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EVIDENTIARY USE OF PRIOR ACQUITTALS: WHEN ANALYSIS EXCEEDS REALITY

INTRODUCTION

NOT GUILTY. Even before the words have faded into silence, the rush of emotion fills the defendant. While feelings of joy and satisfaction abound, one emotion outweighs all others: relief. It's over. Having been accused and tried, he has established his innocence; never again to be confronted with the same charges. For after all, doesn't the Constitution protect him from having to go through this ever again? Well--maybe!

“Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb”¹ are the familiar words of the Fifth Amendment's Double Jeopardy Clause. As usually interpreted, the constitutional protections of this clause prevent successive prosecutions following a final judicial disposition and eliminate cumulative punishments for the same offense.² The case of *Dowling v. United States*³ examines the limits of that protection. Specifically, the issue raised is whether the Double Jeopardy Clause prevents, under Federal Rule of Evidence 404(b),⁴ the introduction of prior criminal conduct of which the defendant has been acquitted⁵ in a subsequent but unrelated criminal prosecution. While the question has been addressed in both state and lower Federal courts,⁶ the Supreme Court for the first time in *Dowling* squarely confronted the issue and decided that the constitutional protections of Double Jeopardy and Due Process do not in all circumstances prevent the admission of such evidence.⁷

The purpose of this note is to assess the basis and propriety of that decision and to highlight some potential problems with the Court's conclusion. Additionally, this casenote will attempt to envision how this holding may affect future prosecutions.

¹ U.S. CONST. amend. V.

² *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause contains three separate constitutional protections: It protects against (a) a subsequent prosecution for the same offense after acquittal, (b) a subsequent prosecution for the same offense after conviction and (c) multiple punishments for the same offense. See Kemmet, *State v. DeLuca: Reinterpreting Double Jeopardy Protection Against Successive Prosecutions*, 41 RUTGERS L.R., 431, 433 (1988). [hereinafter *Reinterpreting Double Jeopardy*].

³ *Dowling v. United States*, 110 S.Ct. 668 (1990). See text *infra*.

⁴ Fed. R. Evid. 404(b). Evidence of other crimes, wrongs or acts is inadmissible 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, absence of mistake, or accident.

⁵ For purposes of this note, “prior acquittal” means the defendant was tried before a jury on the merits and found not guilty. It is not intended to include situations involving dismissals, mistrials, or multiple inconsistent verdicts.

⁶ See, Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense*, 25 A.L.R. 4th 934 (1983).

⁷ *Dowling v. U.S.*, 110 S.Ct. 668, 672 (1990).

Finally it will offer an alternative model which may more adequately address the tension between the government's legitimate prosecutorial interests and the defendant's interest in finality of judgment.

BACKGROUND

As developed within the civil law,⁸ the common law doctrine of collateral estoppel⁹ generally operates to foreclose relitigation of issues conclusively determined during a previous litigation.¹⁰ The doctrine seeks to promote judicial economy, consistency, and finality.¹¹ In application, the doctrine has often raised questions as to the nature of the issues which may be precluded from relitigation. Commentators generally categorize those issues as "ultimate" ("those facts upon whose combined occurrence the law raises the duty or right in question")¹² and "mediate" ("those facts used as the inferential basis for the formation of ultimate facts").¹³ Although some courts have held that estoppel is applicable only to facts found to be ultimate with respect to the second suit,¹⁴ in practice there is no consistent and discernible distinction between them.¹⁵ Thus, the differentiation has had little practical effect.¹⁶

While the doctrine of collateral estoppel is applied most frequently to civil litigation, it also extends to criminal prosecutions.¹⁷ In 1970, the Supreme Court in

⁸ 46 AM. JUR. 2D JUDGMENTS § 397, (1969). See for an overview of both res judicata and collateral estoppel in the civil context.

⁹ RESTATEMENT (SECOND) OF JUDGMENTS § 85 comments (c) and (g) (1980). As used here, collateral estoppel is to be distinguished from the somewhat broader concept of res judicata. Sometimes called issue preclusion, collateral estoppel operates to exclude from relitigation issues of fact and law. Res judicata or claim preclusion prevents relitigation of the same cause of action as between the same parties once determined by a valid, final judgment. 46 Am. Jur. 2d Judgments, § 396, 397 (1969).

