fact of an acquittal. The court declined to adopt the expanded version of collateral estoppel which holds that the doctrine pre-

cludes even the merely evidentiary use of previously litigated facts, and held, accordingly, that the doctrine was not implicated in the present case. The conviction was affirmed.³²

The admission, over the defendant's objection, of testimony to a killing by the defendant immediately after the murder for which he was being tried was held proper, in *State v Millard* (1922, Mo) 242 SW 923, although the defendant had been acquitted of the later killing. The court relied on an exception to the rule precluding the admission of evidence of other offenses, since the two crimes had been committed under such circumstances as to constitute one continuous accomplishment of a common design. As to the contention that the acquittal of the defendant rendered testimony concerning the other offense inadmissible, the court pointed out that such a contention could be supported only on the ground that such testimony would put the defendant in double jeopardy, but that it did not put him in jeopardy of the crime of which he had been acquitted, his jeopardy being of the crime for which he was being tried. Noting that on the admission of the testimony of the other offense the defendant subsequently offered and the court admitted in evidence the

31. *People v Atkins* (1980) 96 Mich App 672, 293 NW2d 671. In the *Atkins* Case, a murder prosecution, evidence of another murder allegedly committed by the defendant was properly excluded by the trial court in a pretrial ruling, under a similar acts statute requiring, inter alia, a showing of substantial evidence that the defendant committed the other crime, where the defendant's previous trial for the other murder had ended in a directed verdict of acquittal. As additional grounds for its decision, the court held that, given the nature of the defense, neither motive

nor intent, the issues to which the other offense was assertedly relevant, was at issue, and that it could find no abuse of discretion by the trial judge in ruling that the probative value of the evidence was outweighed by its prejudicial effect.

32. See *Oliphant v Koehler* (1979, CA6 Mich) 594 F2d 547, cert den 444 US 877, 62 L Ed 2d 105, 100 S Ct 162, *infra* § 6, in which the United States Court of Appeals for the Sixth Circuit, in a subsequent proceeding, affirmed the denial of the defendant's application for a writ of habeas corpus.

record of the acquittal, the court pointed out that the admission of the record of acquittal was proper in that it tended to remove any inference that might otherwise have been drawn by the jury as to the effect of the testimony of the other offense.

Even though the defendant had been acquitted of the murder of one of two men whose bodies were found together in a field, evidence concerning all the circumstances in both deaths was held admissible by the court, in *State v Varner* (1959, **Mo**) 329 SW2d 623, cert den 365 US 803, 5 L Ed 2d 460, 81 S Ct 468, at the defendant's trial on a charge of murder of the other man, in view of the fact that both men came to their deaths under such circumstances as to constitute one single continuous accomplishment of a common design, and that the facts were so intimately related and the crimes so nearly concurrent that proof of one could not well be made without a showing of the facts tending to establish the other. The court also pointed out that if the killing of two people is all a part of one transaction the evidence as to both deaths is competent, not because it shows another crime, but because the single transaction circumstantially bears on and establishes deliberation, if not motive; and that, being all of a part of one transaction, it was appropriate that witnesses, from photographs and personal observation, detailed the location, relative distances, and positions of the bodies, and described the wounds, and related other connected physical circumstances.

In a prosecution of a county attorney for receiving bribes to permit disorderly houses to operate, evidence of payments from one particu-

lar person was held, in *Koenigstein v State* (1917) 101 **Neb** 229, 162 NW 879, to be admissible as tending to establish the system or plan under which the defendant received the specific bribes charged, although the defendant had previously been tried and acquitted on charges of receiving bribes from this person. The fact of acquittal was not *res judicata* as to the facts involved, the court said, since these involved issues merely collateral to the issue of the defendant's innocence or guilt in the former trial, and, while the defendant could not again be placed in jeopardy for the offense there charged, no jeopardy as to that offense resulted from the admission of the evidence. It was further held that evidence of the defendant's acquittal in the previous trial should have been admitted in the present trial.

It was held, in *Williams v State* (1929) 118 **Neb** 281, 224 NW 286, that notwithstanding the defendant's acquittal of charges of practicing medicine without a license on occasions other than those specified in the information, evidence as to the facts which had been the basis of the former prosecution was competent, to show scheme and purpose, at the trial on a like charge predicated on other facts. It may be noted, however, that the court also held that the evidence, though competent had it been properly adduced, was improperly brought out on cross-examination of the defendant's husband.

Although an early New Jersey case³³ had apparently recognized the applicability of the doctrine of collateral estoppel to the question under annotation, the court, in *State v Slocum* (1974) 130 **NJ** Super 358, 327 A2d 244, held that evidence of criminal

33. *State v Robinson* (1838) 16 **NJL** 507.
952

acts for which a defendant has previously been acquitted is admissible where it tends to demonstrate motive, intent, identity, absence of mistake, or plan, and affirmed a conviction for robbery and assault and battery. The defendant urged error by the trial judge in the admission of the testimony of the victim that some 5 years previous to the charged offense the defendant had broken into and robbed her store and that she had testified against him at the trial of the earlier offense. The trial judge had fully cautioned the jury as to the limited purpose of such testimony to show a possible motive, and detailed the course of the prior proceedings, which had ultimately resulted in the defendant's acquittal. The court held that the probative value of the testimony far outweighed any potential for prejudice.

In *State v Heaton* (1927) 56 ND 357, 217 NW 531, involving a prosecution against a bank officer for making false entries in the books of the bank, evidence of a systematic course of falsification on the part of the defendant by which a fictitious balance was maintained in the books was held admissible for the purpose of showing the defendant's motive and intent in making the entries, although the evidence tended to show embezzlement by the defendant, a charge of which he had been acquitted after a trial based substantially on the same evidence. The defendant's contention that the former acquittal constituted res judicata with respect to the facts in question was rejected by the court. It was further held that the trial court properly excluded the defendant's

offer of evidence of his former acquittal.

The court, in *State v Smith* (1975) 271 Or 294, 532 P2d 9, held that acquittal alone, though it may lessen the probative value of evidence of another offense, does not render it inadmissible.³⁴ The court rejected the defendant's argument that the acquittal of the other offense lessens its probative value to such an extent as to render it inadmissible when balanced against its unquestioned prejudicial impact. The court stated that acquittal establishes only that a jury did not find the defendant to have been proved guilty beyond a reasonable doubt of the offense charged, and that to be admissible, evidence of other conduct need not be established beyond a reasonable doubt. The disputed evidence in the present case, admitted to show intent and identity, related to a prior robbery of which the defendant had previously been acquitted. Although holding that the evidence of the prior robbery was properly admitted, the court held that the defendant had been entitled to counter the state's evidence of her participation in the other offense by showing that she had been acquitted, and that the trial judge committed reversible error in excluding the fact of the defendant's acquittal.

The court, in *State v Feela* (1981, App) 101 Wis 2d 249, 304 NW2d 152, held, in light of the policies underlying the doctrine of collateral estoppel as applied in the criminal setting, that the doctrine does not bar the use of a previously litigated issue as an evidentiary fact in a subsequent trial, and affirmed convictions for armed robbery, attempted murder,

34. Though this apparently represents the current rule in Oregon, one isolated case, *State v Dewey* (1956) 206 Or 496, 292 P2d 799, out of line with the rele-

vance approach, recognized the applicability of collateral estoppel to the question under annotation.

and conspiracy to commit armed robbery notwithstanding the fact that evidence of the defendant's theft of a van, of which substantive charge he had previously been acquitted, was admitted to show an overt act of the charged conspiracy.

§ 6. Collateral estoppel test

The courts in the following cases applied, or recognized the applicability of, the doctrine of collateral estoppel³⁵ in determining the admissibility of evidence of another offense, otherwise relevant to some genuine issue in dispute, in light of the defendant's acquittal of the other offense, some courts concluding, under the particular circumstances presented, that the evidence was admissible and others that it was not.

US—United States v De Angelo (1943, CA3 NJ) 138 F2d 466 (disapproved on other grounds *Ashe v Swenson*, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189) as stated in *United States v Venable* (CA3 Pa) 585 F2d 71 (prosecution for conspiracy to commit robbery; prior acquittal of robbery; government estopped to prove defendant was present at and participated in robbery); *United States v Simon* (1955, CA3 NJ) 225 F2d 260 (disapproved on other

grounds *Ashe v Swenson*, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189) as stated in *United States v Venable* (CA3 Pa) 585 F2d 71 (prosecution for guilty possession of stolen turkeys; prior acquittal of receiving stolen turkeys; evidence imputing to defendant guilty knowledge at time turkeys delivered, as part of chain of proof on possession charge, inadmissible); *Yawn v United States* (1957, CA5 Fla) 244 F2d 235 (prosecution for conspiracy to violate provisions of Internal Revenue Code; prior acquittal of possession of unregistered distillery; government estopped to allege as overt act possession of same distillery); *United States v Maybury* (1960, CA2 NY) 274 F2d 899 (recognizing rule); *United States v Kramer* (1961, CA2 NY) 289 F2d 909 (prosecution for conspiracy to commit burglary and to receive stolen property; prior acquittal of substantive offenses; evidence of substantive offenses, to show knowledge, inadmissible); *United States v Feinberg* (1967, CA2 NY) 383 F2d 60, cert den 389 US 1044, 19 L Ed 2d 836, 88 S Ct 788 (recognizing rule; rule not applied because successive prosecutions involved different sovereigns); *United States v Friedland* (1968, CA2 NY) 391 F2d 378, on remand (SD NY) 316 F Supp

35. The United States Supreme Court, in *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189, defined collateral estoppel as meaning that "...when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit."

In some of the cases in this section courts used the term *res judicata* rather than collateral estoppel, and no attempt has been made to conform the terminology where no distinction turns on the use of one rather than the other of these roughly interchangeable phrases.

The applicability of the court-made doctrine of collateral estoppel to criminal cases had been recognized prior to the decision of the United States Supreme Court, in *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189, holding that the doctrine is actually an ingredient of the Fifth Amendment protection against double jeopardy. For the purposes of this annotation, there appears to be no difference between the content and scope of collateral estoppel in its constitutionally mandated as opposed to its court-made form, and accordingly no differentiation between the cases has been made on this basis.

