DePaul Law Review

Volume 28
Issue 2 *Winter 1979*

Article 10

Government Appeal from Defendant's Successful Motion to Dismiss Not Barred by the Double Jeopardy Clause - United States v. Scott

Robert J. Ross

GOVERNMENT APPEAL FROM DEFENDANT'S SUCCESSFUL MOTION TO DISMISS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE—*UNITED STATES V. SCOTT*

The guarantee against double jeopardy in criminal prosecution[1] has recently been the subject of an unusual number of United States Supreme Court decisions which have refined the state of the law in this area.[2] One such case, which has significantly redefined the scope of double jeopardy protection, is *United States v. Scott*.[3] In this case, the Supreme Court narrowed the protection afforded to criminal defendants by altering the criteria used to determine when the double jeopardy clause prevents appeal by the government. The Court held that the double jeopardy clause would not be violated by allowing the government to appeal a defendant's successful motion to dismiss the indictment, which was granted before the issue of guilt or innocence was submitted to the trier of fact.[4] The Court thereby overruled *United States v. Jenkins*,[5] a recent unanimous decision which had barred governmental appeals when factual determinations would be required upon remand.[6]

The purpose of this Note is to analyze the *Scott* decision both in its application of existing law and its formulation of new principles. A limited criticism suggesting possible weaknesses in the decision will follow. Finally, the Note will explore the changes in the law of double jeopardy and will attempt to predict the impact that this decision will have on the trial and appeal of criminal cases.

---

1. The federal Constitution's guarantee against double jeopardy is found in the fifth amendment: "nor shall any person be subject for the same offense to be twice put in jeopardy. . . ." U.S. CONST. amend. V. For an excellent discussion of double jeopardy jurisprudence, *see* Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960). *See also* Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

2. Five such cases were decided during the Court's 1978 term. The decisions, all rendered on June 14, 1978, are: United States v. Scott, 437 U.S. 82 (1978), which is the subject of this Note; Sanabria v. United States, 437 U.S. 28 (1978) (government not allowed to appeal from defendant's successful motion for acquittal based upon insufficiency of the evidence); Green v. Massey, 437 U.S. 19 (1978) (the doctrine of *Burks* applies to state as well as federal proceedings); Burks v. United States, 437 U.S. 1 (1978) (a determination of insufficiency of evidence, whether at trial or on appeal, erects a double jeopardy bar to government appeal); Crist v. Bretz, 436 U.S. 908 (1978) (the Court applied the federal rule, that jeopardy attaches when the jury is impaneled and is sworn, to the states).

3. 437 U.S. 82 (1978).

4. *Id.* at 98.

5. 420 U.S. 358 (1975). For a discussion of *Jenkins*, *see* Wurzburg & Gross, *Double Jeopardy: Dismissal and Government Appeal*, 13 GONZ. L. REV. 337 (1978).

6. United States v. Jenkins, 420 U.S. 358, 370 (1975). For an additional discussion of *Jenkins*, *see* Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI-KENT L. REV. 549, 552-53 (1977).

FACTS AND PROCEEDINGS OF *SCOTT*

John Scott, an undercover narcotics agent,[7] was charged in a three count indictment[8] with violation of federal drug laws.[9] Once before trial[10] and twice during trial, Scott moved to have counts one and two dismissed on the ground that preindictment delay had prejudiced his defense.[11] At the close of the evidence[12] the trial judge granted Scott's motion.[13] The jury found Scott not guilty on count three.[14] The government sought to appeal the dismissal of the first two counts,[15] but the court of appeals, relying on *United States v. Jenkins*,[16] dismissed the appeal because factual determinations would be required upon reversal and remand.[17]

---

7. Scott was a police officer for Muskegon County, Michigan. Petitioner's Brief for Certiorari at 5, United States v. Scott, 437 U.S. 82 (1978).

8. Scott was indicted on March 5, 1975. Count I alleged that Scott distributed cocaine on August 20, 1974; Count II accused Scott of selling codeine on August 24, 1974; Count III charged Scott with selling heroin on January 22, 1975. *Id.*

9. The three counts in the indictment alleged violations of 21 U.S.C. § 841(a)(1) (1976), which states: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance."

10. The trial began on December 1, 1975. Petitioner's Brief for Certiorari at 7, United States v. Scott, 437 U.S. 82 (1978).

11. He contended that the seven-month delay between the alleged criminal activity and his indictment had prejudiced his right to a fair trial, and hence, was a violation of the Due Process Clause of the United States Constitution. U.S. CONST. amend. V. The specific prejudice Scott complained of was that he could not recall the events which transpired on the date of the offense alleged in count I. Petitioner's Brief for Certiorari at 8a, United States v. Scott, 437 U.S. 82 (1978). Scott relied on United States v. Marion, 404 U.S. 307 (1971), which held that substantial prejudice to the defendant must be shown if the delay in bringing the prosecution is intentional. *Id.* at 324. *But see* United States v. Lovasco, 431 U.S. 783 (1977), which the Government, at Scott's trial, claimed was controlling. That case held that delay for the purpose of pursuing a criminal investigation does not offend the due process clause. The Court there recognized that the delay is often designed solely to prejudice the defendant in that it allows the prosecutor more time to gather evidence against a suspect. *Id.* at 804.

12. Just before submission of the evidence to the jury Scott renewed his motion to dismiss. United States v. Scott, 544 F.2d 903 (6th Cir. 1976) (per curiam), *rev'd*, 437 U.S. 82 (1978).

13. The opinion from the bench stated that Scott was unduly prejudiced by the delay in bringing the charge under count I because he could not remember the events that transpired on August 20, 1974. The trial judge cited United States v. Marion, 404 U.S. 307 (1971), *see* note 11 *supra*, in support of the ruling. The reasons for dismissal of count II were unclear. Petitioner's Brief for Certiorari at 5, United States v. Scott, 437 U.S. 82 (1978).

14. *Id.*

15. The Government sought to appeal the dismissal of counts I and II, contending that Scott had led the trial court into error, and asserting that United States v. Lovasco, 431 U.S. 783 (1977), was the controlling case. Supp. to Petitioner's Brief for Certiorari at 5, United States v. Scott, 437 U.S. 82 (1978).

16. 420 U.S. 358 (1975). *Jenkins* held that the double jeopardy clause barred appeal by the government if further proceedings devoted to the factual issues of the offense charged would be required upon reversal. *Id.* at 370.