¹⁰ James and Hazard, Civil Procedure § 11.16 (2d ed. 1977). As generally applied, the party seeking the benefit of estoppel effect must show that the fact or issue to be excluded from relitigation was (1) actually litigated in the previous action, (2) determined with finality, and (3) necessarily so determined.

¹¹ Note, *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, 516 (1974), [hereinafter Note, *Expanding Double Jeopardy*]; Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J., 962, 970 (1980) [hereinafter Note, *Double Jeopardy*].

¹² *Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944), cert. den. 323 U.S. 720 (1944). The categorization of facts as either ultimate or mediate is traced to Judge Learned Hand in the *Evergreens* decision.

¹³ See Note, *Expanding Double Jeopardy*, supra note 11, at 519. "Mediate data" or evidentiary facts are those which relate to incidental or collateral matters in the first proceeding and generally will not be the basis of estoppel. Usually, for an issue to be precluded from relitigation, it must have been important enough so that both parties have had an opportunity to fully litigate it. See, COUND FRIEDENTHAL AND MILLER, CIVIL PROCEDURE: CASES AND MATERIALS, 1090-1091 (3d ed. 1980).

¹⁴ *Evergreens v. Nunan*, 141 F.2d at 930, 31. "We do not hesitate to hold [that] no fact decided in the first suit whether ultimate or mediate conclusively establishes anything except a fact ultimate in the second suit." *But see*, *U.S. v. Kramer*, 289 F.2d 909 (2d Cir. 1961).

¹⁵ JAMES AND HAZARD, supra note 10. §11.18. The supposed differences depend upon how the issue is formulated. The more important distinction is whether the issue was central or peripheral to the first action.

¹⁶ *Id.* at 569. "The point is that the syllogistic position of the finding is less important than whether it was fully litigated and necessarily decided."

¹⁷ See, Note, *Double Jeopardy*, supra note 11, at 971. See also, 1B MOORE'S FEDERAL PRACTICE, ¶ .418 [2], at 2751 (2d ed. 1974).

Ashe v. Swenson,¹⁸ incorporated collateral estoppel as a constitutionally mandated component of the Double Jeopardy Clause.¹⁹ As defined in *Ashe*, criminal collateral estoppel provides that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be again litigated between the same parties in any future lawsuit.”²⁰ Under *Ashe*, it is clear that the core protection²¹ of the Double Jeopardy Clause prevents relitigation of conclusively determined ultimate facts.²² However, *Ashe* does not definitively determine whether such protection extends to evidentiary facts,²³ particularly when a prior prosecution ends in a general verdict of acquittal.²⁴

Faced with this recurrent situation, the United States Circuit Courts of Appeal have responded in one of three ways. Some have found that under *Ashe* the Court’s interpretation of the Double Jeopardy Clause precludes the introduction of prior acquittal evidence.²⁵ Others have held, without reference to the Constitution, that such evidence is inadmissible under the common law doctrine of collateral estoppel.²⁶ Still others have allowed the evidence if otherwise admissible under the Federal Rules of Evidence.²⁷ To resolve this conflict among the federal circuit

¹⁸ *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). *Ashe* was accused of being one of several masked men who robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted *Ashe* for the robbery of one of the men. Following a subsequent conviction for robbery of another player, the Supreme Court held the doctrine of collateral estoppel to be implicit within the Double Jeopardy Clause of the Fifth Amendment. Therefore, the State was constitutionally precluded from relitigating the issue of whether *Ashe* was one of the robbers.

¹⁹ *Id.* at 443.

²⁰ *Id.*

²¹ *Dowling v. U.S.*, 110 S.Ct. 668, 675-76 (1990) (Brennan, J., dissenting).

²² *Ashe* at 443. The Court acknowledged that not all the features of the civil law doctrine are applicable to the criminal context. For example, it rejected mutuality of estoppel which requires that issues not determined conclusively against one party shall not be considered to have been found favorably to a later opponent. See Note, *Expanding Double Jeopardy*, *supra* note 11, at 517 n.35; LANDERS, MARTIN AND YEAZELL, CIVIL PROCEDURE, 960-61 (2d ed. 1988).

