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Criminal Procedure-Double Jeopardy-Government's Right to Appeal a Midtrial Dismissal- United States v. Scott

Criminal Procedure—DOUBLE JEOPARDY—GOVERNMENT'S RIGHT TO APPEAL A MIDTRIAL DISMISSAL—*United States v. Scott*, 98 S. Ct. 2187 (1978).

John Scott was indicted for distributing narcotics. Prior to his trial before the United States District Court for the Western District of Michigan he moved to have the charge dismissed on grounds of preindictment delay.[1] He made the motion again during trial and at the conclusion of the evidence the motion was granted. The government sought appellate review of the dismissal under 18 U.S.C. § 3731[2] before the Court of Appeals for the Sixth Circuit. That court held the government had no right to appeal as any further prosecution of Scott was barred by the double jeopardy clause of the fifth amendment.[3] The Supreme Court reversed,[4] holding that the double jeopardy clause is not offended by a government appeal when a defendant is successful in deliberately seeking to terminate his trial before there is a finding by either judge or jury as to guilt or innocence.[5]

I. BACKGROUND

In *United States v. Sanges*[6] the Supreme Court considered for the first time the federal government's right to appeal adverse criminal decisions. The Court held that government had no right to appeal without express statutory authorization.[7] Since no ena-

1. Scott was indicted on Mar. 5, 1975, for drug transactions which occurred on Sept. 20, 1974, Sept. 24, 1974, and Jan. 22, 1975. Each transaction was the basis for a separate count in the indictment. The transactions allegedly violated 21 U.S.C. § 841 (a)(1) (1970). Scott moved to have the first two counts dismissed because of preindictment delay. The jury acquitted the defendant on the third count. Brief for the United States at 3-4, 6, United States v. Scott, 98 S. Ct. 2187 (1978).

2. 18 U.S.C. § 3731 (1970) states:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
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> . . . .
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> The provisions of this section shall be liberally construed to effectuate its purpose.

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

4. The government appealed the dismissal of the first two counts to the Sixth Circuit. Only the first count was appealed to the Supreme Court. United States v. Scott, 98 S. Ct. 2187, 2190 (1978).

5. *Id.* at 2199.

6. 144 U.S. 310 (1892).

7. *Id.* at 312. The Court indicated that the American common law, as developed by

bling statute existed, the *Sanges* Court did not reach questions involving the constitutional limits of government appeals in particular cases.[8] The constitutional question was finally reached in *Kepner v. United States.*[9] In that case, the Court decided that to allow the government to appeal from an acquittal would violate the fifth amendment guarantee against double jeopardy.[10] This rule was reinforced in *Fong Foo v. United States*[11] where the Court held that double jeopardy protection barred further proceedings even though an acquittal may have been "egregiously erroneous."[12]

A. *Criminal Appeals Act*

In 1907, Congress enacted the Criminal Appeals Act[13] which authorized government appeals in certain limited situations.[14] The rules governing the conditions of appeal under the Act became "highly technical,"[15] and eventually the government's right to appeal came to depend primarily on the appellate court's determination that the lower court's disposition of the case fit into one of the statutorily defined categories.

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the state courts, prohibited the government from appealing after "a final judgment in favor of the defendant, whether that judgment had been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law." *Id.* at 318.

8. *See* Comment, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295, 296 (1976).

9. 195 U.S. 100 (1904).

10. In *Kepner*, after the defendant was acquitted in the lower court the government had appealed and obtained a conviction in the Supreme Court of the Phillipines. The government's authority to appeal the lower court's ruling was derived from the military orders governing the administration of justice in the Phillipines at that time. *Id.* at 110-16.

11. 369 U.S. 141 (1962).

12. The trial judge in *Fong Foo* had directed the jury to return verdicts of acquittal for all the defendants after listening to only four government witnesses. The Court of Appeals directed that the judgments of acquittal be set aside and the defendants tried again. The Supreme Court concluded that this was a violation of the defendants' rights under the double jeopardy clause. *Id.* at 143.

13. Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1970) (current version at 18 U.S.C. § 3731 (1970)).

14. The Act permitted the federal government to appeal directly to the Supreme Court from orders setting aside an indictment or from decisions arresting judgment for insufficiency of an indictment when the basis of such rulings was the construction or invalidity of a criminal statute. It also permitted appeals to the Supreme Court from judgments sustaining pleas in bar prior to the attachment of jeopardy. *Id.*

15. In United States v. Wilson, 420 U.S. 332 (1975), Justice Marshall stated that the Act "was construed in accordance with the common-law meaning of the terms employed, and the rules governing the conditions of appeal became highly technical." *Id.* at 337.

B. The 1970 Amendments and the Wilson-Jenkins *Rules*

In 1970, Congress amended the Criminal Appeals Act[16] to eliminate "technical and outmoded distinctions in pleadings as limitations on appeals by the United States."[17] Congress also intended to expand the government's right to appeal.[18] The language originally proposed for the amendment permitted the government to appeal any dismissal of an indictment but provided "that no appeal shall lie from a judgment of acquittal."[19] The fact that this language was later amended to disallow only those appeals prohibited by the double jeopardy clause[20] has been used by the Supreme Court in concluding that the legislative intent was to expand to the constitutional limits the government's right to appeal, leaving the determination of those boundaries to the courts.[21]

1. United States v. Wilson[22]

United States v. Wilson was the first case to reach the Supreme Court under the 1970 amendments. The trial judge had set aside the jury's guilty verdict by granting a postverdict motion to dismiss on grounds of preindictment delay.[23] After deciding the purpose of the recent statutory amendments was to allow the government the right to appeal whenever the Constitution would permit, the Court concluded the basic protection afforded the criminal defendant by the fifth amendment's double jeopardy clause was a prohibition against multiple trials.[24] Since a successful government appeal would only require a reinstatement of the

16. Omnibus Crime Control Act, Pub. L. No. 91-644, tit. III, § 14(a), 84 Stat. 1890 (1971) (amending 18 U.S.C. § 3731 (1970)).

17. S. REP. No. 1296, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 2206, 2217.

18. *Id.* at 7.

19. *Id.* at 1.

20. H.R. CONF. REP. No. 1768, 91st Cong., 2d Sess. 21 (1970).

21. United States v. Wilson, 420 U.S. 332, 338-39 (1975).

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

23. United States v. Wilson, 357 F. Supp. 619, 621 (E.D. Pa.), *appeal denied,* 492 F.2d 1345 (3d Cir. 1973), *rev'd,* 420 U.S. 332 (1975).

24. 420 U.S. at 342-46. In his majority opinion, Justice Marshall traced the history of the double jeopardy principle back to three common law pleas: *autrefois acquit, autrefois convict,* and pardon. By using one of these pleas, a defendant could avoid a second indictment if he could prove a prior acquittal or conviction for the same offense. Justice Marshall noted that the common law background of the double jeopardy clause does not suggest an implied prohibition against state appeals. "It was only when the defendant was indicted for the second time . . . that he could seek the protection of the common-law pleas." *Id.* at 342. Justice Marshall concluded that the basic constitutional principle underlying the clause is its protection against multiple prosecutions.

jury's verdict and not a new trial, the Court reasoned that to allow an appeal would not violate the basic constitutional principle the double jeopardy clause was designed to protect.[25]

The significance of the *Wilson* decision lies in its attempt to balance the basic interests of both the defendant and the government. The defendant has an interest in avoiding further proceedings once he has had a favorable disposition of his case. Another proceeding would only bring additional expense, harassment, and anxiety. The government, on the other hand, has an interest in convicting those guilty of violating its laws. *Wilson* holds that the double jeopardy clause protects the defendant's interest in avoiding a second trial,[26] but when a successful government appeal would not result in a second trial the government's interest in justice outweighs "the defendant's interest in repose."[27]