17. United States v. Scott, 544 F.2d 903, 903-04 (6th Cir. 1976) (per curiam), *rev'd*, 437 U.S. 82 (1978).

The Supreme Court reversed and remanded the case for further proceedings.[18] In so doing, it overruled *Jenkins*[19] and held that where a defendant seeks termination of his trial prior to submission of the issue of guilt or innocence to the trier of fact, an appeal by the government from his successful motion is not barred.[20] The opinion stressed that the violation complained of by Scott did not address the question of his factual guilt or innocence, but rather was based solely upon a technical legal defense.[21]

THE DECISION

The *Scott* Court was faced with the difficult task of balancing a defendant's constitutional right to be free from double jeopardy against society's valued interest that transgressors of the laws be punished. To understand this, the Court first analyzed the historical underpinnings of the double jeopardy prohibition to determine whether the protection of the clause properly could be invoked on behalf of the defendant. The opinion began by discussing the three common law pleas which antedated the express constitutional ban on multiple jeopardy for the same offense.[22] It then traced the developments in the law leading up to *Scott*.[23]

The Court next reviewed the policies underlying the doctrine. The primary thrust of the prohibition, it was noted, was to prevent successive pros-

---

18. 437 U.S. at 101. The majority opinion was written by Justice Rehnquist, who was joined by Chief Justice Burger, Justices Stewart, Blackmun and Powell. Justice Rehnquist also wrote the opinion for a unanimous Court in United States v. Jenkins, 420 U.S. 358 (1975).

19. 437 U.S. at 101.

20. *Id.*

21. *Id.* at 98-99. In effect, the Court was distinguishing between the defendant's right to be prosecuted in a timely fashion, and a substantive defense. The Court placed great weight on the fact that the defendant was *not* claiming that the government had not introduced sufficient evidence from which the jury may have inferred his guilt beyond a reasonable doubt. Rather, the defendant's claim was that due to a purely legal, procedural defect, a conviction could not stand. *Id.* The dissent discussed this point at length. *Id.* at 101-10 (Brennan, J., dissenting).

22. *Id.* at 84-92.

23. 437 U.S. at 87. The three common law pleas, *autrefois acquit*, *autrefois convict*, and pardon, were based on the principle that no man be brought into jeopardy of his life more than once for the same offense. 4 W. BLACKSTONE, COMMENTARIES* 335; 4 COKE REPORTS* 43(a). James Madison is generally credited with the idea of including a double jeopardy provision in the federal Bill of Rights, but his ideas were not accepted without change. I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, 275 (1950). One proposal read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense . . . ." 1 Annals of Cong. 434 (first Cong. 1789). Legislative intent is difficult to discern, especially since the language was passed upon quickly in both houses of Congress. *See generally* United States v. Wilson, 420 U.S. 332, 342 (1975); Green v. United States, 335 U.S. 184, 187-88 (1957); M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 499-512 (1978); J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 27-33 (1969); Wurzburg & Gross, *Double Jeopardy: Dismissal and Government Appeal*, 13 GONZ. L. REV. 337, 338-43 (1978).

ecutions which enhanced the possibility that an innocent defendant might be found guilty.[24] Secondly, the Court recognized that a person should not be subjected to the embarrassment, expense and anxiety of a criminal trial more than once for the same offense.[25] A third reason given for the existence of the principle was that since the Government's resources normally greatly exceed those of the individual defendant, multiple prosecutions result in a decidedly unfair advantage to the Government.[26]

The Court, after examining the purposes of the prohibition, concluded that the governmental appeal in *Scott* did not violate the rationale supporting the double jeopardy clause. It based this holding on the fact that it was the defendant himself who sought termination of the proceedings, and because the grounds upon which he moved for dismissal of the charges were unrelated to his guilt or innocence.[27]

---

24. 437 U.S. 82 (1978). This is a most important consideration. Even one complete criminal trial is a draining experience for most defendants. The Constitution has many similar types of guarantees to protect innocent persons from being unjustly imprisoned, a few of which are: the privilege against self-incrimination (fifth amendment), the guarantee of the assistance of counsel (sixth amendment), and the due process clauses (fifth and fourteenth amendments).

25. The Court quoted the accepted rationale for the double jeopardy clause set forth in Green v. United States, 355 U.S. 184 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

437 U.S. at 95, *quoting* Green v. United States, 355 U.S. 184, 187-88 (1957). The defendant in *Green* appealed after he was found guilty of second degree murder and arson. In that opinion, the Court explicitly rejected the theory that the defendant had waived his constitutional defense against double jeopardy by obtaining a successful reversal of his improper conviction. Green v. United States, 355 U.S. 184, 191-93 (1957). To illustrate the Court's acceptance of this idea, it is noted that nine Supreme Court cases other than *Scott* and *Jenkins* have quoted this language from *Green*. They are: Crist v. Bretz, 437 U.S. 28, 32 (1978); Arizona v. Washington, 434 U.S. 497, 504 n.13 (1978); Abney v. United States, 431 U.S. 651, 661-62 (1977); United States v. Dinitz, 424 U.S. 600, 606 (1976); Serfass v. United States, 420 U.S. 377, 387-88 (1975); Duncan v. Tennessee, 405 U.S. 127, 130 (1972) (dissenting opinion); United States v. Jorn, 400 U.S. 470, 479 (1971); Benton v. Maryland, 395 U.S. 784, 795-96 (1969); Abbate v. United States, 359 U.S. 187, 199 (1959) (concurring opinion).

26. Green v. United States, 355 U.S. 184, 192 (1957). The government has enormous resources compared to an individual defendant. While this may be unavoidable, it does increase the possibility that an inpecunious innocent will be convicted. This advantage also allows the prosecution to correct errors brought to light at the first trial without fear of economic failure, while it increases the financial burden on the defendant. If counsel is supplied to an indigent defendant by the government, the limited resources of a public defender's budget are depleted further. *See* Note, *Double Jeopardy—A Suggested Limit on the State's Right of Appeal in Criminal Cases*, 1977 UTAH L. REV. 759; Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325 (1977); Note, *Double Jeopardy Limitations on Appeals by the Government in Criminal Cases*, 80 DICK. L. REV. 525 (1976).

27. Although the Court repeatedly emphasized that it rejected the waiver theory as it had done in *Green*, it still relied upon the fact that defendant Scott had moved for the dismissal. Forman v. United States, 361 U.S. 416 (1960), held that by appealing a conviction a defendant waives his double jeopardy protection from another trial for the same offense.

The Court also reviewed recent cases[28] construing the double jeopardy clause. From these cases the court elicited two principles. First, that the double jeopardy clause bars appeal by the government whenever a second factual determination may be required as a result of the appeal.[29] Therefore, the Court reasoned, such an appeal would be allowed when a jury's verdict simply could be reinstated by the reviewing court,[30] or when no factual elements were resolved by the trial court.[31] The majority asserted that the *Scott* case was similar to the latter instance, and consequently, the only factual determination would be made on remand[32] if the government's appeal was successful.

---

28. Only modern cases were relevant to the Court's determination because not until 1975 did the government utilize its full power to appeal. Early in our history the Supreme Court held that the United States has no right of appeal in criminal cases absent explicit statutory authority. United States v. Sanges, 144 U.S. 310 (1892). *See also* United States v. Weller, 401 U.S. 254 (1971); 401 U.S. 394 (1957); Peters v. Hobby, 349 U.S. 331, 344-45 (1955).

