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CASE COMMENTS

CRIMINAL PROCEDURE: FLORIDA'S DOUBLE JEOPARDY ANALYSIS RAISES POLICY CONCERNS

Mars v. State, 498 So. 2d 402 (Fla. 1986)

Respondent was charged with first-degree murder.[1] The state filed a bill of particulars that incorrectly limited the time of the offense.[2] After an instruction that the state must be held to proof within the bill of particulars,[3] the jury returned a verdict of not guilty.[4] The grand jury then reindicted respondent for second-degree murder.[5] The trial court dismissed the prosecutor's second indictment for second degree murder as a violation of double jeopardy.[6] The Florida Fourth District Court of Appeal affirmed the dismissal.[7] The Supreme Court

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1. 498 So. 2d 402, 402 (Fla. 1986), *cert. denied*, 107 S. Ct. 3215 (1987).

2. *Id.* The bill of particulars alleged that the offense occurred between 5 p.m., January 29, and 12:59 a.m., January 30. Evidence at trial showed the crime was committed after 12:59 a.m. on January 30. *Id.* The more detailed allegations in a bill of particulars "limit the government's case at trial in the same manner as factual allegations in the original charging instrument." 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 458 (1984).

3. *Mars*, 498 So. 2d at 403. The jury instruction was routine and was not specifically requested by respondent. The jury made several requests for clarification and was told only that it must hold the state to the allegations made in the bill of particulars. *Id.*

4. *Id.* The jury's requests for clarification of the court's instructions indicate that the jury might have held differently if it had not been held to the erroneously alleged time period. At one point the jury foreman stated: "Your honor, we do not have grave doubts about the facts of this trial, but we do have grave doubts about the time constraints within the Statement of Particulars." *Id.* at 403 n.3.

5. *Id.* The jury was instructed on second-degree murder as a lesser included offense during the first trial. It is therefore irrelevant for the purposes of the instant court's holding that the original indictment was for first-degree murder. *Id.* at n.4.

6. *Id.* at 403. The trial court granted respondent's motion to dismiss. *Id.*

7. *See* State v. Mars, 473 So. 2d 719, 720 (4th D.C.A.), *quashed*, 498 So. 2d 402 (Fla. 1985), *cert. denied*, 107 S. Ct. 3215 (1987). On appeal, both parties concentrated their arguments on the issue of whether respondent was estopped from asserting double jeopardy. The district court initially held that respondent was collaterally estopped from defending on double jeopardy grounds. On petition for rehearing, the court noted that it had erred in concluding that respondent had requested the jury instruction holding the state to the bill of particulars, and affirmed the trial court's dismissal. The district court did, however, certify the following question for review by the Florida Supreme Court:

> DOES THE RULE OF *STATE V. BEAMON* PERMITTING THE FILING OF SUBSEQUENT CHARGES APPLY IN A CASE WHERE THE DEFENDANT WAS ACQUITTED BY GENERAL VERDICT IN THE INITIAL PROCEEDINGS AND THE DEFENDANT DID NOT SEEK A DIRECTED VERDICT OF ACQUITTAL OR REQUEST AN INSTRUCTION TO THE JURY AS TO THE

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of Florida quashed the Fourth District's decision and HELD, respondent had no valid double jeopardy defense, and therefore the second indictment should be allowed.[8]

The prohibition against double jeopardy protects an accused from being placed twice in jeopardy for a single offense.[9] The principle is traceable to the early Greeks and Romans,[10] and a plea similar to double jeopardy existed in England as early as the fourteenth century.[11] The protection was firmly embedded in the English common law by at least the seventeenth century.[12] In keeping with this long tradition, the framers of the United States Constitution included a protection against double jeopardy in the fifth amendment.[13] Double jeopardy is also prohibited in all fifty states, either by incorporation into the state constitution or by common law.[14]

The protection against double jeopardy is based on important policy concerns that acknowledge the potential for governmental abuse.[15] Double jeopardy limits the power of the government to repeatedly try an accused before different juries until a conviction is eventually obtained[16] and prevents the retrying of a convict merely to obtain a harsher sentence. It also prohibits the imposition of multiple punishments for a single offense. Underlying all these concerns is a fear of governmental misuse of the power to bring prosecution.[17]

BINDING NATURE OF A BILL OF PARTICULARS IN THOSE PROCEEDINGS?