459, *affd* (CA2 NY) 441 F2d 855, cert den 404 US 867, 30 L Ed 2d 111, 92 S Ct 143 and cert den 404 US 914, 30 L Ed 2d 188, 92 S Ct 239 (recognizing rule; issue not preserved); *Green v United States* (1970) 138 App DC 184, 426 F2d 661 (prosecution for robbery and assault; prior acquittal of unauthorized use of a vehicle; evidence,³⁶ as part of *res gestae*, inadmissible); *United States v Pappas* (1971, CA3 NJ) 445 F2d 1194, cert den 404 US 984, 30 L Ed 2d 368, 92 S Ct 449 (prosecution for making false entries in accounts receivable ledger of bank; prior acquittal of conspiracy to make false entries in bank's books; evidence admissible since not only intended to establish fact already decided); *United States v Smith* (1971, CA4 Va) 446 F2d 200 (recognizing rule; successive prosecutions involving different sovereigns); *Wingate v Wainwright* (1972, CA5 Fla) 464 F2d 209 (prosecution for robbery; prior acquittal of two similar robberies; evidence, to show course of conduct, inadmissible); *United States v Kills Plenty* (1972, CA8 SD) 466 F2d 240, cert den 410 US 916, 35 L Ed 2d 278, 93 S Ct 971 (recognizing rule); *United States v Cioffi* (1973, CA2 NY) 487 F2d 492, cert den 416 US 995, 40 L Ed 2d 774, 94 S Ct 2410, reh den 417 US 978, 41 L Ed 2d 1149, 94 S Ct 3188 and (disagreed with *United States v Hernandez* (CA9 Cal) 572 F2d 218) (prosecution for possession with intent to use or sell counterfeit postage stamps; prior acquittal of attempt to sell stamps; evidence admissible since jury could have acquitted on other basis); *McDonald v Wainwright* (1974, CA5 Fla) 493 F2d 204 (prosecution for breaking and entering with intent to commit rape; prior acquittal of assault to commit rape and rape; evidence of nonconsent, to show intent, inadmissible); *Blackburn v Cross* (1975, CA5 Fla) 510 F2d 1014, reh den (CA5 Fla) 517 F2d 464 (prosecution for breaking and entering and attempted crime against nature; prior acquittal of similar offense; evidence, to show identity, inadmissible; rule of *Wingate*, *supra*, applied retroactively); *United States v Seijo* (1976, CA2 NY) 537 F2d 694, cert den 429 US 1043, 50 L Ed 2d 756, 97 S Ct 745 and (disagreed with *United States v Hernandez* (CA9 Cal) 572 F2d 218) (prosecution for conspiracy to violate federal narcotics laws; prior acquittal of possession of heroin with intent to distribute; evidence admissible since jury could have acquitted on other basis); *United States v Gonzalez* (1977, CA5 Tex) 548 F2d 1185 (prosecution for conspiracy to distribute heroin; prior acquittal for distributing heroin; evidence of substantive offense admissible since jury could have acquitted on other basis); *United States v King* (1977, CA2 NY) 563 F2d 559, 77-2 USTC ¶ 9717, cert den 435 US 918, 55 L Ed 2d 510, 98 S Ct 1476 (prosecution for tax evasion; prior acquittal of conspiracy to deprive citizens of civil rights by extortion of payoffs; evidence of payoffs admissible since jury could have acquitted on other basis); *Smith v Wainwright* (1978, CA5 Fla) 568 F2d 362 (recognizing rule); *United States v Venable* (1978, CA3 Pa) 585 F2d 71 (recognizing rule); *United States v Ballard* (1978, CA5 Fla) 586 F2d 1060 (retrial for conspiracy to import

36. For the sake of brevity, the exact nature of the contested evidence is not always specified in the parenthetical summaries, but in all cases the evidence re-

ferred to therein showed or related to the other offense of which the defendant had previously been acquitted.

and possess cocaine; acquittal at first trial of substantive counts; evidence bearing on conspiracy admissible since jury could have acquitted on other basis); *United States v Day* (1978) 192 App DC 252, 591 F2d 861 (prosecution for making of sawed-off shotguns and for murder; prior acquittal on counts relating to robbery and forceful taking of automobile; government estopped from using evidence contrary to facts essential to judgment of acquittal); *Oliphant v Koehler* (1979, CA6 Mich) 594 F2d 547, cert den 444 US 877, 62 L Ed 2d 105, 100 S Ct 162 (prosecution for rape; prior acquittal of similar rapes; testimony of prior victims, to show plan or scheme, admissible since jury could have acquitted on other basis); *United States v Mespouledé* (1979, CA2 NY) 597 F2d 329 (prosecution for conspiracy to distribute cocaine; prior acquittal of possession of cocaine with intent to distribute; evidence of possession inadmissible); *United States v Nelson* (1979, CA5 Fla) 599 F2d 714 (retrial on substantive count of possession of narcotics; acquittal at first trial of conspiracy to distribute narcotics; government estopped from using evidence indicating participation in conspiracy); *United States v Mock* (1979, CA5 Fla) 604 F2d 341, 80-1 USTC ¶9184, later app (CA5 Fla) 640 F2d 629, 81-1 USTC ¶9288 (prosecution for income tax evasion; prior acquittal of conspiracy to import and distribute marijuana; government estopped from establishing defendant's involvement in conspiracy during period alleged in prior indictment); *United States v Lee* (1980, CA5 Fla) 622 F2d 787, reh den (CA5 Fla) 633 F2d 582 and cert den 451 US 913, 68 L Ed 2d 303, 101 S Ct 1987 (recognizing rule; issue not ripe for adjudication); *United States v Keller* (1980, CA3 Pa)

624 F2d 1154 (prosecution for conspiracy to distribute controlled substance; prior acquittal for subsequent narcotics transactions; evidence, to undermine entrapment defense, inadmissible); *United States v Castro* (1980, CA7 Ill) 629 F2d 456 (prosecution for heroin possession; prior acquittal of conspiracy to distribute heroin; evidence of conspiracy inadmissible); *United States v De Vincent* (1980, CA1 Mass) 632 F2d 147, cert den 449 US 986, 66 L Ed 2d 249, 101 S Ct 405 (prosecution on charges relating to extortionate credit transactions; prior acquittal on protection racket conspiracy charges; evidence of battery, alleged as overt act of conspiracy, admissible since jury could have acquitted on other basis); *United States v Caucci* (1981, CA5 Fla) 635 F2d 441, cert den 454 US 831, 70 L Ed 2d 108, 102 S Ct 128 (recognizing rule); *United States v De La Torre* (1981, CA5 Tex) 639 F2d 245 (recognizing rule); *United States v Mock* (1981, CA5 Fla) 640 F2d 629, 81-1 USTC ¶9288 (prosecution for income tax evasion; prior acquittal of marijuana conspiracy; evidence of drug transaction on date outside inclusive dates of conspiracy, admissible); *United States v Griggs* (1981, CA5 Fla) 651 F2d 396 (recognizing rule); *Benson v Superior Court Dept. of Trial Court* (1981, CA1 Mass) 663 F2d 355 (recognizing rule; issue not ripe for adjudication); *United States v Kalish* (1982, CA5 Tex) 690 F2d 1144, reh den (CA5 Tex) 689 F2d 190 and cert den (US) 74 L Ed 2d 958, 103 S Ct 735 (recognizing rule).

United States v Morse (1926, DC NY) 24 F2d 1001 (prosecution for conspiracy to devise scheme to defraud through use of mails; prior acquittal on unspecified charge; government estopped to contradict facts already adjudicated); *United States v*

Carlisi (1940, DC NY) 32 F Supp 479 (recognizing rule); United States v Dockery (1943, DC NY) 49 F Supp 907 (recognizing rule; issue not ripe for adjudication); United States v Perrone (1958, DC NY) 161 F Supp 252 (recognizing rule; issue not ripe for adjudication); United States ex rel. Triano v Superior Court of New Jersey, Law Div. (1975, DC NJ) 393 F Supp 1061, *affd* without op (CA3 NJ) 523 F2d 1052, *cert den* 423 US 1056, 46 L Ed 2d 645, 96 S Ct 787 (recognizing rule; issue not ripe for adjudication); United States v Gurney (1976, MD Fla) 418 F Supp 1265 (retrial of charge of making false material declarations to grand jury; prior acquittal on five of seven counts charging various violations of federal law; government estopped as to specified issues in evidence); United States v Mulherin (1981, SD Ga) 529 F Supp 916 (recognizing rule); Petrucelli v Smith (1982, WD NY) 544 F Supp 627 (prosecution for murder; acquittal at first trial of murder of another victim in same shootout; evidence, as part of *res gestae*, improperly admitted without informing jury of acquittal).

For cases from the Fifth, Sixth, and Seventh Circuits applying different rules, see *infra*.

For Eighth Circuit cases, see § 5, *supra*.

Ala—For Alabama cases, see § 5, *supra*.

Cal—For California cases, see § 5, *supra*.

Colo—People v Kernanen (1972) 178 Colo 234, 497 P2d 8 (recognizing rule).

Del—State v Heitter (1964, Sup) 57 Del 595, 203 A2d 69, 9 ALR3d 195 (prosecution for manslaughter by motor vehicle; prior acquittal of reckless and drunk driving; manslaughter could not be predicated on reckless

or drunk driving, though prosecution could proceed on basis of speeding).

For inconsistent, earlier, Delaware authority, see *infra*.

Ga—For Georgia cases, see § 5, *supra*.

Ill—People v Haran (1963) 27 Ill 2d 229, 188 NE2d 707 (prosecution for crime against nature; prior acquittal of rape on same occasion; government estopped to show, as part of *res gestae*, act of intercourse); People v Ulrich (1963) 30 Ill 2d 94, 195 NE2d 180 (prosecution for taking indecent liberties with child; prior acquittal on same charge relating to different victim; evidence not subject of estoppel, since jury could have acquitted on other basis, but still inadmissible because probative value outweighed by prejudicial impact).

People v Bricker (1977) 48 Ill App 3d 452, 6 Ill Dec 661, 363 NE2d 190 (recognizing rule); People v Kennedy (1978) 60 Ill App 3d 947, 18 Ill Dec 345, 377 NE2d 830 (retrial of rape charge; acquittal at first trial of charge of deviate sexual assault; evidence admissible since jury could have acquitted on other basis); People v Brunning (1981) 95 Ill App 3d 673, 51 Ill Dec 173, 420 NE2d 587 (prosecution for rape and deviate sexual assault; prior acquittal of unlawful possession of weapon; evidence, to rebut defendant's denial of ever having owned gun, inadmissible).

For inconsistent Illinois cases, see *infra*.

Kan—State v Irons (1981) 230 Kan 138, 630 P2d 1116 (prosecution for aggravated robbery; acquittal of similar robbery; evidence, to show plan and identity, inadmissible).

For Kansas cases applying other rules, see *infra*.

Md—Bell v State (1881) 57 Md 108 (superseded by statute on other issue

as stated in *Wilson v State*, 239 Md 245, 210 A2d 824 (prosecution for forgery of check; prior acquittal for uttering another forged check; evidence, to show guilty knowledge, admissible since jury could have acquitted on other basis); *Scarlett v State* (1953) 201 Md 310, 93 A2d 753, cert den 345 US 955, 97 L Ed 1377, 73 S Ct 937 (prosecution for conspiracy to violate lottery laws; prior acquittal on substantive offense; evidence admissible since jury could have acquitted on other basis); *Powers v State* (1979) 285 Md 269, 401 A2d 1031, cert den 444 US 937, 62 L Ed 2d 197, 100 S Ct 288 (recognizing rule).

Wise v State (1981) 47 Md App 656, 425 A2d 652, cert den 454 US 863, 70 L Ed 2d 163, 102 S Ct 322 (prosecution for murder; prior acquittal or conspiracy to commit murder relating to different victim; evidence, to show motive, admissible since jury could have acquitted on other basis).

For Maryland cases applying other rules, see *infra*.

Mont—*State v Hopkins* (1923) 68 Mont 504, 219 P 1106 (prosecution for robbery; prior acquittal of grand larceny; evidence, to show intent, admissible, but jury should have been instructed that record of acquittal proved conclusively that other offense not committed).

NJ—For New Jersey cases, see § 5, *supra*.

NY—*People v Cornier* (1964) 42 Misc 2d 963, 249 NYS2d 521 (recognizing rule); *People v Minton* (1967) 54 Misc 2d 552, 283 NYS2d 73 (recognizing rule); *People v Chang* (1976) 86 Misc 2d 272, 382 NYS2d 611 (prosecution for promoting obscenity; prior acquittal of consensual sodomy; evidence, as part of single episode, admissible since jury could have acquitted on other basis).

958

For New York cases applying other rules, see *infra*.

NC—*State v McKenzie* (1977) 292 NC 170, 232 SE2d 424 (recognizing rule; issue not preserved).

