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Criminal Procedure

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CRIMINAL PROCEDURE

ADAMSON *v.* RICKETTS: APPLYING DOUBLE JEOPARDY TO PLEA BARGAIN AGREEMENTS

I. INTRODUCTION

In *Adamson v. Ricketts II*,¹ the Ninth Circuit held that double jeopardy principles prohibit a state from refileing original criminal charges in circumstances where the trial court accepted a plea agreement and had sentenced the defendant, even if subsequently the defendant intentionally breached the agreement.² Because the court in *Adamson II* found that the defendant had made no knowing waiver of his double jeopardy rights,³ the defendant's sentence after his retrial on the more serious first-degree murder charge was a violation of the Fifth Amendment.⁴ Thus, the plea bargained second degree murder conviction and resulting sentence was reinstated.⁵ The court also held that a criminal defendant has a right to assert a reasonable interpretation of a plea bargain agreement that differs from the state's interpretation.⁶

An en banc panel of the Ninth Circuit reversed a district court decision denying the defendant's writ of habeas corpus.⁷

1. 789 F.2d 722 (9th Cir. 1986) (en banc) (per Ferguson, J.; the other panel members were Boochever, J., Hug, J., Nelson, J., Norris, J., Pregerson, J., Schroeder, J.; Kennedy, J., dissenting; and Brunetti, J., dissenting, joined by Alarcon, J., Beezer, J., and Kennedy, J.), *cert. granted*, 55 U.S.L.W. 3188 (U.S. Sept. 30, 1986) (No. 86-6). An earlier Ninth Circuit opinion affirming the denial of habeas corpus is referred to in this Note as *Adamson v. Ricketts I*. See *infra* note 8.

2. *Id.* at 730.

3. *Id.*

4. See *infra* note 35.

5. *Id.* at 730-31.

6. *Id.* at 729.

7. *Id.* at 730.

The district court decision⁸ had been upheld by a previous Ninth Circuit decision.⁹

II. FACTS

On June 2, 1976, a bomb exploded in a car occupied by Arizona investigative reporter Don Bolles, resulting in his death eleven days later.¹⁰ At the time of his death, Bolles was investigating organized crime in Phoenix. Prior to his death, Bolles made statements implicating Adamson in the bombing.¹¹ Adamson was later arrested and charged with murder.¹²

In January 1977, Adamson and the state entered into a plea agreement.¹³ In return for testifying against two other individuals, Adamson would plead guilty to second degree murder and receive a sentence of 48-49 years in state prison, with actual incarceration time to be 20 years, 2 months.¹⁴ The Superior Court accepted the agreement, and for the next three years Adamson cooperated with authorities.¹⁵

The other two people linked with the bombing were Max Dunlap and James Robison.¹⁶ Adamson testified at their joint trial for murder and conspiracy, stating that he was hired by Dunlap and that Robison was the one who actually detonated

8. *Adamson v. Ricketts I*, 758 F.2d 441, 452-54 (9th Cir. 1985). The district court findings are appended to the Ninth Circuit decision. *Id.*

9. *Id.* at 452. The court denied the defendant's petition for habeas corpus by holding that, although hearsay statements were improperly admitted at trial, the error was harmless. *Id.* at 447-48; the Arizona death penalty statute (ARIZ. REV. STAT. ANN. § 13-703 E. (1978)) was not unconstitutional or arbitrarily applied in the case, *Adamson v. Ricketts I*, 758 F.2d at 448-49; the record supported the imposition of the death penalty, *Id.* at 450; and the defendant was not entitled to an evidentiary hearing, *Id.* at 449-50.

10. *Arizona v. Dunlap*, 125 Ariz. 104, 105, 608 P.2d 41, 42 (1980). Some of the facts here are recounted from this case reversing the conviction of Max Dunlap. *See infra* text accompanying note 20.

11. *Arizona v. Adamson*, 136 Ariz. 250, 253, 665 P.2d 972, 975 (1983), *cert. denied*, 464 U.S. 865 (1983). In affirming Adamson's retrial for first degree murder and the resulting death sentence, the court enumerated the factual history in some detail to support its finding that the murder was accomplished in an "especially cruel manner." *Id.* at 988.

12. *Id.* at 975.

13. *Adamson v. Ricketts II*, 789 F.2d at 724. The actual agreement is included as Appendix A of the decision. *Id.* *See infra* text accompanying note 74.