²³ Note, *Expanding Double Jeopardy*, *supra* note 11 at 520. “Thus, any determination of the effect of *Ashe* upon the constitutionality of the evidentiary use of a prior acquittal will largely depend upon whether collateral estoppel, as required by the Double Jeopardy Clause, should be applied only to the redetermination of the ultimate fact of defendant’s guilt or whether the constitutional doctrine prohibits the introduction of evidentiary facts of the prior acquittal.”

²⁴ Note, *Double Jeopardy*, *supra* note 11, at 973. Unless a court can trace some inescapable inference, as in *Ashe*, a general acquittal provides little basis for the application of collateral estoppel.

²⁵ *Wingate v. Wainright*, 464 F.2d 209, 212 (5th Cir. 1972). (Where defendant was acquitted of prior robberies, State violated defendant’s rights under the Double Jeopardy Clause when it offered evidence of such at a later robbery trial.); *U.S. v. Mespulede*, 597 F.2d 329, 334-35, (2d Cir. 1979). (Criminal acquittal necessarily determines defendant’s innocence, and government is precluded from injecting issues necessarily decided in defendant’s favor in a second trial.); *Also see*, *U.S. v. Gonzales-Sanchez* 825 F.2d 572, (1st Cir. 1987); *Albert v. Montgomery*, 732 F.2d 865, (11th Cir. 1984); *U.S. v. Day*, 591 F.2d 861 (D.C. Cir. 1978).
²⁶ *U.S. v. Keller*, 624 F.2d 1154, 1157 (3rd Cir. 1980). (As applied to criminal cases, doctrine of collateral estoppel bars introduction of acquittal evidence.); *U.S. v. Johnson*, 697 F.2d 735, 739 (6th Cir. 1983) (Collateral estoppel may bar relitigation of issues in criminal case when Double Jeopardy considerations are absent.)

²⁷ *U.S. v. Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979), (Evidence of another crime, otherwise competent, is not necessarily rendered inadmissible by fact of prior acquittal); *U.S. v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977), (Federal Rule 404(b) is an inclusionary rule such that evidence of prior drug acquittal admissible in subsequent prosecution.)

courts, the Supreme Court granted certiorari to consider Dowling's contention that admission of prior acquittal evidence violated both the Double Jeopardy and Due Process Clauses of the Fifth Amendment.²⁸

STATEMENT OF THE CASE

On July 8, 1985, a man wearing a ski mask and armed with a small hand gun robbed the First Pennsylvania Bank of Frederikstad, St. Croix, Virgin Islands.²⁹ Upon exiting the bank, the robber commandeered a taxi van in an effort to escape.³⁰ While driving away from the bank, the robber removed his mask and was identified by a bank customer who had slipped out of the bank during the robbery.³¹ Based upon this identification,³² Ruben Dowling was charged with bank robbery,³³ armed robbery,³⁴ and several violations of local law. Dowling pled not guilty.³⁵ The first trial ended in a hung jury.³⁶ Upon retrial, Dowling was convicted notwithstanding information available to the trial judge that the jury was made privy to extrinsic evidence.³⁷ On appeal, the Third Circuit reversed the conviction and remanded for yet a third trial.³⁸

Shortly after the bank robbery, two men entered the home of Ms. Vena Henry in Fredikstad in an apparent burglary attempt.³⁹ One man wore a ski mask⁴⁰ and carried a small pistol. The other was identified as Delroy Christian.⁴¹ Ms. Henry alleged that she surprised the pair, and in the ensuing struggle, unmasked the man whom she identified as Dowling.⁴² Prior to his third trial for bank robbery,⁴³ Dowling

²⁸ Dowling v. U.S., 110 S.Ct. 668, 671 (1990). Petitioner Dowling additionally asserted that the Third Circuit should have found constitutional violations and erred in declining to apply the Chapman v. California harmless error standard. *Chapman v. California*, 386 U.S. 18 (1967), *reh. den.* 386 U.S. 987 (1967). Because the Supreme Court found no constitutional violation, it did not reach this issue.

²⁹ Dowling v. U.S., 110 S.Ct. 668, 670 (1990). (The robber escaped with over \$12,000 in cash and checks.)