Id.; *see generally* State v. Beamon, 298 So. 2d 376 (Fla. 1974) (discussion of collateral estoppel in double jeopardy cases), *cert. denied*, 419 U.S. 1124 (1975).

8. *Mars*, 498 So. 2d at 402. Justice Shaw wrote for the majority, with Justices Overton and Boyd filing dissenting opinions.

9. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795 (1969); Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 3 (1984).

10. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 283 (1963). The idea of double jeopardy found early expression in the *Digest of Justinian*. *Id.*; *see also Benton*, 395 U.S. at 795 (discussion of the origins of double jeopardy).

11. Sigler, *supra* note 10, at 289.

12. Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 262 (1965).

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

14. Note, *supra* note 12, at 262. By 1965 all states except Connecticut, Maryland, Massachusetts, North Carolina, and Vermont had incorporated double jeopardy protections into their state constitutions. *Id.* at 262-63 n.3.

15. Note, *supra* note 12, at 266-67; *see also* Sigler, *supra* note 10, at 283-98 (discussing the relationship between double jeopardy policies and criminal procedure).

16. Note, *supra* note 12, at 267. This policy is the source of the rule prohibiting retrial for an offense after the accused has once been acquitted of the same offense. *Id.*

17. *Id.* The unrestrained power to bring multiple prosecutions for a single offense could be used as a tremendously powerful tool to harass those accused of a crime. *Id.* at 286; *see also* State v. Katz, 402 So. 2d 1184, 1188 (Fla. 1981) (Boyd, J., dissenting) ("The Double Jeopardy Clause . . . recognizes the importance of the power of government to *accuse* persons of crime."), *cert. denied*, 454 U.S. 1164 (1982).

The Supreme Court addressed the scope of the fifth amendment protection against double jeopardy in the landmark case of *United States v. Ball.*[18] In an earlier case, a Texas grand jury had indicted respondent and two co-defendants for murder.[19] Respondent was acquitted, while the two co-defendants were found guilty.[20] The Supreme Court reversed the co-defendants' convictions because the prosecutor's failure to allege the time and place of the victim's death[21] rendered the indictment "fatally" defective.[22] Two years later, a second grand jury reindicted all three original defendants.[23] Respondent then filed a double jeopardy plea, but the Texas circuit court rejected respondent's defense,[24] and the jury convicted respondent for murder.[25] Five years later, in *Ball*, the Supreme Court reversed respondent's conviction, holding that the second trial violated the fifth amendment double jeopardy clause.[26]

The *Ball* Court noted that the prosecutor obtained two convictions under the first indictment.[27] Since the indictment was sufficient to support these convictions, the Court inferred that respondent's acquittal did not result merely from the technical insufficiency.[28] Rather, the jury had acquitted respondent on the merits of the case. Therefore, a second trial would put respondent in jeopardy once more for the same offense.[29] This double jeopardy as construed by *Ball* applied only to federal prosecutions.[30]

In *Benton v. Maryland*,[31] the Court applied the federal double jeopardy clause to the states through the fourteenth amendment. The

18. 163 U.S. 662 (1896). Justice Gray wrote the opinion for a unanimous court. *Id.* at 663.

19. *Id.* The three defendants were tried together at a single trial. The case was brought in federal court because the defendants allegedly killed a Chickasaw Indian in Indian territory. *Id.*

20. *Id.* at 664. The two defendants who were convicted were sentenced to death before bringing this appeal. *Id.*

21. *Id.*

22. *Id.* The case was remanded with directions to quash the original indictment and "take such further proceedings . . . as to justice might appertain." *Id.*

23. *Id.* at 665.