14. *Id.*

15. *Id.*

16. *Arizona v. Dunlap*, 125 Ariz. at 105, 608 P.2d at 42.

the bomb after Adamson had placed it under Bolles' car.¹⁷ Both Dunlap and Robison were convicted and sentenced to 29-30 year prison terms on the conspiracy count and given the death penalty on the murder count.¹⁸

While the Dunlap and Robison convictions were on appeal, Adamson was sentenced, upon the state's motion, in December 1978 by the Superior Court to the agreed term of 48-49 years.¹⁹ In February 1980, the Arizona Supreme Court reversed the convictions of Dunlap²⁰ and Robison²¹ and remanded the cases for new trials.²²

When the state approached Adamson regarding further testimony, Adamson informed the state that he had met his plea bargained obligations by testifying at the first trial but would be willing to testify at the Dunlap and Robison retrials in return for additional consideration.²³ In April 1980, the state sent Adamson's attorney a letter stating that Adamson's refusal to testify would be considered a breach of the plea agreement and may result in prosecution for first degree murder and other charges not previously discussed as part of the plea agreement.²⁴

At the pretrial hearing a few days later, Adamson repeated his prior testimony but asserted a Fifth Amendment privilege when questioned about another crime.²⁵ Consequently, the state

17. *Id.*

18. *Id.*

19. *Adamson v. Ricketts II*, 789 F.2d at 724.

20. *Arizona v. Dunlap*, 125 Ariz. at 104, 608 P.2d at 41. The court reversed and remanded the convictions of Dunlap and Robison (*see infra* note 21) because the trial court permitted the state's key witness, Adamson, to invoke the Fifth Amendment privilege several times during cross examination and yet refused to strike Adamson's direct testimony. *Arizona v. Dunlap*, 125 Ariz. at 106-07, 608 P.2d at 43-44. The court held that this violated the defendants' Sixth and Fourteenth rights by robbing them of their right to confrontation and cross examination. *Id.*

21. *Arizona v. Robison*, 125 Ariz. 107, 608 P.2d 44 (1980).

22. *Arizona v. Dunlap*, 125 Ariz. at 107, 608 P.2d at 44, *Arizona v. Robison*, 125 Ariz. at 111, 608 P.2d at 48.

23. *Adamson v. Ricketts II*, 789 F.2d at 733-34. Adamson sought, *inter alia*, immediate release upon completion of the retrial testimony, relocation to a non-jail facility during the retrials, protection for himself and his family until his release, assistance in relocating and re-establishing a new identity outside of Arizona, and granting of immunity for all other past crimes. *Id.*

24. *Adamson v. Ricketts II*, 789 F.2d at 734-35.

25. *Id.* at 724-25.

recharged Adamson with first degree murder. Adamson unsuccessfully challenged this new information by Special Action to the Arizona Supreme Court.²⁶ Adamson's offer at this point to accept the state's interpretation of the plea agreement and to cooperate fully was refused.²⁷ Adamson unsuccessfully sought habeas corpus review through the federal district court.²⁸ After the Ninth Circuit affirmed the district court's denial,²⁹ Adamson was convicted of first degree murder and sentenced to death.³⁰ After exhausting all state remedies,³¹ Adamson's second petition for habeas corpus review was denied.³² This denial was upheld by the Ninth Circuit³³ but was vacated after an en banc hearing by the Ninth Circuit giving rise to the present decision.³⁴

III. BACKGROUND

The Fifth Amendment of the United States Constitution states, *inter alia*, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."³⁵ The policy

26. *Id.* at 725. The state's information charging Adamson with first degree murder was upheld in *Adamson v. Super. Ct. of Arizona*, 125 Ariz. 579, 611 P.2d 932 (1980). The Arizona State Supreme Court held that "[a]lthough the plea agreement does not specifically spell out the duration of petitioner's obligation, it does contemplate full compliance with the requests of the state until the objectives have been accomplished." *Adamson v. Super. Ct. of Arizona*, 125 Ariz. at 583, 611 P.2d at 936. The court found that Adamson breached the plea agreement and, additionally, had waived any double jeopardy defense. *Adamson v. Super. Ct. of Arizona*, 125 Ariz. at 583-84, 611 P.2d at 936-37.