For North Carolina cases applying other rules, see *infra*.

Or—For Oregon cases, see § 5, *supra*.

Tex—*Stuart v State* (1978, Tex Crim) 561 SW2d 181 (prosecution for rape; prior acquittal of similar rape; evidence, to show nonconsent, inadmissible); *Dedrick v State* (1981, Tex Crim) 623 SW2d 332 (prosecution for robbery; prior acquittal of other robbery; evidence, to show identity, inadmissible).

For Texas cases applying other rules, see *infra*.

Va—*Simon v Commonwealth* (1979) 220 Va 412, 258 SE2d 567 (prosecution for vehicular manslaughter; prior acquittal of driving under influence of alcohol; evidence, to provide one basis for manslaughter charge, inadmissible); *Rhodes v Commonwealth* (1982) 223 Va 743, 292 SE2d 373 (prosecution for manufacturing PCP; prior acquittal of possession of PCP; evidence admissible because jury could have acquitted on other basis).

For Virginia cases applying other rules, see *infra*.

A jury, by its verdict of not guilty on a robbery charge, had determined adversely to the government the questions whether the defendant was present at and participated in the robbery as the driver of the car, and the government was therefore estopped from relitigating those questions at a subsequent trial on a charge of conspiracy to commit the robbery, the court held, in *United States v De Angelo* (1943, CA3 NJ) 138 F2d 466 (disapproved on other

grounds *Ashe v Swenson*, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189) as stated in *United States v Venable* (CA3 Pa) 585 F2d 71, reversing the judgment of conviction and ordering a new trial. The court emphasized that the former acquittal was not a bar to the prosecution of the conspiracy indictment, but rather that its decision was based on a rule of evidence which accords to the accused the right to claim finality with respect to a fact previously determined on a previous trial. The court also noted that it had not been necessary for the government, in light of evidence that the defendant's coconspirators committed overt acts, to have proved that the defendant was an actual perpetrator of any of the overt acts alleged. The court thus made clear that it was not of the view that for collateral estoppel to apply, the fact assertedly precluded must be an ultimate fact in the second prosecution.

Although earlier Fifth Circuit cases³⁷ had applied the rule of relevance to the question under annotation, without reference to collateral estoppel, and an isolated later case also did so,³⁸ the current Fifth Circuit rule is represented by the holding of the court in *Yawn v United States* (1957, CA5 Fla) 244 F2d 235, that the government was precluded as a matter of law by the doctrine of collateral estoppel from attempting to establish the precise fact of possession of an unregistered distillery, alleged as an overt act in a prosecution for conspiracy to violate provisions of

the Internal Revenue Code, which had previously been decided in the defendant's favor by his acquittal on the substantive charge of possession of the identical unregistered distillery at the identical time and place.³⁹ The court stated that it could not be doubted that the erroneous admission of the challenged evidence over vigorous and timely objection had been harmful to the defendant, and reversed the conspiracy conviction.

The prior acquittal of the defendant on eight counts charging substantive offenses in connection with the burglaries of two post offices precluded the government from presenting evidence of the defendant's participation in the burglaries at a subsequent prosecution under an indictment charging two counts of conspiring to commit the crimes of which he had been acquitted, and additional counts of receiving the stolen property and conspiracy to receive it, the court held in *United States v Kramer* (1961, CA2 NY) 289 F2d 909. At the second trial the government had been permitted to present evidence of the burglaries as relevant to the receiving counts, as showing knowledge that the property had been stolen, and as a result of the trial judge's ruling that the government was not limited in its proof of overt acts to only those acts charged in the indictment which, seemingly in recognition of a possible double jeopardy problem, did not include the burglaries themselves. Seasonable objections to the evidence were consistently overruled on the

37. See *Pilcher v United States* (1902, CA5 Ala) 113 F 248; *Woodman v United States* (1929, CA5 Tex) 30 F2d 482, cert den 279 US 855, 73 L Ed 997, 49 S Ct 351.

38. *Oddo v United States* (1968, CA5 Fla) 396 F2d 806, cert den 393 US 844, 21 L Ed 2d 114, 89 S Ct 126.

39. While the court in *Yawn* was applying collateral estoppel as a judicial doctrine, it should be noted that the Fifth Circuit has since made clear its view that such application is constitutionally mandated. See *Wingate v Wainwright* (1972, CA5 Fla) 464 F2d 209 *infra*.

basis of the trial judge's view that the difference in the charged offenses relieved the government of any bar. The court emphasized that the usual difficulties in determining what issues were actually determined by a general verdict of acquittal were not present in the case at issue, since it was clear that the acquittals had determined that the defendant did not burglarize the post offices and was not responsible for whoever did. The court rejected the argument that collateral estoppel applies in criminal cases only when the fact assertedly precluded is an ultimate fact in the second prosecution, necessary to a finding of guilt. The court stated that a defendant who has satisfied one jury that he had no responsibility for a crime ought not to be forced to convince another of this even in a trial where in theory the prosecution need not have tendered the issue. The court noted that its holding was limited to situations involving a second criminal trial relating to the same course of conduct as the first, and that it was not required to decide what the result should be in cases when the second charge is for an unrelated crime as to which evidence of the first charge is somehow relevant. The court reversed the judgments of conviction and directed verdicts of acquittal as to the conspiracy counts, and ordered new trials on the remaining counts.

The court, in *United States v Smith* (1971, CA4 Va) 446 F2d 200, rejected the defendant's contention that in a federal prosecution for the unlawful possession of a money order stolen from the mails the prosecution was collaterally estopped from presenting evidence, over defense objection, as to the defendant's negotiation on the same day of a second money order allegedly stolen from the same envelope notwithstanding the fact

that the defendant had been tried and acquitted in state court on a charge of entering the second money order. The court held, first, that although the constitutionally mandated doctrine of collateral estoppel was indeed applicable in criminal cases, the defendant's collateral estoppel argument was unavailing because the two prosecutions had been undertaken by different sovereigns not in privity with one another. Moreover, the court stated that its decision was also mandated by the fact that the defendant, not having introduced into the record a transcript of the state trial, had made it impossible to ascertain what facts had been concluded adversely to the state in the earlier prosecution, and had failed to carry the burden of proving that the facts he sought to exclude had been necessarily determined by the former judgment of acquittal. The court stated that given the inapplicability under the circumstances of the collateral estoppel doctrine, the determination as to the admissibility of the evidence had been within the area of the trial court's discretion, and while the fact of acquittal had been a relevant factor in evaluating the probative force of the evidence of the other crime, the trial judge had not been bound to accept the acquittal as conclusive. The court agreed with the trial judge that the evidence of the other crime furnished part of the context of the charged crime and had clearly been admissible to show that the defendant had possessed the money order referred to in the indictment and had knowledge that it had been stolen.

Reversing the denial of an application for writ of habeas corpus, the court, in *Wingate v Wainwright* (1972, CA5 Fla) 464 F2d 209, held that harmful constitutional error was committed in the course of a state

court robbery trial when over defense objection the prosecution was allowed to present evidence, for the purpose of showing a "course of conduct," of two prior robberies, among others, for which the defendant had been tried and acquitted. The court rejected the state's argument that the issue of double jeopardy is properly raised only in cases involving multiple prosecutions arising out of the same transaction or offense. The court stated that it could perceive no meaningful difference in the quality of jeopardy to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue between a relitigated issue that is an "ultimate" fact, and one that is merely an "evidentiary" fact, in the second prosecution. The court noted that the state's proof of the other crimes consisted of the testimony of the victims as well as that of arresting and investigating officers, and that the transcript of testimony tending to establish the other crimes was more than twice as long as the transcript of testimony relative to the crime charged. The court also emphasized, in holding the error not to have been harmless, the prosecuting attorney's heavy reliance, in his emphatic and in part improper closing argument, on the proof of the other crimes.

Although an earlier decision of a federal district court within the Sixth Circuit had admitted evidence of a prior offense despite an acquittal on relevance grounds, to show intent or motive, and without reference to collateral estoppel,⁴⁰ the applicability of the collateral estoppel doctrine to the question under annotation was recognized by the Sixth Circuit Court of

Appeals in *Oliphant v Kochler* (1979, CA6 Mich) 594 F2d 547, cert den 444 US 877, 62 L Ed 2d 105, 100 S Ct 162, where, in a rape prosecution, the admission, to show plan or scheme, of the testimony of two rebuttal witnesses who had been complainants in prior rape prosecutions resulting in the same defendant's acquittal was held not to have conflicted with the constitutional protection against double jeopardy and not to have been barred by collateral estoppel. The court therefore affirmed the denial of the defendant's application for a writ of habeas corpus following the affirmation of his conviction by the state supreme court.⁴¹ After discussing the similarity of the charged and prior crimes, and the relevance of the testimony to demonstrate a plan on the part of the defendant to orchestrate events surrounding the rapes in order to increase the difficulty of showing nonconsent, the court pointed out that since the juries which had previously acquitted the defendant could have done so after concluding both that the defendant had orchestrated the events and that the women had ultimately consented, the state prosecutor by introducing the prior complainants' testimony had not sought to relitigate any issue previously determined in the defendant's favor.

Where the trial of a two-count indictment had resulted in a verdict of not guilty on the first count, charging possession of cocaine with intent to distribute, and a hung jury on the second count, charging conspiracy to distribute cocaine, the introduction of the same evidence of possession at the retrial of the conspiracy charge which had formed the basis of the original possession count violated the collateral estoppel element of the

40. *United States v Gilbert* (1939, DC Ohio) 31 F Supp 195.

41. *People v Oliphant* (1976) 399 Mich 472, 250 NW2d 443, supra § 5.

constitutional protection against double jeopardy, the court held, in *United States v Mespouledé* (1979, CA2 NY) 597 F2d 329, reversing the conspiracy conviction. The court stated that it is firmly established that the government is precluded from relitigating an issue decided in a defendant's favor by a valid final judgment, and that collateral estoppel is not limited to the situation in which the fact sought to be relitigated is essential to conviction and thus must be proved beyond a reasonable doubt. The court noted that in the case before it, proof of the defendant's possession of cocaine on the occasion in question was not a *sine qua non* of conviction at the conspiracy retrial, since the statute under which the charge was brought did not require the prosecution to prove any overt act, and since the evidence was of only one of many instances of the defendant's actual possession of cocaine. Before reaching its decision, the court closely analyzed the pleadings, evidence, and jury instructions in the first trial before concluding that the basis of the jury's verdict had necessarily been that the defendant had not possessed the cocaine on the occasion charged, rather than, for example, that he possessed the cocaine but without any intent to distribute. Finally, the court rejected the government's contention that the principles of collateral estoppel were inapplicable to the retrial of charges contained in a multicount indictment.

Reversing a conviction on two counts of income tax evasion and remanding for a new trial, the court, in *United States v Mock* (1979, CA5 Fla) 604 F2d 341, 80-1 USTC ¶9184, later app (CA5 Fla) 640 F2d 629, 81-1 USTC ¶9288, held that the prosecution had been collaterally estopped, under the double jeopardy clause of

the United States Constitution, from arguing or trying to establish that the defendant had been involved in a conspiracy to import, possess, and distribute marijuana during the period alleged in an earlier conspiracy prosecution which had resulted in the defendant's acquittal. The court noted that the government's primary witness at the tax trial had also been the chief witness at the conspiracy trial, that the prosecutor's closing argument in the tax trial had referred several times to the conspiracy, and that in fact the prosecution had based its case on the very theory that the defendant had derived income from the conspiracy of which he had already been acquitted. After retrial, the court, in *United States v Mock* (1981, CA5 Fla) 640 F2d 629, 81-1 USTC ¶9288, affirmed a conviction on two counts of income tax evasion, holding that the testimony of a prosecution witness concerning a drug transaction had not been barred by the constitutional doctrine of collateral estoppel notwithstanding the fact that the defendant had previously been acquitted of a marijuana conspiracy charge involving the same persons as coconspirators, since the transaction was alleged to have taken place on a date some 6 weeks after the end of the period during which the conspiracy had been alleged to have been in existence. The court held that because of the discrepancy in dates, the defendant failed to show that the disputed testimony concerned facts relating to the particular conspiracy of which he had earlier been acquitted.