The statutory grant under which the Government sought to appeal in *Scott*, was 18 U.S.C. § 3731 (1976), which states:

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

In 1975, the Supreme Court interpreted this statute as removing all statutory barriers to reprosecution, thus leaving all questions of appeal to be resolved solely under the double jeopardy clause. United States v. Wilson, 420 U.S. 332, 337 (1975). For further discussion of the history of appeals by the government, *see* Serfass v. United States, 420 U.S. 377, 383-87 (1974). *See also* Note, *Statutory Implementation of the Double Jeopardy Clause, New Life for a Moribund Constitutional Guarantee*, 65 YALE L. REV. 339 (1956).

29. United States v. Wilson, 420 U.S. 332 (1975). In this case the jury found the defendant guilty, but the trial judge granted the defendant's post-verdict motion for dismissal because of prejudicial preindictment delay. *Id.* at 342. The Court allowed a government appeal, reasoning that if reversal was warranted, the appellate court could simply reinstate the jury's verdict, obviating the need for a new trial. *Id.* at 345.

30. 437 U.S. at 85-86.

31. *Id.* at 86. *Jenkins* and *Wilson* were handed down the same day as Serfass v. United States, 420 U.S. 377 (1975). In *Serfass*, the Court held that a dismissal ordered before the jury was impanelled and sworn did not raise a double jeopardy bar to appeal because jeopardy had not yet attached. In that case, the Court intimated that if jeopardy had attached, governmental appeal would be barred. *Id.* at 392. *See* Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303 (1974). *See also* Comment, *Double Jeopardy: Its History, Rationale and Future*, 70 DICK. L. REV. 377, 390-92 (1966).

32. 437 U.S. at 98-100. Nevertheless, even though multiple factual determinations are avoided by this rationale, multiple trials and consequent subjection to jeopardy comes about, often at extreme personal cost to the defendant. *See* United States v. Jorn, 400 U.S. 470, 479 (1971). The Court asserted that the first factual determination of Scott's guilt or innocence will be made on remand. Wilson's first, and only, factual determination was made by the jury at his trial. Once made, it need not be retested. One flaw in this reasoning is that factual determinations necessarily must be made any time a legal question is to be resolved, as the trial judge can only determine the actual nature of the alleged prejudice from facts adduced at trial or at a hearing on the motion. Another oversight is the fact that the defendant in both instances *has* been placed twice in jeopardy and has twice suffered adjudication of his responsibility for the crime in question.

The second factor revolves around the identity of the movant. The Court has developed a theory which reasons that if the defendant moves to terminate the proceedings, he has voluntarily elected[33] to forego his right to have the first jury decide the issue of his guilt or innocence.[34] Under this rationale, Scott was responsible for the termination of the proceedings and as a result, should expect to be subjected to government appeal. Further, since Scott's motion was responsible for the termination of the trial, the Court analogized the situation to one in which the defendant moves for a mistrial declaration and, in such course, contemplates retrial.[35]

The Court's decision further relied on a finding that the termination of the trial pursuant to the defendant's motion was not an *acquittal*.[36] It has been firmly established that a judgment of acquittal bars retrial.[37] Another settled principle is that a trial judge's classification of his own action is not controlling when the propriety of governmental appeal is determined.[38] In

---

33. 437 U.S. at 94-95.

34. *Id.* This doctrine was first articulated in Lee v. United States, 432 U.S. 23 (1977). In *Lee*, the defendant moved for dismissal of the information against him for failure to allege the correct mental element. The motion was made after the prosecutor's opening statement. Since the trial was before the court sitting without a jury, jeopardy had not attached because the judge had not begun to hear evidence. *Id.* at 27 n.3.

The Indiana theft statute under which Lee was charged, INDIANA CODE ANN. § 35-17-5-3 (Burns 1975) (repealed July 1, 1977), required proof that the crime was committed knowingly and with intent to deprive the victim permanently of the property. The information failed to allege either mental element. At no time was a motion made under FED. R. CRIM. P. 7(e) to amend the information. 432 U.S. at 27 n.2. The trial court granted Lee's motion before a verdict was rendered. *Id.* at 27. Subsequent to the dismissal Lee was charged again, and was retried and convicted. He was found guilty on substantially the same evidence as had been presented against him at the first trial. The court of appeals rejected Lee's double jeopardy claim arising from the second prosecution. Lee v. United States, 539 F.2d 612 (7th Cir. 1976), *aff'd*, 432 U.S. 23 (1977). The Supreme Court upheld the conviction, analogizing the disposition to a mistrial declaration, and reasoning that the proceedings were terminated at the defendant's request and with his consent. 432 U.S. at 33.

35. 437 U.S. at 93. A motion for mistrial by the defendant removes any obstacle to reprosecution which results from the success of the motion and, in fact, contemplates retrial. Other cases which have so held are: Lee v. United States, 432 U.S. 23, 32-33 (1977); and United States v. Jorn, 400 U.S. 470, 484 (1971).

The Court weighed the defendant's "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U.S. 684, 689 (1949), against society's interest in having one complete opportunity to convict alleged criminals. Arizona v. Washington, 434 U.S. 497, 509 (1978).

36. 437 U.S. at 99.

37. As early as 1891 the Supreme Court held that an acquittal of the defendant bars appeal by the government. Ball v. United States, 140 U.S. 118 (1891). Other cases have so held: Fong Foo v. United States, 369 U.S. 141 (1962); Green v. United States, 355 U.S. 184, 188 (1957); Kepner v. United States, 195 U.S. 100 (1904). This was reaffirmed recently in Burks v. United States, 437 U.S. 1 (1978). In the federal system, acquittals are entered pursuant to Federal Rule of Criminal Procedure 29. *See generally* Note, *The Double Jeopardy Clause Bars Appellate Review Following a Judgment of Acquittal Entered Under Fed. R. Crim. P. 29(c)*, 46 U. CIN. L. REV. 1055 (1978).

38. The relevance of this consideration is that a disposition termed "an acquittal" by the trial court still may be deemed to be "a dismissal." United States v. Jorn, 400 U.S. 470, 478 n.7

deciding that Scott's dismissal was not an acquittal, the Court relied on *United States v. Martin Linen Supply Co.*[39] In that case, the Court disallowed a prosecution appeal from the trial judge's determination that the evidence was insufficient to convict the defendant, holding that the determination, whether correct or not, resolved some or all of the factual elements of the offense charged.[40] The Court distinguished Scott's case because his motion was based solely upon an asserted violation of his legal right to be prosecuted in a timely fashion, a claim unrelated to the factual elements of the crime.[41] In effect, the majority stated that an acquittal must be a resolution of at least some of the factual elements for the double jeopardy clause to bar reprosecution.[42]

Having decided that the granting of Scott's motion was not an acquittal, which would bar further jeopardy,[43] the Court felt compelled to overrule *United States v. Jenkins.*[44] In *Jenkins*, the trial court[45] dismissed draft evasion charges at the close of the evidence.[46] The defendant's motion was sustained because the local draft board had failed to give him a preinduction hearing on his conscientious objector claims.[47] The Supreme Court held that appeal by the prosecution was barred by the double jeopardy clause, because further proceedings devoted to resolution of factual matters would

---

(1971) (opinion of Harlan, J.), *citing* United States v. Sisson, 399 U.S. 267, 290 (1970). *See also* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) and United States v. Wilson, 420 U.S. 332, 336 (1975).