³⁰ *Id.* During the course of the robbery, a passing police cruiser chased away what the government contended was the robber's getaway car. Police identified one of the occupants of the car as Delroy Christian. *Petitioner's Brief*, 88-6025 (Lexis, Genfed, Briefs, File _____. [hereinafter *Petitioner's Brief*.])

³¹ *See*, *Petitioner's Brief*, *supra* note 30. Antonio Messer, a bank customer, fled the bank and watched the robber exit from across the street. Messer observed the fleeing robber begin to remove the mask. Based upon a three to four second observation, Messer identified Dowling as the robber.

³² *Id.* Because Messer's identification was suspect, the government sought to develop additional identification evidence.

³³ Dowling v. U.S., 110 S.Ct. 668, 670 (1990). (18 U.S.C. §2113 (a)).

³⁴ *Id.* (18 U.S.C. 2113 (d)).

³⁵ *Id.*

³⁶ U.S. v. Dowling, 814 F.2d 134, 135 (3rd Cir. 1987).

³⁷ *Id.* at 135-36.

³⁸ *Id.* at 134.

³⁹ Dowling v. U.S., 110 S.Ct. 668, 670 (1990).

⁴⁰ *See*, *Petitioner's Brief*, *supra* note 30. No contention was made by the government that the mask was the same one used in the bank robbery.

⁴¹ U.S. v. Dowling, 855 F.2d 114 at 120. There was no apparent dispute as to Christian's presence in Henry's home.

⁴² Dowling v. U.S., 110 S.Ct. at 670.

⁴³ *Id.*

Summer, 1990]

was tried under Virgin Island law for burglary, assault, and weapons offenses and was acquitted of all charges.⁴⁴ To strengthen its identity evidence⁴⁵ and to further link Dowling with Christian, the government was permitted, under Federal Rule of Evidence 404(b),⁴⁶ to introduce the testimony of Ms. Henry at the third bank robbery trial.⁴⁷ She was allowed to testify that Dowling had entered her home wearing a mask, notwithstanding Dowling's prior acquittal on those charges.⁴⁸ At the close of Henry's testimony and again during its final charge to the jury, the trial court instructed the jury that Dowling had, indeed, been acquitted of robbing Henry and emphasized the limited purposes for which Henry's testimony was offered.⁴⁹ Dowling was subsequently convicted and sentenced to 70 years imprisonment on the bank robbery charges.⁵⁰

On appeal, the Third Circuit Court of Appeals, relying upon its decision in *United States v. Keller*,⁵¹ held that Dowling's previous acquittal collaterally estopped the government from offering evidence of that incident at a subsequent criminal trial.⁵² Alternatively, the court found that the evidence was also inadmissible under the Federal Rules of Evidence.⁵³ Nevertheless, the Third Circuit affirmed Dowling's conviction, finding that while the acquittal evidence was inadmissible, the error was merely evidentiary and not of constitutional dimension.⁵⁴ Following a denial of a motion for rehearing,⁵⁵ the Supreme Court granted certiorari to consider Dowling's contention that Vena Henry's testimony violated both Due Process and Double Jeopardy.⁵⁶

⁴⁴ *Id.*

⁴⁵ *See, supra* note 30. During instruction to the jury, the District Court explained that the testimony was offered "to the extent it helps you determine the identity" of the bank robber. Additionally, the government sought to link Dowling and Christian to support its theory of a getaway car. *U.S. v. Dowling*, 855 F.2d at 124.

⁴⁶ *See, supra* note 4.

⁴⁷ *U.S. v. Dowling*, 855 F.2d at 120.

⁴⁸ *Id.* On appeal to the Third Circuit, Dowling argued the introduction of Henry's testimony violated Fed. R. Evid. 403. Relying on the Third Circuit's approach in *Keller*, *see supra* note 26, Dowling did not assert a constitutional violation.

⁴⁹ *Id.* at 124. The court, prosecution, and defense emphasized the acquittal and the limited purposes for which it could be used.

⁵⁰ *Dowling v. U.S.*, 110 S.Ct. at 670.

⁵¹ *See, supra* note 26. The Third Circuit acknowledged the constitutional implications of *Ashe*, but relied upon the Circuit's precedents which consistently applied the non-constitutional doctrine to bar evidentiary use of acquittals. *U.S. v. Dowling*, 855 F.2d at 120-121. *See also*, *U.S. v. Simon*, 225 F.2d 260 (3rd Cir. 1955).