In a prosecution for conspiracy to distribute a controlled substance, the introduction of evidence of subsequent narcotics transactions which had been the basis of a prior federal prosecution resulting in acquittal was

barred by the judicial doctrine of collateral estoppel, the court held, in *United States v Keller* (1980, CA3 Pa) 624 F2d 1154, reversing a judgment of conviction. Evidence of the other transactions had been the basis of cross-examination of the defendant aimed at undermining his entrapment defense. In the earlier prosecution, as in the one at issue, the defendant had admitted distributing a controlled substance but had pleaded entrapment. The court, while alluding to decisions of other federal circuit courts of appeals holding that the constitutional incorporation of collateral estoppel is not limited to instances of reprosecution or multiple prosecutions but also precludes the evidentiary use of crimes for which there has been prior acquittal, declined to reach that constitutional issue, which, the court noted, had been left unresolved by the United States Supreme Court. Instead of basing its decision on any constitutional prohibition against double jeopardy as incorporating collateral estoppel, the court relied on the court-made doctrine of collateral estoppel, pointing out that it had consistently applied that doctrine in the past to bar the evidentiary use of crimes for which a defendant had been acquitted. The court also alluded to, but did not reach, the merits of the argument that the evidence should have been excluded under Rule 403 of the Federal Rules of Evidence as more prejudicial than probative, having lost most of its relevance by virtue of the acquittal.

Although an earlier Seventh Circuit case⁴² had seemed to apply a rule leading to the automatic exclusion of evidence of other offenses of which a defendant has been acquitted, the court, in *United States v Castro*

(1980, CA7 Ill) 629 F2d 456, applied the doctrine of collateral estoppel in determining that evidence of a crime of which the defendant had been acquitted was to be excluded on the defendant's retrial for another, related, crime. The court held that where a second conspiracy indictment filed against a defendant for conspiracy to distribute heroin in reality related to the same conspiracy of which the defendant had been acquitted in an earlier prosecution, necessitating the reversal on double jeopardy grounds of the conviction obtained in the second prosecution, the defendant was also entitled to a reversal of his conviction, also obtained in the second prosecution, on a substantive count of heroin possession, with evidence of the conspiracy to be excluded by collateral estoppel from the retrial of the substantive charge. The prosecution argued that even absent the erroneously admitted conspiracy evidence there was still sufficient evidence in the record to support the conviction on the substantive count, while the defendant argued that had the lower court properly applied the doctrine of collateral estoppel, thereby excluding the conspiracy evidence, the remaining evidence would not have been sufficient to send the case to the jury. The court in ordering a new trial held that there was no basis for determining what evidence the jury relied on in reaching its verdict of guilty since the trial judge had not instructed the jury that if they found no conspiracy they should not consider the conspiracy evidence in resolving the substantive count.

Although the indictment, in an earlier protection racket conspiracy prosecution resulting in acquittal, had alleged as an overt act a battery by the

42. See *United States v Phillips* (1968, CA7 Ill) 401 F2d 301.

defendant as part of a pattern of extortionate activity, the government was not collaterally estopped from introducing evidence of the battery, to assist in proving elements of the offenses charged, at the subsequent trial of charges involving extortionate credit transactions, the court held, in *United States v De Vincent* (1980, CA1 Mass) 632 F2d 147, cert den 449 US 986, 66 L Ed 2d 249, 101 S Ct 405. The court affirmed the defendant's convictions for violations of 18 USCS §§ 892 and 894. In reaching the conclusion that the prior acquittal did not operate as an estoppel, the court observed that in light of the jury instructions at the earlier trial a jury could have found either that the beating took place but for a purpose unrelated to the charged conspiracy, or that it took place for the purpose alleged but that there was no conspiracy, and that the significance of the beating in the present case was, first, that it took place, and second, its connection with the charged extortionate loans unrelated to the protection racket.

Though an early Delaware case⁴³ had held evidence of an acquitted offense admissible while adding that the weight of such evidence would then be totally destroyed by the admission, also authorized, of evidence of the acquittal, the court, in *State v Heitter* (1964, Sup) 57 Del 595, 203 A2d 69, 9 ALR3d 195, in answering a question certified by the trial court, applied the doctrine of collateral estoppel, and held that the defendant's acquittal on charges of reckless and drunk driving operated as a finding that the conduct of the defendant on

the day in question did not constitute reckless driving and that the defendant was not driving while under the influence, and that, accordingly, those issues could not be relitigated at the defendant's trial on a charge of vehicular manslaughter, but that the trial could proceed on counts of the manslaughter indictment which charged that the defendant had been driving at an unsafe speed.

Though older Illinois decisions took a relevance approach to the question under annotation,⁴⁴ these cases were apparently disapproved, or characterized as stating only dictum, and the Illinois court's present position seems clearly to be represented, by its decision in *People v Haran* (1963) 27 Ill 2d 229, 188 NE2d 707, in which the court held that the state was estopped by the verdict of not guilty, returned by the jury at the previous trial of the defendant on a rape charge, from introducing evidence of intercourse, as part of the *res gestae*, at his subsequent trial under an indictment charging that on the same occasion and against the same victim he committed a crime against nature. The court stated that the doctrine of estoppel by verdict comes into effect only where it can be ascertained with certainty that the verdict in the first case necessarily determined a particular fact, but that here, since the rape indictment had charged "statutory rape" and the only fact necessary to support a conviction was that the defendant had intercourse with the victim, it could be stated with assurance that the verdict of not guilty amounted to a determination by the jury that the defendant

43. *State v Tindal* (1854) 5 Del 488.

44. See *Nagel v People* (1907) 229 Ill 598, 82 NE 315; *People v Andrae* (1922) 305 Ill 530, 137 NE 496; *People v Bartz*

(1930) 342 Ill 56, 173 NE 779; *People v Kidd* (1934) 357 Ill 133, 191 NE 244 (ovrld on other grounds *People v Love* (1968) 39 Ill 2d 436, 235 NE2d 819).

did not have intercourse with the prosecutrix. The defendant's conviction was reversed.⁴⁵

Although in an earlier case,⁴⁶ the Kansas Supreme Court had stated and applied the rule that otherwise competent evidence of another offense is not rendered inadmissible by the fact of an acquittal, more recently the court held, in *State v Irons* (1981) 230 **Kan** 138, 630 P2d 1116, that when a prior similar offense is offered as evidence of a particular issue of material fact and the defendant was previously tried and acquitted of the offense based on a determination of that issue, collateral estoppel nullifies the probative force of the evidence of the former offense and such evidence should not be admitted. At the defendant's trial, for robbery, the prosecution had been allowed to introduce evidence, to show plan and identity, that the defendant had committed a similar robbery of which he had been acquitted. The court held that since, at the prior trial, the defendant had steadfastly denied committing the crime and had presented an alibi, the issue of his identity had been squarely presented and the issue of his participation in that offense had been settled. The defendant's conviction was reversed.

Though an isolated earlier Maryland case⁴⁷ had held the doctrine of collateral estoppel inapplicable to the question under annotation, the court, in *Wise v State* (1981) 47 **Md App** 656, 425 A2d 652, cert den 454 US 863, 70 L Ed 2d 163, 102 S Ct 322, representing the current Maryland position, stated, as the governing

principle, that when it appears substantially certain that a jury has already decided a fact essential to conviction in the accused's favor, that particular fact may not be relitigated at a subsequent trial for a separate crime. The court noted that the state supreme court, in *Powers v State* (1979) 285 **Md** 269, 401 A2d 1031, cert den 444 US 937, 62 L Ed 2d 197, 100 S Ct 288, supra, while not called on to directly resolve the issue, had clearly indicated that it would interpret the doctrine of collateral estoppel as not distinguishing between ultimate facts and evidentiary facts for purposes of relitigation. Rejecting the argument that collateral estoppel operates automatically to bar all evidence of a crime of which a defendant has previously been acquitted, the court held that the doctrine in fact bars only such evidence as contradicts facts necessarily resolved in the defendant's favor by the prior verdict. Applying this analysis to the contention of the defendant in a murder prosecution that the admission of certain testimony had violated the doctrine of collateral estoppel because it pertained to a charge of conspiracy to commit murder of which he had previously been acquitted, the court held that the state was not estopped to present the contested evidence. The judgment of conviction was affirmed.

Although an early New York case⁴⁸ held that a defendant's acquittal of another offense was immaterial with respect to the admissibility of evidence of the other offense, the court, in *People v Cornier* (1964) 42 Misc

45. In *People v Butler* (1975) 31 **III App 3d** 78, 334 NE2d 448, the court, in holding collateral estoppel inapplicable under the facts there presented, seemed to reject *Haran*, without elaboration.

46. *State v Darling* (1966) 197 **Kan**

471, 419 P2d 836.

47. *Boblits v State* (1969) 7 **Md App** 391, 256 A2d 187.

48. *Re Smith* (1818) 4 **NY City Hall Rec** 166.

2d 963, 249 NYS2d 521, in holding that a prosecution for driving while intoxicated was barred by the collateral estoppel effect of the defendant's prior acquittal on a charge of driving without a license, since the question of whether or not the defendant was operating an automobile had clearly been at issue and resolved in the defendant's favor at the prior trial, also noted that although a judgment in a former criminal prosecution may be res judicata with respect to specific facts or issues determined therein, it will not bar subsequent prosecution unless the facts or issues so determined are necessarily decisive in the second prosecution. The court thereby appears to recognize that collateral estoppel may operate to affect the admissibility of evidence even where the issues assertedly precluded are of only an evidentiary nature with respect to the charges in the second prosecution.

Although an early North Carolina case held collateral estoppel inapplicable to the question under annotation,⁴⁹ more recently the North Carolina Supreme Court applied the doctrine of collateral estoppel in a similar context, in *State v McKenzie* (1977) 292 NC 170, 232 SE2d 424. In that case the court held that the issue of whether the defendant in a vehicular manslaughter prosecution was intoxicated on the occasion in question had necessarily been answered in his favor by a jury verdict of acquittal in a previous prosecution for driving un-

der the influence, and the state was therefore estopped to submit the drunk driving statute to the jury as one possible gravamen, among others, for the involuntary manslaughter charge. The court held, however, that the defendant had waived this defense of res judicata by failing to object below, and affirmed the conviction. The court interpreted the doctrine of collateral estoppel to mean that the acquittal of a defendant precludes the state from relitigating in a subsequent prosecution any issue necessarily decided in favor of the defendant by the former acquittal, apparently making no distinction between the ultimate and evidentiary use of such facts.

