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The Admissibility of Prior Acquittal Evidence - Has North Carolina Adopted the "Minority View?" - The Effect of State v. Scott

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NOTES

THE ADMISSIBILITY OF PRIOR ACQUITTAL EVIDENCE — HAS NORTH CAROLINA ADOPTED THE "MINORITY VIEW"? — THE EFFECT OF *State v. Scott*[1]

"[A]cquittal reflects both an institutional interest in preserving the finality of judgments and a strong public interest in protecting individuals against governmental overreaching."[2]

INTRODUCTION

Imagine you are on trial. After the State musters all of its evidence and presents it to the trier of fact, you are acquitted. In the eyes of the law you are innocent, no longer required to answer for the alleged wrongdoing. However, in reality, this is not always the case; the vast majority[3] of state and federal courts allow evi-

1. 331 N.C. 39, 413 S.E.2d 787 (1992).

2. Dowling v. United States, 493 U.S. 342, 355 (1990) (Brennan, J., dissenting).

3. *See, e.g.,* Dowling v. United States, 493 U.S. 342 (1990) (evidence of other crimes is admissible); Oliphant v. Koehler, 594 F.2d 547 (6th Cir.), *cert. denied,* 444 U.S. 877 (1979) (same); United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972), *cert. denied,* 410 U.S. 916 (1973) (same); United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972), *cert. denied,* 410 U.S. 916 (1973) (same); United States v. Van Cleave, 599 F.2d 954 (10th Cir. 1979) (same); United States v. Hill, 550 F. Supp. 983 (E.D. Pa.), *aff'd mem.*, 716 F.2d 893 (3d Cir. 1983), *cert. denied,* 464 U.S. 1039 (1984) (same); Mitchell v. State, 37 So. 76 (Ala. 1904) (same); Ladd v. State, 568 P.2d 960 (Alaska 1977), *cert. denied,* 435 U.S. 928 (1978) (same); People v. Griffin, 426 P.2d 507 (Cal. 1967) (same); State v. Gibson, 675 P.2d 33 (Idaho 1983), *cert. denied,* 468 U.S. 1220 (1984) (same); State v. Schlue, 323 A.2d 549 (N.J. Super.), *cert. denied,* 331 A.2d 16 (N.J. 1979) (same); State v. Smith, 532 P.2d 9 (Or. 1975) (same); State v. Tarman, 621 P.2d 737 (Wash. App. 1980) (same); Eatherton v. State, 810 P.2d 93 (Wyo. 1991) (same). *See also* Christopher Bello, Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense*, 25 A.L.R. 4th 934 (1983). The author propounds that:

> [A] majority of jurisdictions [follow the rule] . . . 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,

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dence used in a prior trial—even though the person was acquitted of the offense—to be admitted[4] in a subsequent trial, when the evidence sought to be introduced is relevant[5] and not otherwise precluded on constitutional grounds.[6] While the majority of state and federal courts allow such evidence, the North Carolina Supreme Court, in its recent decision of *State v. Scott,*[7] adopted what is considered the "minority view."[8] The court's holding in

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> 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.

Id. at 939.

4. Admissible evidence is defined as "evidence introduced [which] is of such a character that the court or judge is bound to receive it; that is allow it to be introduced at trial." BLACK'S LAW DICTIONARY 44 (5th ed. 1979). *See infra* note 63.

5. Relevant evidence is defined as "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." BLACK'S LAW DICTIONARY 1160 (5th ed. 1979). *See infra* note 62.

6. Bello, *supra* note 3, at 939. The issue of preclusion on constitutional grounds generally encompasses the application of the collateral estoppel doctrine, *see infra* note 98, and/or the protection afforded against double jeopardy, *see infra* note 97, pursuant to U.S. CONST. amend. V. The Fifth Amendment protection against double jeopardy provides that: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[ ]. . . ." *Id.* The question of preclusion on either one of these grounds will not be discussed in this Note, other than in the makeup of the court's ruling under Rule 403. For a more complete discussion of the collateral estoppel and double jeopardy issues, along with the recent Supreme Court ruling in Dowling v. United States, 493 U.S. 342 (1990), see generally Craig L. Crawford, Case Comment, *Dowling v. United States: A Failure of the Criminal Justice System*, 52 OHIO ST. L.J. 991 (1991); Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283 (1992); Ronald A. Goldstein, Recent Development, *Double Jeopardy, Due Process, and Evidence From Prior Acquittals: Dowling v. United States, 110 S.Ct. 668 (1990)*, 13 HARV. J.L. & PUB. POL'Y 1027 (1990).

7. 331 N.C. 39, 413 S.E.2d 787 (1992).

8. *See, e.g.*, United States v. Schwab, 886 F.2d 509 (2d Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990); Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972); United States v. Day, 591 F.2d 861 (D.C. Cir. 1979); State v. Little, 350 P.2d 756 (Ariz. 1960); State v. Perkins, 349 So. 2d 161 (Fla. 1977); State v. Wakefield, 278 N.W.2d 307 (Minn. 1979); State v. Holman, 611 S.W.2d 411 (Tenn. 1981). *See also* Bello, *supra* note 3, at 939. The author concludes that "[a] few jurisdictions follow the rule that such evidence is never admissible, basing such rule either on the concept of fundamental fairness . . ., or on the rationale

Scott renders evidence, whose "probative value depends[ ] . . . upon the proposition that the defendant . . . committed the prior crime", *per se* inadmissible in a subsequent trial, when in fact the defendant was previously acquitted of that prior offense."[9] Not only does this decision refuse to follow the vast majority of state and federal courts, it departs from what appeared to be the position of the courts in North Carolina.[10]

This Note will examine the court's decision in *State v. Scott*.[11] First, the Note will address the facts of the case. Second, it will set out the background on how courts decide whether evidence of this nature should be admitted, mainly focusing on Rules 403 and 404(b) of the North Carolina Rules of Evidence.[12] Next, the Note will analyze how the court arrived at this "bright-line" rule as well as the effect it will have in future cases. Finally, the Note will conclude that even though North Carolina adopted the "minority rule", this approach is proper under the concept of fundamental

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that the prejudicial effect of such evidence necessarily outweighs its probative value . . . ." *Id.*

9. *Scott*, 331 N.C. at 42, 413 S.E.2d at 788.

10. *See* Bello, *supra* notes 3 and 8. For a series of cases in North Carolina, although in the context of impeachment of witnesses, allowing the admissibility of such prior acquittal evidence, see generally State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980) (established principle that when a criminal defendant elects to testify on his own behalf, he is subject to cross-examination, for the purpose of impeachment, with respect to prior specific criminal acts or degrading conduct even if there was no conviction); State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, *cert. denied*, 449 U.S. 960 (1980) (cross-examination of defendant concerning a prior shooting for which defendant had been found not guilty by reason of temporary insanity); State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979) (concluding that it is permissible to cross-examine a defendant about a specific act of misconduct even though the defendant has been acquitted of charges arising out of the misconduct); State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978) (approving of cross-examination about the defendant's prior possession of drugs despite the fact that charges against defendant had been dismissed because the search that disclosed the drugs was declared unlawful).

11. 331 N.C. 39, 413 S.E.2d 787 (1992).