39. 430 U.S. 564 (1977).

40. *Id.* at 571.

41. 437 U.S. at 94 (1978).

42. *Id.* at 97. This decision restricts the definition of acquittals by holding that they must involve factual determinations. In effect, the Court held that there must be one factual determination for every criminal trial—no more, no less. The dissent argued this view is overly restrictive. *See* notes 78-84 and accompanying text *infra*.

43. The three factors relied on by the Court were, first, the granting of the motion did not amount to an acquittal; second, that retrial would not lead to multiple factual determinations; and finally, that the defendant had prompted the termination of the trial.

44. 437 U.S. at 86-87. The Court quoted from the dissenting opinion by Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932), where the Justice said that it is often better to overrule a prior case than to follow it when experience has shown that case to have been wrongly decided.

45. Jenkins was tried without a jury. The Supreme Court held that the double jeopardy clause was fully applicable to bench trials. 420 U.S. 358, 365 (1975).

46. Jenkins was indicted for failure to submit to induction into the armed services. United States v. Jenkins, 349 F. Supp. 1068 (E.D.N.Y. 1972).

47. In *Jenkins* the trial court held that United States v. Geary, 368 F.2d 144 (2d Cir. 1966), required a preinduction hearing to resolve an inductee's conscientious objector claims. The government sought to appeal this ruling. It claimed that no preinduction consideration of conscientious objector claims, which were filed by registrants after receiving their induction orders, was required by Ehlert v. United States, 402 U.S. 99 (1971). *Ehlert*, the government asserted, had rejected *Geary* and was the controlling case. The court of appeals dismissed for lack of jurisdiction and held that the government's appeal was barred by the double jeopardy clause. 490 F.2d 868, 880 (2d Cir. 1978).

be required if the case were remanded.[48] In *Jenkins*, the Court[49] expressed a desire to limit the applicability of the doctrine prohibiting multiple factual determinations[50] to cases where the verdict could be reinstated upon reversal without the necessity of additional trial court proceedings.[51] The decision also stressed that the proceedings, unlike a mistrial declaration, had ended *favorably* to Jenkins.[52] The *Scott* Court, in overruling *Jenkins*, stated that it had "pressed too far"[53] in its earlier decision by including within double jeopardy protection cases such as *Scott* in which a defendant attempts to avoid factual determination of his guilt or innocence by moving for a dismissal on purely legal grounds.[54] It held that in this instance an appeal by the government would not violate the double jeopardy clause. Basically, the Court considered the defendant's "valued right"[55] to be tried before the first jury and concluded Scott was not deprived of that right, because he, by his own motion, precluded that possibility.[56] Further, the Court emphasized the fact that Scott's motion did not address the question of whether he committed the crimes charged, but rather, only protested the government's authorization to prosecute him.[57] Finally, the Court con-

---

48. United States v. Jenkins, 420 U.S. 358, 370 (1975).

49. Justice Rehnquist, who also delivered the opinion in *Scott*, wrote for a unanimous Court in *Jenkins*. Justices Douglas and Brennan filed a separate concurring opinion in *Jenkins*. It was in a concurring opinion in *Lee* that Justice Rehnquist first expressed his growing dissatisfaction with the scope of the *Jenkins* decision. Lee v. United States, 432 U.S. 23, 36 (1977).

50. *See* notes 28-29 and accompanying text *supra*.

51. United States v. Jenkins, 420 U.S. 358, 368 (1975). The Court stated that *Wilson* should control only when no further proceedings reviewing factual determinations would be required. *Id.*

52. Basically, there are two different mistrial situations. The first is a mistrial declared by the trial court on its own motion. The second, the one at issue here, is where a mistrial is granted upon the defendant's motion. According to *Lee* and *Scott*, the latter erects no double jeopardy bar to reprosecution. 437 U.S. at 93-94. Lee v. United States, 432 U.S. 23, 30 (1977); United States v. Jorn, 400 U.S. 470, 485 (1975) (opinion of Harlan, J.). *See* Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169, 184-89 (1977) [hereinafter cited as *Mistrials and Double Jeopardy*].

53. 437 U.S. at 100-01. The *Jenkins* Court did not decide whether the trial judge had made an erroneous ruling of law, United States v. Jenkins, 420 U.S. 358, 365 (1975), or whether any issues of fact were resolved in favor of the defendant, because its holding precluded the necessity for such determinations. *Id.* at 367.

54. 437 U.S. at 86. The Court felt that *Jenkins* placed too great an emphasis on the defendant's right to have his guilt decided by the first jury impanelled to try him, particularly when that reasoning was applied to cases such as *Scott*. *Id.* at 87.

55. *Id.* at 100-01. That "valued right" was recognized explicitly in Downum v. United States, 372 U.S. 734, 736 (1963). *Downum* was the first case in which the Court reversed a subsequent conviction because of an improper declaration of mistrial. The *Scott* Court balanced the defendant's "first jury right" against the public's interest in meting out justice to offenders. 437 U.S. at 92. *See also* Wade v. Hunter, 336 U.S. 684 (1949), which held that retrial was not barred if a military court-martial was discharged due to a tactical necessity in the field.

56. 437 U.S. at 101. Scott's motion precluded submission of his guilt or innocence to the factfinder for its determination.

57. *Id.* This determination that the defense was procedural and unrelated to the factual elements of the drug-related offense was a controlling feature of the *Scott* Court's decision. If

cluded that overruling *Jenkins* would advance the public interest in that the government would be assured of "one complete opportunity to convict"[58] without enhancing the possibility that innocent defendants may be convicted.[59]

WEAKNESSES OF *SCOTT*

The Court made an unnecessary departure from the principle of stare decisis in deciding *Scott*.[60] Instead of following the recent unanimous decision in *Jenkins*,[61] it created new precedent where none was needed.[62] As was pointed out by Justice Brennan in his dissent,[63] there were other compelling reasons for the Court to follow *Jenkins*. He noted that adherence to *Jenkins* would have been consistent with the double jeopardy rationale against multiple prosecutions.[64] Such a holding would have strengthened this constitutional policy,[65] and it also would have retained clarity and certainty in this area of the law.[66]

Aside from its unwise deviation from sound precedent, the *Scott* opinion contains several logical defects as well. Much of the Court's reasoning is

---

Scott's motion had been based upon an alibi, lack of mental element, lack of material element, or upon an absence of concurrence of the mental and material elements, presumably the trial court's determination would have been final and the *Scott* decision would have been controlled by Finch v. United States, 434 U.S. 927 (1977). *See* note 60 *infra*.