24. *Id.* Respondent and both other defendants then entered pleas of not guilty. *Id.*

25. *Id.* at 666. Respondent's co-defendants were also convicted at the second trial. *Id.*

26. *Id.* at 671. Noting that their previous convictions had been reversed on appeal and were therefore void, the Court allowed the second prosecution of respondent's co-defendants. Thus the previous convictions constituted no bar to a second prosecution. *Id.* at 672.

27. *Id.* Both of respondents' co-defendants were convicted at the first trial. *Id.*

28. *Id.* The Court noted that respondent was discharged "by reason of his acquittal by the jury, and not by reason of any insufficiency in the indictment." *Id.* at 670.

29. *Id.* The second indictment charged exactly the same offense, differing only in that it alleged the time and place of the victim's death. *Id.* at 665.

30. *Id.* at 669-71.

31. 395 U.S. 784 (1969). The Court in *Benton* expressly overruled Palko v. Connecticut, 302 U.S. 319 (1937), which held that federal double jeopardy standards did not apply to the states through the fourteenth amendment. *Benton*, 395 U.S. at 794.

Benton majority rejected the argument that the fourteenth amendment applies the individual guarantees of the Bill of Rights to the states less stringently than to the federal government.[32] Basing its holding on the policy concerns expressed in *Ball*, the *Benton* Court stated that all citizens must be protected from governmental abuse of the power to bring prosecutions.[33] The right to be free from the ordeal of repeated prosecutions for the same offense is fundamental to the American scheme of justice,[34] and applies to the states as well as to the federal government.[35]

In criminal prosecutions, the state may not violate the accused's right to be free from double jeopardy under the federal Constitution.[36] Each of the fifty states, however, has its own prohibition against double jeopardy, so that courts must apply state as well as federal standards. The Florida Supreme Court defined the scope of Florida's prohibition of double jeopardy in *Sanford v. State*.[37] In *Sanford*, appellant was indicted for assault with intent to rape.[38] The state accepted a plea of guilty to the lesser-included offense of assault.[39] After appellant completed a six-month jail sentence, the State reindicted him for the rape.[40] The Florida Supreme Court held that the second indictment violated appellant's right to be free from double jeopardy under the Florida Constitution.[41] The *Sanford* court held that a defendant's rights are violated when proof of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment.[42]

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32. *Benton*, 395 U.S. at 794 (citing Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)); *see generally* Washington v. Texas, 388 U.S. 14, 18 (1967) ("[This Court has] increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.").

33. *Benton*, 395 U.S. at 796; *see Ball*, 163 U.S. at 669.

34. *Benton*, 395 U.S. at 794 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that trial by jury in criminal cases applies to the states through the fourteenth amendment)).

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

36. *Id.*

37. 75 Fla. 393, 78 So. 340 (1918).

38. *Id.* at 394, 78 So. at 341. Appellant originally pleaded not guilty to this charge. *Id.*

39. *Id.* at 395, 78 So. at 341. The guilty plea was the result of a plea bargain in which the state agreed to drop the charge of assault with intent to rape in return for a plea of guilty to assault and battery. *Id.*

40. *Id.* Appellant pleaded not guilty to the charge of rape. He was convicted at trial and sentenced to two years in prison. *Id.*

41. *Id.* at 401, 78 So. at 342-43. The court overruled its earlier case of Boswell v. State, 20 Fla. 869 (1884) (acquittal on a lesser offense does not bar prosecution for the greater offense). *Sanford*, 75 Fla. at 401, 78 So. at 342.

42. 75 Fla. at 396, 78 So. at 341. The test adopted by the court was taken from T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470 (7th ed. 1903). 75 Fla. at 396, 78 So. at 341.