12. It should be noted that any reference to rules of evidence throughout this Note, unless otherwise indicated, will be in reference to the North Carolina Rules in contrast to the Federal Rules. In addition, there are other rules involved in the determination of admissibility, however, those rules will not be discussed in the text of this Note. For a discussion of those rules, see *infra* notes 62 and 63. Furthermore, there are also constitutional issues generally addressed when the use of prior acquittal evidence is presented. However, due to the defendant's failure to raise these issues at trial, and the court's refusal to address them on appeal, those issues will not be examined either. For sources dealing with those constitutional questions, see *supra* note 6.

fairness and the constitutional parameters that underlie the court's decision.[13]

THE CASE

On the evening of June 26, 1988, the victim, an adult female, drove to a neighboring town to visit with one of her friends who was working at the time.[14] The victim, after chatting and staying only briefly, agreed to go to a nearby convenience store to purchase a few items for her friend.[15] Upon arriving at the convenience store, the victim observed the defendant, Berry Scott, whom she previously knew, but had not seen in approximately two years.[16] The defendant approached the victim and, after a brief conversation, asked whether she could give him a ride home.[17] While explaining to the defendant that she had to return to where her friend worked, the victim agreed.[18]

The defendant then accompanied the victim back to her friend's place of work.[19] However, shortly thereafter the defendant requested that the victim take him back to the convenience store because he needed to purchase some cigarettes.[20] Upon leaving the convenience store the second time, however, the victim testified that the defendant brandished a pocket knife, threatened her, and eventually ordered her to drive elsewhere.[21]

After arriving at the requested location, the defendant returned the knife to his pocket and took the keys from the ignition.[22] Then the defendant requested again and again that the victim exit the vehicle; but upon repeatedly refusing, the victim was forcibly removed through the driver's side window.[23] After

13. *See generally* Miguel Manuel Delao, Comment, *Admissibility of Prior Acquitted Crimes under Rule 404(b): Why the Majority Should Adopt the Minority Rule*, 16 FLA. ST. U. L. REV. 1033 (1989) (author sets forth reasons why the minority approach should prevail; primarily focusing on the prejudicial effect of prior acquittal evidence and the constitutional infringements which occur in the context of admitting prior acquittal evidence).

14. State v. Scott, 99 N.C. App. 113, 114, 382 S.E.2d 621, 622 (1990).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 115, 382 S.E.2d at 622.

22. *Id.*

23. *Id.*

subduing the victim outside the vehicle, the defendant forced her to remove her clothing and engage in vaginal intercourse.[24] However, because of subsequent adverse weather conditions, the defendant ordered the victim to move back into the vehicle, where he again forced her to have intercourse with him.[25] The defendant then requested that the victim drive him back to his residence, where for the final time he had intercourse with her as well as having her perform fellatio on him.[26] Eventually, the defendant allowed the victim to leave.[27] Subsequently, the State charged the defendant with kidnapping,[28] rape,[29] and a crime against

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24. *Id.*

25. *Id.*

26. *Scott*, 99 N.C. App. at 115, 389 S.E.2d at 622. The defendant testified to the fact that he performed cunnilingus on the prosecuting witness. *Id.* However, it is unclear, from the facts of the case, whether the crime against nature charge encompassed both the fellatio and cunnilingus acts or only one individual offense. For a distinction between the two offenses, see *infra* note 30. The supreme court refused to reverse the cunnilingus charge because consent is not a defense. *Scott*, 331 N.C. at 46, 413 S.E.2d at 791. *See also infra* note 53.

27. *Scott,* 99 N.C. App. at 115, 382 S.E.2d at 622.

28. *See* N.C. GEN. STAT. § 14-39 (1993). Section 14-39 provides:

Kidnapping

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2

(b) (Effective until January 1, 1995) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted the offense is kidnapping in the second degree and is punishable as a Class E felony.

(b) (Effective January 1, 1995) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously

nature.[30]

During trial, the State sought to introduce the testimony of Wanda Freedman, also a past acquaintance of the defendant, who would testify that the defendant raped her two years earlier under similar circumstances.[31] Defense counsel made a general objection to the introduction of the testimony, and a voir dire hearing

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> injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.
>
> (c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000), and its charter and right to do business in the state of North Carolina shall be forfeited.

Id. *See also* BENJAMIN B. SENDOR, NORTH CAROLINA CRIMES, ch. 8, at 103 (3d ed. 1985) (essential elements are: (1) person confines or restrains or removes from one place to another, (2) a person, (3) without his consent, and (4) for the purpose of . . . (d) facilitating the commission of a felony).

29. *See* N.C. GEN. STAT. § 14-27.3 (1993). Section 14-27.3 provides:

> Second-degree rape
>
> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.
>
> (b) (Effective until January 1, 1995) Any person who commits the offense defined in this section is guilty of a Class D felony.
>
> (b) (Effective January 1, 1995) Any person who commits the offense defined in this section is guilty of a Class C felony.

Id.

30. *Scott*, 331 N.C. at 40, 413 S.E.2d at 788. For North Carolina's treatment of crimes against nature, see N.C. GEN. STAT. § 14-177 (1993). Section 14-177 provides:

> Crime against nature (Effective until January 1, 1995)
>
> If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class H felon.
>
> Crime against nature (Effective January 1, 1995)
>
> If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.

Id. *See also* SENDOR, *supra* note 28, at 266. The author describes two of the most prevalent crimes against nature. First, is "[f]ellatio [which] is the oral stimulation of the male sexual organ by a female. [The other is] [c]unnilingus [which] is the penetration of the female sex organ by the tongue." *Id.*

31. *Scott,* 331 N.C. at 41, 413 S.E.2d at 788. *See also infra* note 44.

was conducted.[32] During voir dire, defense counsel opposed the witness' testimony because the State previously tried the defendant for the offense relating to Ms. Freedman, which ultimately resulted in an acquittal.[33] Counsel for the defendant argued that the evidence arising from the prior offense should be precluded by Rules 403[34] and 404(b)[35] of the North Carolina Rules of Evidence.[36] The trial court, however, ruled the evidence admissible to show "opportunity, intent, preparation and plan"[37] pursuant to Rule 404(b).[38] In addition, the trial judge ruled that the probative value of the evidence outweighed any danger of unfair prejudice under Rule 403.[39] At that point, the judge instructed[40] the jury that the evidence could be considered on the issue of the defendant's "intent,[41] knowledge,[42] plan, scheme or design".[43] Then Ms. Freedman testified, and her testimony, in many respects, paral-

32. *Scott,* 99 N.C. App. at 116-17, 392 S.E.2d at 623.

33. *Id.* The court of appeals also, in reviewing the voir dire hearing, concluded that the defendant did not present his constitutional objections at trial, and thus, he did not preserve them for appellate review. *Id.*

34. *See* N.C. GEN. STAT. § 8C-1, Rule 403 (1992). *See infra* text accompanying notes 67-75.

35. *See* N.C. GEN. STAT. § 8C-1, Rule 404 (1992). *See infra* text accompanying notes 54-64.

36. *Scott,* 99 N.C. App. at 116, 392 S.E.2d at 623.