58. 437 U.S. at 100. Arizona v. Washington, 434 U.S. 508 (1978).

59. Green v. United States, 355 U.S. 184 (1957). *See also* authorities cited in note 20 *supra*. The *Scott* Court here balanced the defendant's need for finality against society's need for complete justice.

60. 437 U.S. at 112-16. The majority claimed that intervening decisions necessitated overruling *Jenkins* as wrongly decided. *Id.* at 101. The Court could have distinguished *Jenkins* on the facts presented, or it could have found the decision inapplicable as it had done in *Lee*. *See* note 34 and accompanying text *supra*. *Jenkins* has been cited with approval in various Supreme Court decisions, including Finch v. United States, 434 U.S. 927 (1977) (dismissal based upon the Government's failure to state an offense may not be appealed because factual determinations would be required upon reversal and remand) and United States v. Morrison, 429 U.S. 1 (1976) (per curiam) (post-verdict dismissal did not erect a double jeopardy bar because no further factual proceedings would be required upon remand).

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

62. If the Court's waiver-legal defense rationale was truly significant, the Court could have distinguished *Jenkins* and based its decision purely on that rationale.

63. Justice Brennan was joined in dissent by Justices White, Marshall and Stevens. 437 U.S. at 101.

64. *Id.* at 103. The dissent argued that all of the untoward consequences of facing a second trial would confront Scott. *Id.* at 106. *See* note 25 *supra*, for the *Green* Court's rendition of these consequences.

65. *Id.* at 102. The majority conceded that the double jeopardy clause was designed to protect against multiple prosecutions. *Id.* at 92. In *Ex parte Lange*, 85 U.S. 163 (18 Wall.) (1873), the Court held the clause was designed "as much to prevent the criminal from being twice *prosecuted* for the same offense as from being twice punished for it." *Id.* at 168 (emphasis added).

66. *Jenkins* set forth a clear standard. It held that the double jeopardy clause bars retrial whenever there appears a possibility that the trial court judge, in terminating the proceedings, relied on facts adduced at trial. United States v. Jenkins, 420 U.S. 358, 370 (1975).

based on an analogy between Scott's motion to dismiss the indictment and a request for a mistrial. This comparison is flawed for two reasons. First, a motion for mistrial normally contemplates reprosecution.[67] In *Scott*, though, the defendant and the trial court believed the dismissal would be final, because further proceedings devoted to factual resolutions would have been required on remand.[68] Second, as was emphasized in *Jenkins* and in the *Scott* dissent, a mistrial does not end the proceedings *favorably* to the accused, as did this dismissal.[69] It should be clear, therefore, that at least from the subjective points of view of the trial court and the defendant, none of the qualities of a mistrial were intended to attach to the granting of the dismissal order.[70]

The majority simply held that Scott's motion was akin to a mistrial request, without discussing whether the defendant, in his motion, had evinced any knowing or voluntary waiver of his double jeopardy protection. In *Green v. United States*,[71] the Court held that a waiver of double jeopardy protection must be both knowing and voluntary.[72] The *Scott* opinion, however, did not look into the applicability of this test when it held that Scott had *elected* to forego his double jeopardy protection by moving for dismissal.[73] The opinion never distinguished "election" from "waiver." Indeed, such a

---

67. 437 U.S. at 93. *See* note 35 and related text *supra*.

68. *Jenkins* was then the controlling law which clearly barred any further prosecution of the defendant upon the granting of the motion to dismiss, because factual resolutions would have to be made if the court's decision were reversed. United States v. Jenkins, 420 U.S. 358 (1975).

69. *See* 437 U.S. at 114. Traditionally, under the canon of strict construction of the Criminal Appeals Act, 28 U.S.C. § 3731, Will v. United States, 389 U.S. 90, 96-98 (1967), the Court has distinguished between proceedings ending favorably to the accused and terminations which allow appeal by the Government. Lee v. United States, 432 U.S. 23, 29-30 (1977); United States v. Jenkins, 420 U.S. 358, 365 n.7 (1975); United States v. Sisson, 399 U.S. 267, 293-300 (1970).

70. Even though the nomenclature used by the judge is not controlling, United States v. Jorn, 400 U.S. 470, 478 n.7 (1971) (plurality opinion), his intention and reasoning in granting the motion should be considered. Under *Jenkins* and *Lee*, any midtrial order contemplating an end to prosecution of the defendant would erect a double jeopardy bar to reprosecution. Further, the defendant's knowledge of the possible consequences of his motion as well as his motive in requesting the dismissal should be relevant factors weighed by a higher court in determining reviewability.

71. 355 U.S. 184 (1957).

72. *Id.* at 191. " 'Waiver' is a vague term used for a variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some voluntary, knowing relinquishment of a right." *Id. See also* Johnson v. Zerbst, 304 U.S. 458 (1938). Justice Holmes probably would not have used a waiver theory so readily as Justice Rehnquist, especially where an express constitutional right is involved. Kepner v. United States, 195 U.S. 100, 134 (1904) (dissenting opinion).

73. *See* note 27 *supra*. In another decision, Schnekloth v. Bustamonte, the Court recognized that waiver of double jeopardy rights must be knowing and intelligent. 412 U.S. 218, 237-38 (1972). *Cf.* Johnson v. Zerbst, 304 U.S. 458 (1938) (the requirement of a competent and intelligent waiver when a defendant decides to forego a constitutional right was articulated in this case, which held that the sixth amendment requires appointment of counsel to indigent federal criminal defendants where the right has not been intelligently and competently waived).

distinction would be quite tenuous, as both imply the same conduct.[74] Scott clearly did not meet the first prong of the test. Since, when making his motion, he did not contemplate reprosecution, he could not be deemed to have made a knowing waiver.[75] The second prong of the test also fails because the Court never assessed the defendant's alternatives.[76] Nor did it take into account the government's role in necessitating the request for a dismissal.[77] Consequently, distinguishing this case because Scott elected to forego his double jeopardy protection is, at best, strained reasoning.

In another area, the *Scott* Court went far afield to allow the appeal at issue. The majority employed an unduly restrictive definition of acquittal[78] in its effort to make the holding appear to comport with existing precedent.[79] The Court reasoned that the dismissal did not amount to an acquittal, which would bar any government appeal,[80] because it did not resolve any of the fact questions pertaining to the offense charged.[81] In so holding, the Court promulgated a new test requiring that an acquittal resolve at least

---

74. In *Green*, the Court used "choose" and "waive" interchangeably. 355 U.S. 184, 192 (1957). The *Scott* Court freely used a synonym, "elect," for "waive" and in so doing neglected to afford this "election" similar constitutional safeguards. Indeed, "election" and "waiver" both imply relinquishing one legal right in favor of another. *See* BLACK'S LAW DICTIONARY 608, 1751 (4th ed. 1968).