2. United States v. Jenkins[28]

Jenkins was indicted for failing to report for induction into the armed services. The trial judge refused to retroactively apply an earlier Supreme Court ruling,[29] and therefore dismissed the indictment and discharged the defendant.[30] The Second Circuit dismissed an appeal by the government, holding that the dismissal by the trial judge amounted to an acquittal which could not be appealed regardless of the need for a second trial in the event the ruling was reversed.[31]

In affirming the decision of the Second Circuit,[32] the Supreme Court avoided the fine distinctions involved in labeling one termination an acquittal and another a dismissal. Instead, the Court based its decision on its reasoning in *Wilson.* Whereas in *Wilson* there were findings of guilt in the lower court which could be reinstated in the event of reversal, in *Jenkins* a successful government appeal would require "further proceedings of some sort, devoted to the resolution of factual issues going to the ele-

25. *See id.* at 352-53.

26. *Id.* at 342.

27. Comment, *Double Jeopardy and Government Appeals in Criminal Cases,* 12 COLUM. J.L. & SOC. PROB. 295, 307 (1976).

28. 420 U.S. 358 (1975).

29. The Supreme Court ruling was in Ehlert v. United States, 420 U.S. 99 (1971), where the Court ruled that local draft boards were not required to consider conscientious objector claims arising between notice of induction and the scheduled induction date.

30. United States v. Jenkins, 349 F. Supp. 1068 (E.D.N.Y. 1972), *appeal dismissed,* 490 F.2d 868 (2d Cir. 1973), *aff'd,* 420 U.S. 358 (1975).

31. United States v. Jenkins, 490 F.2d 868 (2d Cir. 1973), *aff'd,* 420 U.S. 358 (1975).

32. United States v. Jenkins, 420 U.S. 358 (1975).

ments of the offense charged."[33] These "further proceedings," the Court reasoned, would violate the basic protection afforded by the double jeopardy clause.[34]

Under the *Wilson-Jenkins* rules an appellate court was not required to search the trial record to see if there was an acquittal. The critical question was whether there had been any finding of guilt in the lower court which could be reinstated in the event of reversal. In *Jenkins* the Court indicated that the government could even appeal from a bench acquittal if it could be shown that the trial court found all the factual elements necessary for guilt, but acquitted the defendant on an erroneous legal theory.[35] Since the judge's finding of guilt could be reinstated upon a successful government appeal, the appeal would be allowed.[36]

Since *Wilson* and *Jenkins,* however, the Supreme Court has indicated a reluctance to apply these rules too mechanically. For example, in *Lee v. United States,*[37] the Court treated a midtrial dismissal as a mistrial and thereby affirmed a conviction arising from the defendant's second trial.[38] *Jenkins,* which would have seemingly invalidated the second trial, was distinguished on the basis that the dismissal in *Lee* was granted by the trial judge in contemplation of a second prosecution. The Court indicated that whether the order is labeled a "dismissal" or a "declaration of mistrial" is not determinative, and that in *Lee* the order was "functionally indistinguishable from a declaration of mistrial."[39]

II. INSTANT CASE

In the instant case the Supreme Court confronted the same issue it had faced in *Jenkins*: Whether the government should be allowed to appeal a dismissal entered by the trial judge after jeopardy has attached.[40] Justice Rehnquist, in the majority opinion, admitted that "if *Jenkins* is a correct statement of the law, the judgment of the Court of Appeals relying on that decision . . . would in all likelihood have to be affirmed."[41] The Court, how-

33. *Id.* at 370.

34. *Id.*

35. FED. R. CRIM. P. 23(c) states that in a bench trial, "the court shall make a general finding and shall in addition on request find the facts specially."

36. 420 U.S. at 368.

37. 432 U.S. 23 (1977).

38. *Id.* at 34. In *Lee* the first information filed against the defendant was faulty because it made no mention of the requisite intent.

39. *Id.* at 31.

40. For a discussion of when jeopardy attaches, see note 62 *infra.*

41. United States v. Scott, 98 S. Ct. 2187, 2191 (1978).

ever, was willing to expressly overrule *Jenkins* and allow the government the right to appeal even though it was evident that "further proceedings" would be required if the government were successful.