37. *See infra* notes 41-43.

38. *Scott,* 331 N.C. at 41-42, 413 S.E.2d at 788. *See infra* text accompanying notes 54-64.

39. *Scott,* 331 N.C. at 41, 413 S.E.2d at 788. *See infra* text accompanying notes 67-75.

40. *See* N.C. GEN. STAT. § 8C-1, Rule 105 (1992). Rule 105 provides:

> Limited Admissibility
>
> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Id. But see Goldstein, *supra* note 6, at 1027. The author may have hit the proverbial "nail on-the-head" when he stated that "[i]nstructions are often the only statements made from the bench telling jurors how they can lawfully consider the introduced evidence. Yet those instructions are generally unclear and difficult to follow, and they are widely thought to be disregarded by juries once the door to the jury room closes." *Id.*

41. For North Carolina's treatment of other offense evidence to show intent under Rule 404(b), see 1 HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE § 92, at 411 (3d ed. 1988). For federal and other state cases on the same issue, see 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 190, at 807 (4th ed. 1992).

42. For North Carolina's treatment of other offense evidence showing

leled the evidence in the case *sub judice*.[44]

At the close of the trial, the jury returned a verdict of guilty for a crime against nature, second-degree kidnapping, and three counts of second-degree rape.[45] On appeal, the court of appeals found no error in the defendant's trial and entered judgments

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knowledge under Rule 404(b), see 1 BRANDIS, *supra* note 41, at 416. For federal and state cases on the same issue, see 1 STRONG, *supra* note 41, at 805.

43. *Scott,* 331 N.C. at 41, 413 S.E.2d at 788. For North Carolina's treatment of other offense evidence to show a plan, scheme or design under Rule 404(b), see 1 BRANDIS, *supra* note 41, at 414-15. For federal and other state cases dealing with the same issue, see 1 STRONG, *supra* note 41, at 800. *Compare* State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992) *with* Oliphant v. Koehler, 594 F.2d 547 (6th Cir.), *cert. denied*, 444 U.S. 877 (1979). In *Oliphant*, the defendant was also being tried for rape, and the State sought to introduce the testimony of witnesses who would testify that the defendant had also raped them in similar circumstances. The defendant had been acquitted of those offenses, but the trial court allowed the evidence to show a "common scheme, or plan." *Id.* However, it is clear—in this author's opinion—from the facts in *Oliphant* that the defendant did have a common scheme or plan. On the other hand, it may not have been so clear in *Scott*. For a contrary view on whether it was clear that a plan existed in *Oliphant*, and if there was a plan, whether it would be relevant, see Delao, *supra* note 13, at 1057-58. The author argued that:

> [T]o prove . . . scheme the government must prove the defendant actually raped the two witnesses. Since the defendant was acquitted of both charges, the two alleged rapes were irrelevant[,] . . . unless orchestration of consensual sex diminishes the defense of consent to the instant charge . . . . Orchestration of consensual intercourse (seduction) is not a crime; [non-]consensual intercourse is a crime.

Id.

44. *Scott,* 331 N.C. at 53-54, 413 S.E.2d at 795. According to the testimony of both the victim and Ms. Freedman, the defendant, on foot, approached both persons whom he had previously been acquainted around midnight and requested a ride home. *Id.* Once the defendant had the victims in secluded places he ordered them out of their vehicles or tried to pull them out of the vehicle, and upon getting them outside he then ordered them to take down their pants. *Id.* Further, after denying his requests, the defendant forcibly proceeded to have multiple acts of vaginal intercourse including one act of fellatio with the victim. *Id.* Moreover, after each incident the defendant inquired if he had hurt the victims, and he displayed a modicum of concern for them. *Id.*

45. *Id.* at 40-41, 413 S.E.2d at 787. The court sentenced the defendant to ten years imprisonment for the crime against nature, thirty years for kidnapping, and forty years on the consolidated rape convictions. *Id.* The defendant was convicted on three separate counts of rape because "each act of forcible sexual intercourse constitutes a distinct and separate offense." *Scott,* 99 N.C. App. at 119, 392 S.E.2d at 624. "In this case, where an act of intercourse is interrupted by some event, adverse weather conditions, and the act is terminated and then after a new act of forcible intercourse begins, then that constitutes a separate and distinct offense." *Id.*

against him.[46] The North Carolina Supreme Court dismissed the defendant's appeal, but allowed his petition for discretionary review[47] as to the court of appeals' determination of: "whether the State may introduce in a subsequent criminal trial evidence of a prior alleged offense for which the defendant had been tried and acquitted in an earlier trial."[48]

The North Carolina Supreme Court in a five to one decision reversed[49]. Chief Justice Exum, writing the majority opinion, held that where:

> [A] defendant committed a prior alleged offense for which he has been tried and acquitted [evidence of the prior crime] may not be admitted in a subsequent trial for a different offense when its pro-

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46. *Scott,* 331 N.C. at 41, 413 S.E.2d at 787. *See supra* notes 12 and 33.

47. *See* N.C. GEN. STAT. § 7A-31 (1993). Section 7A-31 provides in pertinent part:

> Discretionary review by the Supreme Court.
>
> (a) In any cause in which appeal is taken to the Court of Appeals[ ] . . . the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. . . . The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. . . . If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.
>
> . . . .
>
> (c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:
>
> (1) The subject matter of the appeal has significant public interest, or
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Id.

48. *Scott*, 331 N.C. at 41, 413 S.E.2d at 787. Note, however, the limited nature of the question addressed by the supreme court. The framing of this issue is critical in terms of analyzing the dissent's interpretation of this decision and its effects. In this author's opinion, such a narrowly defined issue ultimately narrows the scope of the court's holding and prevents the far reaching ramifications espoused by the dissent. For a discussion on the effects of the *Scott* decision, see *infra* part C of the Analysis.

49. *Id.* Justice Lake did not participate in the decision, and Justice Meyer was the lone dissenter. *Id.* The supreme court affirmed the crime against nature conviction. *Id.*; *see infra* note 53 and accompanying text.

> bative value[50] depends, as it did here, upon the proposition that the defendant in fact committed the prior crime. . . . To admit such evidence violates, as a matter of law, [North Carolina] Evidence Rule 403.[51] . . . [Thus,] [w]hen the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under . . . [R]ule [403] as a matter of law. The evidence at issue here is of that sort.[52]

The court reversed the rape and kidnapping convictions, the rationale being that the admission of Ms. Freedman's testimony resulted in unfair prejudice to the defendant and warranted a new trial.[53]

BACKGROUND

A. *Rule 404(b)*[54]

Rule 404(b) is the most litigated rule within the Rules of Evidence.[55] Rule 404[56] sets out the general proposition that "evi-

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50. Probative value is defined as "evidence[ ] having the effect of proof; tending to prove, or actually proving[;][ ] . . . that which furnishes, establishes, or contributes toward proof." BLACK'S LAW DICTIONARY 1082 (5th ed. 1979) (citations omitted).

51. *See infra* text accompanying notes 67-75.

52. *Scott,* 331 N.C. at 42-43, 413 S.E.2d at 788-89.