27. *Adamson v. Ricketts II*, 789 F.2d at 725.

28. *Id.* This unpublished decision upheld the district court's denial of Adamson's petition.

29. *Adamson v. Ricketts II*, 789 F.2d at 725.

30. *Id.*

31. *Arizona v. Adamson*, 136 Ariz. at 267, 665 P.2d at 989.

32. *Adamson v. Ricketts I*, 758 F.2d at 452-54.

33. *Id.* at 452. See *supra* text accompanying note 8.

34. *Adamson II*, 789 F.2d at 725. The issues raised by Adamson to the Ninth Circuit were that (1) the Confrontation Clause was violated when the trial court permitted admission of certain evidence, *Id.*, (2) his right to jury trial was infringed upon when the court determined the eligibility of the death penalty, *Id.*, (3) the Arizona death penalty statute was unconstitutionally vague, *Id.*, (4) there was prosecutorial or judicial vindictiveness, *Id.*, (5) the Eighth Amendment prohibition against "cruel and unusual" punishment was violated by Arizona's statute requiring an automatic death sentence if aggravating circumstances are present, *Id.*, and (6) the first degree murder prosecution after Adamson's guilty plea and conviction for second degree murder violated the prohibition against double jeopardy. *Id.*

35. U.S. CONST. amend. V. See generally *Criminal Procedure: Double Jeopardy*, ANN. SURV. OF AM. LAW, Mar. 1986, at 309-24; Note, *The Burden of Proof in Double Jeopardy Claims*, 82 MICH. L. REV. 365-86, (1983); Cantrell, *Double Jeopardy and Multi-*

underlying the Double Jeopardy Clause prohibits the government from subjecting a defendant to “[the] embarrassment, expense and ordeal [of multiple trials] and compelling him to live in a continuing state of anxiety and insecurity [reducing any chance of rehabilitation], as well as enhancing the possibility that even though innocent he may be found guilty.”³⁶ The courts have recognized that states generally have much greater resources and power to sustain multiple prosecutions than a defendant has to sustain a defense through such multiple prosecutions.³⁷

The Double Jeopardy Clause incorporates three separate guarantees: It prohibits the government from retrying the defendant after an acquittal, retrying the defendant after a conviction in the hope of obtaining a greater sentence, or punishing the defendant more than once for the same offense.³⁸ The prohibition against double jeopardy has been held to extend to all crimes.³⁹ The Supreme Court, in *Benton v. Maryland*,⁴⁰ found it to be “fundamental to the American scheme of justice”⁴¹ and thus applicable to the states through the Fourteenth Amendment.⁴²

The fundamental test for whether a second prosecution is barred by double jeopardy was first stated in *Blockburger v. U.S.*⁴³ Here the Court stated that “where the same act or transaction constitutes a violation of two distinct statutory provi-

ple Punishment: An historical and constitutional analysis, 24 S. TEX. L.J. 735-72 (1983).

36. *Green v. United States*, 355 U.S. 184, 187-88. The Court held here that Green could not be tried for first degree murder after he had already been convicted of second degree murder. Green had appealed his conviction, which was then reversed and remanded. *Id.*

37. *Id.* at 187.

38. *Illinois v. Vitale*, 447 U.S. 410, 415 (1979), (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). The Court here discussed the application of the *Blockburger* test (see *infra* note 43 and accompanying text) in examining whether a prosecution for involuntary manslaughter was precluded by a prior conviction for the offense of failing to reduce speed to avoid an accident. *Id.*

39. *Ex parte Lange*, 85 U.S. 163 (1873).

40. 395 U.S. 784 (1969).

41. *Benton*, 395 U.S. at 794.

42. *Id.*

43. 284 U.S. 299 (1931). The Court affirmed the conviction of the defendant for selling morphine under two separate counts where each offense required the proof of a different element. *Id.* at 303-04.