The Court indicated the *Jenkins* decision was based on what it perceived to be the underlying purpose of the double jeopardy clause.

> "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."[42]

The Court then observed that the instant case "is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact."[43] Where, as here, the defendant seeks to terminate the trial, the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice."[44]

The four dissenting Justices argued that "[t]he Court's attempt to draw a distinction between 'true acquittals' and other final judgments favorable to the accused quite simply is unsupportable in either logic or policy."[45] They contended that by allowing an appeal from a ruling which could only be made after factual development at trial, the majority was in fact allowing an appeal from an acquittal.[46]

III. ANALYSIS

The *Wilson-Jenkins* rules have been applauded by some commentators as being the basis upon which future decisions could rely, thus bringing uniformity and consistency to an area of the law previously plagued with disparity.[47] By overruling *Jenkins,* however, the Supreme Court has indicated its dissatisfaction with rigid, mechanical rules in the area of government

42. *Id.* at 2196 (quoting United States v. Jenkins, 420 U.S. 358, 370 (1975) (quoting United States v. Green, 355 U.S. 184, 187 (1957))).

43. *Id.* at 2196.

44. *Id.* at 2198.

45. *Id.* at 2200 (Brennan, J., dissenting).

46. *Id.* at 2204-05 (Brennan, J., dissenting).

47. *See* Comment, *Double Jeopardy and Government Appeals in Criminal Cases,* 12 COLUM. J.L. & SOC. PROB. 295, 350 (1976); Note, *Twice in Jeopardy; Prosecutorial Appeals of Sentences,* 63 VA. L. REV. 325, 342-47 (1977).

criminal appeals. The Court's decision in *Scott* reflects its frustration with a legal system that allows a single trial judge to terminate a proceeding in favor of a criminally culpable defendant on legal grounds and then disallows review of that legal decision. This Case Note will examine the Court's reasons for rejecting the *Jenkins* rule and will suggest an alternative approach for double jeopardy analysis.

A. Examination of the Court's Reasoning

1. Balancing Test Approach

In *Wilson,* the Court recognized that the basic protection afforded the criminal defendant by the double jeopardy clause is its prohibition against multiple trials.[48] Although Justice Rehnquist cited this "multiple prosecution" rationale with approval in the present case, he did not rely on it in ultimately reaching a decision.[49] Instead, he chose language indicating a broader coverage for the clause's basic protection. Justice Rehnquist concluded that the double jeopardy clause was designed to "guard against government oppression."[50] His primary focus was on the harassment that may result from multiple prosecutions, not the prosecutions themselves.[51]

By this analysis, multiple trials would be barred only to the extent that they are oppressive. While the defendant would not be protected from the threat of a second proceeding, he would be protected from the harassment of multiple prosecutions. This declaration of the underlying function of the double jeopardy clause is consistent with the Court's willingness to allow the defendant to be prosecuted again for the same offense in the event of a mistrial.[52] It is also consistent with allowing a defendant to be reprosecuted if his conviction is reversed on appeal.[53] It is questionable whether reprosecution in one of these latter instances subjects the defendant to any less harassment than in the instant case.[54] By identifying the basic policy considerations in-

48. 420 U.S. at 343.

49. 98 S. Ct. at 2191, 2193, 2197-98.

50. *Id.* at 2198.

51. *See id.* This idea has been expressed in the legal maxim, "no one shall be twice *vexed* for the same cause." (*Nemo debet bis vexari pro eadem causa.*) State v. Lee, 65 Conn. 265, 272, 30 A. 1110, 1111 (1894).

52. Lee v. United States, 432 U.S. 23 (1977).

53. North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Ball, 163 U.S. 662 (1896).

54. Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1, 12, 15 (1960).

volved in double jeopardy cases, *i.e.*, the defendant's interest in avoiding the harassment of multiple prosecutions and the government's interest in convicting those guilty of violating the law, the *Scott* Court was able to balance the respective interests and reach a conclusion consistent with prior decisions.