In adopting this test, however, the court failed to discuss the policy considerations that the United States Supreme Court stressed in both *Ball* and *Benton*.[43]

Although the *Sanford* test has been followed in Florida,[44] some Florida courts have avoided the probable reindictment of a defendant, and hence the application of *Sanford*, by allowing the prosecution to amend an incorrect bill of particulars.[45] In *Hoffman v. State*,[46] the Supreme Court of Florida approved such an amendment. In *Hoffman*, the prosecution incorrectly alleged the time of the offense in a bill of particulars.[47] After opening arguments, the prosecution recognized the error and requested permission to amend the original bill.[48] The court allowed the amendment over the objection of defense counsel,[49] and petitioner was convicted.[50] On appeal, the Supreme Court noted that "[w]hen procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced . . . . A defendant is entitled to a fair trial, not a perfect trial."[51] The court emphasized that while it did not condone poor preparation by the state, such a non-prejudicial error should not allow the defendant to escape justice. The court therefore held that the state may amend an incorrect statement in a bill of particulars when the prosecution can affirmatively demonstrate that doing so will not result in prejudice to the defendant.[52] This holding reflects the court's concern with balancing society's interests in fully prosecuting those accused of crime against the need to limit the potential for abuse of the power to prosecute.[53]

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43. 75 Fla. at 396, 78 So. at 341.

44. *See, e.g.*, Bizzell v. State, 71 So. 2d 735 (Fla. 1954) (acquittal for charge of embezzlement spanning Jan.-Oct., 1952 barred prosecution for embezzlement in Sept., 1952); State v. Anders, 59 So. 2d 776 (Fla. 1952) (double jeopardy no bar to reprosecution on second indictment that differed only in allegation of owner of stolen vehicle).

45. *See, e.g.*, Hale v. State, 273 So. 2d 145 (3d D.C.A.) (bill of particulars amended to show different location), *cert. denied*, 277 So. 2d 285 (Fla. 1973); Howlett v. State, 260 So. 2d 878 (Fla. 4th D.C.A. 1972) (incorrect date of offense alleged in bill of particulars).

46. 397 So. 2d 288 (Fla. 1981).

47. *Id.* at 288.

48. *Id.* After opening arguments, defense counsel pointed out the inconsistency between the prosecutor's remarks and the date alleged in the bill of particulars. Defense counsel asked that the state be restricted to the date alleged in the bill of particulars. *Id.*

49. *Id.* at 289. The court qualified its statement in the case of State v. Beamon, 298 So. 2d 376, 378-79 (Fla. 1974), that when a bill of particulars specifies only an exact date for the offense, it cannot be amended over the objection of defense counsel. *Hoffman*, 397 So. 2d at 289.

50. *Id.*

51. *Id.* at 290 (quoting Lackos v. State, 339 So. 2d 217 (Fla. 1976)).

52. *Hoffman*, 397 So. 2d at 290.

53. For a discussion of this balancing process, see Note, *A Retreat in Double Jeopardy Policy:* Tibbs v. Florida, 24 B.C.L. REV. 771, 771-72 (1983).

Focusing on these policy concerns of the double jeopardy clause, the instant court based its analysis on the validity of respondent's former double jeopardy defense.[54] The court applied the test it set forth in *Sanford*.[55] In the instant case, the two indictments alleged crimes occurring on different dates.[56] The allegations in the second indictment would not support a conviction under the first indictment.[57] Under *Sanford*, respondent did not have a valid former jeopardy defense to assert.[58] Therefore, the question of whether respondent was collaterally estopped from asserting the defense, which was the focus of the district court's analysis, was moot.[59]

The instant court also addressed respondent's argument that strict application of the *Sanford* test would allow prosecutors to harass and embarrass criminal defendants with repeated prosecutions.[60] Because the record in the instant case showed no signs of prosecutorial abuse,[61] the court refused to let the error in the previous indictment bar the reprosecution of respondent.[62] The court characterized the error as non-prejudicial,[63] and made clear that it would address future instances of prosecutorial abuse on a case-by-case basis.[64]

In a strong dissent, Justice Boyd attacked the majority opinion for ignoring the effects of a second prosecution on a defendant.[65] He stressed the financial and emotional strain of defending against "the awesome powers of government."[66] Justice Boyd would not allow the gov-

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54. *Mars*, 498 So. 2d at 404.