53. *Id.* at 46, 413 S.E.2d at 791. However, the court did not reverse the crime against nature charge. *Id.* "Consent[ ] . . . is not a defense to a crime against nature. Defendant admitted he had committed cunnilingus upon the prosecuting witness. Given this admission, Ms. Freedman's testimony could have had no conceivable effect on whether the jury believed defendant had committed the crime against nature." *Id.* at 46-47, 413 S.E.2d at 791.

54. Note that there are other rules of evidence which are fundamental in determining whether evidence will be admissible. However, in the text of this Note, those rules will not be discussed because they would assumably be addressed prior to any Rule 403 and/or 404 determinations. The pertinent rules are Rules 401 and 402. For a more detailed discussion of Rules 401 and 402 of the North Carolina Rules of Evidence, see *infra* notes 62 and 63 respectively. In addition, although numerically Rule 404(b) falls after Rule 403, the determination of the admissibility of evidence of this nature—evidence of other crimes, wrongs, or acts—must first be examined under Rule 404. If the evidence falls within the purview of Rule 404(b), then the trial judge must then make a determination of whether the evidence is unfairly prejudicial under Rule 403. For a more detailed discussion of Rule 403 and the determinations that must be made, see *infra* text accompanying notes 65-75.

55. 1 GREGORY P. JOSEPH & STEPHAN A. SALTZBURG, EVIDENCE IN AMERICA; THE FEDERAL RULES IN THE STATES, ch. 14 Rule 404, at 6 (1988). In this author's opinion it is evident that the reason for such litigation is the potential advantage

dence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused."[57] However, evidence of other offenses is not admissible if its *sole* or *only* relevancy is to show that defendant has the character or propensity to commit a criminal act.[58] Rule 404 is now considered one of inclusion, rather than one of exclusion for that reason.[59] Thus, many

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or disadvantage that may flow from a Rule 404(b) determination. Thus, it is interesting to note that the *Scott* decision limits this burdensome determination, of whether the evidence does in fact fall within the rule, and promotes, in many ways, judicial efficiency as well as the concerns expressed by the minority of jurisdictions which do not allow the admission of prior acquittal evidence. For a look at the jurisdictions that do not allow the use of prior acquittal evidence, and the concerns they have expressed with the use of such evidence, see *supra* note 8.

56. Rule 404 deals primarily with character evidence and its inadmissibility to prove conduct. North Carolina Rule 404 provides:

> Character Evidence not Admissible to Prove Conduct: Exceptions; Other Crimes.
>
> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purposes of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut the evidence that the victim was the first aggressor;
>
> (3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) 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 that he acted 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, entrapment or accident.

Id.

57. State v. Coffey, 326 N.C. 268, 273, 389 S.E.2d 48, 54 (1990). Also, note that subsection (b) of Rule 404 is not exhaustive. *See* State v. Morgan, 315 N.C. 624, 340 S.E.2d 84 (1986). "The list [of categories in Rule 404(b)] is neither exclusive nor exhaustive." *Id.* at 637 n.2, 340 S.E.2d at 91 n.2 (citations omitted).

58. *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. *Cf.* 1 BRANDIS, *supra* note 41, § 91. Brandis reviews the somewhat erratic nature of the court's holdings in North Carolina concerning the admissibility of other crimes evidence under Rule 404(b); many times within the same opinion. *Id.*

59. *Coffey,* 362 N.C. at 278, 389 S.E.2d at 54. *Compare* State v. McClain, 240 N.C. 171, 174, 81 S.E.2d 364, 366 (1954) (pre-rule case) (Evidence of other crimes, wrongs or acts by a defendant falls under a "general rule of exclu[sion] ... subject to certain ... exceptions ....") *with* State v. Coffey, 326 N.C. 268, 278-

times, admissibility generally falls on whether the other offense evidence sought to be admitted can be framed within any one or more of the categories set forth in subsection (b) of Rule 404.[60] Subsection (b) of Rule 404 provides:

> (b) 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 that he acted 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, entrapment or accident.[61]

In *Scott*, the testimony of Ms. Freedman constituted relevant[62] and otherwise admissible[63] evidence. However, since the

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79, 389 S.E.2d 48, 54 (1990) (post-rule case) ("[G]eneral rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to . . . *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."). For a federal case discussing the "inclusion or exclusion" issue, see United States v. Long, 574 F.2d 761 (3d Cir. 1978). In *Long* the court ultimately held that "[t]he draftsmen of Rule 404(b) intended it to be construed as one of 'inclusion', and not 'exclusion'." *Id.* at 766.

60. *But cf.* State v. Deleonardo, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986) ("[T]he fact that evidence cannot be brought within a category [set forth in Rule 404(b)] does not necessarily mean that the evidence is inadmissible."); *Morgan*, 315 N.C. at 637 n.2, 340 S.E.2d at 91 n.2 (Rule 404(b) is merely illustrative).

61. N.C. GEN. STAT. § 8C-1, Rule 404 (1992); *see also supra* notes 56 and 57. Note that North Carolina Rule 404 is identical to its Federal counterpart, except for the addition of "entrapment" in the last sentence of subsection (b), *Deleonardo*, 315 N.C. at 769, 340 S.E.2d at 356, as well as the notice requirement, provided for in the new federal rules, if other crimes evidence is going to be introduced by the prosecution in criminal cases. The new Federal Rule 404(b) provides in pertinent part:

> (b) Other Crimes, Wrongs, or Acts.
> Evidence of other crimes, wrongs, or acts . . . may, however, be admissible . . . , provided that upon request by the accused, the prosecution in a criminal case *shall provide reasonable notice in advance of trial, or during trial if the court excuses notice for good cause shown, of the general nature of any such evidence it intends to introduce at trial.*

FED. R. EVID. 404 (emphasis added).

62. Rule 401 of the North Carolina Rules of Evidence provides:

> Definition of "Relevant Evidence"
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C. GEN. STAT. § 8C-1, Rule 401 (1992). The North Carolina Supreme Court has

testimony was also "other crimes evidence," it had to fall within

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interpreted this definition very broadly, as stated in State v. Stager, 329 N.C. 278, 404 S.E.2d 876 (1991):

> Evidence is relevant if it has *any* logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance to throw *any* light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

Id. at 302, 404 S.E.2d at 890 (citing State v. Riddick, 316 N.C. 127, 137, 340 S.E.2d 422, 428 (1986) (emphasis added) (quoting State v. Arnold, 284 N.C. 41, 47, 199 S.E.2d 423, 426 (1973))). *See, e.g.,* State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993) (evidence that a person's capacity, to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, is impaired has some tendency to prove he does not know the nature and quality of his acts or the difference between right and wrong); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993) (medical opinion that the vagina of the victim had been penetrated was relevant to the charge of taking indecent liberties with a child, even though the child's testimony did not mention penetration); State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989) (evidence of footprints or shoe prints at the scene of the crime corresponding to those of the accused is admissible as relevant circumstantial evidence); Ferrell v. Frye, 108 N.C. App. 521, 424 S.E.2d 197 (1992) (details of an accident and evidence bearing on the degree of severity of injury was properly admitted for a determination of damages, even though defendant-appellant had stipulated his negligence and that his negligence was the proximate cause of the injury).