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sions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."⁴⁴ In *Blockburger*, the Supreme Court upheld convictions for two separate offenses arising from a single sale of illegal drugs where each count required proof of a different element.⁴⁵

Implicit in the constitutional prohibition against prosecution for the same offense is the concept of finality protecting the defendant from multiple prosecutions.⁴⁶ Otherwise, prosecutors would be encouraged to re prosecute until the maximum penalty is obtained.⁴⁷

Before a defendant can raise a double jeopardy defense, jeopardy must have attached to the first prosecution. Jeopardy is normally said to attach at trial once the jury is empanelled and sworn.⁴⁸ In a non-jury trial, jeopardy attaches when the court begins to hear the evidence.⁴⁹ In the majority of jurisdictions, double jeopardy is held not to apply when a defendant has pleaded guilty to a lesser included offense pursuant to a plea bargain.⁵⁰ However, there is authority to the contrary, prohibiting the government from re prosecuting for a greater offense.⁵¹ In *U.S. v. Vaughn*,⁵² the Ninth Circuit stated that when a defendant opts to forego a jury trial and instead pleads guilty to a

44. *Id.* at 304.

45. *Id.* at 302-05. The defendant was convicted for violating § 1 (selling of forbidden drugs except in the originally stamped packages) and § 2 (selling drugs not in pursuance of a written order) of the Harrison Narcotic Act. *Id.*

46. *United States v. Jorn*, 400 U.S. 470, 479 (1971).

47. *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

48. *Crist v. Bretz*, 437 U.S. 28 (1978). Here, the Supreme Court held that "the federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn . . . is an integral part of the Fifth Amendment guarantee against double jeopardy . . . *Id.* at 28.

49. *Serfass v. United States*, 420 U.S. 377 (1975). See generally J. Sigler, *DOUBLE JEOPARDY* 39-47 (1969) for a general discussion of when jeopardy attaches.

50. *Ward v. Page*, 424 F.2d 491 (10th Cir. 1970), *cert. denied*, 400 U.S. 917 (1970). A lesser included offense is "one which is necessarily established by proof of the greater offense." *Fuller v. United States*, 407 F.2d 1199, 1228 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969).

51. *Mullreed v. Kropp*, 425 F.2d 1095 (6th Cir. 1970). The defendant pleaded guilty pursuant to a plea agreement to a lesser charge of unarmed robbery and was sentenced. The conviction was later overturned on a collateral issue. The court here found an implied-acquittal of the greater charge of armed robbery, thus barring the state's attempt to re prosecute. *Id.* at 1101-02.

52. 715 F.2d 1373 (9th Cir. 1983).

charged offense, under some circumstances jeopardy attaches when the judge accepts the plea.⁵³ In all cases, double jeopardy attaches when the judgment of conviction and sentence is entered.⁵⁴

To interpret the actual meaning behind a plea bargain agreement, the majority of courts apply contract law principles which dictate that disputes over terms of an agreement are to be resolved by objective standards.⁵⁵ Prior to *Adamson II*, the Ninth Circuit followed the majority view.⁵⁶

IV. THE COURT'S ANALYSIS

Although several constitutional issues were raised by the defendant,⁵⁷ the majority found the double jeopardy question to be dispositive of the case and declined to address the other issues.⁵⁸ The court first considered whether a prosecution for first degree murder was barred by Adamson's guilty plea and conviction for second degree murder, a lesser included offense.⁵⁹ It then analyzed whether Adamson waived any double jeopardy defenses.⁶⁰

The court found that jeopardy attached when the Arizona trial court entered a judgment of conviction and sentenced Adamson in 1978.⁶¹ The court held that it was impermissible to re prosecute the defendant under the greater charge of first degree murder.⁶² The court applied the *Blockburger* test⁶³ and concluded that "a conviction for second degree murder requires no

53. *Id.* at 1376.

54. *United States v. Cruz*, 709 F.2d 111 (1st Cir. 1983).

55. *See United States ex rel. Williams v. McMann*, 436 F.2d 103 (2nd Cir. 1970), *cert. denied*, 402 U.S. 914 (1971). *See generally* E. FARNSWORTH, *CONTRACTS* § 7.7-7.15 for a discussion of the principles of interpreting contracts.

56. *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980). The court found that although plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and subject to contract law standards, and thus any dispute over terms of agreement is to be resolved by objective standards.

57. *Adamson v. Ricketts II*, 789 F.2d at 725.

58. *Id.*

59. *Id.* at 725-27.

60. *Id.* at 727-30.

61. *Id.* at 726. The court did not decide whether jeopardy attached at the time Adamson's guilty plea was accepted. In this case, Adamson's plea was accepted and he was actually sentenced. *Id.*

62. *Id.* at 726-27.

63. *Blockburger v. United States*, 284 U.S. at 304.