2. Requirement of No Acquittal

Although the Court balanced the conflicting interests in reaching the end result, it qualified its holding by adhering to the traditional requirement of determining whether there was an acquittal. The Court emphasized that since there was no submission of the defendant's guilt or innocence to the judge or jury, there was no "resolution . . . of some or all of the factual elements of the offense charged"[55] which would constitute an acquittal. It is apparent therefore, that one task facing appellate courts in future cases will be to make a similar determination since a factual resolution favorable to the defendant would constitute an acquittal from which no appeal lies.

By requiring appellate courts to search for an acquittal, the Supreme Court has greatly complicated government appeals from midtrial dismissals. It was the necessity of this kind of investigation that agonized courts prior to *Wilson* and *Jenkins*.[56] The "process of searching the record for an acquittal was time consuming and unpredictable," resulting in disparate and inconsistent results.[57] Since many dismissals are based on decisions involving mixtures of law and fact, separation of these elements will produce arbitrary distinctions.

An example of just such a seemingly arbitrary distinction is presented by the majority in the instant case. The Court argued that the dismissal of an indictment on grounds of preindictment delay represented a legal judgment "that a defendant although criminally culpable may not be punished because of a supposed constitutional violation."[58] The Court contrasted this type of ruling with an acquittal based on a finding that the defendant was insane or entrapped. These latter rulings were characterized as essentially factual determinations establishing the defendant's lack of criminal culpability, therefore constituting unappealable

55. 98 S. Ct. at 2196-97 (quoting United States v. Martin Linen, 430 U.S. 564, 571 (1977)).

56. Comment, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295, 310 (1976).

57. *Id.*

58. 98 S. Ct. at 2197.

acquittals.[59] The Court admitted that although the acquittal in the latter instances "may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,"[60] it would be willing to allow the criminally culpable defendant to go free in spite of the legal error.[61]

By drawing this distinction, the Court detracts from the full application of the balancing test used to achieve the result in the instant case. To allow government appeals from acquittals based on erroneous legal findings of entrapment or insanity can hardly be said to be any more oppressive than to allow government appeals from dismissals based on erroneous legal findings of preindictment delay. The government's interest in convicting the guilty and in maintaining public respect for the criminal justice system is implicated in both cases, while in either case the defendant is subjected to virtually the same kind of harassment, expense, and anxiety.

This inconsistency arises out of the Court's continued adherence to traditional notions of when jeopardy attaches and when it terminates.[62] The traditional jeopardy framework used to balance the respective interests of government and defendant is so inflexible that even when these interests are considered in light of the broader purpose of the double jeopardy clause the results can still be irrational.

B. An Alternate Approach

In *Kepner v. United States,*[63] Justice Holmes filed a strong dissent stating "that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause."[64] This idea of continuing jeopardy has never been approved by a majority of the Supreme Court. In fact, the Court recently rejected the idea, believing that the underlying policies of the double jeopardy clause

59. *Id.*

60. *Id.*

61. *Id.*

62. For example, in Crist v. Bretz, 91 S. Ct. 2156 (1978), the Court held that the federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is a fundamental part of the double jeopardy protection and is therefore applicable to the states. *See* Benton v. Maryland, 395 U.S. 784, 794-95 (1969). In a bench trial, jeopardy attaches when the judge begins to hear the evidence. *E.g.*, McCarthy v. Zerbst, 85 F.2d 640 (10th Cir.), *cert. denied,* 299 U.S. 610 (1936).

63. 195 U.S. 100 (1904).

64. *Id.* at 134 (Holmes, J., dissenting).

would not permit "the Government to appeal after a verdict of acquittal."[65]

The theoretical framework provided by the notion of continuing jeopardy, however, is far more consistent with the Court's decision in *Scott* than is the traditional notion of jeopardy; *i.e.*, that the defendant is taken out of jeopardy at the termination of the first proceeding. If the evil the clause is designed to prevent is undue harassment of a defendant through multiple prosecutions for the same offense, then jeopardy can be properly "thought of as continuing until the final settlement of any one prosecution."[66] If this approach were adopted, the appellate court would not need to search the trial record in order to determine if a dismissal might actually be an acquittal. The government would be allowed to appeal any dismissal or acquittal since the appellate process would be viewed as a continuation of the jeopardy attached to the first proceeding.[67]