63. Rule 402 of the North Carolina Rules of Evidence sets the standard for admissibility of relevant evidence. The North Carolina rule is identical to its federal counterpart except for the addition of "by the Constitution of North Carolina" and "by act of the General Assembly". N.C. R. EVID. 402 advisory committee's note. Rule 402 provides:

> Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

N.C. GEN. STAT. § 8C-1, Rule 402 (1992). As one author notes, "[t]hus, relevance as defined in Rule 401 is the touchstone of admissibility and unless otherwise excluded by law, relevant evidence is rendered *per se* admissible." 1 JOSEPH, *supra* note 55, ch. 12 Rule 402, at 2. However, as Brandis notes in his treatise, "restrictions such as the Rules, Statutes and the Constitutions, impose obvious limitations on such sweeping statements as; 'in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible'[,] and 'generally all relevant evidence is admissible'." 1 BRANDIS, *supra* note 41, at 345 n.13 (citations omitted).

the purview of Rule 404(b) to be allowed. The trial judge ruled the evidence admissible under Rule 404(b) "to show opportunity, intent, preparation and plan".[64] At that point, however, the trial judge faced a determination of whether there was any potential unfair prejudice that might result from the admission of the other offense evidence.[65] That determination is embodied within Rule 403 and requires a balancing of the probative value which must not be substantially outweighed by the unfair prejudicial effect of the evidence if allowed.[66]

B. *Rule 403*[67]

Rule 403 is many times the last hope for defendants and defense attorneys to prevent the admissibility of otherwise damning evidence. For defense attorneys, as well as prosecuting attorneys, a Rule 403 ruling may be the most pivotal stage of a trial; the potential for admission or exclusion of otherwise relevant and pertinent evidence which could be extremely crucial in the ultimate determination of either an acquittal or a conviction. Rule 403 provides:

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,[68] confusion of the issues, or misleading the jury, or by consid-

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64. *Scott,* 331 N.C. at 41, 413 S.E.2d at 788. *See also supra* notes 41-43 and accompanying text.

65. *See generally infra* text accompanying notes 67-75.

66. *See generally* Victor J. Gold, Comment, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence,* 58 WASH. L. REV. 497 (1983) (explaining the counterbalance that Rule 403 provides against the enlarged scope of admissibility under the federal rules).

67. *See* N.C. GEN. STAT. § 8C-1, Rule 403 (1992). "Rule 403 of the North Carolina Rules of Evidence is identical to its federal counterpart." N.C. R. EVID. 403 advisory committee's note.

68. *See* 1 Strong, *supra* note 41, at 780-82. Note STRONG'S elaboration on some of the issues embodied within Rule 403, when he stated:

> Prejudice does not simply mean damage to the opponent's cause, neither does it necessarily mean an appeal to emotion. Prejudice can arise, however, from facts that arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence. Thus, evidence of conviction for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case. A juror influenced in this fashion may be satisfied with a

erations of undue delay, waste of time, or needless presentation of cumulative evidence.[69]

The wording of the statute exemplifies the draftsmen's intent for the trial judge to be given very substantial discretion in "balancing" probative value on the one hand and "unfair prejudice" on the other.[70] However, this discretion is not unlimited. For instance, the *Scott* court opined that "[s]ound judicial discretion is 'that [which] is . . . exercised . . . with regard to what is right and equitable under the circumstance and the law, and directed by the reason and conscience of the judge to a just result."[71]

Once the decision is made that the probative value of the evidence outweighs the risk of prejudice, the evidence may be admitted; however, if the evidence is received, the judge should take "pains to explain to the jurors the limited uses for which the evi-

> slightly less compelling demonstration of guilt than he should be. Second, whether or not "emotional" reactions are at work, relevant evidence can confuse or worse, mislead the trier of fact if he is not properly equipped to judge the probative value of the evidence. Third, certain proof and the answering evidence that it provokes might unduly distract the jury from the main issues. Finally, the evidence offered and the counterproof may consume an inordinate amount of time.

Id.

69. N.C. GEN. STAT. § 8C-1, Rule 403 (1992).

70. *Long,* 574 F.2d. at 767; 1 BRANDIS, *supra* note 41, at 355 n.42. Also, in *Long* the court stated:

> [The trial judge] should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) probative value, or (b) the prejudice presented by the evidence. . . . The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom.

Id. at 767. *But see* United States v. Dolliole, 597 F.2d 102 (7th Cir. 1979). In *Dolliole* the court stated that:

> [T]he use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it 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 . . . .

Id. at 107.

71. *Scott,* 331 N.C. at 42, 413 S.E.2d at 789. *See also* State v. Kyle, 333 N.C. 687, 702, 430 S.E.2d 412, 420 (1993) ("[An] [a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.") (citations omitted).

dence is admitted."[72] If the defendant contends that the trial court erroneously admitted the evidence, then he must prove that "but for" the erroneous admission, there is a "reasonable possibility" that the jury would have reached a different verdict.[73]

In *Scott*, the heart of the court's ruling and its precedential effect revolves, at least facially, around its Rule 403 determination. As mentioned above, the court held that "when the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, it becomes inadmissible under [R]ule [403] as a matter of law."[74] This holding sets forth a "bright-line" rule in which defendants will no longer have the onerous burden of having to show prejudice to prevent the admissibility of prior acquittal evidence.[75] Thus, in effect, the rule divests the trial judge of his discretionary power as to evidence of this nature. The *Scott* court, rather than allowing the trial judge to make the determination of "what is equitable under the circumstances and the law", created this "bright-line" rule to bar the admissibility of prior acquittal evidence. However, in light of the potential unfair prejudice to the defendant, which results from the admission of such evidence, this divestment appears ultimately justified.

72. State v. Davis, 106 N.C. App. 596, 603, 418 S.E.2d 263, 268 (1992). *See also supra* note 40. *But see* Goldstein, *supra* note 6, at 1027. Goldstein points out that "[i]nstructions are often the only statements made from the bench telling jurors how they can lawfully consider the introduced evidence. Yet those instructions are generally unclear and difficult to follow, and they are widely thought to be disregarded by juries once the door to the jury room closes." *Id.* *See also* United States v. Daniels, 770 F.2d 1111 (D.C. Cir. 1985). In *Daniels*, the court opined that "[t]o tell a jury to ignore the defendant's prior convictions in determining whether he committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond moral capacities." *Id.* at 1118.

73. *See* N.C. GEN. STAT. § 15A-1443 (1988); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992). *Compare* State v. Weeks, 322 N.C. 152, 161, 367 S.E.2d 895, 902 (1988) ("[I]f relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, the party asserting such has the burden of showing that the error was prejudicial.") *with* State v. Gappins, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). ("[I]f the evidence was improperly admitted the burden is on the party who asserts such to show both error and that he was prejudiced by its admission.").

74. *Scott,* 331 N.C. at 43, 413 S.E.2d at 789. *But see* State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990) (holding that prior acquittal evidence is admissible when the evidence is within the "chain of circumstances" or the so-called "res gestae" exception). *See also infra* text accompanying notes 114-18.

75. *Scott*, 331 N.C. at 42, 413 S.E.2d at 788.