Although earlier Texas cases had applied other rules,⁵⁰ the current Texas rule is stated in *Stuart v State* (1978, *Tex Crim*) 561 SW2d 181, in which a rape conviction was reversed by the court because of the erroneous admission, over defense objection, of evidence concerning a prior occurrence involving an alleged rape of which the defendant had been tried and acquitted. The court held that any application of an exception to the rule against admission of extraneous offenses must necessarily be to an occurrence which has not already been conclusively established by verdict of acquittal to have not been an extraneous offense in the first place. The court cited with approval cases from other jurisdictions interpreting the collateral estoppel doctrine to

49. *State v Jesse* (1838) 20 NC 95 (ovrld on other grounds *State v Birkhead*, 256 NC 494, 124 SE2d 838, 6 ALR3d 888).

50. In *Ivey v State* (1875) 43 *Tex* 425, the court apparently held that evidence of another offense of which the defendant had previously been acquitted is admissi-

ble only if the charged and uncharged offenses arose from the same transaction. And in *McDowell v State* (1941) 142 *Tex Crim* 530, 155 SW2d 377, the court seemed to state that in the context of a trial for unlawful possession of liquor for sale, evidence of prior sales is never admissible where the defendant has been acquitted of the sales.

preclude the evidentiary as well as the ultimate use of previously litigated facts, but undertook no analysis of what facts in the present case had necessarily been determined by the prior verdict of acquittal.

Likewise, the collateral estoppel principle was held to have been violated, in *Dedrick v State* (1981, **Tex** Crim) 623 SW2d 332, where the prosecution at a robbery trial was allowed to introduce a witness' testimony that had necessarily been rejected by the jury which had previously acquitted the defendant of a subsequent robbery. The court cited *Stuart v State* (1978, **Tex** Crim) 561 SW2d 181, *supra*, for the proposition that the admissibility of the evidence was to be determined by application of the doctrine of collateral estoppel, and, accordingly, that the circumstances of the prior acquittal had to be analyzed to determine whether the issue assertedly precluded was, in fact, necessarily resolved. At the prior trial the robbery victim had positively identified the defendant as the robber and testified that during the struggle he had seized a gun from the defendant, which gun was introduced into evidence. The defense was an alibi and the defendant was acquitted. At the second trial, the same witness was allowed to testify that he had obtained a pistol from the defendant 2 days after the charged robbery, and that pistol was linked to the charged offense by a wood chip from the handle found at the scene. The court held that the fact established against the state at the first trial was that the defendant was not the individual from whom the witness had obtained the pistol, and the prosecution was therefore estopped to introduce the same testimony at the second trial.

Although an earlier Virginia case⁵¹ had approved the admission of evidence of another crime despite an acquittal and without reference to the doctrine of collateral estoppel, the court, in *Simon v Commonwealth* (1979) 220 **Va** 412, 258 SE2d 567, interpreted the doctrine of collateral estoppel to mean that the government is barred from introducing evidence to prove an offense for which a defendant has been previously acquitted, even though the facts necessarily resolved in the acquittal are not dispositive of an element of the offense charged in the second trial. Applying the doctrine to the present case, and concluding that the issue of the defendant's intoxication at the time of the accident which gave rise to the present prosecution for vehicular manslaughter had necessarily been decided in the defendant's favor by his previous acquittal on a charge of operating a motor vehicle while under the influence of alcohol, the court held that the prosecution should have been barred from presenting evidence to show that the defendant was intoxicated while operating the motor vehicle. The court reversed the defendant's conviction, remanding the case for further proceedings, and noting that the retrial of the defendant for involuntary manslaughter was not barred since, to support the charge, the prosecution could show other acts of criminal negligence proving that the defendant operated his car in callous disregard of the rights of others.

IV. Unsettled jurisdictions on rule for determining admissibility

§ 7. Ninth Circuit cases

Some decisions by the Ninth Cir-

⁵¹ *Taylor v Commonwealth* (1947) 186 **Va** 587, 43 SE2d 906.

cuit Court of Appeals have applied the doctrine of collateral estoppel, or *res judicata*, to the question under annotation, while others have taken the relevance approach, either without reference to collateral estoppel or briefly noting its inapplicability. Thus, in the following cases, the court applied, or recognized the applicability of, the doctrine of collateral estoppel to the question under annotation.

Evidence of an occasion on which heroin had been found in the defendant's car, probative on the issue of the defendant's knowledge in connection with the charged crime of facilitating the transportation and concealment of heroin, was not rendered inadmissible by the fact that the defendant had earlier been acquitted of a similar charge relating to the disputed evidence, the court held, in *Hernandez v United States* (1966, CA9 Cal) 370 F2d 171, and affirmed the defendant's conviction. The court acknowledged that the doctrine of *res judicata* applies to criminal proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different, but stated that since the record disclosed nothing more than the fact of acquittal, the verdict had been a general one, and since there was therefore no way to ascertain its basis, it could not be urged that the verdict operated as an estoppel as to the specific facts or issues the defendant sought to exclude. The court stated that despite the acquittal, therefore, the matter of admission of the disputed evidence had been addressed to the sound discretion of the trial judge, and that his conclusion concerning the relevancy of the evidence, together with his repeated limiting instructions, had not constituted an abuse of discretion.

Similarly, in *United States v Powell*

(1980, CA9 Cal) 632 F2d 754, the court recognized the applicability of the doctrine of collateral estoppel where, after the defendant had been acquitted at a previous trial on a charge of possession of marijuana with intent to distribute, the government sought to allege, as two of ten overt acts alleged in an indictment for conspiracy to possess and distribute marijuana, that the defendant had made and received payment for a delivery of marijuana which had been one of the bases of the previous prosecution. Although noting that a nonappealable order of the trial court, refusing to strike the contested overt act allegations, was involved, and that it therefore lacked jurisdiction to rule squarely on the issue, the court clearly indicated its view that the government was barred from alleging the overt acts in question since the defendant's earlier acquittal had necessarily been based on a jury finding that the government had failed to prove its case as to the defendant's possession of the marijuana involved in that delivery. But the court affirmed the denial of the defendant's motion to dismiss the indictment in its entirety, noting that eight of the overt acts alleged involved issues not necessarily litigated at the earlier trial.

However, in the following cases, the court took the relevance approach to the question under annotation, either without reference to collateral estoppel or explicitly holding the doctrine inapplicable.

In *Himmelfarb v United States* (1949, CA9 Cal) 175 F2d 924, 49-1 USTC ¶9313, cert den 338 US 860, 94 L Ed 527, 70 S Ct 103, notwithstanding the defendant's acquittal on charges of income tax evasion in 1942 and 1943, testimony as to tax evasion in those years was held admissible at the defendant's trial on a

charge of income tax evasion in 1944, where the evidence was admitted, not to show that the defendant had committed another crime, but merely to show his intent to act willfully, and his state of mind. The conviction was affirmed. The court also mentioned as an additional basis of its decision that the defendant had made no reference in his briefs as to what specific evidence was or was not assertedly prejudicial, and stated that the court had no duty to seek through the record and speculate as to what portions thereof the defendant was seeking to have declared prejudicial.

Evidence presented in the course of the trial on a charge of assault with intent to commit murder that, on the same occasion, the defendant had shot and killed the assault victim's sister was admissible as part of the overall occurrence, and to explain the circumstances of the crime, to show that the assault had not been a mistake or accident, and as relevant to the issue of intent, the court held, in *Buatte v United States* (1965, CA9 Ariz) 350 F2d 389, cert den 385 US 856, 17 L Ed 2d 83, 87 S Ct 104, affirming the conviction, notwithstanding the fact that a murder conviction relating to the sister's death had been set aside on appeal and a verdict of acquittal entered for failure of the government to maintain its burden of proving beyond a reasonable doubt the defendant's sanity at the time the sister was killed. The court noted that in its view the doctrine of collateral estoppel had no application to the question at issue.

The admission of evidence, in a

state rape prosecution, of a prior rape of which the defendant had been acquitted, for the purpose of showing a peculiar or characteristic behavior pattern manifested in the conduct of the perpetrator of both crimes, did not deprive the defendant of any constitutional right, the court held, in *Crisafi v Oliver* (1968, CA9 Cal) 396 F2d 293, cert den 393 US 889, 21 L Ed 2d 167, 89 S Ct 208,⁵² affirming the denial of the defendant's application for a writ of habeas corpus. The court noted that in the absence of constitutional overtones, state trial court rulings on the admissibility of evidence cannot be questioned in a federal habeas corpus proceeding.⁵³

At the trial of a marijuana smuggling charge, the trial judge did not abuse his discretion in permitting the prosecution to present evidence that on a prior occasion the defendant had been arrested at the Mexico-United States border when 237 kilos of marijuana had been discovered in hidden compartments of the truck he had sought to drive into California, notwithstanding the fact that the ensuing prosecution of the defendant on that occasion had resulted in a verdict of not guilty, the court held, in *United States v Castro-Castro* (1972, CA9 Cal) 464 F2d 336, cert den 410 US 916, 35 L Ed 2d 278, 93 S Ct 971, and affirmed the defendant's conviction. The disputed evidence had been admitted as relevant to the issue of the defendant's intent, and, the court emphasized, the trial judge carefully instructed the jury that the evidence could be considered solely for the purpose of determining whether the defendant on the present occasion

52. For the earlier state court decisions relating to this conviction, see § 5, *supra*.

53. It should be noted that this decision predated the holding of the United States

Supreme Court in *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189, that the doctrine of collateral estoppel is an element of the Fifth Amendment protection against double jeopardy.

had acted willfully or innocently. On the occasion of both arrests, the defendant had denied knowledge of the presence of the marijuana, later testifying at each trial that he had been paid to drive the subject vehicle into California. The court gave no special importance to the fact of the acquittal, discussing only general principles of the admissibility of evidence of other crimes, and the factors to be considered in weighing relevance against possible unfair prejudice.

In a prosecution for conspiracy to steal, conceal, and sell government property, the trial court did not err, the court held, in *United States v Moore* (1975, CA9 Cal) 522 F2d 1068, cert den 423 US 1049, 46 L Ed 2d 637, 96 S Ct 775, in admitting into evidence, over defense objection, the testimony of two government witnesses who told of the defendant's alleged participation in a prior, similar conspiracy, notwithstanding the fact that the defendant had been acquitted of that charge by a jury. The court held that the testimony was admissible to show the knowledge and intent with which the defendant acted during the charged conspiracy, and emphasized that the trial judge's careful limiting instructions undoubtedly minimized, if they did not eliminate, any unfair prejudice that might have accrued. The court did not specifically address itself to the effect, if any, of the acquittal on the admissibility of the testimony.

In a prosecution for possession of marijuana with intent to distribute, there was no error, the court held, in *United States v Rocha* (1977, CA9 Ariz) 553 F2d 615, in the admission of evidence that the defendant had previously been arrested for transportation of marijuana notwithstanding the fact that the defendant had been acquitted at the trial of that charge.

970

The court held that the trial court had not abused its discretion when it decided that the tendency of the disputed evidence to prove the essential elements of knowledge and intent outweighed its potential prejudice. The court did not specifically discuss the effect of the acquittal in the balancing process, pointing out that the facts and its conclusion were nearly identical to those in *United States v Castro-Castro* (1972, CA9 Cal) 464 F2d 336, cert den 410 US 916, 35 L Ed 2d 278, 93 S Ct 971, *supra*. The court rejected the defendant's argument that the two cases were distinguishable because in *Castro* the defendant in both trials had presented the same defense, that he had been ignorant of the presence of the contraband in the vehicle he was driving, while in the present case the defendant had offered different exculpatory explanations at the two trials.

§ 8. Washington cases

While in one case the Washington Supreme Court applied collateral estoppel in determining the admissibility of evidence which had previously been presented at a trial resulting in the defendant's acquittal, in another case the court stated the rule that an acquittal goes only to the weight and not to the admissibility of such evidence, and the latter rule was quoted and followed in one intermediate appellate court decision.