Even some who oppose this notion admit that expanded appellate review under such a theory would "avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them."[68] A system of criminal procedure which holds a verdict of acquittal to be final, yet allows review of a conviction, tips the scales of justice decidedly in the defendant's favor. The trial judge knows that if he rules for the defendant on doubtful points and gives the jury instructions offered by him, he will diminish the possibility of being reversed on appeal.[69] This edge enhances the defendant's likelihood of an acquittal. If the government were allowed to appeal, the judge would be less able to hide his mistakes in acquittals, and the government's interest in convicting the guilty would be served without subjecting the defendant to undue harassment. Expanded appellate review would also promote the uniform development of criminal law and procedure. In view of the inconsistent results likely to result from the *Scott* decision, this would be a distinct advantage.

Commentators have noted that if the notion of continuing jeopardy were adopted, the government would then be permitted to appeal a jury acquittal.[70] Since the Supreme Court has de-

65. United States v. Wilson, 420 U.S. 332, 352 (1975).

66. Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 7 (1960).

67. *Id.*

68. United States v. Wilson, 420 U.S. 332, 352 (1975).

69. Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 511 (1927).

70. *See* Comment, *Double Jeopardy Limitations on Appeals by the Government in Criminal Cases*, 80 DICK. L. REV. 525, 534 (1976).

cleared that the defendant has a valuable interest in the first jury empaneled to try him,[71] it is argued that appellate review of a jury acquittal would deprive the defendant of that interest.[72] In *Scott*, however, Justice Rehnquist stated that the *Jenkins* decision "placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him."[73] This language indicates an unwillingness by the Court to give greater weight to the defendant's interest in his first jury than to the government's interest in convicting the guilty. The continuing jeopardy concept does not ignore the defendant's interest; it rather serves to assure that government interests are at least given equal consideration in the balancing test.

Opponents of the continuing jeopardy notion also contend the power of juries would be seriously eroded by adoption of the concept because "[a]ppellate review would usurp the factfinder's assessment of the credibility and weight of the evidence."[74] Other commentators argue that by allowing appeals from jury acquittals the traditional freedom of juries to "acquit when facts and law dictate otherwise" would be curtailed.[75]

While it is true the right to a jury trial is fundamental to our system of criminal justice, the idea that a jury decision in a criminal action should never be reviewed carries the right too far. In civil cases, jury verdicts are subject to attack on appeal and can be overturned only by a showing that the evidence failed to sustain the verdict.[76] In criminal cases the standard would be even higher since the prosecution has the burden of proving guilt beyond a reasonable doubt. If a jury said it was not convinced beyond a reasonable doubt, "it would indeed be an omniscient court which could say that the jury was so convinced."[77] Also the scope of appellate review would be limited to errors appearing on the record. If the record showed an errorless proceeding and a jury verdict of not guilty, the judgment could not be reversed by the appellate court.[78] The defendant's right to a jury trial can be

71. Illinois v. Somerville, 410 U.S. 458, 471 (1973).

72. Comment, *Double Jeopardy Limitations on Appeals by the Government in Criminal Cases*, 80 DICK. L. REV. 525, 536 n.81 (1976).

73. 98 S. Ct. at 2191.

74. Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303, 340 (1974).

75. Comment, *Double Jeopardy Limitations on Appeals by the Government in Criminal Cases*, 80 DICK. L. REV. 525, 536 (1976).

76. *See, e.g.*, McIntyre v. Belt Ry., 105 Ill. App. 2d 45, 245 N.E.2d 94 (1969); 5 AM. JUR. 2d *Appeal and Error* § 834 (1962).

77. Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 499 (1927).

78. *Id.*

preserved even if the government is allowed to appeal.