ANALYSIS

A. *Evidentiary Ruling*

The North Carolina Supreme Court's holding in *State v. Scott*[76] revolves, at least facially, around its evidentiary ruling. The court's holding will not permit prior acquittal evidence, which is otherwise relevant and admissible, to be admitted because of its prejudicial impact.[77] However, prior rulings by the same court in cases very analogous to *Scott*—although in the context of allowing prior acquittal evidence for the impeachment of witnesses—consistently accepted prior acquittal evidence without it being unduly prejudicial. These cases, *State v. Leonard,*[78] *State v. Royal,*[79] *State v. Ross,*[80] and *State v. Herbin*[81] all set forth the general proposition adhered to in this state; prior acquittal evidence is admissible and the determination of prejudice is the responsibility of the trial judge.[82] If the trial judge failed to make a proper inquiry or abused his discretion, then the judge's determination would be reversed.[83] It would appear from a perfunctory review of these cases that the established course for use of such prior acquittal evidence slanted towards admission rather than exclu-

76. 331 N.C. 39, 413 S.E.2d 787 (1992).

77. *See generally supra* text accompanying Notes 50-52 and 74.

78. 300 N.C. 223, 266 S.E.2d 631, *cert. denied* 449 U.S. 960 (1980) (cross examine on insanity). *See also supra* note 10.

79. 300 N.C. 515, 268 S.E.2d 517 (1980) (defendant who takes the stand is subject to impeachment). *See also supra* note 10.

80. 295 N.C. 488, 246 S.E.2d 780 (1978) (impeachment allowed even though charges have been dismissed). *See also supra* note 10.

81. 298 N.C. 441, 259 S.E.2d 263 (1979) (impeachment allowed even though acquitted of those charges). *See also supra* note 10.

82. *Leonard,* 300 N.C. at 232, 266 S.E.2d at 238. Arguably, it appears that the supreme court's ruling in *Scott* is limited to the use of the evidence in terms of finding guilt, rather than for impeachment purposes. However, it is unclear whether this decision may have an impact on future impeachment cases. For a discussion on the impact or effect of the *Scott* decision, see *infra* part C of the Analysis. In addition, for a more extensive work on the use of prior acquittal evidence for impeachment of witnesses, where the authors contend that the use of prior acquittal evidence is in violation of the concept of fundamental fairness and the constitutional principle of double jeopardy, see generally Robert L. Wilson, Jr. & M. Gordon Widenhouse, Jr., Comments, *Impeachment of the Criminal Defendant by Prior Acquittals- Beyond the Bounds of Reason,* 17 WAKE FOREST L. REV. 561 (1981). *See also* 1 BRANDIS, *supra* note 41, at 489 n.60 (author agrees with barring questioning or inquiry as to acts when witnesses have been acquitted).

83. *Leonard,* 300 N.C. at 232, 266 S.E.2d at 638.

sion. Thus, the *Scott* court misplaced its reliance, as the dissent pointed out, on the case law of this state.[84] The court, however, ultimately relied upon case law within other jurisdictions to support its conclusion.[85]

On the other hand, the rationale for the court may not totally lie within the true prejudicial effect, under Rule 403, that the court espouses. The court's rationale, at least in part, can be found within the fundamental fairness and constitutional concerns set out by the court not only in *Scott*, but also in those cases in which the court held the evidence of prior acquittals admissible. Within *Royal, Herbin, Ross,* and *Leonard* there were strong dissenting opinions—several[86] led by Justice Exum, now Chief Justice Exum, who wrote the opinion for the majority in *Scott*—which adamantly expressed the potential prejudicial effect of requiring a defendant to defend a second time against a crime which had previously resulted in an acquittal.[87] Thus, in that context, wrapped in the *Scott* majority's Rule 403 determination is its previous concern of fundamental fairness and the constitutional protection against double jeopardy.[88] However, to assert that the Rule 403 ruling is insignificant would be foolish, especially in light of the United States Supreme Court's ruling in *Dowling v. United States*.[89] In *Dowling*, the Supreme Court rejected a defendant's objection to the admission of prior acquittal evidence under the constitutional arguments of double jeopardy and fundamental

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84. *Scott,* 331 N.C. at 49-50, 413 S.E.2d at 792-93 (Meyer, J., dissenting).

85. *Scott*, 331 N.C. at 44, 413 S.E.2d at 789. In support of its evidentiary conclusion, the court cited State v. Little, 350 P.2d 756 (Ariz. 1960); where the court held that "[t]he fact of an acquittal, . . . when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities, lowers the scale to the side of inadmissibility of such evidence." *Id.* at 763; and State v. Holman, 611 S.W.2d 411 (Tenn. 1981); where the court concluded that:

> [T]he probative value of such evidence cannot be said to outweigh its prejudicial effect upon the defendant. For such evidence to have any relevance or use in the case on trial, the jury would have to infer that, despite the acquittal, the defendant nevertheless was guilty of the prior crime. No inference can properly be drawn from an acquittal.

Id. at 413.

86. Chief Justice Exum, then Justice Exum, dissented and filed opinions in *Ross, Royal,* and *Herbin*. He joined in dissent with Justice Copeland in *Leonard*.

87. *See generally infra* note 99 and accompanying text.

88. *See generally infra* text accompanying notes 96-112.

89. Dowling v. United States, 493 U.S. 342 (1990). For a more detailed discussion of the *Dowling* decision as well as the criticisms concerning the Court's holding, see Goldstein, *supra* note 6; Crawford, *supra* note 6.

fairness.[90] Moreover, the North Carolina Supreme Court recently adopted the *Dowling* rationale in its decision of *State v. Agee.*[91] Interestingly though, the *Dowling* Court refused to address the evidentiary aspect of whether prior acquittal evidence could be rendered inadmissible as a general rule.[92] Thus, it appears that the *Scott* majority, through its Rule 403 determination, sidestepped the ruling in *Dowling* without directly confronting the *Dowling* court's rationale or its own position in *Agee*.[93] Therefore, defendants in North Carolina will no longer have to set forth constitutional arguments,[94] and can instead cite the *Scott* decision as a bar to the admissibility of prior acquittal evidence.[95]

B. Fundamental Fairness and Constitutional Protection.

Although the *Scott* court did not address[96] the constitutional defenses of double jeopardy[97] and collateral estoppel,[98] the

90. *Dowling,* 493 U.S. at 343. For definitions of double jeopardy and collateral estoppel, see *infra* notes 97 and 98 respectively.

91. *See Agee*, 326 N.C. at 551, 391 S.E.2d at 176-77. The North Carolina Supreme Court adopted the rationale of *Dowling* and refused to extend the collateral estoppel doctrine to exclude in all circumstances relevant evidence that was otherwise admissible under the Rules of Evidence merely because it related to alleged criminal conduct for which the defendant had been acquitted. *Id. But see infra* text accompanying notes 114-18.

92. *Dowling,* 493 U.S. at 343. Although the Court refused to address the evidentiary question, it would appear from Justice White's opinion that the Court would agree that the evidence was admissible, and the Rules of Evidence would provided adequate protection. In Justice White's opinion he stated that "[w]e decline to extend . . . 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 the defendant has been acquitted." *Id.* at 348. *See also Agee*, 326 N.C. at 551, 391 S.E.2d at 176-77.