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fact that is not also needed to sustain a first degree murder conviction" in Arizona.⁶⁴ The court also emphasized that the state recognized that first and second degree murder were not separate crimes by classifying them as different degrees of the same offense.⁶⁵ Consequently, the court held that Adamson's double jeopardy rights were violated by the subsequent prosecution for first degree murder.⁶⁶

The court then addressed the issue of whether Adamson waived his double jeopardy rights in the plea agreement.⁶⁷ The court analogized the double jeopardy protection to other similarly situated constitutional rights,⁶⁸ concluding that any waivers must be made voluntarily, knowingly, intelligently,⁶⁹ and expressly.⁷⁰ Here, the court found no knowing and intelligent waiver: Adamson's actions in accepting the terms of the plea agreement, which the state contended constituted a waiver, were not taken with the knowledge that in so doing, he was waiving his double jeopardy rights.⁷¹

The court stated that Adamson reasonably believed that a refusal to testify did not constitute a breach of the agreement.⁷² The court so held even though Adamson's counsel previously acknowledged that his client might be prosecuted on a first degree murder charge should the Attorney General's office succeed in withdrawing the plea agreement.⁷³

64. Adamson v. Ricketts II, 789 F.2d at 727.

65. *Id.*

66. *Id.*

67. *Id.* at 727-30.

68. *Id.* at 727. See generally United States v. Cochran, 770 F.2d 850 (9th Cir. 1985) (waiving the right to a jury trial); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiving the right to assistance of counsel).

69. Adamson v. Ricketts II, 789 F.2d at 727 (citing Menna v. New York, 423 U.S. 61 (1975) and Launius v. United States, 575 F.2d 770 (9th Cir. 1978)).

70. Adamson v. Ricketts II, 789 F.2d at 729.

71. *Id.* at 728-29.

72. *Id.* at 729.

73. *Id.* at 733. The letter dated April 3, 1980 from William Feldhacker, Adamson's attorney, to the Assistant Attorney General states:

John Harvey Adamson is further fully aware of the fact that your office may feel that he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him. He is aware that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge. (Emphasis added.)

The court found that the language of the plea bargain agreement,⁷⁴ was “not clear”⁷⁵ and was “reasonably”⁷⁶ subject to

Id.

74. *Id.* at 731-32. The relevant sections of Adamson’s plea agreement to plead guilty to second degree murder in return for testifying against Dunlap and Robison are:

The defendant, John Harvey Adamson, hereby agrees to plead guilty to Murder, Second Degree.

. . . .

4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B [omitted]

5. It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant’s transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

. . . .

8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement

. . . .

17. That the defendant understands the following rights and understands that he gives up such rights by pleading guilty:

- a. His right to a jury trial;
- b. His right to confront the witnesses against him and cross-examine them;
- c. His right to present evidence and call witnesses in his defense, knowing that the State will compel such witnesses to appear and testify;
- d. His right to be represented by counsel (appointed free of charge, if he cannot afford [sic] to hire his own) at the trial of the proceedings; and
- e. His right to remain silent, to refuse to be a witness against himself, and to be presumed innocent until proven guilty beyond a reasonable doubt.

Id.

75. *Id.* at 729.

76. *Id.*

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more than one interpretation.⁷⁷ Thus, the court held that a relinquishment of the double jeopardy defense could not have been knowing or intentional.⁷⁸ The court found that, at trial, a defendant has the right to assert a reasonable construction of an agreement that differs from the state's interpretation.⁷⁹ To find otherwise would force defendants into accepting the state's interpretation in all cases of alleged breach.⁸⁰

The court declined, as "ill-suited"⁸¹ and "inappropriate,"⁸² to apply pure contract principles to the terms of the plea agreement in interpreting whether Adamson *impliedly* waived his constitutional right against double jeopardy.⁸³ The court found that such principles were more applicable for determining damages in civil contract litigation, rather than whether a defendant waived a constitutional right.⁸⁴ However, it did apply the general maxim of contract construction of interpreting ambiguous language in an agreement less favorably against the party that supplied the language.⁸⁵

In reaching its conclusion, the court noted four actions that the government could have taken to ensure performance and to bar a successful double jeopardy claim by Adamson: (1) drafted the plea bargain agreement more competently,⁸⁶ (2) specifically stated that Adamson would waive the double jeopardy defense and listed the circumstances under which the first degree charges would be reinstated,⁸⁷ (3) waited until the prosecutions of Adamson's co-defendants were completed before having Adamson sentenced,⁸⁸ or (4) called Adamson to testify after he

77. *Id.*

78. *Id.* at 728-29.