⁵² *Id.* at 121, 122. The government argued that *Keller* is applicable only when the evidentiary fact sought to be introduced has "actually been determined" in the defendant's favor. The Third Circuit rejected the government's position holding that nothing in their precedents "puts the gloss on *Keller* that the government argues." *Id.*

⁵³ *Id.* at 122. The Appellate court held that the prior acquittal "must be taken to signify that it was not proven that Dowling committed a 'bad' act," and concluded the admission was an abuse of discretion.

⁵⁴ *Id.* at 124. The Appellate court observed that "evaluation of prejudice occasioned by trial error is a fact-specific process." In view of the entire record, the court determined the additional identity evidence convincing enough to conclude Dowling was not unduly prejudiced. *See also*, *Dowling v. U.S.*, 110 S.Ct. at 671.

⁵⁵ *Id.* at 124. *See*, Petitioner's Brief, *supra* note 30 at ____.

⁵⁶ *Dowling v. U.S.*, 110 S.Ct. at 671.

ANALYSIS

Collateral Estoppel

The Court began its analysis by recognizing that the sole issue before it was whether Vena Henry's testimony was admissible.⁵⁷ Following a brief review of *Ashe*,⁵⁸ the Court distinguished the present case from *Ashe* by finding that Dowling's prior acquittal did not "determine an ultimate issue in the present case."⁵⁹ The Court reasoned that Dowling's acquittal would not necessarily force a second jury to reach a conclusion directly contrary to the first.⁶⁰ Therefore, the Court summarily declined 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" simply because that evidence relates to alleged criminal conduct for which a defendant has been acquitted.⁶¹ While this holding clearly indicates the Court's unwillingness to construct an exclusionary rule which would absolutely bar the introduction of prior acquittal evidence, it leaves several questions unanswered. First, the Court failed to explain why the distinction from *Ashe* would necessitate such a radically different outcome; why would the distinction make a difference? Secondly, while the Court did not completely preclude the possible exclusion of prior acquittal evidence,⁶² it did not delineate the circumstances under which such evidence could be excluded. Although the Court did not explicitly resolve these questions, some inferences and possible conclusions can be drawn from the decision.

1. Burden of Proof

Perhaps the clearest explanation of the Court's decision lies within the language of *Ashe*. Quoting *Ashe*, the Court reiterated that it "must examine the record of the prior proceeding ... 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."⁶³ The Court cited, with approval, several Appellate cases which, following this general rule, placed the burden upon the defendant to determine that the issue to be precluded was actually decided in his favor during the first trial.⁶⁴ The Court concluded that *Dowling* presented no reason to depart from

⁵⁷ *Id.*

⁵⁸ See *supra* note 18.

⁵⁹ *Dowling v. U.S.*, 110 S.Ct. at 672.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *supra* note 15. Presumably, exclusion would be appropriate if, as in *Ashe*, the fact to be relitigated was to be considered "ultimate" with respect to the second trial.

⁶³ *Dowling v. U.S.*, 110 S.Ct. at 673.

⁶⁴ *U.S. v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988). Unlike *Dowling* however, *Citron* involved a prior prosecution resulting in inconsistent verdicts: an acquittal of falsifying tax returns but conviction on tax evasion. The court noted that, consistent with *Ashe*, it should avoid making the defendant's burden difficult, but the inconsistent verdicts served to foreclose preclusive effects. Also cited is *U.S. v. Mock*, 640 F.2d 629, 631 (5th Cir. 1981). In *Mock*, the Appellate Court stated "this Circuit has decided that the protections of

this rule.⁶⁵

This is the customary collateral estoppel rule in civil actions,⁶⁶ which, when applied to criminal prosecutions, raises obvious problems for the defendant. Since most criminal verdicts are general verdicts, it is often impossible to trace the jury's reasoning and precisely ascertain the issues which were conclusively determined in the defendant's favor.⁶⁷ As Justice Brennan explains in dissent, by "placing the burden on the defendant to prove what was 'actually decided', the Court denies the protections of collateral estoppel to those defendants who affirmatively contest more than one issue or who put the Government to its proof with respect to all elements of the offense."⁶⁸