The court, in *State v Peele* (1968) 75 Wash 2d 28, 448 P2d 923, recognized the application of the doctrines of res judicata and collateral estoppel to criminal cases, and applied the doctrine of collateral estoppel in determining that there had been no error in the admission as exhibits in a robbery prosecution of a rifle and shells, and of a knotted nylon stocking which had been found at the

scene of a subsequent robbery for which the defendant had previously been acquitted. The court stated that it was impossible to say that the verdict of acquittal had necessarily determined that the exhibits had not been in the defendant's control even at the time of the subsequent robbery, and certainly the acquittal did not determine that the exhibits had not been in his possession 9 days earlier at the time of the charged offense. The exhibits were connected to the charged offense by the testimony of witnesses that the defendant, positively identified, had carried a rifle and that the robbers wore stocking masks.

However, in *State v Russell* (1963) 62 Wash 2d 635, 384 P2d 334, the court held, in a prosecution for burglary and grand larceny, that the testimony of a prosecution witness that the defendant had offered her \$40 to leave town so she would not be available as a witness, relevant as showing a consciousness of guilt, was properly admitted notwithstanding the fact that the defendant had been acquitted on a charge, based on the same testimony, of tampering with the witness. The court held that the fact of acquittal of a criminal offense of which evidence is offered does not affect its admissibility but goes only to its weight. The conviction was affirmed.

In holding that the trial judge in a prosecution for assault did not abuse his discretion in rejecting the defendant's offer to prove that he had been acquitted of a charge of driving while intoxicated, after evidence of that charge had been introduced by the prosecution, apparently without defense objection, the court, in *State v Farman* (1980) 27 Wash App 645, 621 P2d 737, recognized the rule stated in *State v Russell* (1963) 62 Wash 2d 635, 384 P2d 334, *supra*, that the fact of acquittal of the crimi-

nal offense of which evidence is offered does not affect its admissibility but goes only to its weight.

V. Defendant's right to prove acquittal if evidence admitted

§ 9. Where collateral estoppel test applied

The following cases state the rule that where the application of the doctrine of collateral estoppel has resulted in a determination that evidence of another offense is admissible notwithstanding the defendant's previous acquittal of that offense, the defendant is not entitled to prove his acquittal.

In *United States v Viserto* (1979, CA2 NY) 596 F2d 531, cert den 444 US 841, 62 L Ed 2d 52, 100 S Ct 80, a case otherwise outside the scope of this annotation because it involved contested evidence that did not reveal another offense, *per se*, it was stated that although a judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or collateral estoppel, once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence relating to another offense that was admitted. In support of this rule, the court observed that Rule 803(22) of the Federal Rules of Evidence excepts from the operation of the hearsay rule only judgments of conviction, not judgments of acquittal.

The same rule was stated in identical language in *United States v Kerley* (1981, CA5 Fla) 643 F2d 299, a case in which the defendant had sought to introduce proof of his acquittal of a prior related offense even though the prosecution had not sought or been

allowed to introduce evidence of the prior offense.

See *Petrucelli v Smith* (1982, WD NY) 544 F Supp 627, in which the court applied the collateral estoppel test, and held that the trial judge in a murder prosecution committed reversible error in permitting the prosecution to introduce extensive evidence relating to the killing of a second victim in the same shootout of whose murder the defendant had previously been acquitted, and in permitting the prosecution to re-argue the defendant's criminal intent with respect to the other killing, but in which the court also appeared to state that in light of the impossibility, otherwise, of developing a complete picture of the charged crime, it would have been proper to permit the prosecution to introduce limited evidence of the other killing had the jury been informed of the fact of the defendant's acquittal, and had the prosecution's argument and the instructions made clear the parameters of the jury's obligation to consider the evidence of the other killing. The court did not formally reach this issue, however, noting that in light of the possibility that the outcome of an evidentiary hearing ordered on other grounds might dictate entry of judgment in the defendant's favor, it was unnecessary at the present time to determine what exact procedures should be followed at a possible re-

trial to vitiate the detrimental impact of the evidence of the other killing.

§ 10. Where rule of relevance followed

[a] View that defendant entitled to prove acquittal

In the following cases, applying the rule of relevance in determining the admissibility of evidence of another offense in light of the defendant's acquittal of that offense, it was held or recognized that if the evidence is admitted the defendant is entitled to inform the jury of the fact of the acquittal.⁵⁴

US—*Pilcher v United States* (1902, CA5 Ala) 113 F 248 (by implication).

Ala—*Mitchell v State* (1903) 140 Ala 118, 37 So 76; *Ex parte Bayne* (1979, Ala) 375 So 2d 1239, on remand (Ala App) 375 So 2d 1244.

Cal—*People v Griffin* (1967) 66 Cal 2d 459, 58 Cal Rptr 107, 426 P2d 507; *People v Beamon* (1973) 8 Cal 3d 625, 105 Cal Rptr 681, 504 P2d 905.

People v Fox (1954) 126 Cal App 2d 560, 272 P2d 832 (by implication); *People v Simms* (1956, 1st Dist) 144 Cal App 2d 189, 300 P2d 898 (by implication); *People v Lancaster* (1957, 1st Dist) 148 Cal App 2d 187, 306 P2d 626 (by implication); *People v Jenkins* (1970, 1st Dist) 3 Cal App 3d 529, 83 Cal Rptr 525.

Conn—*State v Anonymous* (1978) 34 Conn Supp 689, 389 A2d 1270.⁵⁵

54. Cases stating this rule have been included from jurisdictions which formerly applied the relevance approach to the determination of admissibility as well as from those jurisdictions which have continued to do so. Cases applying the relevance approach have also been included from jurisdictions unsettled with respect to the method for determining admissibility.

55. The court in this case was not

called on squarely to address the question of the method to be followed in determining the admissibility of evidence of another offense in light of the defendant's previous acquittal thereof, but cites with approval cases—from jurisdictions taking the relevance approach to such determinations—which state that if such evidence is admitted the defendant should be allowed to prove his acquittal.

Ga—*Dandridge v State* (1964) 109 Ga App 33, 134 SE2d 814.

Iowa—*State v Norman* (1907) 135 Iowa 483, 113 NW 340 (by implication); *State v Pierson* (1927) 204 Iowa 837, 216 NW 43; *State v Leahy* (1952) 243 Iowa 959, 54 NW2d 447; *State v Washington* (1977, Iowa) 257 NW2d 890, cert den 435 US 1008, 56 L Ed 2d 390, 98 S Ct 1881.

Md—*Nolan v State* (1957) 213 Md 298, 131 A2d 851.

Womble v State (1969) 8 Md App 119, 258 A2d 786.

Mo—*State v Millard* (1922, Mo) 242 SW 923.

Mont—*State v Hopkins* (1923) 68 Mont 504, 219 P 1106.

Neb—*Koenigstein v State* (1917) 101 Neb 229, 162 NW 879.

NY—*People v Chang* (1976) 86 Misc 2d 272, 382 NYS2d 611.

NC—*State v Calloway* (1966) 268 NC 359, 150 SE2d 517.

Or—*State v Smith* (1975) 271 Or 294, 532 P2d 9.

Pa—*Commonwealth v Manuszak* (1944) 155 Pa Super 309, 38 A2d 355 (by implication).

SC—*State v Houston* (1829) 17 SCL 300 (by implication).

Tex—*Ivey v State* (1875) 43 Tex 425.⁵⁶

Va—*Taylor v Commonwealth* (1947) 186 Va 587, 43 SE2d 906 (by implication).

Wash—*State v Russell* (1963) 62 Wash 2d 635, 384 P2d 334⁵⁷ (by implication).

State v Tarman (1980) 27 Wash

App 645, 621 P2d 737 (by implication).

In a prosecution for assault with intent to murder, the trial court erred in refusing to allow the defense to prove that an earlier prosecution under an indictment charging assault with intent to murder in connection with the shooting on the same occasion of the second victim had resulted only in a conviction for assault and battery, the fact of the shooting of the second victim having properly been allowed into evidence as part of the *res gestae*, the court held, in *Ex parte Bayne* (1979, Ala) 375 So 2d 1239, on remand (Ala App) 375 So 2d 1244, reversing the conviction. The court recited, as the general rule, that when testimony of another crime is admitted into evidence under one of the exceptions to the general exclusionary rule, the defendant should be allowed to show his acquittal of that crime, and the court held that the rule was applicable in the case under consideration because a conviction of a lesser included offense is an acquittal of the higher offense.

Although holding evidence of another offense to have been properly admitted despite an acquittal, the court, in *People v Griffin* (1967) 66 Cal 2d 459, 58 Cal Rptr 107, 426 P2d 507, set forth as to its facts in *supra* § 5, reversed the defendant's conviction of rape, holding that the trial court had erred prejudicially in excluding evidence that the defendant had been acquitted of the other of-

such determinations.

57. Washington decisions (§ 8, *supra*) are unsettled with respect to the method to be followed in determining the admissibility of evidence of another offense in light of the defendant's previous acquittal thereof.

56. The Ivey Case, applying the rule of relevance in determining the admissibility of evidence of another offense in light of the defendant's previous acquittal of that offense, is not in line with more recent Texas authority (§ 6, *supra*) holding that the doctrine of collateral estoppel governs

fense. The court rejected the state's contention that the acquittal was only the hearsay opinion of another fact finder based on evidence presented at another time and place, holding that whatever merit there may be to denying judgments' evidentiary value in other contexts, the rule should not be departed from that a properly authenticated acquittal is admissible to rebut prosecution evidence of guilt of another crime.

[b] View that defendant not entitled to prove acquittal

In the following cases, applying the rule of relevance in determining the admissibility of evidence of another offense in light of the defendant's acquittal of that defense, it was held or recognized that if the evidence is admitted the defendant is not entitled to inform the jury of the fact of the acquittal.⁵⁸

US—Nordgren v United States (1950, CA9 Alaska) 181 F2d 718.

Ind—McCartney v State (1852) 3 Ind 353.

Mich—People v Bolden (1980) 98 Mich App 452, 296 NW2d 613.

For contrary Michigan authority, see *infra*.

NJ—State v Schlue (1974) 129 NJ Super 351, 323 A2d 549.

ND—State v Heaton (1927) 56 ND 357, 217 NW 531.

Wash—State v Tarman (1980) 27 Wash App 645, 621 P2d 737.

Wis—State v Feela (1981, App) 101 Wis 2d 249, 304 NW2d 152.

Although other Michigan cases, without directly addressing the issue,

had implied approval of trial court rulings permitting defendants to prove their acquittals of other crimes,⁵⁹ the court, in *People v Bolden* (1980) 98 Mich App 452, 296 NW2d 613, held that there was no error in the exclusion of evidence of the defendant's acquittal of an offense evidence of which had been properly admitted on the issue of identity at the defendant's rape trial. The court stated that it was inclined to agree with the trial court's ruling that earlier verdicts pertaining to evidence of similar acts are irrelevant. In order to justify admission of evidence of other crimes, the court explained, a prosecutor must produce evidence sufficient to show that the defendant probably committed the other acts, and if the prosecutor can satisfy that burden the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts. The court held that the defendant's rights were sufficiently protected by the trial court's limiting instructions concerning the purpose of testimony regarding similar acts. Furthermore, the court stated, the prejudicial impact of such testimony is not necessarily diminished when the jury is informed of the defendant's acquittal of the alleged offense.