55. *Id.*; *see supra* notes 37-42 and accompanying text. The *Sanford* court held that the protection against double jeopardy is violated when proof of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment. *Sanford*, 75 Fla. at 401, 78 So. at 343.

56. *Mars*, 498 So. 2d at 402-03. The majority characterized the incorrect allegation of the time as a typographical error. The time period alleged should have ended at 12:59 p.m. rather than 12:59 a.m. *Id.* at 403 n.2.

57. *Id.* at 404. The court held that the difference in the dates alleged was material. *Id.*

58. *Id.* This follows from a strict application of the *Sanford* test to the facts in the instant case. *Id.*

59. *Id.* at 403; *see* State v. Anders, 59 So. 2d 776 (Fla. 1952) (court implies the preferred analysis is to first determine whether the former jeopardy defense itself is valid).

60. *Mars*, 498 So. 2d at 404-05.

61. *Id.*

62. *Id.* The court weighed the prejudicial effect of the error against society's right to prosecute offenses. *Id.*

63. *Id. Contra id.* at 405-06 (Boyd, J., dissenting) (discussing the effects of a second trial on the accused).

64. *Id.* at 404-05.

65. *Id.* at 405-06. For a discussion of the policies Justice Boyd stressed, see *Benton*, 395 U.S. at 796.

66. *Mars*, 498 So. 2d at 405.

ernment to reprosecute based on its own drafting error,[67] and intimated that the bill of particulars prejudiced the defendant.[68] To Justice Boyd, the variance between the proof adduced at trial and the allegations in the bill of particulars meant only that the government had failed to prove its accusation.[69]

When a criminal defendant asserts double jeopardy as a defense, the court must balance two competing interests.[70] The accused's right to be free from multiple prosecutions for a single offense must be weighed against society's interest in the prosecution and punishment of criminals.[71] By strictly applying the *Sanford* test, the Florida Supreme Court has traditionally avoided such balancing and discussion of the policy implications of its double jeopardy cases.[72] The court has allowed mechanical application of the rule to replace consideration and balancing of the policies involved.[73] In the instant case, however, a majority of the court has for the first time included an analysis of these important societal concerns in a double jeopardy case.[74]

The instant court's expansion of its double jeopardy analysis is not without precedent. In *Hoffman*, the court examined policy questions similar to those discussed in the instant case,[75] and balanced the prejudicial effect of prosecutorial error against society's interest in punishing criminals.[76] Unlike the instant case, *Hoffman* did not involve the validity of a double jeopardy defense. Nevertheless, both cases presented the court with the issue of what impact prosecutorial error in a bill of particulars should have on the outcome of a case.[77] In *Hoffman*, the court did not allow the accused to escape justice because of an error the trial court had determined to be non-prejudicial.[78]

The court approached the instant case in much the same manner as *Hoffman*, stressing that the prosecutor did not bring the second

67. *Id.*; *see also Ball*, 163 U.S. at 667-68 (refusing to let the government allege its own error to deprive defendant of benefit of acquittal by a jury).

68. *Mars*, 498 So. 2d at 405-06.

69. *Id.* (quoting State v. Katz, 402 So. 2d 1184, 1188 (Fla. 1981) (Boyd, J., dissenting)).

70. Note, *supra* note 53, at 771-72; *see supra* text accompanying note 53.

71. Note, *supra* note 53, at 771-72.

72. *See* State v. Katz, 402 So. 2d 1184, 1188 (Fla. 1981) (Boyd, J., dissenting).

73. *Mars*, 498 So. 2d at 405 (Boyd, J., dissenting); *see Katz*, 402 So. 2d at 1188.

74. *Mars*, 498 So. 2d at 404-05.

75. *Hoffman*, 397 So. 2d at 290; *see supra* notes 51-52 and accompanying text.

76. *Hoffman*, 397 So. 2d at 290.

77. *See Mars*, 498 So. 2d 402, 404-05 (allowing reprosecution after original indictment's incorrect allegations resulted in acquittal); *Hoffman*, 397 So. 2d at 290 (allowing amendment of bill of particulars).