Since the defendant must bear the burden of proof, the court must then determine the level of proof necessary to meet that burden. Again, the language of *Ashe* is instructive, yet inconclusive. While the *Ashe* Court held that a "high probability" that the jury determined an issue in the defendant's favor was insufficient,⁶⁹ the Court did not require the probability to rise to a logical certainty.⁷⁰ The *Ashe* Court carefully warned that the protection of collateral estoppel in criminal cases was not to be applied with the "hypertechnical and archaic approach of a 19th century pleading book."⁷¹ Any more rigid approach would render criminal collateral estoppel ineffective.⁷² Therefore, it appears the Court would consider exclusion of evidentiary facts, even though not ultimate with respect to the second trial, if there were compelling evidence that those facts were determined in favor of the defendant.

Justice Brennan's alternative approach seemingly strikes a middle ground by permitting the prosecution to admit prior acquittal evidence, while shifting the burden to the government to establish that the issue it seeks to relitigate was not decided in the defendant's favor.⁷³ As Justice Brennan explained, this method would better serve the purposes of both the Double Jeopardy Clause and the collateral estoppel doctrine by reducing the possibility of governmental overreaching⁷⁴ and by

collateral estoppel prevent redetermination of evidentiary facts as well as ultimate facts." The problem was that Mock had not shown the subsequent evidence concerned the particular acquittal. See also *U.S. v. Ragins*, 840 F.2d 1184 (4th Cir. 1988); *U.S. v. Gentile*, 816 F.2d 1157 (7th Cir. 1987) (discussion of "necessarily determined").

⁶⁵ *Dowling v. U.S.*, 110 S.Ct. at 673.

⁶⁶ JAMES AND HAZARD, *CIVIL PROCEDURE* §11.18 at 567 (2d ed. 1977).

⁶⁷ See Note, *Double Jeopardy*, *supra* note 11, at 972-73; Note, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight"*, 21 U.C.L.A. L. REV., 892, 916 (1974). [hereinafter Note, Prior Acquittals].

⁶⁸ *Dowling v. U.S.*, 110 S.Ct. at 677 (Brennan J., dissenting).

⁶⁹ See Note, *Double Jeopardy*, *supra* note 11, at 972 n.54.

⁷⁰ *Id.*

⁷¹ *Ashe v. Swenson*, 397 U.S. 436, 444.

⁷² *Id.*

⁷³ *Dowling v. U.S.*, 110 S.Ct. at 677 (Brennan J., dissenting).

⁷⁴ *Id.* at 676. Quoting *Brown v. Ohio*, 432 U.S. 161 (1977), and *U.S. v. Scott*, 437 U.S. 82 (1978), the dissent observes that an acquittal has traditionally been afforded great significance. This reflects an institutional

preserving the institutional interest in finality of judgments.⁷⁵

2. Standards of Admissibility

Apart from the burden of proof argument, the Court attempted to justify the admission of prior acquittal evidence under *Huddleston v. U.S.*⁷⁶ The *Huddleston* Court determined that evidence of similar acts is relevant and therefore admissible⁷⁷ under Federal Rule of Evidence 404(b)⁷⁸ if the jury can reasonably conclude that the act occurred and that the defendant was the actor.⁷⁹ The court reasoned that even if Dowling's acquittal did establish a reasonable doubt that he was the masked man in Vena Henry's home, it did not prove his innocence.⁸⁰ Therefore, because a jury might reasonably conclude that Dowling was the masked man in question, the evidence was admissible under the *Huddleston* standard.⁸¹ The Court deemed the collateral estoppel component of the Double Jeopardy Clause inapposite.⁸² The Court found this decision to be consistent with previous cases in which a prior criminal acquittal had not precluded the government from relitigating an issue when presented in a subsequent action governed by a lower standard of proof.⁸³

This reasoning is disturbing for at least two reasons. Even if an acquittal had clearly determined a single issue in the defendant's favor, therefore warranting collateral estoppel protection, the government could legitimately seek admission under the lower standard of proof required by *Huddleston*.⁸⁴ Secondly, the Court cites *U.S. v. One Assortment of 89 Firearms*,⁸⁵ and *One Lot Emerald Cut Stones v. U.S.*⁸⁶ as precedent consistent with the proposition that a criminal acquittal does not

interest in finality and a public interest against the governmental use of its superior resources.