75. *See* note 68 and accompanying text *supra*.

76. Scott admitted that if his motion had been granted prior to trial, he could have been subjected to government appeal under the Court's holding in Serfass v. United States, 420 U.S. 377 (1975). 437 U.S. at 95. If Scott had moved for dismissal after the verdict, and if it was not disallowed because of untimely assertion, granting it would still subject Scott to governmental appeal under the *Wilson* holding. Under then existing principles of law, the only way a trial judge could make a final disposition would be to grant the dismissal some time between the attachment and ending of jeopardy, as happened in *Scott*. Defendants now will face a Hobson's choice: a defendant in a case such as *Scott* can remain silent and face an enhanced possibility of conviction because of prejudicial preindictment delay, or he can move for dismissal and face an enhanced possibility of conviction because the Government could correct any errors in its case which had become evident during the first proceeding.

77. Clearly Scott was the movant but the Court never fully assessed the Government's responsibility for necessitating the motion. Its preindictment delay allegedly necessitated the motion for dismissal. While United States v. Dinitz held that a defendant is protected from governmental actions intended to provoke mistrial requests, the Supreme Court never employed a test which would take into account prosecutorial conduct indirectly responsible for termination of trial. 424 U.S. 600, 611 (1976).

78. *Lee* and *Martin Linen* would allow an acquittal to be a resolution based on facts relating to the general issue of the case, or simply, a legal determination that the defendant cannot be convicted of the offense charged. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Lee v. United States, 432 U.S. 358 (1975).

79. The *Scott* majority, while it claimed to recognize the purpose and meaning of the double jeopardy clause, nevertheless decided the case in contravention of the literal meaning of the words. *See* notes 1 & 25 *supra*. Scott will indeed be placed twice in jeopardy for the same offense. *See* 437 U.S. at 105-06. (Brennan, J., dissenting).

80. *See* note 37 *supra*.

81. The *Jenkins* decision had barred government appeal whenever there appeared even the possibility that the trial court's determination might have resolved some of the facts at issue. United States v. Jenkins, 420 U.S. 358, 369-70 (1975).

some of the factual elements of the offense charged in favor of the defendant.[82] Formerly, an acquittal was defined as a determination based on facts relating to the general issue of the case.[83] This new definition of acquittal is not susceptible to a principled application[84] because, as the dissent argued, the Court offered only minimal guidance for distinguishing between a purely legal defense and one based on a resolution of factual elements of the charge.[85] Justice Brennan noted, in the dissent, that many defenses involve overlapping factual and legal components including the statute of limitations,[86] assertions of violation of the right to a speedy trial,[87] and defenses of entrapment[88] and insanity.[89] The aforementioned defenses pre-

---

82. 437 U.S. at 97, *quoting* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

83. The dissent in *Scott* argued that the language taken from United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), was lifted out of the narrow context of that case. 437 U.S. at 111-12. Instead, the dissent argued, the well-accepted and proper definition of acquittal should remain simply "a legal determination on the basis of facts adduced at trial relating to the general issue of the case." *Id.* at 102. It contended that *this* was the proper definition to be elucidated from *Martin* rather than the narrow one announced by the majority. For support of this contention, the dissent cited Serfass v. United States, 420 U.S. 377, 393 (1975), *quoting* United States v. Sisson, 399 U.S. 290 n.19 (1970). 437 U.S. at 112. *See also* Lee v. United States, 432 U.S. 23, 30 (1977); United States v. Jenkins, 420 U.S. 358, 370 (1975).

84. 437 U.S. at 110-11.

85. *Id.* at 111.

86. *Id.* The dissent hypothesized a case in which the date of the offense is in dispute. The resolution of the question would involve a factual determination. A legal determination may then be required to decide whether the prosecution is barred by the statute of limitations. *Id.* at 115 n.10.

87. *Id.* at 111. *Cf.* In Barker v. Wingo, 407 U.S. 514 (1972), the Court held that a defendant's right to a speedy trial was not violated by delay of five years from date of arrest until trial. The Court considered the length of the delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant. *See also* L. KATZ, L. LITWIN AND R. BAMBERGER, JUSTICE IS THE CRIME—PRETRIAL DELAY IN FELONY CASES (1972). For a discussion of the right to a speedy trial in Illinois, *see* Rudstein, *Speedy Trial in Illinois: The Statutory Right*, 25 DEPAUL L. REV. 317 (1976).

88. 437 U.S. at 111. The dissent considered the difficulty a dismissal based on entrapment would present for jeopardy determination. *Id.* at 2206. In one sense the defense is a legal justification inasmuch as it demonstrates lack of defendant's predisposition to commit a crime. *Id. Cf.* Hampton v. United States, 425 U.S. 484 (1976) (Court rejected defendant's entrapment defense even though government supplied and subsequently purchased the illegal substance which he was arrested for selling because he was predisposed to commit the crime). In another sense, however, entrapment is designed to deter reprehensible police activities. *Scott* leaves open the question of how to deal with such a defense. *See* United States v. Russell, 411 U.S. 423 (1973). *See generally* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 171-76 (1976).

89. 437 U.S. at 111. (Brennan, J., dissenting). The dissent contended that defenses of insanity and entrapment provide legal justifications for otherwise illegal acts while preindictment delay protects the integrity of the trial process. *Id.* at 114. "Consideration of all three defenses requires the application of legal standards to the evidence adduced at trial." *Id.* For a discussion of the insanity defense *see* R. ARENS, INSANITY DEFENSE (1974). For a list of some of the problems facing Illinois defendants claiming insanity, and proposed solutions, *see* Thompson, *The Future of the Insanity Defense in Illinois*, 26 DEPAUL L. REV. 359 (1977).

clude the imposition of criminal liability on defendants even though the defendant *in fact* may have committed the offense in question. Furthermore, even though none of these defenses are actually bound up in the statutory definition of the crime, the *Scott* Court acknowledged that a trial judge may make a final disposition of a case prior to the verdict based on motions involving these defenses.[90] Accordingly, it is likely that this holding will ultimately lead to confusion, because legal and factual defenses are not often clearly separable.[91]

Finally, it may be asserted that the *Scott* rationale will be interpreted as a general weakening of constitutional protections. Not only has a new exception to the express prohibition against double jeopardy been created,[92] but the alleged due process violation which was the basis of Scott's motion to dismiss[93] received only cursory treatment. In effect, the court held that a defendant's right to assert a defense based on constitutional grounds was less important, from a double jeopardy perspective, than the public's interest in a proper resolution of factual issues.[94] This holding has significance far beyond the scope of the double jeopardy clause. Indeed, it reaches all criminal prosecutions in so far as it implies that legal defenses are constitutionally less valued than factual ones.[95]

---

90. 437 U.S. at 97-98. The question then arises whether these might be defenses which are "favored" in the eyes of the Court.