After holding that the collateral estoppel doctrine does not bar the use of a previously litigated issue as an evidentiary fact in a subsequent trial, and rejecting the defendant's contention that the trial court had erred in admitting evidence of another offense of which he had previ-

trial judge's discretion.

⁵⁹ See *People v Oliphant* (1976) 399 Mich 472, 250 NW2d 443, and *People v Bolden* (1979) 92 Mich App 421, 285 NW2d 210, *infra* § 10[c].

⁵⁸ Included within this subsection are cases in which the court denied the existence of any right of the defendant to prove his acquittal only to the extent of characterizing the decision whether to permit him to do so as being within the

ously been acquitted, the court, in *State v Feela* (1981, App) 101 Wis 2d 249, 304 NW2d 152, set forth as to its facts in, supra § 5, also held that the trial court, on relevance grounds, correctly prevented the defendant from proving his prior acquittal of the other offense at issue. The court held that the previous jury's opinion was not a fact which in itself made the defendant's complicity in the other offense either more or less likely, pointing out that different juries may draw different conclusions from the same facts, and that a court cannot peer into a jury's collective mind to determine the basis on which its conclusions were founded. The court held as a matter of law that evidence of the defendant's acquittal of the other offense was not relevant at the present trial, particularly since the state sought to prove that the defendant performed the acts constituting the alleged other offense merely as one event in a long series of events taken in furtherance of the charged conspiracy.

[c] Admission of proof of acquittal apparently approved

In the following cases, applying the rule of relevance in determining the admissibility of evidence of another offense in light of the defendant's acquittal of that offense, the courts approved, or apparently approved, trial courts' rulings permitting defendants to inform the jury of the fact of their acquittal of the other offense at issue, but without stating any rule governing the admissibility of proof of the acquittal.

Mich—*People v Oliphant* (1976) 399 Mich 472, 250 NW2d 443.

People v Bolden (1979) 92 Mich App 421, 285 NW2d 210.

For contrary Michigan authority, see *infra*.

Mo—*State v Millard* (1922, Mo) 242 SW 923; *State v Varner* (1959, Mo) 329 SW2d 623, cert den 365 US 803, 5 L Ed 2d 460, 81 S Ct 468.

NJ—*State v Slocum* (1974) 130 NJ Super 358, 327 A2d 244.

Va—*Taylor v Commonwealth* (1947) 186 Va 587, 43 SE2d 906.

Although a subsequent Michigan decision⁶⁰ involving the same defendant stated agreement with a trial judge's ruling excluding, on relevance grounds, evidence that the defendant had been acquitted of the other offense at issue, the court, in *People v Bolden* (1979) 92 Mich App 421, 285 NW2d 210, after holding that evidence of another offense had met the requirements for admitting evidence of similar acts, and referring to the rule that the fact of a defendant's acquittal on charges arising out of the prior incident does not act as a bar to its admission, specifically noted that the prejudicial effect of the evidence had been minimized in the present case as the jury had been made aware of the defendant's previous acquittal.

In *State v Slocum* (1974) 130 NJ Super 358, 327 A2d 244, set forth as to its facts in, supra, § 5, the court noted, in rejecting the defendant's contention that the trial court had erred in admitting evidence of another offense since the defendant had been acquitted of that offense, that after the contested evidence was admitted the fact of the acquittal had been collaterally established, and that in cautioning the jury as to the limited purpose of the evidence, the trial judge had clarified for the jury the

60. *People v Bolden* (1980) 98 Mich App 452, 296 NW2d 613, supra § 10[b].

§ 10[c]

ADMISSIBILITY—OTHER OFFENSE
25 ALR4th 934

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nature of the previous charge and ings leading to the defendant's ac-
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Criminal Law, 369.1, 369.2, 369.7, 370,
371(1), 371(12), 372(1), 374, 878(3), 1169.11
Double Jeopardy, 100-104, 163
Judgment, 751

§ 1. Introduction

[b] Related matters

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity for which witness was arrested or charged, but not convicted—modern state cases. 28 ALR4th 505.

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

§ 3. Rationale of fundamental fairness

In prosecution for trafficking in cocaine, which was based on cocaine found in car that defendant was driving after police officers stopped car, observed marijuana cigarette, searched car and discovered cocaine, trial court erred in admitting evidence, over defense objection, concerning marijuana where defendant had already been acquitted of marijuana possession charge. It was not necessary for evidence of that charge to be admitted since lawful right of police to be where they were when cocaine was discovered was not at issue at time of trial. *Ledo v State* (1991, Fla App D3) 587 So 2d 632, 16 FLW D2681.

In burglary prosecution, state improperly raised fact that defendant had spent time in jail and, when defendant responded by demonstrating his acquittals, improperly established the specific charges of which defendant had been acquitted, requiring reversal of burglary conviction. *State v Reich* (1984) 66 Or App 862, 676 P2d 363.

§ 4. Rationale that prejudice necessarily outweighs probative value

In prosecution for possession and mailing of explosive, it was not abuse of discretion to deny admission of evidence of bomb incidents which were subject of defendant's prior mistrial and acquittal, district court having imposition to evaluate particularized prejudice of such evidence under all circumstances of litigation. *United States v Martinez* (1984,

94

CA10 Colo) 744 F2d 76, 16 Fed Rules Evid Serv 797, later proceeding (CA10 Colo) 771 F2d 424, mod, in part on other gnds, reh den, in part (CA10 Colo) 778 F2d 553, vacated (US) 90 L Ed 2d 333, 106 S Ct 1787.

Evidence of extraneous offenses is inherently prejudicial to accused, and any exception to general rule prohibiting admission of such evidence is grounded in fact that accused has committed an offense. An offense that has been tried and resulted in an acquittal necessarily would not be admissible as extraneous offense. *Kerbyson v State* (1986, Tex App Dallas) 711 SW2d 289.

§ 5. Rule of relevance

See *Dowling v United States* (1990, US) 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1, § 6.

Admission of evidence concerning prior charge of armed robbery, for which defendant had been tried and acquitted, was prejudicial in prosecution arising from single assault of young man and woman, especially where damaging testimony was compounded by use of prior offense evidence during closing argument and in jury instructions. *Albert v Montgomery* (1984, CA11 Ga) 732 F2d 865, 15 Fed Rules Evid Serv 1229.

In prosecution for criminal trespass, there was no merit to defendant's claim that trial court erred in allowing evidence of prior, uncharged misconduct that had resulted in defendant's trial and acquittal on charge of simple battery on victim of criminal trespass where state never introduced evidence of trial, where principal issues at trial were victim's identification of defendant as intruder and his motive for intruding, and where state had to prove as element of offense that victim had let defendant know that his presence was prohibited; assuming arguendo that evidence was improperly adduced, fact that it was elicited as much by defendant as by state invalidated it as subject of error. *Scott v State* (1989) 190 Ga App 359, 378 SE2d 738.

§ 6. Collateral estoppel test

Also holding or recognizing the applicability of the doctrine of collateral estoppel in determining the admissibility of evidence of another offense, otherwise relevant to some genuine issue in dispute, in light of defendant's acquittal of the other offense:

US—*United States v Gonzalez-Sanchez* (1987, CA1 Puerto Rico) 825 F2d 572, 23 Fed Rules Evid Serv 641, cert den (US) 98 L Ed 2d 508, 108 S Ct 510, later proceeding (CA1 Puerto Rico) 840 F2d 1022, 25 Fed Rules Evid

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744 F2d 76, 16 Fed Rules Evid Serv proceeding (CA10 Colo) 771 F2d 424, on other grounds, reh den, in part 778 F2d 553, vacated (US) 90 L Ed 1181, 107 S Ct 1787.

of extraneous offenses is inherently to accused, and any exception to prohibiting admission of such evidence is based in fact that accused has an offense. An offense that has been admitted in an acquittal necessarily is inadmissible as extraneous offense. State (1986, Tex App Dallas) 711

relevance

United States (1990, US) 107 S Ct 668, 29 Fed Rules Evid

evidence concerning prior robbery, for which defendant was acquitted, was prejudicial arising from single assault of woman, especially where robbery was compounded by use of force during closing arguments. Albert v Montalvo (Ga) 732 F2d 865, 15 Fed

criminal trespass, there was defendant's claim that trial evidence of prior trespass that had resulted in acquittal on charge of criminal trespass reduced evidence of trial, in trial were victim's testimony as intruder and his presence where state had to prove that victim had let presence was prohibited that evidence was that it was elicited by state invalidated by State (1989) 190

the applicability of collateral estoppel in determining evidence of another crime to some general principle of defendant's

Alvarez-Sanchez (1972, 23 Fed 1198 L Ed 2d 1198, reh den (CA1) 744 F2d 1198, 16 Fed Rules Evid

ment.

Serv 75 (arson prosecution; evidence of charge connected with another arson was inadmissible on collateral estoppel grounds, where defendant had been acquitted and evidence did not merely concern collateral fact); Feela v Israel (1984, CA7 Wis) 727 F2d 151 (prosecution for armed robbery, attempted murder, and conspiracy; prior acquittal of van theft; government estopped to use van theft as link in conspiracy charge).

Or—State v Garcia (1985) 74 Or App 649, 704 P2d 544, review den 300 Or 180, 708 P2d 1146 (robbery prosecution; prior acquittal for conspiracy based on failure to prove venue—evidence of agreement to commit robbery admissible).

The collateral estoppel component of the double jeopardy clause of the Federal Constitution's Fifth Amendment does not, in all circumstances, exclude relevant and probative evidence that is otherwise admissible under the Federal Rules of Evidence simply because that evidence relates to alleged criminal conduct for which a defendant has been acquitted; in the trial, for offenses under federal and Virgin Islands law, of a defendant who was accused of robbing a Virgin Islands bank while wearing a ski mask and carrying a small handgun, the admission of testimony by a witness who stated that a man later revealed to be the defendant had entered her home 2 weeks after the bank robbery, wearing a different-colored knitted mask and carrying a small handgun and accompanied by another man who had allegedly been involved in the bank robbery, is not barred by the collateral estoppel component of double jeopardy, even though the defendant had been acquitted of charges arising from that intrusion, since (1) the prior acquittal did not determine an ultimate issue in the case at hand, (2) even assuming that the acquittal established that there was a reasonable doubt that the defendant had in fact been the masked man who entered the witness' home, the prosecution did not have to establish this fact beyond a reasonable doubt in order to make such evidence of prior acts relevant under Rule 404(b) of the Federal Rules of Evidence, and a jury could reasonably conclude that the defendant had been that intruder even if the jury did not believe beyond a reasonable doubt that the defendant had committed the crimes charged with regard to that incident, and (3) even if the lower burden of proof with regard to the admission of the testimony at the bank robbery trial did not avoid the application of collateral estoppel, the defendant has not sustained his burden of demonstrating that his acquittal in the other trial represented a jury determina-

tion that he had not been one of the men who entered the witness' house. Dowling v United States (1990, US) 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1.

In prosecution on three-count indictment alleging (1) possession of marijuana with intent to distribute; (2) importation of marijuana; and (3) conspiracy to import marijuana; in which jury returned verdict acquitting defendant on two substantive counts, but could not reach verdict on conspiracy count, government was collaterally estopped from introducing, in retrial on conspiracy charge, evidence regarding purchase, packaging, transportation or importation of marijuana, where, in acquitting defendant on substantive counts, jury must necessarily have found that defendant lacked knowledge of presence of marijuana. United States v Seley (1992, CA9 Ariz) 957 F2d 717, 92 CDOS 1514, 92 Daily Journal DAR 2469.