⁷⁵ *Id.*

⁷⁶ *U.S. v. Huddleston*, 485 U.S. 681 (1988). *Huddleston* was charged with the knowing possession of stolen video tapes. The District Court permitted evidence of "similar acts" linking the defendant to a series of sales of allegedly stolen televisions from the same source. The Court found the evidence clearly relevant to defendant's knowledge that the tapes were stolen. This "similar act" evidence was, therefore, admissible under Fed. R. Evid. 404(b).

⁷⁷ FED. R. EVID. 402. All relevant evidence is admissible, except as otherwise provided Evidence which is not relevant is not admissible.

⁷⁸ *See supra* note 4.

⁷⁹ *U.S. v. Huddleston*, 485 U.S. 681, 689 (1988). The Court held the trial court need not make a preliminary finding that the government has proved the "other act" evidence by a preponderance of the evidence before admitting it under 404(b). *Id.* Such a requirement would be inconsistent with the plain language and legislative history of Rule 404(b). *Id.* at 688.

⁸⁰ *Dowling v. U.S.*, 110 S.Ct. at 672. The Court believed that Dowling's acquittal merely proved the existence of a reasonable doubt as to his guilt. *See, U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984).

⁸¹ *Dowling v. U.S.*, 110 S.Ct. at 668.

⁸² *Id.* at 672.

⁸³ *Id.* at 672.

⁸⁴ *U.S. v. Huddleston*, 485 U.S. at 681.

⁸⁵ *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Acquittal on the charge of dealing firearms did not preclude subsequent *in rem* forfeiture hearing. *Id.*

⁸⁶ *One Lot Emerald Cut Stones v. U.S.*, 409 U.S. 232 (1972). Defendant's acquittal on smuggling charge did not bar later forfeiture hearing. *Id.*

preclude relitigation of an issue in a subsequent action governed by a lower standard of proof.⁸⁷ However, both of these cases involved a criminal acquittal followed by a subsequent civil forfeiture action.⁸⁸ The lower standard of proof in these cases involved the level at which a jury may conclude guilt, not the level at which evidence becomes relevant. *Dowling*, by contrast, involved a criminal acquittal followed by a second criminal prosecution. The standard of proof necessary for conviction is precisely the same in both cases. It does not follow that because subsequent civil actions governed by a lower standard of proof are permissible, that relitigation of prior acquittal evidence avoids collateral estoppel merely because the relevancy standard of similar act evidence is also lower. In response, Justice Brennan notes that the Court had never before applied such reasoning to successive criminal prosecutions where the government seeks to punish.⁸⁹ Brennan also characterized the Court's reasoning as an "unrealistic view of the risks and burdens imposed on the defendant."⁹⁰

Realistic concerns also arise when a defendant is forced to relitigate an acquittal issue under a lower standard of proof. Evidence of prior criminal participation, even though the defendant has been acquitted, is likely to prejudice the jury and lead to an erroneous conviction.⁹¹ In fact, the Court recognized the potential for undue prejudice⁹² but concluded that a defendant is adequately protected by non-constitutional sources like the Federal Rules of Evidence and limiting instructions to juries.⁹³ Additionally, the defendant must essentially "re-defend" himself on charges of which he was acquitted.⁹⁴ Because of increased costs and the passage of time, this may be extremely burdensome.⁹⁵ 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 the offense."⁹⁶

⁸⁷ *Dowling v. U.S.*, 110 S.Ct. at 672.

⁸⁸ *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938). Acquittal on a criminal charge is not a bar to remedial civil action.

⁸⁹ *Dowling v. U.S.*, 110 S.Ct. at 678 (Brennan J., dissenting). "Where the objective of the second action likewise is punishment, the acquittal is a bar to relitigation." *Helvering v. Mitchell*, 303 U.S. at 398, quoting *Murphy v. U.S.*, 272 U.S. 630 (1926).

⁹⁰ *Dowling v. U.S.*, 110 S.Ct. at 678 (Brennan J., dissenting). See, Miller, *Other Crimes Evidence: Relevance Reexamined*, 16 J. MARSHALL L. REV., 371, 387-88 (1983).