79. *Id.* at 729.

80. *Id.* at 728-29.

81. *Id.* at 728.

82. *Id.* at 729.

83. *Id.* at 728-29.

84. *Id.* at 729.

85. See generally FARNSWORTH, CONTRACTS at § 7.11. "An especially common rule of construction is that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred." *Id.*

86. Adamson v. Ricketts II, 789 F.2d at 730.

87. *Id.*

88. *Id.*

later agreed to do so.⁸⁹

V. CRITIQUE

Should the United States Supreme Court uphold the decision in *Adamson II*, the benefits will extend only to a small class of defendants in plea bargain situations. Although ruling in favor of Adamson, the Ninth Circuit has clearly stated that had the government employed better drafting of the plea bargain agreement or timed the events of the case differently, the state would have prevailed.⁹⁰

Jeopardy was found to attach when Adamson was sentenced.⁹¹ In the future, prosecutors may simply wait for final sentencing of co-defendants before asking for sentencing of the testifying defendant. More likely, because of the amount of time needed to reach a final judgment,⁹² prosecutors in the future will attempt to draft agreements containing an express waiver of a double jeopardy claim in the event of a defendant's breach. *Adamson II* will most benefit those defendants who have a strong bargaining position and are able to exert a greater influence over the terms of a plea agreement.⁹³ However, in the majority of cases, the stronger bargaining position remains with the government.⁹⁴

The court refused to find an express waiver of Adamson's double jeopardy rights.⁹⁵ It also did not find an implied waiver even though Adamson's attorney admitted that an unsuccessful challenge to the terms of the plea agreement may result in pros-

89. *Id.*

90. *Id.*

91. *Id.* at 726.

92. *Id.* at 724. Adamson's plea agreement was reached in January 1977. The convictions of Dunlap and Robison were overturned in February 1980. *Id.*

93. J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 2.12(a) (2d ed. 1983). (All studies indicate the poor, the black, and the "least criminal" defendants get worse "deals" than the affluent, the white, and the inveterate criminal defendants.)

94. See generally J. KLEIN, LET'S MAKE A DEAL 17-20 (1976) for a general discussion of the relative bargaining powers of prosecutors and defendants. See also Kipnis, *Criminal Justice and the Negotiated Plea*, 86 Ethics 93 (Jan. 1976) (Plea bargaining necessarily entails impermissible coercion.). But cf. *Kent v. United States*, 272 F.2d 795, 798-99 (1st Cir. 1959).

95. *Adamson v. Ricketts II*, 789 F.2d at 727.

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ecution on a first degree murder charge.⁹⁶ The court, by placing less weight on statements made outside of the plea agreement, was consistent in making the actual words in the agreement the basis upon which to resolve any disputes in interpretation.

The *Adamson II* court noted that a defendant has the right to assert a "reasonable" (emphasis added) construction of a plea agreement.⁹⁷ Unfortunately, this right may be more illusory than real. A defendant still faces the danger of a court finding that his or her interpretation of an agreement is *not* reasonable. He or she would then be in breach.⁹⁸ Additionally, should the government, in future plea bargain agreements, retain the right to re prosecute on greater charges, a defendant may have the "right" to challenge the government's interpretation of the agreement but he or she would obviously run great risks in doing so.

VI. CONCLUSION

In *Adamson II*, the Ninth Circuit held that double jeopardy principles as applied to a plea bargain agreement prohibited the state from re filing original first degree murder charges. The major result of the court's decision will be to force prosecutors to draft more carefully written plea agreements so as to bar the future use of double jeopardy as a possible defense by other defendants.

*Jimmy L. Hom**

96. See *supra* text accompanying note 73.

97. *Adamson v. Ricketts II*, 789 F.2d at 729.

98. For example, while the panel of the Ninth Circuit found that the agreement was "not clear" and "reasonably subject to interpretation," *Id.* at 729, the Arizona Supreme Court previously held that there was a "clear understanding" from the language of the same agreement. *Adamson v. Super. Ct. of Arizona*, 125 Ariz. at 583, 611 P.2d at 936.

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