93. *See generally infra* text accompanying notes 96-123.

94. *See generally* Goldstein, *supra* note 6, at 1028 (author contends that defense attorneys should no longer look to constitutional safeguards but should focus on not allowing the evidence or advocate clearer jury instructions as to its use).

95. Even though the constitutional arguments are still viable alternatives, in light of the *Dowling, Agee,* and *Scott* decisions, it appears uncontested, in this author's opinion, that defendants in North Carolina as well as their attorneys would be better off under a Rule of Evidence argument. *See also supra* note 92.

96. *See supra* notes 12 and 33.

97. Double Jeopardy is defined as the "[c]ommon-law and constitutional (Fifth Amendment) prohibition against a second prosecution after a first trial for the same offense. . . . The evil sought to be avoided is *double trial and double conviction*, not necessarily double punishment." BLACK'S LAW DICTIONARY 440

supreme court's holding permeated with the tones of such constitutional protection. As mentioned above, the *Scott* rationale resulted from the dissenting opinions of *Leonard, Herbin, Ross,* and *Royal*. The main overarching theme being that "[w]hen one has been tried . . . and acquitted of a particular crime that should end the matter for all purposes. A person acquitted [of a prior offense] should not be required continually to defend himself against . . . [that previous] charge in a subsequent criminal proceeding . . . ."[99] This theme is further buttressed by the courts's statements in *Scott*, concerning the fundamental importance of an acquittal, where it stated that:

> An acquittal is the legal and formal certification of the innocence of a person who has been charged . . . .[100] Once a defendant has been acquitted of a crime he has been set free or judicially discharged from an accusation[ ]. . . .[101] The inescapable point is that . . . [the] law requires proof beyond a reasonable doubt in criminal

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(5th ed. 1979) (citations omitted) (emphasis added). *See also* Delao, *supra* note 13, at 1042. Delao argues that:

> Based on *Ashe v. Swenson*, 397 U.S. 436 (1970), admitting evidence of a defendant's prior acquitted crime violates the principles embodied in the double jeopardy clause. [In addition,] *Ashe* stands for the proposition that issues necessarily decided for a defendant in a prior proceeding cannot be relitigated. Introducing, the prior acquitted crime allows, if not encourages, the jury to retry the defendant. Defendants are thus forced to reestablish their innocence because juries often view evidence of a prior offense as proof of guilt in the instant offense. Such a result strikes at the foundation of the double jeopardy clause.

Id. (footnotes omitted).

98. The doctrine of collateral estoppel was established in the criminal arena in Ashe v. Swenson, 397 U.S. 436 (1970). Collateral Estoppel is defined as "[any] [p]rior judgment between [the] same parties on [a] different cause of action is an estoppel as to those matters in issue or points contested, on determination of which finding or verdict was rendered." BLACK'S LAW DICTIONARY 237 (5th ed. 1979) (citations omitted). For sources dealing with the collateral estoppel question in the use of prior acquittal evidence as well as in general, see *supra* note 6.

99. State v. Royal, 300 N.C. 515, 533, 268 S.E.2d 517, 530 (1980) (quoting State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979) (Exum, J., concurring)). *See also* 1 BRANDIS, *supra* note 41, at 489 n.60. Brandis argues that "[t]here were dissents in all three cases[:] [*Herbin, Leonard,* and *Royal*]; and in *Royal*, Exum, J.[— now Chief Justice—], joined by Carlton, J., makes a strong case, with which this writer agrees, for barring inquiry as to the acts when the witness has been charged and acquitted." *Id.*

100. *Scott,* 331 N.C. at 43, 413 S.E.2d at 789 (citing BLACK'S LAW DICTIONARY 23 (5th ed. 1979)).

101. *Id.* (citing People v. Lyman, 65 N.Y.S. 1062, 1065 (N.Y. 1900)).

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> cases as a standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitting jury has left and sentencing has begun.[102]. . . By definition, when the Government fails to prove a defendant guilty . . ., the defendant is considered legally innocent . . . [ ]; [t]he 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.[103] (citations omitted).

The *Scott* majority is not merely paying "lip service" to what a prior acquittal means in a legal and historical sense.[104] Moreover, the court is expressing its double jeopardy concerns, under the rubric of Rule 403, without setting forth those concerns specifically.[105]

Furthermore, the *Scott* court is emphasizing the realization of two important effects that may result from allowing the use of prior acquittal evidence. First, it is all too likely that the jury will punish for past crimes even if they are uncertain about the present charge; this resulting from the inherent ability of the jury to believe the defendant not only committed the past crime as well as the present one.[106] And second, there is little, if any, protection remaining to defendants from the potential inferences the prosecutor can create in the minds of jurors simply by questioning or

102. *Id.* (citing State v. Marley, 321 N.C. 415, 424-25, 364 S.E.2d 133, 138 (1988) (quoting State v. Cote, 530 A.2d 775, 784 (N.H. 1987))).

103. *Scott*, 331 N.C. at 43, 413 S.E.2d at 789 (citing *Dowling*, 493 U.S. at 361 n.4 (Brennan, J., dissenting, joined by Marshall, J., and Stevens, J.) (quoting State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979))).

104. This is in contrast to how a majority of courts see an acquittal, which is correct in a legally conceptual sense *only*; those courts view "an acquittal [a]s . . . [only a result reached because] the State failed to . . . prov[e the defendant guilty] beyond a reasonable doubt." *Scott,* 331 N.C. at 50, 413 S.E.2d at 793 (Meyer, J., dissenting).

105. *See generally supra* notes 99-104 and accompanying text.

106. *See* Delao, *supra* note 13, at 1046-47. The author argues that:

> The jury . . . sees two victims pointing accusatory fingers at the defendant, although one jury has already determined that one finger points unjustly. The adage "where there is smoke there is fire" begins taking a mental foothold in the collective psyche of the jury. If the defendant cannot again disprove the prior crime, the jury is very likely to return a guilty verdict. This is particularly true where the defendant was acquitted of the prior crime because "the jury may feel that the defendant should be punished for that prior activity even if he is not guilty of the offense charged."

Id. (quoting United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979)) (footnotes omitted).

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even referring to those previous crimes or offenses.[107] To the majority in *Scott*, requiring the defendant to defend against previously acquitted crimes, in effect, makes the defendant "run the gauntlet" a second time.[108] Therefore, the *Scott* holding appears to be in full accord with the constitutional safeguards set out for criminal defendants, without the onerous burdens accompanying such determinations.

As to fundamental fairness, the holding in *Scott* falls squarely within the reasoning of the Fifth Circuit in *Wingate v. Wainwright*.[109] The *Wainwright* decision was one of the first cases that set forth the concept of fundamental fairness in the context of prior acquittal evidence. In the *Wainwright* opinion is the often repeated quote:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which the jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime.[110]

Thus, the *Scott* majority arrived at this "bright-line" rule to bar the admission of prior acquittal evidence, which enables defendants to escape the "blight and suspicious aura" which concerned the *Wainwright* court, while the majority of the state and federal courts do not afford such protection.[111]

C. *Effect of Scott*.

The two most obvious effects of the *Scott* decision are (1) the protection afforded to criminal defendants against what is other-

107. *See* Goldstein, *supra* note 6, at 1027.