Although the Supreme Court has never adopted the continuing jeopardy notion, Justice Holmes has not been the only proponent of the idea. Prior to *Benton v. Maryland,*[79] which made the double jeopardy clause applicable to the states through the fourteenth amendment, the Connecticut Supreme Court of Errors used the concept of continuing jeopardy to allow the state to appeal a jury acquittal in *State v. Lee.*[80] The state jurisdictional statute, which gave the state and defendant equal rights of appeal, was held to be constitutional by the Supreme Court in *Palko v. Connecticut.*[81] In *Palko,* the Court chose to predicate its decision on the fourteenth amendment, thereby avoiding the fifth amendment issue.[82] Although decided on the fourteenth amendment, Justice Cardozo indicated his sympathy for Justice Holmes' dissent in *Kepner.*[83] The sentiments expressed by the *Palko* Court in favor of the continuing jeopardy notion have caused some speculation on what the result would have been had that Court been confronted with the *Kepner* problem.[84]

In the instant case, Justice Rehnquist admitted that "Mr. Justice Holmes' concept of continuing jeopardy would have greatly simplified the matter of Government appeals."[85] He chose not to use the concept in his opinion because "it has never been accepted by a majority of this Court."[86]

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79. 395 U.S. 784 (1969).

80. 65 Conn. 265, 30 A. 1110 (1894).

81. 302 U.S. 319 (1937). This decision was overruled by Benton v. Maryland, 395 U.S. 784 (1969).

82. 302 U.S. 319 (1937); Note, *Appeals by the State in Criminal Proceedings,* 47 YALE L.J. 489, 492 (1938).

83. Justice Cardozo stated:

> [T]he dissenting opinions show how much was to be said in favor of a different ruling. Right-minded men . . . could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind.
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> . . . .
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> The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree . . . . The edifice of justice stands, its symmetry, to many greater than before.

Palko v. Connecticut, 302 U.S. 319, 323, 328 (1937) (citations omitted).

84. Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1, 12 (1960).

85. 98 S. Ct. at 2193 n.6.

86. *Id.*

Since handing down *Scott,* the Supreme Court has held that a Maryland juvenile rule, which allows the state to file exceptions to a master's proposals, is not a violation of the juvenile's rights under the double jeopardy clause.[87] Although the Court conceded that jeopardy attached in the master's hearing, it was willing to treat review of the master's proposals by the juvenile court as part of the original jeopardy because the juvenile judge was the ultimate fact finder and adjudicator under the statutory scheme.[88] The dissent argued that the statutory scheme is only a "novel redefinition of trial and appellate functions . . . , intentionally designed to avoid the constraints of the Double Jeopardy Clause."[89] Therefore, the dissent reasoned, the decision "bears an uncomfortable resemblance" to Justice Holmes' notion of continuing jeopardy.[90]

The Maryland case is interesting because the Court, as in *Scott,* used a balancing test approach on the double jeopardy question.[91] The Court was able to do this only because the statute allowed it to regard the review by the judge as part of a single proceeding. Thus, the continuing jeopardy idea was used without being labeled as such.

IV. Conclusion

A legal system which "place[s] in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals"[92] is fatally flawed. In *Scott,* the Supreme Court indicated its frustration with allowing criminally culpable defendants to go free because of a possibly erroneous legal judgment.[93] The Court based its decision in *Scott* on the underlying policies of the double jeopardy clause and balanced the respective interests of defendant and government in reaching a result. However, the Court indicated an unwillingness to apply this balancing test approach in future cases involving similar policy considerations.[94] The Court was forced into this retreat because it was locked in by traditional notions of when jeopardy attaches and terminates. If the Supreme Court were to adopt the

87. Swisher v. Brady, 98 S. Ct. 2699, 2706-07 (1978).
88. *Id.* at 2704 n.9, 2706 n.12.
89. *Id.* at 2710 (Marshall, J., dissenting).
90. *Id.* at 2712.
91. *See id.* at 2707.
92. United States v. Kepner, 195 U.S. 100, 137 (1903) (Brown, J., dissenting).
93. 98 S. Ct. at 2196.
94. *Id.* at 2197.

continuing jeopardy notion, it would then be able to apply its interest-balancing test without restraint.

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