78. *Hoffman*, 397 So. 2d at 290.

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indictment to harass or embarrass the defendant.[79] The instant court, however, ignored the fact that facing a second prosecution is extremely costly and time-consuming for the defendant.[80] Instead, the court focused on the fact that there was no evidence of abuse of the prosecutor's power. Therefore, reprosecution of respondent was held not to violate Florida's double jeopardy clause.[81]

The instant court's finding that reprosecution of respondent in the instant case would not violate double jeopardy does not, however, end the double jeopardy analysis. The United States Supreme Court applied the federal law of double jeopardy to the states through the fourteenth amendment in *Benton*.[82] Respondent is therefore protected by both the federal and state double jeopardy clauses. The Supreme Court interpreted the scope of this protection in *Ball*,[83] holding that prosecutorial error that renders an indictment fatally defective will not be grounds for a second trial after acquittal.[84] The *Ball* Court emphasized that the indictment, although defective, supported convictions of two of the three co-defendants at the original trial.[85] The first indictment in the instant case could not have supported a conviction of respondent because of the prosecutor's error in alleging the date of the offense.[86] Therefore, *Ball* would not bar reprosecution in the instant case.

By introducing policy concerns into its analysis of double jeopardy cases, the Florida Supreme Court has brought Florida law into closer harmony with federal case law. In *Benton*, the United States Supreme Court held that the right to be free from abuse of the government's power to bring prosecutions is fundamental to the American scheme of justice.[87] The instant court evidenced the same concern about prosecutorial abuse.[88] The United States Supreme Court also considered

79. *See supra* note 77.

80. *See Mars*, 498 So. 2d at 405 (Boyd, J., dissenting).

81. *Id.*

82. *Benton*, 395 U.S. at 794; *see supra* notes 31-35 and accompanying text.

83. *Ball*, 163 U.S. at 662; *see supra* notes 27-29 and accompanying text.

84. *Ball*, 163 U.S. at 669-70.

85. *Id.*; *see supra* note 28 and accompanying text.

86. *Compare Ball*, 163 U.S. at 662 (two convictions obtained under indictment that was fatally defective) *with Mars*, 498 So. 2d at 402 (variance between proof at trial and allegations in bill of particulars prevented conviction).

87. *Benton*, 395 U.S. at 794; *see generally* Duncan v. Louisiana, 391 U.S. 145, 149 (sixth amendment guarantees of jury trial are incorporated into fourteenth amendment if fundamental to American scheme of justice).

88. *Mars*, 498 So. 2d at 404-05.

the fact that a defendant is subjected to additional embarrassment and expense as a result of a second prosecution.[89] This is true even when the second prosecution is brought because of an otherwise non-prejudicial error in the original indictment.[90] The instant court, in contrast, did not consider this factor. The omission of this important part of *Benton*'s rationale allows the court to tip the scales in favor of permitting reprosecution.[91]

The instant court has taken an important step in expanding its analysis of double jeopardy. The court extended its analysis beyond comparison of the allegations in the two indictments and mechanical application of the *Sanford* test. Courts must now consider the conduct of the state in bringing the prosecution.[92] In cases in which the state appears to be abusing its prosecutorial power to harass or embarrass the defendant, courts will be less likely to allow reprosecution.[93] Absent evidence of abuse, however, courts will continue to refuse to allow the burden a second trial places on the defendant to outweigh society's interest in punishing those guilty of crimes.[94]

Edward S. Desmarais, Jr.

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89. *Benton*, 395 U.S. at 796; *see also Mars*, 498 So. 2d at 405-06 (Boyd, J., dissenting).

90. *See supra* note 88.

91. *See Mars*, 498 So. 2d at 405-06 (Boyd, J., dissenting) (consideration of extra factor leading to dissent).

92. *See id.* at 404-05.

93. *See supra* notes 80-81 and accompanying text.

94. *See supra* note 79 and accompanying text.