108. *See generally Scott,* 331 N.C. at 43-44, 413 S.E.2d 788-89; *Ashe*, 397 U.S. at 445.

109. 464 F.2d 209 (1972).

110. *Wingate,* 464 F.2d at 215. *See also* Delao, *supra* note 13, at 1045. The author compares the use of prior acquittal evidence to the use of uncounseled prior convictions and the parity that should result from this comparison. He notes that in the United States Supreme Court case of Loper v. Beto, 405 U.S. 473 (1972), the "Court ruled that a state may not use prior uncounseled convictions for the limited purpose of impeaching a defendant. If this use of prior convictions is fundamentally unfair, using prior acquittal crime to prove an element of another crime is grossly unfair." Delao, *supra* note 13, at 1045. This is in stark contrast to the Supreme Court's holding in *Dowling*. *See Dowling*, 493 U.S. at 343. *See also* the second part of *supra* note 6.

111. *See generally* Bello, *supra* note 3.

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wise relevant and admissible evidence in other jurisdictions, and (2) the limiting of discretionary power attributable to trial judges in the context of prior acquittal evidence under Rule 403. As mentioned above, defendants in North Carolina will no longer have to battle the State's ability to try and frame prior acquittal evidence within the purview of Rule 404(b), or prove undue prejudice if in fact the evidence is admitted. Under this framework, the defendant will be tried for the present offense, and not for one he is supposed to be innocent of in the eyes of the law.[112]

However, even though the ruling in *Scott* bars the admission of prior acquittal evidence, there is one scenario in which this type of evidence may still be allowed. The *Scott* majority went to great lengths to distinguish its holding from its other recent decision in *State v. Agee*.[113] In *Agee*, the supreme court held that "despite the defendant's [earlier] acquittal, evidence of his marijuana possession had some probative value by virtue of its inextricable connection to the chain of circumstances[ ] [in the present charge]."[114] The majority in *Scott* tried to distinguish *Agee* because of the "chain of circumstances link that arguably made this evidence probative [and admissible] in *Agee*[,] by virtue of its temporal relevance to the crime for which the defendant was on trial . . .", was absent in *Scott*.[115] However, based on the rule set out in *Scott* it would appear that *Agee* would have limited, if any, significance. The limited occasions in which cases like *Agee* can arise and the potential for abuse by prosecutors,[116] in trying to fall within the now so-called "*Agee* exception", will inevitably lessen, if not totally discard, the significance of *Agee*. Furthermore, if the principles set out in *Scott* are to stand true and reflect the underlying ration-

112. *See supra* notes 99-104 and accompanying text.

113. 326 N.C. 542, 391 S.E.2d 171 (1990).

114. *Scott,* 331 N.C. at 45-46, 413 S.E.2d at 790.

115. *Id.* at 46, 413 S.E.2d at 790-91.

116. *See* Delao, *supra* note 13, at 1045-46. The author points out that:

> Another form of unfairness stems from prosecutorial [over]zealousness. In Ashe v. Swenson, the Court noted that the government improved its strategy at the second trial by not calling a witness whose identification testimony was "conspicuously negative" during the first trial, and that witnesses who did testify again were much surer of their identification. It is repugnant to the principles symbolized by the double jeopardy clause to allow a prosecutor to perfect the government's case against a defendant and retry the matter under the guise of other crimes evidence.

Id.

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ale of the court, *Agee* will most likely be rendered null in future situations.[117]

As to the discretionary powers of trial judges pursuant to Rule 403, the *Scott* decision has rendered such powers—in the context of prior acquittal evidence—non-existent.[118] However, due to the likely unfair prejudice that results to criminal defendants from the admission of prior acquittal evidence, this result is ultimately justified. Furthermore, because courts as a general proposition have been callous to the prejudicial effect of other crimes evidence—and as a result have made no real effort to balance prejudice against probative value—the removal of their discretion is justified and promotes the real purpose of Rule 403.[119]

The effect of the *Scott* decision not yet answered is the impact on evidentiary matters other than prior acquittal evidence. As the dissent pointed out, "the application of the new rule is not limited to evidence of prior crimes of which the defendant has been acquitted."[120] However, the dissent's interpretation, albeit in accordance with the holding of the court, may not be correct. First, due to the limited nature of the question addressed by the court, it would appear that the court's decision would be limited to prior acquittal evidence in the criminal arena only.[121] Furthermore, since the majority did not make such an overarching statement, and facially adhered to *Agee*, the true effect on other aspects of evidentiary questions is yet to be answered.

On the other hand, there is the distinct possibility that the majority's rationale in *Scott* may continue to expand. The court's decision appears to confine *Agee* to very limited, or even nonexistent, circumstances and jeopardizes the holdings in *Leonard, Herbin,* and their progeny concerning the admission of prior acquittal evidence for impeachment purposes.[122] If the majority

117. *See* Delao, *supra* note 13, at 1055-56. Delao notes the potential use of prior acquittal evidence "to complete the story", but qualifies the statement in that such use is generally rendered inadmissible under the *Wingate* rationale. *Id.* This author contends that since the *Scott* court relied, at least partially, upon the *Wingate* rationale for its decision, this would, along with the potential for prosecutorial abuse, work to further undermine the *Agee* court's holding allowing the use of "complete the story" or "res gestae" evidence.

118. *Scott,* 331 N.C. at 47, 413 S.E.2d at 791 (Meyer, J., dissenting).

119. *See generally* Gold, *supra* note 66. The author notes the courts inability many times to handle a determination of other crimes evidence under Rule 403.

120. *Scott,* 331 N.C. at 47, 413 S.E.2d at 791 (Meyer, J., dissenting).

121. *See generally supra* note 48 and accompanying text.

122. *See generally supra* note 82.

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in *Scott*—previously the minority in other impeachment cases—can again persuade the court that the concept of fairness and the finality of judgments should prevail, and the underlying rationale used in *Scott* stands, then the majority in *Scott* may once again conquer. However, the true effect of *Scott*, both in North Carolina and in other jurisdictions, is yet to be seen in the wake of this substantial departure from what appeared to be the position of the courts in this state as well as the majority of courts in the United States.

CONCLUSION

The North Carolina Supreme Court's decision in *State v. Scott*[123] established a "bright-line" rule in which the use of prior acquittal evidence in a subsequent criminal trial is *per se* inadmissible.[124] Although this is the minority view,[125] it is in full accord with the concept of fundamental fairness, the finality of judgments, and the constitutional safeguard against double jeopardy. The court encompassed these safeguards within a Rule 403 overlay as an efficient means for lawyers and judges to limit the State's ability to use prior crimes against the defendant and to promote efficiency within the system. While all of the potential effects of *Scott* are uncertain, there is one aspect which will ring loud and clear; the preservation of judgments and the strong public policy interest in protecting individuals from governmental overreaching are fulfilled.

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123. 331 N.C. 39, 413 S.E.2d 787 (1992).
124. *See generally supra* text accompanying note 9.
125. *See generally supra* note 8 and accompanying text.

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