In prosecution of savings and loan association employee for conspiracy to defraud and aiding and abetting embezzlement of funds from association, jury verdict acquitting employee of substantive count but failing to reach decision on conspiracy count (on which district court then declared mistrial) was consistent since, after excluding evidence necessary for acquittal on substantive count, there was sufficient evidence to raise some doubts about employee's guilt or innocence on conspiracy count; though government could retry employee on conspiracy count, collateral estoppel would require exclusion of evidence of substantive crime. United States v Corley (1987, CA11 Fla) 824 F2d 931.

Evidence of defendant's prior narcotics sales and narcotics-related telephone calls was properly introduced in defendant's trial on various narcotics conspiracy charges, notwithstanding his prior acquittal on substantive charges relating to those sales and telephone calls, where acquittal had been on entrapment grounds, with jury deciding that defendant had committed acts necessary for criminal liability but had lacked necessary intent, and where, in subsequent trial, government was not trying to prove guilt from prior acts but rather sought to introduce them to satisfy overt act element of conspiracy charge. United States v Davis (1987, CA6 Mich) 809 F2d 1194, 22 Fed Rules Evid Serv 567, cert den (US) 97 L Ed 2d 740, 107 S Ct 3234 and (disagreed with United States v Thompson (CA9 Cal) 827 F2d 1254).

In prosecution for tax evasion, government was collaterally estopped from relitigating defendant's former involvement in drug trafficking, of which charge he had already been

acquitted. *United States v Crispino* (1984, DC NJ) 586 F Supp 1525.

In prosecution for firearms violations of defendant previously acquitted on drug trafficking conspiracy charges arising from same activities, evidence initially produced at conspiracy trial would be admissible at firearms violations trial, where presence of defendant at locations where firearms had been recovered and telephone calls between individual locations did not have to be established beyond reasonable doubt at firearms violations trial, and where evidence of surveillance and telephone records were collateral to elements of firearms violations. *United States v Salamone* (1990, CA3 Pa) 902 F2d 237, 30 Fed Rules Evid Serv 324.

Evidence of crimes as to which defendant has previously been acquitted, and concerning which prior jury demonstrably harbored reasonable doubt, should be excluded on retrial under doctrine of collateral estoppel where it would establish element of charged offense and could therefore form basis of conviction. Accordingly, where defendant was charged with conspiracy to commit murder and being an accessory to murder, and where jury acquitted defendant of accessory charge, but could not reach verdict on conspiracy charge, in retrial of conspiracy charge, collateral estoppel doctrine precluded admission of evidence from first trial, which, if believed, would have established defendant's guilt of being accessory to murder and would also have established that, intending that crime of murder be performed, she entered into conspiracy with perpetrator. *State v Aparo* (1992) 223 Conn 384, 614 A2d 401, cert den (US) slip op (citing annotation).

Where defendant was tried as aider and abettor for (1) armed first-degree burglary; (2) armed assault with intent to kill; (3) armed first-degree felony murder; (4) armed first-degree premeditated murder; (5) possession of firearm during commission of crime of violence or dangerous crime; and (6) two counts of carrying pistol without license (CPWL); and where jury acquitted defendant on one CPWL charge but was unable to reach verdict on remaining charges, collateral estoppel principals did not bar evidence regarding pistols, which had been carried by defendant's alleged confederates, at defendant's retrial on first five counts. *Halicki v United States* (1992, Dist Col App) 614 A2d 499.

In armed robbery prosecution, admission of evidence of defendant's previous participation in another armed robbery, of which defendant had been acquitted, was barred by collateral estoppel and was reversible error where ac-

quittal was based on determination that defendant was not perpetrator and where it could not be said that evidence of prior offense did not contribute to conviction. *Moore v State* (1985) 254 Ga 674, 333 SE2d 605, on remand 176 Ga App 314, 336 SE2d 619 (citing annotation; overruling *Taylor v State* and Court of Appeals cases which relied on *Taylor* (see *Rivers v State*, *Jenkins v State*), § 5 to extent they hold that evidence of other offense of which defendant has been acquitted is admissible even though issue of defendant's identity as perpetrator was resolved in favor of defendant in trial on other offense).

In prosecution for burglary in which victim testified that defendant had come into her bedroom partially clothed and had held her on bed, it was error to permit State to prove defendant's intent to commit rape by having victim of previous Florida incident testify that defendant had raped her after breaking into her bedroom where previous incident had been relevant, if at all, only if defendant had raped previous victim, not if he had merely engaged in consensual intercourse, and that issue had been resolved in his favor by acquittal on sexual battery charge (offense similar to Georgia crime of rape) in previous prosecution. *Salcedo v State* (1989) 258 Ga 870, 376 SE2d 360.

In prosecution for aggravated assault, it was error to permit evidence of previous incident in which defendant had attacked someone where, at trial on first incident, defendant's intent had been very much at issue and her acquittal, on grounds of insanity, was determination that she had acted without criminal intent, but jury in subsequent trial was in effect permitted, in comparing the two incidents, to determine that defendant had made first attack with criminal intent, thus relitigation issue and subjecting defendant to double jeopardy. *Riley v State* (1987) 181 Ga App 667, 353 SE2d 598.

In prosecution for kidnapping and rape, it was reversible error, by virtue of collateral estoppel doctrine, to admit evidence of alleged prior, similar criminal transaction for which defendant had been tried and acquitted where state's purpose in putting alleged prior victim on stand had been to establish that defendant had committed offense and thus to relitigate prior case; state's attempt to justify evidence as being for impeachment purposes was without merit since inconsistent testimony by defendant had been triggered by state's attempt to relitigate prior case. *Banks v State* (1988) 185 Ga App 851, 366 SE2d 228.

Doctrine of collateral estoppel did not preclude admission of evidence of death of mur-

dered girl's male companion at defendant's trial for girl's murder, though defendant had earlier been acquitted on charge of murdering companion, where earlier acquittal did not preclude all knowledge on defendant's part of circumstances of companion's death, and it was such knowledge that prosecution sought to use to indicate possible motive and implication in girl's death. *State v Paradis* (1983) 106 Idaho 117, 676 P2d 31, cert den (1984) 468 US 1220, 82 L Ed 2d 888, 104 SCt 3592, later proceeding (1986) 110 Idaho 534, 716 P2d 1306, habeas corpus proceeding (DC Idaho) 667 F Supp 1361, affd in part and revd in part on other grounds (CA9 Idaho) 954 F2d 1483, 92 CDOS 660, 92 Daily Journal DAR 1066.

In defendant's first trial, in which he was acquitted on charge of robbing victim who claimed robbery took place in gas station, issue of whether defendant had been at gas station was necessarily decided since, as issues were framed at trial, acquittal necessarily decided that victim and defendant met in park, as defendant claimed; thus, in defendant's second trial, on charge of robbing another victim on same date and at similar time and place, collateral estoppel precluded admissibility of testimony by first victim placing defendant at gas station, and, in view of testimony's importance, its admission was reversible error. *People v Acevedo* (1987) 69 NY2d 478, 515 NYS2d 753, 508 NE2d 665.

Trial court properly granted defense motion in limine excluding evidence that murder defendant had intent to kill victim arising from victim's involvement with woman who was defendant's former girlfriend and mother of his child, and from victim's alleged threats to kill defendant, where jury in prior trial, instructed that intent to kill distinguished first-degree murder from third-degree murder, acquitted defendant of first-degree murder and convicted him of third-degree murder (later reversed), since jury necessarily resolved intent issue in defendant's favor. *Commonwealth v Cohen* (1992, Pa) 605 A2d 1212, companion case (Pa) 610 A2d 32.

Defendant's acquittal on charges of attempted murder and abduction with intent to defile at first trial, at which mistrial was declared on rape charge, did not collaterally estop commonwealth from introducing evidence of force, threat or intimidation related to attempted murder and abduction charges at second trial on rape charge where jury in first trial could have grounded its acquittal verdicts on issues other than sufficiency of force, threat or intimidation used by defendant against victim during incident. *Rogers v Commonwealth* (1987) 5 Va App 337, 362 SE2d 752.

§ 10. Where rule of relevance follows [b] View that defendant not ex prove acquittal

In state prosecution for burglary, larceny and underlying felony of the property, although defendant had previously tried and acquitted on charges of theft with intent to deliver and simple possession of drugs taken from pharmacy, state's refusal to permit defendant to introduce his previous acquittal did not deny process since possession acquittal was relevant to burglary/theft charges. Dismissal of seizure of drugs that formed basis of charges took place two weeks after theft and defendant was charged with possession on that date. It was not necessary to show that defendant was in possession of drugs at that time to prove that defendant committed burglary/theft two weeks earlier. *Lockhart* (1992, CA8 Ark) 971 F2d 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 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§ 10. Where rule of relevance followed

[b] View that defendant not entitled to prove acquittal

In state prosecution for burglary of pharmacy and underlying felony of theft of property, although defendant had previously been tried and acquitted on charges of possession with intent to deliver and simple possession of drugs taken from pharmacy, state trial court's refusal to permit defendant to inform jury of his previous acquittal did not deny him due process since possession acquittal was not relevant to burglary/theft charges. Discovery and seizure of drugs that formed basis of possession charges took place two weeks after burglary/theft and defendant was charged with possession on that date. It was not necessary for state to show that defendant was in possession of drugs at that time to prove that he committed burglary/theft two weeks earlier. *Prince v Lockhart* (1992, CA8 Ark) 971 F2d 118, reh, en banc, den (CA8) 1992 US App LEXIS 23170 and petition for certiorari filed (Jan 7, 1993).

25 ALR4th 983-1008

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Evidence, 113(1), 113(2), 113(5), 113(8), 113(15-18), 142(1), 142(2), 142(4), 143, 145, 155(3), 156, 215(1), 216, 217, 222(1), 222(2), 222(8), 265(2), 265(18), 271(2), 272, 273(3), 273(4), 317(6), 320, 323(1), 323(3), 355(3), 474(1), 501(7), 502, 558(4), 558(8), 601(4)

Fraud, 52, 53, 57

Mortgages, 559(7)

Railroads, 114(2)

Trespass to Try Title, 45(1), 45(5), 46(3)

Vendor and Purchaser, 329, 341(3), 350, 351(2)

§ 1. Introduction

[b] Related matters

Property taxation of residential time-share or interval-ownership units. 80 ALR4th 950.

Admissibility of evidence of reputation as to land boundaries or customs affecting land,

dered girl's male companion at defendant's trial for girl's murder, though defendant had earlier been acquitted on charge of murdering companion, where earlier acquittal did not preclude all knowledge on defendant's part of circumstances of companion's death, and it was such knowledge that prosecution sought to use to indicate possible motive and implication in girl's death. *State v Paradis* (1983) 106 Idaho 117, 676 P2d 31, cert den (1984) 468 US 1220, 82 L Ed 2d 888, 104 S Ct 3592, later proceeding (1986) 110 Idaho 534, 716 P2d 1306, habeas corpus proceeding (DC Idaho) 667 F Supp 1361, affd in part and revd in part on other gnds (CA9 Idaho) 954 F2d 1483, 92 CDOS 660, 92 Daily Journal DAR 1066.

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Defendant's acquittal on charges of attempted murder and abduction with intent to defile at first trial, at which mistrial was declared on rape charge, did not collaterally estop commonwealth from introducing evidence of force, threat or intimidation related to attempted murder and abduction charges at second trial on rape charge where jury in first trial could have grounded its acquittal verdicts on issues other than sufficiency of force, threat or intimidation used by defendant against victim during incident. *Rogers v Commonwealth* (1987) 5 Va App 337, 362 SE2d 752.

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