91. *Id.* at 103, 111 (Brennan, J., dissenting).

92. The words of the clause are clear and definite, *see* note 1 *supra*, yet the *Scott* Court found that this case did not come within the ambit of its protection. In the final analysis, should he be retried, Scott surely will have been placed twice in jeopardy for the same offense.

93. The defense of preindictment delay is grounded in the due process clause of the fifth amendment. United States v. Marion, 404 U.S. 307, 324-25 (1971). Consequently, Scott complained of a violation of his due process rights when he moved for dismissal because of substantial delay. Nevertheless, the Court held that appeal by the prosecution was permissible because Scott asserted a violation of only a legal right. 437 U.S. at 101. For a general discussion of the doctrine of preindictment delay, *see* Note, *Preindictment Delay in the Eighth Circuit*, 27 DRAKE L. R. REV. 110, 110-12 (1978).

94. A major question left unanswered by the *Scott* Court is why it did not deem preindictment delay to be one of the factual elements of the offense, especially in light of the fact that dismissals based on insanity and entrapment constitute "acquittals." 437 U.S. at 113. The dissent contended that an acquittal based on preindictment delay would not be inconsistent with Burks v. United States, 437 U.S. 1 (1978), 437 U.S. at 113 n.9 (Brennan, J., dissenting). *Cf.* Patterson v. New York, 432 U.S. 197 (1977). New York law requires a defendant to prove by a preponderance of the evidence the affirmative defense of emotional disturbance, to reduce the crime to manslaughter from second degree murder. The *Patterson* case held that such a practice does not violate the due process clause.

95. 437 U.S. at 98. By holding that factual defenses raise a double jeopardy bar while legal defenses do not, the Court lessened the importance of the latter. *Id.* at 101. In *Wilson*, a factual-legal dichotomy was first promulgated in the double jeopardy area, but not until *Scott* has it held such significance for the individual defendant and the criminal justice system. Consequently, fact prevails over law, statutory interpretation over justice.

IMPACT

The effects of *Scott* will be both immediate and substantial.[96] The holding will be felt in both state and federal courts.[97] Particularly, it will affect the time when defenses are asserted.[98] If a motion to dismiss is granted prior to trial, no jeopardy has attached.[99] If such a motion is sustained after the verdict, *Wilson* controls.[100] But if the defendant succeeds in having charges dismissed during the trial, *Scott* will apply.[101] An appellate court considering an appeal by the government must then determine if the dismissal order resolved any factual elements of the charge.[102]

The *Scott* case will clearly complicate the task of courts faced with the problem of determining the proper application of the double jeopardy clause to a government appeal. The courts must consider and balance the relative importance of various factors. Initially, under the *Scott* rationale, the identity of the movant is the issue of immediate importance, because only if the defendant makes the motion[103] is *Scott* relevant. Conceivably, the trial judge *sua sponte*,[104] or even the prosecutor,[105] could move to terminate the

96. Although the *Scott* Court did not give any retroactive effect to the decision, the impact will be marked because of the changes which will result regarding finality of trial court dispositions.

97. 437 U.S. at 114. In 1969, the Supreme Court overruled Palko v. Connecticut, 302 U.S. 319 (1937), and applied the double jeopardy clause to the states via incorporation through the fourteenth amendment due process clause. Benton v. Maryland, 395 U.S. 784 (1969). For a pre-double jeopardy incorporation look at state criminal justice systems, *see* Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1958). *See also* L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968), and Orfield, *Double Jeopardy in Federal Criminal Cases*, 3 CAL. W.L. REV. 76 (1967).

98. *See* note 76 *supra*.

99. 437 U.S. at 95. Serfass v. United States, 420 U.S. 377, 392 (1975). *See* note 31 *supra*.

100. *See* notes 29-33 and accompanying text *supra*.

101. *See* notes 10-13 and accompanying text *supra*.

102. *Id.*

103. The Court's reasoning and analysis turned largely on the consideration that the defendant retained primary control over the course of the trial. 437 U.S. at 93-94, *citing* United States v. Dinitz, 424 U.S. 600, 609 (1976). *See Mistrials and Double Jeopardy, supra* note 52, at 184; Note, *Double Jeopardy: Mistrial Declared without Consent of Defendant as a Bar to Reprosecution*, 33 MD. L. REV. 211 (1973).

104. The Court announced in United States v. Perez, 22 U.S. 579 (9 Wheat.) (1824), that with respect to a judge's mistrial declaration without the consent of the defendant, the double jeopardy clause will bar reprosecution unless there existed a manifest necessity for the action or the ends of public justice would otherwise have been defeated. This was more recently affirmed in Illinois v. Somerville, 410 U.S. 458 (1973). This somewhat flexible two-part test has been the subject of a great deal of scrutiny, and has been met with favor by most legal writers. *See generally Mistrials and Double Jeopardy, supra* note 52, at 172-83; Note, *Double Jeopardy and Reprosecution After Mistrial; Is the Manifest Necessity Test Manifestly Necessary?*, 69 N.W.U. L. REV. 887 (1975); Note, *Retrial After Mistrial: The Double Jeopardy Doctrine of Manifest Necessity*, 45 MISS. L.J. 1272 (1974); Note, *Illinois v. Sommerville: An Encroachment on the Double Jeopardy Protection*, 27 S.W.L.J. 535 (1973).

105. The prosecutor's motion for dismissal is treated with regard to double jeopardy in the same manner as if the judge had made the motion *sua sponte*. Downum v. United States, 372 U.S. 734 (1962). *See* note 104 *supra*.

proceedings.[106] In these later two cases, the proper application of *Scott* may be in doubt. If the defendant is not the movant, he certainly has not made an election. However, if the proceedings are terminated without a resolution of at least some of the factual elements of the charge the *Scott* holding may allow for a new trial.[107]

Another factor to be considered by the courts is the grounds upon which the motion is made. A motion to terminate the proceedings may be essentially legal, as was Scott's, thereby not erecting a double jeopardy bar.[108] The motion may be factually based, and if granted, will be deemed final as an acquittal.[109] There remains a large class of motions which do not fall neatly into the factual or legal categories.[110] The question of a government appeal from a dismissal of charges was once succinctly covered by the *Jenkins* test, regardless of the nature of the motion which precipitated the dismissal.[111] Now the appellate courts will be left to a case by case determination based upon *Scott*.