⁹¹ *Id.* at 676. It seems questionable whether a jury can reasonably be expected to separate impeachment and substantive evidence. The possibility of misuse and the unduly prejudicial effects underscore the need to exclude prior acquittal evidence. See, Note, *Prior Acquittals*, *supra* note 67 at 917; Miller, *Other Crimes Evidence: Relevance Reexamined*, 16 J. MARSHALL L. REV. 371, 389 (1983).

⁹² *Dowling v. U.S.*, 110 S.Ct. at 674.

⁹³ *Id.*

⁹⁴ *Wingate v. Wainright*, 464 F.2d 209 (5th Cir. 1972). There is no reasoned difference between this fact pattern and the exclusion of subsequent prosecutions which are routinely the object of Double Jeopardy protection.

⁹⁵ *Dowling v. U.S.*, 110 S.Ct. at 680 (Brennan J., dissenting).

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Due Process

Dowling also argued that the admission of Vena Henry's testimony violated due process because it offended the concept of "fundamental fairness."⁹⁷ The Court reiterated its narrow view of fundamental fairness and reaffirmed that beyond the specific guarantees of the Bill of Rights, it found the Due Process Clause limited in applicability.⁹⁸ In dismissing Dowling's contention that the evidentiary admissions were fundamentally unfair,⁹⁹ the Court insisted that the trial court's limiting instructions avoided any Due Process concerns.¹⁰⁰

Possible Extensions

The scenario in Dowling has been referred to as the "Prosecutor's Delight."¹⁰¹ The ability to relitigate facts relating to an acquittal not only disadvantages the defendant but may also greatly expand the government's ability to prosecute. For instance, Double Jeopardy protection customarily applies when two offenses are part of the same transaction.¹⁰² After *Dowling*, a prosecutor could presumably introduce substantive evidence in a conspiracy prosecution even though the defendant had been acquitted of the underlying offense.¹⁰³ Additionally, evidence from a prior acquittal might be admissible in a subsequent sentencing hearing which requires a lower standard of proof.¹⁰⁴

Alternative Model

Following *Dowling*, there is little doubt about the admissibility of prior acquittal evidence. What remains an issue is how to best accommodate the competing concerns of the defendant and the government. A possible alternative to the *Dowling* rule would be to create a presumption that prior acquittal evidence must be excluded in subsequent criminal prosecutions unless the government can rebut, by a preponderance of the evidence, that the issue was not determined in the defendant's favor. Such a threshold requirement would insure careful scrutiny under Federal Rule of Evidence 403.¹⁰⁵ The rebuttable presumption alternative is also

⁹⁷ *Id.* at 674.

⁹⁸ *Id.* The Court quoting *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977), observed that judges are not free, in defining due process, to impose their own "private notions of fairness," but must determine whether the actions complained of violate the "fundamental conceptions of justice which lie at the base of our civil and political institutions."

⁹⁹ *Id.* at 675.

¹⁰⁰ *Id.* at 674.

¹⁰¹ See Note, *Prior Acquittals*, *supra* note 67 at 896. Admission of evidence under 404(b) creates an exception to the general rule excluding the use of prior acts to prove subsequent crimes. This exception presents the prosecutor with few situations in which he would be unable to link evidence of prior acts to the current case. See Note, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV., 281, 306-08 (1980).

¹⁰² See Note, *Reinterpreting Double Jeopardy*, *supra* note 2 at 434.

¹⁰³ *Dowling v. U.S.*, 110 S.Ct. at 680 (Brennan J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ FED. R. EVID. 403. Although relevant, evidence may be excluded if its probative value is substantially

consistent with the admonition in *Ashe* concerning the over-technical application of collateral estoppel.¹⁰⁶

CONCLUSION

The *Dowling* Court's refusal to extend the constitutional protections of Double Jeopardy to exclude the admission of prior acquittal evidence is unrealistic. Relying upon non-constitutional protections, such as evidentiary rules and limiting instructions to juries, is insufficient to shield the previously acquitted defendant from the risk of undue prejudice and the burden of relitigation. Because *Dowling* does not require the exclusion of such evidence, the courts must determine a method which more equitably balances the interests of both the defendant and the government.

PAUL HARPER

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury

¹⁰⁶ *Ashe v. Swenson*, 397 U.S. at 444.