However, in addition to consideration of whether certain factual questions have been resolved, the courts will undoubtedly feel compelled to consider other factors as well. In all double jeopardy determinations the public's substantial interest in meting out justice to offenders[112] must be weighed against the vital interest of individual citizens[113] in being free from the fatiguing experience of multiple trials.[114] The confusing set of considerations will be visited upon trial courts attempting to predict the consequences of granting or denying a motion which palpably could result in termination of the proceedings favorably to the accused. Such confusion will also confront those appellate courts which must decide whether it would be appropriate to grant a review requested by the government.[115]

106. One conceivable way to narrow the *Scott* holding is to apply it *only* to cases in which the defendant moves for termination of the trial, and his motion is grounded solely upon a *purely* legal defense.

107. Perhaps the Court will allow for a new trial without regard to the manifest necessity ends of public justice tests.

108. 437 U.S. at 101.

109. *Id.* at 97. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

110. *See* notes 86-92 and accompanying text *supra*.

111. *Jenkins* did not look to the nature of the motion, but rather, to whether facts would have to be reajudicated. United States v. Jenkins, 420 U.S. 358, 370 (1975).

112. 437 U.S. at 84. This interest protects the personal and property rights of people and of society, a major goal of the criminal laws. For a look at the state's interest in obtaining satisfaction for each offense committed against it *see* In re Neilsen, 131 U.S. 176 (1888). *See also* Bigelow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487 (1857).

113. This final component, perhaps the most important, from the perspective of the United States Supreme Court, is the Constitution's express prohibition against multiple prosecutions and the concomitant interest of the defendant. The double jeopardy clause protects the individual defendant from an overzealous society. The trend toward balancing the defendant's and society's interests was noted in Justice Rehnquist's dissent in Finch v. United States, 433 U.S. 676, 678 (1977).

114. *See* notes 24-26 *supra*.

115. Appellate courts will have to decide *ab initio* whether the disposition was final before allowing the government's appeal.

The *Scott* holding will also have a marked impact on the conduct and strategy of the defendant's trial counsel. A defendant who wishes to have a legal defense adjudicated but also wishes to avoid multiple prosecutions may be deprived of the opportunity to do so.[116] Presumably, regardless of the type of constitutional impropriety the defendant may allege, the double jeopardy clause will pose no bar to relitigation of that issue.[117] A defendant, therefore, may wish to include particular allegations regarding factual elements of the offense in the motion to dismiss if he wishes to avoid the pitfall of *Scott*'s legal-factual distinction.[118]

Defendants in criminal cases may suffer other detrimental effects as a result of this decision. Although the government remains prohibited from intentionally provoking a defendant into moving for dismissal,[119] the prosecution will be allowed one more chance to correct errors brought to light during the first trial if its appeal is successful.[120] Consequently, it will have diminished interest in contesting a defendant's essentially legal motion to dismiss, for the trial court's decision will be subject to at least one more tier of judicial review.[121]

Scott may also bring about an incidental increase in the instances of prosecutorial abuse of suspects' rights.[122] Prosecutors are now aware that the defense of unreasonable preindictment delay is disfavored, if only because it has been classified as a purely legal defense.[123] Even if successfully raised at trial, dismissal motions based on this ground will be subject to further attack on appeal, thereby giving the prosecution one more opportunity to

---

116. The Court found nothing amiss in the trial judge's decision to defer Scott's motion to dismiss until after jeopardy had attached. 437 U.S. at 95.

117. This case seems to fit into the trend of Burger Court cases which attempt to limit the more liberal recognition by the Warren Court of constitutional rights for the accused. In other areas, the present Court has cut away at "legal" defenses. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976), which held that federal habeas corpus is not available to test the constitutionality of searches and seizures when a defendant was afforded a full and fair opportunity to litigate that claim at trial.

118. *See* note 57 and accompanying text *supra*.

119. *See* note 77 *supra*. The prosecutor or judge may unintentionally err, but in such a case, if as a result the defendant moves for mistrial, the double jeopardy clause does not prohibit retrial. 437 U.S. at 94. United States v. Jorn, 400 U.S. 470, 485 (1971) (opinion of Harlan, J.).

120. In Ashe v. Swenson, the Court noted with disfavor that upon a second prosecution, government witnesses who had been forgetful at the first trial were able to identify the defendant positively at his second trial. 397 U.S. 436 (1970). This case incorporated the doctrine of collateral estoppel into the double jeopardy clause. For a further discussion of this doctrine, *see* M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 499-503 (1978); Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

121. *See* note 124 and accompanying text *infra*.

122. The dissent contended that doctrines such as preindictment delay and entrapment are designed to deter the government from engaging in objectionable law enforcement techniques, and that this decision will not further their design. 437 U.S. at 115.

123. *See* note 93 and accompanying text *supra*.

argue the reasonableness of the delay.[124] *Scott* will, in addition, likely result in an increase in the number of governmental appeals allowed, since the decision creates a new exception to the double jeopardy prohibition.[125] It is unclear what types of motions and defenses, other than the kind asserted in *Scott*, will be affected by the decision, but it seems that the holding can be read to allow governmental appeals from any successful pre-verdict motion of the defendant which does not relate to a factual element of the offense charged.[126]

CONCLUSION

In *Scott*, the Supreme Court has again altered the protection afforded criminal defendants by the double jeopardy clause. By overruling *Jenkins*, the Court moved from a clear test to a nebulous balancing approach. The rationale of *Jenkins* was appealing not only for its clarity, but also because it gave adequate deference to the objective of the double jeopardy clause to prohibit multiple trials.[127] *Scott* defeated both of these considerations and instead created a new exception to an express constitutional provision. The *Scott* Court clearly strained precedent by using its "election" theory and the legal-factual distinction in evaluating the constitutionality of a government appeal.[128] The Court apparently granted the government's request to appeal a dismissal of charges because it felt that the equities of the case required such, but it did little to further the primary goal of protecting the Constitution. In the future, *Scott* should be limited in application[129] and the Court should reinstate the principles announced in *Jenkins*, which protected the constitutional rights of defendants, as well as those of society, with precision and clarity.[130]

Robert J. Ross

---

124. One interesting twist is that the defendant's and witnesses' memories will likely fade even more as a result of the delay resulting from appeal and reprosecution. *See* note 11 and accompanying text *supra*.

125. The decision will bring about an increase in governmental appeals because it created an exception to the double jeopardy clause not previously recognized. However, the magnitude of that increase will depend upon whether appellate courts read *Scott* narrowly or broadly.

126. *See* note 42 *supra*.

127. *See* notes 66 and 68 *supra*.

128. *See* notes 84-91 and accompanying text *supra*.

129. There are few defenses totally unrelated to factual guilt or innocence. This factor may aid future courts in limiting the applicability of *Scott*. *See* note 89 *supra*. Further, legislative enactment could help to eliminate the confusion that will flow from *Scott*. The question remains, however, whether such legislation would be a return to the pre-Section 3731 days (see note 28 *supra*) with concomitant often ambiguous statutory interpretation. *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 344 (1956).

130. *See* notes 48-51 and accompanying text *supra*.